IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*, *Plaintiffs*, v. ALEJANDRO MAYORKAS, *et al*., *Defendants*.	Case No. 1:22-cv-10808-ADB HON. J. ALLISON D. BURROUGHS Leave to file granted July 15, 2022

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1) AND (6)

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INTRODUCTION

Plaintiffs seek to describe this case as a challenge to new "parole policies" resulting from changes in their home country. But Plaintiffs cannot point to any identifiable departure from or violation of statute, regulation, or policy. Plaintiffs' claims fail because they have no legal right to parole that is susceptible to legal injury; none of their claims are justiciable; and they fail to state Administrative Procedure Act ("APA") claims as a matter of law. *See* Defendants' Motion to Dismiss (ECF No. 41) (cited as "Mot.").

Congress has committed decisions about parole to the discretion of the Department of Homeland Security ("DHS"). Plaintiffs allege that the aftermath to the United States' withdrawal from Afghanistan, namely the airlift and related humanitarian efforts broadly known as Operation Allies Welcome ("OAW"), created a binding parole policy and set an adjudicatory pace that U.S. Citizenship and Immigration Services ("USCIS") is legally *required* to continue. Plaintiffs' Opposition (ECF No. 44) (cited as "Opp.") 21-22, 23. Plaintiffs claim that USCIS had an obligation to parole tens of thousands of Afghans, notwithstanding the loss of operational capability, because Plaintiffs accrued a reliance interest in parole by virtue of the airlift and humanitarian efforts. *See id*. But Plaintiffs err in their contention that this Court can reinstate the airlift's pace and volume because DHS did not go through APA notice-and-comment rulemaking before implementing purported "new standards" for parole applications from Afghan nationals. To conclude that "new" and final agency action occurred would require the Court to disregard the existing statutes, regulations, and policies that have governed such parole decisions throughout the entire period and to accept Plaintiffs' view that *anything* other than paroling tens of thousands of Afghans into the United States after the U.S. withdrawal is a new parole policy reviewable under

the APA. Because that contention is manifestly incorrect as a matter of law, the Complaint should be dismissed.

ARGUMENT

I. Article III Standing is a Threshold Issue and Must be Addressed.

Plaintiffs' threshold argument is that the Court should look the other way on clear standing defects. Opp. 3. It is true that, under certain conditions, "[s]o long as one petitioner has standing, the proceeding may go forward without any consideration of the standing of co-petitioners." *Tilley v. TJX Cos.*, 345 F.3d 34, 36 (1st Cir. 2003). But the circumstance-specific ruling in *Tilley*, which analyzed standing to pursue an interlocutory appeal from a class certification order, did not abrogate the settled rule that "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "The appropriate inquiry must be 'whether each particular plaintiff is entitled to have a federal court adjudicate each particular claim that he asserts.'" *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 733 (1st Cir. 2016) (quoting *Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006)). "[T]he plaintiff-by-plaintiff and claim-by-claim analysis required by standing doctrine demands allegations linking each plaintiff to each of these injuries. Suffering one species of injury does not confer standing on a plaintiff to press claims based on another species of injury, even if the injuries share a common genus." *Hochendoner*, 823 F.3d at 733. Plaintiffs' request that because "the standing of at least some Plaintiffs [is] undisputed, this Court may adjudicate all of their claims" (Opp. 3) is essentially a request for standing in gross. But Diana Doe and Afghan Plaintiffs have no legal injuries, and thus no actionable claims in the lawsuit.

Alternatively, Plaintiffs next claim that "Afghan Plaintiffs have standing because they have suffered injury …: (1) the extinguishment of an opportunity to pursue humanitarian parole according to a process that comports with the law, (2) actual denials issued according to an unlawful process, (3) undue delay in violation of the APA, and (4) ongoing and extreme hardship

and risk caused by Defendants' unlawful process and/or undue delay in adjudication." Opp. 4. As already explained, these arguments based on the denials of parole, delay in parole, and risks of non-parole all wrongly assume an underlying right to parole capable of injury. *Amanullah v. Nelson*, 811 F.2d 1, 14 (1987). Plaintiffs have no legal right to parole and therefore no legal injury from its denial. Mot. 5-6 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990); *Allende v. Shultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988)).

