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.	Civil No. 20-2118-PX

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR HOMELAND SECURITY ACT CLAIM, OR IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

Plaintiffs CASA de Maryland, Asylum Seeker Advocacy Project, Centro Legal de la Raza, Oasis Legal Services, and Pangea Legal Services respectfully move for summary judgment on Count 2 of their Complaint (ECF No. 1) and for vacatur of the two final rules challenged in this action (the Timeline Repeal Rule and the Broader EAD Rule). In the alternative, Plaintiffs respectfully request modification of the Court's preliminary injunction (ECF No. 70) to enjoin enforcement of all provisions of the two final rules on a uniform basis as to all persons.

In support of this motion, Plaintiffs submit a Memorandum of Law; their Statement of Undisputed Material Facts; the Second Declaration of Julia Hiatt-Shepp; the Second Declaration of Jehan Laner; the Second Declaration of Caroline Kornfield Roberts; the Second Declaration of Swapna C. Reddy; the Declaration of Zachary Manfredi, together with the exhibits attached thereto (all filed concurrently with this Motion).

Dated: April 20, 2021

Respectfully submitted,

/s/
Linda Evarts (*pro hac vice*)
Geroline A. Castillo (*pro hac vice*)
Kathryn Austin (*pro hac vice*)
Mariko Hirose (*pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
One Battery Park Plaza, 4th Floor
New York, New York 10004
Tel: (516) 838-1655
Fax: (929) 999-8115
levarts@refugeerights.org
gcastillo@refugeerights.org
kaustin@refugeerights.org
mhirose@refugeerights.org

/s/
Justin B. Cox (Bar No. 17550)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
PO Box 170208
Atlanta, GA 30317
Tel: (516) 701-4233
Fax: (929) 999-8115
jcox@refugeerights.org

/s/
Dennise Moreno (Bar No. 21358)
Amit Jain (Bar No. 21004)
Conchita Cruz (*pro hac vice*)
Zachary Manfredi (*pro hac vice*)
ASYLUM SEEKER ADVOCACY PROJECT
228 Park Avenue S. #84810
New York, NY 10003-1502
Tel: (305) 484-9260
Fax: (646) 968-0279
dennise.moreno@asylumadvocacy.org
amit.jain@asylumadvocacy.org
conchita.cruz@asylumadvocacy.org
zachary.manfredi@asylumadvocacy.org

Richard W. Mark (*pro hac vice*)
Joseph Evall (*pro hac vice*)
Katherine Marquart (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
Fax: (212) 351-4035
RMark@gibsondunn.com
JEvall@gibsondunn.com
KMarquart@gibsondunn.com

Counsel for Plaintiffs

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.	Civil No. 20-2118-PX

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THEIR HOMELAND SECURITY ACT CLAIM, OR IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Plaintiffs CASA de Maryland ("CASA"), Asylum Seeker Advocacy Project ("ASAP"), Centro Legal de la Raza ("Centro Legal"), Oasis Legal Services ("Oasis"), and Pangea Legal Services ("Pangea") submit this memorandum of law in support of their motion for summary judgment on their Homeland Security Act claim, or in the alternative, to modify the scope of the preliminary injunction.

INTRODUCTION

In September 2020, this Court preliminarily enjoined in part two final rules that would have dismantled the decades-old system through which asylum seekers obtain the employment authorization they need to work, and to support themselves and their families, while they wait—often for years—for the government to adjudicate their asylum cases. In issuing its injunction, the Court concluded that Plaintiffs were "likely to succeed on the merits" of their claim arising under the Homeland Security Act ("HSA," or "Appointments claim"). ECF No. 69 at 40. The Court, however, considered the matter one of "first, or near first impression," *id*. at 27, and did not consider summary judgment on the issue as an alternative to preliminary relief. Stressing the constraints imposed by the then-recent Fourth Circuit decision in *CASA de Maryland v. Trump*, the Court limited its preliminary relief to members of Plaintiffs CASA and ASAP. The Court also limited its relief to select provisions of the challenged rules.

Seven months later, the legal landscape has shifted significantly. Courts across the country have endorsed and adopted this Court's Appointments analysis, including by granting summary judgment on such claims brought under the Administrative Procedure Act ("APA"). The Fourth Circuit vacated its panel decision in *CASA v. Trump*, such that Fourth Circuit law on organizational standing and the scope of preliminary relief once again favors Plaintiffs' positions. Meanwhile, the limited relief that the Court determined was appropriate under then-binding

precedent has proven insufficient to prevent continuing irreparable harms.

Plaintiffs respectfully request that the Court grant summary judgment on their HSA claim and vacate the challenged rules in their entirety. If the Court enters summary judgment on the HSA claim, there are two independent reasons why the appropriate relief is vacatur of *all* provisions of the Broader EAD Rule: first, Plaintiffs have organizational standing to challenge all provisions of the Broader EAD Rule, not just those that were preliminarily enjoined; and second, at a minimum, Plaintiffs CASA and ASAP have associational standing to challenge the Timeline Repeal Rule and provisions of the Broader EAD Rule, and the Broader EAD Rule is not severable. Vacatur of the rules, without limitation, is the default remedy at summary judgment. If the Court declines to reach summary judgment at this juncture, Plaintiffs request, in the alternative, that the Court modify the preliminary injunction to provide relief on a uniform basis and as to all provisions of the challenged rules, as the circumstances have changed and a modified injunction is appropriate and necessary to prevent continuing irreparable harm to Plaintiffs, their members, and the communities they serve.

BACKGROUND

I. The Court Preliminarily Enjoined Provisions of the Challenged Rules as to Members of ASAP and CASA

In June 2020, Defendants issued two Final Rules that indefinitely delay or improperly burden asylum seekers' ability to obtain work authorization.[1] In July 2020, Plaintiffs filed suit,

[1] The "Timeline Repeal Rule" repealed the decades-old requirement that the Department of Homeland Security ("DHS") adjudicate asylum seekers' initial Form I-765(c)(8) applications for employment authorization within 30 days of filing, while the "Broader EAD Rule" delayed, burdened, and substantially narrowed asylum seekers' eligibility for EADs through various substantive and procedural hurdles. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 Fed. Reg. 37,502

see Compl., ECF No. 1, and three days later, moved for preliminary relief as to both rules, ECF No. 23. The Timeline Repeal Rule and the Broader EAD Rule (together, the "Asylum EAD Rules") went into effect in August 2020.

In September 2020, this Court granted Plaintiffs' motion in part and preliminarily enjoined the Timeline Repeal Rule and five provisions of the Broader EAD Rule.[2] *See* ECF No. 70 ("Order"). The Court held that Plaintiffs were likely to succeed on the merits of their claims that the putative appointment of then-Acting Secretary Chad Wolf violated the Homeland Security Act and that the challenged rules were not the product of reasoned decision-making, in violation of the APA. ECF No. 69 at 39–58 ("Opinion"). The Court further held that the two membership organizations CASA and ASAP had associational standing to challenge the provisions the Court ultimately enjoined; that their members suffered and would continue to suffer harm that is "indisputably irreparable"; and that the balance of equities and considerations of public interest favored preliminary relief. *Id.* at 22–25, 58–62. In discussing the appropriate scope of relief, the Court noted that although "uniform preliminary relief seem[ed] especially warranted here," the Court "believe[d] itself bound" by the then-recent Fourth Circuit decision in *CASA v. Trump*, 971 F.3d 220 (4th Cir. 2020), which the Court concluded compelled limiting the relief to members of CASA and ASAP. *Id.* at 64, 66.

(June 22, 2020) (to be codified at 8 C.F.R. pt. 208); Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (Aug. 25, 2020) (to be codified at 8 C.F.R. pt. 208, 274); *see* ECF No. 69, at 5–10.

[2] The specific provisions of the Broader EAD Rule enjoined by the Court are the 365-day waiting period, the removal of the "deemed-complete" rule, the discretionary review rule, the one-year filing bar, and the provision requiring submission of biometric information as part of EAD applications. ECF No. 69 at 68; ECF No. 70.

II. Relevant Procedural History

On November 10, 2020, Defendants noticed an interlocutory appeal of this Court's Order. ECF No. 88. On November 23, 2020, Plaintiffs filed a cross-appeal. ECF No. 92. On March 22, 2021, the parties voluntarily dismissed the appeal and cross-appeal. No. 20-2217, ECF No. 22, 23. During the pendency of the appeal, the parties agreed to time-limited abeyances of the proceedings in this Court, which have now expired, and filed successive status reports. *See* ECF Nos. 83, 91, 96. Defendants also provided Plaintiffs with the Administrative Records for the Timeline Repeal Rule and the Broader EAD Rule. *See* ECF No. 91 ¶ 4.

III. Further Proceedings in *CASA v. Trump*

The Fourth Circuit issued its panel decision in *CASA v. Trump* on August 5, 2020, setting aside a nationwide injunction directed to the "public charge" rule (rendering certain immigrants likely to become a "public charge" ineligible for certain immigration benefits). On December 3, 2020, the Fourth Circuit granted en banc review of the panel's decision in *CASA v. Trump*, thereby vacating that panel decision. *CASA de Md. v. Trump*, 981 F.3d 311 (4th Cir. 2020); *see* 4th Cir. L.R.A.P. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion[.]"). On March 9, 2021, the government moved to dismiss its appeal voluntarily, and the Court of Appeals granted that motion on March 11, 2021. *See* No. 19-2222, ECF Nos. 210, 211.

IV. Access to Work Authorization Under the Court's Order

Notwithstanding the Court's holding that CASA and ASAP members suffer irreparable harm when their access to work authorization is delayed, Defendants have largely failed to promptly adjudicate initial member applications for employment authorization documents ("EADs") since the Order issued.

Defendants began implementing the Court's Order in October 2020. From October 2020

to January 2021, Defendants adjudicated only 15 percent of initial EAD applications of CASA and ASAP members within 30 days. *See* Manfredi Decl., Ex. A, March 2021 Processing Data, *Rosario v. USCIS*, No. 15-0813-JLR (W.D. Wash.).[3] In February and March 2021, Defendants adjudicated less than 33 percent of such applications. *Id.*, Ex. B, April 2021 Processing Data; *see id.* ¶¶ 5-7. This stands in stark contrast to the 97 percent of initial EAD applications Defendants adjudicated within 30 days during the 18 months preceding the effective dates of the challenged rules. *See id.*, Ex. A.

Recent government filings in *Rosario* take the position that Defendants' delay in processing such applications is attributable in part to the additional manual review process necessitated by this Court's Order. *See id.*, Ex. C, Decl. of Connie Nolan ¶ 17, *Rosario* ("Distinguishing [members from] non-members at the Dallas Lockbox requires manual review that is more time-consuming than processing prior to the *CASA* court's injunction."); *id.*, Ex. D, Def's Opp. to Pls.' Mot. for Contempt at 5, 10, *Rosario* ("[The district court in *CASA v. Mayorkas*] limit[ed] the scope of the preliminary injunction to members of CASA and ASAP (a result that neither party requested)" and this "ruling raised a number of practical difficulties with implementation."); *id.*, Ex. E, Decl. of Ernesto DeStefano ¶ 3, *Rosario* ("[A]nother challenge contributing to delays is the significant increase in (c)(8) applications that USCIS must manually review since the Fall 2020 as part of the implementation of the preliminary injunction," which is "on average anywhere between 1,500-2,000 (c)(8) applications each day.").

[3] In *Rosario v. USCIS*, the United States District Court for the Western District of Washington issued an injunction compelling the government to comply with the 30-day regulatory deadline for processing asylum seekers' initial EAD applications. The 15 percent figure is derived from the data contained in the government's March 2021 report. *See* Manfredi Decl. ¶¶ 3-4.

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Asylum EAD Rules.

A. Plaintiffs Have Organizational Standing to Challenge the Asylum EAD Rules in Their Entirety.

Plaintiffs have standing to challenge every provision of both Asylum EAD Rules. Specifically, Plaintiffs have organizational standing because they suffer cognizable harms: the rules impair their mission-driven programming, requiring Plaintiffs to divert resources away from their other mission-driven work in order to continue to provide EAD application assistance to their clients and members.[4]

The challenged rules "perceptibly impair[]" each Plaintiff's mission-related programs, and effect a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). That is sufficient to give Plaintiffs organizational standing to challenge the Asylum EAD Rules in their entirety.

The now-vacated panel decision in *CASA* was an aberration that narrowed standing under *Havens*, creating what this Court regarded as an obstacle to organizational standing. *See* Opinion at 21; *see also CASA v. Trump*, 971 F.3d at 265–66 (King, J., dissenting) (*CASA* majority "misconstrue[d]" *Havens* and there was "no question" that plaintiff organization satisfied the Supreme Court's standard). Without the *CASA* obstacle, controlling precedent recognizes that an organizational plaintiff suffers injury where its "discrete programmatic concerns are being directly and adversely affected by the challenged action, as opposed to that there has merely been a

[4] The Court needs to find only one Plaintiff with standing to challenge the Broader EAD Rule in order for Plaintiffs' claims to be justiciable. *See, e.g.*, *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) ("[T]he Supreme Court has made it clear that the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." (internal quotation marks omitted)).

diversion of resources based on the organization's own budgetary choices." *Nat'l Fed'n of the Blind v. Dep't of Educ.*, 407 F. Supp. 3d 524, 531–34 (D. Md. 2019) (internal quotations marks and citation omitted) (citing *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012));[5] *see also S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013) (distinguishing *Havens* as finding organizational injury where "broadly alleged" impairment of organization's ability to advance its purposes combined with alleged "consequent drain on the organization's resources").

For example, in *People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of Western Maryland, Inc.*, the Fourth Circuit held that the plaintiff animal rights organization had standing under *Havens* where it alleged and proved that it diverted resources to counteract harm to animals caused by the defendant zoo, which in turn "impeded [its] efforts to carry out its mission by reducing its ability to engage in mission-related campaigns against other zoos." No. 20-1010, __ F. App'x __, 2021 WL 305546, at *3–4 (4th Cir. Jan. 29, 2021) (unpublished), *petition for cert. filed* (U.S. Feb. 25, 2021) (No. 20-1183). Likewise, in *National Federation of the Blind*, Judge Chuang applied binding precedent to hold that an advocacy organization that assisted its blind members in making discrimination complaints had *Havens* standing to challenge an agency action that made it more difficult to file certain discrimination complaints because such action "forced

[5] *Lane* adopted the D.C. Circuit's test in *Fair Employment Council of Greater Washington v. BMC Marketing Corporation*. *See Lane*, 703 F.3d at 674–74 (citing *BMC*, 28 F.3d 1268, 1276–77 (D.C. Cir. 1994)). Under that standard, an organization has standing where it must divert resources to counteract the effects of a challenged action on the organization's mission-based programming, but the organization's resource diversion is "self-inflicted"—and not cognizable under *Havens*—where it is designed only "to increase legal pressure" and "d[oes] not have any *other* effect on [the organization's] programs." *BMC*, 28 F.3d at 1276–77. The *BMC* court made clear that *Havens* standing was established where the challenged action made plaintiff organization's "overall task more difficult." *Id.*

[the organization] to go above and beyond its normal activities" in order to ensure its members' complaints continued to be investigated and addressed—by updating its training materials, retraining its members, and changing its complaint-filing processes—and, as a result, the organization had to expend resources that it could have spent on other mission-driven activities. 407 F. Supp. 3d at 532–33.

