UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*, Plaintiffs, v. ALEJANDRO MAYORKAS,[1] *et al.*, Defendants.	Civil Action No. 1:21-cv-124-TSC

PLAINTIFFS' MOTION TO PARTIALLY LIFT STAY OF PROCEEDINGS

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 7 of the United States District Court for the District of Columbia, Plaintiffs Tahirih Justice Center and Ayuda, Inc. (together, "Plaintiffs") respectfully submit this motion to partially lift the stay of proceedings in this case.

INTRODUCTION

Plaintiffs agreed to stay this case in order to grant time to the agency leadership under the then new Biden Administration to consider the issues in the case and to review the challenged regulation. But after nearly eighteen months of a stay, several factors that contributed to Plaintiffs' initial willingness to agree to the stay have changed. Moreover, continuing uncertainty about the validity of the regulation, along with confusion caused by its enjoined status, is harming Plaintiffs, their clients, and others. To ameliorate these problems and enable the swiftest resolution of this

[1] On February 2, 2021, Alejandro Mayorkas became the Acting Secretary of Homeland Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, he is automatically substituted as a party.

case, the stay should be partially lifted to allow certain of Plaintiffs' claims to proceed.

FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2020, the U.S. Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") (together, "Defendants") jointly promulgated a rule entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 80,274 (Dec. 11, 2020) (the "Rule"). On January 14, 2021, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief, alleging that the Rule was issued in violation of the Appointments Clause of the Constitution, the Homeland Security Act, 6 U.S.C. § 113, and the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d ("FVRA"), by a DHS official who lacked the authority to issue it, and must therefore be set aside as unlawful under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 706. Plaintiffs also alleged that the Rule violates the procedural and substantive requirements of the APA, as well as the Equal Protection Clause of the Fourteenth Amendment. (Complaint ¶¶ 7-8, *Tahirih Just. Ctr. v. Mayorkas*, No. 1:21-cv-00124-TSC (D.D.C. Jan. 14, 2021), Dkt. 1.)

With respect to Plaintiffs' claims under the Appointments Clause, the Homeland Security Act, and the FVRA, Plaintiffs alleged that the Rule was promulgated by an official who was not lawfully serving in his position. The Rule was approved by Chad Wolf in his role as the purported Acting Secretary of Homeland Security, but Wolf was never a validly serving Acting Secretary and lacked authority to approve the Rule. Agency actions taken by illegally serving officials are "in excess of statutory jurisdiction, authority, or limitations" and "not in accordance with law," and for that reason must be set aside as "unlawful" under the APA. 5 U.S.C. § 706(2)(A), (C); *see SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79-81 (D.C. Cir. 2015), *aff'd*, 580 U.S. 288 (2017); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 564 (9th Cir. 2016). The FVRA independently

requires that such actions "shall have no force or effect." 5 U.S.C. § 3348(d)(1); *see NLRB v. SW Gen., Inc.*, 137 580 U.S. 288, S. Ct. 929, 938 n.2 (2017) ("[T]he general rule [is] that actions taken in violation of the FVRA are void *ab initio.*"). Therefore, the Rule was unlawful under the APA and void under the FVRA.

On January 8, 2021, a nationwide preliminary injunction enjoining the Rule in its entirety was entered in *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021), and Order Re Preliminary Injunction, *Immigr. Equal. v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09258-JD (N.D. Cal. Jan. 8, 2021), ECF No. 55. In granting the injunction, the court held that the plaintiffs were likely to succeed on the merits of their claim that the Rule was issued "without authority of law," because "DHS lacked authority through Wolf for the proposed rulemaking." *Pangea Legal Servs.*, 512 F. Supp. 3d at 975. Both *Pangea Legal Services* and *Immigration Equality* are administratively closed with the terms of the preliminary injunction remaining in effect pending further order of that court. *See* Minute Order, *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec*, No. 3:20-cv-09253-JD (N.D. Cal. Feb. 4, 2022), ECF No. 97.

On January 20, 2021, Joseph R. Biden was sworn in as President of the United States. On February 2, 2021, President Biden issued an executive order directing the Acting Secretary of Homeland Security and other officials to review and consider rescinding migration policies adopted by the previous administration and ordering the implementation of a new, multi-pronged approach toward managing migration, including with respect to the processing of asylum seekers.[2]

[2] Exec. Order 14010 on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/.

Among other instructions, President Biden ordered the Attorney General and the Acting Secretary of Homeland Security to, within 270 days of the order, "promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a 'particular social group,' as that term is used in 8 U.S.C. 1101(a)(42)(A)."[3]

The Executive Order also directed the Acting Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of Health and Human Services, to "promptly begin taking steps to reinstate the safe and orderly reception and processing of arriving asylum seekers, consistent with public health and safety and capacity constraints," including by reviewing and determining whether to rescind certain rules, memoranda, and guidance about the asylum process promulgated during the previous administration.[4]

On January 28, 2021, this Court ordered the parties to meet and confer and to file a joint status report addressing the following: "1) whether the current dispute has been mooted or the parties anticipate that it will be mooted; 2) whether the parties wish to stay this action for any reason, including the parties' negotiations over resolving this dispute; or 3) whether the parties agree that this litigation should continue as anticipated pursuant to the federal rules, local rules or a scheduling order." (Minute Order, Jan. 28, 2021.) On February 8, 2021, the parties filed a joint stipulation agreeing to hold the proceedings in abeyance, "because the Rule at issue in this case is currently under review by the Departments, and holding this case in abeyance will allow incoming Department leadership time to consider the issues in this case and to review the Rule." (Joint Stipulation to Hold Case in Abeyance, *Tahirih Just. Ctr. v. Mayorkas*, No. 1:21-cv-00124- TSC (D.D.C. Feb. 8, 2021), Dkt. 16 (hereinafter "Joint Stipulation, Dkt. 16") at 1.) The Court entered

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3 *Id.*

4 *Id.*

a stay on February 9, 2021. (Minute Order, Feb. 9, 2021.)

On May 9, 2021, the Court continued the stay and ordered the parties to file a joint status report by August 9, 2021, and every thirty days thereafter. (Minute Order, May 9, 2021.) The parties have been so filing status reports during that time. DOJ and DHS have advised that they are working on Notices of Proposed Rulemaking that will address several of the topics addressed in the Rule, and have consistently sought to extend the stay.

