UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO PARTIALLY LIFT STAY OF PROCEEDINGS

When Plaintiffs agreed to the stay in this case, President Biden had recently ordered Defendants to take specific remedial actions concerning the government's asylum and refugee policies, including the Rule, within set deadlines. *See* Opp. at 3-4 (quoting Exec. Order No. 14,010, 86 Fed. Reg. 8,267, 8,271 (Feb. 2, 2021)). Those deadlines came and went more than a year ago, and there is no end in sight, with instead an ever-shifting set of revised timetables that Defendants admit are purely "aspirational." *Id.* at 5. Meanwhile, wide-ranging changes to the asylum system made by an Acting Homeland Security Secretary who lacked authority to hold that position remain on the books, confusing courts and harming Plaintiffs' ability to serve clients and fulfill their missions. *See* Mot. at 12-19.

Defendants maintain that the Court should deny Plaintiffs' motion to lift the stay, continuing to delay indefinitely the adjudication of their claims regarding Chad Wolf's appointment. Resolving those claims, they say, would require addressing various questions about vacatur under the APA and the interaction between that statute and 8 U.S.C. § 1252(f)(1). Not so. Even if APA relief were entirely unavailable here, Plaintiffs could still obtain vacatur of

the Rule under the penalty provision of the FVRA, which establishes that actions by illegally appointed officials "have no force or effect." 5 U.S.C. § 3348(d)(1). That penalty supplies an independent remedy, separate and apart from whatever relief the APA or other sources may provide. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 938 n.2 (2017) ("the general rule" is that "actions taken in violation of the FVRA are void *ab initio*").

Plaintiffs pointed out that the FVRA provides an independent remedy in their opening motion, *see* Mot. 2-3 & 11 n.13, and Defendants do not dispute that in their response. That silence speaks volumes. Despite their effort to stir up a cloud of daunting legal complexities, the issue on which Plaintiffs ask this Court to lift the stay is discrete and straightforward: if Chad Wolf's approval of the Rule violated the FVRA and its penalty provision, Plaintiffs are entitled to relief.

And Chad Wolf's actions clearly *did* violate the FVRA. *See Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 19-26 (D.D.C. 2022). There is no serious argument otherwise. Every court to consider the matter has agreed, without hesitation, that Chad Wolf's tenure as Secretary was unauthorized by either the FVRA or the Homeland Security Act. *See* Mot. at 20-21. The government's contrary arguments amount to "interpretative acrobatics" that contradict "the plain language" of the relevant legal authority, *Asylumworks*, 590 F. Supp. 3d at 20-21 & n.6, essentially boiling down to a "tortured" insistence "that the text means something other than what it says," *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020). So flimsy are the government's arguments that they arguably "lack a good-faith basis in law or fact." *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 973 (N.D. Cal. 2021).

Adjudicating this well-trodden ground will not unduly burden Defendants or this Court. And if Plaintiffs prevail on their FVRA claim, it will dispose of this case, obviating the need to

address any of Plaintiffs' other objections to the Rule, *see* Compl. ¶¶ 191-404, to continue waiting for the results of Defendants' rulemaking efforts, to determine whether or not those rulemakings cumulatively moot each and every one of Plaintiffs' claims, or to address the questions that would promptly arise if the *Pangea* injunction were disturbed—all of which would ultimately promote efficiency and conserve judicial resources.

Lifting the stay is also appropriate in light of changed circumstances and is necessary to address significant harm to Plaintiffs. Given President Biden's February 2, 2021 executive order, Plaintiffs agreed six days later to hold these proceedings in abeyance to "allow incoming Department leadership time to consider the issues in this case and to review the Rule." Joint Stipulation at 2 (Feb. 8, 2021) (Dkt. 16). But after almost two years of reportedly "mak[ing] completing their review a priority," ECF Nos. 22, 23, 24, 26, 27, 28, 30, 32, 33, 34, 35, Defendants' projected timeline remains amorphous and aspirational, while the content of their new rules remains entirely unknown. During this extended delay, federal courts have wrongly relied on the enjoined Rule, and the uncertain status of the Rule threatens Plaintiffs' ability to represent new clients and to apply for funding.