Plaintiffs easily meet this standard for organizational standing. Just as in *People for Ethical Treatment of Animals* and *National Federation of the Blind*, Defendants' rules in their entirety have made it more difficult for Plaintiffs to accomplish their mission-driven work of assisting their asylum seeking clients and members in obtaining and maintaining work authorization, and as a result, Plaintiffs have had "to go above and beyond [their] normal activities" in order to continue to provide services at the core of their missions.[6] *Id.*

For example, the Asylum EAD Rules as a whole have caused Centro Legal to "spend double or triple the amount of time per client," and it must dedicate substantially more attorney (as opposed to non-attorney) time to continue assisting its clients in applying for initial and renewal EADs—mission-critical programming that the organization has done for years. Centro Legal Decl. II ¶¶ 3, 5, 7–9. Doing so has required Centro Legal to divert resources away from other mission-driven work, including helping its clients obtain humanitarian visas and other immigration benefits. *Id.* ¶ 10. And Centro Legal's pro bono clinic assistance model—through which it

[6] *See, e.g.*, Centro Legal July 23, 2020 Decl. ("Centro Legal Decl. I") ¶¶ 2–4, 17–35, ECF No. 24-6; Centro Legal April 19, 2021 Decl. ("Centro Legal Decl. II") ¶¶ 3, 5, 7–16; Oasis July 23, 2020 Decl. ("Oasis Decl. I") ¶¶ 3, 9, 36–53, ECF No. 24-7; Oasis April 16, 2021 Decl. ("Oasis Decl. II") ¶¶ 4–12; Pangea July 23, 2020 Decl. ("Pangea Decl. I") ¶¶ 4–5, 9, 12–16, 23–39, ECF No. 24-8; Pangea April 19, 2021 Decl. ("Pangea Decl. II") ¶¶ 3, 5, 7–10, 12–16; ASAP July 24, 2020 Decl. ("ASAP Decl. I") ¶¶ 4, 17, 39–42, ECF No. 24-5; ASAP April 19, 2021 Decl. ("ASAP Decl. II") ¶¶ 36–48.

provided EAD application assistance to unrepresented asylum seekers—is no longer feasible in the regulatory regime created by the Asylum EAD Rules; the pro bono clinics were therefore ended, and Centro Legal has consequently assisted "tens or even hundreds fewer asylum seekers" just since the Asylum EAD Rules took effect. *Id.* ¶¶ 11–16. Other Plaintiffs have been similarly affected by the Asylum EAD Rules. *See, e.g.*, Pangea Decl. II ¶¶ 5–16 (organization has had to devote "significantly" more resources to mission-critical EAD application assistance, diverted from other mission-critical programming, with negative consequences for its grant funding); Oasis Decl. II ¶¶ 4–11 (organization "had no choice but to make cuts in other Oasis programs" as a result of the Asylum EAD Rules, and additionally injured by the rules diminishing its clients' ability to pay low bono fees); ASAP Decl. II ¶¶ 12–48 (organization has had to divert hundreds of staff hours to EAD application-related programming to assist members impacted by all non-enjoined provisions of Broader EAD Rule and to continue to provide EAD application assistance and resources). The "perceptibl[e] impair[ment]" of Plaintiffs' missions and corresponding drain on their resources were precisely the kinds of harms Plaintiffs anticipated before the Asylum EAD Rules went into effect. *Havens*, 455 U.S. at 379; *see* Centro Legal Decl. I ¶¶ 17–35; Pangea Decl. I ¶¶ 12–16, 23–39; Oasis Decl. I ¶¶ 36-53; ASAP Decl. I ¶¶ 39–42; *see also* Compl. ¶¶ 111–127, 129.

In sum, just as in *Havens*, Plaintiffs have had "to expend more resources than usual to assist their members [and clients] in a specific fashion that is core to their mission . . . , and have asserted that it [is] more burdensome to do so." *Nat'l Fed'n of the Blind*, 407 F. Supp. 3d at 533 (citing *Havens*, 455 U.S. at 379); *accord Harrison v. Spencer*, 449 F. Supp. 3d 594, 601–05 (E.D. Va. 2020) (holding injury cognizable under *Havens* where challenged action increased requests for organization's legal assistance that required the organization to divert resources from its other

programming and causing delays to such programming, and collecting cases within the Fourth Circuit).

B. Plaintiffs Have Associational Standing to Challenge the Asylum EAD Rules.

In addition, in its prior Opinion, this Court correctly held that Plaintiffs have associational standing to challenge the Timeline Repeal Rule and at least certain provisions of the Broader EAD Rule. To have associational standing, a plaintiff must establish that: "'(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit.'" Opinion at 22 (quoting *S. Walk*, 713 F.3d at 184). The Court correctly found that CASA and ASAP members would have standing to sue in their own right based on the irreparable harms they suffered as a result of the Timeline Repeal Rule and certain provisions of the Broader EAD Rule, and that Plaintiffs satisfied the other associational standing factors. *Id.* at 22–24. At a minimum, CASA and ASAP continue to have associational standing to challenge the Timeline Repeal Rule and enjoined provisions of the Broader EAD Rule, and the Broader EAD Rule must be vacated in its entirety because it is not severable. *See infra* Part III.

II. Plaintiffs Are Entitled to Summary Judgment on Their Claim That the Challenged Rules Are Invalid Because Chad Wolf Did Not Lawfully Serve as Acting DHS Secretary When He Purported to Issue the Rules.

Plaintiffs are entitled to summary judgment on their claim under 5 U.S.C. §§ 706(2)(A) and (2)(C) that the Asylum EAD Rules were promulgated "in excess of . . . authority" and not "in accordance with law" because Chad Wolf's putative tenure as Acting Secretary of DHS violated

the HSA, 6 U.S.C. § 113.[7] In a decision of first impression, this Court held that Plaintiffs were likely to succeed on the merits of the claim that "Wolf filled the role of Acting Secretary without authority, [and] promulgated the challenged rules also 'in excess of . . . authority,' and not 'in accordance with law.'" Opinion at 45. As the Court reasoned, Wolf's purported predecessor, Kevin McAleenan, never validly assumed the office of Acting Secretary of DHS under the governing order of succession when then-Secretary Kristjen Nielsen resigned. *Id.* at 44. McAleenan thus "lacked the authority to amend the order of succession to ensure Wolf's installation as Acting Secretary." *Id.* at 44–45.[8]

This Court's analysis turned on the "plain meaning of Nielsen's order," Opinion at 44, a purely legal question that does not require factual development—as Defendants have conceded. *See* Tr. of Aug. 14, 2020 Proceedings at 62, ECF No. 56 ("I cannot conceive of any new facts that would have to be before the Court to decide [Plaintiffs' vacancies claims].") (statement of Defendants' counsel). Four other district courts, presented with the same issue regarding the unlawfulness of Wolf's actions, have adopted this Court's reasoning. In each instance, the government unsuccessfully "recycled exactly the same legal and factual claims" that failed before this Court, and in each instance, the court "soundly rejected" the government's position. *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 20-CV-09253-JD, 2021 WL 75756, at *4 (N.D. Cal. Jan. 8, 2021) (holding government proffered no new facts or law to support the lawfulness of Wolf's appointment); *see Batalla Vidal v. Wolf*, No. 16-CV-4756, __ F. Supp. 3d __, 2020 WL

[7] Pursuant to Federal Rule of Civil Procedure 56(c)(1), Plaintiffs concurrently file a statement of the undisputed facts material to their HSA claim. *See* Statement of Undisputed Facts ¶¶ 1–23.

[8] *See also* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. at 28–31, ECF No. 23-1; Pls.' Reply at 9–11, ECF No. 47; Pls.' Supp. Br. at 3–5, ECF No. 59; Pls.' Supp. Reply at 1–2, ECF No. 62-1.

6695076, at *9 (E.D.N.Y. Nov. 14, 2020) (concerning decision to suspend Deferred Action for Childhood Arrivals ("DACA") program); *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, No. CV 19-3283 (RDM), __ F. Supp. 3d __, 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021) (concerning rule changing fee structure for immigration benefits requests and imposing fee to apply for asylum); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020) (same). Indeed, Judge Donato—"the fifth federal court asked to plow the same ground"—wrote, "[a] good argument might be made that, at this point in time, the government's arguments lack a good-faith basis in law or fact." *Pangea*, 2021 WL 75756, at *4. In short, Wolf was not validly serving as acting Secretary under the HSA, rendering unlawful the challenged agency actions taken under his purview.

Moreover, the only court to issue final judgment on the Wolf Appointments issue granted summary judgment in favor of the plaintiffs. *See Batalla Vidal*, 2020 WL 6695076, at *1. In *Batalla Vidal*, Judge Garaufis adopted this Court's reasoning, explaining that under the "plain text of the operative order of succession, neither Mr. McAleenan nor, in turn, Mr. Wolf, possessed statutory authority to serve as Acting Secretary." *Id*. at *9. Judge Garaufis squarely rejected the government's *post hoc* re-interpretation of the agency delegation orders and concluded that no subsequent factual issues had any impact on his analysis.[9] *Id*.

Here, as in *Batalla Vidal*, there are no factual disputes material to the legal question of Wolf's lack of authority as purported Acting DHS Secretary, and the Court's prior analysis is

[9] Likewise, every court to consider Wolf's purported "ratification" of his own actions has concluded that they have no effect. *See Batalla Vidal*, 2020 WL 6695076 at *9; *Pangea*, 2021 WL 75757 at *5.

correct as a matter of law. Because "there is no genuine dispute as to any material fact and [Plaintiffs are] entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), the Court should grant Plaintiffs summary judgment on their claim that the Asylum EAD Rules were promulgated in violation of the APA because Wolf acted "in excess of . . . authority" and not "in accordance with the law." 5 U.S.C. §§ 706(2)(A), (C); *see* Opinion at 45.

III. The Appropriate Remedy for Defendants' Violation of the APA is Vacatur of the Challenged Rules in Their Entirety.

Under the APA, vacatur is the appropriate final remedy for an agency rule found to be unlawful. 5 U.S.C. § 706(2) ("hold unlawful and set aside"); *see* Opinion at 65 (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018)); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 n.7 (2020). Here, the Court should vacate both of the Asylum EAD Rules in their entirety.

Plaintiffs have standing to challenge every provision of the rules, but even if they did not, vacatur of the rules in their entirety would nevertheless be warranted because the Broader EAD Rule is not severable.[10] The purpose of the severability doctrine is to allow courts to excise unlawful provisions of a rule from the lawful provisions that the agency would have adopted absent the legal defect. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 81 (D.C. Cir. 2020) (severability doctrine premised on court's ability to separate "valid" rule provisions from "invalid" provisions). Where, as here, the legal defect infects every provision of the challenged rules, there are no "lawful" or "valid" portions to excise and preserve. Indeed, the severability clause in the Broader

[10] Plaintiffs excluded from the scope of their challenge a conforming amendment regarding renewal EADs that accompanied the Timeline Repeal Rule. *See* ECF No. 23-1 at 7 n.6. Nonetheless, in light of the unlawful Appointments defect, the Timeline Repeal Rule should be vacated in its entirety as well.

EAD Rule is itself tainted by the unlawful Appointments defect: crediting that clause would improperly sanction the unlawful process that produced it. Courts that have recently addressed the unlawful Appointments issue have applied this principle in holding that Chad Wolf's unlawful appointment infects all aspects of the rules he purported to issue. *See, e.g.*, *Nw. Immigrant Rights Project*, 2020 WL 5995206, at *33 ("[B]ecause the Court concludes that Wolf acted without authority when he approved the Final Rule and later attempted to ratify that action and McAleenan's issuance of the Proposed Rule, the legal infirmity at issue reaches all portions of the Rule."); *Immigrant Legal Res. Ctr.*, 2020 WL 5798269, at *19–20 (same); *see also Pangea*, 2021 WL 75756, at *1, 6–7 (enjoining in its entirety rule that "would make sweeping changes to the United States asylum system" based on likelihood of success on the merits of plaintiffs' claim that Chad Wolf was unlawfully appointed); *see generally Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 378–80 (5th Cir. 2021) (holding, in context of standing analysis, that appropriate remedy for successful procedural challenge would be vacatur of entire rule, notwithstanding that plaintiffs were injured by only one of five provisions). Because DHS's unlawful decision-making process infected the entire Broader EAD Rule, the rule stands or falls as one.[11]

Even if the Court concluded that traditional severability analysis is required, the Broader EAD Rule is not severable under Fourth Circuit law. Whether a regulation is severable turns on whether the agency would have issued the rule without the offending provisions, and "[s]everance and affirmance of a portion of an administrative regulation is improper if there is substantial doubt

[11] Moreover, if the Court enters summary judgment on Plaintiffs' HSA claim and sets aside the challenged rules in their entirety, the case will be over (since none of Plaintiffs' remaining claims would entitle them to any additional relief).

that the agency would have adopted the severed portion on its own." *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292–93 (4th Cir. 2020) (en banc) (affirming district court injunction and reasoning that rule was not severable—notwithstanding its severability clause—where agency desired "a single, coherent policy" and rule would "lose[] its primary purpose" without the challenged provisions), *cert. granted sub nom. Cochran v. Mayor & City Council of Baltimore*, No. 20-454, 2021 WL 666373 (U.S. Feb. 22, 2021).

