**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ASYLUM SEEKERS TRYING TO ASSURE THEIR SAFETY,<br><br>*Plaintiffs,*<br><br>v.<br><br>TAE D. JOHNSON, in his official capacity as Acting Director of U.S. Immigration, *et al.*,<br><br>*Defendants.* | Civil Action No.: 1:23-cv-00163-RCL<br><br>**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM** |

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**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM**

Plaintiffs ROE #1-49 (collectively, "Plaintiffs"), respectfully oppose Defendants' Motion to Dismiss (ECF No. 33), and bring forth the memorandum below in support of that opposition.

## I. INTRODUCTION

The Court should not dismiss claims brought by Plaintiffs, 49 victims of Defendants' November 28, 2022 data breach. Unknown Defendant JOHN DOE 1, a U.S. Immigration and Customs Enforcement ("ICE") employee, published the Personally Identifiable Information ("PII") of Plaintiffs, who are in or were formerly in the custody of ICE, to the ICE public-facing website, ice.gov.[1]

Plaintiffs, who were among the affected 6,252 noncitizens affected by the data breach, came to the United States to seek asylum and were thereafter detained in ICE custody at 10 different facilities. FAC, ¶ 1; ECF 16-1 through 16-49, Plaintiff Declarations for ROE #1- ROE #49, ¶ 1 (of each). Plaintiffs are natives of Colombia, the Dominican Republic, Ecuador, El Salvador, France, Guatemala, Haiti, Honduras, India, Jamaica, Mexico, Nicaragua, Peru, Tunisia, and Venezuela. *Id*.

Defendants' action put Plaintiffs, and other affected noncitizens in, or formerly in, ICE custody in danger, both today and in the future. Many of the victims came to the United States to flee gang violence, government retaliation, persecution, and torture. FAC at ¶ 2, 6; ECF No. 16-

[1] Unintentional Disclosures of Personally Identifiable Information on November 28 and December 7, 2022, U.S. Immigration and Customs Enforcement, https://www.ice.gov/pii.

13, Declaration of ROE #13, ¶ 2-5. Plaintiffs believed the U.S. government would protect them from the harm that they faced in or from their countries of origin. Due to Defendants' conduct, their faith has been shattered, and their safety is at risk. FAC, ¶ 124. Plaintiffs fear for their safety and the safety of their families. FAC, ¶ 121; ECF No. 16-28, Declaration of ROE #28, ¶ 3; ECF No. 16-31, Declaration of ROE #31, ¶ 3.

Further, Defendants' meager efforts to remedy the danger they created have been insufficient. FAC at ¶¶ 75-78; 81-82; 87.

## II. BACKGROUND

### A. ICE's Data Breach.

On Monday November 28, 2022, at 9:45 A.M. EST,[2] Defendant JOHN DOE 1 posted the names, immigration information, and other PII of 6,252 noncitizens in, or formerly in, ICE custody, including Plaintiffs in this action to ICE.gov, a public-facing website. The PII was published on a webpage where ICE regularly publishes anonymized detention statistics. FAC, ¶ 68.[3] The published PII included the names, A-numbers, dates of birth, countries of citizenship, detention facility name, and **other immigration information**,[4] including credible or reasonable fear decisions associated with each case." ECF No. 6-1, *Notice*, (emphasis added); FAC at ¶ 4.

Notably, Defendants have never disclosed whether "other immigration information" published was limited to "credible or reasonable fear decisions associated with each case," and

[2] *See* Hamed Aleaziz, ICE accidentally released the identities of 6,252 immigrants who sought protection in the U.S., LOS ANGELES TIMES, (Nov. 30, 2022, 6:04 PM), https://www.latimes.com/california/story/2022-11-30/ice-released-names-6252-immigrants-persecution, ("The agency said the data were posted at 6:45 a.m. Pacific Monday…").

[3] *Id.*

have fought efforts to answer that question before immigration courts. See: **Exhibit B, *Sample Subpoena Request Denied (redacted)***.

Approximately 1,000 affected noncitizens were either removed or released from ICE custody prior to the date of the disclosure. FAC, ¶ 69.[5]

At least 170 affected noncitizens were removed from the United States between November 18 and November 30, 2022.

ICE claims that at the time ICE began trying to notify the affected noncitizens, a large majority of the affected noncitizens were no longer in ICE custody, and therefore were receiving the notification via mail. However, ICE has failed to clarify whether this applies to noncitizens already removed to their countries of origin. Further, there has been no assessment of how merely receiving such mail itself would put affected noncitizens in danger. FAC, ¶ 70.[6]

While live on ICE's website, the PII was able to be downloaded, copied, captured by screenshot, and otherwise preserved by the public. FAC, ¶ 71.

This confidential data remained posted, viewable, and downloadable for approximately five hours.[7] I remained live until it was flagged and brought to ICE's attention by the immigrant advocacy group Human Rights First, just prior to 2:00 PM EST. FAC, ¶ 72.[8]

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

**B. Defendants' Insufficient Attempts at Mitigation.**

On November 30, 2022, ICE posted a statement on the same newsroom section of the same website conceding that the release of information was "a breach of policy," and that "the agency [was] investigating the incident and taking all corrective actions necessary," and that "ICE [was] notifying noncitizens impacted by the disclosure." FAC, ¶ 73.[9]

In the statement, ICE promised to take "all corrective actions necessary" to remedy the breach. ICE also announced an investigation but has not provided any additional details about the investigation, including which office will conduct the investigation, its estimated length, or its objectives. ICE has not disclosed any corrective measures it has taken to ensure a data breach of this nature will not be repeated. Further, ICE has not disclosed the identity of the individual who uploaded the data or whether that individual will be held responsible. FAC, ¶ 74.[10]

Beginning in December 2022, ICE officers began giving notice letters to Plaintiffs informing them of the breach. Some of the notice letters were on Department of Homeland Security ("DHS") letterhead, and others were not. For those subject to removal, their notices indicate that they will not be removed for 30 days. FAC, ¶ 75; See: ECF No. 6-1, *Notice*.

On December 7, 2022, the Department of Homeland Security ("DHS") also disclosed information related to the November 28, 2022 posting to the Government of Cuba. FAC at ¶ 78.[11]

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[9] Statement on improper disclosure of noncitizen personally identifiable information, U.S. Immigration and Customs Enforcement, https://www.ice.gov/news/releases/statement-improper-disclosure-noncitizen-personally-identifiable-information, (last assessed Apr. 17, 2023).

[10] *Id*.

[11] Hamed Aleaziz, *DHS accidentally informed Cuba that deportees had sought protection in U.S.*, (Nov. 30, 2022, 6:04 PM), https://www.latimes.com/world-nation/story/2022-12-19/cuba-immigrants-deported-asylum-leak, (quoting Robyn Barndard, associate director of refugee advocacy at Human Rights First, as saying ""The words egregious and illegal don't go far enough,"

During routine communications with the Government of Cuba regarding a group of 103 Cuban nationals awaiting removal from the United States to Cuba, DHS indicated that some of those individuals were among those noncitizens whose PII was included in the November 28, 2022 data breach. *Id.*; *see also* Ex. 2, FAQ at 1. Of the 103 individuals, 46 of them in fact had their information included in the November 28, 2022 posting and 57 did not have their information posted. FAC ¶ 78. According to Defendants, "[t]hese 103 individuals were released to Cuba," where they are at high risk of persecution. ECF No. 28, at 3.