In arguing they are injured by "the extinguishment of an opportunity to pursue humanitarian parole according to a [different] process" (Opp. 4), Plaintiffs rely on inapposite cases, starting with *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633 (6th Cir. 2013). Each case addressed only whether employee-beneficiaries, whose employer's employment-based visa petitions (Form I-140, Immigrant Petition for Alien Workers) are revoked or denied, have standing to challenge errors made by the defendant agencies in the adjudication of the employer-submitted Form I-140, a non-discretionary adjudication. Each case involved noncitizen employee-beneficiaries who had already arrived in the United States, and who had no pathway to apply for lawful permanent residence without an approved Form I-140. In those cases, errors in the denial or revocation of the Form I-140 resulted in "the loss of an opportunity to become a permanent resident." *Patel*, 732 F.3d at 638; *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016); *Shalom Pentecostal Church v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, 783 F.3d 156 (3d Cir. 2015); *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015); *Kurapati v. U.S. Bureau of Citizenship & Immigration Servs.*, 775 F.3d 1255 (11th Cir. 2014). By contrast, Afghan Plaintiffs never had an opportunity to apply for lawful permanent residency nor any other legal entitlement vis-à-vis parole discretion, and loss of what was never had creates no injury. *Amanullah*, 811 F.2d at 10.

Additionally, at least one court in this district has noted that the *Patel* cases are distinguishable from cases dealing with entry. *Zigzag, LLC v. Kerry*, No. 14-14118-DJC, 2015 U.S. Dist. LEXIS 29826, at *15 n.3 (D. Mass. Mar. 10, 2015) (stating that *Patel* and *Kurapati* do not address "unadmitted and nonresident aliens"). At base, Afghan Plaintiffs lack standing because they have no constitutional or statutory rights in § 1182(d)(5)(A) parole protectable by the APA. *See* Mot. 6 (citing *Adams v. Baker*, 909 F.2d at 647 n.3 ("It is, of course, beyond peradventure that … an unadmitted and non-resident alien, has no right, constitutional or otherwise, to enter the United States. Nor does he have standing to seek either administrative or judicial review of the consular officer's decision to deny him a visa." (internal citations omitted)) and *Bazzi v. Gacki*, 468 F. Supp. 3d 70, 80 (D.D.C. 2020)).

Diana Doe also lacks a legal injury and, accordingly, standing. Separation from friends, including "close friends of [] family," has not been recognized as a cognizable legal injury. Plaintiffs quote *Trump v. Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080 (2017) (Opp. 7-8) but omit that a key sentence in that decision that excludes Diana Doe: "[f]or individuals, a close *familial* relationship is required." *IRAP*, 137 S. Ct. at 2088 (emphasis added). As *IRAP* explained, "[t]he facts of these cases illustrate the sort of relationship that qualifies…. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife '. . . , clearly has such a relationship." *Id.* Diana Doe's claim of legal injury in her separation from friends is meritless.

Alternatively, Plaintiffs claim Diana Doe has standing as a fee-paying petitioner whose petition was denied. Opp. 7. However, the payment of a filing fee and/or submitting a petition to benefit another does not automatically confer standing. *E.g.*, *Polyzopoulos v. Garland*, No. 20-0804 (CKK), 2021 U.S. Dist. LEXIS 71835, at *22 (D.D.C. Apr. 14, 2021). "Petitioner" status,

without a qualifying relationship, is simply not enough, as the Supreme Court's decision in *IRAP* makes clear. *See IRAP*, 137 S. Ct. at 2088 ("For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion."). Because Afghan Plaintiffs and Diana Doe lack legal injuries, they lack Article III standing, and should be dismissed.

II. Parole Decisions Are Not Reviewable

A. 8 U.S.C. § 1252(a)(2)(B)(ii) and 5 U.S.C. § 701(a)(2) Preclude Review of Parole Decisions

Congress has clearly precluded judicial review of the discretionary parole authority reserved for the Executive Branch. 8 U.S.C. § 1252(a)(2)(B)(ii). Opp. 7. Each of Plaintiffs' arguments to the contrary lacks merit.

First, Plaintiffs renew their argument that 8 U.S.C. § 1252(a)(2)(B)(ii) applies only to individual parole decisions on the merits of an individual's case, rather than policies or practices raising issues of law. Opp. 9-10. Thus, they argue that they *can* challenge alleged policies and that this case is not about "individual" decisions. *See id.* But Plaintiffs are attempting to read the term "individual" into § 1252(a)(2)(B)(ii) to escape the statute's broad reading. To be sure, § 1252(b) provides procedures for review of individual removal orders via a petition for review, but it does not follow that the word "individual" is silently attached to "any… decision or action" in § 1252(a)(2)(B)(ii). Plaintiffs can no more read "individual" into § 1252(a)(2)(B)(ii) any more than "discretionary" can be read into § 1252(a)(2)(B)(i)'s reference to "judgment." *See Patel v. Garland*, 142 S. Ct. 1614, 1624 (2022) (interpreting neighboring provision to find expansive meaning of "judgment").

