Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Concely del Carmen MENDEZ ROJAS, et al.,

Plaintiffs,

v.

Elaine C. DUKE, Acting Secretary of the Department of Homeland Security, in her official capacity; [1] et al.,

Defendants.

Case No. 2:16-cv-01024-RSM

MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
November 24, 2017

ORAL ARGUMENT REQUESTED

[1] Elaine C. Duke has been substituted for Defendant Jeh Johnson pursuant to Fed. R. Civ. P. 25(d).

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I. INTRODUCTION

Plaintiffs and class members (hereinafter "class members") are asylum seekers who fled persecution in their countries of origin and expressed a fear of persecution or a desire to apply for asylum to federal immigration officers employed by the Department of Homeland Security (DHS) upon their arrival in the United States. DHS Defendants specifically permitted class members to enter the country to pursue their asylum claims, but did not notify them that they must file their asylum applications (Form I-589) within one-year of their arrival. *See* 8 U.S.C. § 1158(a)(2)(B). As a result, class members either are unaware of the deadline or already have missed it, and therefore are at risk of losing their opportunity to obtain refuge from the persecution they fled.

Furthermore, all class members, even those fortunate enough to retain counsel and discover the filing deadline, risk missing the deadline or have already missed it because neither DHS nor Executive Office for Immigration Review (EOIR) Defendants provide procedural mechanisms that ensure class members the ability to timely file. Defendants' systems effectively prevent class members from filing asylum applications until after DHS files the case with EOIR and EOIR enters it into its system. Yet Defendants often do not take the necessary actions to ensure that cases are filed and entered into the EOIR system before the expiration of the one-year deadline. DHS Defendants' failure to provide notice of the one-year deadline and the failure of all Defendants to create and implement procedural mechanisms that guarantee class members the opportunity to timely submit their asylum applications violate the Immigration and Nationality Act (INA), Administrative Procedure Act (APA), governing regulations, and due process.

II. BACKGROUND

This class action challenges Defendants' policies and practices as violative of class members' statutory and regulatory rights to apply for asylum and their right to due process under the Fifth Amendment to the Constitution. This Court previously certified the following two classes and subclasses:

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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 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.[2]

Dkt. 37 at 13-14. This Court also denied Defendants' motion to dismiss, clarifying that "[i]f Plaintiffs' allegations are true, they have lost the statutory right to apply for asylum and must now depend on the discretion of an adjudicator to apply." Dkt. 41 at 3. Class members now move for summary judgment because the record demonstrates that their allegations are true. Class members seek a meaningful opportunity to apply for asylum: this requires DHS

[2] The difference between the two classes centers on the two different ways in which DHS Defendants process asylum seekers upon entry. Class A consists of individuals whom DHS initially placed in "expedited removal" proceedings, 8 U.S.C. § 1225(b)(1), and who, as part of that process, passed initial screenings for their asylum claims ("credible fear" screenings). Because they demonstrated credible fear of returning to their countries of origin, they were taken out of expedited removal proceedings to pursue their asylum claims in removal proceedings before an immigration judge under 8 U.S.C. § 1229a. 8 U.S.C. § 208.30(f). DHS subsequently released them from detention. Class B consists of individuals who, upon arrival into the United States, expressed to DHS a fear of returning to their countries of origin and whom DHS released into the country; DHS did not give them credible fear screenings but instead issued them NTAs for removal proceedings before an immigration judge.

Moreover, each class is divided into two subclasses based on whether the individual is in removal proceedings. Those in subclasses A.I. and B.I. face barriers to timely filing their asylum applications because DHS Defendants have not implemented a uniform procedural mechanism to ensure that their asylum applications will be accepted and treated as timely filed. Those in subclasses A.II. and B.II. face barriers to timely filing their asylum applications because EOIR Defendants have not implemented a uniform procedural mechanism to ensure that their asylum applications will be treated as timely filed with the immigration court presiding over their removal proceedings.

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Defendants to provide them with notice of the one-year deadline and DHS and EOIR Defendants to implement uniform procedural mechanisms to ensure compliance with the deadline.

III. ARGUMENT

Summary judgment is warranted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. DHS'S FAILURE TO PROVIDE ADEQUATE NOTICE OF THE ONE-YEAR DEADLINE VIOLATES CLASS MEMBERS' STATUTORY AND CONSTITUTIONAL RIGHTS.

1. DHS's Failure to Provide Adequate Notice of the One-Year Deadline Violates the INA and the APA.

The INA and implementing regulations entitle class members to an opportunity to apply for asylum. *See* 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); 208.309(f) (obligating an asylum officer to process an individual for "full consideration" of her asylum claim, if the individual demonstrates a credible fear of persecution); and 1003.42(f) (requiring that an individual who demonstrates a credible fear of persecution "shall have the opportunity to apply for asylum"); *see also 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").[3] The failure to file an asylum application within one year

[3] Moreover, the United States is obligated under various international treaties and protocols to abide by *non-refoulement*, a duty that prohibits a country from returning or expelling an individual to a country where she has a well-founded fear of persecution and/or torture. *See, e.g.*, 1967 Protocol Relating to the Status of Refugees (adopting Articles 2-34 of the 1951 Convention on the Rights of Refugees); Convention Against Torture (CAT), Art. 3.

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of arrival is a basis to deny an individual's application unless the applicant overcomes additional obstacles. 8 U.S.C. § 1158(a)(2)(B).[4] Notice of this one-year deadline is critical, and DHS's failure to provide such notice amounts to a denial of class members' statutory and regulatory right to seek asylum.

a. DHS Does Not Provide Notice of the One-Year Deadline.

i. DHS's position is that the agency has no legal obligation to provide affirmative notice of the one-year deadline.

