IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CASA DE MARYLAND, INC., *et al.*,

Plaintiffs,

v.

MAYORKAS, *et al.*,

Defendants.

Case No. 20-2118-PX

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR CONTEMPT, AND OPPOSITION TO DEFENDANTS' MOTION TO STAY [ECF NO. 185]

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Two years ago, this Court issued a Preliminary Injunction ("PI") to preserve, in part, the *status quo* Employment Authorization Document ("EAD") application system for ASAP and CASA Members ("Members") while the Court adjudicated Plaintiffs' claims on the merits.[1] Early this year, another district court ordered the vacatur of all the 2020 EAD Rules. Now, seven months later, and notwithstanding this Court's continuing PI, Plaintiffs and Members continue to suffer harms due to the government's ongoing implementation of the 2020 EAD Rules and its failure to restore the *status quo ante*. First, the government's public statements and instructions regarding initial EAD applications for asylum seekers are confusing and contradictory, and continue to implement the Rules in material ways, creating uncertainty (and delay) for all applicants and straining Plaintiffs' resources. Second, the government dismantled the system for identifying and timely processing EAD applications for Members—notwithstanding that the system was put in place as a way of complying with this Court's PI that was acceptable to everyone.

For the past several months, Plaintiffs have tried to work with the government to stem these ongoing harms and to resolve the case without judicial intervention. Plaintiffs proposed a solution that would have committed the government to follow its own stated plan. Defendants' blunt response, a week later, was to move to stay the case indefinitely. Defendants have not shown entitlement to a stay, and their motion should be denied. Plaintiffs are entitled to summary

[1] This case concerns Plaintiffs' challenge to the 2020 Employment Authorization Document Rules ("2020 EAD Rules" or "Rules") that severely constrain asylum seekers' ability to work lawfully while their asylum applications are pending. *See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications* ("Timeline Repeal Rule"), 85 Fed. Reg. 37,502 (June 22, 2020); *Asylum Application, Interview, and Employment Authorization for Applicants* ("Broader EAD Rule"), 85 Fed. Reg. 38,532 (June 26, 2020). In the course of implementing the 2020 EAD Rules, Defendants made changes to Form I-765, Application for Employment Authorization ("EAD application" or "Form I-765"), Form I-589, Application for Asylum and for Withholding of Removal ("Form I-589"), and the Code of Federal Regulations. *See* Cruz Decl. ¶ 10.

judgment granting the relief sought in the Complaint that was not granted or implemented by actions or orders of other courts. Alternatively, Defendants' violation of the PI causes irreparable harm to Plaintiffs and their Members, and Plaintiffs are entitled to the modest relief outlined below.

I. Relevant Facts

A. This Court Preliminarily Enjoined, In Part, the 2020 EAD Rules

For two years before the effective date of the 2020 EAD Rules, the government processed 95% of EAD applications within 30 days. *See* ECF No. 185-6, at 2-3.[2] Plaintiffs filed this action to stop the irreparable harm that would result if the 30-day processing rule were eliminated and the other constraints on asylum seekers' access to work authorization went into effect.

The Court scheduled rounds of briefing and argument to address the issues of first impression raised by Plaintiffs' PI motion. ECF Nos. 54, 55, 59, 60, 64, 68. The Court also secured the government's agreement that if the Rules went into effect before the Court's decision, the government would not thereafter argue that "the ship has sailed because there's a new status quo"; indeed, before the effective date, the Court put the parties on notice that the motion was likely to be granted, at least in part. Manfredi Decl., Ex. E at 102:22-103:3; 109:1-5 (Tr. 8/28/20 Conf.).

The Rules went into effect, and three weeks later, on September 11, 2020, this Court issued its PI enjoining parts of the Rules with respect to Members and thereby preserving Members' entitlement to 30-day processing under the *status quo ante*. ECF No. 69 at 68; ECF No. 70. Over the next six weeks, the parties agreed that to implement the PI and preserve the *status quo ante* with respect to Members entitled to its benefit, the government would set up a system to identify Member applications. ECF No. 76 at 4-5. The government put that system in place by October

[2] Pls.' Mot. for Civil Contempt & to Enf. Pmn't Inj. at 3, *Rosario v U.S. Citizenship & Immigr. Servs.*, No. 2:15-cv-00813-JLR (W.D. Wash. Sept. 9, 2022). Defendants introduced this document in support of their motion to stay.