Here, even if the Court concludes that Plaintiffs have standing to challenge only the currently enjoined provisions of the Broader EAD Rule, *but see supra* Part I(A), there is at least "substantial doubt" that the agency would have adopted only the un-enjoined provisions of that rule. The agency's purpose for the Broader EAD Rule was, according to the rule itself, deterring frivolous, fraudulent, and otherwise non-meritorious asylum applications. 85 Fed. Reg. 38,532, 38,543–46, 38,578, 38,584. Defendants themselves identified several specific provisions as the linchpins of the rule—changes without which the rule could not achieve its stated purpose. For example, Defendants explained that the one-year filing bar provision was "necessary to disincentivize abusive behavior," and that "failing to take this significant action [would] invite more of the same behavior that ha[d] brought the asylum system to its current crisis." *Id.* at 38,569. With respect to the extension of the waiting period to 365 days, the agency explained that it "started with the premise that the current 180-day waiting period"—encompassing a 150-day waiting period and a 30-day adjudication period—"is insufficient to deter aliens from filing asylum applications that are without merit." 85 Fed. Reg. at 38,595. The discretionary review provision was necessary, in turn, because "[a] mandatory and limitless (c)(8) EAD is too strong a draw for economic migrants." *Id.* at 38,577. But the one-year filing bar provision, the 365-day wait provision, and the discretionary review provision are all provisions that the Court enjoined.

In short, without the enjoined provisions the Broader EAD Rule "loses its primary purpose," such that the remaining provisions would not accomplish the agency's stated goal on their own. *See Mayor of Baltimore*, 973 F.3d at 293.

Moreover, the Broader EAD Rule itself makes clear that DHS desired a "single, coherent policy" with complementary provisions. *Id*. at 292. For example, DHS intended to eliminate the 180-day asylum clock (with its complicated rules for starting and stopping the "clock") and replace it with *both* the (enjoined) 365-*calendar* day waiting period *and* the more expansive applicant-caused delay provisions (which are not currently enjoined).[12] *See* 85 Fed. Reg. at 38,547–48. Similarly, the rule justified the (enjoined) biometrics collection provision as necessary to implement the (not enjoined) provisions eliminating work authorization eligibility for essentially all asylum seekers with criminal history. *See* 85 Fed. Reg. at 38,550. Given this tangle of interlocking provisions, there is at least "substantial doubt" that DHS would have chosen to retain only some parts of that tangle,[13] and "substantial doubt" is all that is required for the rule to be set aside in its entirety.

[12] The Court did not enjoin the elimination of the 180-day asylum clock provision or the new applicant-caused delay provisions, but the Government has conceded in a recent filing in *Rosario* that Defendants are unable to implement this Court's Order without relying on the pre-existing (and formally repealed) 180-day asylum clock and applicant-caused delay provisions. *See* Manfredi Decl., Ex. D, *Rosario*, ECF No. 179 at 4 & n.2 (*CASA v. Mayorkas* preliminary injunction "essentially creat[es] two different sets of rules for the adjudication of [I-765(c)(8)] applications," and explaining that applicants who are not CASA or ASAP members must wait 365 days after filing their asylum case to file an EAD application, but for CASA and ASAP members, the "prior rules apply whereby asylum applications must [have] been pending for a minimum of 180 'clock' days, not including delays caused or requested by the applicants").

[13] And it is impossible in any event to determine what provisions DHS would have adopted if the agency had been led by a lawfully-appointed Secretary. *See supra* Part III.

IV. In the Alternative, Modification of the Preliminary Injunction is Appropriate and Necessary to Prevent Continuing Irreparable Harm to Plaintiffs.

Plaintiffs seek expeditious relief from the irreparable harms they, their members, and their clients and communities continue to suffer. If the Court determines in its discretion that Plaintiffs' motion for partial summary judgment should not be adjudicated at this time, Plaintiffs respectfully request that the Court address the continuing irreparable harm that the rules inflict by modifying the preliminary injunction in light of the changed circumstances.

Modification of a preliminary injunction is appropriate where the moving party demonstrates a "significant change in fact, law or circumstance since the previous ruling" that renders the initial injunction inequitable. *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin*., No. TDC-20-1320, __ F. Supp. 3d __, 2020 WL 7240396, at *6 (D. Md. Dec. 9, 2020) (internal quotation marks omitted); *see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co*., 60 F.3d 823, 823 (4th Cir. 1995) (unpublished); *Nelson v. Collins*, 700 F.2d 145, 147 (4th Cir. 1983); *Tobin v. Alma Mills*, 192 F.2d 133, 136 (4th Cir. 1951). Changed circumstances sufficient to meet this standard include that "(1) there has been an intervening change in controlling law; (2) there is additional evidence that was not previously available; or (3) the prior decision was based on clear error or would work a manifest injustice." *J.O.P. v. U.S. Dep't of Homeland Sec.*, No. GJH-19-1944, __ F.R.D. __, 2020 WL 7489017, at *19 (D. Md. Dec. 21, 2020) (appeal filed Feb. 19, 2021).[14] There is no requirement

[14] The Fourth Circuit has not determined whether a motion to modify a preliminary injunction should be analyzed under Federal Rule of Civil Procedure 54(b), 59(e), or outside of the Rules, but the basic standard is the same. *See Sanchez v. McAleenan*, No. GJH-19-01728, 2020 WL 6263428, at *3–4 (D. Md. Oct. 23, 2020) (appeal filed Jan. 5, 2021) (surveying the case law).

of bad faith or fault on the part of the nonmoving party. *See Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 404 F.3d 821, 829 (4th Cir. 2005). Rather, where the moving party meets the changed circumstances standard, the relevant inquiry is then the traditional preliminary injunction analysis. *See, e.g.*, *J.O.P*, 2020 WL 7489017, at *20–21.

Here, the changed circumstances standard is satisfied on two independent bases: (i) there has been an intervening change in controlling law—specifically, the en banc vacatur of the *CASA v. Trump* panel decision has restored the pre-existing Fourth Circuit precedent relating to the appropriate scope of preliminary injunctive relief, and has removed limitations on what constitutes a cognizable injury for *Havens* standing purposes, *see supra* Part I; and (ii) continuance of the Court's prior, limited preliminary injunction—crafted in response to then-binding Fourth Circuit precedent—has proven insufficient to prevent irreparable harm to Plaintiffs and must be modified to prevent manifest injustice.

First, the Court's Opinion relied heavily on the Fourth Circuit's then-controlling opinion in *CASA v. Trump* in analyzing the key questions of *Havens* standing and the appropriate scope of the injunction. *See, e.g.*, Opinion at 21 ("In light of [the *CASA* court's] clear guidance, and on the current record, the Court cannot find that any one Plaintiff has organizational standing."); *id.* at 66 ("[E]ven though this Court remains concerned about 'slicing and dicing' application of the rules in a manner contrary to the uniform administration of immigration laws, the Court believes itself bound to follow the Circuit's binding precedent [in *CASA*]." (quoting *District of Columbia v. Dep't of Agric.*, 444 F. Supp. 3d 1, 37 (D.D.C. 2020)).

The vacatur of *CASA* restores this Circuit's prior precedent on two central points of law: (i) *Havens* standing (such that at least one Plaintiff has standing to challenge every provision of the rules), *see supra* Part I(A); and (ii) the appropriate scope of a preliminary injunction in an APA

case challenging an immigration-related rule (such that a uniform injunction is preferred), *see* Opinion at 64–66. With respect to the un-enjoined provisions of the Broader EAD rule, the *CASA* vacatur removes any doubt that Plaintiffs directly suffer harms, which flow from the challenged rules in their entirety. *See supra* Part I(A). These direct harms are irreparable. *See HIAS v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021); *see also* ECF No. 23-1 at 31, 34.

And with respect to the question of who should be protected from the enjoined rules, the vacatur removes the impediment this Court identified, permitting the Court to ensure "uniform preliminary relief" that "seem[ed] especially warranted" in this case, rather than "slicing and dicing" the population affected. Opinion at 64, 66 (collecting cases); *see Texas v. United States*, 809 F. 3d 134, 187–88 (5th Cir. 2015) ("Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*; and the Supreme Court has described immigration policy as a comprehensive and *unified* system." (internal quotation marks omitted)), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); *see also HIAS*, 985 F.3d at 327 (4th Cir. 2021) (affirming nationwide preliminary injunction of immigration-related executive action where limited relief "would . . . undermine the very national consistency that the Refugee Act is designed to protect"); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, No. CV CCB-20-3531, __ F. Supp. 3d __, 2020 WL 7640818, at *12 & n.16 (D. Md. Dec. 23, 2020) (granting uniform preliminary relief and explaining that "[w]hen a plaintiff prevails on a challenge under the APA to a rule of broad applicability, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual"). Thus, in light of the *CASA* vacatur and under now-controlling law, Plaintiffs have established direct and irreparable harm from the challenged rules in their entirety and that it is appropriate for the Court to rectify this inequity on a uniform basis.

Second, this Court held that asylum seekers are irreparably injured when they are forced to

wait more than six months for work authorization—but notwithstanding this Court's order, members continue to suffer this irreparable injury at a high rate.[15] *See* Manfredi Decl., Ex. A (March 2021 Processing Data); *id.*, Ex. B (April 2021 Processing Data). Indeed, Defendants concede that the limited scope of the Court's Order itself is adding to processing delays. *See id.*, Ex. C (Connie Nolan Decl.) ¶¶ 15, 17 (the manual review process required to distinguish members from non-members "is more time-consuming than processing prior to [this Court's] injunction").[16] Defendants have also conceded that they are unable to implement the Court's Order without declining to enforce some of the un-enjoined provisions of the Broader EAD Rule as to CASA and ASAP members, demonstrating that the rule is not severable. *See supra* Part III n.12.

These new circumstances demonstrate that the preliminary injunction, as implemented, is not affording even Plaintiffs' members the relief from irreparable harm that was the Court's objective. *See* Opinion at 62–63 ("[T]he relief granted . . . 'should be no more burdensome . . . than necessary to *provide complete relief* to the plaintiffs.'" (emphasis added) (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). The continuing irreparable harms Plaintiffs suffer constitute "manifest injustice" sufficient to warrant modification. *See J.O.P.*, 2020 WL 7489017, at *21 (granting plaintiffs' motion to modify preliminary injunction to expand relief to "correct a manifest injustice" whereby some class members were excluded from relief). And as the Fourth Circuit recently acknowledged, the inability of a more limited injunction to

[15] *See* Opinion at 59 ("[E]very additional day these individuals wait [for employment authorization] will visit on them crippling dependence on the charity and good will of others" and may "damage . . . [their] ability to seek asylum in the first instance.").

[16] As a matter of common sense, the un-enjoined provisions of the Broader EAD Rule must similarly add to processing delays, given that they increase the findings DHS must undertake when it adjudicates applications and require the agency to monitor the status of asylum cases to enforce the automatic termination provisions. *See* 85 Fed. Reg. at 38,551–53; *id.* at 38,574.

prevent irreparable harm to Plaintiffs results in inequity that warrants broader relief. *See HIAS*, 985 F.3d at 327 (affirming nationwide preliminary injunction where more limited relief "would cause inequitable treatment of refugees").

Seven months ago, this Court found that Plaintiffs met each of the preliminary injunction factors, and that the balance of equities favored preliminary injunctive relief to prevent irreparable harm to Plaintiffs. *See* Opinion at 27–62. Plaintiffs continue to satisfy each of the preliminary injunction factors, and the irreparable harms they suffer have not abated. Centro Legal Decl. II ¶¶ 10–16; ASAP Decl. II ¶¶ 41–48; Oasis Decl. II ¶¶ 11–12; Pangea Decl. II ¶¶ 8–16. In the absence of prompt final vacatur (*i.e.*, summary judgment on the HSA claim), it is both appropriate and necessary to expand the Court's preliminary injunction.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for summary judgment on their HSA claim and vacate the Timeline Repeal Rule and the Broader EAD Rule in their entirety. In the event that the Court determines, in its discretion, that Plaintiffs' motion for partial summary judgment cannot be expeditiously resolved at this time, Plaintiffs respectfully request that the Court grant their motion to modify the preliminary injunction as set forth herein.

Dated: April 20, 2021

Respectfully submitted,

/s/
Linda Evarts (*pro hac vice*)
Geroline A. Castillo (*pro hac vice*)
Kathryn Austin (*pro hac vice*)
Mariko Hirose (*pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
One Battery Park Plaza, 4th Floor
New York, New York 10004
Tel: (516) 838-1655
Fax: (929) 999-8115
levarts@refugeerights.org
gcastillo@refugeerights.org
kaustin@refugeerights.org
mhirose@refugeerights.org

/s/
Dennise Moreno (Bar No. 21358)
Amit Jain (Bar No. 21004)
Conchita Cruz (*pro hac vice*)
Zachary Manfredi (*pro hac vice*)
ASYLUM SEEKER ADVOCACY PROJECT
228 Park Avenue S. #84810
New York, NY 10003-1502
Tel: (305) 484-9260
Fax: (646) 968-0279
dennise.moreno@asylumadvocacy.org
amit.jain@asylumadvocacy.org
conchita.cruz@asylumadvocacy.org
zachary.manfredi@asylumadvocacy.org

/s/
Justin B. Cox (Bar No. 17550)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
PO Box 170208
Atlanta, GA 30317
Tel: (516) 701-4233
Fax: (929) 999-8115
jcox@refugeerights.org

Richard W. Mark (*pro hac vice*)
Joseph Evall (*pro hac vice*)
Katherine Marquart (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
Fax: (212) 351-4035
RMark@gibsondunn.com
JEvall@gibsondunn.com
KMarquart@gibsondunn.com

Counsel for Plaintiffs

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.

Civil No. 20-2118-PX

INDEX OF EXHIBITS
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
ON THEIR HOMELAND SECURITY ACT CLAIM,
OR IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

Exhibit	Document Title
1	Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment on Their Homeland Security Act Claim
2	Second Declaration of Julia Hiatt-Shepp, Managing Attorney at Centro Legal de la Raza, dated April 19, 2021
3	Second Declaration of Jehan Laner, Co-Director of Pangea Legal Services, dated April 19, 2021
4	Second Declaration of Caroline Kornfield Roberts, Executive Director and Co-Founder of Oasis Legal Services, dated April 16, 2021
5	Second Declaration of Swapna C. Reddy, Co-Executive Director of Asylum Seeker Advocacy Project, dated April 20, 2021
6	Declaration of Zachary Manfredi in Support of Plaintiffs' Motion for Summary Judgment on Their Homeland Security Act Claim, or in the Alternative, to Modify Preliminary Injunction

6A	*Rosario* Fifth Status Report, *Rosario v. USCIS*, No. 15-0813-JLR (W.D. Wash.) ("*Rosario*"), ECF No. 170-1 (Mar. 10, 2021)
6B	Defendants' April 12, 2021 Report Entitled "I-765 - Application for Employment Authorization Eligibility Category: C08, Pending Asylum Initial Permission to Accept Employment Completions by Processing Time Buckets August 1, 2020 - March 31, 2021"
6C	Declaration of Connie Nolan, *Rosario*, ECF No. 170-2 (Mar. 10, 2021)
6D	*Rosario* Defendants' Response to Motion for Civil Contempt and to Enforce Permanent Injunction, *Rosario*, ECF No. 179 (Apr. 12, 2021)
6E	Declaration of Ernest DeStefano, *Rosario*, ECF No. 179-5 (Apr. 12, 2021)

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

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

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*

Defendants.

