

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

STATE OF INDIANA, STATE OF NORTH DAKOTA, STATE OF ALASKA, STATE OF ARKANSAS, STATE OF FLORIDA, STATE OF IDAHO, STATE OF IOWA, COMMONWEALTH OF KENTUCKY, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEW HAMPSHIRE, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF TENNESSEE, STATE OF UTAH, COMMONWEALTH OF VIRGINIA, and STATE OF WYOMING,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; TROY A. MILLER, in his official capacity as Acting Commissioner of U.S Customs and Border Protection; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, in his official capacity as Director of U.S. Immigration and Customs Enforcement; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UR JADDOU, in her official capacity as Director for U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; RAUL ORTIZ, in his official capacity as Chief of the U.S. Border Patrol; U.S. BORDER PATROL; MERRICK GARLAND, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; DAVID NEAL, in his official capacity as Director of the Executive Office for Immigration Review; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES OF AMERICA,

Defendants.

Civil Action No.

Introduction

1. At a hearing by the House Committee on Homeland Security on March 15, 2023, U.S. Border Patrol Chief Raul Ortiz admitted that the United States does not have operational control of the southern border.¹ Since then, the situation at the southern border has deteriorated further.

2. Yet, in the midst of the worst border crisis in our nation's history, the Defendants are attempting to implement a final rule that will further degrade our nation's border security and make it even easier to illegally immigrate into the United States. *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 (May 16, 2023) (the "Circumvention Rule").

3. The Circumvention Rule euphemistically characterizes the current once-in-a-century border crisis—whereby millions of aliens have illegally crossed the border, flooded American communities, and stretched to the breaking point state and local social services and education systems—as merely “a substantial increase in migration.” 88 Fed. Reg. at 31,341. Strikingly, the Circumvention Rule does not acknowledge the root cause of the crisis: the Administration's reckless open borders policies. Instead, the Circumvention Rule tries to define the problem away by re-characterizing what would be illegal crossings as “lawful pathways.”

4. The Defendants claim that the Circumvention Rule will deter illegal border crossings, decrease the number of new unlawful aliens in the United States, and reduce reliance on human smuggling networks. The truth, however, is that the Circumvention Rule is some combination of a half measure and a smoke screen. It is riddled with exceptions, and it is part of the Biden Administration's broader effort to obfuscate the true situation at the Southwest Border.

5. The Biden Administration's unlawful parole policies will increase the number of unlawful aliens in the United States by guaranteeing a quicker path to quasi-legal status in the United

¹ See Priscilla Alvarez, *Border Chief Disputes DHS Has 'Operational Control' of the Entire US Southern Border*, CNN (Mar. 15, 2023), <https://www.cnn.com/2023/03/15/politics/border-control-hearing/index.html>.

States (with accompanying work permits and access to entitlement programs and social services). And the toothless Circumvention Rule will do little to prevent the resulting irreparable harm to the Plaintiff States.

6. The Circumvention Rule claims that it will reduce illegal immigration by introducing a “rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel.” 88 Fed. Reg. at 31,314. However, the preamble to the Circumvention Rule itself gives the game away, explaining that aliens who use the CBP One app² to “schedule” their entry into the United States at a specific Port of Entry (POE) will be “exempted from this rule’s rebuttable presumption on asylum eligibility.” 88 Fed. Reg. at 31,318. The real purpose of the Circumvention Rule is to incentivize “an increasing number of migrants” to use the CBP One app to make bogus asylum claims, all while avoiding the bad optics of crowds of illegal aliens “wait[ing] in long lines of unknown duration at the POEs” or crossing between POEs. *Id.*

7. The rebuttable presumption of the Circumvention Rule includes a number of exceptions that unlawfully circumvent U.S. immigration law and that allow into the United States aliens not entitled to admission into the United States. 88 Fed. Reg. at 31,450 (creating exceptions at new 8 C.F.R. § 208.33(a)(2)). Those exceptions are contrary to law, and are arbitrary and capricious. Furthermore, the Circumvention Rule’s list of factors that would allow an alien to rebut the Rule’s presumption contains some factors that are contrary to law, unreasonably vague, and arbitrary and capricious. *Id.* (creating conditions for rebuttal of presumption at new 8 C.F.R. § 208.33(a)(3)).

8. The Circumvention Rule references a new “process” that is unlawful and would allow vast numbers of aliens to enter the country and receive instant work authorization and quick access

² CBP One is a mobile application that serves as a portal for a variety of U.S. Customs and Border Protection (CBP) services. Through guided questions, the app directs users to the appropriate CBP services.

to public benefits. These aliens, who previously would have had to cross the border illegally, will still lack lawful status in the United States (though with a false imprimatur of legality, thanks to the Biden Administration's unlawful procedures), and the States will still be forced to bear the cost of their presence.

9. The rebuttable presumption created by the Circumvention Rule is lawful. However, the exemptions to that rebuttable presumption are not. Nor are the unreasonably vague factors allowing aliens to rebut the presumption. The Circumvention Rule contains a severance provision stating "that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law." This Court should therefore declare the exceptions to the Circumvention Rule to be unlawful, vacate those exceptions, and enjoin Defendants from implementing them.

Parties

10. Plaintiff State of Indiana is a sovereign State of the United States of America. Indiana sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Indiana brings this suit through its Attorney General, Todd Rokita. He is authorized by Indiana law to sue on the State's behalf. His address is 302 W. Washington Street, I.G.C.S – 5th Floor, Indianapolis, IN 46204.

11. Plaintiff State of North Dakota is a sovereign State of the United States of America. North Dakota sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. North Dakota brings this suit through its Attorney General, Drew H. Wrigley. He is authorized to sue on the State's behalf. His address is 500 N. 9th St., Bismarck, ND 58501-4509.

12. Plaintiff State of Alaska is a sovereign State of the United States of America. Alaska sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Alaska brings this suit through its Attorney General, Treg Taylor. He is authorized by Alaska law to sue on the State's behalf. His address is 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501.

13. Plaintiff State of Arkansas is a sovereign state of the United States of America. Arkansas sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Arkansas brings this suit through its Attorney General, Tim Griffin. He is the chief legal officer of the State of Arkansas and has the authority to represent the State in federal court. *See* Ark. Code Ann. § 25-16-703(a).

14. Plaintiff State of Florida is a sovereign State of the United States of America. Florida sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Florida brings this suit through its Attorney General, Ashley Moody. She is authorized by Florida law to sue on the State's behalf. Her address is PL-01, the Capitol, Tallahassee, Florida 32399.

15. Plaintiff State of Idaho is a sovereign State of the United States of America. Idaho sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Idaho brings this suit through its Attorney General, Raúl R. Labrador. He is authorized by Idaho law to sue on the State's behalf. His address is P.O. Box 83720 Boise, Idaho 83720.

16. Plaintiff State of Iowa is a sovereign State of the United States of America. Iowa sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Iowa brings this suit through its Attorney General, Brenna Bird. She is

authorized by Iowa law to sue on the State's behalf under Iowa Code § 13.2. Her address is 1305 E. Walnut St., Des Moines, Iowa 50309.

17. Plaintiff Commonwealth of Kentucky is a sovereign State of the United States of America. Kentucky sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Kentucky brings this suit through its Attorney General, Daniel Cameron. He is authorized by Kentucky law to sue on the State's behalf. His address is 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601.

18. Plaintiff State of Mississippi is a sovereign State of the United States of America. Mississippi sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Mississippi brings this suit through its Attorney General, Lynn Fitch. She is authorized by Mississippi law to sue on the State's behalf. Her address is 550 High Street, Suite 1200, Jackson, MS 39201.

19. Plaintiff State of Missouri is a sovereign State of the United States of America. Missouri sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Missouri brings this suit through its Attorney General, Andrew Bailey. He is authorized by Missouri law to sue on the State's behalf. His address is P.O. Box 899, Jefferson City, Missouri 65102.

20. Plaintiff State of Montana is a sovereign State of the United States of America. Montana sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Montana brings this suit through its Attorney General, Austin Knudsen. He is authorized by Montana law to sue on the State's behalf. His address is 215 North Sander Street, Helena, Montana 59601.

21. Plaintiff State of New Hampshire is a sovereign State of the United States of America. New Hampshire sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including

its interests in protecting its citizens. New Hampshire brings this suit through its Attorney General, John M. Formella. He is authorized to sue on the State's behalf. His address is 33 Capitol Street, Concord, NH 00301.

22. Plaintiff State of Oklahoma is a sovereign State of the United States of America. Oklahoma sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Oklahoma brings this suit through its Attorney General, Gentner F. Drummond. He is authorized by Oklahoma law to sue on the State's behalf under OKLA. STAT. tit. 74, § 18b. His address is 313 NE 21st Street, Oklahoma City, OK 73105.

23. Plaintiff State of South Carolina is a sovereign State of the United States of America. South Carolina sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. South Carolina brings this suit through its Attorney General, Alan Wilson. He is authorized by South Carolina law to sue on the State's behalf. His address is P.O. Box 11549, Columbia, South Carolina 29211.

24. Plaintiff State of Tennessee is a sovereign State of the United States of America. Tennessee sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Tennessee brings this suit through its Attorney General, Jonathan Skrmetti.

25. Plaintiff State of Utah is a sovereign State of the United States of America. Utah sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Utah brings this suit through its Attorney General, Sean D. Reyes. He is authorized by Utah law to sue on the State's behalf.

