The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CONCELY DEL CARMEN MENDEZ ROJAS, *et al.*,	§	
	§	CIVIL No. 2:16-cv-01024-RSM
Plaintiffs,	§	
	§	DEFENDANTS' OPPOSITION TO
v.	§	PLAINTIFFS' MOTION FOR
	§	SUMMARY JUDGMENT
JEH JOHNSON, Secretary of Homeland Security, *et al.*,	§	
	§	
Defendants.	§	Noted on Motion Calendar:
	§	December 1, 2017

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INTRODUCTION

This case involves challenges to the practices and procedures the Government applies to individuals who seek asylum in the United States and who may or may not be detained at some point during the process. Plaintiffs claim, first, that the Department of Homeland Security (DHS) and its components, U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS), collectively "DHS Defendants," fail to notify Plaintiffs that they must comply with their statutory requirement to file their asylum applications (Form I-589) within one year of their arrival. ECF No. 57 at 2 (citing 8 U.S.C. § 1158(a)(2)(B)). This argument seeks to impute to DHS Defendants a requirement that neither Congress nor the U.S. Constitution mandates. Moreover, the undisputed facts demonstrate that DHS Defendants do, in fact, notify aliens, including class members, of this requirement throughout the asylum process and throughout their immigration proceedings.

Plaintiffs further allege that the United States Department of Justice (DOJ), through its Executive Office for Immigration Review (EOIR), as well as the DHS Defendants have failed "to create and implement procedural mechanisms that guarantee class members the opportunity to timely submit their asylum applications [which] violate[s] the Immigration and Nationality Act (INA), Administrative Procedure Act (APA), governing regulations, and due process." ECF No. 57 at 1. This claim asks the Court to exercise subject-matter jurisdiction where it does not exist and is, nonetheless, not supported by undisputed facts. Additionally, the claim does not rise to a statutory or procedural due process violation, given the existence of other avenues for relief.

CLASS DEFINITIONS

On January 10, 2017, the Court granted Plaintiffs' motion for class certification, defining two classes and four subclasses as follows:

> **CLASS A ("Credible Fear Class"):** All individuals who have been released or will be released from DHS custody after they have been found to have a credible fear of

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persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v) and did not receive notice from DHS of the one-year deadline to file an asylum application as set forth in 8 U.S.C. § 1158(a)(2)(B).

A.I.: All individuals in Class A who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

A.II.: All individuals in Class A who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

CLASS B ("Other Entrants Class"): All individuals who have been or will be detained upon entry; express a fear of return to their country of origin; are released or will be released from DHS custody without a credible fear determination; are issued a Notice to Appear (NTA); and did not receive notice from DHS of the one-year deadline to file an asylum application set forth in 8 U.S.C. § 1158(a)(2)(B).

B.I.: All individuals in Class B who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

B.II.: All individuals in Class B who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

ECF No. 37 at 13.[1]

LEGAL STANDARD FOR REVIEW

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If applicable, a court may grant summary judgment on part of a claim or defense, known as partial summary judgment, to which the same legal standard applies. *See* Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought."); *see also Allstate Ins. Co. v. Madan*, 889 F. Supp. 374, 378–79 (C.D. Cal. 1995); *State of Cal. ex rel. Cal. Dep't of*

[1] The DOJ Defendants, who are sued only relating to Counts Three and Four (the "procedural mechanisms" claims), *see infra* at 1, further only face claims by the subclasses who are in removal proceedings, *i.e.* subclasses A.II and B.II. *See* ECF No. 57 at 2 n. 2 (Plaintiffs' clarifications of claims by subclasses against EOIR, which serves to waive any other claims against EOIR).

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Toxic Substances Control v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998) (applying summary judgment standard to motion for summary adjudication). Additionally, after giving notice and a reasonable time to respond, a court may also grant summary judgment to a nonmoving party. Fed. R. Civ. P. 56(f)(1); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982) ("It is, nevertheless, true that the overwhelming weight of authority supports the conclusion that if one party moves for summary judgment and, at the hearing, it is made to appear from all the records, files, affidavits and documents presented that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may sua sponte grant summary judgment to the non-moving party.").

In a summary judgment motion, the moving party always bears the initial responsibility of informing the court of the basis for the motion and identifying the portions in the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). In resolving a summary judgment motion, a court must accept the evidence of the opposing party and draw all reasonable inferences in favor of the opposing party. *Anderson*, 477 U.S. at 255.

ARGUMENT

I. The undisputed facts do not demonstrate that DHS Defendants have violated Plaintiffs' statutory or constitutional rights.

Plaintiffs are not entitled to summary judgment on their claim that DHS Defendants violate their statutory or constitutional rights by failing to provide adequate notice of the Congressional imposition of a one-year deadline by which aliens must file for asylum. That claim finds no support in the undisputed facts or the law. First, Plaintiffs cannot demonstrate that such rights exist. Second, the undisputed facts demonstrate that DHS Defendants have elected – at several instances throughout the immigration process – to provide aliens with notice of the statutory deadline.

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A. Neither the INA nor the APA requires DHS Defendants to provide affirmative personal notice.

Despite Plaintiffs' allegations that "DHS's failure to provide notice violates the INA and the APA," their motion for summary judgment is utterly silent as to any provision of the INA that would require such personal notice. *See* ECF No. 57 at 9. No statutory notice requirement exists. In the absence of any statutory mandate, Plaintiffs attempt to construct one from a congressional record that also fails to support their claim, asserting that "when DHS fails to provide notice of the one-year deadline or delays providing notice, it violates congressional intent." *Id.* (citing 142 CONG. REC. S11,840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch)). This citation to Senator Hatch, however, does not answer the issue. To the contrary, Senator Hatch was expressing his support for an amendment adding the one-year deadline and, importantly, two relief-valve exceptions to the deadline for changed or extraordinary circumstances. *See id.* at S11,839–40 ("The way in which the time limit was rewritten in the conference report—with the two exceptions specified—was intended to provide adequate protections to those with legitimate claims of asylum."), *available at* https://www.gpo.gov/fdsys/pkg/CREC-1996-09-30/pdf/CREC-1996-09-30-pt1-PgS11838.pdf. Congress did not create an affirmative personal notice requirement regarding the one-year deadline. Rather, Congress clearly intended that permissible failures to meet the one-year deadline would be covered under the two articulated statutory exceptions, and lack of notice of the statutory requirements to apply for asylum was never one of those exceptions.