For Plaintiffs and others similarly situated who are subject to a final order of removal, ICE provided an "opt-out' form, which reads "you may ask that ICE proceed with arranging your removal by signing the form below." However, ICE officers have repeatedly attempted to get some Plaintiffs to sign a waiver of the 30 days, even after they refused. FAC, ¶ 76.

Additionally, ICE failed to promptly or consistently share the notice or form with immigration advocates and attorneys, hindering service providers' ability to address the confusion at many detention centers. While ICE is now notifying attorneys of record for those impacted by the breach who have counsel, notice is by mail and inevitably a slow process. Meanwhile, legal proceedings continue to march forward. FAC, ¶ 77.

Since the data breach, many victims of ICE's data breach have appeared before immigration judges *pro se* and raised the issue of the data breach. Several immigration judges have dismissed their concerns and denied their asylum or other claims for relief. FAC, ¶ 81. [12]

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and "this is not any foreign government, but a government we have irrefutable evidence routinely detains and tortures those they suspect of being in opposition to them.").

[12] Defendants make a false claim that "no Plaintiff alleges that he or she has been denied asylum after raising the inadvertent disclosure in immigration proceedings" (Motion at 1), yet Plaintiff ROE #4 clearly alleges just that. FAC at ¶ 81, ("ROE #4, representing himself pro se, raised the

### C. The Plaintiffs.

Plaintiffs are natives of 15 different countries and are detained at, or were formerly detained, at 10 different ICE facilities, all seeking asylum or other relief from removal. FAC at ¶ 1.[13] All Plaintiffs received written notices from ICE officers that their PII was uploaded to ICE's public-facing website, and unknown persons were able to download it. FAC at ¶ 4. By releasing the private information of asylum seekers on their public-facing website, Defendants have increased the risk that Plaintiffs' persecutors (1) know Plaintiffs seek refuge and protection from the United States and (2) know more information about Plaintiffs, including their location, making it easier to carry out the persecutions. FAC at ¶ 155. With the leaked information, Plaintiffs' persecutors could even better pursue them inside the United States. *Id*. Defendants have thrown Plaintiffs "into the snake pits," and thus owe them a duty of protection. *Id*.

### D. Procedural History

On January 19, 2023, original Plaintiffs ROE #1 - ROE #21 concurrently filed a class action complaint and a sealed motion to proceed under pseudonyms. ECF Nos. 1, 2. On January 26, 2023, the Chief Judge granted the motion to proceed under pseudonyms. ECF No. 3. On February 17, 2023, Plaintiffs filed their FAC while Plaintiffs ROE #22- ROE #49 filed their sealed motion to proceed under pseudonyms. ECF Nos. 6, 7, 12. On February 27, 2023, the court granted the second motion to proceed under pseudonyms. ECF No. 14. Further, Plaintiffs filed their Motion for Class

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issue with an immigration judge in his December 19, 2022 merits hearing in Aurora, Colorado, and the immigration judge told him he would be fine.").

[13] Defendants shamefully suggest that Plaintiffs came "to the United States *unlawfully*" and are "*unlawfully* present within the United States" (Motion at 2, 3), and neither suggestion is relevant, correct, or appropriate. It is not unlawful to seek asylum. 8 U.S.C. § 1158. Further, although a grant of asylum is discretionary, the right to apply is not. 8 U.S.C. § 1158(a)(1).

Certification under Fed. R. Civ. P. 23 on March 10, 2023, Defendants filed their opposition to that motion on March 24, 2023, and Plaintiffs filed their reply in support on March 31, 2023. ECF Nos. 16, 28, 31. On April 4, 2023, Defendants filed their Motion to Dismiss (ECF No. 33) ("Motion"), without providing a certified list of the administrative record as required by Local Civil Rule 7(n)(1), and absent the Court's leave to excuse that requirement, leading Plaintiffs to file a Motion to Compel that is currently pending before the Court. ECF No. 34. On April 11, 2023, the Immigration Reform Law Institute ("IRLI") filed a motion for leave to file a brief as amicus curiae in support of Defendants' motion to dismiss. ECF No. 35. On April 12, 2023, the Court issued an order terminating Plaintiffs' Motion to Dismiss. ECF No. 36.

## III. LEGAL STANDARD

### A. Rule 12(b)(1) Motion to Dismiss

Rule 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. A motion pursuant to this Rule "presents a threshold challenge to the court's jurisdiction . . . ." *See Haase v. Sessions*, 835 F.2d 902, 906, 266 U.S. App. D.C. 325 (D.C. Cir. 1987); *see also Grand Lodge Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (noting that "a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"). Accordingly, the Court must dismiss a claim if it "lack[s] . . . subject matter jurisdiction [.]" Fed. R. Civ. P. 12(b)(1).

Under Rule 12(b)(1), "it is to be presumed that a cause lies outside [a federal court's] limited jurisdiction," *see Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994), and the plaintiff bears the burden of establishing the Court's jurisdiction by a preponderance of the evidence, *see Moore v. Bush*, 535 F. Supp. 2d 46, 47 (D.D.C. 2008). In deciding a motion to

dismiss based upon lack of subject matter jurisdiction, a Court is not limited to the allegations set forth in the complaint, but "may consider materials outside the pleadings . . . ." *Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). Because the Court must ensure its jurisdictional authority, "'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *See Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 13-14, (alteration in original) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (2d ed. 1987)).

**B. Rule 12(b)(6) Motion to Dismiss**

A Rule 12(b)(6) motion tests whether a complaint "state[s] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the [C]ourt to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." [*7] Id. (citing *Twombly*, 550 U.S. at 556).

In evaluating a motion to dismiss under Rule 12(b)(6), "the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Hettinga v. United States*, 677 F.3d 471, 476, 400 U.S. App. D.C. 218 (D.C. Cir. 2012) (internal quotation marks omitted). While the Court must "assume [the] veracity" of any "well-pleaded factual allegations" in a complaint, conclusory allegations "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Thus, "[t]hreadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 678 (citing *Twombly*, 550 U.S. at 555). Also, the Court need not "accept legal conclusions cast as factual allegations," or "inferences drawn by [the] plaintiff if those inferences are not supported by the facts set out in the complaint." *Hettinga*, 677 F.3d at 476. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the . . . [C]ourt to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

The Court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [the Court] may take judicial notice." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997). "[A] document need not be mentioned by name to [*8] be considered 'referred to' or 'incorporated by reference' into the complaint[,]" *Strumsky v. Washington Post Co.*, 842 F. Supp. 2d 215, 218 (D.D.C. 2012) (citation omitted), and "where a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion [to dismiss] to one for summary judgment[,]" as required by Rule 12(d). *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999), aff'd, 38 Fed. Appx. 4 (D.C. Cir. 2002) (citation omitted).