2020, *id.*; ECF No. 83 at 1-2, but also rejected, with instructions on how to reapply, more than 22,000 initial EAD applications that it had received after the PI issued—claiming the large-scale rejection would let it apply the new system to Members, and presumably comply with the PI's requirements for them. *See* ECF No. 76 at 5-6; ECF No. 83. Over the next seven months, Defendants still only processed an average of 42.7% Member applications within 30 days, *see* Manfredi Decl. ¶ 32—far below the 95% of applications consistently processed in that timeframe before the Rules went into effect, *see* ECF No. 185-6 at 3. The government did not come close to meeting its *status quo ante* processing obligations for Members until June 2021. ECF No. 185-5 ¶ 16.[3]

B. Plaintiffs Moved for Additional Relief in Light of Ongoing Irreparable Harm

Both sides cross-appealed from the PI, ECF Nos. 88, 92, and voluntarily dismissed their appeals in March 2021, ECF No. 102. The following month, Plaintiffs moved to expand the PI, or for partial summary judgment. ECF Nos. 107, 107-1. After the Court denied Defendants' motion to stay the case pending possible future rule changes, ECF Nos. 109, 118, Defendants opposed Plaintiffs' motions and represented that if the Court were to expand the PI, "a reasonable implementation plan would necessarily be required" for the government to comply. ECF No. 121 at 22-23. The parties later briefed cross-motions for partial summary judgment on Plaintiffs' claims involving the Timeline Repeal Rule. ECF Nos. 127, 130, 134, 135.

Before this Court ruled on the parties' pending motions, Judge Howell ruled in *Asylumworks v. Mayorkas* that Chad Wolf's appointment was unlawful and granted summary

[3] Decl. of Connie Nolan ("Nolan Decl.") in Opp. to Pls.' Mots. to Enforce J. or for Inj. Relief, *Asylumworks v. Mayorkas*, No. 1:20-cv-03815-BAH (D.D.C. Aug. 23, 2022). Defendants introduced this and other documents from *Asylumworks* in support of their motion to stay. *See generally* ECF Nos. 185-2, 185-4, 185-5.

judgment ordering vacatur of the 2020 EAD Rules. *See* ECF No. 185-2 ("*Asylumworks* Order").[4]

C. This Court's PI Continued to Protect Members From Irreparable Harm Associated with Processing Delays

The day after the *Asylumworks* Order issued, Plaintiffs filed a notice of supplemental authority alerting the Court to it. ECF No. 162. The Court promptly convened the parties and explained its intention to stay this case until after the government decided whether to appeal the *Asylumworks* Order. Manfredi Decl. Ex. F at 4:25-5:3 (Tr. 2/14/22 Conf.). Plaintiffs sought—and obtained—the Court's assurance that the PI would remain in place during the stay. *Id.* at 7:4-11.

After the government declined to appeal the *Asylumworks* Order, Defendants asked the Court to dismiss this case as moot. ECF No. 168. The Court stated its intention to dismiss the pending motions as moot, Manfredi Decl., Ex. G at 3:23-25; 5:10-15 (Tr. 4/12/22 Conf.), but Plaintiffs vigorously opposed dismissal of the case, arguing that the case was not moot "until we can be assured that the irreparable harm that this Court's preliminary injunction is currently protecting members against is not at risk of recurring," *id.* at 6:11-15. Plaintiffs informed this Court that actual vacatur of the 2020 EAD Rules would entitle *all* asylum seekers to 30-day processing, but that only Members appeared to be receiving this *status quo ante* processing—apparently due to the Court's continuing PI. *Id.* at 4:7-13; 6:17-20. Defendants stated that they were not "prepared" to address whether *Asylumworks* was being implemented for all asylum seekers, and the Court concluded that there remained a "live question" as to "whether the government is actually honoring its obligation to asylum applicants at issue in this case." *Id.* at

[4] The *Asylumworks* court relied on the analysis in this Court's PI and the opinions of five other courts that adopted that analysis, in issuing its order to vacate the 2020 EAD Rules under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(C), and the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3348(d). *See generally Asylumworks* Order. The time for Defendants to appeal the *Asylumworks* Order has passed. *See* ECF No. 168.

8:22-9:10. The Court stated that it would "not modify the injunction as it stands." *Id.* at 5:12-13.

Over the next few months, Plaintiffs closely monitored the mounting evidence of the government's failure to restore the *status quo ante*; promptly and repeatedly brought their concerns to Defendants; and kept the Court apprised of their investigations and discussions. *See* ECF No. 171; ECF No. 185-7 (Tr. 6/13/22 Conf.); Manfredi Decl., Ex. H (Tr. 7/18/22 Conf.); *id.* ¶¶ 2, 6-7, 9-15 & Ex. A. During this Court's June 13 conference, Plaintiffs again explained that the government still appeared to be processing only Member applications within 30 days—apparently because of the PI. Tr. 6/13/22 Conf. at 5:13-22; *see also* Cruz Decl. ¶ 25. Despite the Court's reiteration to Defendants that "[t]here is an injunction in place," Tr. 6/13/22 Conf. at 28:10, Defendants did not seek to dissolve the PI or inform the Court that their interpretation of their obligations under the PI had changed.

D. Plaintiffs Diligently Tried to Get the Government to Resolve Their Concerns

In June and July 2022, Plaintiffs repeatedly informed Defendants that the government's instructions to asylum seekers indicated that the 2020 EAD Rules remained in effect. *See, e.g.*, Tr. 6/13/22 Conf. at 4:20-5:6; Tr. 7/18/22 Conf. at 6:10-10:7; Manfredi Decl. ¶¶ 5, 7-11, 13 & Ex A. And in July 2022, Plaintiffs learned that Defendants had—without Court permission, Plaintiffs' agreement, or prior notice—stopped complying with the PI and dismantled the parties' agreed-upon implementation process. Manfredi Decl. ¶ 11; *see also* Nolan Decl. ¶¶ 25, 27, 32. Plaintiffs immediately informed Defendants they believed this to be a PI violation. Manfredi Decl. ¶ 11.