Notwithstanding the statutory right to seek asylum, DHS Defendants take the position that DHS is not legally required to provide notice of the one-year deadline to class members. *See* Dkt. 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"); *see also* 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).[5] Moreover, there is no mention whatsoever of the one-year deadline in the documentation DHS officers must affirmatively provide to class members. *See* Ex. C, DHS Resp. to First Req. for Produc., RFP 6-9 (referencing documentation provided to class members after apprehension, after expressing fear of persecution, and during the credible fear interview process); Ex. B, DHS Resp. to First Interrog., Interrog. 8-11 (same). Nor is there any mention of the one-year deadline in any other documentation that Defendants state they affirmatively provide to many class members. *See, e.g.*, Ex. B, DHS Resp. to First Interrog., Interrog. 8 (discussing, inter alia,

[4] An adjudicator may review an untimely asylum application only if the applicant demonstrates either (1) "changed circumstances … materially affect[ing] the[ir] … eligibility for asylum"; or (2) "extraordinary circumstances relating to the[ir] delay in filing an application" by the deadline. 8 U.S.C. § 1158(a)(2)(D).

[5] All references to exhibits in this motion refer to the exhibits accompanying the Declaration of Glenda M. Aldana Madrid in support of Plaintiffs' Motion for Summary Judgment, filed concurrently herewith.

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the National Detainee Handbook).

ii. DHS's reliance on any mention of the deadline in existing materials or through legal orientation programs is misguided and insufficient to guarantee notice to all class members.

Unable to demonstrate that DHS affirmatively provides notice of the one-year deadline to all class members, DHS Defendants argue that the notice in the instructions to Form I-589 or instructions provided through some legal orientation programs *might* reach *some* class members. Significantly, however, DHS does not provide the I-589 or its accompanying instructions to class members prior to releasing them, believing it is not obligated to do so. Similarly, many, if not most, class members do not even attend a legal orientation program (LOP). And even if they do attend an LOP, providers are not obligated to discuss the one-year deadline and, indeed, Defendants acknowledge that some do not. Consequently, most class members never receive notice. That notice *may* fortuitously reach some class members is insufficient to safeguard the statutory right to asylum for all class members.

With respect to the instructions to Form I-589, DHS Defendants admit that they do not affirmatively or uniformly provide either the form or these instructions to class members. *See* Ex. C, DHS Resp. to First Req. for Produc., RFP 6-9 (listing documents DHS is required to provide to class members, which does not include Form I-589 or its accompanying instructions); Ex. D, DHS Supp. Resp. to First Req. for Admis., RFA 12-15 (admitting only that DHS complies with the immigration statute and applicable regulations, which do not require affirmatively providing a copy of the instructions or Form I-589 to all class members). Curiously, Defendants ignore 8 C.F.R. § 208.5(a), which provides that when class members are detained, DHS "shall make available the appropriate application forms" to pursue asylum or withholding of removal.[6]

[6] The regulation creates an exception for detained persons with pending credible fear determinations, stating only that "[a]lthough DHS does not have a duty in the case of an [noncitizen] who is in custody pending a credible fear or reasonable fear determination . . . DHS may provide the appropriate forms upon request." 8 C.F.R. § 208.5(a). However, by definition, Class A members successfully completed the credible fear process and Class B members were not placed in credible fear proceedings. Thus, under the regulation, DHS should provide class members with appropriate application forms because they all were in DHS custody when they stated their fear of

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The instructions to Form I-589 are on USCIS' website,[7] but that provides no aid to class members who lack knowledge of the deadline and, based on Defendants' actions, have no reason to believe that they need to seek out additional information regarding their ability to apply for asylum before seeing an immigration judge (IJ). Similarly, online materials do not aid class members who face a language barrier or lack access to technology. *Cf. Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000) (noting that applicants for asylum are often unrepresented, uninformed about relevant legal issues, and lacking English-language proficiency). Nor will it aid class members who mistakenly believe they already have applied for asylum when USCIS determined their fear of return was credible. *See, e.g.*, Dkt. 15, Freshwater Decl., ¶8 ("[S]everal of my clients have told me that they believed they had applied for asylum by passing the credible fear interview because during that process they told an asylum officer in detail about their asylum claim. . . . They are surprised when I tell them that they need to complete another application for asylum in writing."); Dkt. 16, Greenstein Decl., ¶7 ("[S]ome of these individuals think that because they have a received a positive credible fear determination, they have been granted asylum."); Dkt. 19, Cheng Decl., ¶9 ("Many of the individuals released from DHS custody are under the assumption that they have *already applied* for asylum").

Furthermore, an agency cannot comply with its duty to provide notice at a particular time by assuming that another entity may provide notice at some later time. *Cf. Picca v Mukasey*, 512 F.3d 75, 79 (2d Cir. 2008) (finding DHS's provision of notice of free legal services insufficient to fulfill immigration judge's duty to inform respondents of such services). Thus, DHS may not rely on EOIR's legal access programs to discharge its legal obligation.

Moreover, EOIR's legal access programs are inadequate as a substitute for notice. Many, if not most, class members will never attend one of the EOIR programs mentioned in Defendants' discovery responses, which include LOPs, Immigration Court Helpdesk programs

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return and/or desire to apply for asylum. But DHS does not do so. *See* Ex. C., DHS Resp. to First Req. for Produc., RFP 9 (identifying documents DHS is required to provide to class members who completed the credible fear process, which does not include Form I-589 or its accompanying instructions).

[7] *See, e.g.*, Ex. B, DHS Resp. to First Interrog., Interrog. 12-13.

