IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASYLUM SEEKERS TRYING TO ASSURE THEIR SAFETY, *et al*., Plaintiffs, v. TAE D. JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement, *et al.*, Defendants.	No. 23-cv-00163-RCL

IMMIGRATION REFORM LAW INSTITUTE'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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DISCLOSURE STATEMENT

Pursuant to LCvR 7(o)(5) and Fed. R. App. P. 29(a)(4), *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute, whose mission is: to defend responsible immigration policies in court, before administrative agencies, and before legislative bodies on behalf of the American people; to serve as a watchdog to safeguard against abuses of power; and to educate the American people about the threat of unchecked mass migration to themselves and their communities.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to achieving responsible immigration policies that serve the best interest of the nation. IRLI has litigated or filed amicus curiae briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec*., 518 F. Supp. 3d 448 (D.D.C. 2021); *Save Jobs USA v. U.S. Dep't of Homeland Sec*., 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). For more than twenty years, the Board of Immigration Appeals has solicited amicus briefs drafted by IRLI staff from the Federation for American Immigration Reform, of which IRLI is a supporting organization, because the Board considers IRLI an expert in immigration law.

ARGUMENT

This case arises out of the unintentional and temporary disclosure of certain personally identifiable information, including immigration information, of approximately 6,000 aliens who were in ICE custody in November 2022. *See* Defendants' Response in Opposition to Plaintiffs' Motion to Certify Class, ECF Doc. 28, at 10.[2] The information was posted on ICE.gov for about five hours before U.S. Immigration and Customs Enforcement ("ICE") was notified and removed the information. *Id*. Subsequently, in December 2022, the Department of Homeland Security

[1] Consistent with Fed. R. App. P. 29 (a)(4)(E), counsel for *amicus* authored this brief in whole, and no counsel for a party authored the motion in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to preparation or submission of the brief.

[2] Page number citations are to the ECF header pagination, not the original document pagination.

("DHS") "unintentionally disclosed information related to the November 28, 2022, posting to the Government of Cuba." *Id*. As a result, "ICE has since undertaken several measures to mitigate the impact of the inadvertent disclosure and prevent any inadvertent disclosure from recurring." *Id*. at 11.

Plaintiffs allege violations of the Privacy Act of 1974, the Administrative Procedure Act, the *Accardi* doctrine, and the Fifth Amendment of the U.S. Constitution. IRLI supports the arguments made by Defendants in their motion to dismiss and offers this *amicus* brief to add that Plaintiffs' constitutional claims must fail because Plaintiffs had not entered the country for immigration purposes when the unintentional disclosure of their personal information occurred. It is a basic principle of immigration law that aliens who have not effected "entry" into the United States have not acquired rights under our Constitution. Because Plaintiffs did not effect an entry into the United States, their procedural rights are limited solely to those provided by Congress, which in this case consists of a determination of whether they have a significant possibility of establishing eligibility for asylum.

I. Plaintiffs had not effected an entry into the United States and therefore have no constitutional right to "recovery" due to the data breach.

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

> Any discussion of [Plaintiffs'] rights in the immigration context must also start with the fundamental difference in the legal status of (1) unadmitted aliens and (2) resident aliens who have effected "entry" into the United States, whether legally or illegally. This critical difference not only was recognized in *Zadvydas*, but has been a hallmark of immigration law for more than a hundred years.

Benitez v. Wallis, 337 F.3d 1289, 1296 (11th Cir. 2003). "[F]or an alien who has not effected entry into the United States, whatever the procedure authorized by Congress is, it is due process as far

as an alien denied entry is concerned.'" *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 145 (D.D.C. 2018) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). As the D.C. Circuit has explained, "[t]he long line of cases dealing with constitutional rights of both lawful resident aliens and illegal aliens establishes only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Rasul v. Myers*, 563 F.3d 527, 531 (D.C. Cir. 2009) (quotation marks and citation omitted). *See also Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) ("Decisions of the Supreme Court and of this court … hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated in relevant part*, 605 F.3d 1046 (D.C. Cir. 2010).

"Entry" is a term of art in immigration law that requires "physical presence in the United States" and "freedom from official restraint." *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016). Several circuit courts have adopted the definition of "entry" followed by the Board of Immigration Appeals, which requires "(1) a crossing into the territorial limits of the United States, *i.e.*, physical presence; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint." *Sidhu v. Ashcroft*, 368 F.3d 1160, 1163-64 (9th Cir. 2004) (citing *Nyirenda v. INS*, 279 F.3d 620, 624 (8th Cir. 2002); *Yang v. Maugans*, 68 F.3d 1540, 1545 (3d Cir. 1995); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990); *Farquharson v. United States Att'y Gen.*, 246 F.3d 1317, 1320-21 (11th Cir. 1976)). Thus, an alien who "was never inspected and admitted in the usual manner by an immigration officer, nor … actually succeed in evading inspection at the border" has not made an entry into the United States." *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004).