As reflected in the joint status reports, Plaintiffs never intended for this litigation to be stayed indefinitely: in Plaintiffs' view, challenges to the Rule would be moot if (and only if) the Rule is repealed and replaced by the agencies or vacated by another court.

On June 21, 2022, the Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions (the "Spring Agenda") was published by the Office of Management and Budget. The Spring Agenda discusses several rulemakings addressing the matters at issue in this litigation. Of note, the Spring Agenda says that one of the Notices of Proposed Rulemaking ("NPRMs") that will address portions of the Rule at issue here was expected to issue in August 2022, but that two others are not expected until May 2023.[5] This is a change from the Fall 2021 version of this agenda, which said that the first of these two NPRMs would issue in November 2021, indicating the aspirational nature of the deadlines listed in the Spring Agenda.[6] In fact, the first of the three

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[5] *See* Particular Social Group and Related Definitions and Interpretations for Asylum and Withholding of Removal, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1125-AB13 (last visited Aug. 18, 2022) (stating NPRM expected in August 2022); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1125-AB14 (last visited Aug. 18, 2022) (stating NPRM expected in May 2023).

[6] Asylum and Withholding Definitions, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1615-AC65 (stating NPRM expected in November 2021).

NPRMs did not issue in August of 2022.

The Spring Agenda indicates that the first planned NPRM will propose to either rescind or "modify" several portions of the current Rule, which address "definitions of membership in a particular social group, the requirements for failure of State protection, and determinations about whether persecution is on account of a protected ground."[7] A second planned NPRM, currently slated for May 2023, will propose to either rescind or "modify" portions of the Rule governing credible fear determinations. A third planned NPRM, also currently slated for May 2023, will propose to either rescind or "modify" the remaining regulatory changes made by the Rule.[8]

In the parties' August 2022 joint status report, Defendants noted "that the Supreme Court recently issued a decision in *Garland v. Aleman Gonzalez*, No. 20-322, 2022 WL 2111346 (U.S. June 13, 2022), and that the Departments are currently considering its applicability, if any, to the preliminary injunction in *Pangea*." (Joint Status Report, Tahirih Just. Ctr. v. Mayorkas, No. 1:21-cv-00124-TSC (D.D.C. July 8, 2022), Dkt. 33 at 1.)

By request of the Plaintiffs, the parties have met and conferred via telephone several times since February 2021. In each instance, counsel for Defendants have been unable to provide a substantive update on when new rulemakings are expected. On August 8, 2022, counsel for the parties met and conferred regarding the status of the litigation. Counsel for Plaintiffs advised

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7 Particular Social Group and Related Definitions and Interpretations for Asylum and Withholding of Removal, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1125-AB13 (last visited Aug. 18, 2022).

8 Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1125-AB14 (last visited Aug. 18, 2022); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1125-AB20 (last visited Aug. 18, 2022).

counsel for Defendants of Plaintiffs' concerns regarding the continuing stay and of Plaintiffs' intention to move to lift the stay, and counsel for Defendants advised that they would not consent to lifting of the stay. The parties conferred again on September 6, 2022. Counsel for Plaintiffs explained the expected scope of this Motion. Counsel for Defendants confirmed that the Defendants do not consent to lifting of the stay. Counsel for Defendants further advised that they believe that the proceedings in *United States v. Texas & Louisiana*, No 22A (U.S. filed July 2022) (hereinafter "*United States v. Texas*"), now pending in the Supreme Court, is relevant to this matter. The parties agreed that their Local Rule 7 meet and confer obligations have been satisfied.

STANDARD OF REVIEW

A court has the "inherent power and discretion" to lift its own stay order. *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003); *see also Liff v. Off. of Inspector Gen. for U. S. Dep't of Labor*, No. 14-1162 (JEB), 2016 WL 4506970, at *2 (D.D.C. Aug. 26, 2016). When "circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay *sua sponte* or upon motion." *Marsh*, 263 F. Supp. 2d at 52; *see also Liff*, 2016 WL 4506970, at *2. As in determining whether to grant a stay, a court also considers judicial efficiency and harm to the parties when considering whether to lift a stay. *SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, 928 F. Supp. 2d 43, 50-51 (D.D.C. 2013); *see also Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 20 (D.D.C. 2019) (a stay order "must be supported by a balanced finding that [its] need overrides the injury to the party being stayed" (citations omitted)); *Nat'l Indus. for Blind v. Dep't of Veterans Affs.*, 296 F. Supp. 3d 131, 137-38 (D.D.C. 2017) (if a stay would harm a party, the proponent of the stay "must demonstrate a clear case of hardship or inequity in being required to go forward"(citation omitted)).

ARGUMENT

This Court should partially lift the stay to permit summary judgment briefing on Plaintiffs' claims regarding Chad Wolf's authority to approve the Rule as Acting Secretary of Homeland Security. Numerous factors support partially lifting the stay in this way: (1) Defendants' decision to defend Wolf's appointment in other litigation constitutes changed circumstances; (2) an intervening Supreme Court decision that Defendants regard as potential grounds for limiting the injunction in the *Pangea* case constitutes changed circumstances; (3) the extended uncertainty concerning the status of the Rule continues to harm Plaintiffs and their clients; (4) confusion in the federal courts about the validity of the Rule is escalating, with numerous decisions treating the Rule as valid and operative, harms Plaintiffs and their clients; (5) there is a strong likelihood that Plaintiffs will win on these claims, as evidenced by the unanimous consensus of other courts that Wolf's tenure leading DHS was unlawful; and (6) successfully litigating the Wolf claims would promote judicial efficiency by invalidating the Rule and fully resolving this case.

I. THE CIRCUMSTANCES THAT JUSTIFIED THE STAY NO LONGER EXIST.

The parties originally sought an abeyance "because the Rule at issue in this case is currently under review by the Departments, and holding this case in abeyance will allow incoming Department leadership time to consider the issues in this case and to review the Rule." (Joint Stipulation, Dkt. 16 at 1.) Plaintiffs also agreed to stay the case because of the injunction that had already issued in *Pangea Legal Services* and *Immigration Equality*. (*Id.*)

A court may use its power and discretion to lift a stay "[w]hen circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate." *Marsh*, 263 F. Supp. 2d at 52. In determining whether circumstances have changed, courts in this District have considered numerous factors, such as the status of similar ongoing cases, the nature of agency actions—such as whether an agency is reviewing a rule at issue or negotiating with other parties—

and the pace of agency actions. *See, e.g.*, *Judicial Watch, Inc. v. U. S. Dep't of Justice*, 57 F. Supp. 3d 48, 50 (D.D.C. 2014). In short, the court compares any "changed circumstances" to its initial reason for imposing the stay to decide whether the stay remains warranted. *See generally id.*; see also *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177 (D.D.C. 2016).