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(ICHs), and Self-Help Legal Centers (SHLC). *See* Ex. F, EOIR Resp. to First Interrog., Interrog. 4. LOPs offer services only at 36 detention centers in the nation. *Compare* Ex. G, LOP Sites, at USA00173 *with* Ex. H, Authorized Facility List, at USA03338- USA03344 (revealing that out of 203 Immigration and Customs Enforcement (ICE) detention facilities, 167 *do not* offer LOPs). Since LOPs are intended for individuals in standard removal proceedings, they currently are not targeted to reach class members in expedited removal proceedings, and are only offered in over-72-hour detention facilities. *See* Ex. I, Lang Dep., at 57:6-58:18; 80:2-80:18. Where LOPs are offered, they are not provided every day, and Defendants admit that DHS could either transfer or release an individual interested in attending prior to the actual LOP session. *See* Ex. J, LOP and ICH Sched., at USA00175-USA00195; Ex. I, Lang Dep., at 95:22-96:3; 96:22-97:14. Tellingly, in 2015, *over half* of the individuals who appeared in LOP courts—that is the courts with detained dockets that serve LOP facilities—had not attended an LOP session. *See* Ex. K, 2015 Annual LOP Report, at USA-6-000317.[8]

Third, even if a class member were to attend an EOIR legal access program, there is absolutely no requirement—let alone any guarantee—that he or she would receive information about the filing deadline. EOIR approves a model curriculum for the LOP and ICH programs, which contains information about the one-year deadline, but Defendants readily admit that providers need not follow the model curriculum. *See* Ex. I, Lang Dep., at 74:12-75:10; *id.* at 64:21-65:12 (admitting also that the model curriculum does not include information about how an application can be filed to meet the one-year deadline).

In sum, DHS does not provide adequate notice of the one-year deadline.

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[8] Similarly, ICHs, to the extent that they might provide information on the filing deadline, do not reach all class members. They currently are available in only *five* of the more than 58 immigration courts nationwide. *See* Ex. G at USA00174; U.S. Dep't of Justice, EOIR, "EOIR Immigration Court Listing," *available at* https://www.justice.gov/eoir/eoir-immigration-court-listing (last updated Sept. 2017) (listing immigration court locations) (last accessed Oct. 27, 2017). SHLCs are also only offered in 22 immigration courts nationwide. *See* Ex. G at 174; Ex. L, Weintraub email, at 2 (providing updates to SHLC sites). Moreover, SHLC materials are not automatically provided to all potentially interested class members at those courts. *See* Ex. I, Lang Dep., at 143:4-14.

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b. DHS's Failure to Provide Notice Violates the INA and the APA.

Class members have a statutory right to apply for asylum. *See supra* § III.A.1. Because their ability to exercise that right is contingent upon filing in a timely manner, when DHS fails to provide notice of the one-year deadline or delays providing notice, it violates congressional intent. When it established the one-year deadline, Congress affirmed that it remained "committed to ensuring that those with legitimate claims of asylum are not returned to persecution . . ." 142 CONG. REC. S11, 840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch). Congress also emphasized that it did not want legitimate asylum seekers "returned to persecution" due to mere "technical deficiencies" in their asylum applications, like the expiration of the one-year deadline. *Id.* (statement of Sen. Hatch).

By failing to provide notice of the deadline when it apprehends and later releases class members, DHS causes class members to either (1) not receive notice of the deadline within one year of arrival, forcing them to face additional obstacles (*see supra* n.4); or (2) belatedly learn about the deadline through a third party, effectively depriving them of the full statutory period to which they are entitled to prepare and file their asylum application. In so doing, DHS limits the opportunity for class members to timely pursue their asylum claims, even though Congress did not intend for the one-year deadline to foreclose legitimate claims. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1076-77 (9th Cir. 2011) (holding that the government cannot unilaterally reduce the statutory time period for filing a motion to reopen where doing so would "completely eviscerate" congressional intent); *Almero v. INS*, 18 F.3d 757, 763 (9th Cir. 1994) ("[T]he INS may not *restrict* eligibility to a smaller group of beneficiaries than provided for by Congress"). Defendants' failure to provide notice of the one-year deadline thus violates the asylum statute and the implementing regulations. *See also* 8 C.F.R. § 208.5(a). Moreover, because the INA has been violated, the APA provides this Court with authority to remedy this violation. 5 U.S.C. §§ 702, 706.

2. DHS's Failure to Provide Adequate Notice Violates the Due Process Clause of the Fifth Amendment.

Notice is a "[a]n elementary and fundamental requirement of due process in any

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proceeding which is to be accorded finality." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 14 (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'"). Such notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. DHS must provide written notice of the one-year deadline at the time of or before class members' release from custody to comply with its due process obligations.

a. DHS Does Not Provide Notice That Is Reasonably Calculated to Timely Convey Information About the One-Year Deadline.

When determining "whether the government has provided sufficient notice," courts should apply the "reasonably calculated" test set out by the Supreme Court in *Mullane*. *Nozzi v. Hous. Auth.*, 806 F.3d 1178, 1193 n.17 (9th Cir. 2015). Thus, to comply with due process:

> [t]he notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane, 339 U.S. at 314-15 (citations omitted); *see also Nozzi*, 806 F.3d at 1994 ("The means [of providing notice] employed must be reasonably certain to actually inform the party, and in choosing the means, one must take account of the capacities and circumstances of the parties to whom the notice is addressed.") (citations and quotations omitted). For example, where the government provides notice on forms that are "confusing" and "affirmatively misleading," those forms are not reasonably calculated to inform affected parties of their rights. *Walters v. Reno*, 145 F.3d 1032, 1042, 1043 (9th Cir. 1998) (holding that "a confluence of factors" rendered notice constitutionally inadequate).

Here, DHS's failure to affirmatively require officials to provide *any* notice of the one-year deadline is a policy that, by definition, is not "reasonably calculated" to put class members on notice. *See supra* § III.A.1.a.i.