Indeed, if Congress had intended § 1252(a)(2)(B)(ii) to be applicable only to a "decision or action" in an "individual" case, Congress could have ported language from neighboring §

1252(a)(2)(A)(i) or (iii). *See* 8 U.S.C. § 1252(a)(2)(A)(i) ("no court shall have jurisdiction to review— … any *individual determination* or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)…"); (iii) ("no court shall have jurisdiction to review— the application of such section to *individual aliens*, including the determination made under section 1225(b)(1)(B)…") (emphasis added). The fact that Congress has specified when litigation is permitted and prohibited on class or individual bases supports the position that § 1252(a)(2)(B)(ii) withdraws review of a "decision or action" to decline § 1182(d)(5) parole, whether procedural or substantive, no matter how many persons challenge their parole declinations in any given case. *Biden v. Texas*, 142 S. Ct. 2528, 2539-2540 (2022) ("where Congress intended to deny subject matter jurisdiction over a particular class of claims, it did so unambiguously. Section 1252(a)(2), for instance, is entitled 'Matters not subject to judicial review' and provides that '*no court shall have jurisdiction to review*' several categories of decisions…."); *Garland v. Gonzalez*, 142 S. Ct. 2057, 2065 (2022); *see also Loa-Herrera v. Trominski*, 231 F.3d 984, 991 (5th Cir. 2000) (holding that, with reference to § 1226(a) parole and § 1226(e)'s jurisdictional bar, "[i]n sum, 'the Attorney General's discretionary judgment regarding the application of' parole—including the *manner* in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is 'not . . . subject to review.'").

The Supreme Court's recent opinion in *Biden v. Texas*, a challenge to the government's efforts to terminate the "Migrant Protection Protocols" (MPP), cited by Plaintiffs (Opp. 11), does not support Plaintiffs. In that case, the Court held that 8 U.S.C. § 1225(b)(2)(C)—which provides that for certain noncitizens "arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary] *may* return the alien to that territory pending a proceeding under section

1229a of this title," (emphasis added)—did not *require* DHS to continue implementing the MPP, which authorized immigration officers to return certain noncitizens to Mexico pending a decision on their removability. In reaching that conclusion, the Court explained that one of several reasons why § 1225(b)(2)(C) could not be read as establishing a mandatory requirement of returning noncitizens to Mexico was because "the INA expressly authorizes DHS to process applicants for admission under . . . parole" "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Biden v. Texas*, 142 S. Ct. at 2543. But *Biden v. Texas* did not address the applicability of § 1252(a)(2)(B)(ii) to § 1182(d)(5) parole decisions, which was not at issue in that case. *Id.* (disclaiming any intent to address whether "the Government is lawfully exercising its parole authorities pursuant to sections 1182(d)(5)"). Indeed, as noted, the Court in fact made clear that a statutory provision like §1252(a)(2)(B)(ii) operates clearly "to deny subject matter jurisdiction over a particular class of claims." *Id.* at 2532. *Biden v. Texas* thus does nothing to disturb the many cases on which the government relies. In short, *Biden v. Texas* is distinguishable and, more importantly, never held that declining § 1182(d)(5)(A) parole or disuse of § 1182(d)(5)(A) authority is reviewable under the APA, as § 1182(d)(5)(A) provides no meaningful standard to evaluate declinations or disuse of parole authority, or procedures resulting therein. As such, the APA does not apply per § 1252(a)(2)(B)(ii) and 5 U.S.C. § 701(a)(1) or (2).

Moreover, even beyond Plaintiffs' misreading of § 1252(a)(2)(B)(ii), 5 U.S.C. § 701(a)(2) separately precludes judicial review here because broader parole decisions and procedures under § 1182(d)(5)(A) (i.e., decisions that result in the denial to more than one individual) would *still* be "agency action [] committed to agency discretion by law[,]" and thus unreviewable. Plaintiffs do not mount any meaningful contention to the contrary. *See* Opp. 15-16. Rather, Plaintiffs invoke general principles of judicial review under the APA to try bypassing 5 U.S.C. § 701(a)(2). *See id.*

But the relevant analysis under 5 U.S.C. § 701(a)(2) is the same as 8 U.S.C. § 1252(a)(2)(B)(ii)—by looking to the discretionary authority under the parole statute, 8 U.S.C. § 1182(d)(5)(A). *See* Mot. 8-11.

To obtain APA review notwithstanding 5 U.S.C. § 701(a)(2) requires some rule or "statutes constraining or guiding the relevant agency's discretion" to create 'judicially manageable standards'" for review. *See Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 21 (1st Cir. 2020). Plaintiffs point to "the humanitarian parole statute, USCIS's internal Policy Manual," and the "new" standards that allegedly apply to Afghan parole applications "bind agency discretion and provide a focus for judicial review." Opp. 15-16. But as Defendants motion sets out, the "First Circuit has emphasized the breadth of the discretion that Congress granted to the Executive branch in making parole decisions, describing that authority in § 1182(d)(5) as 'close to plenary,'" and the policy manual "encourage[s], but do[es] not require, officers to issue RFEs or NOIDs when eligibility is in doubt." *See* Mot. 9-10 (quoting *Amanullah*, 811 at 6), Mot. 13. And it is unclear how the alleged "new" heightened standards for Afghan parole constrain or guide the agency's discretion when that discretion is authorized by statute. If anything, Plaintiffs appear to be using the "new" policy circularly as evidence that their claims can proceed to judicial review. But because Plaintiffs cannot identify what "meaningful standards" guide review of agency action, the parole declination decisions remain within agency discretion, and the APA's "arbitrary and capricious" language itself cannot supply those standards. *See, e.g., Lunney v. United States*, 319 F.3d 550, 559 n.5 (2d Cir. 2003). As such, the Court has ample basis to find that Plaintiffs' challenge is unreviewable under 5 U.S.C. § 701(a)(2).