A. Defendants Have Taken the Position That Chad Wolf Served Lawfully as Acting Secretary of DHS.

At the time Plaintiffs agreed to the stay, the newly installed Biden Administration's position regarding the legitimacy of Wolf's appointment was not known, and Plaintiffs reasonably understood that the Administration would assess its position on the numerous ongoing challenges to that appointment. *See* Joint Stipulation, Dkt. 16 at 1 (explaining that a stay "will allow incoming Department leadership time to consider the issues in this case"). Since then, DOJ and DHS have resolved to defend the legitimacy of Wolf's appointment and his authority to approve DHS regulations, taking the position that "Chad Wolf was lawfully serving as Acting Secretary." Corr. Opp. To Pls.' Mot. For Summ. J. at 8, *CASA de Maryland, Inc. v. Mayorkas*, No. 8:20-cv-02118-PX (D. Md. June 4, 2021), ECF No. 123¬-1; *see also id.* at 7 ("Defendants ... respectfully request that this Court reconsider it prior finding."); see also Mem. of P. & A. in Supp. of Defs.' Cross-Mot. for Partial Summ. J. at 15, *Asylumworks v. Mayorkas*, No. 1:20-cv-03815-BAH (D.D.C. July 28, 2021), ECF No. 29 ("Wolf validly served as Acting Secretary."). This determination by the Biden Administration constitutes a changed circumstance since Plaintiffs agreed to the stay.

B. The Rulemaking Process Has Been Significantly Delayed, and There Is Now a Prospect of Relevant Rulemaking Continuing for Another Eighteen Months.

At the time Plaintiffs agreed to the stay, the Biden Administration's actions, including Executive Order 14010, indicated that the Administration would act quickly and decisively to address the changes imposed by the Rule. In particular, the Executive Order instructed the

Attorney General and the Acting Secretary of Homeland Security to promulgate joint rulemaking within 270 days addressing the definition of "particular social group."[9] But that deadline passed in the fall of 2021 without any evidence of significant developments in that rulemaking.[10]

The Spring Agenda released in June 2022 does not reflect a commitment by the Administration to repeal the Rule and instead shows that the Administration plans to "rescind or modify" the changes imposed by the Rule in three stages, the last of which is not scheduled even for an NPRM until May of 2023—two and a half years after the Rule was issued and over two years since Executive Order 14010 was issued and this case was stayed.

The Spring Agenda provided that one of the NPRMs that DOJ and DHS have represented will address several of the topics at issue in this litigation was scheduled to issue in August 2022, which did not take place. Even if the NPRM issues in September 2022, it is likely that a Final Rule relating to that NPRM would not be effective until April or May of 2023, based on statutory time periods for rulemaking processes and on other, similar, recent rulemakings.[11] With respect to the second and third NPRMs relating to several other aspects of the Rule at issue in this litigation, which are now scheduled for May 2023, proceeding along the same timeline means that the corresponding Final Rules would not be effective until the very last days of 2023.[12] This

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9 Exec. Order 14010 (Feb. 2, 2021).

10 *See* Asylum and Withholding Definitions, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1615-AC65 (last visited Aug. 18, 2022).

11 *See, e.g.*, 5 U.S.C. § 553 (setting forth the framework for the rulemaking process); Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821,3822 (Jan. 18, 2011) (stating that the comment period should generally be at least sixty days); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022) (publishing final rule 167 days after the NPRM comment period closed).

12 *Id.*

timeline is not consistent with the representations made by the Administration at the time that Plaintiffs agreed to the abeyance.

C. An Intervening Supreme Court Decision Has Given the Government a Potential Way to End the *Pangea Legal Services* Injunction.

As set out in the Complaint, Plaintiffs brought this action to prevent evisceration of statutory asylum protections that were created by Congress to fulfill the United States' obligation to shelter immigrants fleeing persecution (Compl. ¶ 1), and Plaintiffs agreed to the stay because the Rule was enjoined in the *Pangea* litigation. DOJ and DHS's stated position that the recent Supreme Court opinion in *Garland v. Aleman Gonzalez* may impact the injunction in *Pangea* is a significant development with respect to the conditions under which Plaintiffs agreed to an abeyance.

In *Aleman Gonzalez*, the Supreme Court held that the Immigration and Nationality Act prevents the federal district courts from ordering nationwide injunctive relief with respect to the implementation of certain immigration statutes. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2063-68 (2022). And DHS has taken the position in *U.S. v. Texas* that *Aleman Gonzalez* should be extended such that 8 U.S.C. § 1252(f)(1) prevents a district court from entering an order to "hold unlawful and set aside" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law.[13] There are thus potential new weapons that Defendants could use to seek modification or termination of the *Pangea* injunction—in a case where Plaintiffs are not parties.

The fact that the Rule had been enjoined nationwide was the primary reason that Plaintiffs

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[13] *Aleman Gonzalez*, even as interpreted expansively by DHS in *United States v. Texas*, does not affect this Court's ability to grant Plaintiff's relief because if Wolf did not have authority to approve the Rule, the FVRA independently requires that such actions "shall have no force or effect," 5 U.S.C. § 3348(d)(1).

agreed to the abeyance, as reflected in the language of the stipulation and subsequent status reports filed by the parties with this Court: "The parties . . . agree that these proceedings should be held in abeyance, as long as the preliminary injunction . . . remains in place." (Joint Stipulation, Dkt. 16 at 1.) Given these new developments, the stay here should be partially lifted to allow Plaintiffs to litigate the Wolf appointment issue on its merits.

Waiting to see whether the *Pangea* injunction is ultimately modified—months from now—before lifting the stay in this case and beginning the process of summary judgment briefing is not a tenable option for Plaintiffs, given the ongoing harms to them and their clients from continued uncertainty about the status of the Rule, as described below. Additionally, waiting in this manner may allow the Rule to take effect; if the stay is not lifted until the *Pangea* injunction ends, the Rule could come into effect and would be effective during the pendency of summary judgment briefing and the Court's deliberation, causing serious harm to Plaintiffs and their clients. Wait-and-see is not a viable option.

