IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASYLUM SEEKERS TRYING TO ASSURE THEIR SAFETY, *et al.*, Plaintiffs, v. TAE D. JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement, *et al.*, Defendants.	No. 23-cv-163-RCL

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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INTRODUCTION

The Court should dismiss all claims brought by Plaintiffs, 49 individuals who have applied for asylum and whose information was inadvertently posted to a government website for around five hours. Defendants, federal officials all sued in their official capacities, have already provided an opportunity for these individuals to raise the inadvertent disclosure in Plaintiffs' underlying immigration proceedings, including allowing Plaintiffs to reopen proceedings if necessary. Under the facts of this case, there are no other remedies available for this type of inadvertent disclosure.

Plaintiffs' First Amended Complaint ("FAC"), ECF No. 6, faces a number of threshold issues. Plaintiffs lack standing to seek declaratory and injunctive relief because they allege a past legal harm (the inadvertent disclosure), not an ongoing alleged violation or imminent future violation. Allegations of past legal harms—even if the *effects* of those harms are felt in the future—are not sufficient to demonstrate Article III standing under Supreme Court and D.C. Circuit precedent. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994). Some of Plaintiffs' requests for relief are moot, including their request for an order to allow them reopen immigration proceedings to raise the inadvertent disclosure. Defendants have already provided that opportunity. And other requested relief is not ripe—no Plaintiff alleges that he or she has been denied asylum after raising the inadvertent disclosure in immigration proceedings. The proper venue for judicial review is in a court of appeals after Plaintiffs have exhausted their administrative remedies—not in district court. Moreover, provisions of the Immigration and Nationality Act ("INA") specifically preclude this Court from granting parts of Plaintiffs' requested injunctive relief.

Plaintiffs' request for damages fares no better. Defendants are all federal officials sued in their official capacities, so sovereign immunity bars damages unless Congress specifically waived that immunity. Congress has not waived sovereign immunity for damages arising from

Administrative Procedure Act ("APA") claims, constitutional claims, or claims brought under the *Accardi* doctrine (even assuming that Plaintiffs can even bring a stand-alone *Accardi* claim, a legal theory that an agency must follow its own regulations).

The only cause of action raised by Plaintiffs that contains a waiver of sovereign immunity for damages is the Privacy Act. But the Privacy Act only applies to citizens and permanent residents—Plaintiffs do not qualify. While the Judicial Redress Act allows foreign citizens from a limited number of countries to bring Privacy Act claims, only Roe #3 alleges to be from a covered country. No other Plaintiffs are from covered countries. But Roe #3's Privacy Act claim fails for other reasons, including failing to plausibly allege a willful violation of the Privacy Act which is necessary for damages and failing to specially plead non-speculative economic harm.

For these reasons and others, Defendants move to dismiss Plaintiffs' FAC in its entirety. Since the issues identified in this motion generally cannot be remedied through additional pleading, the Court should dismiss all claims with prejudice.

BACKGROUND

A. Statutory and Regulatory Background for Seeking Asylum

The INA establishes procedures for detaining, removing, or granting immigration-related relief for noncitizens unlawfully present within the United States. Upon discovering a noncitizen who is unlawfully in the United States, the government may initiate removal proceedings by sending the noncitizen a "[n]otice to appear." 8 U.S.C. § 1229(a). A notice to appear informs the noncitizen of, among other things, the charges against him and the time and place of the hearing at which an immigration judge will determine whether the noncitizen is to be removed. *See id.* §§ 1229(a)(1)(D), (G)(i). The INA also provides that the government may arrest and detain the noncitizen "pending a decision on whether the alien is to be removed from the United States." *Id.*

§ 1226(a). The government may release the noncitizen subject to bond or conditional parole. *See id*. § 1226(a)(2)(A)–(B).

A noncitizen who comes to the United States unlawfully may seek various forms of relief from removal from the country, including asylum and withholding of removal. *See, e.g.*, *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021). Individuals who seek asylum bear the burden to show that they satisfy the definition of a refugee. *See* 8 U.S.C. § 1229a(c)(4) (seeking asylum as relief from removal); 8 U.S.C. § 1158(b)(1)(A) (affirmative asylum requests). The individual must show "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42), which is sometimes referred to as "credible fear." Persecution for reasons other than those reasons are not a basis for asylum.

Even if someone can prove that they meet the *prima facie* elements for asylum, that individual still might not be granted asylum. For example, "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" is not eligible for asylum. *Id.* Individuals who have been "convicted by a final judgment of a particularly serious crime" and thus "constitute[] a danger to the community of the United States" are not eligible. *Id.* § 1158(b)(2)(ii). Individuals are also ineligible where "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States," "there are reasonable grounds for regarding the alien as a danger to the security of the United States," or the Attorney General determines they should be excluded for terrorist activity. *Id.* § 1158(b)(2)(iii)–(iv). An individual who "was firmly resettled in another country prior to arriving in the United States" is also ineligible. *Id.* § 1158(b)(2)(vi).

In addition to asylum, noncitizens may also seek protection under the United Nations Convention Against Torture (CAT), which requires them generally to show that they would be subject to (1) the intentional infliction, (2) of severe pain and suffering (physical or mental), (3) committed by or at the acquiescence of the government. *See generally* 8 C.F.R. § 208.18. An individual seeking relief from removal pursuant to CAT does not need to show that the persecution is based on any particular grounds. However, even if the individual demonstrates an entitlement to relief, they may still be removed from the United States to another country where they will not face torture as defined by CAT.

In addition, federal regulations prohibit the government disclosure to third parties of "[i]nformation contained in or pertaining to any application for refugee admission, asylum, withholding of removal . . . , or protection under [CAT]," as well as "records pertaining to any credible fear determination." 8 C.F.R. § 208.6(a).

B. The Privacy Act

The Privacy Act of 1974 establishes "a comprehensive and detailed set of requirements" for federal agencies that maintain systems of records containing individuals' personal information. *FAA v. Cooper*, 566 U.S. 284, 287 (2012). As relevant here, the Privacy Act prohibits a federal agency from disclosing "any record which is contained in a system of records" unless certain exceptions apply. 5 U.S.C. § 552a(b); *see also id.* § 552a(a)(4)–(5). In addition, the Act requires agencies to "establish appropriate administrative, technical, and physical safeguards" in order to keep records secure and to guard against anticipated security threats that could substantially harm, embarrass, inconvenience, or cause unfairness to an individual for whom an agency record is maintained. *Id.* § 552a(e)(10).

The Privacy Act vests the district courts with jurisdiction over any civil action brought by an individual who has been adversely affected by a violation of the Act. *See id.* § 552a(g)(1)(A).

The Privacy Act authorizes injunctive relief in only two specific circumstances: (1) to order an agency to amend inaccurate, incomplete, irrelevant, or untimely records, *id.* §§ 552a(g)(1)(A), (g)(2)(A); and (2) to order an agency to allow an individual access to his records, *id.* § 552a(g)(1)(B). Neither apply in this case.

As relevant here, the Privacy Act also authorizes courts to award monetary damages when the 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." *Id.* § 552a(g)(1)(C)-(D), (g)(4). The "adverse effect" requirement "acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue." *Doe v. Chao*, 540 U.S. 614, 624 (2004).

To recover monetary damages, a plaintiff must do more than demonstrate standing and show that the agency failed to satisfy its Privacy Act obligations. The plaintiff must also plead and prove facts showing "that the agency acted in a manner which was intentional or willful" and that, as a result, the plaintiff suffered "actual damages." 5 U.S.C. § 552a(g)(4)(A). "Actual damages" under the Privacy Act "are limited to actual pecuniary loss, which must be specially pleaded and proved." *See Cooper*, 566 U.S. at 295. The Privacy Act does not provide "damages for mental or emotional distress." *Id.* at 287. The federal government retains sovereign immunity from liability for all other kinds of injury. *Id.* at 304.

C. Factual Background

This case arises out of a five-hour, inadvertent posting on ICE.gov of certain personally identifiable information and immigration information. While performing routine website updates on November 28, 2022, U.S. Immigration and Customs Enforcement ("ICE") inadvertently posted a document to ICE.gov that included certain personally identifiable information and immigration

information of approximately 6,000 noncitizens who were in ICE custody as of November 19, 2022. FAC ¶ 68; *see also* Pls.' Ex. 2, Frequently Asked Questions 1, ECF No. 6-2 ("Ex. 2, FAQ"). The posted information included names, immigration identification numbers, and the fact that individuals had applied for asylum or sought protection pursuant to CAT. Plaintiffs allege that this information was publicly posted online for approximately five hours—from 9:45 a.m. to 2:00 p.m. EST—when ICE removed the document after an immigration advocacy group notified ICE that it was posted. FAC ¶¶ 68, 71–72.