More importantly, the court cannot find the Government has violated a statutory or regulatory provision requiring affirmative personal notice where no such provision exists. Plaintiffs simply lack standing to assert such a claim, as they cannot show they have suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical," where the statute affords no such protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)

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(citations and quotation marks omitted); *see also Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1083 (E.D. Cal. 2015).

Defendants do not dispute Plaintiffs' claim that the INA and its implementing regulations "entitle class members to an opportunity to apply for asylum." ECF No. 57 at 4 (citing 8 U.S.C. § 1158(a)(1) (providing that "[a]ny [individual] who is physically present in the United States or who arrives in the United States . . . may apply for asylum in accordance with [8 U.S.C. §§ 1158 or 1225(b)]"); 8 U.S.C. § 1225(b)(1)(A)(ii) (obligating immigration officers to refer for a credible fear interview noncitizens subject to expedited removal who express an intention to apply for asylum or a fear of persecution); 8 C.F.R. §§ 235.3(b)(4) (requiring that "the inspecting officer shall not proceed further with removal of the [noncitizen] until the [noncitizen] has been referred for an interview by an asylum officer," if a noncitizen subject to expedited removal expresses an intention to apply for asylum or a fear of persecution); 208.30(f) (obligating an asylum officer to issue a Form I-862, Notice to Appear (NTA), for "full consideration" of her asylum claim, if the individual demonstrates a credible fear of persecution); 1208.30(g)(2)(iv) (in reviewing an asylum officer's negative credible fear finding, if an immigration judge finds that the alien possesses a credible fear of persecution or torture, he shall vacate the order of the asylum officer and DHS may commence removal proceedings); and 1003.42(f) (requiring that an individual who demonstrates a credible fear of persecution "shall have the opportunity to apply for asylum in the course of removal proceedings"); *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994) (recognizing that the statute "confer[s] upon all [noncitizens] a statutory right to apply for asylum"). Likewise it is indisputable that the one-year deadline is expressly spelled out in the law. What Plaintiffs have failed to do is point to a statutory provision that requires DHS Defendants to provide additional notice of the one-year statutory filing requirement, in excess of the notice that 8 U.S.C. § 1158 necessarily provides. The Court must therefore deny their motion for summary judgment on that ground.

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B. The Due Process Clause of the Fifth Amendment does not require DHS Defendants to provide affirmative personal notice.

In the absence of a statutory provision requiring DHS Defendants to provide notice to class members of the one-year statutory filing deadline, Plaintiffs urge the Court to find one in the Fifth Amendment's Due Process Clause. ECF No. 57 at 9-16. Plaintiffs cite to the "reasonably calculated" test. *Id*. at 10 (citing, *inter alia*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). In an attempt to show that DHS Defendants have failed to meet that test, Plaintiffs proffer an unsupportable claim that DHS fails "to affirmatively require officials to provide *any* notice of the one-year deadline." ECF No. 57 at 10 (emphasis in the original).[2] Regardless of whether DHS requires officials to provide notice of the one-year statutory filing deadline, the undisputed facts clearly demonstrate that DHS Defendants *do* provide such notice. *See, e.g.*, Information Guide for Prospective Asylum Applicants (available in eleven languages),[3] Form I-589 (Application for Asylum and for Withholding of Removal) and its instructions, which expressly specify "NOTE: You must submit an application for asylum within 1 year of arriving in the United States, unless there are changed circumstances that materially affect your eligibility for asylum or extraordinary circumstances directly related to

[2] Plaintiffs attempt to support this claim by citing, by reference, to ECF No. 42 ¶ 31 ("Defendants admit that upon apprehension, during the credible fear process, and upon release Defendants are not required to provide notice of the one-year deadline."); *id*. ¶ 38 ("[A]t no point in the parole or release process are DHS officers required to provide notice of the one-year deadline"); Motion Ex. A, Mura Dep., at 143:23-146:3 (admitting that there is no national policy requiring USCIS officers to provide oral or written notice of the one-year deadline during the credible fear process or when an asylum application is rejected); Ex. B, DHS Resp. to First Interrog., Interrog. 8-11 (failing to identify any documents that DHS employees are required to provide which contain notice of the one-year deadline).

[3] Available at https://www.uscis.gov/humanitarian/refugees-asylum/asylum/information-guide-prospective-asylum-applicants (last visited Nov. 27, 2017).

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your failure to file within 1 year;"[4] self-help materials ICE provides to detainees[5]; and the "Know Your Rights" video that many ICE detention facilities play for detainees.[6] Plaintiffs summarily dismiss the existence of such notice, but their arguments are factual arguments that address the sufficiency of the notice DHS Defendants provide, rather than dispute their existence at all. ECF No. 57 at 7 (arguing, *e.g.*, that "online materials do not aid class members who face language barriers or lack access to technology"). The Ninth Circuit has held that providing information on applications can provide all the notice that is due to potential asylum applicants. *See Cheema v. Holder*, 693 F.3d 1045, 1049 (9th Cir. 2012) ("We join the Tenth Circuit in concluding that the written warning on the asylum application adequately notifies the applicant of both the consequences of knowingly filing a frivolous application for asylum as well as the privilege of being represented by counsel, as required by 8 U.S.C. § 1158(d)(4)(A)."). Certainly, if a written warning on the asylum application is adequate to provide notice when a statute requires such notice, then a written warning on the instructions to the asylum application must be adequate to provide notice when no statute requires such notice.