This should not go on forever. Plaintiffs' good-faith willingness to afford the new administration time to rescind the Rule is no reason to continue denying them their day in court for 658 days (and counting), not when Defendants have still produced virtually nothing but an assurance that—after they "take their time" with their rulemakings—they will eventually generate something that "they expect" will moot all of Plaintiffs' claims. Opp. at 7. None of Defendants' arguments for further delay are persuasive, and the balance of harms tips decisively in Plaintiffs' favor. Plaintiffs respectfully ask this Court to partially lift the stay to resolve their appointments-based challenges to Chad Wolf's authority to approve the Rule.

I. LIFTING THE STAY WOULD PROMOTE JUDICIAL EFFICIENCY.

"[J]udicial economy . . . favors swift adjudication," *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 270 (D.D.C. 2022), and is served by "narrowing the issues in [an] action," *Campaign for Accountability v. U.S. DOJ*, 280 F. Supp. 3d 112, 115 (D.D.C. 2017). If Chad Wolf lacked authority to serve as Homeland Security Secretary, triggering the FVRA's penalty provision, then the Rule has "no force or effect," 5 U.S.C. § 3348(d)(1), and is retroactively void in its entirety. *See SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 78 (D.C. Cir. 2015) ("The FVRA renders any action taken in violation of the statute void ab initio."), *aff'd*, 137 S. Ct. 929 (2017); *Asylumworks*, 590 F. Supp. 3d at 25 (vacating a rule promulgated by the improperly appointed Chad Wolf). Resolving that discrete issue—which multiple courts have already addressed in detailed opinions, *see* Mot. at 20-21, and which the government has already briefed more than a dozen times, *see id.* at 23 n.15—therefore has the potential to end this case without requiring this Court to consider the Complaint's many complex allegations that the Rule is otherwise contrary to law, is unsupported by reasoned decision-making, and was promulgated without adequate time for notice and comment. *See* Compl. ¶¶ 191-404.

While it is true that Defendants may raise threshold jurisdictional objections to this suit, they have offered no reason to believe they have any conceivable objection except the one they spend most of their opposition brief discussing—the possibility that vacatur of the Rule under the APA could become unavailable if the government prevails on its remedial arguments in *United States v. Texas*, No. 22-58 (U.S. cert. granted July 21, 2022). And that objection is not persuasive, as explained below.

A. *United States v. Texas* Is Not a Plausible Barrier to this Suit.

Even if the government wholly prevails in *United States v. Texas*, it would not affect the availability of relief under the FVRA or Plaintiffs' entitlement to a declaratory judgment. The remedial question presented in *Texas* is whether 8 U.S.C. § 1252(f)(1) precludes vacatur orders *under the APA*. *See* Questions Presented, https://www.supremecourt.gov/qp/22-00058qp.pdf ("Whether 8 U.S.C. § 1252(f)(1) prevents the entry of an order to 'hold unlawful and set aside' the Guidelines under 5 U.S.C. § 706(2)"). Accordingly, the government's arguments hinge on the "language," "statutory context," and "legislative history" of the APA. *See* Br. for Petitioners at 40-42, *United States v. Texas*, No. 22-58 (U.S. Sept. 12, 2022). The FVRA, however, has different language, statutory context, and legislative history, and its penalty provision supplies an independent remedy that is distinct in several respects from APA vacatur. As such, relief under the FVRA will not be precluded by *United States v. Texas*.

"Congress prescribed particular relief for violations of the FVRA." *Bullock v. U.S. Bureau of Land Mgmt.*, No. 4:20-cv-00062-BMM, 2020 WL 6204334, at *2 (D. Mont. Oct. 16, 2020). "The plain terms of the FVRA . . . direct[] that unlawful actions under that statute are void *ab initio*, thereby rendering the rules without 'force or effect' and requiring vacatur." *Asylumworks*, 590 F. Supp. 3d at 26 (quoting 5 U.S.C. § 3348(d)(1)); *see SW Gen.*, 796 F.3d at 71 ("[T]he FVRA renders actions taken by persons serving in violation of the Act void ab initio."); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 36-37 (D.D.C. 2020) (denying injunction but vacating agency directives and determinations under the FVRA).