26. Plaintiff Commonwealth of Virginia is a sovereign State of the United States of America. Virginia sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including

its interests in protecting its citizens. Virginia brings this suit through its Attorney General, Jason Miyares. He is authorized by Virginia law to sue on the Commonwealth's behalf.

27. Plaintiff State of Wyoming is a sovereign State of the United States of America. Wyoming sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Wyoming brings this suit through its Attorney General, Bridget Hill. She is authorized by Wyoming law to sue on the State's behalf under Wyo. Stat. Ann. § 9-1-603. Her address is 109 State Capitol, Cheyenne, WY 82009.

28. Defendants are officials of the United States government and United States governmental agencies responsible for promulgating or implementing the Circumvention Rule.

29. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and therefore the "head" of DHS with "direction, authority, and control over it." 6 U.S.C. § 112(a)(2). Defendant Mayorkas is sued in his official capacity.

30. Defendant United States Department of Homeland Security ("DHS") is a federal cabinet department.

31. Defendant Troy A. Miller serves as Acting Commissioner of U.S. Customs and Border Protection. He is sued in his official capacity.

32. Defendant U.S. Customs and Border Protection ("CBP") is an agency within DHS that is headquartered in Washington, D.C.

33. Defendant Tae Johnson serves as the senior official performing the duties of the director of U.S. Immigration and Customs Enforcement. He is sued in his official capacity.

34. Defendant U.S. Immigration and Customs Enforcement ("ICE") is an agency within DHS that is headquartered in Washington, D.C.

35. Defendant Ur Jaddou serves as the Director for U.S. Citizenship and Immigration Services. She is sued in her official capacity.

36. Defendant U.S. Citizenship and Immigration Services is an agency within DHS that is headquartered in Camp Springs, Maryland.

37. Defendant Raul Ortiz serves as the Chief of the U.S. Border Patrol. He is sued in his official capacity.

38. Defendant U.S. Border Patrol (“BP”) is an agency within DHS that is headquartered in Washington, D.C.

39. Defendant Merrick Garland is Attorney General of the United States of America. He is sued in his official capacity.

40. Defendant Department of Justice (“DOJ”) is a federal cabinet department.

41. Defendant David Neal is the Director of the Executive Office for Immigration Review. He is sued in his official capacity.

42. Defendant Executive Office for Immigration Review (“EOIR”) is an agency within DOJ.

43. Defendant the United States of America is sued under 5 U.S.C. §§ 702–703 and 28 U.S.C. § 1346 and includes the departments and agencies thereof.

Jurisdiction and Venue

44. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§ 1331, 1346, 1361; 5 U.S.C. §§ 701-06.

45. An actual controversy exists between the parties within the meaning of 28 U.S.C. §§ 2201(a), and this Court may grant declaratory and injunctive relief, vacatur, and other relief under 28 U.S.C. §§ 2201-02, 5 U.S.C. §§ 705-06, 28 U.S.C. § 1361, and its inherent equitable powers.

46. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because (1) Defendants are United States agencies or officers sued in their official capacities, (2) the State of North Dakota is a resident of this judicial district, and (3) no real property is involved. *See Atlanta & F.R. Co. v. W. Ry.*

Co. of Ala., 50 F. 790, 791 (5th Cir. 1892); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482 (D. Md. 2020).

Factual and Legal Background

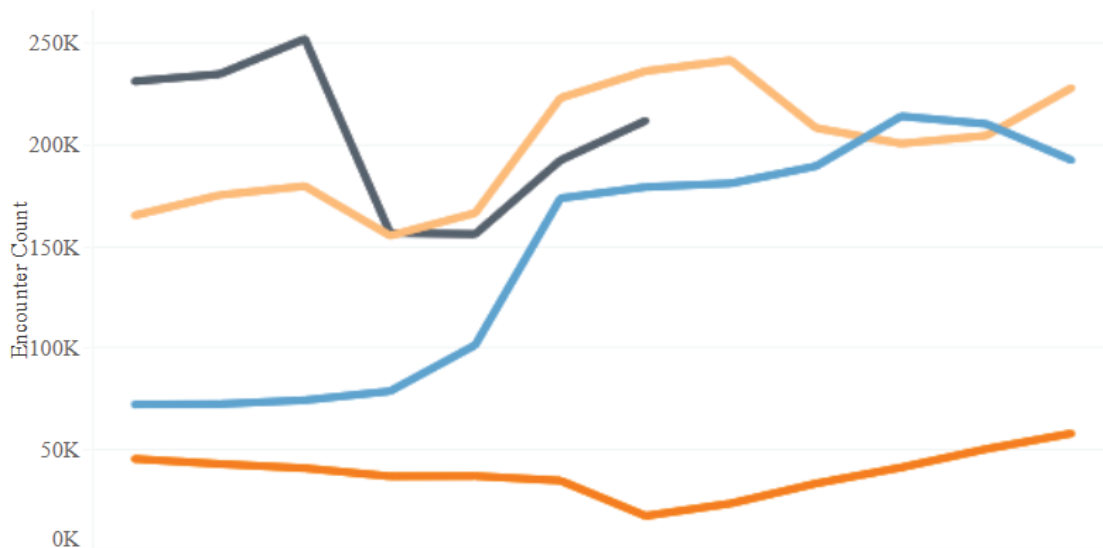
47. States “bear[] many of the consequences of unlawful immigration.” *Arizona v. United States*, 567 U.S. 387, 397 (2012). They are, however, limited in their ability to “engage in” their own immigration “enforcement activities.” *Id.* at 410. The States thus rely significantly on the federal government to fulfill their duties under the immigration laws, particularly when Congress has created mandatory obligations or otherwise limited the federal government’s discretion.

48. Record numbers of aliens have entered the United States unlawfully since January 20, 2021.

49. DHS’s own statistics show the dramatic increases in the number of crossings into the United States. Indeed, current levels of encounters with illegal aliens are at their highest levels in at least two decades, and perhaps ever. The following is DHS’s own chart graphically showing these enormous increases in crossings:

FY 2020 2021 2022 2023 (FYTD)

FY Southwest Land Border Encounters by Month



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2023 (FYTD)	230,778	234,306	251,644	156,223	155,656	191,956	211,401						1,431,964
2022	164,837	174,845	179,253	154,874	166,010	222,574	235,785	241,136	207,834	200,162	204,087	227,547	2,378,944
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088

Source: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

50. Furthermore, between Fiscal Year 2021 and March 15, 2023, DHS had recorded 1.4 million “gotaways,” or illegal aliens who evaded border patrol agents.³ There were 385,000 gotaways between October 1, 2022, and March 15, 2023,⁴ and given the accelerated pace of illegal border crossings this year, it is likely that there will be more than 1 million recorded gotaways in FY2023.

³ Guy Benson, *Crisis: CBP Chief Reveals Shocking 'Got-Away' Numbers at Border Hearing Boycotted By Democrats*, Townhall, (Mar. 16, 2023), <https://tinyurl.com/34uxxw37>.

⁴ *Id.*

51. What’s worse, these DHS numbers are likely significant underestimates. Border Patrol Chief Raul Ortiz has estimated that these numbers underestimate the actual number of gotaways by up to 20 percent.⁵ Comprehensive monitoring by Arizona law enforcement using an advanced camera system observing a large section of the border showed that “for the period from July 2020 to January 2021, only 27.6% of undocumented persons crossing the southern border were apprehended by DHS personnel.” *Louisiana v. Centers for Disease Control & Prevention*, --- F.Supp.3d ----, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022). These observations took place when the border was not facing a once-in-a-century crisis of overwhelming numbers of illegal crossings. The proportion of gotaways may very well be higher now.

52. Defendant Raul Ortiz, who is Chief of the Border Patrol, has admitted under oath that when citizens of other countries perceive that immigration policy has become more favorable to them, they are more likely to cross U.S. borders illegally. *Florida v. United States*, No. 21-CV-1066, ECF No. 78-3 at 59:12-60:5, 67:22-68:5, 171:13-172:9, 173:7-12 (N.D. Fla. 2021). Because the Circumvention Rule makes it easier for aliens with non-meritorious asylum claims to be released in the United States, it will induce a significant increase in illegal immigration into the United States. Tens of thousands of these aliens will be released into the Plaintiff States in violation of federal statutes.

53. Reducing the likelihood that an alien will be released into the United States reduces the number of aliens who attempt to enter the United States illegally. *Texas v. Biden*, 554 F. Supp. 3d 818, 834, 847-48 (N.D. Tex. 2021); *cf. Zadvydas v. Davis*, 533 U.S. 678, 713 (2001) (Kennedy, J., dissenting) (“An alien ... has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility.”).

⁵ *Id.*

54. Since 1982, the Supreme Court has mandated that States provide public education to school-age aliens not lawfully in the United States. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). As a direct result of the influx of migrants that the Circumvention Rule will cause, some of whom will be minors, the Plaintiff States will be compelled to spend additional money on education for these additional aliens. The Circumvention Rule is thus a direct, but-for cause of these imminent injuries.

55. The population of potential asylum applicants includes a large number of school-age children.⁶ After these school-age children enter the United States, they disperse across the United States and force local schools to incur significant additional costs to educate them.⁷ On information and belief, school-age aliens processed under the Circumvention Rule have moved or may move to every Plaintiff State. However, on information and belief, DHS tracks detailed information about the age, location, and immigration status of school-age asylum applicants. Information about the extent of harm that the Plaintiff States are suffering from additional education expenses is therefore in the sole possession of Defendants and will come to light during discovery in this case.