Two days later, on November 30, 2022, ICE posted a statement on ICE.gov notifying the public that the November 28, 2022 posting was "a breach of policy," that "the agency [was] investigating the incident and taking all corrective actions necessary," and that "ICE [was] notifying noncitizens impacted by the disclosure." *Id.* ¶ 73.

More specifically, as alleged by Plaintiffs and as further described in Plaintiffs' attachments, ICE has since undertaken several measures to mitigate the impact of the inadvertent disclosure and to prevent a similar inadvertent disclosure from recurring. *See generally* Ex. 2, FAQ. In particular, ICE began notifying all affected noncitizens by letter of the inadvertent disclosure—including the approximately 6,000 noncitizens whose information was posted on November 28, 2022. FAC ¶ 75. The Pseudonymous Plaintiffs were all notified that their information was included in the disclosure. *See* Pls.' Decl. ISO Class Cert, ECF Nos. 16-1–16-49. For those affected noncitizens subject to removal, ICE first delayed their removal by 30 days, *id.*; *see also* Ex. 2, FAQ 3, and then announced an indefinite extension on this 30-day delay "to allow [affected noncitizens] time to further discuss their options with a legal representative." FAC ¶ 82; *see also* Ex. 2, FAQ 4.

Additionally, ICE distributed a Frequently Asked Questions form to affected noncitizens. FAC ¶ 83; *see also generally* Ex. 2, FAQ. That form confirmed that "[a]lmost all individuals impacted by both incidents have now been notified or will be notified imminently." Ex. 2, FAQ 2. The form also noted that ICE had sent "'clawback' letters to all identified external entities or individuals that may have downloaded, received, or accessed the document" that was posted on November 28, 2022, asking "those entities or individuals to destroy the document and refrain from using or disclosing the information contained in the disclosure." *Id.* at 4.

The Frequently Asked Questions form also clarified what will happen to affected noncitizens. All will have the opportunity to make the argument in support of their request for asylum or relief under CAT that ICE's unauthorized disclosure increased the risk that their alleged persecutors will harm them should they be deported by publicly identifying them and disclosing their immigration status. In "rare circumstances," an applicant who otherwise did not meet the standard for asylum or relief under CAT may be able to show that the unauthorized disclosure itself entitles them to the requested relief. FAC ¶ 138.

At bottom, all will have the opportunity to raise the inadvertent disclosure in removal proceedings, regardless of where they are already in the process and regardless of whether or not they have previously been found to have credible fear. Affected noncitizens not yet or currently in removal proceedings may apply or re-apply for relief as normal based on the inadvertent disclosure. *Id*. at 2–3. For those affected noncitizens already in withholding-only proceedings,[1] they may instead continue to removal proceedings and apply (or re-apply) for relief based on the

[1] Withholding-only proceedings "are 'limited to a determination of whether the alien is eligible for withholding or deferral of removal,' and as such, 'all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.'" *Guzman Chavez,* 141 S. Ct. at 2283 (quoting 8 C.F.R. §§ 208.2(c)(3)(i), 1208.2(c)(3)(i)).

inadvertent disclosure. *Id.* at 3. Affected noncitizens with an appeal pending before the Board of Immigration Appeals ("BIA") may apply, or add to a currently pending application, for relief based on the disclosure. *Id.* Alternatively, the Office of the Principal Legal Advisor ("OPLA") will not oppose motions to remand for further proceedings that are filed due to the disclosure. *Id.* For affected noncitizens with an unexecuted order of removal, OPLA will not oppose a motion to reopen to apply or reply for relief based on the disclosure. *Id.* For those with an executed order of removal—*i.e.*, they have already been removed from the United States—ICE will contact their representative or place an alert in ICE systems to ensure that the noncitizen may reopen proceedings on request on the basis of the inadvertent disclosure. *Id.*

D. Procedural Background

Plaintiffs in this action are 49 affected noncitizens from 15 countries who allegedly "came to the United States to seek asylum and were thereafter detained in ICE custody." FAC ¶¶ 1–2. Plaintiffs' asylum applications, and the asylum applications of other affected noncitizens, are at various stages of proceedings. *Id.* ¶ 3. Some are still in ICE custody, and some have been released from ICE custody. No Plaintiff alleges that they have yet exhausted their opportunity to raise the issue of the disclosure in immigration proceedings and a subsequent appeal to the BIA.[2]

On January 19, 2023, Plaintiffs filed this purported class-action lawsuit on behalf of themselves and other individuals whose information was posted on the ICE.gov website on November 28. Plaintiffs bring this suit against Tae D. Johnson, in his official capacity as Acting Director of ICE; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security;

[2] Plaintiffs allege that approximately 1,000 affected noncitizens had already been removed or released from ICE custody prior to the inadvertent disclosure on November 28, 2022. FAC ¶ 69. Plaintiffs also allege that 170 affected noncitizens were removed from the United States between November 18 and November 30, 2022, *id.* ¶ 70, and that approximately 2,900 affected noncitizens have been released from custody since November 28, 2022. *Id.* ¶ 85.

Merrick Garland, in his official capacity as Attorney General of the United States; and John Doe 1, in their official capacity as an employee of ICE who allegedly made the November 28, 2022 posting. *See* Class Action Compl., ECF No. 1 ("Compl."); FAC.[3]

Plaintiffs bring four claims against various Defendants. First, Plaintiffs allege that all Defendants violated the Privacy Act of 1974 by failing to "establish appropriate administrative, technical, and physical safeguards to prevent the" inadvertent disclosure. FAC ¶¶ 117, 119. Second, Plaintiffs allege that various Defendants violated the APA by "fail[ing] to safeguard Plaintiffs' personal information," "fail[ing] to post a vulnerability disclosure policy on ICE.gov," "offering merely a 30-day grace period on effectuation of existing removal orders," and "proceed[ing] with removal processes despite [the] harms" allegedly arising from the inadvertent disclosure. *Id.* ¶¶ 127–30. Third, Plaintiffs claim that Defendants violated the Equal Protection Clause of the Fourteenth Amendment by allegedly violating their affirmative duties to protect Plaintiffs' data. *Id.* ¶¶ 146–68. Plaintiffs also appear to bring a claim against the Secretary of Homeland Security[4] under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). *Id.* ¶¶ 132–45.

Plaintiffs seek a host of declaratory relief, injunctive relief, and damages. Plaintiffs seek a declaration that Defendants violated the Privacy Act, the APA, and the Equal Protection Clause. FAC, Prayer for Relief ¶ B at 38. Plaintiffs ask this Court to enjoin Defendants from removing them or any member of the class for "one year" and "to rescind removal orders and reopen removal

[3] Only 21 Plaintiffs joined the original complaint, filed on January 19, 2023. *See* Compl., ECF No. 1. On February 17, 2023, Plaintiffs filed an amended complaint adding 28 new Plaintiffs, bringing the total to 49. *See* FAC.

[4] Plaintiffs refer throughout their complaint to "Defendant DHS." *See* FAC ¶¶ 92, 136, 160, 162; *id.* at 30 (Third Claim). However, the Department of Homeland Security is not named as a defendant. Defendants assume that references to "Defendant DHS" refer to the Secretary of DHS who is named in his official capacity.

proceedings for" themselves and every member of the purported class. *Id*., Prayer for Relief ¶ E at 39. Plaintiffs also seek an order instructing "Defendant DOJ to instruct immigration judges to take administrative notice to recognize a presumption of risk of danger created by the data breach and a presumption that each asylee's fear is well-founded." *Id.*, Prayer for Relief ¶ G at 39[5] Finally, Plaintiffs seek a "monetary award" of $10,000 for themselves and every class member "pursuant to the Privacy Act" and $5,000 in "compensatory and punitive damages" pursuant to "the other counts"—totaling nearly $94 million. *Id*., Prayer for Relief ¶¶ H–I at 39. Plaintiffs moved to certify a class, ECF No. 16, which Defendants opposed, ECF No. 28.