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[4] Available at https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf (last visited Nov. 27, 2017) (See Part C, Additional Information about Your Application in Section V on Part 1 of the instructions for further explanation.) The instructions again discuss the one-year filing deadline on the second page, immediately after the Table of Contents.

[5] *See* ECF No. 58-1, at 17, DHS Resp. to First Interrog., Answer to Interrog. 7 ("ICE disseminates, to detainees who are housed in over-72 hour detention facilities, the ABA-produced "Know Your Rights" video and a Guidebook that provides detainees with information about the immigration removal process. ICE also disseminates, to detainees who are housed in over 72-hour detention facilities, in collaboration with EOIR, legal self-help materials. Each ICE detention facility has a law library with pro se legal materials. ICE also provides to detainees the National Detainee Handbook from April 2016 (this is not a document produced as part of a LOP, but it does discuss legal rights). *See* https://www.ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF (last visited Nov. 27, 2017).

[6] *See* ECF No. 29-1 (Final Pretrial Conference Order, *Lyon v. U.S. Immigration & Customs Enforcement* (N.D. Cal., 3:13-cv-05878-EMC), ECF No. 229, at 18 (Apr. 25, 2016) (admitting into evidence ICE's "Know Your Rights" presentation (2012) (English version)).

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Moreover, the undisputed facts further show that Defendant EOIR also provides notice to many class members. *See, e.g.*, ECF No. 58-1, EOIR Resp. to First Interrog., Answer to Interrog. 4, at 68 ("Through EOIR's Office of Legal Access Program (OLAP), EOIR administers the Legal Orientation Program (LOP), the Immigration Court Helpdesk (ICH) program, and coordinates the placement of self-help legal materials for Self-Help Legal Centers in non-detained courts. Currently, OLAP administers thirty-nine LOPs and five ICH programs, and seventeen courts nationwide have Self-Help Legal Centers."); *see also* ECF No. 58-1, EOIR Resp. to First Req. for Produc. RFP 1, at 136 (discussing notice provided by IJs); ECF No. 58-1, EOIR Resp. to First Req. for Produc. RFP 2, at 137 ("Immigration Judges also make available the I-589 application, which has instructions and relevant information, in immigration court to respondents who express a fear of return. The form's instructions and application, which are publically available, explain how to file an asylum application and reference the one-year requirement.").

And to the extent that Plaintiffs support their notice claim against DHS Defendants with factual arguments as to whether, how many, and to which class members Defendant EOIR provides notice, Plaintiffs raise genuine issues of material fact which are disputed and therefore not proper for resolution on summary judgment.[7]

For example, Plaintiffs overstate the OLAP Director's testimony to argue that LOP "providers are not obligated to discuss the one-year deadline" at LOP presentations, and "Defendants acknowledge that some do not," ECF No. 57 at 5, by selectively quoting the OLAP Director out of context, *see id.* at 7, *citing* Ex. I, ECF 58-1 at 89, 91-92, Lang. Dep. at 74:12-75:10, 64:21-65:12. In fact, though, that testimony clearly refers to presentations where asylum

[7] The DOJ Defendants are not defendants to Plaintiffs' notice claims against the DHS defendants (Counts One and Two), and thus should not be subject to an injunction based on Counts One and Two. However, to the extent Plaintiffs support their notice claims with facts regarding EOIR's provision of notice, those facts can be considered to raise genuine issues of material fact as to Plaintiffs' claims.

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seekers – *i.e. Class Members* in this lawsuit – are *not present*.[8] But in instances relevant to this lawsuit, *i.e.* where asylum seekers *are present* at a LOP presentation, LOP providers *are* contractually obligated to perform duties such as discussing the one-year filing deadline,[9] and EOIR conducts robust monitoring to oversee those obligations.[10] And, although Plaintiffs argue that in 2015, "over half of the individuals who appeared in LOP courts… had not attended an LOP session," *see* ECF No. 57 at 7, Plaintiffs ignore key caveats to that data in evidence,[11] and

[8] Plaintiffs' cited testimony, in essence, merely stated that "there is no one script that every LOP provider must follow at every Legal Orientation Program sessions." ECF No. 58-1 at 94, Ex. I, Lang Dep. at 75:8-10. But relevant to this lawsuit, that statement only applies in the narrow circumstance where "there are no individuals who express any potential for applying for asylum," based on "trained LOP providers' identification." Ex. A, Excerpts of Deposition of Stephen Lang, at 72:3-73:22; 75:21-76:7; *see also id.* at 44:12-19, 43:11-18. In that narrow circumstance, a LOP provider might not mention the one-year filing deadline, so as to "modify the orientation to best suit the needs of the population" (s)he is presenting to. *Id.* at 75:21-76:7; *see also id.* at 65:5-12, 71:3-72:2; *compare* ECF No. 57 at 7 (arguing that "Defendants readily admit that providers need not follow the model curriculum.")

[9] The OLAP Director explained in detail how LOP providers are obligated to identify individuals present at presentations that may apply for asylum, Ex. A at 44:12-19, 43:11-18, and discuss the one year deadline at those presentations, *id.* at 74:1-11, *see also* 48:3-6, 54:16-55:5, 55:14-21, per the model LOP curriculum provided to all LOP providers, *id.* at 55:22-56:7, 59:10-60:13. That model LOP curriculum in three places directs providers to discuss the one-year filing deadline, in detail. *Id.* at 60:14-64:14.