Lastly, § 1252(a)(2)(D) does not apply. Opp. 10. Section 1252(a)(2)(D) states:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as

> precluding review of constitutional claims or questions of law raised *upon a petition for review* filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D) (emphasis added). But this action is not "a petition for review… filed with an appropriate court of appeals." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020) (noting § 1252(a)(2)(D) "provides that, in this kind of immigration case …, a court of appeals may consider only 'constitutional claims or questions of law.'").

B. Plaintiffs Cannot Obtain Judicial Review of their Parole Decisions by Merely Recasting their Claims for Review as an Amorphous "Policy" Challenge.

Plaintiffs deny that they seek APA review of their parole denials, despite requesting that the Court "[v]acate, as arbitrary, capricious, and not in accordance with law, each of the denials of the humanitarian parole applications filed on behalf of Plaintiffs[.]" *Compare* Compl. at 36 *with* Opp. 5, 12 (stating that they do not challenge the "outcome" of decisions). In any case, Plaintiffs cannot perform an end-run around the APA's limitations, 5 U.S.C. §§ 701(a), 702, 704, and the INA's jurisdictional bar, 8 U.S.C. § 1252(a)(2)(B)(ii), by claiming that the denials of their applications are reviewable as a "policy" matter, despite being unreviewable individually.

The Complaint alleges the denials of three parole applications – the Noes (Compl. ¶ 133), the A. Does (*id*. ¶ 157), and P. Doe (*id.* ¶ 169). Because of these three denials, Plaintiffs allege that the decisions are subject to vacatur as "arbitrary and capricious" under the APA (Compl. at 36), notwithstanding the discretionary nature of § 1182(d)(5)(A) parole and the jurisdiction-stripping provisions in § 1252(a)(2)(B)(ii), merely because Plaintiffs characterize their claims as challenging a "practice or policy." Opp. 13-14. This is incorrect.

Where judicial review is carefully circumscribed, "plaintiffs cannot rely on the APA to challenge what they are expressly prohibited from challenging" by statute by cloaking the substance of their claim in "policy" garb. *Competitive Enter. Inst. v. U.S. EPA*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) ("CEI cannot challenge EPA's decision to destroy text messages by casting its

claim as a challenge to an illusory record-keeping policy."). Besides failing to escape § 1252(a)(2)(B)(ii) and the inapplicability of the APA under either 5 U.S.C. § 701(a)(1) or (2),[1] Plaintiffs' conclusory "policy" allegation also fails to identify any discrete final agency action that may be challenged under the APA, thereby opening the door to review "preliminary, procedural, or intermediate agency action" such as these purportedly new "standards." 5 U.S.C. § 704; *Ramos v. Wolf*, 975 F.3d 872, 893-94 (9th Cir. 2020) ("Plaintiffs . . . characterize their APA claim as a challenge to an 'arbitrary and capricious' change in a broad agency practice . . . . Despite this characterization, we find that Plaintiffs' claim is not reviewable under [the jurisdiction-stripping provision]. As we have reiterated several times before, the phrase 'pattern and practice' is not an automatic shortcut to federal court jurisdiction. In other words, Plaintiffs cannot obtain judicial review over what is essentially an unreviewable challenge to specific TPS terminations by simply couching their claim as a collateral 'pattern or practice' challenge." (citations and quotation marks omitted)); *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018) ("It does not matter that Plaintiff characterizes his claims as challenges to the substantive standards that the Secretary uses. The standards by which the Secretary reaches a decision within his or her 'sole and unreviewable discretion'—and the methods by which the Secretary adopts those standards—are just as unreviewable [under § 1252(a)(2)(B)(ii)] as the Secretary's ultimate decisions themselves.").