Rather than move for contempt, Plaintiffs continued trying to work things out with Defendants. Plaintiffs' counsel met with Defendants' counsel and with USCIS officials four times in July and August, and counsel exchanged emails. *Id*. ¶¶ 10–24. After Defendants disclosed their target timeframes for resolving various issues, Plaintiffs proposed a settlement agreement under

which Defendants would commit to their own schedule, with an option to resume briefing if they fell short. *See id*. ¶¶ 20-22 & Exs. A, C. A week passed, with no substantive response from Defendants. *See id.* ¶¶ 25–29. On August 26, the previously-adjourned date for motion practice, Defendants rejected Plaintiffs' proposal, and without notice or trying to meet and confer, Defendants moved to stay the case indefinitely, pending the resolution of motions by the *Asylumworks* and *Rosario* courts. ECF No. 185; *contra* L.R. 105(9).

On Tuesday, September 6, 2022—three days before Plaintiffs were scheduled to file this motion—USCIS published an updated version of Form I-765, and updated versions of the instructions for Forms I-765 and I-589. Manfredi Decl., Exs. M, N, O. These updates addressed some of Plaintiffs' concerns (*e.g.*, by removing questions relating to asylum applicants' manner of entry), but they continue to give effect to enjoined components of the 2020 EAD Rules. For example, the Form I-765 instructions continue to implement the 2020 EAD Rule changes granting USCIS discretionary authority to deny employment authorization based on any arrest or conviction; and the instructions for both Forms continue to cross reference 8 C.F.R. § 208.7, which continues to implement the 2020 EAD Rules. *See id.* ¶¶ 42-43 & Exs. N, O; Hernandez Decl. ¶ 5.

E. Plaintiffs and Members Suffer Irreparable Harm to this Day

The government's unilateral decision to stop complying with this Court's PI and to focus its resources on the oldest pending EAD applications "consisting largely of 'non-CASA and ASAP' cases," Nolan Decl. ¶ 32, has had dire implications for Members. Rather than receiving the benefit of the *status quo ante* treatment that this Court's PI required, Members now wait for months for their EAD applications to be processed. *See* Manfredi Decl., Exs. B & D ("*Rosario* Reports"); Cruz Decl. ¶ 27; *see, e.g.*, Saleh Decl. ¶ 12 (still waiting for EAD 132 days after filing). These delays are devastating for the vulnerable families that count the days until they are able to work. *See* Tan Decl. ¶¶ 12, 21–22 (struggling to afford necessities like food, rent, and medical

care); Correa Decl. ¶¶ 22–23 (same); Saleh Decl. ¶¶ 13–14 (same); Cruz Decl. ¶¶ 43-47 (mental health repercussions); *see also* ECF No. 69 at 59 ("[E]very additional day [asylum seekers] wait will visit[] on them crippling dependence on the charity and good will of others.").

At the same time that it fails to timely process Member applications as required by the PI, the government continues to instruct those Members—on its public-facing website—that "[w]e are implementing the . . . preliminary injunction in *Casa de Maryland*," such that Members are entitled to the benefit of this Court's PI if they submit membership evidence with their EAD applications. *See* Manfredi Decl. ¶ 37 & Ex. I. The government also continues to instruct Members to identify themselves as such when they use the *Rosario* class action email tool. Cruz Decl. ¶ 29. Meanwhile, the 2020 EAD Rules have not been removed from the Code of Federal Regulations ("CFR"). *See* Manfredi Decl. ¶ 38 & Ex. J.

All of this causes ongoing harms to Plaintiffs. Members call ASAP seeking assistance when their applications are not processed within 30 days. Cruz Decl. ¶¶ 26, 29. They and their attorneys call ASAP because they are confused by the continued implementation of 2020 EAD Rules in Forms I-765 and I-589, and Defendants' revisions to the instructions in recent days are all but certain to add to that confusion. *Id.* ¶¶ 38-39, 41; *supra* § I.D. Members and their attorneys call to ask about the continuing presence of the Rules in the CFR. Cruz Decl. ¶¶ 19-23, 40–41. Such inquiries have generated substantial additional work for ASAP, diverting the organization's limited resources away from its other mission-driven programming. *Id.* ¶¶ 31–35. Similarly, the government's decision to continue to implement the 2020 EAD Rule authorizing discretionary denials of EADs, *supra* § I.D, requires Plaintiff Pangea Legal Services to do "substantial additional work" to assist its clients with their EAD applications because it must obtain certified copies of client arrest records, even for arrests that did not result in a conviction. Hernandez Decl. ¶¶ 4-11.