## IV. ARGUMENT

### A. Plaintiffs Have Demonstrated an Article III Case or Controversy.

Defendants rely upon *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and *Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) to argue that "Plaintiffs have not alleged ongoing or future legal violations, which are necessary to show standing for declaratory or injunctive relief," and that "because there are no allegations that ICE

will ever disclose any information about Plaintiffs again, there is nothing for the Court to enjoin." Motion at 11-12. In *City of Los Angeles*, the Supreme Court held that a citizen subjected to a police chokehold was not entitled to an injunction against future police chokeholds. *City of Los Angeles*, 461 U.S. at 97. The Court relied upon earlier precedent that was clear that "[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . *if unaccompanied by any continuing, present adverse effects*." *Id.* at 103, (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974))(emphasis added). Further, in both *City of Los Angeles* and *Fair Emp. Council of Greater Wash., Inc.*, plaintiffs were found to have faced "emotional consequences of a prior act." *Fair Emp't Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (1994). When a judge in California recently considered the same government arguments regarding harms to asylum seekers under the Migrant Protection Protocols, he found them uncompelling because "…Plaintiffs' claims seek[] redress for the continuing adverse effects of Defendants' unlawful conduct." *Immigrant Defenders Law Center, et al. v. Mayorkas, et al.*, No. 2:20-cv-9363-JGB-SHK (C.D. Cal. Mar.15, 2023) ECF No. 261 at 12, (explaining how "[t]hroughout the SAC, Plaintiffs claim that past decisions continue to cause ongoing injury.")

Here, Plaintiffs' case is distinguished from *City of Los Angeles* and *Fair Emp. Council of Greater Wash., Inc.*, and very much like *Immigrant Defenders Law Center, et al.*.

Here, Plaintiffs have continuing, present adverse effects. In *City of Los Angeles*, the injury was LAPD officers using an unwarranted chokehold "rendering [Adolph Lyons] unconscious and causing damage to his larynx." *Id*. at 103. Here, Plaintiffs never alleged the injury was the publishing of their PII itself. Unlike a chokehold, the injury ICE's victims face was not incurred in the moment of Defendants' unlawful act. Rather "[a]s a result of Defendants' actions, Plaintiffs have an enhanced risk of injury." FAC at ¶ 131. "Defendants' action put Plaintiffs…in danger,

both today and in the future," not just in the five-hour duration that their PII was publicly available to anyone with internet access. FAC at ¶ 6, 120, 121, 122.

Second, ICE publishing Plaintiffs' PII to its website is only half of what Plaintiffs' case is about. Here, Plaintiffs also challenge the Defendants' insufficient mitigation efforts, which increase their exposure to danger and risk of harm. For example, "Defendants have not offered to bear the cost of legal representation, making it likely that the majority of those affected have not sought legal counsel [to raise concerns about enhanced risks of danger as a result of the breach]." FAC at ¶ 123. Further, "DOJ's failure to account for the harms to Plaintiffs and proceed with removal processes despite those harms constitutes an abuse of discretion." FAC at ¶ 130. "Defendants have thrown Plaintiffs 'into the snake pits,' and thus owe them a duty of protection." FAC at¶ 155. "The insufficient protection initially offered, a mere 30-day reprieve from deportation, still exposed the Plaintiffs to ongoing dangers and fails to meet the obligations owed to them. Defendants' subsequent measures fail to meet the moment as well." FAC at ¶ 155.

Third, Plaintiffs face not only the emotional consequences of Defendants' data breach, but also real-world consequences. In fact, "Defendants' prior statements serve as evidence of their knowledge of the potential dangers associated with the public release of asylum-related information." FAC at ¶ 164. As Defendants explain, "[p]ublic disclosure of asylum-related information may subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin." FAC at ¶ 140. "Plaintiffs are in danger of imminent harm." FAC at ¶ 157. "Due to Defendants' actions, an untold number of persecutors and malicious actors now have the information they need to track Plaintiffs down and cause bodily harm, or even death." *Id*. "Although persecutors may have missed the initial leak, the

data was easily copied, downloaded, or otherwise preserved." *Id*. "Therefore, it can be distributed indefinitely and presents a perpetual and permanent threat to the safety of Plaintiffs and those similarly situated." *Id*.

Fourth, Defendants claim that "there are no allegations that ICE will ever disclose any information about Plaintiffs again" (Motion at 12) disregards Plaintiffs' allegation that "DHS must be held accountable to end what appears to be a Department-wide culture of disregarding the privacy of asylum seekers." FAC at ¶ 8. Further, the presumption that it would not happen again is contradicted by the fact that there were subsequent data breaches of asylum seeker PII (FAC at ¶ 8), including to this very Court. ECF No. 23, (explaining how in ECF No. 21, Defendants unnecessarily exposed the alleged gender and criminal history of a specific Plaintiff). Further, "ICE has not disclosed any corrective measures it has taken to ensure a data breach of this nature will be repeated." FAC at ¶ 74.

Defendants also argue "[o]ther portions of Plaintiffs' claims are not ripe," and mischaracterize Plaintiffs' FAC as asking for decisions from immigration judges but do not cite where those portions are. Motion at 13. Plaintiffs do not ask for this Court to review decisions by immigration judges. FAC at 38-40, *Prayer*. So, this argument does not make sense.

**B. Plaintiffs' Request for Injunctive Relief Is Not Precluded by Statute.**

Defendants argue that Congress "has channeled review of final removal orders into courts of appeals—not district courts. See 8 U.S.C. § 1252(a)(5)." Motion at 13. Plaintiffs agree, but also, again, they do not ask this Court to review decisions by immigration judges.

Defendants also argue "Plaintiffs do not allege that their individual claims fall within any exception to this exclusive review process," citing 8 U.S.C. § 1252(e) which limits the Court's ability to "enter declaratory, injunctive, or other equitable relief *in any action pertaining to an order to exclude an alien*." Motion at 13; 8 U.S.C. §1252(e), (emphasis added). Here, the Court

should note Plaintiffs are not challenging any exclusion order. If they were, said exclusion orders would have been exhibits to Plaintiffs' complaint.[14] That's simply not what this case is about.

Further, Defendants argue they "already have provided Plaintiffs with the opportunity to raise the November 28 data post in their individual immigration proceedings—whether those proceedings have already begun or not—where the IJ can weigh individual-specific facts to determine if they are entitled to relief." Motion at 14. There are two problems with this argument. First, that's not true. Defendants have not set hearing dates for this reconsideration for some Plaintiffs. For 26 of 49 Plaintiffs, a case status check on the EOIR website shows "There are no future hearings for this case." **Exhibit A, *April 17, 2023 EOIR screenshots (redacted)***.[15] These Plaintiffs do not know whether they will have the opportunity that Defendants promise today. Second, even if Defendants had provided the mitigation that they propose, their insufficient mitigation "fail[s] to meet the moment…" FAC at ¶ 155. Plaintiffs are not asking just for reconsideration of their cases before immigration judges operating on a presumption of regularity. Instead, they ask that their claims "be re-adjudicated, with the presumption of risk of danger created by the data breach and a presumption that each asylee's fear is well-founded." FAC, Prayer,

[14] Plaintiffs did reference a single removal order in their FAC (for ROE #4), but not as a challenge to that order but to demonstrate what happens under Defendants' insufficient mitigation scheme. FAC at ¶ 81; *See* FN 12.