56. Asylum applicants often do not remain in the State in which they first crossed into the United States.

57. The presence of these aliens violates each State's sovereign and quasi-sovereign interest in its territory and the welfare of its citizens.

58. The Circumvention Rule will also cost the States millions, as explained in further detail below.

⁶ CBS News, *Despite COVID-19 Pandemic, Texas Border Pop-Up School For Young Asylum Seekers Thrives*, CBS NEWS, (Dec. 1, 2020), <https://www.cbsnews.com/dfw/news/covid-19-texas-pop-up-school-asylum-seekers-thrives/>.

⁷ Polo Sandoval, Kimberly Berryman and Ray Sanchez, *'It's all behind us now.' 1,700 migrant children see hope in nation's largest school system*, CNN, (Sep. 20, 2022), <https://www.cnn.com/2022/09/19/us/migrants-new-york-school-year>; Czarinna Andres, *Adams Administration Preparing to Enroll 1,000 Migrant Children in City Schools Who Were Bused From Texas*, JACKSON HEIGHTS POST, (Aug. 19, 2022), <https://jacksonheightspost.com/adams-administration-preparing-to-enroll-1000-migrant-children-in-city-schools-who-were-bused-from-texas>; Reema Amin, *New York City grapples with influx of new asylum-seeking students*, CHALKBEAT NEW YORK, (Oct. 18, 2022), <https://ny.chalkbeat.org/2022/10/18/23411736/nyc-asylum-seekers-students-budget-bilingual-teachers>.

Indiana

59. Plaintiff Indiana is injured by the Circumvention Rule. Indiana will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendant to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend. The Circumvention Rule will create increased crime and drug trafficking in Indiana's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Indiana to expend limited resources on education, healthcare, public assistance, and general government services.

60. The increase in illegal aliens arriving in Indiana has forced Indiana to incur additional expenses. Indiana has roughly 207,000 illegal aliens, including their children; about 53% are uninsured and about 31% of them have incomes below the poverty line.⁸ The cost per alien to taxpayers is \$4,451.⁹ This total cost of illegal aliens and their children amounts to \$921,276,750.¹⁰ Indiana bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs.

61. Discovery in *State of Indiana v. Joseph R. Biden, Jr., et al.*, United States District Court for the Northern District of Indiana, Cause Number 1:22-cv-192-HAB-SLC, there were almost 8,000 aliens paroled under the Parole + ATD program residing in Indiana between August 2021 and October 2022. Upon information and belief, additional aliens have moved to Indiana.

⁸ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/IN> (53% uninsured, 31% below the poverty line).

⁹ *Id.*

¹⁰ *Id.*

62. The Indiana Department of Education provides a portion of the State's Title III (of the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act of 2015) appropriation to support schools and school districts experiencing an influx of immigrant students. Based upon the influx of immigrant students in eight school districts, the Indiana Department of Education made Title III appropriations in the amount of \$183,738.40 for the 2021-2022 school year, in addition to the per-pupil state tuition support payment.¹¹ In fact, the Indiana Department of Education sought to double its budget for English Language Learners during the most recent session before the Indiana General Assembly citing an increase of more than 30% since 2017.¹² The 3,151 additional children arriving between October 2020 and September 2022 would cost Indiana an average of \$1,332,852.51 for English Language Learner services assuming the children are all school-age and require English Language Learner services.¹³ This does not include the additional expenditures by Indiana for state tuition support provided for all children enrolled in public schools, which would amount to almost \$27.3 million for the 3,151 additional children.¹⁴

63. According to a report from the Government Accountability Office, as many as 5,000 family units settled in Indiana between July 2021 and February 2022 as a result of the Biden Administration's similar Parole + ATD policy.¹⁵ If each family unit consisted of two people, the State of Indiana has the burden of providing education, medical care, and other benefits to 10,000 aliens entering under Parole + ATD. If each family unit consists of just one child, the annual cost to the

¹¹ INDIANA DEPT. OF ED., 2021-2023 TITLE III IMMIGRANT INFLUX ALLOCATIONS (2023) <https://www.in.gov/doi/files/2021-2023-TIII-Immigrant-Influx-Allocations.pdf>.

¹² Camilla Fernandez, *Indiana Education Leaders Want Budget Doubled for English Language Learners*, WISH-TV, (December 28, 2022) <https://www.wishtv.com/news/education/indiana-department-of-education-seeks-to-double-its-budget-for-english-language-learners/>

¹³ OFFICE OF REFUGEE RESETTLEMENT, Unaccompanied Children Released to Sponsors by State (March 9, 2023), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state>.

¹⁴ Ind. Code § 20-43-3-8 (school corporation's foundation amount); Ind. Code § 20-43-6-3 (formula for calculating basic tuition support).

¹⁵ U. S. GOVERNMENT ACCOUNTABILITY OFFICE, SOUTHWEST BORDER: CHALLENGES AND EFFORTS IMPLEMENTING NEW PROCESSES FOR NONCITIZEN FAMILIES (Sept. 2022), <https://www.gao.gov/assets/gao-22-105456.pdf>.

State of Indiana to educate them would be as high as \$45,467,551.20 for English Language Learner services and state tuition support.

North Dakota

64. Plaintiff North Dakota is injured by the Circumvention Rule, which will predictably cause an influx of illegal aliens throughout the United States. Indeed, between July 2021 and February 2022, as many as 400 family units (and potentially more) came to North Dakota as a result of the Administration's similar Parole + ATD policy.¹⁶ It is estimated that there are approximately 6,000 to 9,000 illegal aliens residing in North Dakota, including their children, costing North Dakota taxpayers between approximately \$27 million and \$36 million per year.¹⁷ North Dakota bears those costs of illegal immigration through education programs, healthcare costs, government benefits, and the incarceration of illegal aliens who commit crimes in its communities.

65. By encouraging and facilitating the increased presence of illegal aliens within the States, the Circumvention Rule will force North Dakota to expend more of its limited state resources on their education, healthcare, and government benefits, diverting those resources from its own citizens. The Circumvention Rule will also predictably create increased crime and drug trafficking in North Dakota's communities, requiring additional resource expenditure by state and local law enforcement.

Alaska

66. Plaintiff Alaska is also injured by the Circumvention Rule. Alaska will be required to stretch its scarce resources under the Termination Order because the Order will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States and similarly increasing the number of aliens Defendants fail to apprehend initially. The

¹⁶ U. S. GOVERNMENT ACCOUNTABILITY OFFICE, SOUTHWEST BORDER: CHALLENGES AND EFFORTS IMPLEMENTING NEW PROCESSES FOR NONCITIZEN FAMILIES (Sept. 2022), <https://www.gao.gov/assets/gao-22-105456.pdf>.

¹⁷ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

Circumvention Rule will create increased crime and/or drug trafficking in Alaska's communities, requiring additional expenditure for law enforcement. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Alaska to expend additional resources on education, healthcare, public assistance, and/or general government services.

67. Alaska has approximately 5,000 to 11,260 illegal aliens living in the State, and the Federation for American Immigration Reform (FAIR) estimated that they cost the State Alaska more than \$96 million a year as of 2017, including \$11 million for law enforcement. If more illegal aliens enter the State, that will increase the costs of the State's healthcare system, among other government services.

Arkansas

68. Plaintiff Arkansas is injured by the Circumvention Rule. Arkansas will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Arkansas to expend limited resources on education, healthcare, public assistance, and general government services.

69. The increase in illegal aliens arriving in Arkansas has forced Arkansas to incur additional expenses. Arkansas has roughly 97,000 illegal aliens, including their children; about 63% are uninsured and about 30% of them have incomes below the poverty line.¹⁸ The cost per alien to

¹⁸ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; *Unauthorized Immigrant Population Profiles*, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/AR> (63% uninsured, 19% below the poverty line).

Arkansas taxpayers is \$4,475.¹⁹ This total cost to Arkansas of illegal aliens and their children amounts to \$586,262,089.²⁰ Arkansas bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to the State of Arkansas will increase significantly with the influx of aliens resulting from the Circumvention Rule.

Florida

70. Florida has already successfully litigated to final judgment a case against DHS regarding the agency's unlawful releases. In that case, Florida proved at trial that DHS's unlawful releases at the border injure the State. *See Florida v. United States*, No. 3:21-cv-1066, 2023 WL 2399883, at *18–20 (N.D. Fla. Mar. 8, 2023).

71. To prove that, Florida relied on public assistance, unemployment benefits, emergency Medicaid, public education expenditures, and the costs of incarcerating aliens who commit crimes.

72. Florida will rely on the same evidence here, which DHS has already tested in discovery and at trial and which a court already determined was sufficient to demonstrate Article III standing to challenge a similar policy.

Idaho

73. Plaintiff Idaho is injured by the Circumvention Rule. Idaho will be required to expend State resources as a result of the Circumvention Rule, including because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In

¹⁹ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

²⁰ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

addition, by incentivizing further illegal immigration, the Circumvention Rule will force Idaho to expend limited resources on education, healthcare, public assistance and general government services.

74. The increase in illegal aliens arriving in Idaho has forced Idaho to incur additional expenses. Idaho has roughly 83,000 illegal aliens, including their children; about 60% are uninsured and about 27% of them have incomes below the poverty line.²¹ The cost per alien to Idaho taxpayers is \$4,880.²² The total cost to Idaho of illegal aliens and their children amounts to at least \$405,030,392.²³ Idaho bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. The Circumvention Rule will cause these expenses to the State of Idaho to increase dramatically.