A cursory review of the Complaint reveals just how conclusory Plaintiffs' "policy" claim actually is – indeed, Plaintiffs' primary source is "information and belief[,]" which is cited fifteen

[1] The analysis of whether a parole "decision or action" is committed to DHS discretion by statute for purposes of § 1252(a)(2)(B)(ii) overlaps with determining whether parole is "agency action [] committed to agency discretion by law" for purposes of 5 U.S.C. § 701(a)(2). Avoiding duplicative argument on "committed to agency discretion" for each jurisdictional bar by advancing a pure § 701(a)(2) argument in the context of RFEs (as 8 U.S.C. § 1252(a)(2)(B)(ii) would not apply) is deduplication, not underdevelopment, contrary to Plaintiffs' suggestion. *See* Opp. 15

times as evidence of the purported policy in their Complaint. Compl. ¶¶ 47, 48, 53, 55, 56, 57, 60, 64, 66, 67, 180, 181, 192. Alleging "final agency action requires more" than grafting "a 'policy' label to their own amorphous description of the [agency's] practices." *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014). Beyond "information and belief," Plaintiffs point to three parole denials, and "ask[] the Court to surmise therefrom the existence of a broader policy. That is, however, not enough for purposes of § 704." *Pearl River Union Free Sch. Dist. v. King*, 214 F. Supp. 3d 241, 260 (S.D.N.Y. 2016). It is "unsatisfactory [] to try to meet the requirements of 5 U.S.C. § 704 by alleging without further factual support that a policy was adopted," *id.*, including allegations relating to "change" from an undescribed and unalleged "prior" policy. *Greater Boston Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 21-cv-10083-DJC, 2022 U.S. Dist. LEXIS 7430, at *20 (D. Mass. Jan. 13, 2022) ("For agencywide policies, like the alleged Policy here, courts look to whether the complaint refers to an *identifiable* agency order, regulation, policy or plan of the Defendants, which constitutes or reflects an agency policy applicable to all agency officials." (internal marks omitted; emphasis added)).

As explained, Plaintiffs' claims are barred because: 8 U.S.C. § 1252(a)(2)(B)(ii) precludes review of § 1182(d)(5)(A) decisions, even when dressed as "policy" challenges, and APA review is therefore unavailable under 5 U.S.C. § 701(a)(1); parole under 8 U.S.C. § 1182(d)(5)(A) is committed to agency discretion, and so APA review is unavailable under 5 U.S.C. § 701(a)(2); Conclusory claims of a new "policy" are not enough to satisfy the "final agency action" requirement of § 704—particularly where, as explained below, the purported "new" policies are in conformity with each applicable statute, regulation, and policy that pre-existed 2021.

III. The Court Should Dismiss Plaintiffs' Claims Under Rule 12(b)(6).

A. Plaintiffs' Complaint Fails As A Matter Of Law

In their opposition, Plaintiffs heavily rely on *Atieh v. Riordan*, 727 F.3d 73, 76 (1st Cir. 2013) to argue that review of their complaint must proceed on the administrative record because they have invoked the APA and that they have plausibly stated claims for relief. *See* Opp. 18-23. But Plaintiffs fail to fully grapple with the legal issues that Defendants' motion raised on the viability of Plaintiffs' claims as a matter of law.

Generally, in Rule 12(b)(6) motions to dismiss, a "plausibility standard does not apply to a complaint for judicial review of final agency action . . . ." *Atieh*, 727 F.3d at 76. "The relevant inquiry is—and must remain—not whether the facts set forth in a complaint state a plausible claim but, rather, whether the administrative record sufficiently supports the agency's decision." *Id.* Yet "[t]his does not mean, however, that Rule 12(b)(6) can never be in play in an APA appeal." *Id.* at 76 n.4. "Such a motion may be appropriate … where the agency claims that the underlying premise of the complaint is legally flawed (rather than factually unsupported)." *Id.* (citing *Zixiang Li v. Kerry*, 710 F.3d 995, 1000-01 (9th Cir. 2013)).

Further, *Zixiang Li*—underpinning *Atieh*—is instructive on why Rule 12(b)(6) applies here. In *Zixiang Li*, the Ninth Circuit concluded that plaintiffs failed to state claims against USCIS after analyzing several causes of action challenging alleged statutory and regulatory violations and "based on insufficiency of Plaintiffs' allegations in the complaint." 710 F.3d at 1000-01. For example, the court found that "Plaintiffs failed to state a plausible claim against USCIS" for violating several statutory and regulatory provisions because those provisions were silent about the challenged conduct. *See id.* The court also rejected the demand to "hold that USCIS could be acting arbitrarily and capriciously by failing to create a system, or complying with vague standards, not required by law" to monitor pending applications. *Id.* Instead, the Ninth Circuit recognized

that "USCIS's responsibilities are carefully circumscribed" by law and found "no authority" that required USCIS to perform specific duties. *Id.* at 1001.

Likewise, Rule 12(b)(6) applies here given the Complaints' plain legal flaws. As a matter of law, Plaintiffs cannot adequately allege that a new and illegal policy change exists when the purported new policy is in compliance with existing law (8 U.S.C. § 1182(d)(5)(A)-(B)), existing regulations (8 C.F.R. § 212.5(f); 8 C.F.R. § 103.2(b)(8)), and existing policy (*see* 1 USCIS-PM E.8, E.6[2]), and there is nothing beside "information and belief" to support the claim. The APA demands more to sustain a claim. *Pearl River*, 214 F. Supp. 3d at 260. As put by the Supreme Court, there is a "specificity requisite for agency action" that must be alleged to sustain an APA claim. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Respondent alleges that violation of the law is rampant within this program . . . . Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree. . . . Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."). Where, as here, a complaint does not satisfy the APA's requirement for challenged agency action, it is proper fodder for a 12(b)(6) motion.