LEGAL STANDARD

"Rule 12(b)(1) requires courts to dismiss any case over which they lack subject-matter jurisdiction." *Joorabi v. Pompeo*, 464 F. Supp. 3d 93, 98 (D.D.C. 2020) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). "It is the plaintiff's burden to establish that the Court has subject-matter jurisdiction. *Id.* (*citing Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)). A plaintiff's lack of constitutional standing is "a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). Moreover, "it is well established that the Court may look to materials beyond the pleadings when considering a 12(b)(1) motion to assure itself of jurisdiction." *Ctr. for Biological Diversity v. U.S. Int'l Dev. Fin. Corp.*, 585 F. Supp. 3d 63, 70 (D.D.C. 2022) (collecting cases), *appeal filed,* No. 22-5095, (D.C. Cir. Apr. 8, 2022).

Under Rule 12(b)(6), a plaintiff must allege "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). "When deciding a motion to

[5] Defendants also assume that Plaintiffs' references to "Defendant DOJ" in the Prayer for Relief refers to the Attorney General, since he is sued in his official capacity and the Department of Justice is not a party.

dismiss under 12(b)(6), courts must construe the pleadings broadly and assume that the facts are as plaintiff alleges[.]" *Joorabi*, 464 F. Supp. 3d at 98–99. "[H]owever, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "courts are not obligated to accept as true a legal conclusion couched as a factual allegation." *Id.* at 99 (cleaned up). Additionally, "in deciding a Rule 12(b)(6) motion, a court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 54–55 (D.D.C. 2016) (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F.Supp.2d 117, 119 (D.D.C. 2011) (citations omitted)).

ARGUMENT

I. Threshold Issues Bar Plaintiffs' Claims.

A. Plaintiffs Have Not Demonstrated an Article III Case or Controversy.

Plaintiffs have not alleged ongoing or future legal violations, which are necessary to show standing for declaratory or injunctive relief. To demonstrate standing for prospective relief, a plaintiff must show that she "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be real and immediate, not conjectural or hypothetical." *See City of Los Angeles,* 461 U.S. at 101–02 (quotations & citations omitted). In the D.C. Circuit, "plaintiffs must allege a likelihood of future *violations* of their rights by [defendant], not simply future *effects* from past violations." *Fair Emp. Council of Greater Wash., Inc.*, 28 F.3d at 1273; *see also Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 36 (D.D.C. 2021) (confirming *Fair Employment* standard). Here, because there are

no allegations that ICE will ever disclose any information about Plaintiffs again, there is nothing for the Court to enjoin.

Indeed, Plaintiffs' own requested relief focuses on the effects of alleged *past* legal harm—not any ongoing or future legal harm. Plaintiffs seek to enjoin ICE from removing them or any member of the class for "one year" and "to rescind removal orders and reopen removal proceedings for" themselves and every member of the purported class, as well as to order "DOJ to instruct immigration judges to . . . recognize a presumption of risk of danger created by the data breach and a presumption that each asylee's fear is well-founded." FAC, Prayer for Relief ¶¶ C, E, G at 39. Plaintiffs thus seek relief only as to the future *effects* of Defendants' alleged unlawful conduct, rather than relief as to any ongoing allegedly unlawful conduct.

Moreover, some portions of Plaintiffs' requested relief are moot. Mootness is an Article III jurisdictional doctrine that "limits federal courts to deciding actual, ongoing controversies." *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 645 (D.C. Cir. 2011) (quoting *Clarke v. United States*, 915 F.2d 699, 700–01 (D.C. Cir. 1990) (en banc)). A claim "becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Almaqrami v. Pompeo*, 933 F.3d 774, 779 (D.C. Cir. 2019) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). Plaintiffs seek an injunction to "rescind removal orders and reopen removal proceedings" to allow them to raise the disclosure to argue in support of asylum. FAC, Prayer for Relief ¶ E at 39. But Defendants already have paused removals indefinitely to allow plaintiffs to raise the facts of the November 28 incident in immigration proceedings, including providing the opportunity to reopen immigration cases if necessary. *See* Ex. 2, FAQ. Because Plaintiffs have already received this portion of their requested relief, this request for relief is moot. *See, e.g.*, *Ravulapalli v. Napolitano*,

840 F. Supp. 2d 200, 205 (D.D.C. 2012) (dismissing as moot challenge to USCIS's initial denial of applications for permanent residence where applications were lawfully re-opened and granted).

Other portions of Plaintiffs' requested relief are not ripe. All Plaintiffs will be given an opportunity to raise or reraise the inadvertent disclosure in removal proceedings in support of a claim for asylum, and no Plaintiff has alleged to have completed that administrative process. Ripeness is a justiciability doctrine that helps "'to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 463 (D.C. Cir. 2006) (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior,* 538 U.S. 803, 807–08 (2003)). "The claimant must at least apply and be denied the benefit before the claim ripens." *Ayuda, Inc. v. Reno*, 7 F.3d 246, 249 (D.C. Cir. 1993). "Typically, when the claimant is denied the benefit, the claim is then ripe for adjudication." *Id.* (citation omitted).

To the extent that Plaintiffs complain that at some point their requests for asylum or relief under CAT *might* be denied by an immigration judge or the BIA *in the future*, those claims are not yet ripe. To the extent a Plaintiff is ultimately granted their requested relief (asylum or relief under CAT), they will not have standing to seek the injunctive relief requested in this lawsuit.

B. Plaintiffs' Request for Injunctive Relief Is Precluded by Statute.

Plaintiffs are also precluded by statute from seeking injunctive relief in this Court. Congress established a comprehensive administrative system to review individual immigration claims and, with limited exceptions, has channeled review of final removal orders into courts of appeals—not district courts. *See* 8 U.S.C. § 1252(a)(5). Similarly, district courts do not have jurisdiction to review "any cause or claim under the United Nations Convention Against Torture" outside of limited exceptions. *Id.* § 1252(a)(4). Plaintiffs do not allege that their individual claims fall within any exception to this exclusive review process. *Id.* § 1252(e) (identifying limited

exceptions). Plaintiffs do not claim to bring a habeas corpus petition per § 1252(e)(2). And they do not allege to bring a claim pursuant to the subsection allowing "[c]hallenges [to the] validity of the system." *Id.* § 1252(e)(3). Moreover, Plaintiffs have not even attempted to meet the standards required to bring a challenge to the "validity of the system" per § 1252(e)(3).[6]

Plaintiffs cannot bring preemptive collateral challenges to their eligibility for immigration-related relief because such challenges are not exhausted unless and until an immigration judge ("IJ") determines their eligibility and Plaintiffs appeal that determination to the BIA. When Congress channels judicial review of final administrative decisions to courts of appeal, that channeling is usually sufficient to divest district court jurisdiction to hear collateral attacks on that process. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). For example, in *Massieu v. Reno*, the Third Circuit explained that a district court did not have jurisdiction to consider Plaintiff's immigration claims because "plaintiff's claims can be afforded meaningful judicial review in [the] court [of appeals] after exhaustion" through immigration courts and the BIA. 91 F.3d 416, 424 (3d Cir. 1996); *id.* at 422 (holding district court did not have jurisdiction because "Congress intended to delay federal court review of claims by aliens against whom deportation proceedings have been instituted until the conclusion of the administrative proceedings"). The same principle applies here. Defendants 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. And if necessary, Plaintiffs can appeal those decision to the BIA. Until they pursue and exhaust available administrative relief, their claims for injunctive and

[6] Even if Plaintiffs' claims fell within a limited exception under this sub-section, Congress does not allow class actions to be certified. *See* 8 U.S.C. § 1252(e)(1)(B).

declaratory relief are not ripe and cannot be heard in this Court. The fact that Plaintiffs make preemptive collateral attacks on their eligibility for immigration-related relief—rather than waiting for the process to unfold, perhaps in their favor, and then seeking relief from this Court—does not change this Court's jurisdiction over those attacks pursuant to the exclusive review scheme.

Not only did Congress create an exclusive review scheme that divested district court review, but it also codified certain restrictions on what relief a district court can provide. For example, prospective relief enjoining or restraining operation of removal proceedings is generally unavailable. The INA provides: "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). Plaintiffs' requested relief is outside this Court's jurisdiction because Plaintiffs ask it to enjoin or restrain operations covered by part IV of that subchapter—specifically 8 U.S.C. §§ 1229 & 1229a—by requesting an order that would interfere with the initiation of removal proceedings and the proceedings themselves (by requiring certain presumptions). While § 1252(f)(1) includes a limited exception for an individual to bring a claim in district court seeking an order to conform removal proceedings with the applicable INA provisions, no claim raised in the FAC asks this Court to order immigration judges or the BIA to conform with any applicable INA provisions.