The FVRA's remedy is distinct from the APA's remedy, although in some cases both will be available. *See Asylumworks*, 590 F. Supp. 3d at 26 (separately vacating agency rules

under "both" the FVRA "and" the APA); *L.M.-M.*, 442 F. Supp. 3d at 37 (same); *Bullock*, 2020 WL 6204334, at *2 (same).

Making available a distinct and effective remedy for appointments violations was central to Congress's purpose in enacting the FVRA. The statute "was framed as a reclamation of the Congress's Appointments Clause power," *SW Gen.*, 796 F.3d at 70, which is "among the significant structural safeguards of the constitutional scheme," *L.M.-M.*, 442 F. Supp. 3d at 7 (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)). And "the lack of an effective enforcement process" to deter appointments violations is largely what "convinced Congress of the need to enact the FVRA." *Id.* at 34 (quoting S. Rep. No. 105-250, at 7 (1998)); *see Pub. Emps. for Env't Resp. v. Nat'l Park Serv.*, No. 19-3629 (RC), 2022 WL 1657013, at *12 (D.D.C. May 24, 2022) ("In enacting the FVRA, Congress was in part motivated to create a meaningful sanction for noncompliance.").

Accordingly, "the FVRA imposes carefully calibrated limits on who can be appointed as an acting . . . officer," and its penalty provision serves to "enforce" those limits. *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018). Thus, "Section 3348 provides an enforcement mechanism for the legislation," S. Rep. No. 105-250, at 17, that "impose[s] a sanction for noncompliance," *SW Gen.*, 796 F.3d at 71 (quoting 144 Cong. Rec. S6414). "The goal is . . . to encourage that a nomination be forwarded to the Senate," S. Rep. No. 105-250, at 18-19, and Congress fully understood that courts would use Section 3348 to vacate agency action violating the FVRA: "The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action." *Id.* at 19-20.

Consistent with that purpose, FVRA vacatur under 5 U.S.C. § 3348 is distinct from APA vacatur under 5 U.S.C. § 706. Unlike actions that violate only the APA, actions that violate the FVRA "may not be ratified." 5 U.S.C. § 3348(d)(2). Unlike under the APA, defenses like "harmless error and the de facto officer doctrine" are unavailable. *SW Gen.*, 796 F.3d at 78-79. And unlike under the APA, actions violating the FVRA are retroactively "void ab initio," not merely prospectively "voidable." *Id.* at 71, 79. Thus, where Section 3348 applies, "no remedy other than vacatur is appropriate." *Asylumworks*, 590 F. Supp. 3d at 26.

Notably, unlike the APA, the FVRA was passed (in 1998) *after* the enactment of 8 U.S.C. § 1252(f)(1). *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009, 3009-611 (1996) (adding Section 1252(f)(1) to the INA); *Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) ("recent enactments should be favored over older ones" if they conflict). And although Congress, in the FVRA, "expressly exempted from its reach several offices," *Asylumworks*, 590 F. Supp. 3d at 24, those offices do not include any immigration, asylum, or border security officials. *See* 5 U.S.C. § 3349c. "Congress could have chosen to exclude [such officials] by using similar language, but it did not." *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 140 (D.D.C. 2019), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019).

In short, FVRA vacatur is different from—and entirely independent of—vacatur under the APA. Even if the government fully prevails in *United States v. Texas*, vacatur of the Rule will remain available under 5 U.S.C. § 3348(d)(1).

Moreover, declaratory relief will also remain available. *See* Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate."). As the government acknowledges in *United States v. Texas* itself (and here, *see*

Opp. at 18), Section 1252(f)(1) "'does not deprive the lower courts of all subject matter jurisdiction' over claims involving the covered provisions," Br. for Petitioner, *supra*, at 48 (quoting *Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022)), and "does not preclude respondents from obtaining declaratory relief," *id.* (citing *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (opinion of Alito, J.)). Unsurprisingly, therefore, Defendants do not deny that declaratory relief will be available to Plaintiffs regardless of the outcome in *United States v. Texas*. Instead, they merely throw out a flyby assertion that Plaintiffs "did not state a claim under the Declaratory Judgment Act." Opp. at 20. But Plaintiffs' Prayer for Relief asked this Court to "Declare the Rule unlawful," Compl. at 126 ¶ A, and it made this request separately from Plaintiffs' requests to "[v]acate and set aside the Rule under 5 U.S.C. § 706(2)," *id.* ¶ B, and to "[e]nter a nationwide permanent injunction," *id.* ¶ C. Plaintiffs also requested "any such other or further relief as this Court deems just and equitable." *Id.* ¶ E.