II. THE CONTINUED STAY HARMS PLAINTIFFS AND THEIR CLIENTS.

A. Ongoing Uncertainty About the Validity of the Rule Is Causing Harm to Plaintiffs and Their Clients and Diversion of Plaintiffs' Resources.

The extended period of uncertainty about whether or not the Rule will go into effect puts Plaintiffs' and their clients in legal limbo, harming their interests. In short, the uncertainty in and of itself interferes with Plaintiffs ability to evaluate their clients' cases, allocate internal resources and secure future funding.

As set out in the Complaint, Tahirih's mission is to provide free holistic services to immigrant women and girls fleeing violence such as rape, domestic violence, female genital mutilation/cutting, forced marriage, and human trafficking, and who seek legal immigration status under U.S. law. (Compl. ¶ 11.) Tahirih offers legal representation and social services for

individuals who seek protection, including asylum, in their immigration proceedings. Ayuda's direct legal immigration services include helping individuals seek a wide range of immigration benefits, including asylum, withholding of removal, and relief under the Convention Against Torture, in addition to an array of other benefits under the INA. Ayuda provides clients with representation in immigration court removal proceedings in addition to affirmative applications for relief before USCIS.

The demand for legal services from both Plaintiffs exceeds their resources. Accordingly, in accepting clients, Plaintiffs are constantly assessing the merits of potential asylum or relief applications to assess how best to allocate resources to maximize successful applications. To do so, Plaintiffs assess the facts of a case against the numerous issues covered by the Rule, such as "nexus to a protected ground" (*see id*. ¶¶ 214-225); membership in a "particularized social group" (*see id*. ¶¶ 255-260); definition of "political opinion" (*see id*. ¶¶ 285-288); definition of "persecution" (*see id*. ¶¶ 299-309); and reasonableness or unreasonableness of internal relocation (*see id*. ¶¶ 316-319). (*See also id*. ¶¶ 407-408, describing the harm to Plaintiffs from the complexity of the Rule.)

Plaintiffs are currently evaluating cases based on the current state of the law, with the Rule enjoined and this case stayed. However, the extended period of the stay and uncertainty about the future of the injunction means that Plaintiffs are accepting cases that may become unwinnable or less meritorious in the future, frustrating Plaintiffs' missions and ability to allocate resources. Uncertainty about whether or when the Rule will go into effect also risks Plaintiffs spending significant time in briefing a case for hearing on one standard, only to have to redo the briefing and preparation if the standards change prior to calendaring the hearing. Finally, the uncertainty also affects Plaintiffs' ability to secure funding. To apply for grant funding, Plaintiffs inform

prospective funders of their expected number and nature of cases and other uses of funds such as education and training. Continued uncertainty about whether the new legal standards imposed by the Rule will take effect frustrates Plaintiffs' ability to provide accurate information to potential funders.

B. Ambiguity About the Status of the Rule Is Leading to Confusion in Judicial Rulings.

Prolonged uncertainty about the status of the Rule is also causing significant harm and confusion for adjudicators and practitioners across the country. Even when the status of laws and regulations is settled, immigration law is "complex" and "a specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Here, although the Rule is enjoined and accordingly the regulations in place prior to the Rule remain the governing law, the changes made by the enjoined Rule appear as current, operative law in the official electronic version of the Code of Federal Regulations maintained by the federal government. (*See* Code of Federal Regulations (CFR), 1996 to Present, https://www.govinfo.gov/help/cfr#about (last visited Aug. 18, 2022.); Nat'l Archives & Records Admin., "eCFR," https://www.ecfr.gov/.) Only vacatur of the Rule—not injunction—will result in a change to the Code. Such change is essential because, notwithstanding the best efforts of counsel, judicial clerks, and judges, many federal circuit and district courts have been relying on the enjoined Rule, including aspects of the Rule that Plaintiffs challenge in their Complaint.

For example, numerous courts have erroneously relied on changes that the Rule made to the standards for evaluating an asylum seeker's ability (as an alternative to asylum) to relocate within his or her home country. Under current law, when an asylum applicant demonstrates past persecution, that showing creates a presumption that the applicant has a well-founded fear of future persecution, a presumption that the government may rebut only by presenting evidence that

internal relocation within the applicant's home country would be reasonable. 8 C.F.R. §§ 208.13(b)(3)(i)–(ii), 1208.13(b)(3)(i)–(ii). The Rule shifts this burden of proof: when the persecutor was not the government or a government-sponsored actor, internal relocation is presumed to be a reasonable remedy, and asylum seekers must prove that relocation would be *un*reasonable. (*See* Compl. ¶¶ 330–331 (citation omitted).) Although the Rule is enjoined, numerous courts have cited its provision changing the burden of proof (printed at 8 C.F.R. 1208.13(b)(3)(iii)), as if that change were valid and operative:

- *Bhandari v. Garland*, 847 F. App'x 257, 259 (5th Cir. 2021) ("As the BIA added, [the applicant] failed to carry his burden of showing that relocation within Nepal was not a reasonable means to avoid future persecution by his attackers, who were private actors not sponsored by the government. *See* 8 C.F.R. § 1208.13(b)(3)**(iii)-(iv)**." (emphasis added));

- *Padilla-Franco v. Garland*, 999 F.3d 604, 608 (8th Cir. 2021) ("'Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is ... a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.' 8 C.F.R. § 1208.13(b)(3)**(iii)**." (alteration in original) (emphasis added));

- *Guatemala-Pineda v. Garland*, 992 F.3d 682, 685 (8th Cir. 2021) ("Because Pineda has not demonstrated past persecution, and the gangs she fears are not government or government sponsored, she bears the burden to show that relocation would not be reasonable. *See* [8 C.F.R.] § 1208.13(b)(3)(i). In these circumstances relocation is presumed to be reasonable. *See id.* § 1208.13(b)(3)**(iii)**." (emphasis added));

- *Mamun v. Garland*, No. 20-60804, 2022 WL 897035, at *1 (5th Cir. Mar. 28, 2022) (per curiam) ("As [the applicant] did not show that his attackers were government actors or sponsored by the government, it was his burden to show that relocation within Bangladesh was unreasonable. *See* 8 C.F.R. § 1208.13(b)(3)**(i)-(iv)**; *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 445 (5th Cir. 2001)." (emphasis added));

- *Escobar Guerra v. Garland*, No. 21-70292, 2022 WL 563246, at *1 (9th Cir. Feb. 24, 2022) ("Where, as here, the applicant fails to establish past persecution and is seeking relief on the basis of a well-founded fear of persecution by a non-state actor, the applicant bears the burden of showing that internal relocation would be unreasonable. 8 C.F.R. § 1208.13(b)(3)**(iii)**." (emphasis added)); and

- *Hossain v. U.S. Att'y Gen.*, No. 20-14863, 2022 WL 854466, at *3 (11th Cir. Mar. 23, 2022) ("When—as in this case—the alleged persecutor is neither a government nor government-sponsored, 'we presume that internal relocation would be reasonable, unless the applicant establishes otherwise by a preponderance of the evidence.' *See id.* (citing 8 C.F.R. § 1208.16(b)(3)**(iii)**)." (emphasis added)).