To the extent that Plaintiffs seek to enjoin the Attorney General from executing final orders of removal, FAC, Prayer for Relief ¶ C at 39 (asking to bar removal for one year), no court has jurisdiction to review the Government's decision to execute a removal order. *See* 8 U.S.C. § 1252(g) ("Except as provided in this section, . . . no court shall 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"); *Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022); *Camarena v. Dir., Immigr. & Customs Enf't*, 988 F.3d 1268, 1274 (11th Cir. 2021), *cert. denied sub nom. Camarena v. Johnson*, 142 S. Ct. 424 (2021).

C. Plaintiffs' Request for a Presumption Fails for Additional Reasons.

Plaintiffs identify no authority that would allow this Court to order the Attorney General to direct immigration judges to alter the burden of proof and require that immigration judges "presume[] [a] risk of danger created by the data breach" and presume "that each asylee's fear is well-founded." FAC, Prayer for Relief ¶¶ D, F, G at 39.

Not only would such an order run afoul of the jurisdictional limitations discussed above, but an order requiring such a presumption would also be inconsistent with how every other court of appeals has handled an unauthorized disclosure of asylum-seeker information. In those individual cases on appeal from a BIA decision where courts have found an unauthorized disclosure under 8 C.F.R. § 208.6 (requiring confidentiality of asylum records), courts of appeals have held that the proper remedy was to remand to an immigration judge to allow consideration of the disclosure in light of the other facts contained in the record. *Lin v. U.S. Dept. of Justice*, 459 F.3d 255, 268 (2d Cir. 2006); *L-T- M v. Whitaker*, 760 F. App'x 498, 500 (9th Cir. 2019) (remanding "for consideration of whether the disclosure gives rise to a new claim for asylum or withholding of removal"); *Owino v. Holder*, 771 F.3d 527, 535–36 (9th Cir. 2014) (holding that a "violation of the regulation does not necessarily lead to asylum relief," and instead "remand[ing] to the agency for consideration of whether the disclosure . . . gives rise to a new claim" of asylum).

"If it is found that the asylum applicant's confidentiality was breached in violation of § 208.6, the applicant must be given the opportunity to establish a new claim for asylum,

withholding of removal, or relief under the CAT based on the breach." *Ngwa v. Holder*, 517 F. App'x 176, 180 (4th Cir. 2013) (citation omitted); *Dayo v. Holder*, 687 F.3d 653, 657 (5th Cir. 2012) (same); *Anim v. Mukasey*, 535 F.3d 243, 253 (4th Cir. 2008) (same); *Befekadu-Ashene v. Holder*, 367 F. App'x 446, 447 (4th Cir. 2010) (same); *Corovic v. Mukasey*, 519 F.3d 90, 96 (2d Cir. 2008) (same); *Kaputskiy v. Keisler*, 251 F. App'x 65, 67 (2d Cir. 2007) (same). But Defendants have *already provided* Plaintiffs the opportunity to establish a new claim for asylum in pending or future immigration proceedings, so no further injunctive relief is available.

Plaintiffs ask this Court for something different—and something no court has ever granted under similar facts. They ask this Court to order re-adjudication of plaintiffs' claims for asylum "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 for Relief ¶ D, F at 39. Plaintiffs cite no statute, case, or regulation in support of their requested presumption, Plaintiffs do not explain how this Court would have jurisdiction to issue an injunction binding the way immigration judges adjudicate and manage their cases, and Defendants are aware of no court that has ever ordered an immigration judge to make such a presumption after an unauthorized disclosure. In fact, 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. *See* 8 U.S.C. § 1158(b)(1)(A).

Nor have Plaintiffs alleged sufficient facts to show that they are entitled the presumption they seek. Plaintiffs bear the burden to demonstrate "an objectively reasonable fear of future persecution due to the exposure of [their] confidential information" in their individual immigration proceedings. *Ke Chiang Dai v. Mukasey*, 296 F. App'x 204, 206 (2d Cir. 2008). That is a burden that each plaintiff must individually satisfy before an immigration judge with evidence. *Id.*

As an initial matter, unauthorized disclosure that an individual seeks asylum (the information disclosed here)—standing alone—is not sufficient to make out a *prima facie* case for asylum. In *Dayo*, for example, the government breached 8 C.F.R. § 208.6 and the BIA reopened immigration proceedings to allow the petitioner to present evidence of the breach in support of his claim for asylum and relief under CAT. 687 F.3d at 657. The immigration judge and the BIA concluded that the applicant failed to carry his burden, that his testimony was not credible, and that he provided no evidence to support his claims of prior prosecution. *Id.* at 657–58. Furthermore, the petitioner did not provide evidence that "Nigeria persecutes those who seek asylum." *Id.* at 658. Thus, even though the Government violated 8 C.F.R. § 208.6, the Fifth Circuit nonetheless held that the petitioner was not entitled to asylum.

Many other courts have come to the same conclusion—unauthorized disclosure that an individual seeks asylum alone is not sufficient to demonstrate asylum or a claim under CAT. *See Chande v. Barr*, 763 F. App'x 355, 356 (5th Cir. 2019) (holding that even if "a deportation officer disclosed information in violation of 8 C.F.R. § 208.6 and that the Tanzanian government knew he was a failed asylum seeker, [applicant] did not present any evidence that the Tanzanian government is embarrassed by and persecutes failed asylum seekers upon their return" (citation omitted)); *Che v. Mukasey*, 532 F.3d 778, 783 (8th Cir. 2008) ("assuming without deciding that the use of Che's name was a disclosure that violated the regulation, the same would be of no consequence in the pending claim for asylum"); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 454 (4th Cir. 2007) (rejecting petition to review request for asylum despite "a violation of § 208.6" because "although Ali may face punishment upon returning to Egypt, his treatment there will be due to his military desertion and other alleged criminal activity and not on account of a protected ground"); *Da Tong Peng v. Att'y Gen. of U.S.*, 340 F. App'x 121, 126 (3d Cir. 2009) (declining to

remand despite alleged violation of § 208.6 when "the overwhelming evidence support[ed] the IJ's determination that [applicant] was not credible"); *Averianova v. Mukasey*, 509 F.3d 890, 900 (8th Cir. 2007) (holding that even if there was a breach of § 208.6, "we would still deny their petition" because applicant failed to satisfy criteria for asylum).

The burden is on the applicant to show in immigration proceedings that the unauthorized disclosure creates an increased risk that satisfies the criteria for asylum—credible fear after an unauthorized disclosure is not presumed. *See Dayo*, 687 F.3d at 658 (no evidence that Nigeria persecutes those who seek asylum); *Chande*, 763 F. App'x at 356 (holding that even if "a deportation officer disclosed information in violation of 8 C.F.R. § 208.6 and that the Tanzanian government knew he was a failed asylum seeker, [applicant] did not present any evidence that the Tanzanian government is embarrassed by and persecutes failed asylum seekers upon their return"). Plaintiffs in this case merely plead a conclusory assertion that "each of the Plaintiffs now faces var[ious] increased risk of harm should they be deported." FAC ¶ 109; Pls.' Mot. for Class Certification 18, ECF No. 16 (disclosure created "varying degrees of increased risk of state-created danger"). But they do not plead any facts in support of that assertion. Proving increased risk sufficient to be a credible fear will be highly subjective and individualized, likely requiring country-specific evidence that applies to the particular applicant. And as discussed above, the appropriate place to raise those facts is in immigration proceedings in the first instance.