Civil No. 20-2118-PX

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THEIR HOMELAND SECURITY ACT CLAIM

Pursuant to Federal Rule of Civil Procedure 56(c)(1), Plaintiffs CASA de Maryland ("CASA"), Asylum Seeker Advocacy Project ("ASAP"), Centro Legal de la Raza ("Centro Legal"), Oasis Legal Services ("Oasis"), and Pangea Legal Services ("Pangea") submit the following statement of undisputed material facts in support of their Motion for Summary Judgment on their Homeland Security Act ("HSA") claim.

I. The Challenged Rules

1. On September 9, 2019, the Department of Homeland Security ("DHS") issued a notice of proposed rulemaking ("NPRM") that announced its intention to repeal a regulatory provision requiring USCIS to adjudicate initial Form I-765(c)(8) employment authorization applications within 30 days of the date on which the agency receives the application. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47,148 (Sept. 9, 2019) (to be codified at 8 C.F.R. pt. 208), *available at* https://www.govinfo.gov/content/pkg/FR-2019-09-09/pdf/2019-19125.pdf.

Kevin McAleenan, the purported Acting Secretary of DHS, signed this NPRM. *Id.* at 47,170.

2. On June 22, 2020, DHS issued a final rule repealing that 30-day regulatory timeline. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants, 85 Fed. Reg. 37,502 (June 22, 2020) (to be codified at 8 C.F.R. pt. 208) ("Timeline Repeal Rule"), ECF No. 24-2.

3. The Timeline Repeal Rule was "reviewed and approved" by the then-purported Acting Secretary of DHS, Chad Wolf. *Id.* at 37,545.

4. The Timeline Repeal Rule became effective on August 21, 2020. *Id.* at 37,502.

5. On November 14, 2019, DHS issued an NPRM announcing its intention to impose additional limitations on asylum seekers' eligibility for work authorization and to modify certain aspects of DHS processing of applications for asylum and for employment authorization. Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62,374 (Nov. 14, 2019) (to be codified at 8 C.F.R. pts. 208, 274), *available at* https://www.govinfo.gov/content/pkg/FR-2019-11-14/pdf/2019-24293.pdf. Kevin McAleenan, the purported Acting Secretary of DHS, signed this NPRM. *Id.* at 62,424.

6. On June 26, 2020, DHS issued a final rule on this matter. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (June 26, 2020) (to be codified at 8 C.F.R. pts. 208, 274) ("Broader EAD Rule"), ECF No. 24-3.

7. The Broader EAD Rule was "reviewed and approved" by the then-purported Acting Secretary of DHS, Chad Wolf. *Id.* at 38,626.

8. The Broader EAD Rule became effective on August 25, 2020. *Id.* at 38,532.

II. Amendments to the DHS Succession Order

9. On April 10, 2019, then-Secretary of Homeland Security Kirstjen Nielsen purported to amend the existing order of succession for the office of the Secretary, Delegation 00106, issued in 2016 by then-Secretary of Homeland Security Jeh Johnson. *See* DHS Orders of Succession and Delegations of Authorities for Named Positions, Rev. 8.5, dated April 10, 2019 (the "April 2019 Amendment"), ECF No. 24-15.

10. The April 2019 Amendment provides that "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office," the order of succession is governed by Executive Order 13753, amended on December 9, 2016. April 2019 Amendment at II.A; *see* Exec. Order No. 13,753, 81 Fed. Reg. 90,667 (Dec. 9, 2016) ("Executive Order 13753"), ECF No. 24–16.

11. The April 2019 Amendment also provided that in the event of "disaster or catastrophic emergency," the delegation of authority is determined by an updated version of Annex A included in the April 2019 Amendment. April 2019 Amendment at II.B.

12. Under Executive Order 13753, the order of succession is, in relevant part, as follows: "(i) Deputy Secretary of Homeland Security; (ii) Under Secretary for Management; (iii) Administrator of the Federal Emergency Management Agency; (iv) Under Secretary for National Protection and Programs; . . . (vii) Commissioner of U.S. Customs and Border Protection." Executive Order 13753 at 90,667.

13. In 2018, Public Law 115-278 renamed the position of Under Secretary for National Protection and Programs to be Director of the Cybersecurity and Infrastructure Security Agency ("CISA"). Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, § 2202(b)(1), 132 Stat. 4168, 4169 (codified at 6 U.S.C. § 652(b)(1)), *available at*

https://www.govinfo.gov/content/pkg/PLAW-115publ278/pdf/PLAW-115publ278.pdf.

14. Former Secretary of DHS Nielsen resigned from her position no later than April 10, 2019. *See* Blackwell Decl., ECF No. 41-1 ¶ 6.

15. On April 10, 2019, the position of Deputy Secretary was not filled, and that position had been vacant since April 14, 2018. *See* U.S. Government Accountability Office Decision, Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security (Aug. 14, 2020) ("GAO Report"), ECF No. 51-1 at 4.

16. On April 10, 2019, the Under Secretary for Management resigned, leaving that position vacant as well. *Id.*

17. On April 10, 2019, the office of the Under Secretary for National Protection and Programs, which had been renamed the Director of CISA, was occupied by Senate-confirmed official Christopher Krebs. *Id.* at 8 n.11.

18. After Nielsen's departure, Kevin K. McAleenan, who had been serving as the Commissioner of U.S. Customs and Border Protection, purported to assume the office of the Acting Secretary of DHS. *Kevin K. McAleenan*, Department of Homeland Security (Aug. 1, 2019), https://www.dhs.gov/person/kevin-k-mcaleenan.

19. At the time of Nielsen's resignation, the Senate-confirmed Director of CISA, Christopher Krebs, was ahead of McAleenan under the DHS Orders of Succession and Delegations of Authorities. GAO Report at 8.

20. On November 8, 2019, McAleenan purported to issue an amendment to the DHS Orders of Succession and Delegation. ECF No. 24-17, Department of Homeland Security, Amendment to the Order of Succession for the Secretary of Homeland Security (Nov.

8, 2019). The amendment revised the language of Section II.A to provide that Annex A of DHS Delegation Order No. 00106—not Executive Order 13753—determined the order of succession in the event of a Secretary's "death, resignation, or inability to perform the functions of the Office." *Id.* The amendment also revised the succession order set forth in Annex A to be: (i) Deputy Secretary of Homeland Security; (ii) Under Secretary for Management; (iii) Commissioner of the U.S. Customs and Border Patrol; and (iv) Under Secretary for Strategy, Policy, and Plans. *Id.*

21. On November 13, 2019, McAleenan resigned from his purported role as Acting Secretary of DHS. Blackwell Decl. ¶ 7.

22. On November 13, 2019, Chad F. Wolf was confirmed by the Senate as the DHS Under Secretary for Strategy, Policy, and Plans. On the same day, Wolf purported to assume the Office of Acting DHS Secretary upon McAleenan's resignation. *Chad F. Wolf*, Department of Homeland Security (Jan. 29, 2018), https://www.dhs.gov/person/chad-f-wolf.

23. On November 14, 2019, the Department of Homeland Security released another order of succession and delegation. ECF No. 41-1 Ex. 2, DHS Orders of Succession and Delegations of Authorities for Named Positions, Rev. 8.6, dated November 14, 2019. This amendment included the same order of succession as McAleenan's November 8 pronouncement. *Id.* at A-1.

Dated: April 20, 2021

Respectfully submitted,

/s/
Linda Evarts (*pro hac vice*)
Geroline A. Castillo (*pro hac vice*)
Kathryn Austin (*pro hac vice*)
Mariko Hirose (*pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
One Battery Park Plaza, 4th Floor
New York, New York 10004
Tel: (516) 838-1655
Fax: (929) 999-8115
levarts@refugeerights.org
gcastillo@refugeerights.org
kaustin@refugeerights.org
mhirose@refugeerights.org

/s/
Dennise Moreno (Bar No. 21358)
Amit Jain (Bar No. 21004)
Conchita Cruz (*pro hac vice*)
Zachary Manfredi (*pro hac vice*)
ASYLUM SEEKER ADVOCACY PROJECT
228 Park Avenue S. #84810
New York, NY 10003-1502
Tel: (305) 484-9260
Fax: (646) 968-0279
dennise.moreno@asylumadvocacy.org
amit.jain@asylumadvocacy.org
conchita.cruz@asylumadvocacy.org
zachary.manfredi@asylumadvocacy.org

/s/
Justin B. Cox (Bar No. 17550)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
PO Box 170208
Atlanta, GA 30317
Tel: (516) 701-4233
Fax: (929) 999-8115
jcox@refugeerights.org

Richard W. Mark (*pro hac vice*)
Joseph Evall (*pro hac vice*)
Katherine Marquart (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
Fax: (212) 351-4035
RMark@gibsondunn.com
JEvall@gibsondunn.com
KMarquart@gibsondunn.com

Counsel for Plaintiffs

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

CASA DE MARYLAND, INC., *ET AL.* *Plaintiffs*, *– versus –* ALEJANDRO MAYORKAS, *ET AL.* *Defendants*.	**Case No. 8:20-cv-02118-PX**

SECOND DECLARATION OF JULIA HIATT-SHEPP

Pursuant to 28 U.S.C. § 1746, I, Julia Hiatt-Shepp, declare under penalty of perjury as follows:

1. I make this sworn statement based upon personal knowledge and information provided to me by colleagues at Centro Legal de la Raza ("Centro Legal") whom I believe to be reliable.
2. I am a managing attorney with the Immigrants' Rights team at Centro Legal.
3. Centro Legal is a legal services agency that protects and advances the rights of low-income individuals through bilingual legal representation, education, and advocacy.
4. I submitted a declaration in support of Plaintiffs' motion for a stay of effective dates under 5 U.S.C. § 705, or in the alternative, preliminary injunction. *See* ECF No. 24-6. In this declaration, I am providing additional information about the impact on Centro Legal of the two rules ("asylum EAD rules") that Centro Legal and other Plaintiffs challenged in this case.

5. An essential part of Centro Legal's asylum representation is assisting asylum-seekers in applying for employment authorization (EADs). This work is core to our mission. Centro Legal has assisted asylum-seekers applying for initial EADs and renewals since at least 2016.
6. Centro Legal does not charge for its services, and the funding the organization receives is tied to the number of clients that we represent in removal proceedings, including through filing asylum applications. Centro Legal does not receive dedicated funding for assisting asylum seekers with EAD applications.
7. As I anticipated, as a result of the asylum EAD rules, Centro Legal must spend double or triple the amount of time per client to assist our clients in applying for EADs. This is because EAD applications are necessarily more complicated, time-consuming, and resource-intensive under the asylum EAD rules. *See* ECF No. 24-6 ¶¶ 27-36.
8. Centro Legal must also spend more time and resources assisting each client applying for EAD renewal under the asylum EAD rules. This is because Centro Legal must perform time- and resource-intensive eligibility assessments for EAD renewal clients, similar to the assessments we perform for clients applying for initial EADs, in order to ensure that renewal applicants who remain eligible for employment authorization are not denied.
9. Before the asylum EAD rules went into effect, Centro Legal's assistance to clients applying for EAD renewals was largely an administrative task performed by paralegals. After the asylum EAD rules went into effect, much of the work associated with EAD renewals must be performed by an attorney.
10. Because Centro Legal's work assisting clients in applying for EADs and renewing their EADs has become more resource- and time-intensive, Centro Legal has had to shift the organization's limited resources away from other work we do in support of our mission, such

as helping clients obtain Special Immigrant Juvenile status, humanitarian visas, or other vital benefits, in order to continue providing EAD application assistance to our clients.

11. As I anticipated, the asylum EAD rules have made Centro Legal's pro bono EAD clinics infeasible, and Centro Legal has had no choice but to stop providing the pro bono EAD clinics that help unrepresented asylum seekers apply for EADs. *See* ECF No. 24-6 ¶¶ 17-22.

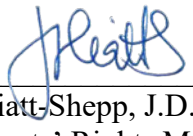
12. The EAD pro bono clinic model is based on identifying asylum seeking EAD applicants who meet straightforward eligibility requirements and whose applications can be completed in a half-day clinic, but under the asylum EAD rules, eligibility requirements are not straightforward in any asylum seeker case.

13. Each EAD application now requires significant counseling to determine whether the asylum-seeker is eligible for an EAD. The staff running the pro bono clinic would need to evaluate, for each asylum-seeker participating in the clinic, whether any of the new categorical bars to eligibility apply, and if so, they would need to ask detailed follow up questions to determine whether the applicant qualified for an exception.

14. For example, staff would have to inquire whether EAD applicants entered the U.S. at a port of entry, and if not, whether they had presented themselves to DHS officials within 48 hours of entry and expressed a fear of return. Prior to submitting Form I-765, staff would then have to compare clients' memories of the details of their entries with DHS records, which are often only available through a lengthy Freedom of Information Act process, in order to eliminate the risk that an otherwise-unrepresented asylum seeker's recollection is contradicted by DHS records.

15. Prior to the asylum EAD rules going into effect, Centro Legal held pro bono EAD clinics remotely over Zoom while our physical office was closed due to the Covid-19 pandemic. If the asylum EAD rules had not gone into effect, Centro Legal would have continued to hold the pro bono EAD clinics remotely until our physical office reopened.
16. Because Centro Legal is no longer able to hold the pro bono EAD clinics, we have assisted tens or even hundreds fewer asylum seekers with their EAD applications since August 2020. This reduction in our services comes at a time of severe economic stress for the low-income populations we serve when their need for work authorization is especially high.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on April 19, 2021, in Oakland, California.



Julia Hiatt-Shepp, J.D.
Immigrants' Rights Managing Attorney
Centro Legal de la Raza

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

CASA DE MARYLAND, INC., ET AL. *Plaintiffs*, *– versus –* ALEJANDRO MAYORKAS, ET AL. *Defendants*.	**Case No. 8:20-cv-02118-PX**

SECOND DECLARATION OF JEHAN LANER

I, Jehan Laner, declare under the pains and penalty of perjury as follows:

1. I make this declaration based on my personal knowledge and information provided to me by colleagues at Pangea Legal Services ("Pangea") whom I believe to be reliable.