B. *Mandel*'s "Facially Legitimate and Bona Fide" Standard Applies

As set forth above, Plaintiffs have cloaked their complaint in "policy" garb to try and side-step Defendant's motion to dismiss. *See supra* at § II.B. But because they ultimately seek to set aside their entry denials, review is under *Mandel*'s "facially legitimate and bona fide" test in lieu of the APA's "arbitrary and capricious" standard. *See* Mot. 15.

Plaintiffs relegate discussion of *Mandel* to a footnote. *See* Opp. 17, 17 n.7. But the decision whether to grant a noncitizen entry into the country has long been within "the plenary sweep of

[2] USCIS Policy Manual, Vol. 1, Part E – Adjudications, Ch. 8 – Discretionary Analysis, uscis.gov/policy-manual (last accessed June 13, 2022); *Id.* Ch. 6 – Evidence.

Congress's power to make policies and rules for the exclusion of aliens." *Amanullah*, 811 F.2d at 10. *Amanullah* specifically addressed the narrow *Mandel* test and whether the INS "advanced a facially legitimate and bona fide reason for withholding parole" from several appellants in exclusion proceedings. *Id.* at 10-11. *Amanullah* dealt with the same sweeping authority discussed in *Mandel*, *see id.* at 10, which has been consistently upheld. *See Kerry v. Din*, 576 U.S. 86, 103-104 (2015) (involving a consular officer's denial of a visa to a noncitizen); *Trump v. Hawaii*, 138 S. Ct. 2392, 2419-2420 (2020) (involving the President's exercise of authority pursuant to 8 U.S.C. § 1182(f) to suspend entry of a class of noncitizens). Plaintiffs' relegation of *Amanullah*—the most pertinent binding authority—to a footnote is extremely telling, as is their failure to address the substance of these rulings when it comes to foreign nationals seeking entry into the United States.

C. Plaintiffs' Policy Counts Fail As A Matter Of Law (Counts I-III)

Plaintiffs assert that their "first three APA claims relate to the allegation that USCIS violated the statute when it 'implemented new standards used to adjudicate requests for humanitarian parole on behalf of Afghans.'" Opp. 19 (citing Compl. ¶ 179; *see also id.* at 1 (stating claimed changed standards). But as Defendants' motion establishes, nowhere do Plaintiffs identify a discrete statutory or regulatory violation, mirroring the same issues that *Atieh* recognized vis-à-vis *Zixiang Li*, 710 F.3d at 1000-01. Plaintiffs merely reiterate existing standards and how they may apply given that: the United States no longer has a presence in Afghanistan, and there is no local operational embassy to complete necessary steps for parole processing. *See* Mot. 18-19. Nowhere do Plaintiffs adequately respond to this point, only reiterating the "plausibility" of their allegations, and referencing the need for the administrative record to address this legal issue, and that "credibility" determinations are not made at this stage. *See* Opp. 20-21, 24-25.

i. Plaintiffs Point to No Violation of Statute, Regulation, or Policy by the Purported New Policy

To start, Plaintiffs still do not articulate what the "old" policy or standards were, other than attempting to use the U.S. Government's response to the impending withdrawal from Afghanistan and the resulting humanitarian crisis to bootstrap a policy into existence. *See generally* Opp. Regardless, as Defendants' motion observes, Plaintiffs' first allegation of a new standard that USCIS "would deny or administratively close applications for all beneficiaries in Afghanistan" does not violate any statute or regulation to give rise to an APA claim. Opp. 1. Rather, the relevant regulation, 8 C.F.R. § 212.5(f) states that "[w]hen parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel." It is no surprise, then, that Afghans, like nationals of other countries without in-country U.S. immigration services, in most circumstances (post U.S. withdrawal) must travel abroad to a location where such services are offered in order to be issued that travel document. 8 C.F.R. § 212.5(f); Mot. 18-19. Plaintiffs admit facts showing that this regulation was effective and complied with prior to September 2021. Compl. ¶ 47. The suspension of operations at U.S. Embassy Kabul does not equate to a change in standards.