To the extent that Plaintiffs' requested injunction would require immigration judges to assume they are eligible for asylum, that relief is also unavailable because no Plaintiff alleges facts sufficient to show entitlement to a presumption of asylum. An individual who alleges persecution on a basis other than those identified in 8 U.S.C. § 1101(a)(42) (race, religion, nationality, membership in a particular social group, or political opinion), will generally not be eligible for

asylum, regardless of whether their information was shared in an unauthorized disclosure and thereby heightened the risk of punishment. *See Abdel-Rahman*, 493 F.3d at 454 (rejecting petition to review request for asylum despite "a violation of § 208.6" because "although Ali may face punishment upon returning to Egypt," it would "not [be] on account of a protected ground"); *Averianova*, 509 F.3d at 900 (holding that even if there was a breach of § 208.6, "we would still deny their petition" because applicant failed to satisfy criteria for asylum); *Che*, 532 F.3d at 783 ("assuming without deciding that the use of Che's name was a disclosure that violated the regulation, the same would be of no consequence in the pending claim for asylum"). Plaintiffs do not allege any specific facts sufficient to show that any particular Plaintiff is entitled to asylum, much less that all are. That is, they do not allege facts showing that they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

D. Sovereign Immunity Bars Most of Plaintiffs' Claims for Damages and Plaintiffs' Claims for Injunctive Relief.

Sovereign immunity bars virtually all of Plaintiffs' requested relief for damages and all of Plaintiffs' requests for equitable relief. "Under the doctrine of sovereign immunity, the United States and its agencies are immune from suit for money damages unless Congress explicitly waives this immunity." *Bond v. U.S. Dep't of Just.*, 828 F. Supp. 2d 60, 73 (D.D.C. 2011) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). "Actions against federal officials in their official capacity are treated as suits against their employer," so "sovereign immunity 'bar[s] suits for money damages against officers in their official capacity absent a specific waiver by the government.'" *Id.* at 74 (citing *Clark v. Library of Cong.*, 750 F.2d 89, 103 (D.C. Cir. 1984)). All Defendants have been sued in their official capacities, so "Plaintiffs, therefore, bear the heavy

burden of overcoming federal sovereign immunity." *Greenbaum v. Islamic Republic of Iran*, 588 F. Supp. 3d 77, 81 (D.D.C. 2022), *appeal filed*, No. 22-5080 (D.C. Cir. Mar. 28, 2022).

Most causes of action alleged by Plaintiffs do not include a waiver of sovereign immunity for damages. "Congress has not waived immunity for suits seeking monetary damages that arise under the Constitution." *Bond*, 828 F. Supp. 2d at 74 (quoting *Scinto v. Fed. Bureau of Prisons*, 608 F.Supp.2d 4, 9 (D.D.C. 2009)). The APA also does not provide a basis for money damages. 5 U.S.C. § 702; *Benoit v. USDA*, 608 F.3d 17, 21 (D.C. Cir. 2010) ("suit for money damages not within limited waiver of sovereign immunity in APA") (citing *Hubbard v. Administrator, EPA*, 982 F.2d 531, 539 (D.C. Cir. 1984) (en banc). Even if Plaintiffs could bring a standalone claim under the *Accardi* doctrine, Plaintiffs have not identified any Congressional waiver of sovereign immunity that would allow damages. *Cf. Oliveros v. United States*, No. 2:12-cv-01278, 2013 WL 139891, at *5 (W.D. La. Jan. 9, 2013) (dismissing claim seeking damages for purported violation of federal regulation that "prohibits disclosure of confidential information in an immigration case").

The only cause of action brought by Plaintiffs that includes a waiver of sovereign immunity for damages is the Privacy Act. But as explained in the next section, only one Plaintiff can bring a Privacy Act claim, and that Plaintiff has failed to allege a plausible cause of action. Moreover, the Privacy Act does not include a waiver of sovereign immunity over Plaintiffs' requested equitable relief. If a plaintiffs' requested relief is not unequivocally authorized under the Privacy Act, then it is barred by sovereign immunity. *See Cooper*, 566 U.S. at 304 (holding that because "the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress," the Privacy Act therefore "does not waive the Federal Government's sovereign immunity from liability for such harms").

"[A] Privacy Act plaintiff can only obtain equitable relief for a claim brought under section 552a(g)(1)(A) to correct inaccurate or improper material contained in a record, or under section 552a(g)(1)(B) to gain access to a record after the agency denies an inspection request." *See Kelley v. FBI*, 67 F. Supp. 3d 240, 253 (D.D.C. 2014). Plaintiffs do not specify under which provision of the Privacy Act they are bringing suit. But regardless, Plaintiffs do not request that this Court order Defendants to "correct inaccurate or improper material contained in a record," or to "gain access to a record after the agency denies an inspection request." *Id*. Plaintiffs' requested injunctive and declaratory relief is not authorized by the Privacy Act (or any other statutory waiver), and thus barred by sovereign immunity.

II. Plaintiffs Fail to State a Viable Privacy Act Claim.

Plaintiffs ask the Court for "a monetary award of $10,000 to each Plaintiff, and others similarly situated, pursuant to the Privacy Act." FAC, Prayer for Relief ¶ H at 39. But Plaintiffs cannot bring Privacy Act claims because the Act only applies to an individual who is "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a. No Plaintiff is a citizen of the United States or lawfully admitted for permanent residence. *See* FAC ¶¶ 15–63. Since "it is clear that Plaintiffs are neither U.S. citizens nor lawful permanent residents," "Plaintiffs are not entitled to bring suit under the Privacy Act." *Soto v. U.S. Dep't of State*, 244 F. Supp. 3d 207, 208–09 (D.D.C. 2017) (citing *Cudzich v. INS*, 886 F. Supp. 101, 105 (D.D.C. 1995); *Fares v. INS*, No. 94-1339, 1995 WL 115809 (4th Cir. Mar. 20, 1995) (per curiam); *Raven v. Panama Canal Co.*, 583 F.2d 169, 171 (5th Cir. 1978)).

As Plaintiffs point out, however, the Judicial Redress Act, permits nationals of a limited number of foreign countries to bring claims under the Privacy Act. *See* Judicial Redress Act of 2015, Pub. L. No. 114-126, 130 Stat. 282 (2016); Attorney General Designations, 82 Fed. Reg. 7860 (Jan. 23, 2017). The Judicial Redress Act extends the protections of the Privacy Act to

citizens of designated foreign countries. *See* 82 Fed. Reg. 7860. Those countries include countries within the European Union, Austria, Belgium, Bulgaria, Croatia, the Republic of Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *See* Office of Privacy and Civil Liberties, U.S. Department of Justice, *Judicial Redress Act of 2015 & U.S.-EU Data Protection and Privacy Agreement*, https://perma.cc/45MC-JKYY (last updated Dec. 28, 2022). Plaintiffs allege that Plaintiff Roe #3 is a citizen of France and thus can bring a Privacy Act claim through the Judicial Redress Act of 2015. FAC ¶¶ 17, 97. No other pseudonymous plaintiff is from a country covered by the Judicial Redress Act, *see* FAC ¶¶ 15–63,so the Privacy Act claims of all other Plaintiffs should be dismissed.

Although Roe #3's claim clears the initial threshold hurdle of being able to bring a Privacy Act claim under the Judicial Redress Act, the FAC does not plausibly plead a viable Privacy Act claim for damages under the pleading standard of *Iqbal*—both because Roe #3 fails to allege a willful violation and because Roe #3 fails to specially plead damages.

"[D]ismissal of a damages claim under the Privacy Act is proper where the complaint fails to allege" sufficiently "the willful or intentional manner of the agency action." *Kelley*, 67 F. Supp. 3d at 257 (quoting *White v. Off. of Pers. Mgmt.*, 840 F.2d 85, 87 (D.C. Cir. 1988)). "[T]he words 'intentional' and 'willful' in [the Privacy Act] do not have their vernacular meanings; instead, they are terms of art" which means that the agency acted "'without grounds for believing it to be lawful' or in a manner that 'flagrantly disregard[ed] others' rights under the Act.'" *Id.* (quoting *White*, 840 F.2d at 87, and *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984). "The plaintiff must plead sufficient facts to support a plausible inference that the defendant's conduct was 'so patently

egregious and unlawful that anyone undertaking the conduct should have known it unlawful' in order to survive a motion to dismiss." *Id.* (quoting *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584 (D.C.Cir.2002)).

The First Amended Complaint does not include any facts to support that any Defendant intentionally acted in a manner so patently egregious and unlawful that anyone should have known it unlawful. Here, there are no allegations that the breach was anything other than a simple error. The information was corrected within hours, shortly after it was brought to ICE's attention. FAC ¶ 72. Moreover, the FAC incorporates by reference the FAQ that ICE sent to all Plaintiffs, which repeatedly confirms that the disclosure was "unintentional," "accidental," and "inadvertent[]." *See* FAQ at 1–2; *see also In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46 at 54–55 (confirming court may consider documents incorporated by reference in the complaint). Under these facts, there is no plausible allegation that the posting was intentional or willful.

Plaintiffs instead allege "[o]n information and belief, DHS and ICE specifically, did not establish appropriate administrative, technical, and physical safeguards to prevent the data breach." FAC ¶ 119. That merely parrots the statute, which is not sufficient under the pleading standards set out in *Iqbal*. *See Joorabi*, 464 F. Supp. 3d at 99. ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "courts are not obligated to accept as true a legal conclusion couched as a factual allegation"). This conclusory allegation made on information and belief falls well short of what courts have accepted as plausibly pleaded data breach Privacy Act claims, such as allegations that there had been OIG reports or other similar warnings of security failures, and that those specific identified security failures plausibly led to the breach at issue in the case. *See In re: U.S. OPM Data Sec. Breach*, 928 F.3d

42, 51-52 (D.C. Cir. 2019) (identifying numerous identified security failures before breach). There is nothing similar alleged in this case.