[10] The OLAP Director also explained how EOIR monitors that and other obligations, Ex. A at 55:14-21, as part of LOP providers' subcontracts with EOIR's contractor, *id.* at 26:2-12, 27:3-5, 27:15-19, 31:4-21, which EOIR can terminate if LOP providers are not in compliance. *Id.* at 27:21-28:10. EOIR monitors that obligation through required training and monthly conference calls, *id.* at 45:16-47:4, and site visits, *id.* at 47:5-48:12, at which EOIR staff "observe how the information is being presented to ensure that it's being presented in a legally sufficient way, within the scope of the program," *id.* at 48:3-6, including information on the one-year filing deadline, *id.* at 54:16-55:5, 55:14-21. EOIR conducts formal evaluations, *id.* at 48:13- 49:19, and takes corrective action as necessary, *id.* at 49:10-19, 51:5-52:13, such as where "someone had not covered an important area of the law given the folks being served," *id.* at 50:13-15.

[11] Following the quoted text, the report at issue states, "However, it is important to note that some of these immigration courts have dockets that combine detained and non-detained cases. In addition, some LOP courts also hear the cases of individuals detained at facilities at which LOP services are not provided." ECF No. 58-1 at 128, Ex. K, at USA-6-000317.

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ignore other testimony showing a higher rate of access to the LOP if one tracks individuals in 72-hour detention facilities, rather than individuals in "LOP courts" (over half of individuals, perhaps 50 to 70 percent).[12] In short, while Plaintiffs seek to minimize the effectiveness of notice that Defendant EOIR provides, the Court should not resolve those factual disputes at this stage.

A wealth of published information about asylum and the asylum process, in addition to the statute itself, is available to the Plaintiff classes. Plaintiffs assert a right to additional extraordinary notice that is neither required by statute nor by the Constitution. Further, but because the undisputed facts demonstrate that Defendants provide notice to class members throughout the asylum process, the Court must also deny Plaintiffs' motion for summary judgment on their Fifth Amendment Due Process claim.

C. DHS Defendants do not violate Plaintiffs' procedural due process rights.

Asserting a protected interest in the right to apply for asylum, Plaintiffs claim DHS Defendants deprive them of the right to apply for asylum by failing to provide extraordinary notice of the statutory one-year filing deadline. ECF No. 57 at 13. In so arguing, Plaintiffs improperly impute to the Government a responsibility Plaintiffs themselves bear. For instance, Plaintiffs reference 8 C.F.R. § 208.5, which states that DHS Defendants "shall *make available* the appropriate application forms and shall provide the applicant with the information required by [INA] section 208(d)(4) to aliens in the custody of DHS." ECF No. 57 at 6; 8 C.F.R. § 208.5(a). Section 208(d)(4) of the INA [8 U.S.C. § 1158(d)(4)] requires the government to provide notice of the right to counsel and the consequences of filing a frivolous asylum application. Clearly, making forms available is a distinct obligation from providing the forms. There is no dispute that DHS complies with this obligation, by making the forms readily available in the detention facilities. In the detained setting, all ICE detainees have the right to

[12] The OLAP Director testified that as of "one year ago … over 50 percent of individuals in ICE [72-hour or greater] facilities had access to the Legal Orientation Program," Lang Dep. at 82:8-83:2, approximately "50 to 70 percent." Lang Dep. at 84:13-19.

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use the facility's law library to access approved legal materials and office equipment (such as copy machines, typewriters, and computers) to copy and prepare legal documents only.[13] In the non-detained setting, the forms are available on the USCIS website, in USCIS Asylum Offices, and from the USCIS National Customer Service Center.

It is reasonable for the Government to expect that aliens – even those seeking asylum in this country – must carry some obligations along the way. A person seeking asylum must actually *seek* asylum. An asylum seeker must make an effort to identify and understand the procedures and laws that exist, and certainly has a duty to conform to them. Indeed, as the Seventh Circuit has held, "it is an impermissible leap to conclude that Congress is under a constitutional duty to take measures, whether by indexing a new statute, or deferring the statute's effective date long enough to enable the contents of the statute to be widely disseminated, to make sure that no one is caught unawares. . . ." *Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998).

The Supreme Court has gone further, holding that "just as *everyone* is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (emphasis added). Plaintiffs propose to turn this principle on its head by asking this court to assign to the federal government, absent any statutory basis for such assignment, the extraordinary obligation of personally notifying potential asylum seekers of specific requirements for filing an asylum application. Plaintiffs cannot credibly claim that Defendants fail to make detailed information regarding the asylum process

[13] Enforcement and Removal Operations National Detainee Handbook, Custody Management, April 2016 at page 9. *See* https://www.ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF (last visited Nov. 27, 2017); *see also* ICE/ERO Detention Standards at PBNDS 2011 at Section 6.3 Law Libraries and Legal Material, https://www.ice.gov/doclib/detention-standards/2011/6-3.pdf (last visited Nov. 27, 2017); PBNDS 2008 at Part 6 Section 36 Law Libraries and Legal Material, https://www.ice.gov/detention-standards/2008 (last visited Nov. 27, 2017); PBNDS 2000 at Access to Legal Material, https://www.ice.gov/doclib/dro/detention-standards/pdf/legal.pdf (last visited Nov. 27, 2017).

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available to potential asylum seekers. It is undisputed that Defendants make such information available to potential asylum seekers, in multiple forms and formats, in eleven different languages, for free. Rather, Plaintiffs assert that the Constitution obligates the federal government to provide potential asylum seekers personally with (in this instance) special notice of specific asylum requirements. Plaintiffs' assertion that the Government is at fault for their own failure to meet the one-year filing requirement "because they are unaware of the deadline" improperly shifts the burden and the responsibility completely away from class members, who should have the most interest in maintaining awareness of how the process works. *See* ECF No. 57 at 14.[14] The statute, the regulations, the informational materials, and the instructions for the Form I-589 all describe the one-year requirement. *See, e.g.*, *Husyev v. Mukasey*, 528 F.3d 1172, 1182 (9th Cir. 2008) (applicable statutes and regulations may provide "adequate notice of procedures and standards that will be applied to . . . claims for relief"); *Williams v. Mukasey*, 531 F.3d 1040, 1042-43 (9th Cir. 2008) (publication of regulations was sufficient notice for due process purposes with respect to deadline for filing motion for CAT protection); *cf. Higashi v. United States*, 44 Fed. Cl. 238, 250 (Fed. Cl. 1999) ("By itself, however, publication in the Federal Register is sufficient to give notice of the contents of the document to a person subject to or affected by those contents."), *aff'd*, 225 F.3d 1343 (Fed. Cir. 2000). The Court should not find Plaintiffs have a protected liberty interest in failing to make themselves aware of their duties, legal requirements, and responsibilities, or that the Government is under an extraordinary duty to notify potential asylum seekers of the statutory requirements for asylum, which they are indisputably able to seek out for themselves.