[15] The Court may take judicial notice of information posted on official public websites of government agencies. See, e.g., *Markowicz v. Johnson*, 206 F. Supp. 3d 158, 161 n.2 (D.D.C. 2016) (citing *Pharm. Rsch. & Mfrs. of Am. v. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014) ("Courts in this jurisdiction have frequently taken judicial notice of information posted on official public websites of government agencies.") (citing *Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of document posted on D.C. public website)))). As such, the Court can consider the websites cited herein without converting this motion into one seeking summary judgment. See, e.g., *Wilson v. Wolf*, Civ. A. No. 20-0100 (ABJ), 2021 WL 230136, at *4 (D.D.C. Jan. 22, 2021).

at ¶ D, F.[16] Further, "ICE [has] made no offer to provide victims [who are Plaintiffs] with a legal representative, or pay their attorney fees." FAC at ¶ 82. Rather, ICE instead included a list of "free or low-cost legal representatives along with the [notice to victims]." ECF No. 6-1, *Notice*. Here, ICE simply created the danger and then suggested to its victims to either hope that overburdened legal aid organizations can help them, or obtain counsel at their own expense. which is insufficient mitigation,[17] and results in outcomes such as seen by ROE #4 and ROE #21. *See* FN 12.

Defendants also point to 8 U.S.C. § 1252(g) and a couple of cases to argue the Court does not have jurisdiction to "hear any cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Motion at 15-16, (emphasis added). For example, Defendants point to *Rauda v. Jennings*, 55 F.4th 773 (9th Cir. 2022) where "the execution of his removal order was precisely what Matias challenged...." *Rauda v. Jennings*, 55 F.4th 773, 775 (9th Cir. 2022). However, here, unlike in *Rauda*, Plaintiffs do not challenge removal orders.[18]

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[16] Even if the Court finds it cannot compel Defendant Merrick Garland, who oversees EOIR, to extend accommodations to Plaintiffs (FAC, Prayer, at ¶ F), that does not stop the Court from compelling Defendant Tae Johnson, who oversees ICE, to stipulate to the same blanket accommodation. FAC, Prayer, at ¶ D.

[17] In 2011, Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit commissioned a study on immigrants' access to representation in removal proceedings in New York State. The report found that only 40% of detained immigrants had counsel at the time their case was completed. Immigrants with legal representation had a success rate of 18%, but those without had a mere 3%. This disparity remained for immigrants who were not detained. Those with legal representation had a 74% success rate, compared to 13% for those without. See: New York Immigrant Representation Study. 2011, "Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings." New York, https://justicecorps.org/app/uploads/2020/06/New-York-Immigrant-Representation-Study-I-NYIRS-Steering-Committee-1.pdf.

[18] In fact, fewer than 10 of 49 plaintiffs even have active removal orders. See **Exhibit A, *April 17, 2023 EOIR screenshots (redacted.)***

More importantly, the case before this Court right here, is not *arising from* removal order decisions, but from Defendants' prior decisions: (1) to publish Plaintiffs PII on their public-facing website, and (2) to insufficient mitigate the danger they created. FAC at ¶ 4, 68, 87, 123, 127, 129, 130, 155, 166.

Finally, even if the Court found Plaintiffs' request for injunctive relief was precluded by statute, their request for declarative relief would not be precluded. "Any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

**C. Plaintiffs' Request for a Presumption Is A Sufficient And Reasoned Remedy.**

Defendants cite *Lin v. U.S. Dept. of Justice*, 459 F.3d 255, 268 (2d Cir. 2006) for the proposition that "the proper remedy [for an unauthorized disclosure of asylum-seeker information] was to remand to an immigration judge to allow consideration of the disclosure in light of the other facts contained in the record." Motion at 16. That case is illustrative, but not in the way Defendants suggest. In *Lin*, "the government through its negligence [] potentially exposed Lin and his family to risks beyond those that he claims caused him to flee China," and the BIA reversed an immigration judge's granting of asylum relief. *Lin v. U.S. Dept. of Justice*, 459 F.3d 255, 268 (2d Cir. 2006). When Lin appealed the BIA decision, the government argued the Circuit Court "should presume that there was no disclosure of the fact that Lin had applied for asylum," and that "that "[g]overnment officials are entitled to a presumption of regularity in the execution of their duties,

absent clear evidence to the contrary." *Id*. at 265-66.[19] That court did not find those arguments compelling. Here, unlike in *Lin*, Defendants exposed 6,252 asylum seekers to enhanced risks of danger, not just one asylum seeker whose injury could be and was likely cured with the court's remand of the case to the BIA, consistent with its opinion. *Id*. at 273. Here, unlike in *Lin*, most of ICE's victims cannot afford counsel to represent them before an immigration judge, much less to continue the fight to the BIA or Circuit Court.

**D. Sovereign Immunity Does Not Bar Plaintiffs' Claims for Damages or Plaintiffs' Claims for Injunctive Relief.**

Defendants argue "[s]overeign immunity bars *virtually* all of Plaintiffs' requested relief for damages and all of Plaintiffs' requests for equitable relief. Motion at 20, (emphasis added). Defendants concede that the Judicial Redress Act "extends the protections of the Privacy Act" and "permits nationals of a limited number of foreign countries to bring claims under the Privacy Act." Motion at 22, (*citing* Judicial Redress Act of 2015, Pub. L. No. 114-126, 130 Stat. 282 (2016)). Plaintiffs do not disagree. *See*: FAC at ¶¶ 95, 96. ROE #3 is a French national. FAC at ¶¶ 17, 97, 118, 143.[20] Defendants concede ROE #3 "clears the initial threshold hurdle of being able to bring a Privacy Act claim under the Judicial Redress Act…" Motion at 23. At the end of the day, if Defendants wish to use the sovereign immunity defense to only pay damages exclusively to ROE #3, and other victims from predominantly white European countries, when most of their victims

[19] It is ironic that Defendants argue that "an order requiring a presumption would be contrary to the standard set by Congress that burden of proof to prove a prima facie case for asylum is always on the applicant" (Motion at 17), when they cite a case in the same motion, where they argued before a different court that a presumption in their favor was okey-dokey.

[20] Defendants suggest ROE #3's French citizenship is merely an allegation (Motion at 23), despite obtaining and retaining her French passport.

are Black and Brown and from predominantly non-white countries in the Global South, Plaintiffs concede that is something they can *lawfully* do.