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Moreover, as in *Walters*, a "confluence of factors" here demonstrates that whatever notice EOIR Defendants happen to provide is not reasonably calculated to impart the necessary information to class members at a reasonable time and thus is constitutionally insufficient. Specifically, Defendants' discovery responses indicate that any notice they allegedly provide to class members is: (1) not provided to all or even most class members (*see, e.g.*, failure to provide Form I-589 with instructions and discussion of LOPs, *supra* § III.A.1.a.ii), and/or (2) not provided to class members early enough to allow them to benefit from the full statutory period which Congress authorized (*see, e.g.*, Ex. M, EOIR Resp. to First Req. for Produc., RFP 1 (discussing notice provided by IJs); *infra* n.11 (discussing delays in scheduling hearings before IJs)). The documents which Defendants are required to provide affirmatively in writing, either prior to or at the time they release class members from custody, do not contain notice of the filing deadline. *See* Ex. B, DHS Resp. to First Interrog., Interrog. 8-11; *supra* § III.A.1.a.i. Furthermore, some of the documentation DHS provides to class members is affirmatively misleading in that it states that IJs will provide them with any necessary information about and/or the opportunity to seek relief from removal. *See, e.g.*, Ex. N, Form I-862, "Notice to Appear," at USA03060 ("You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible . . . . You will be given a reasonable opportunity to make any such application to the immigration judge.").

Notice that is publicly available but not affirmatively provided may sometimes meet the requirements of due process. *See City of W. Covina v. Perkins*, 525 U.S. 234, 242 (1999) (finding public sources, like state statutes and case law, provided sufficient notice of remedies for return of seized property). Significantly, however, such notice is not always sufficient. *See Grayden v. Rhodes*, 345 F.3d 1225, 1244 (11th Cir. 2003) ("[]*West Covina* does not stand for the . . . proposition that statutory notice is always sufficient to satisfy due process."). It is not sufficient here. Class members in this case are especially vulnerable: many have suffered severe trauma, do not speak English, are unfamiliar with the very complicated immigration

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legal system, do not have access to counsel, and will be returned to face persecution if they are unable to navigate the asylum application process. *See Jacinto*, 208 F.3d at 733 (noting that applicants for asylum are often unrepresented, uninformed about relevant legal issues, and lacking English-language proficiency); *see also, e.g., Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (emphasizing the complexity of the immigration system and noting lawyers may be the only ones capable of navigating it); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (describing immigration laws as "second only to the Internal Revenue Code in complexity") (citation omitted). Furthermore, DHS released class members from its custody for the *express* purpose of allowing them to pursue their claims for asylum; its failure to provide them notice of the one-year deadline—a basic, threshold requirement to consideration of their applications—understandably deceived many of them, who would not expect to have to do more than what DHS officers advised when they were allowed to enter the country to seek refuge.

This problem is compounded by notices that DHS *does* provide class members, which indicate that they will be able to seek relief from removal by appearing before an IJ, but which make no mention of the one-year deadline. *See* Ex. N, Form I-862, "Notice to Appear," at USA03060 (stating that individuals "will be given" an opportunity to apply for relief before an IJ); Ex. O, Form I-870, "Record of Determination/Credible Fear Worksheet," at USA03069 (stating that if DHS finds credible fear, "your case will be referred to an immigration court, where you will be allowed to seek asylum" and related relief from removal). This information is particularly misleading for class members whose filing deadline will pass before they appear before an IJ. *See infra* § III.B.1 (discussing class members who do not appear before an IJ before the one-year deadline has run). These class members, having received instructions to pursue their cases in immigration court, reasonably wait for a hearing and indeed, many believe that they already have applied for asylum when they were interviewed by asylum officers for the credible fear determination. *See supra* § III.A.1.a.ii. To meet the deadline, class members

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would need to anticipate that the directions they receive are insufficient—i.e., do not inform them that they may be required to apply for relief *before* they have an opportunity to see an IJ—and then choose to seek out the information regarding obstacles they must overcome to secure their right to apply for asylum.

This is not a situation, then, in which class members could be expected to be on notice that they should search publicly available information for possible remedies they should pursue. Such a "confusing" and "misleading" system is not reasonably calculated to provide the necessary information. *Walters*, 145 F.3d at 1043; *see also Fogel v. Zell*, 221 F.3d 955, 962-63 (7th Cir. 2000) ("Fair or adequate notice has two basic elements: content and delivery. If the notice is unclear, the fact that it was received will not make it adequate.") (citation omitted).

Thus, DHS does not provide sufficient notice of the one-year deadline to satisfy the requirements of the Due Process Clause.

b. DHS's Failure to Provide Adequate Notice Violates Procedural Due Process.

DHS's failure to provide notice also violates procedural due process under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). When considering claims that an administrative procedure impedes individuals' due process rights, courts consider:

> [f]irst, 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, 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.

Id. at 335. To comply with their procedural due process obligations, DHS must provide affirmative notice of the filing deadline in writing at or before class members' release from custody.

i. Class members have a protected interest in the right to apply for asylum.

DHS's failure to provide adequate notice impedes class members' right to apply for asylum, and the strength of class members' interests in this right should weigh heavily in favor of requiring additional procedural protections. Decades of case law confirm that deportation

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from the United States can result in serious and irreparable injuries, *see, e.g.*, *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."), especially for class members here, all of whom fear persecution in their countries of origin, *see, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the [noncitizen] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

These interests are cognizable under the Due Process Clause of the Fifth Amendment. Class members have an unquestioned right to apply for asylum under the INA. *See supra* § III.A.1; *Campos*, 43 F.3d at 1288. Their protected interest in this statutory right triggers procedural due process protections. *See Kerry v. Din*, 135 S. Ct. 2128, 2136 (2014) (Scalia, J.) (finding the proposition "that procedural due process rights attach to liberty interests . . . created by nonconstitutional law, such as a statute," "unobjectionable" under Supreme Court case law); *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970); *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from . . . an expectation or interest created by state laws or policies . . . .").

ii. The risk of erroneous deprivation is high absent adequate notice.