Similarly, the Rule changed the definition of "acquiescence" in implementing the Convention Against Torture, and several courts have mistakenly relied on the enjoined provisions of the Rule. Acquiescence had been broadly defined to include situations in which a public official, being aware of prior activity constituting torture, thereafter breaches his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. §§ 208.18(a)(7), 1208.18(a)(7). (*See* Compl. ¶ 343.) The Rule imposes a more restrictive definition of "acquiescence," requiring that the victim prove either actual knowledge or that a public official had awareness of "a *high probability* of activity constituting torture and *deliberately* avoided learning the truth." 85 Fed. Reg. at 80,369 (emphasis added; citation omitted). The Rule emphasizes that "it is not enough that such a public official acting in an official capacity or other person acting in an official capacity was 'mistaken, recklessly disregarded the truth, or negligently failed to inquire.'" *Id.* (citation omitted) (*See* Compl. ¶ 344.) Notwithstanding the injunction, numerous courts have cited the revised definition of acquiescence as if it were valid and operative:

- *Quintanilla-Mejia v. Garland*, 3 F.4th 569, 594 (2d Cir. 2021) ("there is no evidence that any government official who sanctioned publication acted from more than mistake or negligence about any attendant risk. *See* 8 C.F.R. § 1208.18(a)(7) (stating that mistake, negligence, or even reckless disregard of truth are insufficient to demonstrate 'acquiescence' in torture)");

- *Moreno-Osorio v. Garland*, 2 F.4th 245, 256 (4th Cir. 2021) ("'awareness' can be shown either through 'actual knowledge or willful blindness.' 8 C.F.R. § 1208.18(a)(7).");

- *Giron-Giron v. Garland*, No. 21-3472, 2022 WL 216568, at *11 (6th Cir. Jan. 25, 2022) ("And under the CAT, 'it is not enough that [a] public official ... recklessly disregarded the truth, or negligently failed to inquire.' 8 C.F.R. § 1208.18(a)(7). That is especially important here where petitioner is the one who failed to provide the police with any

information about the alleged extortionists, much less file a police report. Nothing compels reversal of the IJ's decision to deny petitioner relief." (alterations in original)); and

- *Romero-de Guzman v. Garland*, No. 20-9540, 2021 WL 2879131, at *4 (10th Cir. July 9, 2021) ("To obtain CAT relief, the torture in question must be 'inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity.' 8 C.F.R. § 1208.18(a)(1). Acquiescence includes 'willful blindness.' *Id.* § 1208.18(a)(7).").

In addition, numerous other courts have mistakenly relied on, discussed, quoted, or cited the enjoined provisions of the Rule as governing authority. *See Padilla-Franco*, 999 F.3d at 608 n.2 (treating enjoined changes to 8 C.F.R. § 208.13(b)(3) as governing law); *Thile v. Garland*, 991 F.3d 328, 335 n.2 (1st Cir. 2021) (stating that the enjoined version of 8 C.F.R. § 208.15 was valid but did not apply because it was not retroactive in application); *Rios-Valladares v. Garland*, 846 F. App'x 566, 568 (9th Cir. 2021) (Fletcher, J., dissenting) (citing the enjoined version of 8 C.F.R. § 1208.13(b)(3)(ii) in a case in which the majority did not make clear which version of the regulations it applied); *Gomez-Abrego v. Garland*, 26 F.4th 39, 46 (1st Cir. 2022) (quoting the enjoined version of 8 C.F.R. § 208.18(a)(1)); *Patel v. Garland*, No. 20-823, 2022 WL 2069272, at *1 (2d Cir. June 9, 2022) (incorrectly stating that the still effective, pre-2020 text of 8 C.F.R. §§ 1208.13(b)(3)(ii) and 1208.16(b)(3)(ii) was in effect only until November 19, 2020); *Gutierrez v. Garland*, 12 F.4th 496, 502 (5th Cir. 2021) (extensively quoting the enjoined version of 8 C.F.R. § 1208.18(a)(7)); *Xi Jin Lin v. Att'y Gen. U.S.*, No. 21-1286, 2022 WL 92612, at *2 (3d Cir. Jan. 10, 2022) (quoting the enjoined version of 8 C.F.R. §§ 208.20(a)(1) and 1208.20(a)(1)); *Tomas-Ramos v. Garland*, 24 F.4th 973, 978 n.2, 984 (4th Cir. 2022) (repeatedly relying on the enjoined version of 8 C.F.R. § 208.30(e)(1)-(3)); *Guerrier v. Garland*, 18 F.4th 304, 307 (9th Cir. 2021) (quoting language from the enjoined version of 8 C.F.R. § 208.30(g)(2)(i) and citing the enjoined version of 8 C.F.R. § 1208.30(g)(2)(iv)(A)); *Cancino Castellar v. Mayorkas*, No. 17-cv-00491-BAS-AHG, 2021 WL 4081559, at *3 (S.D. Cal. Sept. 8, 2021) (quoting the enjoined version of 8