**E. Plaintiff ROE #3 States a Viable Privacy Act Claim.**

Plaintiffs concede that Plaintiffs ROE #1-#2, and ROE #4-#49 do not state viable Privacy Act claims, however, Plaintiff ROE #3 does. Defendants argue that ROE #3 "does not plausibly plead a viable Privacy Act claim for damages…because Roe #3 fails to allege a willful violation and because Roe #3 fails to specially plead damages" (Motion at 23).[21] Not so.

First, ROE #3 alleged a willful violation because ROE #3 did not allege the PII published itself. "Defendants …published the [PII]." FAC at ¶ 4. "Defendant JOHN DOE 1 published the [PII]. FAC at ¶ 67.

Second, ROE #3 also alleged a willful violation by listing the question, "Whether the actions of Defendant JOHN DOE 1 were intentional or willful?" and "What caused ICE to release a statement determining the data breach was 'unintentional' before the conclusion of its investigation?" as common questions of law and fact. FAC at ¶ 110.

Third, Defendants attempt to evade accountability through their lack of transparency as to how and why the PII was published. The only context Defendants have released in this regard is

[21] In contrast to Defendants' attempt to dismiss ROE #3's claims under the Judicial Redress Act, one predecessor of Defendants' counsel and Defendant Attorney General Merrick Garland, Attorney General Loretta Lynch, was a voice in support of the Judicial Redress Act of 2015, with her Assistant Attorney General submitting a letter to Congress highlighting how "the European Commission and Parliament both made it clear that the EU would sign the [Data Protection and Privacy Agreement signed in 2016] only if EU citizens are granted the right to seek redress in U.S. courts for major privacy violations related to personal information covered by the [agreement]." *See DOJ Announces Support for Murphy-Hatch Judicial Redress Act, available at:* https://www.murphy.senate.gov/newsroom/press-releases/doj-announces-support-for-murphy-hatch-judicial-redress-act.

that they "posted" the PII to the public-facing website "while performing routine website updates." ECF No. 6-2, *FAQ*, at 1; *See* FN 1. Their litigation strategy includes, without explanation, not revealing the identity of JOHN DOE 1, the individual who published the PII, making it impossible for Plaintiff ROE #3, the other victims, their counsel, the public, or the Court, to raise questions directly with the key actor of the breach.[22] Defendants should not be entitled to a presumption that their act was unintentional just because they say it was.

Further, ROE #3 did specially plead damages as Plaintiffs collectively specially did plead damages. For example, Plaintiffs pointed to "a lifetime of added security needs that will be expensive to meet." FAC at ¶ 120. "[W]hether removed from the U.S. or not, Plaintiffs at risk of retaliation may need to adopt a nomadic lifestyle making it more difficult to establish a normal life. Similarly, Plaintiffs may need to purchase security systems, change door and window locks, private mailboxes or obtain other protection to ensure their physical safety. Some Plaintiffs have spouses and children residing in the United States and fear their families may have increased risk of harm. Some Plaintiffs will incur costs related to legally changing their name." FAC at ¶ 121. "Plaintiffs may also require counseling to process their experience." FAC at ¶ 122. There is also "the cost of legal representation [for raising the impact of the data breach in the individual removal proceeding]" (FAC at ¶ 123), which continues to accrue for ROE #3, and the minority of ICE's victims who can afford legal representation or access free representation. (At the Court's request, Plaintiff ROE #3 can file receipts for that representation.).

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[22] This Court could compel Defendants to produce JOHN DOE 1, or another knowledgeable Defendant representative, to answer the Court's questions in a status conference, a technique employed by other judges in the initial stage of litigation in immigration matters. See: *Rai v. Biden*, No. 1:21-cv-00863-TSC (Minute Order)(D.D.C. May 18, 2021) ("… the government shall ensure the attendance at the hearing of an individual from the State Department who has firsthand knowledge of diversity visa processing, is able to respond to Plaintiffs' comments, and is able to make representations on behalf of the agency.")

To the extent that Defendants' counsel's googling turned up what he says "appears to show a home address" for ROE #3," he needs to curb his enthusiasm over this alleged piece of non-compelling evidence. Motion at 26. Even if that was ROE #3's home address, and it is not, he omits that he did not find on his Google search ROE #3's A-number, date of birth, country of citizenship, detention facility name, *and other immigration information*, including credible or reasonable fear decisions associated with their case, which Defendant concede that JOHN DOE 1 published to ICE's public-facing website.

**F. Plaintiffs State a Viable APA Claim.**

Defendants argue Plaintiffs' Administrative Procedures Act ("APA") claim fails because "the Privacy Act precludes the injunctive and declaratory relief that Plaintiffs seek under the APA," and that "Plaintiffs also fail to state a claim under the APA because they fail to challenge a discrete agency action." Motion at 26. They are wrong.

Defendants argue "Plaintiffs may not use the APA to obtain relief for Privacy Act violations that Congress has not made part of the Privacy Act's comprehensive remedial scheme." *Id*. However, Defendants also made strident arguments that the Privacy Act did not apply to Plaintiffs ROE #1-#2, or ROE #4- #49. Plaintiffs concede that Defendants are right about that, and thus, the Privacy Act, which does not apply to most Plaintiffs in this case, cannot preclude the challenge these Plaintiffs bring under the APA.

To the extent that Defendants argue ROE #3's Privacy Act claims preclude their APA claims, it appears to be a novel theory. They point to two cases, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204–05 (2012), and *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983), where the Supreme Court found APA

claims were precluded by the **Quiet Title Act of 1972**. They also point to *Kelley v. FBI*, 67 F. Supp. 3d 240, 267 (D.D.C. 2014), where the DC Circuit found APA claims were precluded by the **Stored Communications Act**. However, none of these cases involve the Privacy Act.

Finally, even if Plaintiffs' APA challenge to the publishing of PII is precluded under the Privacy Act for ROE #3, their challenge to Defendants' insufficient mitigation efforts would not be precluded as the Privacy Act is about the incident itself, not the subsequent mitigation. *See* 5 U.S.C. § 552a(g)(1) ("[Whenever an agency] fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, ….the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.")"

**G. Plaintiffs State a Valid Constitutional Claim.**

First, Defendants use Plaintiffs' singular mention of the word "recovery" (in FAC at ¶ 150) to mischaracterize Plaintiffs' constitutional claims only to be a pursuit for money damages. Motion at 34. Rather, Plaintiffs used recovery as defined as "the action or process of regaining possession or control of something stolen or lost." Here, that something was Plaintiffs' safety, Plaintiffs' families' safety, and Plaintiffs' Constitutional protections.