Roe #3's Privacy Act also fails for the separate reason that a claim for money damages under the Privacy Act requires that there be "proven pecuniary or economic harm." *Cooper*, 566 U.S. at 298–88. At the pleading stage, that requires that Roe #3 "specially plead[]" sufficient facts to show Roe #3 is entitled to damages from "actual pecuniary loss." *Id.* at 295 (analogizing the Privacy Act's "actual damages" element to "special damages" for common-law torts of libel *per quod* and slander, "which must be specially pleaded and proved"); *id.* at 303 (describing the Privacy Act as "a scheme that limits the Government's . . . liability to harm that can be substantiated by proof of tangible economic loss"). Roe #3 does not allege any specific facts showing pecuniary or economic harm; instead, the only alleged harms are future-based and speculative on a theory that the disclosed "information [] makes it easier for Plaintiffs to be located today or in the future." *See* FAC ¶ 120–124. While Plaintiffs allege that "malicious actors now have the information they need to track Plaintiffs down," FAC ¶ 127, and Plaintiffs thus may have "added security needs," FAC ¶ 120, such as "purchas[ing] security systems, chang[ing] door and window locks, [purchasing] private mailboxes," or "legally changing their name," FAC ¶ 121, Plaintiffs do not allege that any Plaintiff—much less Roe #3—has actually incurred any of these costs. *Compare In re OPM*, 928 F.3d at 64–66 (describing actual pecuniary harms suffered by plaintiffs, all of which were harms already accrued).

Even if Roe #3 had alleged actual pecuniary loss, Roe #3 fails to plead that such loss was "as a result of" the inadvertent disclosure. *See, e.g.*, *Taylor v. FAA*, No. 18-CV-00035 (APM), 2019 WL 3767512, at *6 (D.D.C. Aug. 9, 2019) (rejecting plaintiffs' Privacy Act claim because plaintiff failed to establish that economic loss was "as a result of" the alleged improper release of

plaintiffs' personal information). Rather, publicly available information that predates the inadvertent disclosure already discloses that Roe #3 is located within the United States and even appears to show a home address. *See* Avallone Decl. Ex. C (Sealed Exhibit), ECF No. 29. Accordingly, the FAC includes no specific, individualized allegations about Roe #3's pecuniary harm, and nothing explains how the additional information disclosed on the ICE website regarding Roe #3 has caused any economic harm when so much personal information is already available online.[7]

III. Plaintiffs Fail to State a Viable APA Claim.

Plaintiffs' request for declaratory and injunctive relief against Defendants under the APA fails for multiple reasons. As discussed above, Plaintiffs' request for injunctive relief is precluded by statute, *see supra* § I.B, and barred by sovereign immunity, *see supra* § I.D. But regardless, Plaintiffs' APA claim fails for the additional reason that the Privacy Act precludes the injunctive and declaratory relief that Plaintiffs seek under the APA. Plaintiffs also fail to state a claim under the APA because they fail to challenge a discrete agency action.

A. The Privacy Act Precludes Plaintiffs' Requested Injunctive Relief Under the APA.

The APA generally waives the federal government's immunity from a lawsuit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. That waiver of immunity, however, "comes with an important carve-out." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204–05 (2012). It

[7] Because Roe #3 does not plead intentionally or willful harm, and because Roe #3 does not plead any pecuniary or economic harm, the Privacy Act's waiver of sovereign immunity does not apply to Roe #3's claims. *See, e.g.*, *Cooper*, 566 U.S. at 304 (holding that the Privacy Act does not waive sovereign immunity for damages for mental or emotional distress).

"cannot be invoked where another statute 'expressly or impliedly forbids the relief which is sought.'" *Kelley,* 67 F. Supp. 3d at 267 (citing 5 U.S.C. § 702). As the Supreme Court has explained, "[t]hat provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Patchak*, 132 S. Ct. at 2204–05; *see also Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 & n.22 (1983); *cf.* 5 U.S.C. § 704 (permitting review of "final agency action for which there is no *other* adequate remedy in a court") (emphasis added). "'[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy'—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Patchak*, 132 S. Ct. at 2205 (citing *Block*, 461 U.S. at 286 & n.22).

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. As noted above, Privacy Act authorizes injunctive relief in only two specific circumstances: (1) to order an agency to amend inaccurate, incomplete, irrelevant, or untimely records, 5 U.S.C § 552a(g)(1)(A), (g)(2)(A); and (2) to order an agency to allow an individual access to his records, *id.* § 552a(g)(1)(B). Several courts have established that the equitable remedies for Privacy Act violations are limited to those specifically identified in the statute. *See Cell Assocs., Inc. v. Nat'l Insts. of Health*, 579 F.2d 1155, 1161-62 (9th Cir. 1978)*; Edison v. Dep't of the Army*, 672 F.2d 840, 846-47 (11th Cir. 1982) (citing *Parks v. IRS*, 618 F.2d 677, 683-84 (10th Cir. 1980)); *Houston v. U.S. Dep't of Treasury*, 494 F. Supp. 24, 29 (D.D.C. 1979); *cf. Kelley*, 67 F. Supp. 3d at 252.

These holdings are consistent with the principle that "[w]here [a] 'statute provides certain types of equitable relief but not others, it is not proper to imply a broad right to injunctive relief.'" *Parks*, 618 F.2d at 684 (citing *Cell Assocs.*, 579 F.2d at 1161–62). This is especially true with the

Privacy Act because Congress "link[ed] particular violations of the Act to particular remedies in a specific and detailed manner[,]" which "points to a conclusion that Congress did not intend to authorize the issuance of [other] injunctions." *Cell Assocs.*, 579 F.2d at 1158–59.

Following these well-established principles, this court and numerous other federal courts have repeatedly concluded that the Privacy Act precludes injunctive relief under the APA, and thus a plaintiff cannot bring an APA claim to obtain injunctive relief for an alleged Privacy Act violation. *See, e.g.*, *Harrison v. Fed. Bureau of Prisons*, 248 F. Supp. 3d 172, 182 (D.D.C. 2017); *Westcott v. McHugh*, 39 F. Supp. 3d 21, 33 (D.D.C. 2014); *Wilson v. McHugh*, 842 F. Supp. 2d 310, 320 (D.D.C. 2012); *Doe P v. Goss*, No. 04-2122, 2007 WL 106523, at *6 n.8 (D.D.C. Jan. 12, 2007); *Reid v. Fed. Bureau of Prisons*, No. 04-1845, 2005 WL 1699425, at *2 (D.D.C. July 20, 2005); *Mittleman v. U.S. Treasury*, 773 F. Supp. 442, 449 (D.D.C. 1991); *Mittleman v. King*, No. 93-1869, 1997 WL 911801, at *4 (D.D.C. 1997); *see also, e.g.*, *Arruda & Beaudoin, LLP v. Astrue*, No. 11-10254, 2013 WL 1309249, at *15 (D. Mass. Mar. 27, 2013); *Ware v. U.S. Dep't of Interior*, No. 05-3033, 2006 WL 1005091, at *3 (D. Or. Apr. 14, 2006); *Schaeuble v. Reno*, 87 F. Supp. 2d 383, 393-94 (D.N.J. 2000)); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 119 (D. Conn. 2010); *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 280 n.35 (D. Conn. 2008).[8]

In sum, Plaintiffs should not be allowed to circumvent the limited equitable remedies that Congress has authorized for Privacy Act violations by improperly invoking the APA. The APA is a limited waiver of sovereign immunity that is strictly construed in favor of the Government, and

[8] Defendants are aware of one contrary district court decision permitting a plaintiff to bring an independent APA claim based on a Privacy Act violation. *See Radack v. U.S. Dep't of Just.* 402 F. Supp. 2d 99, 104 (D.D.C. 2005). This outlier decision is incorrect, however, as it conflicts with 5 U.S.C. §§ 702 and 704 of the APA, the principles enunciated by the Supreme Court, as well as the decisions of dozens of other federal courts.

it does not confer authority to grant injunctive relief for Privacy Act violations beyond the relief specifically provided in the Privacy Act.