Second, Plaintiffs fail to demonstrate how § 1182(d)(5)(A) can be violated if "except in extreme cases, applications from Afghan beneficiaries located outside of Afghanistan" are denied. *See* Opp. 1. As discussed, Congress has limited DHS's use of parole to cases where it is justified by urgent humanitarian reasons or significant public benefit. Mot. 19 (citing *Amanullah*, 811 F.2d at 6-7). Having fled to a safe third country necessarily implicates the "urgency" of a parole request, particularly if an applicant could await routine refugee processing in that third country. 8 U.S.C. § 1182(d)(5)(A)-(B); Mot. 19. In protection-based decisions, the availability of refugee processing

may be considered, along with imminence of harm, when an applicant is in a third country. *See id*. Plaintiffs fail to allege how 8 U.S.C. § 1182(d)(5) is violated thereby.

Third, Plaintiffs cite no provision of law requiring USCIS to issue RFEs whenever Plaintiffs consider their own applications to be grantable with more evidence. Opp. 1. USCIS regulations and policy permit adjudicators to issue RFEs or NOIDs, but nowhere are they required. 8 C.F.R. § 103.2(b)(8)(ii), (iii); Mot. 20 n.10. Indeed, "[f]or discretionary benefits, the benefit requestor has the burden of showing that a favorable exercise of discretion is warranted through the submission of evidence" and "[i]f the officer determines the requestor has not met the eligibility requirements for the benefit sought, the officer may deny the request" outright. 1 USCIS-PM E.8, § C.1. That an RFE was issued in one case, but not others, does not support Plaintiffs' conclusory assertion that there has been a change in overall RFE policy, particularly when RFEs are not and were not required by statute, regulation, or policy. No change in standards exists, much less one that is "illegal[,]" though still utterly compliant with all applicable authority. *See* Mot. 20.

Because Plaintiffs have not identified discrete and final agency actions in violation of law, Plaintiffs' policy claims fail as a matter of law. Indeed, Plaintiffs' opposition reveals its Complaint is a transparent attempt to manufacture a "new policy" APA claim by ignoring factual realities and misstating or misapplying existing law, all in the apparent hope that the Court will allow Plaintiffs to fish for other claims merely by invoking the APA (hence the demand for expedited record production before resolution of threshold issues). To illustrate, Plaintiffs claim that "USCIS has breached… its regulatory obligation to grant or deny parole only 'after review of the individual case,'" citing 8 C.F.R. §212.5(c). Opp. 21. This regulation applies to "all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section[.]"

8 C.F.R. § 212.5(c). Plaintiffs omit that they are not "arriving aliens" as that term is defined by regulation (8 C.F.R. § 1.2), a fact which undercuts their claim of regulatory breach entirely.

ii. Plaintiffs Have No Reliance Interests

To support their APA claims, Plaintiffs acknowledge that they asserted reliance interests in the alleged "old" policy, allegedly to "indicate that USCIS failed to consider an important aspect of the problem when implementing new standards, and shed light on the reasonableness of Government's delay in processing the Plaintiffs' parole applications." Opp. 25. Plaintiffs also argue that "credibility" determinations have no bearing at this stage. *Id.*

But again, these are legal issues, not factual or unsupported attorney argument, and Plaintiffs fail to address them. Defendants' motion explained that Plaintiffs cannot establish a reliance interest because, by Plaintiffs' own admission, no "longstanding" policy existed to generate such a reliance, and particularly when all but the Does' applications were submitted after the supposed policy change. *See* Mot. 20-21. Additionally, Defendants' humanitarian efforts assisting Afghans before the withdrawal from Afghanistan, and any alleged solicitation of parole applications, cannot create a reliance interest without a source of law, particularly when the benefit decision is discretionary and is granted at the low rate (25%-35%) alleged by Plaintiffs in their own Complaint. *See id.* at 21-22.

iii. Even If the Alleged New Standards were Legislative, the Foreign Affairs Exception to Notice-and Comment Rulemaking Would Apply

Though the parole program is within the DHS's statutory discretion, and thus not subject to notice-and-comment rulemaking, and even assuming the alleged "new" standards were legislative, the foreign affairs exception to the APA's notice-and-comment requirement would apply. *See* Mot. 23-24.

In response, Plaintiffs claim that Defendants satisfied neither test for the foreign affairs exception and that Defendants did not explain or demonstrate "how complying with the notice-and-comment procedures, and leaving the 'old' standards for parole in place in the interim, could have provoked negative international consequences." Opp. 27. But as explained, the effect of 8 C.F.R. § 212.5(f)—the existing regulation with which Plaintiffs primarily take issue—is a result of the suspension of U.S. immigration services in Afghanistan. This suspension of services is not subject to notice and comment. Suspension of core foreign affairs functions (such as suspension of in-country immigration services) do not require a separate "undesirable consequences" justification to satisfy the foreign affairs exception, nor do their downstream effects. *City of N.Y. v. Perm. Mission of India*, 618 F.3d 172, 202 (2d Cir. 2010). The Court should decline the invitation to wade into the areas directly involving the conduct of foreign affairs, and which are outside of the Court's authority.