II. Argument

A. Defendants Have Not Met Their Burden to Justify an Indefinite Stay

A party seeking a discretionary stay "must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983); *see also Landis v. N. Amer. Co.*, 299 U.S. 248, 254-55 (party seeking stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to someone else."). All three factors militate against a stay here: (1) "hardship and equity to the moving party if the action is not stayed"; (2) "potential prejudice to the non-moving party," and (3) "the interests of judicial economy." *See Mullins v. Suburban Hosp. Healthcare Sys., Inc.*, 2017 WL 3023282, at *1 (D. Md. July 17, 2017) (Xinis, J.) (identifying three factors relevant to stay request).

First, Plaintiffs and their Members continue to suffer irreparable harm as a result of the 2020 EAD Rules. *See supra* § I.E. Asylum seekers suffer irreparable harm every extra day that they wait for work authorization. *See* ECF No. 69 at 59. Defendants concede that the government is not processing Members' initial EAD applications within 30 days, *see* Nolan Decl. ¶¶ 25, 27, 32; ECF No. 185-5 at 52-73 (*Rosario* Reports). Likewise, Plaintiffs' resources are strained by Defendant-caused confusion, with the government advising Members that the PI protects them, while continuing to implement the 2020 EAD Rules in material ways. *See supra* § I.E.

Defendants assert that the requested stay is "likely" to be "relatively short," rendering any resulting harm "nominal." ECF No. 185 (Defs.' Mot.) at 16-17. But their duration prediction is belied by their concession that "it would be folly to try and predict the exact [stay] timeline," *id.* at 17, and their belittlement of the serious, enduring effects of delayed processing is belied by the record, *see supra* § I.E; Correa Decl. ¶¶ 19-23; Saleh Decl. ¶¶ 13-14, 17-20; Tan Decl. ¶¶ 12-15,

18, 21-22; Cruz Decl. ¶¶ 15, 31-35, 42-47. Moreover, Defendants' statement that Plaintiffs "lack some dire urgency" because they purportedly sat on their rights for seven months after the *Asylumworks* Order grotesquely misrepresents the factual record and the law. *See supra* § I.D (Plaintiffs' diligence); Manfredi Decl. ¶¶ 2, 9-28 (Plaintiffs' efforts to resolve issues with the government). Meanwhile, Defendants withheld key information about their non-compliance with the PI. Even as Plaintiffs informed the Court in June 2022 of their understanding that the PI ensured that Members—but no one else—continued to benefit from 30-day processing, Defendants did not disclose that sometime "after April 7, 2022," USCIS unilaterally stopped abiding by the agreed-upon system for complying with the PI and channeled processing resources away from Member applications—with the expected effect on compliance. *See supra* § I.D; Nolan Decl. ¶¶ 25, 32.

Second, far from "mak[ing] out a clear case of hardship or inequity," *Landis*, 299 U.S. at 255, Defendants simply speculate that this Court and the *Asylumworks* court might issue conflicting orders, Defs.' Mot. at 15. But as history has already shown, each court is capable of considering orders issued by the other in adjudicating a pending motion.[5] *See, e.g.*, ECF 185-2 (*Asylumworks* court adopting this Court's analysis); *see also Asylumworks v. Mayorkas*, No. 20-cv-03815-BAH, 2021 WL 2227335, at *5 (D.D.C. Jun. 1, 2021) (denying government's motion to stay briefing based on parallel proceedings in this Court). The lone case Defendants cite is inapposite, involving a stay while the Fourth Circuit decided "virtually identical" issues in another

[5] Nor do Defendants even attempt to explain why this action must be stayed pending the outcome of the *Rosario* contempt motion. That court has also considered developments in this Court and their implications for the *Rosario* class. *See Rosario v. U.S. Citizenship & Immigr. Servs.*, 2:15-cv-00813 (W.D. Wash., May 28, 2021), Order, ECF No. 184 (denying without prejudice the plaintiffs' motion for contempt and directing parties to file joint status report addressing the impact of this Court's anticipated order on summary judgment).

case. *See* Defs.' Mot. at 16 (citing *Popoola v. MD-Individual Practice Ass'n*, 2001 WL 579774, at *2 (D. Md. May 23, 2001)).

Moreover, if Defendants believe that there is a conflict between this Court's PI and the *Asylumworks* Order, they should welcome judicial intervention here. *See* Defs.' Mot. at 13 (After *Asylumworks*, "Plaintiffs . . . should not[] have an alternative special basis for compelling 30-day compliance . . . that is not available to other asylum EAD applicants."). But rather than coming to this Court for guidance, Defendants flouted the PI by dismantling the parties' implementation plan. *See* Nolan Decl. ¶¶ 25, 27, 32 (USCIS priority was "largely [] 'non-CASA and ASAP' cases").