C.F.R. § 235.6(a)(1)(ii)); *Gonzalez-Camacho v. Wilkinson*, No. 20-3282, 2021 U.S. App. LEXIS 2665, at *3 (6th Cir. Jan. 29, 2021) (citing 8 C.F.R. § 1208.1(e), which exists only in the enjoined version of the regulations); *Singh v. Garland*, 11 F.4th 106, 117 n.5 (2d Cir. 2021) (per curiam) (treating 8 C.F.R. § 1208.13(b)(3) as validly amended in 2020); *Singh v. Garland*, 858 F. App'x 170, 170 (5th Cir. 2021) (citing portions of 8 C.F.R. § 1208.13(b)(3) that exist only in the enjoined version of the regulation); *Meza Benitez v. Garland*, No. 19-60819, 2021 WL 4998678, at *4 (5th Cir. Oct. 27, 2021) (discussing the enjoined version of 8 C.F.R. § 1208.13(b)(3)(ii)); *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 705 n.5 (9th Cir. 2022) (discussing the enjoined version of 8 C.F.R. § 1208.13(b)(3)(ii)); *Martinez v. Garland*, No. 15-72614, 2022 WL 861026, at *1 (9th Cir. Mar. 23, 2022) (quoting the enjoined version of 8 C.F.R. §§ 1208.13(b)(3)(ii) & 1208.16(b)(3)(ii)); *United States v. Greenberg*, 21-CR-92 (AJN), 2022 WL 827304, at *12 (S.D.N.Y. Mar. 9, 2022) (citing 8 C.F.R. § 1208.13(d)(2)(i)(H), which was added by the enjoined rule); *Dort v. U.S. Att'y Gen.*, No. 21-10952, 2022 WL 1558918, at *6-7 (11th Cir. May 17, 2022) (treating the still-effective version of 8 C.F.R. § 1208.15 as having been superseded on January 11, 2021); *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312, 1330 (11th Cir. 2021) (relying on 8 C.F.R. § 1208.16(b)(3)(iii), which was added by the enjoined rule); *Sital v. Garland*, No. 21-70033, 2022 WL 624582, at *1 (9th Cir. Mar. 3, 2022) (applying the enjoined version of 8 C.F.R. § 1208.20(a)(1)); *Cao v. Garland*, 846 F. App'x 614, 615 (9th Cir. 2021) (applying the enjoined version of 8 C.F.R. § 1208.20(a)(1)); *Martinez v. Garland*, 2021 WL 4060434, at *6 n.4 (D. Md. Sept. 7, 2021) (citing the enjoined version of 8 C.F.R. § 1208.30(g)(2)(iv)(A)); *Potosme v. Garland*, No. C21-1531-TSZ-SKV, 2022 WL 993644, at *2 (W.D. Wash. Mar. 1, 2022) (quoting the enjoined version of 8 C.F.R. § 1208.30(g)(2)(iv)(A)), *recommended & adopted*, 2022 WL 990552 (W.D. Wash. Apr. 1, 2022).

The longer the Rule remains enjoined rather than vacated, the higher the probability that additional courts may erroneously rely on its provisions. Moreover, given the errors that federal courts have made concerning the status of the Rule, there can be no question that respondents in immigration court, particularly those proceeding *pro se*, will have difficulty identifying the operative provisions of the Code of Federal Regulations. Plaintiffs should now be permitted to litigate vacatur of the Rule.

II. PARTIALLY LIFTING THE STAY WILL PROMOTE JUDICIAL EFFICIENCY BECAUSE PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR APPOINTMENTS CLAIM.

Based on precedent involving similar claims in other cases, including in this district, Plaintiffs are likely to prevail on their claim that Chad Wolf lacked authority to serve as Acting Secretary of DHS and to approve the Rule. Deciding the merits of only the Wolf claims and granting relief on that basis would moot future litigation challenging the Rule on APA or other grounds. Resolving this case without reaching the complex APA questions about the Rule serves the interest of judicial economy.

"[J]udicial economy . . . favors swift adjudication." *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, No. 1:19-cv-02424 (TNM), 2022 WL 715215, at *4-5 (D.D.C. Mar. 10, 2022); *accord Stone v. Trump*, 402 F. Supp. 3d 153, 162 (D. Md. 2019) (declining to continue a stay that would "further delay resolution of [a] case" because doing so "would not promote judicial economy."); *see also DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 31 (D.D.C. 2002) ("Postponing the resolution of the issues raised in this case for some indefinite time does not comport with the efficient and timely judicial resolution of matters before the federal courts."). Accordingly, "narrowing the issues in [the] action" serves the interests of judicial economy. *Campaign for Accountability v. U.S. Dep't of Just.*, 280 F. Supp. 3d 112, 115 (D.D.C. 2017).

Partially lifting the stay to allow the Wolf claims to proceed would serve the interests of judicial economy because Plaintiffs have a strong likelihood of prevailing on those claims, which would allow this Court to grant relief without reaching the remaining claims in this action.

Every court to have decided whether Kevin McAleenan or his self-appointed successor Chad Wolf served lawfully as Acting Secretary of Homeland Security has answered, "no." *See Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH), 2022 WL 355213, at *8 (D.D.C. Feb. 7, 2022) ("The undisputed facts and administrative record make clear that neither McAleenan nor Wolf possessed lawful authority to serve as Acting Secretaries of Homeland Security."); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 943–44 (N.D. Cal. 2021) ("This Court joins the numerous other courts which have held that . . . [McAleenan's] appointment was invalid."), *appeal dismissed sub nom. Behring Reg'l Ctr. LLC v. Mayorkas*, No. 21-16421, 2022 WL 602883 (9th Cir. Jan. 7, 2022); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020) ("[N]either Mr. McAleenan nor, in turn, Mr. Wolf, possessed statutory authority to serve as Acting Secretary."); *see also CASA de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020), *appeal dismissed sub nom CASA de Maryland, Inc. v. Mayorkas*, No. 20-2217 (L), No. 20-2263, 2021 WL 1923045 (4th Cir. Mar. 23, 2021); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 533-36 (N.D. Cal. 2020); *La Clinica de La Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL 6940934 , at *12-14 (N.D. Cal. Nov. 25, 2020); *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 69-70 (D.D.C. 2020), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021); *Pangea Legal Servs.*, 512 F. Supp. 3d at 975.

The only circuit judge to have addressed the question also concluded that the plaintiffs in that case had demonstrated a likelihood of success on their claim that "Chad Wolf was not lawfully acting as the Acting Secretary of DHS." Order at 3, *Manzanita Band of the Kumeyaay Nation v.*

Wolf, No. 20-5333 (D.C. Cir. Nov. 23, 2020), Doc. No. 1872824 (Millett, J., dissenting in part) (observing that "every district court to confront the decision has ruled through careful analyses that Chad Wolf likely never lawfully assumed the authority of Acting Secretary"). The only government oversight body to have addressed the question publicly also concluded that Wolf was serving unlawfully. *See* U.S. Gov't Accountability Office, B-331650, *Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security* 11 (Aug. 14, 2020), https://www.gao.gov/assets/710/708830.pdf (concluding that Wolf assumed the position of Acting Secretary "by reference to an invalid order of succession").