Iowa

75. Plaintiff Iowa is injured by the Circumvention Rule. Iowa will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Iowa to expend limited resources on education, healthcare, public assistance, and general government services.

76. Iowa spends tens of millions of dollars providing services to illegal aliens due to the federal government's abuses of federal law. Those services include education services and emergency healthcare, as well as many other social services. Federal law requires Iowa to include illegal aliens in

²¹ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/ID> (60% uninsured, 27% below the poverty line).

²² Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

²³ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

those programs. As the number of illegal aliens in Iowa increases, the number of illegal aliens receiving such services likewise increases, and so too the burden on the public increases.

77. In 2007, the Fiscal Services Division of the Iowa Legislative Services Agency found that Iowa was home to an estimated 55,000 to 85,000 illegal immigrants. At that time, 16 years ago, the total cost of illegal immigrants to the State General Fund was more than \$100 million and accounted for about 2.4% of Iowa's general fund expenditures. IOWA LEGISLATIVE SERVICES AGENCY FISCAL SERVICES, Undocumented Immigrants' Cost to the State (Feb. 22, 2007), <https://bit.ly/3HkKMS5>. Even simply adjusting for inflation (without accounting for any increase in services or the number of illegal immigrants) would bring that total to nearly \$150 million annually.

78. Iowa also spends tens of millions of dollars each year for increased law enforcement, while its citizens suffer increased crime, unemployment, environmental harm, and social disorder, due to illegal immigration.

79. The total costs to Iowa of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases.

80. Iowa has been identified as a hot spot for trafficking activity due to the junction of Interstate 35 and Interstate 80. Traffickers bring illegal immigrants to and through the State. Proactively, in 2020, Iowa became one of the first states in the country to pass legislation to require motel and hotel staff to receive training in human-trafficking prevention. Iowa bears the additional costs of combating trafficking associated with illegal immigration.

Kentucky

81. Plaintiff Kentucky is injured by the Circumvention Rule. Kentucky will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend

initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Kentucky to expend limited resources on education, healthcare, public assistance, and general government services.

82. The increase in illegal aliens arriving in Kentucky has forced Kentucky to incur additional expenses. Kentucky has roughly 94,000 illegal aliens, including their children; about 60% are uninsured and about 37% of them have incomes below the poverty line.²⁴ The cost per alien to Kentucky taxpayers is \$4,579.²⁵ This total cost to Kentucky of illegal aliens and their children amounts to \$430,416,645.²⁶ Kentucky bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to the State of Kentucky will increase significantly with the influx of aliens resulting from the Circumvention Rule.

Mississippi

83. Plaintiff Mississippi is injured by the Circumvention Rule. Mississippi will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Circumvention Rule will create increased crime and drug trafficking in Mississippi's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Mississippi to expend limited resources on education, healthcare, public assistance, and general government services.

²⁴ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/KY> (63% uninsured, 19% below the poverty line).

²⁵ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

²⁶ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

84. The increase in illegal aliens arriving in Mississippi has forced Mississippi to incur additional expenses. Mississippi has roughly 45,000 illegal aliens, including their children; about 75% are uninsured and about 39% of them have incomes below the poverty line.²⁷ The cost per alien to Mississippi taxpayers is \$4,169.²⁸ This total cost to Mississippi of illegal aliens and their children amounts to \$187,621,434.²⁹ Mississippi bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs.

Missouri

85. Plaintiff Missouri is injured by the Circumvention Rule. Missouri will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Missouri to expend limited resources on education, healthcare, public assistance and general government services.

86. The increase in illegal aliens arriving in Missouri has forced Missouri to incur additional expenses. Missouri has roughly 104,000 illegal aliens, including their children; about 52% are uninsured and about 31% of them have incomes below the poverty line.³⁰ The cost per alien to Missouri taxpayers

²⁷ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MS> (75% uninsured, 39% below the poverty line).

²⁸ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

²⁹ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

³⁰ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/SC> (69% uninsured, 33% below the poverty line).

is \$4,446.³¹ This total cost to Missouri of illegal aliens and their children amounts to \$462,350,529.³² Missouri bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to the State of Missouri will increase significantly with the influx of aliens resulting from the Circumvention Rule.

Montana

87. Plaintiff Montana is injured by the Circumvention Rule. Montana will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendant to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend. The Circumvention Rule will create increased crime and drug trafficking in Indiana's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Montana to expend limited resources on education, healthcare, public assistance, and general government services.

88. The increase in illegal aliens arriving in Montana has forced Montana to incur additional expenses. Montana has roughly 10,000 illegal aliens, including their children.³³ The cost per alien to Montana taxpayers is \$5,196.³⁴ This total cost to Montana of illegal aliens and their children amounts to \$39,081,833.³⁵ Montana bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These

³¹ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

³² Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

³³ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

³⁴ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

³⁵ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

expenses to the State of Montana will increase significantly with the influx of aliens resulting from the Circumvention Rule.

New Hampshire

89. Plaintiff New Hampshire is injured by the Circumvention Rule. New Hampshire will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendant to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Circumvention Rule will create increased crime and drug trafficking in New Hampshire's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force New Hampshire to expend limited resources on education, healthcare, public assistance and general government services.

90. The increase in illegal aliens arriving in New Hampshire has forced New Hampshire to incur additional expenses. New Hampshire has between 11,000 and 19,000 illegal aliens, including their children.³⁶ The cost per alien to taxpayers is \$5,659.³⁷ This total cost of illegal aliens and their children amounts to \$107,530,149.³⁸ New Hampshire bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs.

91. The impact on New Hampshire residents extends far beyond financial impacts. Indeed, some New Hampshire residents no longer feel safe in their own homes due to their own direct and numerous encounters with illegal crossings through their private property. Residents are fearful

³⁶ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles#NH> (53% uninsured, 31% below the poverty line).

³⁷ *Id.*

³⁸ *Id.*

due to the many witnessed events of drug and human trafficking, and patrol their properties regularly in order to quell the opportunity for their property to be utilized for illegal activity.

Oklahoma

92. Plaintiff Oklahoma is injured by the Circumvention Rule. Oklahoma will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Circumvention Rule will create increased crime and drug trafficking in Oklahoma's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Oklahoma to expend limited resources on education, healthcare, public assistance, and general government services.

93. The increase in illegal aliens arriving in Oklahoma has forced Oklahoma to incur additional expenses. Oklahoma has roughly 183,000 illegal aliens, including their children; about 68% are uninsured and about 27% of them have incomes below the poverty line. The cost per alien to Oklahoma taxpayers is \$4,278. This total cost to Oklahoma of illegal aliens and their children amounts to approximately \$782,858,760. Oklahoma bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs.

South Carolina

94. Plaintiff South Carolina is injured by the Circumvention Rule. South Carolina will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule

will force South Carolina to expend limited resources on education, healthcare, public assistance, and general government services.

95. The increase in illegal aliens arriving in South Carolina has forced South Carolina to incur additional expenses. South Carolina has roughly 157,000 illegal aliens, including their children; about 69% are uninsured and about 33% of them have incomes below the poverty line.³⁹ The cost per alien to South Carolina taxpayers is \$4,752.⁴⁰ This total cost to South Carolina of illegal aliens and their children amounts to \$746,000,585.⁴¹ South Carolina bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to the State of South Carolina will increase significantly with the influx of aliens resulting from the Circumvention Rule.

Tennessee

96. Tennessee expends resources, including monetary resources, in providing services to lawfully and unlawfully present aliens. Those include, but are not limited to, education and healthcare services.

97. As the number of aliens in Tennessee increases, Tennessee will be required to expend its limited resources and additional money on providing services to those aliens.

98. Because the Circumvention Rule, through its exceptions, will result in the presence of more aliens in Tennessee, the Rule's exceptions will result in Tennessee expending more resources than it would if Defendants had not included the unlawful and arbitrary exceptions.

³⁹ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/SC> (69% uninsured, 33% below the poverty line).

⁴⁰ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

⁴¹ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

Utah

99. Plaintiff Utah is injured by the Circumvention Rule. Utah will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Utah to expend limited resources on education, healthcare, public assistance, and general government services.

100. The increase in illegal aliens arriving in Utah has forced Utah to incur additional expenses. Utah has roughly 185,000 illegal aliens, including their children; about 61% are uninsured and about 23% of them have incomes below the poverty line.⁴² The cost per alien to Utah taxpayers is \$5,033.⁴³ This total cost to Utah of illegal aliens and their children amounts to \$931,075,992.⁴⁴ Utah bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to the State of Utah will increase significantly with the influx of aliens resulting from the Circumvention Rule.

Virginia

101. Plaintiff Virginia is injured by the Circumvention Rule. Virginia will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend

⁴² Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/UT> (61% uninsured, 23% below the poverty line).

⁴³ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

⁴⁴ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Virginia to expend limited resources on education, healthcare, public assistance, and general government services.

102. The increase in illegal aliens arriving in Virginia has forced Virginia to incur additional expenses. Virginia has roughly 563,000 illegal aliens, including their children; about 58% are uninsured and about 20% of them have incomes below the poverty line.⁴⁵ The cost per alien to Virginia taxpayers is \$5,038.⁴⁶ This total cost to Virginia of illegal aliens and their children amounts to \$2,836,268,654.⁴⁷ Virginia bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to the Commonwealth of Virginia will increase significantly with the influx of aliens resulting from the Circumvention Rule.