Therefore, Plaintiffs indisputably can obtain relief here on their Chad Wolf claims, either through FVRA vacatur or, failing that, through a declaratory judgment.

B. *Garland v. Aleman Gonzalez* Is Not a Plausible Barrier to this Suit.

Defendants also cite *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), as potentially precluding relief here. But as the government's own brief acknowledges, that decision is explicitly limited to *injunctions*, namely "'injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out' certain specified provisions of the INA." Opp. at 10 (quoting *Aleman Gonzalez*, 142 S. Ct. at 2065); *see also Biden*, 142 S. Ct. at 2539 (explaining that Section 1252(f)(1) deprives lower courts only of the authority "to grant a particular form of relief," and that its title, "Limit on injunctive relief," "makes clear the narrowness of its scope"). A vacatur order is not an injunction, which is an

"additional," "drastic[,] and extraordinary remedy" that courts may grant only if "a less drastic remedy . . . such as partial or complete vacatur" is insufficient. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). Thus, *Aleman Gonzalez*, standing alone, poses no plausible obstacle to vacatur, much less to declaratory relief. *See Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366-BAS-KSC, 2022 WL 3135914 (S.D. Cal. Aug. 5, 2022) (awarding declaratory relief after *Aleman Gonzalez* for a DHS rule that violated both the APA and the Fifth Amendment Due Process clause).

C. Lack of Standing Is Not a Plausible Barrier to this Suit.

Finally, Defendants suggest (without elaboration) that they might challenge Plaintiffs' standing. Such a challenge is unlikely to tax this Court's resources. Organizational plaintiffs like Tahirih and Ayuda have been plaintiffs in similar proceedings, and courts have not found any standing issues there, because there are none. *See, e.g.*, *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31 (D.D.C. 2020) (granting preliminary injunction in favor of the three organizational plaintiffs due to likelihood of success on Chad Wolf appointments claim), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020) (granting preliminary injunction in favor of eight organizational plaintiffs for similar reasons); *La Clínica de la Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL 6940934 (N.D. Cal. Nov. 25, 2020) (finding organizational plaintiffs had standing for similar claim and denying motion to dismiss).

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In sum, Plaintiffs will be entitled to relief if they prevail on their Chad Wolf claims, even if the result in *United States v. Texas* limits the availability of APA vacatur (which is certainly

not inevitable). Defendants are therefore wrong that reopening these claims will "require" this Court to entangle itself in the morass of questions the opposition brief discusses. Opp. at 12.

Conspicuously absent from Defendants' discussion is any serious argument that Plaintiffs are unlikely to prevail on the merits of their Chad Wolf claims. "[E]very district court to confront the decision has ruled through careful analyses that Chad Wolf likely never lawfully assumed the authority of Acting Secretary." 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). Eight different courts have now reached that conclusion, *see* Mot. at 20-21, and there is no reason to "depart from the reasoned holding of these other decisions," *Asylumworks*, 590 F. Supp. 3d at 13.

II. LIFTING THE STAY IS APPROPRIATE BECAUSE OF CHANGED CIRCUMSTANCES.

Defendants do not—and cannot—dispute the fundamental fact that nearly two years have passed since Plaintiffs agreed to this stay based on the President's order that Defendants take specific remedial actions within fixed deadlines. Those deadlines have long since passed, and Defendants cannot provide any assurance that they will be met in the foreseeable future. Instead, Defendants' progress update has remained the same since November 2021. *See* Joint Status Reports, ECF Nos. 22, 23, 24, 26, 27, 28, 30, 32, 33, 34, 35.