Accordingly, the district courts have uniformly held that Wolf's actions as purported Acting Secretary "were a legal nullity." *Pangea Legal Servs.*, 512 F. Supp. 3d at 973. This Court can dispose of this case by doing the same. Although the appointments issues surrounding Wolf may appear complex, a wealth of authority now exists describing and analyzing those issues in detail—and uniformly reaches the same conclusion. Indeed, Wolf's legitimacy has been so roundly rejected that some courts have even suggested that "the government's arguments lack a good-faith basis in law or fact." *Id.* Resolving those claims is the most expeditious way to move forward in this case.

As the Complaint describes in detail, there are dozens of specific instances in which the Rule is contrary to law or not supported by "reasoned decisionmaking," *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *see* Compl. ¶¶ 6, 191–201, 214–404, and the Rule as a whole is unlawful because Defendants failed to provide adequate time for notice and comment, *see id.* ¶¶ 7, 202–13. Because each of these defects provides an independent basis for future challenges to the Rule, leaving the stay in place and the Rule on the books disserves the interest of

judicial economy.[14]

III. MOVING FORWARD ON THE FVRA CLAIMS WILL NOT CAUSE HARDSHIP OR INEQUITY TO DEFENDANTS.

In contrast to the harm that Plaintiffs, their clients, and others are likely to suffer if the current stay of proceedings continues, Defendants will not suffer any cognizable hardship if this Court partially lifts the stay to allow litigation on the merits of the Wolf claims.

When deciding whether to lift a stay of proceedings, courts must balance "the court's interests in judicial economy" against "any possible hardship to the parties," including defendants. *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 733 (D.C. Cir. 2012). But as a court in this district recently held, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity'" sufficient to warrant a stay. *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21 (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005)). Like the defendants in *Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH), 2021 WL 2227335, at *15

[14] A holding that Wolf lacked authority to approve the Rule on behalf of DHS would require invalidation of the entire Rule, notwithstanding its joint promulgation with DOJ, because the Rule's individual provisions are not severable into DHS and DOJ components. The government has not seriously argued otherwise. *See Pangea Legal Servs.*, 512 F. Supp. 3d at 975. Severability turns on the agency's intent, and severance is improper if there is "substantial doubt" that the government "would have adopted . . . the unchallenged portion if the challenged portion were subtracted." *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 929 (D.C. Cir. 2017) (quoting *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984)). Here, the Rule itself explains that "the DHS and DOJ regulations are inextricably intertwined," 85 Fed. Reg. at 80,286, and Defendants have always "treated the project as a single, integrated proposal," *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017); *see also* 85 Fed. Reg. at 80,286 (the purpose of the Rule is to "harmonize" the asylum system). Treating the DOJ and DHS portions of the Rule as severable would lead to illogical results that the agencies cannot have contemplated, such as differing definitions of "persecution" between DOJ and DHS regulations. *See* 8 C.F.R. §§ 208.1, 1208.1; *see also* 85 Fed. Reg. at 80,286 ("officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum," thus requiring coordination to "ensure consistent application of the immigration laws").

(D.D.C. June 1, 2021)—which involved another set of 2020 regulations affecting people who seek asylum—the Defendants in this case would not "suffer any hardship, save for the expenditure of resources in proceeding with the litigation." *Id.* at *6. "That burden of litigation is wholly insufficient to warrant a stay." *Id.*

Because the Defendants in this case are particularly well-equipped to litigate the Wolf claims, partially lifting the stay to allow consideration of those claims would not cause the defendants any hardship. Defendants' counsel not only represent "the richest, most powerful, and best represented litigant to appear before [the federal courts]," *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21 (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)), but also have litigated the exact legal questions at issue here in at least fourteen prior cases.[15]

Because the circumstances that justified the stay have changed; continuing the stay harms Plaintiffs, their clients, and the public; and partially lifting the stay would serve the interests of judicial economy without causing hardship or inequity to Defendants, this Court should partially lift the stay of proceedings to allow consideration of the Wolf appointments claims.

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[15] In addition to the nine cases cited above, *supra* at 20, the government has briefed the validity of Chad Wolf and Kevin McAleenan's tenure in at least five other cases. *See* Defs.' Supp. Post-Hearing Filing at 7-12, *A.B.-B. v. Morgan*, No. 1:20-cv-00846-RJL (D.D.C. June 1, 2020), ECF No. 25; Defs.' Suppl. Br. at 4-13, *ASISTA Immigration Assistance, Inc., v. Albence*, No. 3:20-cv-00206-JAM (D. Conn. Oct. 13, 2020), ECF No. 58; Defs.' Mot. to Dismiss at 30-41, *Don't Shoot Portland v. Wolf*, No. 1:20-cv-2040-CRC (D.D.C. Oct. 15, 2020), ECF No. 24; Mem. in Opp'n to Mot. for Prelim. Injunc. at 24-28, *Make the Road New York v. McAleenan*, No. 1:19-cv-02369-KBJ (D.D.C. Nov. 2, 2020), ECF No. 62; Mem. in Support of Defs.' Opp. to Pls.' Mot. for Partial Sum'y J. at 5-14, *New York v. U.S. Dept. of Homeland Sec.*, No. 1:19-cv-07777-GBD (S.D.N.Y. Nov. 17, 2020), ECF No. 249.

Dated: September 23, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS,[1] *et al.*,

Defendants.

Civil Action No. 1:21-cv-124-TSC

DECLARATION OF MARICARMEN GARZA

I, Maricarmen Garza, make the following declaration.

1. I am the Chief of Programs of the Tahirih Justice Center ("Tahirih"), a national nonprofit organization that provides free holistic services to immigrants fleeing gender-based violence, including sexual assault, domestic violence, female genital mutilation/cutting, human trafficking, and forced and child marriage. Tahirih provides free legal representation for survivors who seek humanitarian immigration relief, including asylum, in the United States. This declaration is based on my personal knowledge and on information that I reviewed in the course of my duties as Chief of Programs of Tahirih.
2. Tahirih has offices in Falls Church, VA; Atlanta, GA; Baltimore, MD; Houston, TX; and San Bruno, CA. Each office screens service seekers for potential legal representation in immigration matters, including asylum claims.