B. Plaintiffs Do Not Challenge Any Final Agency Action.

Even if Plaintiffs could bring an APA claim for an alleged Privacy Act violation, which they cannot, Plaintiffs fail to state a claim under the APA because they fail to challenge any final agency action or failure to take such action.

The APA limits judicial review to "final agency action," 5 U.S.C. § 704, and without it, "there is no doubt that [a plaintiff] would lack a cause of action under the APA," *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003). The APA defines "agency action" as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *id.* § 701(b)(2) (noting that "agency action" has the same meaning for purposes of the APA as that given by 5 U.S.C. § 551). Agency actions are final if: "(1) the action 'mark[s] the consummation of the agency's decisionmaking process' and is not 'of a merely tentative or interlocutory nature;' and (2) it is an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Supreme Court has clarified that a "failure to act" is "properly understood as a failure to take an *agency action*—that is, a failure to take one of these agency actions . . . earlier defined." *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 62 (2004). Moreover, "the only agency action that can be compelled under the APA is action legally *required*." *Id.* at 63. A plaintiff challenging an agency's failure to act must therefore allege "that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. In contrast, "[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action." *Id.* at 66.

None of the actions or failures to act that Plaintiffs plead are cognizable under the APA. Plaintiffs first challenge "Defendants' failure to safeguard Plaintiffs' personal information from public disclosure" as "not in accordance with the law." FAC ¶ 127. This alleged conduct does not constitute a failure to take agency action. Plaintiffs identify no discrete agency action that Defendants failed to take, instead citing generally to various studies and guidance documents related to computer security and privacy. FAC ¶¶ 100–02. But Plaintiffs cannot simply challenge Defendants' alleged "[g]eneral deficiencies in compliance." *SUWA*, 542 U.S. at 66. The APA does not authorize courts to enter a general order compelling compliance with broad statutory mandates, especially in data breach cases such as this. *See In re Dep't of Veterans Aff. Data Theft Litig.*, No. 06-0506, 2007 WL 7621261, at *7 (D.D.C. Nov. 16, 2007) (dismissing with prejudice APA claim in data breach case alleging that the VA "'failed to ensure' that its 'processes, policies, and procedures were adequately implemented[,]'" because these broad allegations did "not state a challenge to discrete agency action."(citation omitted)).

Plaintiffs' challenge to "Defendants' failure to safeguard Plaintiffs' personal information from public disclosure," FAC ¶ 127, is perhaps better understood as a challenge to the inadvertent disclosure itself. Yet inadvertent disclosure is not final agency action. An inadvertent disclosure is not a "rule, order, license, sanction, [or] relief." 5 U.S.C. § 551(13). Nor does an inadvertent disclosure "'mark[] the consummation of the agency's decisionmaking process,'" nor constitute "an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Soundboard Ass'n*, 888 F.3d at 1267 (quoting *Bennett*, 520 U.S. at 177–78). And as discussed, *see supra* pp. 24–25, Plaintiffs allege no facts indicating that the disclosure was anything but inadvertent.

Moreover, even if the inadvertent posting could be "final agency action," Plaintiffs point to no provision in the APA that authorizes the requested injunctive relief. There is no discrete "agency action unlawfully withheld or unreasonably delayed" required by law that the court can compel since the agency promptly removed the inadvertent posting. *See* 5 U.S.C. § 706(1); *SUWA*, 542 U.S. at 64. And Plaintiffs have identified no agency action for the Court to "hold unlawful and set aside." 5 U.S.C. § 706(2). The agency has already removed the information from the website; there is no longer anything for this Court to "set aside." *Id.*; *see Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) (rejecting request for equitable relief beyond setting aside agency and remand because "'under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end" and no further relief is available outside of remand back to the agency).

Plaintiffs next allege that DHS's "failure to post a vulnerability disclosure policy on ICE.gov constitutes agency action taken not in accordance with the law." FAC ¶ 128. Plaintiffs apparently refer to Binding Operational Directive 20-01 ("BOD 20-01"), issued by the Cybersecurity and Infrastructure Security Agency of DHS in 2020, which Plaintiffs allege "requir[ed] all federal executive branch departments and agencies to develop and publish a vulnerability disclosure policy." FAC ¶ 104 (citing DHS, *Binding Operational Directive 20-01* (Sept. 2, 2022), https://perma.cc/2KL7-5S73 (hereinafter, "DHS, *BOD 20-01*")). Contrary to Plaintiffs' allegations, DHS has long had exactly such a vulnerability disclosure policy published on their website. *See* DHS, *Vulnerability Disclosure Program Policy and Rules of Engagement* (Feb. 9, 2021), https://perma.cc/6R6T-F8D4. That policy was first published on DHS.gov on March 19, 2019 and was most recently revised on February 9, 2021, long before the inadvertent disclosure at issue here. *See id.* at i. Plaintiffs cannot seriously assert that DHS breached any

obligation by publishing the vulnerability disclosure policy on DHS.gov rather than ICE.gov. BOD 20-01 requires only that the agency "[p]ublish a vulnerability disclosure policy as a public web page . . . at the . . . agency's primary .gov website." DHS, *BOD 20-01* at 4. ICE is a component of DHS, *see, e.g.*, *Statewide Bonding, Inc. v. DHS*, 980 F.3d 109, 112 (D.C. Cir. 2020), and ICE's affiliation with DHS is posted prominently across ICE.gov, *see generally* ICE, *Home Page*, https://perma.cc/DNY7-HKZL (last visited March 30, 2023).[9]

Plaintiffs also challenge "ICE's failure to sufficiently address the harm the agency caused, by offering merely a 30-day grace period on effectuation of existing removal orders" as "not in accordance with the law." FAC ¶ 129. As described above, *see supra* pp. 12–13, any such challenge is moot because Defendants have already extended the initial 30-day grace period to an

[9] Regardless, Plaintiffs would lack standing to challenge Defendants' alleged failure to disclose information in compliance BOD 20-01. To establish injury-in-fact from an alleged failure to disclose information, a plaintiff must establish: "(1) it has been deprived of information that" the government or a third party is required to disclose to it, and "(2) it suffers, by being denied access to that information, the type of harm" that the disclosure intended to prevent. *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (quoting *FEC v. Akins*, 524 U.S. 11, 21–22 (1998)).

Plaintiffs cannot allege that, by being denied access to the vulnerability disclosure policy, they suffered "the type of harm" DHS "sought to prevent by requiring disclosure." *Id.* BOD 20-01 mandates that agencies provide information aimed allowing the public to discover and report government vulnerabilities, *i.e.*, "[w]eakness[es] in an information system, system security procedures, internal controls, or implementation that could be exploited or triggered by a threat source." DHS, *BOD 20-01* at 2. BOD 20-01 therefore "was not designed to vest a general right to information in the public" and instead "was designed to protect individual privacy" by identifying security vulnerabilities that could be exploited or triggered by a threat source. *Elec. Priv. Info. Ctr. v. U.S. Dep't of Com.*, 928 F.3d 95, 103 (D.C. Cir. 2019).

Plaintiffs do not allege any harm from the exploitation of security vulnerabilities on ICE.gov—nor could they. Indeed, Plaintiffs' only alleged injury from ICE's alleged noncompliance is that, "[i]f posted, the policy would have made it easier for the public to report the data breach to ICE employees who could have removed it sooner." FAC ¶ 104. But BOD 20-01 was not intended as a safety net to catch inadvertent disclosures. That is decisive. Regardless, ICE removed the inadvertent disclosure within five hours of its posting, promptly after being notified by the public. FAC ¶ 104. And Plaintiffs provide no support to indicate that posting the vulnerability disclosure policy on DHS.gov rather than ICE.gov had any impact on how long it took for ICE to remove the inadvertent disclosure.

indefinite pause. Even so, Plaintiffs do not—nor can they—point to any authority that ICE violated by providing a 30-day grace period.

Finally, Plaintiffs challenge "DOJ's failure to account for the harms to Plaintiffs" and to instead "proceed with removal processes despite those harms" as "an abuse of discretion." FAC ¶ 130. As explained above, Congress precluded most judicial review (including under the APA) of the Attorney General's decision to execute removal orders. *See* 8 U.S.C. § 1525(f). Even setting that aside, Plaintiffs do not identify any legally required action that DOJ violated by "proceed[ing] with removal processes." *Id.* To the contrary, DOJ is statutorily required to "proceed with removal processes," *id.*, to determine whether Plaintiffs have established entitlement to immigration-related relief, *see supra* pp. 2–4; *see also, e.g.*, *Guzman Chavez*, 141 S. Ct. at 2281. Plaintiffs point to no authority that an inadvertent disclosure requires Defendants to immediately halt removal proceedings for all affected noncitizens. Moreover, as explained, Defendants have allowed all affected noncitizens to raise the inadvertent disclosure in removal proceedings, regardless of whether they are in the process—including those who have already concluded removal proceedings.