While Defendants point to an Interim Final Rule, they have already explained that it does not affect "the provisions at issue in this case." Joint Status Report, ECF No. 19 at 2 (discussing Notice of Proposed Rulemaking for this rule). Moreover, it covers only a miniscule portion of the forty changes the Rule makes to immigration law, *see* 85 Fed. Reg. 80,274 (Dec. 11, 2020). The most damaging portions of the Rule remain: the restriction on particular social groups, the blanket ban on certain nexus theories, the prohibition on evidence that purportedly "promote[s]

cultural stereotypes," the redefining of political opinion, the narrowing of what counts as "persecution," the changed inquiry into whether reasonable relocation is possible, the dramatic expansion on the bars to asylum, and the narrowing of eligibility for relief under the Convention Against Torture. *See generally* Compl., Dkt. 1.

The government's failure to meet the deadlines that were in place when Plaintiffs agreed to the stay—and the fact that no end is in sight more than a year after the government missed those deadlines—is enough of a changed circumstance to warrant lifting the stay. But in addition, when the stay began, Plaintiffs did not know whether the new administration would defend the lawfulness of Chad Wolf's appointment. It was reasonable to anticipate that under new leadership Defendants might not do so, which would have provided a basis for rescinding the Rule. After all, the parties' Joint Stipulation indicated that the Rule was not the only issue in this case that Defendants were planning to review: "holding this case in abeyance will allow incoming Department leadership time to consider the issues in this case *and* to review the Rule." Dkt. No. 16 at 2 (emphasis added). And Defendants *did* change their position on the legal issues surrounding Chad Wolf's appointment. They eventually "abandoned" some of the arguments the prior administration had made in defense of his tenure, *Asylumworks*, 590 F. Supp. 3d at 21 n.7, underscoring that when Plaintiffs agreed to the stay, Defendants' position on these questions was not a foregone conclusion.[1] In suggesting that Plaintiffs should have known where Defendants

[1] Under the prior administration, Defendants tried to establish the validity of Wolf's actions by relying on two sets of convoluted bureaucratic maneuvers that DHS leadership took to legitimize his actions after courts began ruling against him. *See* Compl. ¶¶ 150-169 (first effort); *id.* ¶¶ 178-185 (second effort); *see also* Mem. of P. & A. in Opp'n to the Mot. for Prelim. Inj. at 7, 16, 18 n.4, *Human Rights First v. Wolf*, No. 1:20-cv-03764-TSC (D.D.C. Dec. 30, 2020), ECF No. 8 (relying on first effort); Notice of Ratification, *Human Rights First v. Wolf* , No. 1:20-cv-03764-TSC (D.D.C. Jan. 19, 2021), ECF No. 14 (relying on second effort). The new administration, however, seems to have found these arguments *(cont'd)*

would ultimately land on these questions, Defendants cite a brief the government filed *after* Plaintiffs had agreed to the stay. *See* Opp. at 19.

To be sure, Defendants' position has now been clear for some time, but Plaintiffs should not be penalized for engaging in good faith in continued joint status conferences on Defendants' representation that they were making "progress" on their review of the Rule, with the initial promise of an update "within 90 days." Joint Status Report at 2 (May 7, 2021) (Dkt. 17).

Finally, Defendants do not dispute that *Aleman Gonzalez*—which limits the scope of injunctive relief in certain immigration-related matters—is a new weapon that Defendants could use to seek modification or narrowing of the *Pangea* injunction at any time. They simply aver that they currently do not have "plans" to move to "vacate" the injunction. Opp. at 19 n.10.

III. PLAINTIFFS WILL BE IRREVOCABLY HARMED BY FAILING TO LIFT THE STAY, AND DEFENDANTS WILL NOT BE HARMED BY LIFTING IT.

As detailed in Plaintiffs' motion, the continuing uncertainty about the validity of the Rule imposes tangible costs on Plaintiffs and the communities they serve. Mot. at 12-14. Defendants inexplicably assert that this is not so because, "[e]ven a final judgment vacating the Rule would not by itself change the status quo." Opp. at 22. But a "final judgment vacating the Rule" would address the existing uncertainty regarding whether this Rule is going to go into effect. Whether Defendants might in the future make other changes through rulemaking is beside the point.