Third, the interests of judicial economy do not warrant any stay, let alone an indefinite one.[6] Defendants' contention that the *Asylumworks* court alone should construe its own order, *see* Defs.' Mot. at 13-14, misconstrues the relief Plaintiffs request: Plaintiffs are not asking this Court to opine on what *Asylumworks* requires, but rather to grant Plaintiffs summary judgment and order the injunctive relief necessary to ensure that Defendants restore the *status quo ante*—relief sought in the Complaint, and preliminarily granted in part to Members by this Court's PI. *See infra* § II.C. In the alternative, Plaintiffs ask the Court to enforce its PI in the face of Defendants' admitted non-compliance.[7] *See infra* § II.D. It is beyond cavil that courts have inherent authority to enforce their own orders, as Defendants' own cases demonstrate. *See* Defs.' Mot. at 14 (collecting cases).

Defendants' remaining contention, that briefing would be "wasteful" and "add[] no value," *id.* at 13-14, is without merit: First, this Court was the first to address the matters of first impression related to the challenged rules, and is intimately familiar with the issues. Indeed, it issued the first

[6] As explained, *infra* § II.B, this Court has continuing jurisdiction over this case. Defendants' suggestion that this is "absurd," Defs.' Mot. at 14 n.12, is wrong—and hardly the appropriate posture to take with respect to an injunction that is still in place.

[7] Because this Court's PI is still in effect, it provides "an alternative . . . basis for compelling 30-day compliance" for Members. *Contra* Defs.' Mot. at 13.

decision requiring Defendants to restore, at least in part, the *status quo ante*, and it was on the verge of issuing a summary judgment decision when *Asylumworks* issued. *See, e.g.*, ECF Nos. 69, 70; Tr. 7/18/22 Conf. 17:4-7. Second, contrary to Defendants' argument, courts in different jurisdictions routinely "address[] issues that are already in active litigation in other federal courts," Defs.' Mot. at 13, as this case and the *Asylumworks* case amply demonstrate. Finally, Defendants should not be permitted to use their status as defendants in two cases to leave Plaintiffs without any avenue for relief—the government argued in *Asylumworks* that the *Asylumworks* Order does not compel any of the relief Plaintiffs seek here, and that the *Asylumworks* plaintiffs lack standing to seek additional injunctive relief. *See* ECF 185-5.

B. Plaintiffs Have Standing

The 2020 EAD Rules forced Plaintiffs to divert resources away from other mission-driven programming to counteract the Rules' effects, with a resulting drain on their resources; as a consequence, Plaintiffs have organizational standing to challenge the Rules.[8] In addition and in the alternative, this Court has already held that CASA and ASAP have associational standing sufficient to challenge the 2020 EAD Rules, ECF No. 69 at 22-23, and the Broader EAD Rule is not severable. ECF No. 107-1 at 13-16.

[8] The Fourth Circuit's now-vacated decision in *CASA de Maryland v. Trump*, which had narrowed organizational standing at the time that the Court issued its PI, no longer applies. *See* ECF No. 107-1 at 6-10; ECF No. 125 at 1-2. The evidence that Plaintiffs submitted in support of their motions for partial summary judgment and their motion to modify the PI, which they incorporate herein, establishes standing under the correct standard—as set forth in their arguments, also incorporated herein. *See infra* n.9.

C. Plaintiffs Are Entitled to Summary Judgment and a Permanent Injunction

a. This Case Is Not Moot

A case is moot "only if it is impossible for a court to grant any effectual relief whatever." *Mission Prod. Holdings, Inc v. Tempnology*, 139 S. Ct. 1652, 1660 (2019) (internal quotation marks omitted). In addition to seeking vacatur of the 2020 EAD Rules, the Complaint requested injunctive relief and "other and further relief" necessary to prevent harm stemming from the Rules. *See* ECF No. 1 at 53-54. Such relief would be effective, stopping the ongoing harms to Plaintiffs and their Members from the government's failure to restore the *status quo ante*. *See supra* § I.E. They are entitled to such relief.

b. Plaintiffs Are Entitled to Summary Judgment on Their Claims

As explained above, *supra* § I.B & n.4, the *Asylumworks* court held Chad Wolf's ascension to the office of Acting Secretary to be unlawful, rendering his purported acts—including the promulgation of the Rules challenged here—unlawful under the APA and the FVRA. Plaintiffs respectfully request that this Court adopt the merits holding in *Asylumworks*—which is itself based on this Court's analysis—and grant them summary judgment on their APA and FVRA claims.[9]

i. Injunctive Relief Is Necessary to Remedy the Injuries Caused by the Implementation of the 2020 EAD Rules

Plaintiffs request final injunctive relief on their claims, including a final order requiring Defendants to (1) correct all forms, instructions, websites, and other official documents that reflect

[9] Plaintiffs hereby incorporate the arguments and evidence they submitted in support of their motions for partial summary judgment and their motion to modify the PI. *See* ECF No. 107-1 (MSJ & Mot. to Modify); ECF No. 125 (Reply iso MSJ & Mot. to Modify); ECF No. 130-1 (Opp'n to Defs.' MSJ & Mem. iso Pls.' Cross-MSJ); ECF No. 135 (Reply iso Cross-Mot. for MSJ); ECF No. 24-4 (CASA Decl.); ECF No. 24-5 (ASAP Decl. I); ECF No. 24-6 (Centro Legal Decl. I); ECF No. 24-7 (Oasis Decl. I); ECF No. 24-8 (Pangea Decl. I); ECF No. 107-4 (Centro Legal Decl. II); No. 107-5 (Pangea Decl. II); ECF No. 107-6 (Oasis Decl. II); ECF No. 107-7 (ASAP Decl. II).