Plaintiffs' challenge to "DOJ's failure to account for the harms to Plaintiffs," FAC ¶ 130, appears to be a general challenge to DOJ's failure to implement Plaintiffs' sought-after "presumption of risk of danger created by the data breach and a presumption that each asylee's fear is well-founded," *id*. at 39, Prayer for Relief. But Plaintiffs cannot identify any authority indicating that DOJ was required to order immigration judges to make such presumptions. Indeed, as explained, *see supra* pp. 13–20, Plaintiffs identify no authority indicating that DOJ is even authorized to mandate such presumptions.

Accordingly, Plaintiffs fail to state a claim under the APA because those claims are precluded by the Privacy Act, because Plaintiffs fail to allege any final agency action, or failure to take agency action, sufficient to establish an APA violation, and because they point to no provision in the APA that authorizes their requested relief.

IV. Plaintiffs Fail to State a Valid Constitutional Claim.

Plaintiffs are also foreclosed from bringing constitutional claims under the Due Process Clause of the Fifth Amendment. *See* FAC ¶¶ 146–68. Plaintiffs argue that if they succeed on their constitutional claim that they are entitled to "recovery." FAC ¶ 150. Assuming that Plaintiffs are referring to money damages, the United States has not waived sovereign immunity over claims for damages arising out of alleged constitutional violations. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). And as explained above, Plaintiffs are not entitled to injunctive relief. However, even setting aside these threshold issues, Plaintiffs fail to allege a viable constitutional claim under the Due Process Clause.

The D.C. Circuit has explained, "assuming (without deciding) the existence of a constitutional right to informational privacy, it affords relief only for intentional disclosures." *In re OPM*, 928 F.3d at 74 (citations omitted). As discussed above, there are no plausible allegations that the information at issue in this case was intentionally disclosed.

Plaintiffs attempt to side-step the lack of intentionality by raising two arguments. First, they argue that the Defendants violated "affirmative duties of care and protection with respect to particular individuals" because they were in involuntary custody at the time of the unauthorized disclosure. FAC ¶¶ 148, 151; *id.* ¶ 152 (citing *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 200 (1989)). But this case does not rise out of any condition of involuntary custody—this involves information that Plaintiffs voluntarily provided in furtherance of an application for asylum. That fact brings these claims outside the scope of *DeShaney* because there is no constitutional

"affirmative government duty to safeguard personal information that [plaintiffs] voluntarily submitted to the government." *In re OPM*, 928 F.3d at 75. The fact that plaintiffs were in custody at the time of the disclosure is not legally relevant under these facts.

Second, Plaintiffs argue that the District of Columbia's "state endangerment exception" applies. FAC ¶ 149 (quoting *Gormly v. Walker*, No. 21-CV-2688 (CRC), 2022 WL 1978731, at *5 (D.D.C. June 6, 2022). Under this exception, "'an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individuals' harm.'" *Gormly*, 2022 WL 1978731, at *5 (quoting *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001)). Even assuming that such a claim could be brought against a federal government agency or a federal government employee in an official capacity, Plaintiffs have not alleged any actual third-party violence that would trigger this exception.

Even if one of these exceptions applied, Plaintiffs could only make out a Due Process claim if the alleged conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Gormly*, 2022 WL 1978731, at *5 (citation omitted). "[T]he Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). "Deliberate conduct 'intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.'" *Jordan v. District of Columbia*, 161 F. Supp. 3d 45, 55 (D.D.C. 2016), *aff'd*, 686 F. App'x 3 (D.C. Cir. 2017). While deliberate indifference can shock the conscience in some circumstances, for deliberate indifference to rise to that level, Plaintiffs must show that "an official had adequate time for reflection" and still failed to act. *Id.* at 56.

Again, nothing in the allegations show deliberate conduct intended to injure Plaintiffs or deliberate indifference that shocks the conscience. Plaintiffs do not allege that the posting was deliberate. FAC ¶ 84 ("private information was *inadvertently* made public"). Plaintiffs incorporated the FAQ, which confirms that the disclosure was "unintentional," "accidental," and "inadvertent[]." *See* Ex. 2, FAQ at 1–2. And nothing in the alleged facts show that any official had "adequate time for reflection" after being notified of the inadvertent posting and then deliberately failed to act. Instead, all allegations and inferences from those allegations show that the data was removed once ICE was notified of the mistake. Plaintiffs provide no examples where comparable conduct has ever met that high shock-the-conscience standard and Defendants are aware of none.

V. Plaintiffs Fail to State a Valid *Accardi* Doctrine Claim.

A. The *Accardi* Doctrine Does Not Provide a Standalone Cause of Action Under These Facts.

Plaintiffs finally purport to bring a stand-alone claim pursuant to the *Accardi* doctrine, which is based on the Supreme Court's decision in *Accardi*, 347 U.S. at 260 (holding that the Attorney General could not disregard "[r]egulations with the force and effect of law" regarding the Board of Immigration Appeals). Plaintiffs argue that the *Accardi* doctrine "stands for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005). While generally true, that does not mean that the Supreme Court created the right to bring a standalone claim based on it.

Quite to the contrary, "*Accardi* 'enunciates[s] principles of federal administrative law rather than of constitutional law.'" *CGB v. Wolf*, 464 F. Supp. 3d 174, 212 (D.D.C. 2020) (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 n.8 (1978)). In other words, "Accardi is rooted instead in notions of *procedural* due process" in *administrative proceedings*, it does not

create a free-standing claim to challenge any departure from an agency's internal guidelines. *Id.* at 226.

An argument based on *Accardi* must generally be brought in the context of an APA claim. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 335 (D.D.C. 2018) (applying the *Accardi* doctrine to APA claims); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 151 (D.D.C. 2018) (APA claims based on *Accardi* can involve "procedural rights for asylum seekers in connection with the parole process," or similar procedural rights); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 107 (D.D.C. 1999), *aff'd*, 38 F. App'x 4 (D.C. Cir. 2002) ("Courts have often relied upon the APA as the source of the *Accardi* doctrine"); *see also Dodson v. U.S. Cap. Police*, No. CV 18-2680 (RDM), 2022 WL 4598575, at *21 n.7 (D.D.C. Sept. 30, 2022) (noting that "the *Accardi* doctrine might require, as a principle of administrative law, that 'an agency comply . . . with this own regulations in effecting the removal of one of its employees'"). Since Plaintiffs' *Accardi* theory is derivative of their APA claim, it fails for the same reasons that Plaintiffs' APA claim is not viable.[10]

Nor is it clear that *Accardi* applies here—that doctrine concerns itself with ensuring agencies comply with *procedural requirements*, as opposed to substantive regulations. *See CBG* 464 F. Supp. 3d at 226-27 (collecting cases). Plaintiffs' primary claim is that Defendants violated 8 C.F.R. § 208.6, which states that information pertaining to an application for asylum "shall not be disclosed without the written consent of the applicant, except as permitted by this section."

[10] While some courts have sometimes discussed the *Accardi* doctrine in the context of constitutional due process, "*Accardi* is based on administrative law principles, not constitutional due process requirements." *Vanover*, 77 F. Supp. 2d at 103. Should the Court construe the *Accardi* claim as a Due Process claim, it fails for the reasons explained above.

B. The Remedy for Violating 8 C.F.R. § 208.6 Is Remand and Reopening IJ Proceedings, A Remedy Defendants Already Provided to Plaintiffs

Even if Defendants did violate 8 C.F.R. § 208.6, "the violation of a regulation does not necessarily require the vacatur of an order of removal." *Lin*, 459 F.3d at 267. Instead, the remedy for unauthorized disclosure is to allow the asylum-seeker to raise the disclosure before an immigration judge and the BIA. *Id.*; *see supra* pp. 16–20. Plaintiffs already will have the opportunity to raise the disclosure in removal proceedings and before the BIA. *See* Ex. 2, FAQ at 3. And as detailed above, in all cases where a court has found a violation of 8 C.F.R. § 208.6, the court has remanded to allow the individual to raise the violation in immigration proceedings in the first instance.

CONCLUSION

For the foregoing reasons, the Court should dismiss all of Plaintiffs' claims with prejudice.

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Respectfully submitted,

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