Plaintiffs further cite to the rest of the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test[15] to attempt to show that DHS Defendants have "impede[d] due process rights,"

[14] Citing ECF No. 13, Alberti Decl., ¶ 6; ECF No. 15, Freshwater Decl., ¶¶1 2-13; ECF No. 16, Greenstein Decl., ¶ 7; ECF No. 19, Cheng Decl., ¶¶ 8-10.

[15] This test requires courts to consider "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used,

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concluding with the presumption that to meet "their procedural due process obligations, DHS must provide affirmative notice of the filing deadline in writing at or before class members' release from custody." ECF No. 57 at 13. Their analysis, however, is flawed, and it should not sway this Court.

First, the *Mullane* framework, rather than the *Mathews* balancing test, governs here. As the Supreme Court has instructed, "*Mullane* supplies the appropriate analytical framework" in considering whether the Government has provided constitutionally sufficient notice. *Dusenbery v. United States*, 534 U.S. 161, 167-168 (2002) (citations omitted) (" [W]e have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice. We see no reason to depart from this well-settled practice."); *see Williams*, 531 F.3d at 1042 (applying *Mullane* framework in holding that publication of regulations satisfied due process notice requirement).

Second, even assuming arguendo that *Mathews* applies here, Plaintiffs, as demonstrated *infra*, lack a protected liberty interest in having the Government provide the notice they demand. For example, the Ninth Circuit has expressly held under the Due Process Clause that "[a]n alien has no blanket right to be advised of the possibility of asylum or other relief" from removal, regardless of whether the alien is an applicant for admission or has been admitted into the United States. *Valencia v. Mukasey*, 548 F.3d 1261, 1263 (9th Cir. 2008). Beyond that, however, the undisputed facts do not show that application of the test weighs in Plaintiffs' favor.

Here, as to the second prong of the *Mathews* test, Plaintiffs proffer that the "[t]he risk of erroneous deprivation is high absent adequate notice." ECF No. 57 at 14. The risk is only high in the event that potential asylum seekers fail to take reasonable steps to educate themselves

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and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

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about their own asylum claims. Setting that aside, due process requires only that the Government follow *reasonable* procedures for minimizing mistaken deprivations of liberty, requiring the Court to "consider the weight of the interest at stake, the risk of error, and the costs of additional process." *Atkins v. City of Chicago*, 631 F.3d 823, 827 (7th Cir. 2011) (quoting *Hernandez v. Sheahan*, 455 F.3d 772, 777 (7th Cir. 2006)). Plaintiffs offer no evidence supporting their claim that DHS Defendants must bear the entirety of the burden of preventing class members from "miss[ing] the one-year deadline." ECF No. 57 at 14; *cf. Williams*, 531 F.3d at 1042 ("As a general rule, publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance."). Indeed, as noted *supra*, the undisputed facts show that DHS Defendants take reasonable steps to provide notice of the one-year deadline and the other asylum requirements. *See* Sec. I. B., listing, *e.g.*, Form I-589 and its instructions, self-help materials ICE provides to detainees, and the "Know Your Rights" video that many ICE detention facilities play for detainees. To the extent any protected liberty interest exists in this context, Defendants have taken reasonable steps to inform potential asylum seekers of the one-year filing requirement by making detailed information regarding the asylum process, including the one-year filing requirement, readily available to asylum seekers. Those steps meet any burden that may arise under the second *Mathews* prong.

Plaintiffs then state unequivocally, "There are *no* government interests that weigh against providing adequate notice of the one-year deadline under the third prong of *Mathews*." ECF No. 57 at 15 (emphasis added). This assertion blatantly ignores, or at best significantly devalues, the costs (both monetary and in employee work hours) of producing or modifying written materials and implementing new procedures necessary to provide notice in the manner Plaintiffs demand. Those costs would necessarily have a negative impact the rest of the work in which DHS Defendants' employees engage (including evaluating claims for benefits), which would necessarily have to be set aside or restructured should Plaintiffs prevail and DHS be required to

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create new processes and distribute new material to provide additional notice of the one-year filing deadline. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (stating that it is appropriate to refuse to grant relief, where a judicial order benefitting a party seeking government benefits would negatively affect non-litigants seeking the same types of benefits). In other words, it would not be reasonable to require DHS Defendants to undertake additional costs and unfairly burden other applicants for benefits, simply because Plaintiffs claim to need additional written notice beyond what they already receive. Further, the Ninth Circuit has expressly held under the Due Process Clause that "[a]n alien has no blanket right to be advised of the possibility of asylum or other relief" from removal, regardless of whether the alien is an applicant for admission or has been admitted into the United States. In *Valencia*, the Ninth Circuit recognized that the "resources of the agencies charged with administration of our immigration laws are limited and severely taxed." *Valencia*, 548 F.3d at 1264. Plaintiffs fail to recognize those facts.

As the Supreme Court emphasized in assessing the adequacy of certain Government procedures, a court's task is limited to "determin[ing] what procedures would satisfy the *minimum* requirements of due process," not to imposing procedural mandates "simply . . . because the [ ] court may find them preferable." *Landon v. Plasencia*, 459 U.S. 21, 35 (1982) (emphasis added). Even were the Court to apply the *Mathews* test, rather than the proper *Mullane* framework, to the undisputed facts, DHS Defendants already provide all the notice that is reasonably required.[16] Therefore, the Court should not find that Plaintiffs have a due process right to any more than that.