Second, Defendants argue the **custody exception** of *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 200 (1989) does not apply because "this case does not rise out of any condition of involuntary custody…" Motion at 34. This is disputed by their own notices to Plaintiffs, which say explicitly that "a document was mistakenly posted on…ICE.gov, that included limited information *on some individuals in ICE custody*." ECF No. 6-1, *Notice*, (emphasis added). Absent the condition of being in Defendants' custody, Plaintiffs would not have been affected by the data breach. Defendants also suggest, without any evidence of declaratory support, that the PII that JOHN DOE

1 published to ice.gov "involves information that Plaintiffs voluntarily provided in furtherance of an application for asylum." Motion at 24. This is not true or logical. It does not make sense that the published PII would have been collected from asylum applications because Defendants have their own records related to an individual's A-number which is separate information from what may be disclosed in an asylum application. For example, the published PII included credible or reasonable fear decisions associated with each case and Plaintiffs' detention locations, which Plaintiffs certainly did not provide in furtherance of their asylum application. There is no box on the form for that information.[23] While it is not clear what other immigration information was included in the published PII, and Defendants are notably conspicuously silent on disclosing it to Plaintiffs or this tribunal, that information likely contained other information that Plaintiffs did not include in their applications for asylum and other relief from removal.

Third, Defendants express doubts that the **state endangerment exception** of *DeShaney* could be applied because "Plaintiffs have not alleged any actual third-party violence that would trigger this exception." *Id*.

Defendants also argue "nothing in the allegations show deliberate conduct intended to injure Plaintiffs or deliberate indifference that shocks the conscience." Motion at 36. First, Defendants cutely quote portions of Plaintiffs' complaint where Plaintiffs quote them, to convince the Court that Plaintiffs alleged their actions were "inadvertent." Motion at 36, (pointing to FAC ¶ 84 which begins with the words "Despite ICE's claim that…") (pointing to the FAQ that is clearly on Defendants' letterhead, found as an exhibit to FAC at ECF 6-2). This disingenuous gamesmanship is insulting to Plaintiffs and this Court. Defendants' motion to dismiss was their

[23] Form I-589, Application for Asylum or Withholding of Removal, https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf.

opportunity to bring forth evidence or declarations to support their rebuttal that there is nothing to see here, but they choose not to. Also, as Plaintiffs alleged, thirteen United States Congress members wrote a letter to Defendant Tae Johnson "to express concern and outrage," and that they "believe that ICE's failure to comply with simple regulations to protect asylum seekers has potentially endangered the lives of these vulnerable individuals and their families and urge you to take immediate action to ensure the privacy of this and other sensitive information held by the agency." FAC at ¶ 79.[24] Further, as alleged, "ICE failed to promptly share the notice or form with immigration advocates or attorneys hindering service providers' ability to address the confusion at many detention centers," further evidence that Defendants' action and inaction shocks the conscience. FAC at ¶ 77.[25] More recently, at a February 9, 2023 liaison meeting between DHS and immigration attorney organizations, DHS refused even to discuss its mitigation efforts due to "possible forthcoming litigation." **Exhibit C, *February 9, 2023 AILA-LACBA liaison meeting with DHS OPLA-LA and ERO***, at 12.

Plaintiffs, like members of Congress, explained exactly why Defendants' actions shock the conscience. *See*: FAC at ¶ 155. Simply, "Defendant JOHN DOE 1 was able to post the information onto ICE.gov for any persecutor or bad actor anywhere in the world to view, download, distribute,

[24] December 15, 2022 Letter from Rep. Torres and other members of Congress to JOHNSON, https://torres.house.gov/sites/torres.house.gov/files/221215%20ICE%20Letter%20re_%20Release%20of%20Asylum%20Seeker%20Information%20FINAL.pdf.

[25] See: *AILA Leads Letter to Administration With Recommendations to Protect Asylum Seekers Whose Information Was Leaked* (AILA Doc. No. 22122789) (December 22, 2022), https://www.aila.org/advo-media/aila-correspondence/recommendations-to-protect-asylum-seekers, (noting "ICE did not initially share the notice or form with any of the Legal Orientation Providers, hampering the abilities of service providers to counter the confusion at many detention centers, and "[w]hile ICE is alerting attorneys of record for those impacted by the breach, notice is by mail and is inevitably a slow process. Meanwhile, legal proceedings for those without removal orders continue to march forward.")

and use for nefarious purposes." *Id*. at ¶ 166. "Therefore, Defendants were deliberately indifferent to the safety of Plaintiffs and those similarly situated." *Id*.

Further, "[c]onscience-shocking conduct that violates due process usually takes the form of affirmative state action." *Gormly v. Walker*, No. 21-cv-2688 (CRC), 2022 U.S. Dist. LEXIS 100080, at *15-16 (D.D.C. June 6, 2022) (citing *Est. of Phillips v. District of Columbia*, 455 F.3d 397, 403, 372 U.S. App. D.C. 312 (D.C. Cir. 2006). Here, "Defendant JOHN DOE 1 posted the names and other personally identifiable information, along with immigration information, of 6,252 noncitizens in, or formerly in, ICE custody, including Plaintiffs in this action to ICE.gov." FAC at 68. That is affirmative action. Further, ICE's insufficient mitigation efforts, are also affirmative actions, albethey insufficient. FAC at ¶ 74-78.

Further, Defendants argue for Plaintiffs to show deliberate indifference, they must show that "'an official had adequate time for reflection' and still failed to act." Motion at 35. Plaintiffs' complaint is full of allegations about Defendants' reflections on the importance of protecting PII. FAC ¶¶ 91-105; ¶¶ 138-142.

In an amicus brief submitted in support of Defendants, IRLI argues "Plaintiffs are not entitled to the constitutional protections they claim because they have not effected an 'entry' into the United States." ECF No. 35 at 2. It is unclear whether IRLI obtained information about Plaintiffs' manner of entry from the data breach itself or just made assumptions. However, it does not matter because IRLI asks this Court to upset constitutional law that has been settled for several decades. "The Fourteenth Amendment provides that '[no] State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws.'" *Plyler v. Doe*, 457 U.S. 202, 210 (1982), (Emphasis in original). In *Plyer*, the Supreme Court reasoned, "[w]hatever his status under the immigration laws, an alien

is surely a 'person' in any ordinary sense of that term. *Id*. "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). "Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Further, once questions are answered by Defendants regarding the race

Finally, if the Court finds Plaintiffs' Privacy Act, APA, and *Accardi* claims cannot proceed, the Court should allow the Due Process Clause of the Fifth Amendment claims to proceed. In that case, it would be the only path left for redress, and thus the Court would not be precluded by another avenue. *See Fazaga v. FBI*, 916 F.3d 1202, 1243 (9th Cir. 2019) (finding when "an avenue for some redress exists, bedrock principles of separation of powers foreclose[s] judicial imposition of a new substantive liability." (internal quotations omitted)).