Wyoming

103. Plaintiff Wyoming is injured by the Circumvention Rule. Wyoming will be required to stretch its scarce resources even further under the Circumvention Rule, because the Rule will cause an influx of aliens at the border, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. In addition, by incentivizing further illegal immigration, the Circumvention Rule will force Wyoming to expend limited resources on education, healthcare, public assistance, and general government services.

⁴⁵ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>; Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/AR> (63% uninsured, 19% below the poverty line).

⁴⁶ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

⁴⁷ Federation for American Immigration Reform, The Fiscal Burden of Illegal Immigration, (Mar. 8, 2023), at 40, <https://tinyurl.com/yzdh3rvk>.

104. The increase in illegal aliens arriving in Wyoming has forced Wyoming to incur additional expenses. Wyoming has roughly 10,000 illegal aliens, including their children.⁴⁸ The cost per alien to Wyoming taxpayers is \$4,520.⁴⁹ This total cost to Wyoming of illegal aliens and their children amounts to \$33,997,112.⁵⁰ Wyoming bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs. These expenses to Wyoming will increase with the influx of aliens resulting from the Circumvention Rule.

All Plaintiffs

105. The Circumvention Rule will result in tens or hundreds of thousands of aliens unlawfully entering the United States, who would otherwise not be able to gain entry. This, in turn, will cause the Plaintiff States to spend money on healthcare, detention, education, and other services for aliens that would otherwise not have to be spent.

106. For example, the States are required to spend state monies on Emergency Medicaid, including for unauthorized aliens. 42 C.F.R. § 440.255(c). The Plaintiff States' emergency medical providers deliver millions of dollars in medical services to illegal aliens each year. These costs are not fully reimbursed by the federal government or the aliens themselves. The Circumvention Rule necessarily increases the number of aliens in the States who are subject to receiving such medical care at the expense of Plaintiff States' healthcare institutions.

107. Furthermore, under federal law, aliens who have been paroled into the United States become eligible for a variety of benefits after five years (or immediately depending on their country of origin).⁵¹ These benefits include Medicaid; SNAP (commonly referred to as “food stamps”); and

⁴⁸ Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 40.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See* 8 U.S.C.A. § 1641(b)(4) (defining a “qualified alien” as “an alien who is paroled into the United States under [8 U.S.C. § 1182(d)(5)] for a period of at least 1 year”); 8 U.S.C. § 1612 (2)(L) (making eligible for food stamps aliens who have been “qualified aliens” for a period of 5 years or more”); 8 U.S.C. § 1613(a) (making qualified aliens eligible for “any Federal means-tested public benefit ... 5 years” after “the date of the alien's entry into the United States”).

TANF (commonly referred to as “welfare” payments). Because these benefits are paid by State agencies and are partially financed from State budgets, the Circumvention Rule will increase the States’ costs because higher numbers of aliens being paroled into the United States will cause a higher number of individuals claiming benefits in each Plaintiff State. This will cause quantifiable financial harm to the States, and the exact magnitude of those harms will become clear in discovery when the federal government produces statistics about the number of aliens being paroled and the number of aliens settling in each Plaintiff State. For present purposes, however, even “a dollar or two” of injury satisfies Article III. *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008).

108. By ignoring the requirements of the INA and Secure Fence Act of 2006, and thus facilitating the entry of unauthorized aliens into the United States, the Circumvention Rule encourages a greater influx of unauthorized aliens into Plaintiff States.

109. The Biden Administration continues to publicly tout its lax border policies. As Defendant Secretary Mayorkas boasted, “[u]nlawful presence in the United States will alone not be a basis for an immigration enforcement action.”⁵²

110. Defendant Border Patrol Chief Raul Ortiz admitted under oath that, since President Biden’s election, the number of aliens trying illegally to enter the United States has increased, and that internal U.S. Customs and Border Protection documents state that “since President Biden was elected ... aliens illegally entering the United States perceive that they will be able to enter and remain in the United States.” *Id.* at 59:12-60:5. Chief Ortiz agreed that “aliens who cite favorable immigration policy as a reason to come to the United States are perceiving what actually is happening in the United States.” *Id.* at 67:22-68:5.

⁵² *Secretary Mayorkas Delivers Remarks at the U.S. Conference of Mayors*, U.S. Dep’t of Homeland Security (Jan. 20, 2022), <https://www.dhs.gov/news/2022/01/20/secretary-mayorkas-delivers-remarks-us-conference-mayors>, but it has since been removed.

111. The Circumvention Rule contributes to the perception that the border is open and that immigration policy has become more favorable to aliens illegally crossing the southern border. The Circumvention Rule thus incentivizes increased immigration into the Plaintiff States. Increased illegal immigration imposes on the States through increased law enforcement, education, medical, and other costs, as explained *supra* ¶¶ 59-105. All of this constitutes an injury to the States and to their sovereign, quasi-sovereign, and proprietary interests.

112. Chief Ortiz also admitted under oath that “the southern border is currently in crisis” and that “the crisis that is currently ongoing at the southern border [is] making the border less safe for Americans and aliens alike.” Ortiz Depo. at 40:18-21, 53:9-13. Specifically, Chief Ortiz admitted that criminal trafficking organizations, incentivized by the border crisis created by the Biden Administration, “are putting ... border communities in danger,” such as by locating “stash houses in neighborhoods” and causing “damage to property [of] ranchers and farmers,” including damage to “fences” and “livestock that are lost when these smugglers drive through their property,” and that they “have little regard for the safety of the community out there.” *Id.* at 241:6-242:3.

113. Chief Ortiz further admitted that criminal trafficking organizations “continue to flood the border area with ... narcotics... We’ve had more agents assaulted this year than we ever have, and we continue to see increase in firearm seizures.” *Id.* at 243:7-9, 15-17.

114. The Circumvention Rule contributes to this increase in lawlessness and criminal activity in border regions, and also within the Plaintiff States. This causes sovereign harm to Plaintiff States, because “[t]he States have a legally protected sovereign interest in ‘the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and enforce a legal code.’” *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008); *see also Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 377 (2017) (similar); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (collecting cases

where a state was found to possess sovereign standing on this basis). Indeed, the “defining characteristic of sovereignty” is “the power to exclude from the sovereign’s territory people who have no right to be there.” *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part).

115. Because illegal aliens settle in all of the Plaintiff States, encouraging a greater influx of unauthorized aliens further increases law enforcement costs in all of the Plaintiff States, including costs related to coordinated activity between federal and state law enforcement agencies in the pursuit of suspected unauthorized aliens. The increased lawlessness at the border thus also injures the States’ proprietary interests because it increases the States’ law enforcement and incarceration costs.

116. The Circumvention Rule will allow a far greater number of aliens to enter the United States. Such aliens rarely leave the United States of their own accord, and Defendants rarely remove such aliens, even after their asylum or other immigration claims have been denied. The Circumvention Rule will therefore increase the Plaintiff States’ costs of providing emergency medical care to these individuals who would otherwise never have been allowed into the United States. Additionally, the Circumvention Rule encourages a greater influx of unauthorized aliens into the Plaintiff States, further increasing the number of unauthorized aliens for whom the Plaintiff States must bear the cost of emergency medical care, education, and other social services.

117. The Circumvention Rule will increase illegal immigration into the United States. Some of the additional illegal aliens will migrate into each of the Plaintiff States, and some of those aliens will commit crimes in each of the Plaintiff States. The increased number of illegal aliens in the Plaintiff States will thus also increase crime and criminal justice expenses in the Plaintiff States, thus injuring the States through increased law enforcement, incarceration, and crime-prevention costs. The increased crime will also injure the citizens of Plaintiff States.

118. In addition, the Defendants will be unable to adequately screen, mitigate, and treat for communicable diseases—of all types—when illegal border crossings (including crossings of “covered

aliens”) reach the elevated levels induced by the Circumvention Rule. This presents a serious threat to the public health of Plaintiff States.

119. In *Florida v. United States*, No. 21-CV-1066 (N.D. Fla. 2021), which asserts claims related to the Administration’s failure to follow immigration law, discovery produced by the federal government showed that from November 1, 2021, to July 4, 2022, the number of aliens that DHS released into the United States who had listed Florida addresses as their place of final destination and who had failed to report back to DHS for further immigration proceedings was 47,984 individuals. During Florida’s deposition of Defendant Ortiz, he admitted that this was “a large number” that was “concerning.” *Id.* at 148:11-14.

120. DHS keeps detailed statistics about grants of asylum, the aliens it allows into the United States, their intended destinations, their residential addresses, and about their immigration status. Additionally, DHS (or a DHS contractor) monitors a subset of asylum applicants using global positioning system tracking devices, telephonic reporting, or a smartphone application called SmartLink.⁵³ On information and belief, aliens allowed into the United States under the Circumvention Rule have settled, and continue to settle, in some or all of the Plaintiff States. Furthermore, on information and belief, the number of aliens settling in the states is higher because of the Circumvention Rule, and aliens who would have been approved under the old asylum system will be eligible for benefits sooner than they otherwise would have been. Discovery in this case, as in *Florida*, will confirm it.

⁵³ <https://www.ice.gov/detain/detention-management>

CLAIMS FOR RELIEF

COUNT I

Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)

Rule in Excess of Defendants’ Statutory Authority

(Exceptions that Rely on Unlawful Parole Programs)

121. The Plaintiff States repeat and incorporate by reference all the Complaint’s allegations stated above.

122. Under the APA, a court must “hold unlawful and set aside agency action” that is “not in accordance with law” or is “in excess of statutory . . . authority[] or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C).