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II. The undisputed facts do not demonstrate that Defendants' procedures violate Plaintiffs' statutory or constitutional rights to apply for asylum.

A. Defendants' procedures do not violate the INA or the APA.

Plaintiffs argue that "Defendants have failed to create uniform mechanisms which ensure that they may timely file their asylum applications," ECF No. 57 at 16, but fail to support that claim with undisputed facts.[17] Instead, Plaintiffs proffer exaggerations or isolated instances of

[17] Additionally, the INA precludes review of their claims in this Court. The Ninth Circuit has interpreted 8 U.S.C. § 1252(a)(5) and (b)(9) to mean that "Congress has clearly provided that all claims—whether statutory or constitutional—that 'aris[e] from' immigration removal proceedings can only be brought through the petition for review process in the federal courts of appeals." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016). The Ninth Circuit added that "[d]espite the gravity" of the claims in an action, plaintiffs "cannot bypass the immigration courts and proceed directly to district court," but, rather, "must exhaust the administrative process before they can access the federal courts." *Id*. "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition for review] process." *Id.* at 1031 (citing *Viloria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015)) ("It is well established that this court's jurisdiction over removal proceedings is limited to review of final orders of removal.")).

As in *J.E.F.M.*, Plaintiffs' claims are properly brought in immigration proceedings, where they can seek asylum as relief from removal. To clarify, before any class member was in removal proceedings, he or she could have filed for asylum with USCIS – what is known as an affirmative filing. Once the Government placed each class member in removal proceedings, however, that individual could only file for asylum defensively in the immigration court. Plaintiffs cannot plausibly argue, therefore, that their claims are not "removal-related." *See* 8 C.F.R. §§ 208.4(a)(1), 1208.4(a)(1). The Ninth Circuit recognized that "[t]he legislative history of the INA, as well as amendments to § 1252(b)(9), confirm that Congress intended to channel all claims arising from removal proceedings . . . to the federal courts of appeals and bypass the district courts." *J.E.F.M.*, 837 F.3d at 1033. Addressing Congress's continued streamlining of judicial review of immigration proceedings, the Ninth Circuit further explained that Congress's amendment of § 1252(b)(9) in 1996 was "designed to make perfectly clear 'that only courts of appeals—and not district courts—could review a final removal order,' that 'review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding,' and that the statute was 'intended to preclude all district court review of any issue raised in a removal proceeding.'" *Id*. at 1034 (emphasis added) (quoting H.R. Rep. No. 109-72, at 173 (2005) (Conf. Rep.)); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 306(a)(2), 110 Stat. 3009-610. Accordingly, 8 U.S.C. § 1252(b)(9) bars this Court from reviewing Plaintiffs' claims. *J.E.F.M.*, 837 F.3d at 1034.

Moreover, it is well settled that aliens must appeal to the Board of Immigration Appeals (BIA) all immigration judge decisions finding no changed or extraordinary circumstances that

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delay by DHS in filing NTAs or by EOIR in processing NTAs, as though they were the norm. *See id*. at 16-21. Defendant EOIR, responding to Plaintiffs' request for admission, for instance, indicated only that within the last three years, EOIR had entered "an" NTA into the EOIR system more than one year after DHS submitted the NTA to an immigration court. *See* ECF 58-1, EOIR Resp. to First Req. for Admis., RFA 5, at 152. Plaintiffs use that admission as support for their allegation that "Immigration courts routinely experience delays" and that "in some cases, it has taken more than a year for an immigration court to enter a filed NTA into its computer system." Additionally, Plaintiffs cite to Defendants' email to support an allegation that "as of March 2017, San Francisco Immigration Court staff had not entered NTAs from December 2016 into EOIR's system." ECF No. 57 at 21 (citing Email "RE: NTAs," at USA-8-002111-12. That email, contrary to the allegation that such delays were common, noted only that "some" were from December 2016, while the majority were from January 2017, only two months prior to the email date. *See* ECF No. 58-1 at 208.

Moreover, the evidence to which Plaintiffs cite frequently relates to situations that are dated and, therefore, fail to indicate that a problem exists for class members today. *See, e.g.*, ECF No. 57 at 21 ("EOIR noted in March 2016 that, in the Los Angeles Immigration Court, there were NTAs from November 2015 that had not yet been entered into its computer system.").

Plaintiffs, further, assail the system Defendant USCIS has developed to determine whether to accept asylum applications filed by individuals who have been issued NTAs – calling it "convoluted" – but the Court must afford deference to that procedure. *See, e.g., Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc*., 470 U.S. 116, 125 (1985) (the "view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we

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would excuse late-filed asylum applications, and that only federal courts of appeals may review those BIA decisions. *See, e.g., Dhital v. Mukasey*, 532 F.3d 1044, 1049 (9th Cir. 2008). Accordingly, such decisions are issues to be "raised in a removal proceeding," and Plaintiffs lack standing to raise their issues before this Court. *See J.E.F.M.*, 837 F.3d at 1034.

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need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]."); *California Trout v. F.E.R.C.*, 572 F.3d 1003, 1007 (9th Cir. 2009) ("The Supreme Court has long stressed that 'the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments.' Agencies must have the ability to manage their own dockets and set reasonable limitations on the processes by which interested persons can support or contest proposed actions. In this respect, an agency's procedural rules operate much as our own rules of procedure do: we require litigants to observe the orderly procedures of the court, even if such rules occasionally bar inattentive or ill-advised parties from our courtrooms. So long as an agency's procedural rules do not afford petitioners less protection than the minimum mandated by the Administrative Procedure Act ("APA") and the Constitution, we are not free to 'improperly intrude[ ] into the agency's decisionmaking process' and second-guess its administrative tradeoffs.") (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978)).