2. I am an immigration attorney and Co-Director of Pangea.

3. Pangea's mission is to stand with immigrant communities and to provide services through legal representation, especially in the area of deportation defense. In addition to providing direct legal services, we are committed to advocating on behalf of noncitizens through policy advocacy, education, and legal empowerment efforts.

4. I submitted a declaration in support of Plaintiffs' motion for a stay of effective dates under 5 U.S.C. § 705, or in the alternative, preliminary injunction. *See* ECF No. 24-8. In this declaration, I am providing additional information about the impact on Pangea of the two rules ("asylum EAD rules") that Pangea and other Plaintiffs challenged in this case.

5. In the service of Pangea's mission, Pangea assists our asylum seeking clients with their applications for work authorization (EADs). *See* ECF No. 24-8 ¶¶ 4-5, 9. This assistance has been our practice since 2013, if not before.

6. Since the asylum EAD rules took effect, staff at Pangea have filed approximately 30 EAD applications for asylum seeking clients.

7. As anticipated, the asylum EAD rules have forced us to devote significantly more resources to EAD applications, including training staff, counseling clients about their eligibility under the new and more complicated standards, collecting additional records, printing more documents, responding to more Requests for Evidence, and crafting more involved cover letters setting out legal arguments why our clients are eligible for and should be granted work authorization under the new rules.

8. Given our finite resources, in order to continue to assist asylum seeking clients with applications for EADs, we have been forced to move resources away from other legal representation and advocacy programs.

9. For example, as a result of the new rules, we've had to reduce the number of prospective clients—most of whom are asylum seekers in removal proceedings—that we can accept for representation. In the seven-and-a-half months before the new rules went into effect we took on 45 new clients. In the seven-and-a-half months since, we have been able to take on only 35 new clients—nearly 25% fewer.

10. Our capacity to take on new clients is becoming increasingly strained as the effects of the rule changes continue to compound. Since the beginning of 2021, we have been able to take on only 15 new clients, which puts Pangea on pace to take even less clients overall in 2021.

11. Our reduced capacity to take on new clients also hurts Pangea financially, which in turn further reduces our capacity, as our grant money is typically tied to deliverables for applications for relief other than EADs.

12. Before the rule changes went into effect, our staff devoted significant time to client and community outreach. We hosted community forums, created educational fliers and infographics, and presented know your rights presentations.

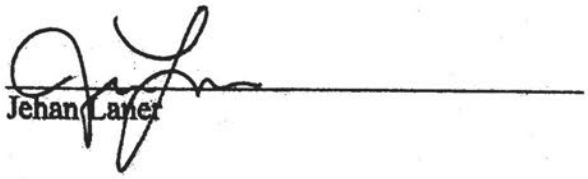
13. Our capacity to engage in this type of work has been greatly reduced.

14. For example, before the rules went into effect but after the start of the pandemic, our staff participated in three virtual community forums. Community forums include presentations on immigration law or news, opportunities to ask questions, and immigration legal consultations. They enable us to stay up-to-date on the needs of the communities we serve, to connect our clients with resources, and to identify potential clients for legal representation.

15. Since the rules went into effect, we have not participated in these types of community forums at all. Staff that previously organized these forums are so busy with additional administrative tasks related to the new EAD rules that they do not have enough time to organize or participate in community forums. One staff member who previously did client communications work now devotes twice as much time as she did before the rule changes to EAD applications.

16. These changes have been painful for Pangea and the people we are committed to serving because they limit our ability stand with immigrant communities and provide services through legal representation.

I hereby declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of April 2021 in Berkeley, California.



Jehan Laner

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

CASA DE MARYLAND, INC., ET AL. *Plaintiffs*, *– versus –* ALEJANDRO MAYORKAS, ET AL. *Defendants*.	**Case No. 8:20-cv-02118-PX**

SECOND DECLARATION OF CAROLINE KORNFIELD ROBERTS

I, Caroline Kornfield Roberts, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am the Executive Director and co-founder of Oasis Legal Services ("Oasis"), a Plaintiff in the above-captioned case.

2. I submit this declaration based on my personal knowledge and information supplied to me by employees of Oasis whom I know to be reliable.

3. I previously submitted a declaration in support of Plaintiffs' motion for a stay of effective dates under 5 U.S.C. § 705, or in the alternative, preliminary injunction. *See* ECF No. 24-7. This declaration adds additional information about the impact of the two rules limiting asylum seekers' ability to obtain work authorization and changing asylum case processing ("rules"), which Oasis and the other Plaintiffs challenged in the above-captioned case.

Impacts of the Rules on Oasis

4. Oasis's mission is to provide direct legal services and holistic case management to LGBTQ+ asylum seekers living within the jurisdiction of the U.S. Citizenship and Immigration Services' (USCIS) San Francisco Asylum Office. *See* ECF No. 24-7 ¶¶ 3-10.

5. The rules have had a direct, negative impact on Oasis's programming. As described in my original declaration, Oasis offers assistance in obtaining work authorization for all of its asylum-seeking clients. This assistance takes the form of counseling clients on whether and when they will become eligible to apply for work authorization; helping clients to complete the I-765 form; helping clients to identify, collect, and assemble any supporting documentation required for their EAD applications; and physically mailing the application to USCIS on the client's behalf. The new rules have increased the amount of time and resources Oasis must use to continue to provide this assistance to all of its asylum-seeker clients.

6. As a result of the new rules, Oasis had to retrain staff on how to determine whether an asylum-seeker client is eligible to apply for work authorization because the new rules impose new categorical bars to work authorization and new limits on work authorization eligibility.

7. Oasis also had to rewrite the resources we provide to asylum-seeker clients which discuss (c)(8) employment authorization eligibility. The resources we provided before the new rules became effective were no longer accurate after the new rules became effective, and we could not continue to provide them unless we revised them to discuss the impact of the new rules. Oasis spent approximately 25 hours of staff time in reviewing the new rules, understanding their impact on our clients, and updating our employment authorization resources to ensure their accuracy.

8. Because of the new rules, Oasis staff must also spend more time counseling each asylum-seeker client applying for an EAD. This is because under the new rules, many more asylum seekers are categorically ineligible to apply for work authorization, and in counseling clients, Oasis must screen for each ground of ineligibility. If a client is subject to one of the new ineligibility bars, Oasis must then screen to see if any of the exceptions to the bar applies and if so, determine what documentation must be submitted with the EAD application to demonstrate that the client remains eligible for work authorization. For example, because of the ineligibility bar for individuals who entered without inspection, Oasis staff must now look through each asylum seeker EAD client's case file and investigate how the client entered the country.

9. Oasis staff also need additional time to help clients fill out the new I-765 form, given that the form has more questions and is longer as a result of the new rules. Based on my conversations with Oasis staff and my personal experience, I believe it takes at minimum 30 minutes (and up to an hour) longer per client to fill out the new I-765 form than was needed before the new rules took effect.

10. Oasis needs even more time to complete the new I-765 form for some clients because it must also obtain documentary evidence in support of the client's statements, for example, with respect to the circumstances under which the client entered the United States. For some clients who no longer have access to their I-94 number or passport with their entry stamp that shows how and when they lawfully entered the country, Oasis must draft affidavits to prove the client entered the United States lawfully because otherwise they may be subjected to the bar on asylum seekers who entered without inspection.

11. Because the new rules require Oasis to spend additional time and resources in order to continue to provide asylum-seeker clients with assistance obtaining employment authorization,

and Oasis has limited staff and financial resources, I have had no choice but to make cuts in other Oasis programs. For example, because each EAD application now takes longer, our one paralegal in our asylum program has had to stop all her work on filing new asylum cases and devote her time almost entirely to asylum seeker EAD applications. Because of this, we now file two fewer new asylum applications a month for clients.

12. I believe that the impact of the new rules on Oasis would have been even more severe if the Court had not enjoined the Timeline Repeal Rule, the 365-day rule, the one-year filing bar, the rescission of the "deemed complete" rule, the discretionary review rule, and the $85 biometrics fee for Oasis clients who are members of ASAP or CASA. These provisions would have required Oasis staff to take even more time to counsel each client on these additional complications to asylum seeker EAD eligibility requirements, required us to collect and submit more documentary evidence and information (particularly as to the one-year filing bar), and reduced each client's ability to pay low bono fees by significantly delaying (or in some cases denying) their receipt of EADs. *See also* ECF No. 24-7 ¶ 46.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 16 day of April 2021 in Oakland, California.

Caroline Kornfield Roberts
Executive Director
Oasis Legal Services

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

CASA de MARYLAND, INC., ET AL. *Plaintiffs*, *– versus –* ALEJANDRO MAYORKAS, ET AL. *Defendants*.	**Case No. 8:20-cv-02118-PX**

SECOND DECLARATION OF SWAPNA C. REDDY

I, Swapna Reddy, declare:

1. I am a Co-Executive Director of the Asylum Seeker Advocacy Project (ASAP).

2. I make this sworn statement based upon personal knowledge, files and documents of ASAP that I have reviewed (such as case files, reports, and collected case metrics), and information supplied to me by employees of ASAP whom I believe to be reliable (including ASAP's management, attorneys, paralegals, and administrative staff). These files, documents, and information are of a type that is generated in the ordinary course of our business and that I would customarily rely upon in conducting ASAP business.

ASAP's Mission and Programming

3. ASAP's mission is to build a future where the United States welcomes individuals fleeing violence. ASAP works alongside its thousands of members to make this vision a reality

by providing critical information to members about the U.S. immigration system, connecting members to legal support, and engaging in member-led nationwide systemic reform through litigation, press, and other advocacy.

4. ASAP attorneys represent a limited number of ASAP members in their immigration proceedings. Some ASAP members secure immigration legal representation from non-ASAP attorneys, while many others do not have immigration legal representation.

5. In furtherance of ASAP's mission and as capacity permits, ASAP staff provides *pro se* assistance to unrepresented members to ensure they are able to meaningfully pursue their immigration cases, including assistance in preparing and filing applications for work authorization documents ("EADs").

6. ASAP also provides daily support to members Monday through Friday. ASAP staff produce original educational materials about how to navigate the immigration system that are shared with members every week and host live video sessions to answer members' questions about asylum, the immigration process, work, access to health care, education, and other topics.

7. ASAP members also have continuous access to ASAP-created guidance and resources shared online and receive relevant updates by text message and email on a regular basis.

The Impact of the EAD Rules on ASAP Members

8. The Department of Homeland Security ("DHS") issued two rules in August 2020 that substantially limited asylum seekers' eligibility for work authorization and made the process for applying for an EAD much more difficult. *See* Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47,148 (proposed September 9, 2019) ("Timeline Repeal Rule"); Asylum Application, Interview,

and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (proposed November 14, 2019) ("Broader EAD Rule," together with Timeline Repeal Rule, "Asylum EAD Rules").

9. It is my understanding that these rules seriously impact many ASAP members, who without an EAD are unable to work legally in the United States to provide stable housing, food, medical care, or other basic necessities for themselves and their families, or to pay for representation to meaningfully pursue their asylum claims.

10. Recognizing that harm, the Court issued a preliminary injunction enjoining the government from applying the Timeline Repeal Rule and five provisions of the Broader EAD Rule to ASAP and CASA members.

11. ASAP members, however, continue to be harmed by provisions of the Broader EAD Rule that are not enjoined. I am aware that many members face significant hurdles or delays in receiving EADs or are altogether barred from eligibility under the Asylum EAD Rules.

12. Applicant-caused delays. As I know from ASAP's experience in preparing EAD applications, prior to the Broader EAD Rule, an asylum applicant's eligibility for an EAD was based on the "Asylum EAD Clock." That clock begins running after an applicant submits their asylum application. The clock may stop running if USCIS determines there are certain delays in an applicant's asylum case, and begins running again once those delays are resolved. Asylum seekers were previously eligible to *apply* for an EAD after their "Asylum EAD Clock" reached 150 days. Asylum seekers would then be eligible to *receive* an EAD after their clock reached 180 days, even if a subsequent delay in their case stopped their clock.

13. While immigration courts continue to operate a clock for asylum cases, the Broader EAD Rule replaced the clock system for EAD applications in favor of two changes: extending the waiting period before asylum seekers may apply for an EAD to 365 calendar days, and making

applicants with ongoing "applicant-caused delays" in their asylum cases ineligible for an EAD. Although the 365-day timeline has been enjoined, ASAP members have reported to ASAP staff that their EAD applications have been denied and the denial notices have cited ongoing "applicant-caused delays," even where they have the requisite number of clock days.

14. For example, M.M.R. is an ASAP member who reports that she applied for an EAD after she accumulated more than 180 days on her Asylum EAD Clock. USCIS nevertheless denied her EAD application, citing her timely appeal to the Board of Immigration Appeals ("BIA") as an unresolved "applicant-caused delay." In ASAP's experience, under the regulations in place before the Broader EAD Rule took effect, M.M.R. would have been eligible for an EAD during the pendency of her BIA appeal because, even though her clock may have stopped when the immigration judge (IJ) decided her asylum application, her clock had already reached more than 180 days. Under the new rules, however, because USCIS considers timely filed appeals ongoing "applicant-caused delays," M.M.R. will remain ineligible for an EAD for the months or even years that her case remains pending before the BIA. *See* 8 C.F.R. §§ 208.7(a)(1)(iv)(A)-(J).

15. ASAP member E.T.N. has been similarly impacted by the applicant-caused delay provision. E.T.N. reported that he applied for asylum after fleeing political persecution in Cuba. He applied for an EAD in February 2021, after accumulating over 200 days on his Asylum EAD Clock. Under the old rules, E.T.N. would have been eligible for an EAD. But under the new rules, USCIS denied his EAD application based on an ongoing "applicant-caused delay," citing E.T.N.'s motion to change the venue of his case to an immigration court closer to him.

16. Termination of EAD following denial by Asylum Officer. Under the Broader EAD Rule, an asylum applicant's EAD automatically terminates if an asylum officer ("AO") denies the asylum application. *See* 8 C.F.R. § 208.7(b)(2). M.A.S is an ASAP member who filed an

affirmative asylum application in April 2019 and is still waiting for her asylum interview to be scheduled. M.A.S. currently has a (c)(8) EAD based on her pending asylum application and is not eligible for an EAD on other grounds. Because M.A.S. is currently on an F1 student visa, if the asylum officer reviewing her case does not grant her application, instead of being referred to an IJ for removal proceedings, M.A.S.'s asylum application will be denied. M.A.S.'s EAD may, therefore, be subject to one of the new automatic termination provisions of the Broader EAD Rule. It is my understanding that if M.A.S. were unable to maintain her work authorization, she would be unable to pay her rent and her school tuition.