Unrefuted evidence confirms that the second *Mathews* factor also weighs in class members' favor. Under DHS's current system, class members regularly miss the one-year deadline. Adequate notice—provided directly by DHS, in writing, soon after apprehension—would decrease the risk that class members would be erroneously denied their statutory right to apply for asylum.

The record reflects that asylum seekers regularly fail to file their applications within a year of entering the United States because they are unaware of the deadline. *See, e.g.*, Dkt. 13, Alberti Decl., ¶6; Dkt. 15, Freshwater Decl., ¶¶12-13; Dkt. 16, Greenstein Decl., ¶7; Dkt. 19, Cheng Decl., ¶¶8-10. These class members are therefore erroneously deprived of their statutory

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right to seek asylum.[9] Written notice affirmatively provided to class members shortly after their entry into the United States and apprehension by DHS would minimize the risk of erroneous deprivation by alerting asylum seekers to their obligations while they are still within the statutory period in which to prepare and file an application. *See supra* § III.A.2.a. (discussing misleading information DHS currently provides to class members).

iii. Defendants have no countervailing interests that overcome the private interests at issue in this case.

There are no government interests that weigh against providing adequate notice of the one-year deadline under the third prong of *Mathews*. Indeed, the government has an affirmative interest in the fair and accurate adjudication of immigration cases in general—and asylum cases in particular—which further counsels in favor of providing notice. *See, e.g.*, *Matter of S-M-J-*, 21 I. & N. Dec. 722, 727 (BIA 1997) ("[A]s has been said, the government wins when justice is done."); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

Any associated administrative burden or cost to DHS in providing affirmative, written notice at or before class members' release from detention would be marginal at most. DHS already provides a variety of printed forms to class members between their apprehension and release from custody, *see* Ex. B, DHS Resp. to First Interrog., Interrog. 8-11, and either handing a person a pre-printed form or printing one out and handing it to a person generally takes officers only a few minutes, *see, e.g.*, Ex. A, Mura Dep., at 150:22-151:11; s*ee also* 8 C.F.R. § 208.5(a) (obligating DHS officials to make available appropriate application forms while persons are detained). Adding information about the filing deadline to such forms or

[9] The opportunity to seek a discretionary waiver of the deadline from an IJ does not remedy this harm. As this Court has already recognized, individuals who must undertake the burden of seeking a discretionary waiver are still denied their statutory right to apply for asylum. Dkt. 37 at 8-9; Dkt. 41 at 3. But even if the discretionary waiver system were a potential alternative safeguard, it would not solve the procedural due process concerns at issue here—requiring each class member to seek a discretionary waiver would further impede both private and government interests by requiring additional litigation by vulnerable class members and slowing down the already overburdened immigration court system.

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creating a new print-out would not place a significant burden on the government. As the Ninth Circuit has recognized:

> Surely [a small amount of additional] information could be readily incorporated into the standard form without placing any burden on the government's fiscal and administrative resources. There is no reason to conclude, after all, that "printing six paragraphs of information is any more burdensome than printing four paragraphs of information."

Nozzi, 806 F.3d at 1198 (quoting *Henry v. Gross*, 803 F.2d 757, 768 (2d Cir. 1986)). Here, there is no reason to believe that adding text to a document or printing one additional document would place any burden on the government. For all these reasons, the record reveals no genuine dispute as to class members' due process claim to adequate notice of the one-year deadline.

B. DEFENDANTS' FAILURE TO PROVIDE A MECHANISM TO TIMELY FILE THEIR ASYLUM APPLICATIONS VIOLATES CLASS MEMBERS' STATUTORY AND CONSTITUTIONAL RIGHTS TO APPLY FOR ASYLUM.

1. The Lack of a Uniform Mechanism Violates the Asylum Statute and the APA.

Defendant DHS's failure to provide notice of the one-year deadline is compounded by the fact that, even if class members happen to learn of the filing deadline in a timely manner, Defendants have failed to create uniform mechanisms which ensure that they may timely file their asylum applications. Instead, Defendants have done the exact opposite, making it impossible in many cases for class members to timely apply for asylum.

As detailed below, DHS refuses to accept asylum applications filed by class members, purportedly because jurisdiction to adjudicate those applications is going to—at some point in the future—vest with the immigration court. However, at the same time, an immigration court will not accept an application until, at a very minimum, an NTA has been filed with that court—an event that, in some cases, does not occur until the class member has been in the United States for more than a year. *See* Ex. V, DHS Resp. to First Req. for Admis., RFA 5. Moreover, as Defendants acknowledge, immigration courts have delayed processing an NTA after receipt for more than six, nine, or even 12 months. *See* Ex. P, EOIR Resp. to First Req. for Admis., RFA 3-5. These delays are not rare and occur at immigration courts across the country. *See* Ex. W, Neifert Memo., at USA-6-000193 (Los Angeles Immigration Court); Ex. X,

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Memo., at USA-6-000117 (Cleveland Immigration Court); Ex. Y, Email "RE: Overtime Evaluation," at USA-6-000844 (Boston Immigration Court); Ex. Z, Email "RE: NTAs," at USA-8-002111-12 (San Francisco Immigration Court); *see also* Dkt. 14, Allyn Decl., ¶11 ("[T]he NTA might be delivered to the court, but it may not be recorded in the court system for weeks or months"); Dkt. 13, Alberti Decl., ¶6 (discussing case of client whose first immigration court hearing was not scheduled until more than a year after her arrival in the U.S.); Dkt. 17, Harriger Decl., ¶8 (noting that the San Antonio immigration court "regularly is delayed in docketing cases"). Where the immigration court does not promptly process the NTA, and the filing deadline passes, there is no venue for class members to file their asylum applications and, thus, Defendants violate class members' statutory right to apply for asylum.