the provisions of the 2020 EAD rules; (2) take all necessary steps to finalize a rule that removes the 2020 EAD Rules from the CFR; (3) make substantial and continuous progress in returning to 30-day processing of initial EAD applications for asylum applicants; and (4) produce an Implementation Plan and disclose data sufficient to permit monitoring of Defendants' progress toward compliance.

ii. Plaintiffs Satisfy the Requirements for a Permanent Injunction

To obtain a permanent injunction, a plaintiff succeeding on the merits must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 364 (4th Cir. 2022) (citation omitted). Each factor favors granting an injunction here.

First, as discussed above, Plaintiffs and Members have suffered and continue to suffer irreparable injuries due to the continued existence of erroneous information on official forms, instructions, websites, and in the CFR. *See supra* §§ I.E & II.B. Moreover, the government's promulgation and implementation of the Timeline Repeal Rule ("TRR") continues to cause irreparable harm to Plaintiffs and Members by substantially delaying initial EAD processing times for Members. After this Court ordered the government to resume 30-day processing for Members, the government allowed 93,639 non-Member initial EAD cases to accumulate, of which 66,935 had been pending for at least 121 days. Nolan Decl. ¶ 31. The government did so notwithstanding that (i) it was on notice that the TRR was likely unlawful, *see* ECF No. 69 at 68, (ii) plaintiffs in two cases challenging that rule's legality were seeking final judgment, and (iii) USCIS was consistently able to process at least 95% of *all* initial asylum EADs within 30 days during two

years before the TRR went into effect.[10] The result: Members are not receiving 30-day processing now because the government is "address[ing] the backlog of pending initial C8 EAD applications, consisting largely of 'non-CASA and ASAP' cases." Nolan Decl. ¶ 32; *see, e.g.*, Saleh Decl. ¶ 12 (Member waiting 132 days for EAD). And ASAP must assist Members with delayed EAD applications, at the expense of its other mission-driven work. Cruz Decl. ¶¶ 31-35.

Second, the remedies available at law are inadequate. Money damages are not available under the APA. *See* 5 U.S.C. § 702. Moreover, Plaintiffs' continuing injuries seven months after the *Asylumworks* Order have amply demonstrated that the standard APA remedy of vacatur—the subject of the *Asylumworks* Order—is inadequate to prevent irreparable harm. *See supra* § I.E; *see also* ECF No. 185-5 at 14-15 (opposing *Asylumworks* motion to enforce on ground that vacatur does not require relief sought in this case, which is necessary to return to *status quo ante*).

Finally, the balance of the equities and the public interest favor Plaintiffs. *See Kravitz v. U.S. Dep't of Com.*, 366 F. Supp. 3d 681, 755 (D. Md. 2019) ("last two factors merge" where "government is a party"). In weighing the harms caused by an unlawful regulation against government interests, courts give little weight to government claims that an injunction mandating compliance with the law causes any legally cognizable harm. *See, e.g.*, *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011). This Court has already held, with respect to the TRR, that the government's desire not to "continue devoting more resources than it would like to meet its 30-day processing deadline" is not a persuasive equitable consideration "[w]here the agency has functioned with this deadline since 1995." ECF No. 69 at 61-62. Defendants had the benefit of this Court's pronouncement on the likely unlawfulness of the TRR for two years, but

[10] *See* ECF No. 108-1, Decl. of Zachary Manfredi in Supp. of Pls.' MSJ or, in the Alternative, Mot. to Modify PI, Ex. A, at 3.

they failed to prepare for the Rule's inevitable demise; they cannot now claim surprise at being required to remedy the harm caused by their unlawful Rule and to restore the *status quo ante*.

As for Plaintiffs' requests that the government correct official documents and regulations that contain incorrect information, Defendants told Plaintiffs and the Court they would do so, but refused to commit to a timeframe. *See* Manfredi Decl. ¶ 29. Defendants' amendments this week to the instructions for Forms I-765 and I-589 continue to implement the 2020 EAD Rules in several respects, such as giving effect to the enjoined "discretionary review rule" that permits discretionary EAD denials to asylum seekers based on any arrest or criminal conviction (*see supra* § I.D; *contra* ECF No. 69 at 68), and cross-referencing 8 C.F.R. § 208.7, which—like other provisions of the CFR—continues to implement the 2020 EAD Rules, *see, e.g.*, 8 C.F.R. §§ 208.7(a)(1)(i), (ii), (iii)(F) (implementing enjoined 365-day rule, one-year filing bar, and biometrics requirement of the 2020 EAD Rules); *contra* ECF No. 69 at 68 (enjoining same). The government's recent publication of instructions that continue to implement the 2020 EAD Rules show that injunctive relief is necessary to provide complete relief to Plaintiffs.