123. The Circumvention Rule exceeds Defendants’ statutory authority because the INA strictly limits Defendants’ exercise of the parole power, yet the main exception that the Rule relies on is the unlawful programmatic grant of parole to aliens.

124. The Circumvention Rule relies entirely on creating so-called “lawful, safe, and orderly pathways” that “are authorized separate from this rulemaking.” 88 Fed. Reg. at 31,410. The Circumvention Rule adds a regulation that exempts aliens from the Circumvention Rule’s rebuttable presumption of ineligibility for asylum if the alien “[w]as provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process.” *Id.* at 31,322. As the Circumvention Rule preamble explains, those pathways are DHS policies to programmatically grant parole to large classes of aliens, expanding on DHS’s prior unlawful programmatic parole programs for aliens from Venezuela, Cuba, Haiti, and Nicaragua. *E.g. id.* at 31,315-17.

125. And, as the preamble further explains, those “lawful ... pathways” will also include the programmatic grant of parole to aliens who use the CPB One app to schedule their unlawful entry into the United States in advance. *Id.* at 31,314. The Rule itself states that an exception to the rebuttable presumption is when an alien “[w]as provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process.” 88 Fed. Reg. at 31,450 (creating

exception at new 8 C.F.R. § 208.33(a)(2)(ii)(A)). The Circumvention Rule even goes so far as to exempt aliens from even needing to use the CBP One App to pre-schedule their illegal arrival “if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” *Id.* (creating exception at new 8 C.F.R. § 208.33(a)(2)(ii)(B)).

126. But DHS lacks the authority to create a “parole process” involving the programmatic grant of parole to entire classes of aliens. And because these exceptions to the Circumvention Rule rely on an unlawful abuse of DHS’s extremely limited parole authority, the exceptions to the Circumvention Rule are unlawful.

COUNT II

Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)

Rule in Excess of Defendants’ Statutory Authority

(Secure Fence Act)

127. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

128. Under the APA, a court must “hold unlawful and set aside agency action” that is “not in accordance with law” or is “in excess of statutory . . . authority[] or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C).

129. The Circumvention Rule exceeds Defendants’ statutory authority because it violates the Secure Fence Act.

130. In 2006, Congress passed the Secure Fence Act, which requires the Secretary of Homeland Security to “take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States.” Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat 2638 (2006) (codified as 8 U.S.C. § 1701 note). The bill specifically defines “operational control” to mean “the prevention of *all unlawful*

entries into the United States, including entries by terrorists, *other unlawful aliens*, instruments of terrorism, narcotics, and other contraband.” *Id.* (emphasis added).

131. The Secure Fence Act remains in force. It enjoyed bipartisan support in both houses of Congress, and passed in the Senate by a vote of 80 to 19. Indeed, among those voting for the bill was then-Senator Biden.⁵⁴

132. The Circumvention Rule violates the Secure Fence Act because, as discussed above, rather than preventing unlawful entries into the United States, it incentivizes them.

COUNT III

Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)

Rule in Excess of Defendants’ Statutory Authority

(CBP One App)

133. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

134. Under the APA, a court must “hold unlawful and set aside agency action” that is “not in accordance with law” or is “in excess of statutory . . . authority[] or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C).

135. The Circumvention Rule exceeds Defendants’ statutory authority because it relies on the existence of an unlawful scheme for aliens to establish a “pre-scheduled time and place” to arrive at a POE and request entry into the United States without a visa and that exists outside of, and entirely separate from, the actual system for issuing visas established by Congress. While the Circumvention Rule does not explicitly state the name of this system, its current instantiation is as the CBP One App (the “App”).

⁵⁴ https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00262#top

136. As discussed *supra*, the legislative history makes clear that Defendants' actions are the opposite of what Congress intended when it amended the INA to limit the parole power.

137. One major component of the App is allowing aliens to apply for Advance Travel Authorizations (ATAs). The ATA process requires that aliens submit biometric and biographic data, which Defendants use to decide whether to approve the alien for travel to a port of entry (POE), where the alien may request parole into the United States. Visas work almost the exact same way-- they do not give an alien the right to enter the United States, but only to travel to a POE and request admission, at which time a CBP officer decides whether the alien is admissible or not. Except, the visa process enacted by Congress is stricter and much more involved. The visa form is longer and requires more information, and it has stricter compliance requirements. For example, to get a visa, aliens must 1) pay a substantial fee; 2) appear in person for a visa interview at the embassy or consulate; and for immigrant visas, 3) submit to a comprehensive medical exams; 4) comply with strict vaccination requirements; 5) prove they have the financial means to support themselves, or instead get a U.S. sponsor to sign an affidavit of support that legally obligates the sponsor to financially support the alien for the rest of the alien's life (and which allows state and local governments to sue the sponsor to get reimbursed for government support provided to the alien, whereas the financial support form for an ATA does not impose a lifetime commitment on the sponsor and does not allow states to sue to recover expenditures).

138. For countries with populations representing a low risk of overstaying in the United States, Congress has created the Electronic System for Travel Authorization ("ESTA") program which allows visa-free travel for temporary non-immigrant travelers. Upon information and belief, virtually all of the aliens who will make use of the App and provisions of the Circumvention Rule come from non-ESTA countries. Yet, even though Congress has clearly established that these aliens do *not* qualify for visa-free travel to the United States, Defendants have created by executive fiat what is essentially

a parallel system for visa-free immigration to the United States for aliens from countries with populations with *high* risk of overstaying in the United States. The Circumvention Rule circumvents the process that Congress has created for immigration into the United States—it completely evades numerous limits that Congress has imposed, such as numerical quotas and caps, visa security requirements, required visa fees, security vetting, and affidavits of support to prove that aliens have sufficient financial support from friends and family to ensure that they will not become a burden on public resources.

139. Additionally, the Circumvention Rule, and the CBP One app on which it relies for implementation, would turn the expedited removal process on its head. Instead of being the intended procedure for quickly removing aliens from the United States, it turns the process into one for expediting the entry of illegal aliens into the United States to remain indefinitely.

140. Not only has Congress never clearly authorized the Circumvention Program, it has already established an entire system for allowing aliens into the country that is completely at odds with the Circumvention Rule and the App, and which Defendants are ignoring. The Circumvention Rule and App are therefore unlawful.

COUNT IV

Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)

Arbitrary and Capricious Agency Action

(Circumvention Rule’s Exceptions)

141. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

142. The APA prohibits agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

143. “[A]gency action is lawful only if it rests on a consideration of the relevant factors” and “important aspects of the problem.” *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring

“reasoned decisionmaking”). This means agencies must “examine all relevant factors and record evidence.” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

144. For starters, an agency cannot “entirely fail[] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Am. Wild Horse*, 873 F.3d at 931 (“the Service’s Finding of No Significant Impact not only failed to take a ‘hard look’ at the consequences of the boundary change, it averted its eyes altogether”); *Gresham v. Azar*, 363 F. Supp. 3d 165, 177 (D.D.C. 2019) (“The bottom line: the Secretary did no more than acknowledge—in a conclusory manner, no less—that commenters forecast a loss in Medicaid coverage”).

145. Further, agencies must actually analyze the relevant factors. “Stating that a factor was considered ... is not a substitute for considering it.” *State v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021). The agency must instead provide more than “conclusory statements” to prove it considered the relevant statutory factors. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

146. The Circumvention Rule’s exceptions are arbitrary and capricious for multiple independently sufficient reasons, including the following:

147. *First*, Defendants failed to estimate or account for the costs to the States of the Exceptions to the rebuttable presumption and also the vague and broadly worded factors allowing an alien to rebut the presumption (collectively, the “Exceptions”). The Exceptions will increase the rate of illegal immigration into the United States and Defendants failed to consider the cost of increased illegal immigration caused by the Rule, and the presence of much greater numbers of paroled aliens with non-meritorious asylum claims who were induced to enter the United States because of the Circumvention Rule.

148. However, the Circumvention Rule never even attempts to quantify or forecast many essential factors, such as 1) how many aliens will gain entry under the Circumvention Rule (including

through the App); 2) how many aliens will still attempt unlawfully to cross the border without using the app (and thus become “gotaways”); 3) how many aliens will be deterred from illegally crossing; and 4) how many aliens will be incentivized to cross because of the Exceptions and because of the App. These are all “important aspects of the problem” that must be understood before adopting the Circumvention Rule. *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring “reasoned decisionmaking”). Nor can the Defendants claim that such figures are unknowable. The Circumvention Rule is littered with specific forecasts of how many aliens will illegally cross the border when Title 42 restrictions are rescinded. *E.g.* 88 Fed. Reg. at 31,316, 31,331, 31,341, 31363-4 (forecasting daily crossings of 11,000). If Defendants can forecast the number of crossings when Title 42 is canceled, then there is no reason they cannot forecast crossing numbers under the Circumvention Rule. But they do not even attempt to make such forecasts or explain their failure to forecast.