The absence of a guaranteed and accessible venue in which to timely file an asylum application also violates congressional intent. Through § 201(b) of the Refugee Act, Congress first enacted the asylum statute, currently located at 8 U.S.C. § 1158(a), and directed the Attorney General to "establish a procedure for [a noncitizen] physically present in the United States or at a land border or port of entry . . . to apply for asylum . . . ." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 552 (9th Cir. 1990); *see also* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102 (1980). "Congressional intent was to create a 'uniform procedure' for consideration of asylum claims which would include an opportunity for [noncitizens] to have asylum applications 'considered outside a deportation and/or exclusion hearing setting.'" *Orantes-Hernandez*, 919 F.2d at 552 (citation omitted).

All class members have indicated to DHS that they fear persecution in their countries of origin and, all possess the statutory right to apply for asylum. *See supra* § III.A.1; *see also* Dkt. 7 § II.A. Indeed, for those within Class A, DHS already has determined that they possess a credible fear of persecution. The procedures that DHS and EOIR have developed for thereafter accepting class members' asylum applications do not allow them to uniformly exercise their right to apply for that protection. Instead, class members are only able to file their asylum

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applications within a year of their arrival if the agencies act promptly to initiate their removal proceedings—which Defendants acknowledge does not always happen and is entirely outside the control of the class members themselves. Put simply, there is no procedural mechanism that ensures class members will have the opportunity to timely file their applications.

USCIS, the agency within DHS designated to adjudicate affirmative asylum applications, has a convoluted system for determining whether to accept asylum applications filed by individuals who have been issued NTAs. *See* Ex. Q, Lafferty Memo, at USA-2-000053 ("Asylum Jurisdiction Reference Chart" identifying when USCIS has jurisdiction over an asylum application filed by an individual who has been issued an NTA). As a result, USCIS will accept few, if any, applications filed by class members. *Id.*

First, USCIS will not accept any application filed by a Class A member. *See, e.g., id.* (noting that USCIS does not have jurisdiction over an I-589 application from an applicant who has been placed in expedited removal proceedings). These class members are *initially* placed in expedited removal; but once they are found to have a credible fear of persecution, they are taken out of expedited removal proceedings and issued an NTA. *See supra* n.2. USCIS policy is to uniformly reject asylum applications filed by these class members, even where the NTA has not yet been filed with an immigration court. *See* Ex. Q, Lafferty Memo, at USA-2-000053. In fact, this is exactly what happened to Plaintiffs Rodriguez and Mendez. Plaintiff Rodriguez attempted to file his asylum application with USCIS within a year of his arrival in the United States (and before his NTA had been filed with an immigration court). However, USCIS did not accept his application as affirmatively filed. *See* Dkt. 42 ¶63. In fact, it appears USCIS did not know how to process his application. *See* Ex. R, at USA-3-000348 (email correspondence noting that USCIS does not "exactly have a system" for dealing with I-589 applications filed by someone to whom an NTA has been issued and that two individuals "have been working on some of these cases piecemeal"). Similarly, Plaintiff Mendez attempted to file her application with USCIS while waiting for her NTA to be filed with an immigration court. However, USCIS

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rejected her application, presumably because an NTA had been issued. *See* Dkt. 42 ¶73; Ex. T, USCIS Notice of Lack of Jurisdiction.

USCIS also prevents most Class B members from applying for asylum with USCIS if their NTAs have not yet been filed with immigration courts. Class B members have expressed a fear of persecution, been issued an NTA, and released to wait for a court hearing. USCIS will not accept an asylum application for filing if it determines that ICE "will file" the NTA with a court at some point in the future. *See* Ex. Q, Lafferty Memo, at USA-2-000053. Because ICE almost always intends to submit the NTAs it has issued with the immigration court, USCIS generally will reject an asylum application filed by a Class B member.

USCIS's refusal to accept jurisdiction over asylum applications from class members whose NTAs have not been filed with an immigration court violates the immigration regulations and the agency's own policy: 8 C.F.R. § 208.2 provides that an immigration court's jurisdiction to accept and adjudicate an asylum application vests "after the charging document has been filed with the Immigration Court." Similarly, USCIS's Affirmative Asylum Procedures Manual states that USCIS has jurisdiction over an application until an NTA has been filed. Ex. S, Affirmative Asylum Proc. Manual, at USA-2-000003. Yet, USCIS's policy and practice dictate the opposite. *See* Ex. Q, Lafferty Memo., at USA-2-000053 (identifying numerous scenarios in which USCIS will not accept jurisdiction over an asylum application even though an NTA has not been filed with the immigration court). Even assuming USCIS has a valid basis for rejecting asylum applications in this procedural posture, the fact remains that class members are unable to file their applications with that agency.

Where USCIS refuses to accept jurisdiction over asylum applications from class members whose NTAs have not been filed with the immigration court, the only possible venue for filing these applications is with an immigration court. However, many class members are unable, through no fault of their own, to timely file their applications with an immigration court for several reasons.

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First, immigration courts will not accept an asylum application unless the NTA is filed with the immigration court. *See* Ex. U, Neifert Dep., at 58:9-21. But, as Defendants admit, there is no requirement that DHS ever file an NTA with an immigration court and, correspondingly, no requirement that DHS file an NTA within any particular period of time. *See* Ex. V, DHS Resp. to First Req. for Admis., RFA 1-2. Consistent with that lack of a temporal requirement, Defendants admit that at times it takes more than a year for DHS to file an NTA with an immigration court. *See id.*, RFA 5; Ex. U, Neifert Dep., at 27:11-15; *see also* Dkt. 31, Bailey Decl., ¶¶4-5 (reporting more than a year-long delay in filing an NTA with the immigration court); Dkt. 32, Huebner Decl., ¶¶4, 7 (reporting more than a three-year and two-year delay); Dkt. 33, Arno Decl., ¶¶6, 13 (reporting more than a year-long and two-and-a-half-year delay); Dkt. 34, Contreras Decl., ¶5 (reporting more than a three-year delay).