17. Termination of EAD following denial by IJ. The Broader EAD Rule also provides that an asylum seeker's EAD will automatically terminate 30 days after an IJ denies their asylum application, unless the person files a timely appeal with the BIA. *See* 8 C.F.R. § 208.7(b)(2). ASAP has many members in defensive removal proceedings before an IJ who may be negatively impacted by this provision. First, if a member with an EAD has their asylum case denied by an IJ, and the member is unable to file a timely appeal before the BIA, the member's EAD may be automatically terminated. In my experience, this scenario is particularly likely for ASAP members who are unrepresented. ASAP has many such members, including Z.B.A.C, a mother of three who recently received an EAD and is currently unrepresented in her removal proceedings.

18. And second, this auto-termination provision also does not account for the fact that under current law, an individual is permitted to file a motion to reopen their asylum case within 90 days after an IJ denial or 180 days if the denial was issued *in absentia*. As a result of the automatic termination provision, ASAP members may lose their EADs, even where they will ultimately be able to reopen their asylum cases and prevail on their asylum claims. ASAP has

helped dozens of asylum seekers to reopen their asylum cases after receiving *in absentia* removal orders.

19. Termination of automatically extended EADs. The Broader EAD rule also specifies that the termination provisions apply to EADs that have been automatically extended for 180 days based on a timely filed renewal application, *see* 8 C.F.R. § 274a.13(d)(3), which may affect many ASAP members who are currently within their 180-day extension period. S.G.L., for example, filed an application to renew her EAD that was set to expire in January 2021. She received a receipt notice for her renewal application from USCIS on December 28, 2020. Because she filed a timely renewal application and received a receipt notice, her current EAD was automatically extended for 180 days. But if her asylum application is denied during this period, she will be susceptible to the termination provision and she will lose her employment authorization.

20. Auto-termination of EAD following BIA affirming denial. The final auto-termination provision of the Broader EAD rules provides that an asylum applicant's EAD will be automatically terminated if the BIA affirms an IJ's decision denying their asylum application, regardless of whether the asylum seeker seeks federal court review. *See* 8 C.F.R. § 208.7(b)(2). One of ASAP's current members and clients, D.B.M., currently relies on her EAD to provide for her six children while her case is pending appeal before the BIA. If the BIA affirms the IJ's denial of D.B.M.'s asylum application, the automatic termination will apply and D.B.M. will no longer have work authorization that she needs to support her family while she continues to pursue her claim through federal court review.

21. Relatedly, ASAP members who have already petitioned federal courts for review following the BIA's denial of their asylum claims are also harmed by the Broader EAD Rule.

Previously, these members would have remained eligible to apply for and renew their EADs while their federal petitions are pending.

22. ASAP member M.A.I.C., an asylum seeker from El Salvador who is currently pursuing federal court review before the Fourth Circuit, for example, was granted an EAD based on his pending asylum application, but the EAD expired after the Broader EAD Rule went into effect and while his petition for review was pending. Because of the Broader EAD Rule, M.A.I.C. is not eligible to renew his EAD, leaving him without work authorization.

23. Ineligibility following denial of asylum case by IJ. Before the Broader EAD Rule went into effect, asylum seekers were able to apply for an EAD in the first instance while their asylum case was on appeal as long as they had accumulated 180 days or more on their Asylum EAD Clocks before the IJ issued a decision on their asylum application. Before the Asylum EAD rules went into effect, ASAP helped some individuals apply for their first EAD while their administrative appeal was pending before the BIA.

24. Under the Broader EAD Rule, however, USCIS has denied members' EAD application where an IJ has denied the asylum application, even where the member has a pending BIA appeal and has accumulated the requisite number of days for EAD eligibility. *See* 8 C.F.R. § 208.7(a)(1)(iii)(e).

25. ASAP member I.A.L., for example, reached 180 days on her Asylum EAD clock in August 2017. However, her prior attorney never filed her EAD application, despite telling her he would. I.A.L. recently found a new attorney who is helping her pursue ineffective assistance of counsel claims against her prior attorney, and also helped her file an EAD application. However, by the time she applied for an EAD, an IJ had already denied I.A.L.'s asylum claim, and her case was on appeal before the BIA. USCIS denied I.A.L.'s EAD application, stating she was no longer

eligible to apply for an initial EAD because her case had been denied by the IJ. ASAP has heard directly from at least three additional members who have been denied on this same basis.

26. Parole bar. Previously, asylum seekers who received parole were immediately eligible to apply for an EAD under the (c)(11) category. The Broader EAD Rule, however, made asylum seekers who are paroled into the United States after establishing a credible or reasonable fear of persecution or torture ineligible for (c)(11) EADs. *See* 8 C.F.R. § 274a.12(c)(11). ASAP has members who, under the prior rules, would have been immediately eligible for a (c)(11) EAD, but now must wait a minimum of 180 days from the filing of their asylum applications before they are eligible for work authorization.

27. ASAP member M.C.G.R., for example, received a positive credible fear determination after entering the United States with her minor child in October 2020. She and her child were paroled from ICE custody pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA") in December 2020. Her parole is valid for one year, and she previously would have been permitted to apply for an EAD immediately. However, she is no longer eligible to immediately apply for an EAD under the (c)(11) category. It is my understanding that M.C.G.R. intends to file an asylum application, but that she has not done so yet. Therefore, she will not be eligible for an EAD under the (c)(8) category for at least 180 days.

28. EWI bar. The Broader EAD Rule makes asylum seekers who entered between ports of entry without being inspected by an immigration official on or after August 25, 2020, ineligible for an EAD, unless they satisfy certain narrow exceptions. *See* 8 C.F.R. § 208.7(a)(1)(iii)(G). ASAP member W.A.A. reports that he fled El Salvador after his father was murdered in front of him. He entered the United States without inspection in September 2020 (when most asylum seekers were being expelled at the border with little to no process) with the intent to seek asylum

and reunite with his family who had previously entered the United States to seek asylum. W.A.A. applied for asylum in November 2020, and he will have 180 days on his asylum clock in the coming weeks. However, W.A.A. does not meet the narrow exceptions to the new eligibility bar for entering without inspection. As a result of the asylum EAD rules, he will remain categorically ineligible for an EAD. It is my understanding that without an EAD, he is unable to support his family.

29. Criminal bars. The Broader EAD Rule also created additional and complex criminal bars to EAD eligibility, making asylum seekers ineligible for EADs if they are convicted of a "particularly serious crime" on or after August 25, 2020 or if USCIS has "serious reasons for believing" that the applicant committed a serious non-political crime outside of the United States on or after August 25, 2020. *See* 8 C.F.R. §§ 208.7(a)(1)(iii)(A)-(D). ASAP has members with pending criminal charges impacted by these provisions. For example, ASAP member J.I.A.B. (who is also a client of plaintiff Pangea) is an asylum seeker with pending criminal charges for driving under the influence. J.I.A.B.'s attorneys fear that USCIS is likely to determine these charges constitute a "particularly serious crime," such that if she is convicted, the Broader EAD Rule could render her ineligible for an EAD.

30. 14-day evidence rule. Under the Broader EAD rule, asylum applicants are now required to submit documentary evidence in support of their asylum application at least 14 calendar days in advance of their asylum interview date. *See* § 8 C.F.R. 208.9(e). ASAP has members who have been and continue to be impacted by this rule. For example, S.R.S., who is both an ASAP member and a client of Plaintiff Oasis, applied for asylum in August 2019. His asylum interview was scheduled for December 10, 2020. Ten days before his interview, his sister provided him a letter that is important to his asylum case. His attorney reports that under the old San Francisco

Asylum Office procedure, S.R.S. could have submitted this letter to the Asylum Office and the AO would have considered it in reviewing his case. But as a result of the 14-day requirement of the new rules, S.R.S. postponed his asylum interview to ensure the document would be considered as part of his asylum case. S.R.S.'s interview has yet to be rescheduled and he has no control over when it is rescheduled. He therefore must wait an unknown amount of time before his asylum claim is adjudicated. Many of ASAP's other members in affirmative proceedings will face similar harms in the future.

31. Recommended Approval. The Broader EAD Rule eliminates USCIS's prior policy of granting "Recommended Approval" to certain asylum seekers based on the strength of their asylum cases and the likelihood that they would be granted asylum. Before the new rules, asylum seekers who were granted Recommended Approvals became immediately eligible for EADs. Previously, ASAP members in affirmative proceedings with strong asylum claims would have been able to obtain EADs prior to 180 days from the filing of their asylum case by receiving Recommended Approvals; now, many of ASAP members will have to wait significantly longer.

32. For example, V.M.T.G. is an ASAP member (and a client of Plaintiff Oasis) who applied for asylum in December of 2020. V.M.T.G. had his asylum interview on February 16, 2021. His asylum claim is based on his past persecution in Colombia due to his status as a gay man. According to his attorneys, in the past, V.M.T.G. may have received a Recommended Approval about two weeks after his asylum interview (approximately the end of February of 2021). Instead, he had to wait for an EAD until he was either granted asylum or reached 180 days after filing his asylum application. V.M.T.G. was ultimately granted asylum on April 14, 2021 (more than one month after he would have been eligible for an EAD if he had received a Recommended Approval, and over a month before he would have been eligible for an EAD absent the grant of

asylum). The elimination of Recommended Approvals continues to harm other ASAP members with strong asylum claims who have had their asylum interview, await a final decision, and have not accumulated 180 days since filing their asylum application.

33. Limited validity periods. The Broader EAD Rule creates a maximum validity period for EADs of two years. *See* 8 CFR § 274a.12(c)(8). Previously, there was no limit on USCIS's discretion to set the validity period of an EAD. This provision has impacted ASAP members who have applied for and received EADs that were issued with this express limitation in place, like Z.B.A.C., *see supra* ¶ 17, as well as the many ASAP members currently in the process of applying for an initial or renewal EAD.

Impact of EAD Rules on ASAP

34. The sweeping impacts of the EAD Rules on ASAP members have significantly impacted ASAP's ability to fulfill its mission and to meet its programming obligations and commitments.

35. As capacity permits, ASAP provides limited-scope legal assistance to its unrepresented members. Because having an EAD is critical to ASAP members' ability to pursue their asylum claims, ASAP's pro se assistance has historically included helping members prepare and file EAD applications.

36. As described in the preceding paragraphs, the asylum EAD rules are significantly more complex than the prior rules. As a result, ASAP staff must expend significantly more time and resources on individual EAD applications in order to continue to operate ASAP's pro se assistance program as it previously had.

37. Given the new eligibility bars, for example, ASAP staff members must screen cases to assess how and when ASAP members entered the United States and whether they have any criminal offenses that have become disqualifying under the new rules.

38. Moreover, the new "applicant-caused delay" provision makes it harder for ASAP staff to determine whether a member is eligible to apply for an EAD. Previously, ASAP was able to simply check the Asylum EAD Clock calculations provided by the Executive Office for Immigration Review's ("EOIR") automated hotline to evaluate whether a member in removal proceedings was eligible for an EAD. After the asylum EAD rules went into effect, however, some members who have more than 180 days on their clock may be ineligible for work authorization if USCIS determines that they have an ongoing "applicant-caused delay." Therefore, ASAP staff must spend additional time to determine whether such a delay exists and whether it can be resolved.

39. Even when members' applications for EADs are approved, ASAP staff must also take additional time to explain the Broader EAD Rule's termination provisions to our short-term pro se assistance clients, so they know that their EAD may not be valid until the listed expiration date depending on developments in their case.

40. Given all of these changes, on average, it takes ASAP staff 10 hours longer to complete and close a pro se EAD application assistance case than was necessary before the EAD rules went into effect.

41. Because the length of time associated with completing EAD cases has grown so significantly, ASAP has been forced to reallocate staff time and decrease other forms of pro se assistance that it would have previously provided members in furtherance of its mission, including

helping members avoid *in absentia* removal orders by assisting them in preparing and filing motions to change the venue of their cases, or helping members file motions to reopen.

42. Another central part of ASAP's member-based mission is keeping members informed about important legal changes to empower them to take control of their own immigration cases. Prior to the implementation of the Asylum EAD rules, ASAP had committed to providing its members detailed legal updates on any changes in work authorization eligibility for asylum seekers. ASAP provided this programming because many members informed ASAP that work authorization was important to them.

43. To that end, before the Asylum EAD rules went into effect, ASAP created resources that members can access online, including written resources, example pro se filings, and videos explaining the process for applying for a work permit as an asylum seeker.

44. After the Asylum EAD Rules took effect, some of ASAP's written pro se resources, including a toolkit informing members how they could prepare and file pro se EAD applications and videos explaining work permits, became obsolete. As a result, ASAP was required to spend significant time and resources to re-make and update those videos and written resources in order to continue to provide this programming to its members. In total, ASAP staff has spent more than 150 staff hours adapting its resources to ensure they are accurate after the effective date of the asylum EAD Rules.

45. Furthermore, because the EAD rules are more complex than the pre-existing rules, ASAP staff has had to create more detailed resources in order to ensure that those resources continue to be useful for members, particularly members applying for EADs pro se. This staff time would otherwise have been allocated to developing new resources addressing other topics that are

important to members, such as resources explaining how as how to prepare and submit an asylum application or how to prepare for an asylum interview or hearings in immigration court.

46. ASAP staff also provide daily support to our members Monday through Friday and answer questions about the asylum process. Legal assistants and paralegals have historically taken a large role in helping address member inquiries at ASAP. After the EAD Rules took effect, however, ASAP received a greater proportion of questions relating specifically to EADs and the new rules. Given the volume and complexity of the inquiries, they often could not be addressed by paralegals and legal assistants, and instead required legal analysis from ASAP attorneys in order for ASAP to be able to continue to offer this same service to its members.

47. ASAP attorneys have answered more than 1,100 EAD-related inquiries since the Asylum EAD rules took effect, which has required approximately 500 hours of attorney time. ASAP continues to receive dozens of questions relating to the new EAD Rules every day from members and will continue having to devote significant staff time and resources to responding to those inquiries.

48. All of the additional time and resources ASAP has been forced to devote to the EAD process and to responding to member inquiries about the new rules has diverted and will continue to divert resources from ASAP's other mission-critical programming, including engaging with members on other advocacy efforts such as advocating for the expansion of Temporary Protected Status for asylum seekers from specific countries or for other reforms of the immigration system.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 20, 2021
Chicago, Illinois

Swapna Reddy
Co-Executive Director
Asylum Seeker Advocacy Project

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

CASA DE MARYLAND, INC., *et al.*, Plaintiffs, – *versus* – ALEJANDRO MAYORKAS, *et al.,* Defendants.	**Case No. 8:20-cv-2118-PX**

DECLARATION OF ZACHARY MANFREDI IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

ZACHARY MANFREDI, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an attorney admitted to practice in the State of California. In my role as Litigation and Advocacy Director at the Asylum Seeker Advocacy Project ("ASAP"), I am counsel to Plaintiffs in the above-captioned case. I have been admitted *pro hac vice* in this case and am fully familiar with the proceedings. I make this declaration based on my personal knowledge and review of docket filings.