**H. Plaintiffs State a Valid *Accardi* Doctrine Claim.**

Defendants suggest that "[a]n argument based on *Accardi* must generally be brought in the context of an APA claim," and "[s]ince Plaintiffs' *Accardi* theory is derivative of their APA claim, it fails..." Motion at 37. Wrong again. An *Accardi* claim can be a freestanding claim, and "is at heart a claim of procedural fairness that owes as much to the Due Process Clause as to the Administrative Procedure Act." *See Jefferson v. Harris*, 285 F. Supp. 3d 173, 185 (D.D.C. 2018); *see also*: *J. W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

"It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion." *See Padula v. Webster*, 822 F.2d 97,

100 (D.C. Cir. 1987). This doctrine stems from *United States ex rel. Accardi v. Shaunessy*, 347 U.S. 260 (1954). "*Accardi* has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." *See Battle v. F.A.A.*, 393 F.3d 1330 (D.C. Cir. 2005); *see also Steenholdt v. F.A.A.*, 314 F.3d 633, 639 (D.C. Cir. 2003) ("The *Accardi* doctrine requires federal agencies to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions."); *see also Damus v. Nielsen*, 313 F. Supp. 3d 317, 335-38 (D.D.C. 2018) (explaining connection between *Accardi* doctrine and APA cases).

In fact, "in the immigration context," courts have found that "the *Accardi* doctrine's 'ambit is not limited to rules attaining the status of formal regulation,' and that it can be applied to internal agency guidance." *Damus*, 313 F. Supp. 3d at 336 (quoting *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991)). The D.C. Circuit has explained that "an agency pronouncement is transformed into a binding norm if so intended by the agency," and to determine agency intent, a court must examine "'the statement's language, the context, and any available extrinsic evidence.'" *See Padula*, 822 F.2d at 100.

Plaintiffs have sufficiently alleged this claim in multiple ways. See FAC at ¶¶ 132-145. Plaintiffs have included in their pleading the internal guidance adopted by the Defendants. *See Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 121 (D.D.C. 2020) (holding that the waiver adjudication mandated by the implementation of Presidential Proclamation 9645 was enforceable); *see also Thomas v. Pompeo*, 438 F. Supp. 3d 35, 43 (D.D.C. 2020) (same); *see also*, *e.g.*, *Najafi v. Pompeo*, No. 19-CV-05782-KAW, 2019 U.S. Dist. LEXIS 210968 at *5 (N.D. Cal. Dec. 5, 2019) (finding that "mandatory language" in agency guidance relating to Proclamation "demonstrates a decision is required" on waivers and noting that "[t]o now argue that the waiver program requires no decision would be to render the waiver program illusory"); *see also Emami v. Nielsen*, 365 F.

Supp. 3d 1009, 1021 (N.D. Cal. 2019) (finding that plaintiffs sufficiently alleged *Accardi* claim in broader challenge to waiver program).

First, Plaintiffs alleged that "a December 4, 2017 DHS Instruction Guide entitled "Privacy Incident Handling Guide" explained the agency affirmed its internal policy and duty to safeguard the PII of nonimmigrant aliens in the custody of DHS. FAC at ¶ 101.[26] Defendants point to no rescission of that guidance or policy, and thus, Plaintiffs state a viable *Accardi* claim. Further, in that same guidance, Defendants reveal that the Senior Agency Official for Privacy ("SAOP") "shall determine if there are services the agency can provide (i.e., identity monitoring, credit monitoring, identity theft insurance, and other related services)" to mitigate the risk of harm to individuals affected by a privacy incident. *See* FAC at ¶ 141, FN 21.[27] Yet, Defendants have not mentioned the SAOP in any of the public-facing statements or these proceedings, much less any accommodation that the SAOP has determined was necessary to mitigate the harm from the published PII. Here, this is a *procedural requirement* that the agency should have, but failed to, comply with under the *Accardi* doctrine.

Further, Plaintiffs alleged that, "[i]n September 2000, the INS published 2000 National Detention Standards for Non-Dedicated Facilities." FAC at ¶ 94. Those standards included a directive that Detention file contents were "subject to the same Privacy Act regulations" as A-file contents. *Id*. When ICE was formed in March 2003, the agency operated its detention system under

[26] *See* Privacy Incident Handling Guidance, DHS Instruction Guide 047-01-008, at 3, 36, *available at* https://www.dhs.gov/sites/default/files/publications/047-01-008%20PIHG%20FINAL%2012-4-2017_0.pdf, ("Every individual has a role in protecting the personal information of U.S. citizens, DHS personnel, lawful residents, visitors, and nonimmigrant aliens in the custody of DHS.").

[27] *Id*. at 52.

those standards." *Id*. In sum, Defendant's own policies treated all detainees as protected by the Privacy Act, not just detainees from countries designated under the Judicial Redress Act.

Further, while Defendants argue *ad nauseum* that the Privacy Act does not apply or protect Plaintiffs throughout their filings in this civil action, Defendants are duplicitous in that they argue the exact opposite in the Immigration Courts. Specifically, in response to motions to compel discovery on the data breach filed in March 2023 on behalf of victims, in support of the victims' removal defense, Defendants argue that the Privacy Act – **a concession that the Act applies to these victims** – prevents Defendants from providing a single document beyond the "Inadvertent Disclosure" notice. *See* **Exhibit D, *Defendants' Opposition to Motion to Compel Discovery (redacted).*** Further, Defendants offer a glimpse into the treasure trove of information that ***could have been*** posted on Ice.gov when they have argued in removal proceedings that there is just so much information about respondents in their possession ("third-party" PII, " "law enforcement" information, TPS or VAWA applications") which Defendants acknowledge is confidential, Defendants could not possibly hand over that information under any circumstance. *Id*. at 5.[28] To do otherwise they admit, is "criminal." *Id*. at 6. Defendants also send victims on a fool's errand by stating the proper avenue to obtain the requested information is to file a FOIA request. In the same paragraph, however, Defendants state that such confidential information though would not be released pursuant to a FOIA request. *Id.* at 4-7. Related, in 2019, the US Attorney Office for the Northern District of California objected to interrogatories about the status of visa applications for

[28] *See also,* Mehrotra, Dhruv, *ICE Records Reveal How Agents Abuse Access to Secret Data,* WIRED (Apr. 17, 2023), https://www.wired.com/story/ice-agent-database-abuse-records/, (reporting that ICE "has amassed an enormous trove of databases containing billions of data points that enable the agency "to pull detailed dossiers on nearly anyone, seemingly at any time.").

Iranian nationals arguing those records were protected by the Privacy Act. FAC at ¶ 93; **Exhibit E, *DOJ arguing Iranian nationals in Iran are subj. to Privacy Act*.**

Further, Plaintiffs sufficiently allege that USCIS published a training module in 2019 that listed three factors DHS requires adjudicators to consider when addressing refugee *sur place:* (1) Visibility of asylee's activities outside country of feared persecution; (2) Extent of feared persecutor's network outside country of feared persecution; and (4) Persecutor's opinion of those residing in other countries. FAC ¶¶ 103, 142. **Here, asylees' activities could not be more visible than being published on a public-facing US government website**. Whatever network their persecutors have, they would have access to removed asylees, and the persecutors' opinions of asylees are likely murderous or vengeful. FAC at ¶ 142. Thus, all three factors weigh strongly in favor of a presumption of well-founded fear for all Plaintiffs and similarly situated putative class members. *Id*.