[1] On February 2, 2021, Alejandro Mayorkas became the Secretary of Homeland Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, he is automatically substituted as a party.

3. Tahirih's services are in high demand, far outstripping our capacity to serve all those who seek legal representation. When a service seeker requests Tahirih's representation for a claim of asylum, an attorney reviews the facts of the case and analyzes its merit under U.S. law. The legal analysis requires knowledge of current standards for persecution, nexus to a protected ground, particular social groups, political opinion, and safe and reasonable internal relocation. Uncertainty surrounding the standards that apply to an asylum claim complicates the analysis of the merit of each case, adding to the time required to determine whether the case is appropriate for acceptance and representation.
4. Delays in adjudication of asylum claims further contribute to the uncertainty surrounding the merit of a case. Tahirih's docket includes a number of affirmative asylum cases that have been pending for several years, including some filed in 2015. Defensive asylum cases also face severe delays and backlogs, with many cases scheduled for individual merits hearings in 2025. On any given day, Tahirih staff must decide whether to accept a case that may not be adjudicated for many years. The prospect of applicable rules changing between case acceptance and adjudication threatens the integrity of the legal representation.
5. In particular, Tahirih represents survivors of gender-based violence. Because the Rule purports to bar claims based on certain particular social groups, including some relating to gender, the viability of critical legal arguments is at stake. A change in the status of the rule could dramatically reduce the viability of many of Tahirih's clients' asylum claims, resulting in a significant increase in hours required to prepare a case for adjudication.

In accordance with 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 16th day of September, 2022, in Houston, Texas.

Maricarmen Garza
Chief of Programs
Tahirih Justice Center

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*, Plaintiffs, v. ALEJANDRO MAYORKAS,[1] *et al.*, Defendants.	Civil Action No. 1:21-cv-124-TSC

DECLARATION OF MEGAN S. TURNGREN, LEGAL DIRECTOR, AT AYUDA, INC. IN SUPPORT OF THE MOTION TO LIFT THE STAY

I, Megan S. Turngren, swear under penalty of perjury that the following is true and correct to the best of my knowledge, belief and understanding:

1) My name is Megan S. Turngren and I am the Legal Director for Ayuda Inc., a non-profit that provide legal, social, and language services to low income immigrants in the District of Columbia, Virginia, and Maryland. I began my position on May 1, 2022. As part of my job, I am responsible for supervising the immigration programs in three Ayuda offices, Virginia, Maryland, and the District of Columbia.
2) My responsibilities include identifying and assisting with determining case capacity, quality of services provided, and obtaining and monitoring funding for Ayuda's programs to ensure stability for both staff and clients.

[1] On February 2, 2021, Alejandro Mayorkas became the Secretary of Homeland Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, he is automatically substituted as a party.

3) The uncertainty around the Global Asylum Rule: Particular Social Group and Related Definitions and Interpretations for Asylum and Withholding of Removal is having a detrimental effect on Ayuda's staff and clients and, therefore, a detrimental effect on Ayuda as an institution.

4) Ayuda, like most other legal service providers serving low-income immigrants, receives many more requests for services than our staff can provide. Our staff is constantly tasked with determining their caseload and their capacity for new cases. As Legal Director, I work with Managing Attorneys and Supervising Attorneys to guide staff in what is an appropriate caseload to ensure quality services for our clients.

5) As part of the caseload determination, staff must by necessity make determinations on the challenges a particular case can present with regards to multiple factors including the client's immigration history, personal history, and the ruling law at the time.

6) Among the most challenging types of cases to evaluate for complexity are asylum and withholding cases. Asylum and withholding cases require full briefing, evidence collection, expert testimony, witness preparation, and could conclude in a multi-day trial before an Immigration Judge in the Executive Office for Immigration Review (EOIR).

7) Given the complexity of asylum cases and the great need for our services, our attorneys take great care in accepting new cases. They evaluate the strength of the case, the resources the case will require (both in terms of attorney hours and evidence collection), and the estimated length of time it will take to resolve the case.

8) The uncertainty surrounding the Rule severely hinders our attorneys' ability to make educated decisions regarding accepting a case because it forces our attorneys to assess the potential merit of a claim without knowing the legal standards that will be applicable to that claim when it is litigated.

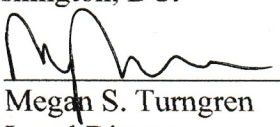
9) Another negative implication for the uncertainty surrounding the Rule is Ayuda's inability to properly apply for funding.

10) Ayuda's services are primarily funded through grant applications and awards. To be competitive in our applications, Ayuda must provide a goal or "deliverable" to the grantor or funder. These deliverables often revolve around the number of cases we commit to retaining during the grant cycle for the award amount provided. To come up with realistic deliverables, Ayuda examines our current staff levels, the award amount, and our staff members' capacity.

11) The uncertainty surrounding the Rule makes it more difficult for Ayuda to provide funders with accurate deliverable numbers, because of the difficulty that uncertainty adds to our attorneys' assessment of the merits of our clients' claims, and therefore, to our evaluation and estimation of the time and resources that Ayuda must devote to those claims. This might mean that Ayuda could provide numbers that are too high, making it extraordinarily difficult to meet our deliverables by the end of the grant cycle. Or, we make them too low, putting at risk our competitiveness in comparison to other legal service providers also applying for the same grant.

12) If Ayuda cannot accurately predict and meet our deliverable numbers we could lose funding and have to decrease staff size, further affecting the number of clients Ayuda can serve as a whole.

Executed this 16 day of September, 2022, in Washington, DC.



Megan S. Turngren
Legal Director
Ayuda

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS,[1] *et al.*,

Defendants.

Civil Action No. 1:21-cv-124-TSC

[PROPOSED] ORDER

Upon consideration of plaintiffs' motion to lift the stay, defendants' opposition to the motion, any reply, any declarations or exhibits offered in support, and any oral argument, the Court grants plaintiffs' motion and lifts the stay of proceedings as to plaintiffs' First, Second and Third Claims for Relief.

SO ORDERED.

Dated: _____

_____
Hon. Tanya S. Chutkan
United States District Judge

[1] On February 2, 2021, Alejandro Mayorkas became the Acting Secretary of Homeland Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, he is automatically substituted as a party.