149. By the Defendants’ admission, “the fact that [aliens making asylum claims] can wait in the United States for years before being issued a final order denying relief, and that many such individuals are never actually removed, likely incentivizes migrants to make the journey north.”⁵⁵ Yet, the Defendants also admit that under a recent rule implementing allegedly faster asylum procedures, they “do not yet have the capacity, and do not expect to have the capacity in the near term, to process the large number of migrants expected to cross the border through the system.”⁵⁶ In light of this lack of capacity, the Defendants never adequately explain how the Circumvention Rule will solve the problem it is supposed to address. If the Defendants lack the capacity to apply the new procedures to process aliens’ asylum claims at the border quickly, then this means that aliens using the CPB One app

⁵⁵ Notice of Proposed Rulemaking, Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11,716 (Feb. 23, 2023); see also *id.* at 11,729.

⁵⁶ *Id.* at 11,717.

will have to be admitted into the United States for their asylum claims to be processed under the old system that, by the Defendants' admission, takes years.

150. If allowing aliens entry into the United States to await a years-long asylum process “incentivizes migrants to make the journey north,”⁵⁷ and if the Circumvention Rule (by the Defendants' admission) will facilitate the entry of aliens to start that years-long asylum process, then this means that the Circumvention Rule and the CPB One app will incentivize increased rates of illegal immigration into the United States. The only rational conclusion, therefore, is that the purpose of the Circumvention Rule is to facilitate and incentivize the entry of illegal aliens into the United States—a purpose directly contrary to the clear language of the INA and to Congress's intent.

151. Our republican form of government cannot function when the Executive Branch subverts the will of the people by doing the exact opposite of what Congress has commanded. President Biden said, “the American system ... depends on the rule of law.”⁵⁸ Yet, the Circumvention Rule unlawfully facilitates the presence of countless unlawful aliens in the United States.

152. Indeed, that the purpose of CBP One is to encourage migration is widely recognized in Latin America. For example, Enrique Lucero, municipal director of migration for the Mexican city of Tijuana, recently commented during a media interview that “[w]e believe that CBP One has encouraged migration,” not least because the number of aliens arriving in Tijuana who intend to migrate into the United States illegally increased by 181 percent after CBP One went live.⁵⁹

153. *Second*, aliens using the CBP One App “may be eligible to apply for employment authorization as they await resolution of their cases.” 88 Fed. Reg. at 31,318. Yet Defendants never attempt to analyze how this aspect of the Circumvention Rule will incentivize increased entries by

⁵⁷ *Id.* at 11,716

⁵⁸ Joseph Biden, Remarks by President Biden on Standing up for Democracy, WhiteHouse.Gov, (Nov. 2, 2022), <https://tinyurl.com/2zcrkb3t>.

⁵⁹ Cinthya Gómez, “*Creemos que CBP One ha fomentado la migración*”: Aumenta 181% llegada de migrantes a Tijuana en búsqueda de asilo en EEUU, TELEMUNDO 10 SAN DIEGO, (Feb. 10, 2023), <https://tinyurl.com/5bcka98e>.

aliens into the United States. Nor did the Circumvention Rule attempt to quantify the downward pressure that these additional aliens will exert on the wages of low-skilled citizens and permanent residents and the concomitant increase in costs to States for unemployment or welfare benefits paid to citizens and permanent residents who will be forced to accept lower wages to compete against newly arrived aliens with employment authorization.

154. *Third*, the Circumvention Rule fails to consider the States' reliance interests. The government must "turn square corners in dealing with the people." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). When an agency changes course, as Defendants have done here, they must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). "It would be arbitrary and capricious to ignore such matters." *Id.* (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

155. The Circumvention Rule repeatedly considers and defers to the interests of foreign countries. Yet, it claims that "[t]he Departments are unaware of any existing policies altered by this rule in which States have a substantial reliance interest." 88 Fed. Reg. at 31,438. Defendants' dismissal of the existence of any reliance interests misses the mark. Their analysis fails to account for the actual real-world effects of the current immigration system and how States might have legitimately relied on the Defendants' obligation to enforce the law.

156. The Plaintiff States have overwhelming reliance interests in federal enforcement of immigration law. Specifically, many of the Plaintiff States submitted a comment explaining that the Circumvention Rule will incentivize additional illegal immigration and thus cause increased costs "through education programs, state medical costs, incarceration of illegal aliens who commit crimes,

and welfare programs.”⁶⁰ The Plaintiffs’ State budgets and resource allocations are determined in reliance on Defendants’ continued enforcement of immigration law—or, at the very least, in reliance on Defendants’ not making a bad situation worse. Nevertheless, Defendants explicitly disclaimed any reliance by the States and the Plaintiff States’ determinations about how they would marshal and distribute their resources to deal with the number of unauthorized aliens entering their states. The Circumvention Rule is arbitrary and capricious because it utterly ignores these reliance interests. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1913-14.

157. *Fourth*, Defendants failed to consider or arbitrarily rejected obvious alternatives to the broad Exceptions, such as by hiring more Border Patrol agents to patrol the border or by implementing in good faith the Migrant Protection Protocols (“MPP”) (and thus sending most aliens from third countries back to Mexico to await asylum decisions). The Circumvention Rule claims at one point that it will not increase illegal immigration into the United States, yet it later admits that “the purpose and effect of this rule is not to return noncitizens to Mexico pending their removal proceedings” but instead “to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States.” 88 Fed. Reg. at 31,329. Yet, the “lawful” pathway on which the Circumvention Rule mostly relies is to unlawfully parole aliens *en masse* into the United States. And because that exercise of the parole power is unlawful, then all aliens admitted under that illegal exercise are unlawfully present in the United States. Thus, the purpose of the Circumvention Rule is to increase the number of illegal aliens in the United States.

158. *Fifth*, Defendants ignored statutory factors and relied upon factors Congress did not direct it to consider, by completely failing to address the immigration consequences of the

⁶⁰ Comment Submitted by Indiana and 21 other States, USCIS-2022-0016-12295 at 8 (Mar. 27, 2023), <https://tinyurl.com/3jyd4hnd>

Circumvention Rule. IIRIRA and the Secure Fence Act are designed to reduce crossings. Yet the Circumvention Rule utterly ignores this aspect of the problem and will instead *increase* crossings.

159. *Sixth*, the Defendants failed to justify their deviation from prior practice. The APA prohibits the Defendants from “whistl[ing] past [this] factual graveyard” to “evade[]” their “established pattern of agency conduct and formalized positions.” *Am. Wild Horse Pres. Campaign*, 873 F.3d at 923-27; *see also Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (APA requirements ensure that an agency’s “prior policies and standards are being deliberately changed, not casually ignored”). Yet Defendants fail to grapple with their prior actions and act as if their prior positions don’t exist.

160. *Seventh*, the Exceptions are arbitrary and capricious because they are obviously pretextual. The actions of the President, Secretary Mayorkas, and other Administration officials have made clear that the intent of the Administration’s immigration policies is to incentivize illegal immigration. Indeed, that the Administration’s immigration policies incentivize high amounts of illegal immigration is widely recognized internationally. For example, the President of Mexico called President Biden the “migrant president” and observed that the Biden Administration’s policies and rhetoric greatly incentivize illegal immigration.⁶¹ Human traffickers have recognized this as well. Internal Mexican government assessments “state that gangs are diversifying methods of smuggling and winning clients as they eye U.S. measures that will ‘incentivize migration.’”⁶² The presence of such blatant pretext is enough to render the Circumvention Rule arbitrary and capricious. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Accepting Defendants’ description of the Circumvention Rule requires this Court to “exhibit a naiveté from which ordinary citizens are free.” *Id.*

⁶¹ Dave Graham, “Exclusive: ‘Migrant president’ Biden stirs Mexican angst over boom time for gangs,” Reuters, Mar. 10, 2021 <https://reut.rs/3vKlk1x>.

⁶² *Id.*

161. *Eighth*, the Exceptions are focused on facilitating the entry into the United States of aliens making asylum claims, yet it fails to account for the reality that the vast majority of asylum claims have no merit. Between FY2008 and the FY2019, the grant rate for asylum matters originating from credible fear referrals made by Asylum Officers (AOs) was only 14%.⁶³ Furthermore, *in absentia* removal order rates for such cases are very high.⁶⁴ This means that most aliens being placed into immigration court proceedings following a positive credible fear determination by AOs are being ordered removed. The current system is rife with fraud and frivolous claims. Rather than make the system stricter to solve these problems, the Circumvention Rule inexplicably relaxes requirements even further, thus making it even easier for aliens with meritless claims improperly to gain entry into the United States.

COUNT V

Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)

Arbitrary and Capricious Agency Action

(Exceptions to Rebuttable Presumption)

162. The Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

163. As explained above, the APA prohibits agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

164. The Circumvention Rule's exceptions to its “rebuttable presumption,” and also the vague and broadly worded factors allowing an alien to rebut the presumption, are arbitrary and capricious.

⁶³ EOIR, “Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019,” <https://www.justice.gov/eoir/file/1216991/download>, accessed on May 23, 2024.

⁶⁴ *Id.*

165. The Circumvention Rule’s exceptions to the “rebuttable presumption,” and the factors allowing the presumption to be rebutted (the “Exceptions”) render the “rebuttable presumption” entirely toothless. The Rule, therefore, will not decrease real illegal immigration rates and will likely increase them for three reasons.

166. *First*, the rebuttable presumption does not apply to aliens who illegally cross the border using the CBP One app to schedule their crossing ahead of time. Entries facilitated by the CBP One app will undoubtedly continue to increase dramatically, increasing the total number of unlawful aliens in the States. The only aspect that will change is that DHS will no longer record those entries as unlawful. The Circumvention Rule is an accounting exercise allowing the Administration to claim that illegal entries have decreased. In reality, though, the Circumvention Rule will drastically incentivize increased illegal immigration into the United States and lead to an explosion in the population of unlawful alien residents in the States. This will impose enormous new demands on State social service and education systems already stretched to the breaking point.