D. Plaintiffs' Delay Claims Fail As A Matter of Law (Counts IV-V)

In their opposition, Plaintiffs discuss the multi-factor analysis in an attempt to support their delay claims, but posit that their claims are "unsuited to resolution now, not only for the reasons stated in *Atieh*, but also in light of decisions holding more specifically that, at this stage, a court 'need not consider whether the agency delay . . . is unreasonable' because 'such a fact-specific inquiry at this stage would be premature.'" Opp. 22-23, 25 (citing, *inter alia*, *Moghaddam v. Pompeo,* 424 F. Supp. 3d 104, 117 (D.D.C. 2020)).

Plaintiffs, however, fail to address several case issues and why the Court may evaluate their delay claims under Rule 12(b)(6). First, Plaintiffs have not shown that Defendants have a "non-discretionary" duty to adjudicate parole applications. As Defendants' motion establishes, "nothing in § 1182(d)(5)(A) requires USCIS to adjudicate—or even accept—applications for parole." *See* Mot. 13-14. If DHS is not required by § 1182(d)(5)(A) to accept applications at all—much less

adjudicate them—§ 1182(d)(5)(A) cannot be read to contain an implicit "reasonable time" limitation to act under 5 U.S.C. § 555(b). This is reason enough for the Court to find that Plaintiffs APA unreasonable delay and mandamus claims fail as a matter of law.

Second, even if Defendants had a non-discretionary duty to adjudicate parole applications, the Court can dismiss the complaint because a seven-to-nine-month delay is not so "egregious" to warrant a writ of mandamus. Although Plaintiffs invoke *Atieh* and *Moghaddam*, neither of those cases prevent the Court from dismissing the delay claims. Plaintiffs disregard *King v. Off. for Civ. Rts. of U.S. Dep't of Health & Human Servs.*, 573 F. Supp. 2d 425 (D. Mass. 2008) that applied the *TRAC* factors at the motion to dismiss stage, arguing that that case and others do not comport with *Atieh*. *See* Opp. 26 n.8. But *Atieh* did not involve an APA unreasonable delay claim, nor did it address case law recognizing that in claims asserting delay or agency inaction, there is no record to review. *See* 727 F.3d 73; *see, e.g., Dastagir v. Blinken*, 557 F. Supp. 3d 160, 164 n.5 (D.D.C. 2021) (in a challenge to the "Government's inaction" on an immigrant visa application," stating that "if any agency fails to act, there is no 'administrative record' for a federal court to review.") (citing *Nat'l Law Ctr. on Homeless. & Poverty v. U.S. Dep't of Vets. Affs.*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012)). Indeed, *Moghaddam*'s reference to the "fact-specific inquiry" being premature at the motion to dismiss stage without discovery does not acknowledge that no record exists or that the inquiry in APA cases is limited. 424 F. Supp. 3d at 117. And at least one case after *Atieh* has ruled on a motion to dismiss on unreasonable delay claims. *See, e.g., V.U.C. v. USCIS*, 557 F. Supp. 3d 218, 224 (D. Mass. 2021) (finding four-year delay in processing U-visa petitions was not unreasonable, and where plaintiffs were not pending longer than others, the court lacked power to accelerate adjudication or dictate the order).

Finally, a nine-month delay does not warrant mandamus. *See Wellesley v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987). The delays are not "egregious" given the multiple humanitarian crises in the last 19 months and the flood of approximately 45,000 parole applications from Afghans alone that have inundated USCIS. *See* Mot. 25. Given the number of applications and the relative number of adjudicators, this timeframe does not break the "rule of reason" under the first factor. *Id.* Plaintiffs concede the increase of applications since September 2021, but steadfastly refuse to acknowledge any connection between the pace of adjudications and the deluge in applications. *See* Opp. 22-23.[3] Additionally, balancing the humanitarian concerns (second factor) against the competing interests of other pending applicants (third factor) not before the Court would require the Court to guess whether Plaintiffs are entitled to expedited consideration that would produce no net-gain. Mot. 25-26. On the fourth factor, Defendants reiterate that Plaintiffs are not prejudiced by withholding of something to which they are not legally entitled, and which—by their own statistics—Plaintiffs are unlikely to obtain. *Id.* at 26. Plaintiffs want to be served first, but Plaintiffs do not otherwise address the point that they seek to compel their adjudications ahead of other similarly-troubled applicants—including (but not limited to) other Afghans—or that USCIS continues to accept and review applications from other countries with equally pressing issues. *See* Opp. 23. Plaintiffs have not demonstrated entitlement to mandamus relief, and the delay claims should be dismissed.

CONCLUSION

The Court should dismiss the Complaint for lack of jurisdiction or for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

[3] To be clear, longer processing times and backlogs are across the board. The median processing time for most forms have increased—some doubling or tripling—since FY 2020. *See* https://egov.uscis.gov/processing-times/historic-pt (last accessed July 25, 2022).

DATE: July 25, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

DATED: July 25, 2022

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