iii. Neither the *Asylumworks* Order Nor the *Rosario* Permanent Injunction Militates Against Injunctive Relief Here

Defendants protest that an injunction would be improper because other courts have granted relief touching upon Plaintiffs' claims here. *See* Manfredi Decl. ¶ 30; ECF No. 185-3, Defs.' correspondence of June 3, at 2. Although "[r]elief granted in another tribunal can moot a claim," it only does so "where the relief granted is complete." *Kennedy Building Assocs. v. Viacom, Inc.*, 375 F.3d 731, 746 (8th Cir. 2004) (citations omitted); *see also Wong v. Dep't of State*, 789 F.2d 1380, 1384 (9th Cir. 1986) ("Partial relief in another proceeding does not moot an action seeking additional relief."). Because neither the *Asylumworks* Order, nor the permanent injunction in

Rosario v. USCIS, 365 F. Supp. 3d 1156 (W.D. Wash. 2018), provides the complete relief that Plaintiffs here seek, this Court can and should grant additional injunctive relief.

Plaintiffs may obtain injunctive relief even after challenged agency actions have been vacated if they show that an injunction would have a "meaningful practical effect independent of [the rules'] vacatur." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Such is the case here. *Asylumworks* ordered the vacatur of the 2020 EAD Rules more than seven months ago, yet the government so far has failed to remedy or even stem Plaintiffs' injuries flowing from the Rules' promulgation and implementation. *See supra* § I.E; *see also* Cruz Decl. ¶¶ 31–35, 42-47; Manfredi Decl. ¶¶ 2, 5, 7, 11, 14, 18. The government has even taken the position that the vacatur ordered in *Asylumworks* does not (and cannot) entail the measures requested by Plaintiffs here. *See* ECF No. 185-5 at 14-15. Even absent the *Asylumworks* Order, injunctive relief would ensure that the government takes the actions necessary to abate the ongoing harms to Plaintiffs caused by the 2020 EAD Rules and restore the *status quo ante*—as requested in the Complaint here. *See* ECF No. 1 at 53-54.

Nor has the *Rosario* permanent injunction made Plaintiffs whole. While that injunction mandates that initial asylum EADs be processed within 30 days, 365 F. Supp. 3d at 1163, this is the case that ensured meaningful protections for Members. Specifically, in this case, not *Rosario*, the parties negotiated a process by which the government was to identify Members entitled to 30-day processing and other aspects of the *status quo ante* pursuant to this Court's PI. *See supra* § I.A. Defendants have consistently recognized that this Court's PI is what entitles Members to 30-day processing. *See infra* § II.D. Until Defendants stopped complying with the PI and unilaterally dismantled the agreed-upon process, it was this Court's PI that ensured Members—

and only Members—received 30-day processing after the *Asylumworks* Order, notwithstanding that *all* asylum seekers were then entitled to 30-day processing under *Rosario*.

Moreover, *Rosario* has been insufficient to ensure that the government is making meaningful progress toward 30-day processing for asylum seekers. In recent months, USCIS adjudicated *fewer* applications than it has received—a situation that exacerbates, rather than mitigates, the government's compliance problem. *See infra* § II.D. As such, additional relief—beyond *Rosario*—is necessary to eliminate the ongoing harms to Plaintiffs and Members as a result of the government's implementation of the 2020 EAD Rules and to restore the *status quo ante*. Defendants should, at minimum, be required to explain to the Court how they intend to restore Plaintiffs to the *status quo ante*. *See* Proposed Order. This modest additional relief is sufficiently distinct from the *Rosario* injunction to render it appropriate here.

D. Alternatively, Enforcing the Preliminary Injunction is Urgently Needed to Abate Ongoing Irreparable Harm to Plaintiffs and Members

If the Court elects to defer ruling on Plaintiffs' request for final relief in light of the proceedings in *Asylumworks* and *Rosario*, the Court nonetheless should immediately require compliance with the existing preliminary injunction, which Defendants have disregarded. "There can be no question" that federal courts have the "inherent power to enforce compliance with their lawful orders." *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *see also Kemp v. Peterson*, 940 F.2d 110, 113 (4th Cir. 1991) (noting district court's authority "to issue all orders necessary to enforce orders it has previously issued in the exercise of its jurisdiction"); *Augustus v. Sch. Bd. of Escambia Cnty.*, 507 F.2d 152, 156 (5th Cir. 1975) ("A court has inherent power to enter such ancillary orders as are necessary to carry out the purpose of its lawful authority."). A finding of civil contempt is warranted if Plaintiffs establish:

> (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant's favor; (3)

> that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) that the movant suffered harm as a result.

De Simone v. VSL Pharms., Inc., 36 F.4th 518, 529 (4th Cir. 2022) (citation omitted). "Willfulness is not an element of civil contempt." *In re Gen. Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995). "Once the movant establishes that the alleged contemnor violated the decree, the burden shifts to the alleged contemnor to demonstrate that [they] made in good faith all reasonable efforts to comply with the decree." *De Simone*, 36 F.4th at 529 (citation omitted and cleaned up).