2. On March 10, 2021, USCIS filed as ECF No. 170-1 in *Rosario v. USCIS*, No. C15-00813 (W.D. Wash.) (hereinafter "*Rosario*"), a report that showed the rate at which it processed initial EAD applications through January 31, 2021. Attached as Exhibit A hereto is a true and correct copy of ECF No. 170-1. Beginning in October 2020, the data reflected in ECF No. 170-1 primarily, if not solely, pertain to ASAP and CASA members who applied for their initial (c)(8) EADs using Form I-765 after August 21, 2020 (in other words, individuals within the scope of the preliminary injunction entered by this Court on September 11, 2020).

3. The data reflected in ECF No. 170-1 show that of the *Rosario* class members' I-765(c)(8) applications adjudicated between October 1, 2020 and January 31, 2021, Defendants "completed" 22.3% within 30 days. *See* Exhibit A at 3. This calculation, however, includes only applications for which processing was "completed" and does not include those applications that were received by the agency, but that were still pending adjudication at the time the report was issued. *Id*.

4. When one accounts for applications that were still pending as of January 31, 2021, as well as the applications that were adjudicated (*i.e.*, for which processing was complete), the data in Exhibit A show that Defendants only adjudicated 15.1% of all *Rosario* class members' initial I-765(c)(8) applications within 30 days during this time period. I used the data in the report to calculate this percentage. Specifically, I took the sum of the numbers in the "2021 Total [of Applications Processed]" row on page 3 of Exhibit A corresponding to October 2020, November 2020, December 2020, and January 2021, which the Report reports as the "Grand Total" of "13,813," and I added that number to the "Grand Total [of Applications Pending as of January 31, 2021]," reported as "13,515" on page 4. The sum of 13,813 and 13,515 is 27,328. Because the Report also indicates that 6,980 of the applications that remained pending as of January 31, 2021 had been pending for 30 days or fewer, and therefore could theoretically still be "adjudicated" within 30 days, I subtracted that number of applications (*i.e.*, 27,328 – 6,980) to obtain 20,348. That number (20,348) is the total number of initial I-765(c)(8) applications that were adjudicated from October 2020 through January 2021 plus those applications that remained pending for more than 30 days as of January 31, 2021 ("Denominator"). Then, I took as the "Numerator" the total number of applications processed within "0-30 Days [Processing Time]" during the months October 2020 through January 2021, which is reported to be 3,079 on page 3 of Exhibit A. I divided

the Numerator by the Denominator, 3,079 / 20,348, to obtain approximately 0.151 or 15.1%, which is the percentage of applications adjudicated in 30 days or fewer during those four months, based on the total number of applications adjudicated or still pending at the close of those four months.

5. On April 12, 2021, pursuant to an agreement between counsel for the parties hereto, Defendants' Counsel supplied Plaintiffs' Counsel with a report similar to Exhibit A hereto, which included the same categories of data for the months February and March of 2021 ("February and March Report"). Attached as Exhibit B hereto is a true and correct copy of the April 12, 2021 report provided by Defendants' Counsel in this matter.

6. The February and March Report indicates that of all the *Rosario* class members' I-765(c)(8) applications adjudicated in February 2021, Defendants "completed" 26.3% within 30 days. *See* Exhibit B. The data reflected in the February and March Report indicate that of all the *Rosario* class members' I-765(c)(8) applications adjudicated in March 2021, Defendants "completed" 32.2% within 30 days. *Id*. These calculations include only "completed" or "processed" applications and do not include those applications that were received by the agency, but still pending adjudication at the time the report was issued. *Id*.

7. The February and March Report shows that 15,096 applications remained pending, including 4,793 applications that were pending for longer than 30 days (*i.e.*, 15,096 – 10,303). *See* Exhibit B. It is not clear from the report whether this includes applications pending as of April 12, 2020 (as indicated in the chart's heading on page 2 of Exhibit B), or applications pending as of March 31, 2020 (as indicated in the query parameters listed on the bottom of page 2 of Exhibit B).

8. Attached as Exhibit C hereto is a true and correct copy of the "Declaration of Connie Nolan," filed on March 10, 2021, as ECF No. 170-2 in *Rosario*. According to paragraph 1 of Exhibit B, Connie Nolan is the "Acting Associate Director of Service Center Operation

("SCOPS") Directorate, U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS")."

9. On April 12, 2021, Defendants in *Rosario* electronically filed several documents in response to the "Motion for Civil Contempt and to Enforce Permanent Injunction" filed by plaintiffs in *Rosario*.

10. Attached as Exhibit D hereto is a true and correct copy of one such filing, *Rosario* Defendants' "Response to Motion for Civil Contempt and to Enforce Permanent Injunction," ECF No. 179 in *Rosario*.

11. Attached as Exhibit E hereto is a true and correct copy of a second such filing, the "Declaration of Ernest DeStefano," ECF No. 179-5 in *Rosario*. According to paragraph 1 of Exhibit E, Ernest DeStefano is the "Chief of the Office of Intake and Document Production (OIDP)."

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington D.C. on April 20, 2021

/s/
ZACHARY MANFREDI

Exhibit A

To Declaration of Zachary Manfredi in Support of Plaintiffs' Motion for Summary Judgment or, in the Alternative, to Modify Preliminary Injunction

CASA de Maryland, Inc. v. Mayorkas, No. 8:20-cv-2118

Rosario, Fifth Status Report

I-765 - Application for Employment Authorization
Eligibility Category: C08, Pending Asylum
Initial Permission to Accept Employment
Completions by Processing Time Buckets
FY 2015 - August 31, 2020
Aggregated by Fiscal Year and Month

U.S. Citizenship and Immigration Services

Period		Processing Time						Compliance Percentage	
Fiscal Year	Month	0-30 Days	31-60 Days	61-90 Days	91-120 Days	121+ Days	Grand Total	% Completed within 30 Days	% Completed within 60 Days
2015	OCT	2,324	2,538	1,071	230	35	6,198	37.5%	78.4%
	NOV	1,583	2,727	921	132	35	5,398	29.3%	79.8%
	DEC	1,331	2,745	941	157	79	5,253	25.3%	77.6%
	JAN	1,189	2,992	1,765	316	39	6,301	18.9%	66.4%
	FEB	1,828	1,676	1,532	598	110	5,744	31.8%	61.0%
	MAR	1,478	3,461	2,743	1,167	166	9,015	16.4%	54.8%
	APR	1,206	6,131	3,137	895	190	11,559	10.4%	63.5%
	MAY	2,539	6,907	1,120	251	115	10,932	23.2%	86.4%
	JUN	3,875	4,081	1,083	265	91	9,395	41.2%	84.7%
	JUL	3,431	3,631	1,635	252	71	9,020	38.0%	78.3%
	AUG	3,323	4,377	1,957	448	84	10,189	32.6%	75.6%
	SEP	2,731	5,177	1,388	254	70	9,620	28.4%	82.2%
2015 Total		**26,838**	**46,443**	**19,293**	**4,965**	**1,085**	**98,624**	**27.2%**	**74.3%**
2016	OCT	2,897	3,917	1,251	246	96	8,407	34.5%	81.1%
	NOV	2,767	4,724	2,001	465	98	10,055	27.5%	74.5%
	DEC	2,507	3,154	2,622	438	146	8,867	28.3%	63.8%
	JAN	2,302	6,033	3,363	547	105	12,350	18.6%	67.5%
	FEB	5,483	3,780	3,061	2,073	95	14,492	37.8%	63.9%
	MAR	5,715	2,330	3,465	905	212	12,627	45.3%	63.7%
	APR	4,587	3,055	2,538	320	112	10,612	43.2%	72.0%
	MAY	4,392	2,709	1,262	3,376	81	11,820	37.2%	60.1%
	JUN	5,436	4,039	1,686	4,706	337	16,204	33.5%	58.5%
	JUL	6,933	1,882	4,927	4,684	612	19,038	36.4%	46.3%
	AUG	8,478	6,600	6,159	902	382	22,521	37.6%	67.0%
	SEP	9,001	9,269	988	281	169	19,708	45.7%	92.7%
2016 Total		**60,498**	**51,492**	**33,323**	**18,943**	**2,445**	**166,701**	**36.3%**	**67.2%**
2017	OCT	7,567	6,273	579	108	84	14,611	51.8%	94.7%
	NOV	7,784	8,820	728	111	72	17,515	44.4%	94.8%
	DEC	9,888	7,848	545	53	41	18,375	53.8%	96.5%
	JAN	9,588	8,991	671	95	63	19,408	49.4%	95.7%
	FEB	15,108	4,214	566	99	49	20,036	75.4%	96.4%
	MAR	13,735	4,875	530	144	74	19,358	71.0%	96.1%
	APR	8,026	7,337	717	113	73	16,266	49.3%	94.4%
	MAY	12,193	5,190	2,273	156	90	19,902	61.3%	87.3%
	JUN	12,865	1,884	5,047	340	100	20,236	63.6%	72.9%
	JUL	11,406	1,742	4,221	1,340	155	18,864	60.5%	69.7%
	AUG	12,130	5,294	9,220	5,685	1,340	33,669	36.0%	51.8%
	SEP	13,900	14,737	5,076	2,618	843	37,174	37.4%	77.0%
2017 Total		**134,190**	**77,205**	**30,173**	**10,862**	**2,984**	**255,414**	**52.5%**	**82.8%**
2018	OCT	12,021	9,710	1,429	535	337	24,032	50.0%	90.4%
	NOV	17,032	6,094	474	119	171	23,890	71.3%	96.8%
	DEC	18,148	5,917	372	132	204	24,773	73.3%	97.1%
	JAN	18,306	4,787	341	74	168	23,676	77.3%	97.5%
	FEB	17,699	2,515	217	123	191	20,745	85.3%	97.4%
	MAR	22,084	2,304	121	56	89	24,654	89.6%	98.9%
	APR	20,178	2,792	123	39	49	23,181	87.0%	99.1%
	MAY	24,598	3,114	156	33	48	27,949	88.0%	99.2%
	JUN	18,631	2,631	140	45	53	21,500	86.7%	98.9%
	JUL	17,380	3,625	167	49	60	21,281	81.7%	98.7%
	AUG	19,861	2,376	247	77	87	22,648	87.7%	98.2%
	SEP	15,434	1,673	107	48	82	17,344	89.0%	98.6%
2018 Total		**221,372**	**47,538**	**3,894**	**1,330**	**1,539**	**275,673**	**80.3%**	**97.5%**

Rosario, Fifth Status Report

Period		Processing Time						Compliance Percentage	
Fiscal Year	Month	0-30 Days	31-60 Days	61-90 Days	91-120 Days	121+ Days	Grand Total	% Completed within 30 Days	% Completed within 60 Days
2019	OCT	17,266	1,375	75	33	77	18,826	91.7%	99.0%
	NOV	13,511	1,297	76	37	55	14,976	90.2%	98.9%
	DEC	15,806	451	81	26	50	16,414	96.3%	99.0%
	JAN	17,896	996	257	159	60	19,368	92.4%	97.5%
	FEB	16,479	189	27	34	33	16,762	98.3%	99.4%
	MAR	17,923	129	17	37	19	18,125	98.9%	99.6%
	APR	19,041	112	18	30	16	19,217	99.1%	99.7%
	MAY	18,586	109	24	26	28	18,773	99.0%	99.6%
	JUN	17,925	114	11	28	20	18,098	99.0%	99.7%
	JUL	19,178	108	5	55	13	19,359	99.1%	99.6%
	AUG	18,711	140	18	79	26	18,974	98.6%	99.4%
	SEP	17,946	63	13	50	50	18,122	99.0%	99.4%
2019 Total		**210,268**	**5,083**	**622**	**594**	**447**	**217,014**	**96.9%**	**99.2%**
2020	OCT	21,817	206	10	45	35	22,113	98.7%	99.6%
	NOV	17,318	183	8	33	38	17,580	98.5%	99.6%
	DEC	18,217	312	10	26	40	18,605	97.9%	99.6%
	JAN	20,287	462	24	8	59	20,840	97.3%	99.6%
	FEB	16,636	282	53	18	87	17,076	97.4%	99.1%
	MAR	22,450	215	8	28	90	22,791	98.5%	99.4%
	APR	16,412	112	30	40	51	16,645	98.6%	99.3%
	MAY	14,517	289	31	28	45	14,910	97.4%	99.3%
	JUN	20,005	317	13	47	46	20,428	97.9%	99.5%
	JUL	19,240	197	72	30	26	19,565	98.3%	99.3%
	AUG	20,458	514	168	15	34	21,189	96.6%	99.0%
2020 Total		**207,357**	**3,089**	**427**	**318**	**551**	**211,742**	**97.9%**	**99.4%**
Grand Total		**860,523**	**230,850**	**87,732**	**37,012**	**9,051**	**1,225,168**	**70.2%**	**89.1%**

NOTE:

1) The report reflects the most up-to-date data available at the time the system was queried.
2) The data reflect initial decision only. Subsequent decisions are excluded.
3) Processing time is represented by the elapsed number of days between receipt date to initial decision date.
4) Applications with a request for initial evidence will reset the processing time to 0 upon receiving the evidence.
5) Applications with a request for additional evidence will have the processing time paused and resumed upon receiving the evidence.

Database Queried: February 5, 2021
Report Created: February 5, 2021
System: C3 Consolidated, ELIS
Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER)

Parameters
Form(s): I-765
Class Preference(s): C08
Initial RFE Codes: FBA, FBC, 109, 1436, 1438
Additional RFE Codes: FBB, 1437
RFE Received Codes: HA, 110
Time Period(s): October 1, 2014 - August 31, 2020
Data Type(s): Processing Time

I-765 - Application for Employment Authorization
Eligibility Category: C08, Pending Asylum
Initial Permission to Accept Employment
Completions by Processing Time Buckets
August 1, 2020 - January 31, 2021
Aggregated by Fiscal Year and Month
Potential *Rosario* Class Members

U.S. Citizenship and Immigration Services

Period		Processing Time						Compliance Percentage	
Fiscal Year	Month	0-30 Days	31-60 Days	61-90 Days	91-120 Days	121+ Days	Grand Total	% Completed within 30 Days	% Completed within 60 Days
2020	AUG	20,458	514	168	15	34	21,189	96.6%	99.0%
	SEP	14,385	6,600	177	16	71	21,249	67.7%	98.8%
2020 Total		**34,843**	**7,114**	**345**	**31**	**105**	**42,438**	**82.1%**	**98.9%**
2021	OCT	862	7,557	216	30	94	8,759	9.8%	96.1%
	NOV	788	317	73	46	26	1,250	63.0%	88.4%
	DEC	479	258	102	45	27	911	52.6%	80.9%
	JAN	950	889	868	85	101	2,893	32.8%	63.6%
2021 Total		**3,079**	**9,021**	**1,259**	**206**	**248**	**13,813**	**22.3%**	**87.6%**
Grand Total		**37,922**	**16,135**	**1,604**	**237**	**353**	**56,251**	**67.4%**	**96.1%**

NOTE:

1) The report reflects the most up-to-date data available at the time the system was queried.