Finally, Defendants themselves concede that "this release of information is a breach of policy" on the same website where they published the PII. [29] When Defendants argue an *Accardi* claim is not reviewable after conceding that they breached their own policy, they are really asking this Court to overturn *Accardi*.

## I. Defendants Do Not Get to Unilaterally Prescribe the Remedy for Their Violation of 8 C.F.R. § 208.6.

Defendants argue "the remedy for unauthorized disclosure is to allow the asylum-seeker to raise the disclosure before an immigration judge and the BIA," and that "Plaintiffs already will have the opportunity to *raise* the disclosure in removal proceedings and before the BIA." Motion

[29] See FN 1, (under the section "What is ICE doing to prevent this sort of privacy spill from happening in the future?").

at 38, (citing *Lin*, 459 F.3d at 267) (emphasis added). However, Lin was a single violation of the regulation, not 6,200 violations. Even so, the *Lin* court viewed the compromised PII for one asylum seeker much more seriously than Defendants view the compromised PII for 6,226 victims. "The government's violation of section 208.6, however, is not merely a procedural flaw in an immigration proceeding." *Lin*, 459 F.3d at 267-8, (stopping short of expressing an opinion as to whether it would be appropriate to discipline any employee for violating section 208.6, but pointing to a case where it was found to be a fireable offense. *See Lewis v. DOJ*, 34 Fed. Appx. 774 (Fed Cir. 2002) (unpublished opinion) (affirming decision of *Merit Systems Protection Board* concluding that breach of section 208.6 was a fireable offense irrespective of whether that breach was harmless)).

Importantly, even the *Lin* court made a ruling on the sought after declaratory relief, finding that "**the BIA erred in concluding that the government had not violated section 208.6."** *Lin*, 459 F.3d at 267. Here, even before this tribunal, Defendants have the audacity to say "Even if" they violated 8 C.F.R. § 208.6, as if that was a fact in dispute. Motion at 38. In the notice Defendants gave to every Plaintiff in this case, they conceded that "the disclosure violated confidentiality obligations under 8 C.F.R. § 208.6. ECF No. 6-1, *Notice*. Plaintiffs should not have to prove this fact in 6,200 different tribunals when this court could issue declaratory relief making it clear to Defendants that they broke the law, no "even if" about it. Plaintiffs deserve that, and more.

Finally, for multiple reasons, Plaintiffs dispute Defendants' unsupported claim that they will be afforded the opportunity to *raise* the issue before immigration court or BIA. Victims can be separated into six tranches as it relates to whether they have had the opportunity to "raise" the issue before an immigration tribunal.

First, there is a group of victims who were released from ICE custody between the period of November 28, 2022 and when ICE began notifying victims.1 Those victims may or may not have received a disclosure letter in the mail.[30] Those victims may or may not have had a "Notice of Inadvertent Disclosure" ("Notice") posted into the Electronic Record of Proceedings ("ECAS") in immigration court. The compliance rate is not nearly 100%. For example, there are instances where a Notice was not posted to ECAS until February 2023, after counsel inquired with DHS. If a victim is pro se, they may not even know what ECAS is, much less how to navigate it, and such inquiry and remedial action likely would not occur.

Second, there is a large group of victims who were released from detention soon after the data breach, and their cases are now on dockets (or will be someday) where their first master hearing is not until late 2023 or even 2024, if they are scheduled at all.[31] Even if we assume that the victims have received actual notice, their first opportunity to raise the issue in a merits hearing is not likely to occur until 2024 at the earliest. For this large group, Defendants' arguments that all victims have had an opportunity to "raise" the issue are demonstrably false.

Third, there is a group of victims who have been continuously in ICE custody from November 28, 2022 and today, which includes approximately 28 of the 49 Plaintiffs. Defendants' assertions that victims have had an opportunity to "raise" the issue before an immigration tribunal can only theoretically apply to this smaller group who have had several court hearings between November 28, 2022 and now due to the expedited nature of a detained docket. Defendants make

[30] *See also* Unintentional Disclosures of Personally Identifiable Information on November 28 and December 7, 2022, U.S. Immigration and Customs Enforcement, https://www.ice.gov/pii ("*Almost* all individuals impacted by both incidents have now been notified…") (emphasis added).
[31] For example, the master hearing for ROE #34, who was recently released, is set for September 28, 2023. ROE #13 was released weeks ago, yet no future is hearing scheduled despite that fact being disclosed in earlier briefing. ECF No. 31 at 2, FN 3.

no attempt to advise this Court of the truly dismal state of affairs as it pertains to seeking any redress on the disclosure issues. Defendants' use of the word "raise" is telling because it correctly characterizes the complete absence of accountability, seriousness, and care towards victims triggered by this data breach, immigration courts and prosecutors, leaving the burden on the victims to figure things out for themselves. On information and belief, Plaintiffs are aware of only one immigration judge across the United States who has granted a Motion to Terminate as a result of the data breach, and DHS promptly appealed this grant. In immigration courts, DHS prosecutors have fought against any further discovery on the ICE data breach and have refused to concede any prejudice towards victims in their removal cases. When Plaintiffs have attempted discovery, immigration judges have shut it down. For example, Plaintiffs have attached an example where an immigration judge "concur[red] in DHS's assertion that Respondent has failed to set forth "what [they] … expect[] to prove" from the documents," and denied the *subpoena duces tecum*. *See* **Exhibit B,** ***Sample Subpoena Request Denied (redacted)***. It is disingenuous for Defendants to argue Plaintiffs had an opportunity to *raise* the disclosure in removal proceedings and before the BIA while also refusing to be transparent about the disclosure in those tribunals.

Fourth, there is a group of victims whose cases have already been adjudicated without the benefit of reasonable relief sought in this action. For example, Plaintiff ROE #21 and ROE #48 are in this group. ROE #21 was removed to Colombia in March 2023, where they are now in hiding. ROE #48 is set to be placed on the next plane back to the Dominican Republic.

Fifth, there is a group of victims who, absent counsel or the resources to access counsel, signed the waiver form that ICE officers repeatedly presented to them. FAC at ¶ 76; Those who signed that form were likely removed without even knowing about Defendants' belated and

insufficient mitigation scheme, and thus, did not have the opportunity to *raise* the disclosure in removal proceedings and before the BIA.

Sixth, there is the group of victims who are already in danger because they were removed before being notified their PII was compromised (FAC at ¶ 84), as well as the 46 Cuban victims whom Defendants reveal in a recent filing have been "released to Cuba." *See supra*, at 4-5. ECF No. 28 at 3. No Plaintiffs here are in this category, but it is clear this group did not have the opportunity to *raise* the disclosure in removal proceedings and before the BIA. Plaintiffs hope to represent not only themselves but also those who may not yet know of the increased danger they face and those who cannot access the U.S. justice system to seek relief.

## V. CONCLUSION

For the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss in substantial part, granting Defendants' motion only as to the Privacy Act claim for all Plaintiffs except ROE #3, a citizen of France.

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Respectfully submitted,

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