Faced with a litany of district and circuit court decisions that have erroneously relied on the enjoined Rule, Defendants are forced to argue that none of these mistakes materially affected the outcome in any case. Opp. at 23. But even if that were true, it would not make the judicial confusion "harmless." *Id.* The efforts of immigration practitioners and their clients—and

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beyond the pale. *See Asylumworks*, 590 F. Supp. 3d at 21 n.7 (describing government's abandonment of these particular efforts to "salvage" the validity of Wolf's actions).

especially the efforts of individuals who are forced to proceed *pro se* in immigration court—are hindered when the operative provisions of asylum law cannot reliably be found in the Code of Federal Regulations, and when changes made by the enjoined Rule are cited as valid authority in judicial opinions. Until the Rule is declared void *ab initio* and rescinded, courts will continue to rely on it, as they have been doing, and Defendants cannot guarantee that these errors will all be "harmless." Defendants instead suggest that Plaintiffs can address this issue by bringing mistaken reliance on the Rule to Defendants' attention, so they can inform courts of the errors. *See* Opp. at 22 n.11. But the suggestion that Plaintiffs should do that only underscores how the continuing uncertainty about the status of the Rule imposes burdens on Plaintiffs that they would not face if this litigation were resolved.

Defendants claim that litigating this action would impede their ability to promulgate new rules. But they offer no reason to think that the litigators in the Department of Justice are the policymakers drafting new rules at the Department of Homeland Security, or that the latter would be needed to help brief the question of whether Chad Wolf's appointment violated the FVRA. Regardless, Defendants should be particularly well-equipped to litigate that issue because they have done so in at least fourteen prior cases.[2] In any event, "the expenditure of

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[2] *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 Immigr. 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 Rd. N.Y. 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. Dep't of Homeland Sec.*, No. 1:19-cv-07777-GBD (S.D.N.Y. Nov. 17, 2020), ECF No. 249; *Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH), 2022 WL 355213, at *8 (D.D.C. Feb. 7, 2022); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 943–44 (N.D. Cal. 2021), *appeal dismissed sub nom. Behring Reg'l Ctr. LLC v. Mayorkas*, No. 21-16421, 2022 WL 602883 (9th Cir. Jan. 7, 2022); *Batalla Vidal*, 501 F. Supp. 3d at 132; *see also CASA de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020), *appeal dismissed sub nom CASA de Md., Inc. v. Mayorkas*, *(cont'd)*

resources in proceeding with . . . litigation" is a "wholly insufficient" reason to continue a stay. *Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH), 2021 WL 2227335, at *6 (D.D.C. June 1, 2021).

Defendants also argue that this Court's vacatur of the Rule would require Defendants to engage in additional rulemaking, Opp. at 25, because "the provisions will remain in the Code of Federal Regulations until the Departments issue a final rule removing them," *id.* at 9. They argue that such additional rulemaking would, therefore, not provide timely clarity for the parties and the public. This is unpersuasive.

First and foremost, it is unclear why Defendants would not move at a timely pace to honor a vacatur order from this Court, when DHS has itself remarked that "delaying the ministerial act of restoring the regulatory text in the Federal Register is contrary to the public interest because it could lead to confusion, particularly among the regulated public." *Strengthening the H-1B Nonimmigrant Visa Classification Program, Implementation of Vacatur*, 86 Fed. Reg. 27,027 (May 19, 2021) (removing from the C.F.R. a rule that was vacated by a federal district court on December 1, 2020); *see also Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (updating the C.F.R. to address the vacatur ordered by a federal district court on March 9, 2021). Defendants do not explain what makes rescinding this Rule any different.

Second, concerns that Defendants will delay their rescission should not stop this Court from granting a partial lift of the stay because a vacatur from this Court, in and of itself, would

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Nos. 20-2217 (L), 20-2263, 2021 WL 1923045 (4th Cir. Mar. 23, 2021); *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 533-36; *La Clinica de La Raza*, 2020 WL 6940934, at *12-14; *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 69-70; *Pangea Legal Servs.*, 512 F. Supp. 3d at 975.

"restore[] the status quo before the invalid rule took effect," *Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004), and thus would provide immense immediate relief to Plaintiffs and the public.

CONCLUSION

For the foregoing reasons, the stay should be partially lifted.

Dated: November 28, 2022

Respectfully submitted,

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