The first and second factors require little discussion. The PI is a valid decree in Plaintiffs' favor of which Defendants have actual knowledge. The fourth factor is discussed above, *supra* § I.E, and Plaintiffs have been and are injured by Defendants' unilateral decision to abandon 30-day processing for Members, and Defendants' implementation of the 2020 EAD Rules in the instructions for Forms I-765 and I-589 will continue to cause the very irreparable harms this Court's PI sought to prevent, *see* ECF No. 69 at 58-61.

The third factor is readily met as well: Defendants' conduct violated the terms of this Court's PI. This Court's PI enjoined several rule changes, including the TRR. ECF Nos. 69, 70. Throughout this litigation, both sides have manifested their understanding that the PI requires Defendants to process Members' initial EAD applications within 30 days, and they have said so in no uncertain terms.[11] Yet, some time after April 7, 2022, USCIS—without notifying Plaintiffs or the Court—"beg[a]n to dismantle the bifurcated processes and procedures applicable to CASA

[11] *See, e.g.*, ECF No. 133-1 at 22 (opposing modification of PI to include non-Members on the basis that government "would be unable to immediately comply" with an order "to adjudicate these pending applications within 30 days"); Nolan Decl. ¶ 18 ("[O]n September 11, 2020, as a result of the CASA PI, 30-day processing was reinstituted for a subset of initial C8 EAD applicants, consisting of CASA and ASAP members."); USCIS, Rosario Class Action, rb.gy/mg3ohl (*CASA* PI "required [USCIS] to process a smaller group of initial asylum-based EAD applications within 30 days.").

and ASAP initial C8 EAD applications." Nolan Decl. ¶ 25. Defendants subsequently—and unilaterally, without notice, and without moving to dissolve the PI—"took steps to reincorporate CASA and ASAP initial C8 EAD applications into a common adjudication queue with all other initial C8 EAD applicants." *Id.* ¶ 27. Defendants also violated the PI by publishing form instructions that continue to implement 2020 EAD Rule provisions that the PI enjoined as to Members. *See supra* § I.D. Defendants' conduct violates the terms of the PI, and they knowingly engaged in it, thus satisfying the third factor.

Accordingly, the burden shifts to the government to demonstrate that they have made "all reasonable efforts to comply with the decree." *De Simone*, 36 F.4th at 529 (citation and alternations omitted). They cannot. Since Defendants' unilateral decision to place Members and non-Members in a common adjudication queue, USCIS has consistently received about 30,000 new initial EAD applications per month. *See* ECF No. 185-5, *Rosario* Reports. Yet, in the seven months since the *Asylumworks* decision, USCIS has not significantly reduced the backlog of unadjudicated applications, which still stands at nearly 77,000. *See* Manfredi Decl., Ex. D. Indeed, in July and August of 2022, the agency adjudicated fewer applications per month than it received, *id.* (net increase of 3,000 applications in July and 1,500 applications in August); *see also* Manfredi Decl. ¶ 17—moving USCIS away from the goal of substantial compliance with the PI. Moreover, Defendants concede that they have shifted processing resources *away from* Member applications to non-Member applications to address the backlog they allowed to accumulate. *See* Nolan Decl. ¶ 32. In short, where compliance with the PI requires providing 30-day processing for Members, progress toward compliance requires adjudicating substantially *more* Member applications each month than are received. Yet nothing in the record suggests that USCIS has done so. USCIS dismantled the system designed to ensure compliance with the PI, with the expected result.

"The appropriate remedy for civil contempt is within the court's broad discretion." *In re Gen. Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995). What Plaintiffs seek here is straightforward, modest, and entirely appropriate: reaffirm that the PI means what the parties have always understood it to require and mandate that Defendants make all reasonable efforts to process Member applications within 30 days, order Defendants to remove the references to the discretionary review rule from the Form I-765 instructions, and require Defendants to submit an implementation plan, subject to Plaintiffs' review and comment, and this Court's approval, for returning to compliance with this Court's order.[12]

III. Conclusion

Plaintiffs respectfully request that this Court deny Defendants' stay motion, ECF No. 185; grant Plaintiffs' summary judgment motion, or in the alternative, motion for contempt; and issue Plaintiffs' attached Proposed Order.

[12] To the extent that the Court orders Defendants to produce an implementation plan to achieve 30-day processing for substantially all asylum EAD applicants (instead of only CASA and ASAP members), then the relief requested to enforce the PI would merge with the final relief granted on summary judgment. *See Fleet Feet, Inc. v. NIKE, Inc.*, 986 F.3d 458, 464 (4th Cir. 2021) ("[A] preliminary injunction generally merges into the final judgment.").

Additionally, Plaintiffs respectfully suggest that attorney's fees may be appropriate to compensate them for the expense of enforcing the PI, but that a determination of the appropriateness and amount of any fees may best be left to the end of this litigation, when Plaintiffs can also evaluate their position with respect to the government's liability for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

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Respectfully submitted,

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