It is a longstanding principle that an alien detained at the border and held in custody has not effected an entry. *Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892); *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) ("[T]he detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States."). This Court has recognized that:

> [T]he [Supreme] Court [has] held that—regardless of whether a noncitizen is "detained shortly after unlawful entry" (for example, "25 yards into U.S. territory"), or is detained "at a port of entry" such as an international airport (which is, technically, U.S. soil), or is first detained at the border and then paroled into the country pending removal—noncitizens who have not "effected an entry" into the United States are only entitled to the process that Congress has afforded them by statute.

Las Ams. Immigrant Advocacy Ctr. v. Wolf, 507 F. Supp. 3d 1, 39 (D.D.C. 2020) (quoting *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020)).

"The entry doctrine is of considerable antiquity and its extended tenure and continued vigor derive from the fact that . . . the power to admit or exclude aliens is a sovereign prerogative." *Ukranian-American Bar Assn'n v. Baker*, 893 F.2d 1374, 1383 (D.C. Cir. 1990) (Sentell, J., concurring) (quotations and citations omitted). As both the Supreme Court and several circuit courts have explained, "the detention of an alien in custody pending determination of his admissibility does not legally constitute entry though the alien is physically within the United States." *Id.* (collecting cases). For example, a woman who had been detained at Ellis Island for a year and then released to live with her father "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared," even though she had been in the United States for a decade. *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). "She was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.*; *accord Wong*

Sang v. United States, 144 F. 968, 970 (1st Cir. 1906) (citing *United States v. Ju Toy*, 198 U.S. 253, 263 (1905)). This Court has recognized that

> [i]t is . . . firmly established that although aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country. Because such aliens are not considered to be within the United States, but rather at the border, courts have long recognized that such aliens have no constitutional right[s] with respect to their applications for admission.

Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 58-59 (D.D.C. 1998) (internal citations omitted).

"To survive a Rule 12(b)(6) motion to dismiss, the complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiffs' allegations." *Long v. Safeway, Inc.*, 842 F. Supp. 2d 141, 145 (D.D.C. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Here, Plaintiffs claim that they are entitled to "recovery" under the Fifth Amendment to the Constitution. *See* First Amended Complaint, ECF Doc. 6 at 35-36, ¶¶ 147, 150. But Plaintiffs have not pled any facts indicating that they have effected an entry into the United States such that they would fall within the protection of the Fifth Amendment. Instead, Plaintiffs concede that they were all in ICE custody when the data breach occurred. *See* ECF Doc. 6 at 36, ¶ 151 ("Plaintiffs and all similarly situated were in ICE custody at the time of the data breach."). Thus, Plaintiffs fail to allege that they were free from official restraint such that they had effected an entry into the United States, a prerequisite for coming under the protection of the Fifth Amendment of the U.S. Constitution.

II. Because Plaintiffs had not effected entry, their constitutional rights were limited to those afforded by Congress.

"Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

See also Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020) (explaining that aliens "ha[ve] only those rights regarding admission that Congress has provided by statute.").

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

Nishimura Ekiu, 142 U.S. at 660.

Here, the only protection Congress has afforded aliens such as Plaintiffs is the opportunity to apply for asylum. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (B)(ii), (v) (setting forth the credible fear of persecution screening process for inadmissible aliens). This Court has recognized that

> a noncitizen who is undergoing the credible fear process and has not yet 'effected an entry' within the territory of the United States, the Due Process Clause provides nothing more than the right, provided under section 1225(b) of the INA, to a determination [of] whether he had a significant possibility of establishing eligibility for asylum[.]

Las Ams. Immigrant Advocacy Ctr., 507 F. Supp. 3d at 39 (alterations in original) (internal quotation marks and citations omitted).

Plaintiffs do not make any factual showing that they have been deprived of the right to make an asylum claim and have a fair opportunity to be heard on such claim. Indeed, as Defendants make clear in their Motion to Dismiss, Plaintiffs have been (or will be) afforded the opportunity to have their asylum claims re-evaluated in light of the data breach. *See* ECF Doc. 33 at 26-30, 48; *id.* at 17 ("At bottom, all will have the opportunity to raise the inadvertent disclosure in removal proceedings, regardless of where they are already in the process and regardless of whether or not they have previously been found to have credible fear. Affected noncitizens not yet or currently in

removal proceedings may apply or re-apply for relief as normal based on the inadvertent disclosure.").

In sum, because Plaintiffs had not effected an entry into the country, their constitutional claims must fail. Further, because Plaintiffs have already been afforded the opportunity to establish a credible fear of persecution and to have their claims re-evaluated in light of the data breach, there is no other relief that the Court can award. Accordingly, the Court should grant Defendants' motion to dismiss.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion to Dismiss.

Dated: April 11, 2023

Respectfully submitted,

/s/ Gina D'Andrea

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with LCvR 7(o)(4) because it does not exceed 25 pages in length.

/s/ Gina D'Andrea

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2023, a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) and served on all counsel of record.

/s/ Gina D'Andrea