Indeed, this is exactly the experience of named Plaintiffs Rodriguez, Mendez, and Lopez. DHS did not file Plaintiff Rodriguez's NTA with the immigration court until more than one year after his arrival—in fact, until after this litigation began. *See* Ex. DD, Rodriguez NTA, at USA-3-000307 (showing issuance date of July 2014 and filing date with EOIR of September 2016). In the meantime, USCIS rejected his asylum application based solely on the fact that an NTA had been issued, *see* Ex. R at USA-3-000349, and the San Antonio Immigration Court rejected his application because the NTA had not been filed, *see* Ex. FF, San Antonio Rejection Notice. Likewise, DHS did not file Plaintiff Mendez's NTA within one year of her arrival. *Compare* Ex. CC, Mendez NTA, at USA-3-254 (showing issuance date of October 2013 and entry date of September 2013) *with* Ex. BB, Mendez Hearing Notice (showing first immigration court hearing notice sent May 2015, with the hearing set for November 2019). In the meantime, USCIS had rejected her asylum application because DHS had issued an NTA. *See* Ex. T, USCIS Notice of Lack of Jurisdiction. Additionally, DHS also filed Plaintiff Lopez's NTA more than a year after her arrival. *See* Ex. GG, Lopez NTA, at USA-3-000422 (showing issuance date of September 2015 and entry date of February 20*14*, along with filing

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date with EOIR of October 2015). For these Plaintiffs, and for similarly situated class members, there was and is no mechanism for timely filing their asylum applications.

Second, even where DHS files an NTA with an immigration court within a year of a class member's arrival in the United States, various delays within the immigration court prevent that class member from being able to file an application prior to the deadline. Immigration courts routinely experience delays between the court's receipt of an NTA and its entry into EOIR's computer system. Defendants admit that, in some cases, it has taken more than a year for an immigration court to enter a filed NTA into its computer system. *See* Ex. P, EOIR Resp. to First Req. for Admis., RFA 5; Ex. U, Neifert Dep. at 49:2-5. For example, 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. Ex. W, Neifert Memo., at USA-6-000193. EOIR also found numerous NTAs stacked on staging shelves in that court. *Id.* In May 2017, there were 377 NTAs in the Cleveland Immigration Court that had, similarly, not been processed. Ex. X, Memo., at USA-6-000117. The Boston Immigration Court likewise noted backlogs in its processing of NTAs. Ex. Y, Email "RE: Overtime Evaluation," at USA-6-000844; *see also* Ex. Z, Email "RE: NTAs," at USA-8-002111-12 (showing that as of March 2017, San Francisco Immigration Court staff had not entered NTAs from December 2016 into EOIR's system).[10]

During this period—between the receipt of the NTA and its entry into EOIR's computer system—courts do not uniformly accept class members' asylum applications. In the San Francisco Immigration Court, for example, court staff were instructed to check the computer system before accepting asylum applications submitted by mail. *See* Ex. AA, Email from SF Court Administrator, at USA-8-001800 ("With regard to mailed filings, the staff person . . . will review CASE to ensure the NTA has been filed with San Francisco . . ."). And it makes sense

[10] In fact, even where the court takes four months to input the NTA, as it did in Los Angeles in March 2016, Ex. W, Neifert Memo., at USA-6-000193, a class member could be denied the opportunity to timely file his or her application if DHS waited eight months or more to file the NTA with the court.

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that a court would not know whether an NTA had been filed with it before the NTA has been entered into the computer system, because—as discussed above—some courts have hundreds of unprocessed NTAs at any one time. Thus, the courts' delay in entering NTAs into their computer system provides another impediment to class members' ability to timely file their applications.

This delay affects class members in another way as well. As Defendants acknowledge, "no information [about a case in removal proceedings] would be available on [EOIR's public] phone system until an NTA was filed with EOIR *and* entered into EOIR's system." Dkt. 42 ¶72 (emphasis added); *see also* Ex. U, Neifert Dep., at 65:20-67:10. Even entering the NTA into EOIR's computer system, however, is insufficient to notify class members that the court has his or her case.[11] And, of course, where that NTA entry takes more than a year, Defendants effectively deny class members the ability to timely file their applications with the court.

To the extent Defendants attempt to argue that their September 14, 2016, Operating Policies and Procedures Memorandum ("OPPM"), *see* Ex. E, OPPM 16-01, which was implemented after this lawsuit was filed, provides a mechanism ensuring that class members may timely file their asylum applications, this is not the case. To be sure, class members who sought to timely file their asylum applications before the issuance of the OPPM faced additional significant procedural roadblocks. Most significantly, before the OPPM, EOIR's sub-regulatory policy and practice required that asylum applications be filed only at a hearing before an immigration judge. Dkt. 1 ¶¶53-58.

The OPPM changed this EOIR policy by eliminating the requirement that asylum applicants file their applications in open court. Now, after an NTA is filed with an immigration court and entered into the EOIR system, an applicant can file the application by mail or at the

[11] EOIR does not affirmatively notify class members of their removal proceedings until it issues a hearing notice, something which is not necessarily done upon initial entry of the NTA into EOIR's system, and which is not required by written policy to occur within a particular time frame. *See* Ex. U, Neifert Dep., at 70:3-25, 72:16-19; 75:22-76:1; *see also, e.g.*, Dkt. 14, Allyn Decl., ¶11 (noting that scheduling a hearing in immigration court "also present[s] further delay"); Dkt. 15, Freshwater Decl., ¶11 (noting it "may take the Immigration Court several months to schedule a hearing").