167. *Second*, the rebuttable presumption does not apply to any alien who failed to use the CBP One app “if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” 88 Fed. Reg. at 31,450 (creating exception at new 8 C.F.R. § 208.33(a)(2)(ii)(B)). Given that the CBP One app is plagued with bugs and rarely works,⁶⁵ this exception entirely swallows the rule.

168. *Third*, the rebuttable presumption has so many conditions allowing it to be rebutted that it might as well be called an “always-rebutted presumption.” The Circumvention Rule includes the following factors that allow for it to be rebutted: “medical emergency”; “imminent and extreme

⁶⁵ Joel Rose and Marisa Peñaloza, NPR (May 12, 2023), <https://tinyurl.com/yw26z6v2>.

threat to life or safety”; being a “victim of a severe form of trafficking in persons”; or *any other circumstance* whenever adjudicators in their complete discretion decide that there exist “other exceptionally compelling circumstances.” 88 Fed. Reg. at 31,318. It is well-known that various NGOs and legal organizations coach illegal aliens in Mexico on which “magic words” they must utter to gain entry into the United States. The exceptions to the “rebuttable presumption” just provide a new list of magic words for coaching aliens. Furthermore, the catch-all provision allowing adjudicators to make exceptions whenever they want renders the rebuttable presumption entirely toothless.

COUNT VI

Administrative Procedure Act, 5 U.S.C. § 706(2)(D)

Lack of Notice and Comment – Logical Outgrowth

169. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

170. The APA provides that courts must “hold unlawful and set aside agency action” that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

171. The APA requires agencies to publish notice of all “proposed rule making” in the Federal Register, *id.* § 553(b), and to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,” *id.* § 553(c). Thus, the Circumvention Rule can be issued, if at all, only via notice-and-comment rulemaking under the APA. 5 U.S.C. § 553.

172. Such requirements “are not mere formalities” but rather “are basic to our system of administrative law.” *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018). “Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.” *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984); *see also NRDC*, 894 F.3d at 115 (notice and

comment serves “the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking”); *Spring Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (notice and comment “ensures fairness to affected parties[] and provides a well-developed record that enhances the quality of judicial review”).

173. The Circumvention Rule is not an interpretive rule, general statement of policy, or a rule of agency organization, procedure, or practice otherwise exempt from notice-and-comment rulemaking.

174. The Circumvention Rule was issued as a final rule, thus becoming effective without additional notice or comment (except for those portions dealing with the extension of the Rule’s provisions to maritime contexts).

175. The Circumvention Rule makes six changes from the initial Proposed Rule that would go into effect without notice and comment. *See* 88 Fed. Reg. at 31,319-21 (summarizing seven major changes, six of which would go into effect without notice and comment). “[A]gencies may not ‘pull a surprise switcheroo’” between a proposed and final rule. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014). When a final rule has major changes from the proposed rule, the “logical outgrowth” test governs whether an agency must submit the rule again for notice-and-comment before it may take effect. “As the Supreme Court recently explained [in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)], the object of the logical outgrowth test is one of fair notice.” *Owner-Operator Indep. Drivers Ass’n, Inc., v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 209 (D.C. Cir. 2007) (citations omitted).

176. Specifically, Defendants make the following six changes without notice-and-comment: 1) removing provisions implementing the proclamation bar IFR and the TCT bar final rule, *see* 88 Fed. Reg. at 31,319; 2) making the rebuttable presumption continue to apply in perpetuity after the rule’s

two-year period has expired, for aliens who entered under the Rule and then later choose to apply for asylum, *id.* at 31,319-20; 3) expanding the meaning of the term “final decision” in the Exception for aliens who applied for asylum in a third country and had received a negative “final decision,” *id.* at 31,321; 4) expanding the applicability of the Exception for unaccompanied alien children, *id.*; 5) expanding its family unity provision, *id.*; 6) making a number of structural changes and changes to headings. *Id.*

177. Defendants never even claim that the Circumvention Rule is a logical outgrowth of the Proposed Rule. However, the six changes to the Circumvention Rule are not a “logical outgrowth” of the Proposed Rule because a “reasonable commenter” would not “have anticipated that such ... requirement[s] would be promulgated,” and the Circumvention Rule did not provide notice “sufficient to advise interested parties that comments directed to the controverted aspect of the final rule should have been made.” *First Am. Discount Corp. v. Commodity Trading Futures Ass’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (cleaned up). The Circumvention Rule therefore may not take effect until commenters are provided “their first occasion to offer new and different criticisms which the agency might find convincing.” *Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058-59 (D.C. Cir. 2000) (citation omitted).

178. Because the logical outgrowth test requires that the Circumvention Rule be subject to an additional round of notice-and-comment before taking effect, the Circumvention Rule must be “held unlawful and set aside” as it was promulgated “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

179. Furthermore, considering the magnitude of the Circumvention Rule’s impact on State authorities, it was incumbent on Defendants to consult with the States on both the wisdom and implementation of such a far-reaching endeavor, and failure to do so was not harmless error. *See United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011) (“An overreaching harmless error doctrine would

allow the agency to inappropriately ‘avoid the necessity of publishing a notice of a proposed rule and perhaps, most important, [the agency] would not be obliged to set forth a statement of the basis and purpose of the rule, which needs to take account of the major comments—and often is a major focus of judicial review.’”); 2 U.S.C. § 1534(a) (“[e]ach agency *shall* . . . develop an effective process to permit elected officers of State, local, and tribal governments . . . to provide *meaningful and timely* input in the development of regulatory proposals containing significant Federal intergovernmental mandates.” (emphasis added)).

180. Under these circumstances, Defendants’ failure to comply with the APA’s notice and comment provisions is fatal to the Circumvention Rule. *Johnson*, 632 F.3d at 928-29 (“Without good cause, we must enforce Congress’s choice in favor of the traditional, deliberative rulemaking process.”).

COUNT VII

Administrative Procedure Act, 5 U.S.C. § 706(2)(D)

Notice and Comment

(Failure to Address Comments)

181. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

182. The Circumvention Rule is a rule that can be issued, if at all, only by notice-and-comment rulemaking under the APA. 5 U.S.C. § 553.

183. The Circumvention Rule failed to take account of the States’ comments, either summarily rejecting them without substantive explanation, or outright ignoring them. For example, a coalition of 22 states that includes most of the Plaintiffs submitted a 15-page comment that raised general concerns, as well as five specific comments about serious deficiencies in the proposed rule, particularly focused on the Exceptions and the App. *See* Comment Submitted by Indiana and 21 other States, USCIS-2022-0016-12295 at 8 (Mar. 27, 2023), <https://tinyurl.com/3jyd4hnd>. Defendants

ignored much of the States’ comment and, for the aspects of the comment that they purported to address, they summarily disposed of the States’ comment in a cursory, dismissive fashion that refused to offer any substantive legal or factual basis for dismissing the States’ comment. *E.g.*, 88 Fed. Reg. at 31,438 (cursorily rejecting States’ reliance concerns without offering substantive legal or factual justification for rejection).

184. Thus, the Exceptions to the Circumvention Rule must be “held unlawful and set aside” as they were promulgated “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

COUNT VIII

Non-Statutory Equitable Cause of Action

(Violation of the INA and other Federal Statutes)

185. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

186. Defendants cannot ignore federal statutes and the States have a non-statutory cause of action to challenge the government’s unlawful, ultra vires conduct, which does indeed “survive[] displacement by the APA.” *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (citing *e.*, 337 U.S. 682, 690–91 (1949)). Thus, review is available to parties who lack any future alternate remedy for judicial review of unlawful agency action. *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958); *see also Board of Governors of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43-44 (1991) (holding *Kyne* not to apply where there was an available “meaningful and adequate opportunity for judicial review of the ... regulation”).

187. Defendants’ application of the Exceptions is unlawful and ultra vires, and the States therefore have non-statutory cause of action to challenge the Exceptions.

PRAYER FOR RELIEF

NOW, THEREFORE, Plaintiffs request an order and judgment:

1. Declaring, under 28 U.S.C. § 2201, that the Exceptions are arbitrary and capricious and unlawful under the APA;
2. Declaring, under 28 U.S.C. § 2201, that the Exceptions are contrary to law and in excess of statutory authority under the APA;
3. Declaring, under 28 U.S.C. § 2201, that the Exceptions violate the APA because it was promulgated without notice and comment;
4. Declaring, under 28 U.S.C. § 2201, that the Exceptions violate the INA and the Secure Fence Act;
5. Postponing the effective date of the Circumvention Rule pursuant to 5 U.S.C. § 705;
6. Holding unlawful and vacating the following portions of the Circumvention Rule under 5 U.S.C. § 706: 8 C.F.R. § 208.33(a)(2)-(3) and 8 C.F.R. § 1208.33(a)(2)-(3);
7. Preliminarily and permanently enjoining, without bond, Defendants from applying the following portions of the Circumvention Rule: 8 C.F.R. § 208.33(a)(2)-(3) and 8 C.F.R. § 1208.33(a)(2)-(3);
8. Awarding Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and
9. Granting any and all other such relief as the Court finds appropriate.

Respectfully Submitted,

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**motion for pro hac vice admission forthcoming*