With regard to Class A members, Plaintiffs argue that USCIS will not accept any asylum application filed and describe the circumstances faced by Plaintiffs Rodriguez and Mendez. ECF No. 57 at 18-19 (citing Ex. Q, Lafferty Memo, at USA-2-000053). In citing almost exclusively to the Lafferty Memo to support this claim, Plaintiffs ignore the statutory and regulatory scheme that governs USCIS's jurisdiction over such claims. While an alien is in expedited removal proceedings under 8 U.S.C. § 1225, USCIS lacks jurisdiction to accept an affirmative filing of an asylum application, because, in such instances, the alien is subject to the I-860, Notice and Order of Expedited Removal. An immigration officer – not an asylum officer – issues an I-860 under 8 U.S.C. § 1225(b)(1)(A)(i), and, in those instances, the alien remains subject to that I-860 when the alien is screened by USCIS for credible fear. The alien further remains in expedited removal

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proceedings and subject to that I-860 until removal proceedings are initiated through the filing of an NTA with the immigration court or until ICE cancels the I-860.

For individuals placed into the expedited removal process, USCIS has jurisdiction to make credible fear determinations, but not to accept asylum applications, under 8 C.F.R. § 208.30(a). This provision notes that the procedures therein are the exclusive procedures under 8 U.S.C. § 1225(b)(1)(B) describing credible fear processing under the expedited removal scheme. Further, the former INS made clear in the preamble to the Interim Rule, "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures," that following a positive credible fear determination, the alien's application for asylum is to be heard by an Immigration Judge. 62 Fed. Reg. 10312–95 (Mar. 6, 1997) ("the further consideration of the application for asylum by an alien who has established a credible fear of persecution will be provided for in the context of removal proceedings under section 240 of the Act").

In the Class B cases, where there is an NTA issued but not yet filed with EOIR, 8 U.S.C. § 1158(d) and 8 C.F.R. § 208.2(a) permit – but do not require – USCIS to take jurisdiction over an alien's asylum application. Regardless, USCIS has determined that the better policy would be to decline such jurisdiction until first determining whether ICE intends to file the NTA. By first checking with ICE to find out if they will file the NTA, USCIS affords the appropriate deference to DHS's initial determination that the person should be placed into removal proceedings. This determination is consistent with the Lafferty Memo. *See* ECF No. 58-1 at 160, Plaintiffs' Ex. Q, Lafferty Memo, Appendix A, at USA-2-000053. In most cases, as Plaintiffs are correct to note, ICE will "submit the NTAs it has issued with the immigration court. *See* ECF No. 57 at 19. Under such circumstances, as the AAPM, describes, USCIS lackd jurisdiction over the asylum applications. See ECF No. 58-1 at 169, Ex. S, Affirmative Asylum Proc. Manual, at USA-2-000003. However, if ICE does not file the NTA with the immigration court, USCIS accepts

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jurisdiction over the asylum application. *See* ECF No. 58-1 at 160, Plaintiffs' Ex. Q, Lafferty Memo, Appendix A, at USA-2-000053.

As a matter of policy, it is completely reasonable for USCIS to first defer to the determination that was already made by another DHS component that the individual should be in removal proceedings and, further, to confirm whether ICE will follow through on that initial determination, before expending resources on interviewing and adjudicating the asylum application. Those decisions, as noted *supra*, directly relate to whether USCIS will retain jurisdiction over the asylum application. In developing those procedures, USCIS determined that it would be an inefficient policy for USCIS to take jurisdiction over all such asylum applications, without first confirming whether ICE intended to file the NTAs. Otherwise, of course, if ICE subsequently filed the NTAs, USCIS would lose jurisdiction over those asylum applications and would have wasted scarce adjudicative resources. The Court must afford deference to that well-reasoned policy determination. *See Vt. Yankee*, 435 U.S. at 524-525; *Natural Res. Def. Council*, 470 U.S. at 125; *California Trout*, 572 F.3d at 1007.

Furthermore, Plaintiffs have not pointed to any authority imposing any particular temporal deadline on ICE's filing of an NTA with the immigration court or EOIR's entry of a filed NTA into its systems. That is, the statutory and/or regulatory right to have an opportunity to apply for asylum is not a statutory and/or regulatory right to have an NTA filed or entered within a certain time. *See* 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service."), (b) ("When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge."); *see also DiPeppe v. Quarantillo*, 337 F.3d 326, 333 (3d Cir. 2003) ("DiPeppe argues that the INS improperly delayed placing her case before an Immigration Judge in violation of its own regulations, but fails to point to any mandatory time frame under those regulations to support her claim."). Moreover, the lack of a temporal deadline to issue or enter an NTA stands in stark

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contrast to other statutorily-created explicit timelines in the asylum adjudication process. *E.g.*, 8 U.S.C. § 1158(d)(5)(A)(iii) (providing that "in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed").

Ultimately, of course, the issue of whether Defendants have impeded Plaintiffs' ability to meet the statutory one-year filing deadline is one for the Ninth Circuit, rather than for this Court. 8 U.S.C. § 1252(a)(5), (b)(9); *J.E.F.M.*, 837 F.3d at 1031. Regardless, Plaintiffs have failed to demonstrate that undisputed facts support their claims that Defendants violated their statutory obligations.

B. Defendants' procedures do not violate Plaintiffs' due process rights.

In arguing that Defendants' "failure to implement a mechanism by which class members can timely file their asylum applications also violates their constitutional right to due process," Plaintiffs assert that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" ECF No. 57 at 23-24 (quoting *Mathews*, 424 U.S. at 333). Defendants, as noted supra, argue that the "meaningful time" and "meaningful manner" for Plaintiffs to assert their claims is before an immigration court, with the right to appeal to the BIA, and, ultimately, to the Ninth Circuit. *See J.E.F.M.*, 837 F.3d at 1029.