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court prior to an initial master hearing, and upon receipt by the court, the application will be considered filed for purposes of the one-year rule. Ex. E, OPPM 16-01, at 3. Though this new policy has allowed some class members to timely file their asylum applications with an immigration court, it does not come close to providing a guaranteed mechanism for all class members.[12] This is because, as discussed above, DHS fails to file, and/or immigration courts fail to enter, many NTAs until the filing deadline has passed. As such, asylum seekers are unaware that their cases are pending in a particular immigration court and that they may apply for asylum with EOIR. And in the meantime, USCIS generally will not accept these asylum applications because an NTA has been issued. *See supra* at 17-18. Thus, the OPPM did not remedy Defendants' failure to provide an adequate mechanism to protect class members' statutory rights.[13]

In sum, Defendants have violated class members' statutory right to apply for asylum by failing to provide a mechanism that guarantees them the opportunity to file their applications within a year of their arrival in the country. As such, the APA provides this Court with authority to remedy this violation. 5 U.S.C. §§ 702, 706.

2. Defendants' Failure to Provide a Mechanism for Timely Filing Also Violates Procedural Due Process.

Defendants' failure to implement a mechanism by which class members can timely file their asylum applications also violates their constitutional right to due process.

Because they have a statutory right to apply for asylum, class members are entitled to due process in the pursuit of that right. *Wilkinson*, 545 U.S. at 221 (stating that due process requires compliance with fair procedures prior to any deprivation of an individual's protected liberty or property interest). The "fundamental requirement of due process is the opportunity to

[12] Moreover, for class members who missed their filing deadline before the OPPM was implemented, the changes it created are of no value. *See, e.g.*, *supra* at 17-18 (discussing Plaintiffs Rodriguez and Mendez's inability to file within one year after entries in 2014 and 2013, respectively).

[13] Moreover, Defendants' pre-OPPM policy is relevant for the Court to consider in adjudicating this motion. The OPPM was issued after the commencement of this litigation. As such, many class members, whose one-year deadlines lapsed prior to the OPPM's issuance, already lost the opportunity to timely file for asylum.

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be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The proper procedure to be afforded in a particular case depends on the interests at stake. *Id.* at 334.

In this case, the *Mathews* balancing test weighs heavily in class members' favor. As previously established, class members' interest could hardly be graver: Defendants' current procedures impact an interest that, in some cases, literally involves life or death. Class members have fled their home countries and seek protection from persecution. USCIS already has found some to have a credible fear of persecution. Class members' ability to properly file an asylum application is of utmost importance, as asylum is the only remedy that can protect many of them from being returned to a country where they have been harmed and/or are at risk of being harmed or even killed. *See supra* § III.A.2.b.i.

As discussed in Section III.A.2, *supra*, Defendants' current procedures violate due process because Defendant DHS fails to provide notice of the one-year deadline. They also violate due process because class members cannot count on either USCIS or the immigration courts to provide an opportunity to comply with the deadline. On the one hand, USCIS will not accept their applications if DHS has issued an NTA (despite a regulatory mandate to do so), and, on the other hand, because of delays by both DHS and EOIR, *see supra* § III.B.1, immigration courts will not accept their applications until the NTA is received and entered into their system, which often does not happen until they have been in the United States for more than a year. The risk of erroneous deprivation is thus impermissibly high.

Finally, Defendants could remedy these statutory and constitutional violations by providing class members with a guaranteed mechanism for timely filing their asylum applications. As just one of a number of possible solutions, Defendants could establish a central mail lockbox for accepting and processing asylum applications filed by class members, as they do with other application processes. *See, e.g.*, Ex. EE, Instructions for Submitting Certain Applications (requiring applicants for relief in removal proceedings, including asylum

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applicants, to send their application and applicable fees to a USCIS service center). DHS could provide class members, upon issuance of an NTA, with notice of the deadline and instructions for filing an asylum application with that lockbox. Upon receipt, both DHS and EOIR could consider the application filed for purposes of the one-year deadline.[14] This would provide class members the right that they have under the statute: the ability to prepare and file their asylum applications during their first year in the country. The establishment of such a lockbox would entail minimal burden to Defendants as USCIS and EOIR already work jointly to accept and process many different kinds of applications for people in removal proceedings. *See, e.g., id.*; *see also* Ex. S, Affirmative Asylum Proc. Manual, at USA-2-000002; Ex. Q, Lafferty Memo, at USA2-000053 (USCIS already receives asylum applications filed by class members and other people who are seeking asylum but have been issued an NTA). As this illustrates, the burden to Defendants of establishing such a procedure would be minimal.

In any event, any burden on Defendants caused by establishing a guaranteed mechanism does not outweigh the private interest at stake in this case. When considering the *Mathews* factors, the balance tips sharply in favor of class members as a procedural safeguard is necessary to protect their statutory right to apply for asylum.

IV. CONCLUSION

Class members respectfully request that the Court grant this motion and enter the enclosed proposed order requiring DHS Defendants to provide notice of the one-year deadline and decreeing that both DHS and EOIR Defendants must implement a system that ensures class members the opportunity to timely comply with the deadline.

Dated this 30th day of October, 2017.

Respectfully submitted,

[14] At that point, the administrators of the lockbox would simply route it to the proper agency for further processing. If an NTA has not been filed with an immigration court, DHS would process the application; if an NTA has been filed, the application should be forwarded to the immigration court with jurisdiction over the case.

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CERTIFICATE OF SERVICE

I, Glenda M. Aldana Madrid, hereby certify that on October 30th, 2017, I electronically filed the foregoing motion and proposed order with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

Executed in Seattle, Washington, on October 30, 2017.

s/ Glenda M. Aldana Madrid

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