Further, a straightforward application of the *Mathews* test does not militate in favor of Plaintiffs' claims. As to the first *Mathews* prong, Plaintiffs lack a protected liberty interest in having the DHS or DOJ Defendants alter their procedural mechanisms to issue or enter an NTA, respectively, within a strict temporal deadline. The Ninth Circuit has held as such regarding applications for cancellation of removal, which like asylum, is ultimately a discretionary form of relief. *See Mendez-Garcia v. Lynch*, 840 F.3d 655, 669 (9th Cir. 2016) (quoting *Hyuk Joon Lim v. Holder*, 710 F.3d 1074, 1076 (9th Cir. 2013) (rejecting aliens' argument that delays in adjudication of their applications for cancellation of removal violated their procedural due process rights by rendering them ineligible for such relief, because a cancellation application

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"gives rise to no 'substantive interest protected by the Due Process Clause.'") quoting *Hyuk Joon Lim*, 710 F.3d at 1076 (9th Cir. 2013); *Ramos-Garcia v. I.N.S.*, 35 F. App'x 501, 502 (9th Cir. 2002) (unpublished) (rejecting due process claim of alien who argued that I.N.S.'s delay in filing the charging document denied him the opportunity to apply for suspension of deportation). "Procedural delays, such as routine processing delays, do not deprive aliens of a substantive liberty or property interest unless the aliens have a 'legitimate claim of entitlement' to have their applications adjudicated within a specified time." *Mendez-Garcia*, 840 F.3d at 666 (quoting *Ruiz-Diaz v. United States*, 703 F.3d 483, 487 (9th Cir. 2012)). And in *Mendez-Garcia*, like here, the Court observed that "[n]o statute or regulation require[d] the government to take action on their applications within a set period." *Id.* Similarly, in the absence of any authority dictating a timeframe for the filing of an NTA with the immigration court or the entry of a filed NTA into EOIR's computer system, Plaintiffs cannot show that due process requires the procedural mechanisms they seek.

As to the second prong – the risk of erroneous deprivation – Plaintiffs describe the risks they face when late-filing asylum applications (*see* ECF No. 57 at 24), but ignore that statutory and regulatory remedies already exist to remedy those risks. Where other avenues for review exist, the risk of erroneous deprivation is lessened. *See Foss v. National Marine Fisheries Serv.*, 161 F.3d 584 (9th Cir. 1998) (denial of license application as untimely did not violate due process given that, even without actual notice of the deadline, "[t]he notification and appeal procedures were more than adequate and the risk of erroneous deprivation of the permit was virtually nil").

For instance, Congress intended, *see supra* Sec. I.A, that class members can demonstrate to an immigration judge that extraordinary circumstances should excuse the delay in filing. 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(2)(i)(B), (5)[18]; *see Ramadan v. Gonzales*, 479

[18] To show extraordinary circumstances, an asylum applicant must demonstrate "that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the

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F.3d 646, 650 (9th Cir. 2007). Extraordinary circumstances may include scheduling of a hearing beyond the one-year deadline, such as where a NTA has not yet been entered by the immigration court. *See, e.g.*, *Martinez-Alfaro v. Holder*, 591 F. App'x 564, 565 (9th Cir. 2015) (unpublished) (remanding to the BIA for consideration of extraordinary circumstances where DHS did not file the NTA, and the immigration court did not schedule the master calendar hearing, until more than a year after the alien's arrival); *see also Garcia-Alvarez v. Holder*, 590 F. App'x 695, 696 n.1 (9th Cir. 2015) (unpublished). Moreover, if the immigration judge does not conclude that extraordinary circumstances are present, the alien may seek review before the BIA (and, ultimately, may file a petition for review in the relevant Circuit Court).[19] *See* 8 C.F.R. § 1003.1(b) (setting forth the BIA's appellate authority); *see also Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (discussing the exceptions to the one-year asylum filing deadline).

Lastly, Plaintiffs cite to *Mathews* without any consideration whatsoever of the costs the Government would incur, should the Court order the remedies Plaintiffs suggest. ECF No. 57 at 23-24 ("[T]he *Mathews* balancing test weighs heavily in class members' favor."). This is especially inappropriate in light of the reasonableness of the Government's policies and procedures, when, as noted *supra*, reasonableness is the key consideration for the Court. *Atkins*, 631 F.3d at 827 (noting that due process requires only that the Government follow *reasonable* procedures and holding that courts must "consider the weight of the interest at stake, the risk of error, and the costs of additional process").

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application within the 1–year period, and that the delay was reasonable under the circumstances." 8 C.F.R. § 1208.4(a)(5). Although the implementing regulations list examples of "extraordinary circumstances," the list is non-exhaustive. 8 C.F.R. §§ 208.4(a)(5), 1208.4(a)(5); *Al Ramahi v. Holder*, 725 F.3d 1133, 1135 (9th Cir. 2013); *see also Wakkary v. Holder*, 558 F.3d 1049, 1056 (9th Cir. 2009).

[19] In addition, although federal courts generally lack jurisdiction to review the BIA's determination regarding an exception to the one-year filing deadline, 8 U.S.C. § 1158(a)(3), the Ninth Circuit has construed its appellate authority to encompass a review of constitutional claims or questions of law, including the BIA's application of the exceptions to the one-year deadline where the facts are undisputed. *Al Ramahi*, 725 F.3d at 1138.

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Accordingly, where there already exists a statutory remedy to the harm Plaintiffs allege, and where Plaintiffs have wholly failed to acknowledge the costs to the Government, the Court should find that Defendants have not violated Plaintiffs' rights to due process, and the Court should deny Plaintiffs' motion for summary judgment on this claim.

CONCLUSION

This Court should deny Plaintiffs' motion for summary judgment, and, instead, should enter summary judgment for Defendants, under Fed. R. Civ. P. 56(f). Neither the INA nor the Constitution requires Defendants to take any more action regarding notice or ability for asylum applicants to file than they already offer. Thus, under the undisputed facts of this case, Plaintiffs cannot establish that such a mandate exists.

DATED: November 27, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 27, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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