2) The data reflect initial decision only. Subsequent decisions are excluded.

3) Processing time is represented by the elapsed number of days between receipt date to initial decision date.

4) Applications with a request for initial evidence will reset the processing time to 0 upon receiving the evidence.

5) Applications with a request for additional evidence will have the processing time paused and resumed upon receiving the evidence.

6) Postmark date is not generally reportable in USCIS' electronic systems. Received date is used as a proxy for postmark date when defining potential class members.

7) Based on the best data available in USCIS systems, potential class members are defined as applications received on or prior to Aug. 20, 2020 or received Aug. 21, 2020 or after and, in accordance with USCIS website instructions related to the *CASA* preliminary injunction, did not pay a biometrics fee and included evidence of CASA/ASAP membership. Individuals who did not submit CASA/ASAP membership evidence, but did not pay a biometrics fee due to a Request for a Fee Waiver are not included. Potential CASA/ASAP and fee waiver cases are differentiated with the "ELIS Base Fee Code" variable. Potential CASA/ASAP members are defined with ELIS Base Fee Code "E". Fee waiver cases are defined with ELIS Base Fee Code "W".

8) Individuals who pay a biometrics fee and submit evidence of CASA/ASAP membership are not identifiable in USCIS' systems and are not included.

Database Queried: February 5, 2021
Report Created: February 5, 2021
System: C3 Consolidated, ELIS
Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER)

Parameters
Form(s): I-765
Class Preference(s): C08
Initial RFE Codes: FBA, FBC, 109, 1436, 1438
Additional RFE Codes: FBB, 1437
RFE Received Codes: HA, 110
ELIS Base Fee Code : E
Time Period(s): August 1, 2020 - January 31, 2021
Data Type(s): Processing Time

Rosario, Fifth Status Report

I-765 - Application for Employment Authorization
Eligibility Category: C08, Pending Asylum
Initial Permission to Accept Employment
Pending by Processing Time Buckets
Pending as of January 31, 2021
Potential *Rosario* Class Members

U.S. Citizenship and Immigration Services

	Processing Time						Compliance Percentage	
Data Type	0-30 Days	31-60 Days	61-90 Days	91-120 Days	121+ Days	Grand Total	% Pending 0-30 Days	% Pending 0-60 Days
Pending	6,980	4,892	1,470	146	27	13,515	51.6%	87.8%

NOTE:

1) The report reflects the most up-to-date data available at the time the system was queried.

2) Reopened applications are excluded from this report.

3) Processing time is represented by the elapsed number of days between receipt date to report date.

4) Applications with a request for initial evidence will reset the processing time to 0 upon receiving the evidence.

5) Applications with a request for additional evidence will have the processing time paused and resumed upon receiving the evidence.

6) Postmark date is not generally reportable in USCIS' electronic systems. Received date is used as a proxy for postmark date when defining potential class members.

7) Based on the best data available in USCIS systems, potential class members are defined as applications received on or prior to Aug. 20, 2020 or received Aug. 21, 2020 or after and, in accordance with USCIS website instructions related to the *CASA* preliminary injunction, did not pay a biometrics fee and included evidence of CASA/ASAP membership. Individuals who did not submit CASA/ASAP membership evidence, but did not pay a biometrics fee due to a Request for a Fee Waiver are not included. Potential CASA/ASAP and fee waiver cases are differentiated with the "ELIS Base Fee Code" variable. Potential CASA/ASAP members are defined with ELIS Base Fee Code "E". Fee waiver cases are defined with ELIS Base Fee Code "W".

8) Individuals who pay a biometrics fee and submit evidence of CASA/ASAP membership are not identifiable in USCIS' systems and are not included.

Database Queried: February 5, 2021
Report Created: February 5, 2021
System: C3 Consolidated, ELIS
Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER)

Parameters
Form(s): I-765
Class Preference(s): C08
Initial RFE Codes: FBA, FBC, 109, 1436, 1438
Additional RFE Codes: FBB, 1437
RFE Received Codes: HA, 110
ELIS Base Fee Code : E
Time Period(s): Pending as of January 31, 2021
Data Type(s): Pending

Exhibit B

To Declaration of Zachary Manfredi in Support of Plaintiffs' Motion for Summary Judgment or, in the Alternative, to Modify Preliminary Injunction

CASA de Maryland, Inc. v. Mayorkas, No. 8:20-cv-2118

I-765 - Application for Employment Authorization
Eligibility Category: C08, Pending Asylum
Initial Permission to Accept Employment
Completions by Processing Time Buckets
August 1, 2020 - March 31, 2021
Aggregated by Fiscal Year and Month
Potential *Rosario* Class Members
Casa De Maryland, Inc, et al., v. Mayorkas et al,
20-cv-2118-PX (D.Md)

U.S. Citizenship and Immigration Services

Period		Processing Time						Compliance Percentage	
Fiscal Year	Month	0-30 Days	31-60 Days	61-90 Days	91-120 Days	121+ Days	Grand Total	% Completed within 30 Days	% Completed within 60 Days
2020	AUG	20,458	514	168	15	34	21,189	96.6%	99.0%
	SEP	14,385	6,600	177	16	71	21,249	67.7%	98.8%
2020 Total		**34,843**	**7,114**	**345**	**31**	**105**	**42,438**	**82.1%**	**98.9%**
2021	OCT	862	7,557	216	30	94	8,759	9.8%	96.1%
	NOV	787	318	73	46	26	1,250	63.0%	88.4%
	DEC	479	258	102	45	27	911	52.6%	80.9%
	JAN	951	889	868	84	102	2,894	32.9%	63.6%
	FEB	1,735	2,646	1,725	454	29	6,589	26.3%	66.5%
	MAR	5,656	7,458	3,432	702	307	17,555	32.2%	74.7%
2021 Total		**10,470**	**19,126**	**6,416**	**1,361**	**585**	**37,958**	**27.6%**	**78.0%**
Grand Total		**45,313**	**26,240**	**6,761**	**1,392**	**690**	**80,396**	**56.4%**	**89.0%**

NOTE:

1) The report reflects the most up-to-date data available at the time the system was queried.

2) The data reflect initial decision only. Subsequent decisions are excluded.

3) Processing time is represented by the elapsed number of days between receipt date to initial decision date.

4) Applications with a request for initial evidence will reset the processing time to 0 upon receiving the evidence.

5) Applications with a request for additional evidence will have the processing time paused and resumed upon receiving the evidence.

6) Postmark date is not generally reportable in USCIS' electronic systems. Received date is used as a proxy for postmark date when defining potential class members.

7) Potential class members are defined as applications received on or prior to Aug. 20, 2020 or received Aug. 21, 2020 or after and, in accordance with USCIS website instructions related to the *CASA* preliminary injunction, did not pay a biometrics fee and included evidence of CASA/ASAP membership. Individuals who did not submit CASA/ASAP membership evidence, but did not pay a biometrics fee due to a Request for a Fee Waiver are not included.

8) Individuals who pay a biometrics fee and submit evidence of CASA/ASAP membership are not identifiable in USCIS' systems and are not included.

Database Queried: April 12, 2021
Report Created: April 12, 2021
System: C3 Consolidated, ELIS
Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER)

Parameters
Form(s): I-765
Class Preference(s): C08
Initial RFE Codes: FBA, FBC, 109, 1436, 1438
Additional RFE Codes: FBB, 1437
RFE Received Codes: HA, 110
ELIS Base Fee Code : E
Time Period(s): August 1, 2020 - March 31, 2021
Data Type(s): Processing Time

I-765 - Application for Employment Authorization
Eligibility Category: C08, Pending Asylum
Initial Permission to Accept Employment
Pending by Processing Time Buckets
Pending as of April 12, 2021
Potential *Rosario* Class Members
Casa De Maryland, Inc, et al., v. Mayorkas et al,
20-cv-2118-PX (D.Md)

U.S. Citizenship and Immigration Services

	Processing Time						Compliance Percentage	
Data Type	0-30 Days	31-60 Days	61-90 Days	91-120 Days	121+ Days	Grand Total	% Pending 0-30 Days	% Pending 0-60 Days
Pending	10,303	3,152	989	471	181	15,096	68.2%	89.1%

NOTE:

1) The report reflects the most up-to-date data available at the time the system was queried.

2) Reopened applications are excluded from this report.

3) Processing time is represented by the elapsed number of days between receipt date to report date.

4) Applications with a request for initial evidence will reset the processing time to 0 upon receiving the evidence.

5) Applications with a request for additional evidence will have the processing time paused and resumed upon receiving the evidence.

6) Postmark date is not generally reportable in USCIS' electronic systems. Received date is used as a proxy for postmark date when defining potential class members.

7) Potential class members are defined as applications received on or prior to Aug. 20, 2020 or received Aug. 21, 2020 or after and, in accordance with USCIS website instructions related to the *CASA* preliminary injunction, did not pay a biometrics fee and included evidence of CASA/ASAP membership. Individuals who did not submit CASA/ASAP membership evidence, but did not pay a biometrics fee due to a Request for a Fee Waiver are not included.

8) Individuals who pay a biometrics fee and submit evidence of CASA/ASAP membership are not identifiable in USCIS' systems and are not included.

Database Queried: April 12, 2021
Report Created: April 12, 2021
System: C3 Consolidated, ELIS
Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER)

Parameters
Form(s): I-765
Class Preference(s): C08
Initial RFE Codes: FBA, FBC, 109, 1436, 1438
Additional RFE Codes: FBB, 1437
RFE Received Codes: HA, 110
ELIS Base Fee Code : E
Time Period(s): Pending as of March 31, 2021
Data Type(s): Pending

Exhibit C

To Declaration of Zachary Manfredi in Support of Plaintiffs' Motion for Summary Judgment or, in the Alternative, to Modify Preliminary Injunction

CASA de Maryland, Inc. v. Mayorkas, No. 8:20-cv-2118

The Honorable James L. Robart

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Wilman GONZALEZ ROSARIO, *et al.,*

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al*.

Defendants.

CASE NO. 2:15-cv-00813-JLR

DECLARATION OF CONNIE NOLAN

I, Connie Nolan, declare and say:

1) I am the Acting Associate Director of Service Center Operation ("SCOPS") Directorate, U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"). I have held this position since January 2021. Prior to that, I was the Deputy Associate Director of SCOPS since June 2019, and occupied this same position in an Acting capacity from January to April 2019.

2) In my position, I oversee policy, planning, management, and execution functions of SCOPS. In this, I assist in overseeing a workforce of more than 7,100 government and contract employees at five USCIS Service Centers located in California, Nebraska, Texas, Vermont, and Virginia. These five service centers adjudicate about five million immigration-related applications, petitions, and requests annually, including applications for employment authorization.

3) I understand that in *Rosario v. USCIS*, Defendants file status reports with the court every six months regarding "the rate of compliance with the 30-day timeline." Dkt. 127 at 12.

4) The status report accompanying this declaration indicates that in January 2021, 32.8% of potential *Rosario* class members' initial Form I-765, Application for Employment Authorization ("Form I-765" and "applications"), were processed within 30 days, and 63.6% were processed within 60 days. Exhibit A. Of the applications that remained pending on January 31, 2021, 51.6% had been pending 30 days or less, and 87.8% were pending 60 days or less. *Id.*

5) I recognize that this indicates an increase in processing times from the last report filed in September 2020, which reflected that in July 2020, 98.7% of *Rosario* class members' applications were completed within 30 days. Dkt. 167 at 1.

6) USCIS is committed to improving its processing times. The change in compliance rates reflected in this report are due to a variety of factors, including the issuance of several new regulations, followed by a preliminary injunction (PI) issued by the U.S. District Court for the District of Maryland, and USCIS' efforts to appropriately respond to those events. Agency financial challenges, the COVID-19 pandemic, and processing changes related to technological updates occurring at the same time as the issuance of the new regulations and the subsequent PI exacerbated agency challenges to maintain processing times.

7) Despite significant challenges, USCIS has implemented improvements and anticipates that processing times for potential *Rosario* class members will decrease over the course of the next several months. Below, I will describe agency challenges in more detail, as well as the ongoing, concerted efforts being made to address them.

Regulatory Changes Impacting *Rosario* Injunction

8) I understand that this court issued an injunction based on language in the then-existing portion of 8 C.F.R. § 208.7(a)(1) that required adjudication of initial applications for employment authorization for asylum-seekers within 30 days.

9) On June 22, 2020, the Department of Homeland Security (DHS) amended this regulation to eliminate the 30-day processing rule. *See* Removal of 30-Day Processing Provision for Asylum Applicant- Related Form I–765 Employment Authorization Applications, 85 Fed. Reg. 37,502 (June 22, 2020) ("Timeline Repeal Rule"). The change to 8 C.F.R. § 208.7(a)(1) became effective on August 21, 2020.

10) A broader rule related to employment authorization for asylum seekers, which implemented changes affecting various aspects of the employment authorization process, including when an application could be filed, the amount of fees required, eligibility criteria, among other changes, was promulgated on June 26, 2020, and became effective on August 25, 2020. 85 Fed. Reg. 38532 ("Broader Asylum EAD Rule").

11) I understand that the parties in this litigation agreed that because the regulation upon which this court's injunction was issued had been repealed by the Timeline Repeal Rule, that by its terms, the Court's injunction did not apply to Forms I-765, Applications for Employment Authorization ("Forms I-765") filed after the Timeline Repeal Rule took effect. Dkt. 164 at 1. It was anticipated, as a practical matter, that after the August 21, 2020 effective date, there would be no *Rosario* class members once the applications of individuals who filed before August 21, 2020 were adjudicated.

12) Once the changes became effective, USCIS took steps to implement the two new rules. This included making changes to the way employment authorization applications are processed

and ultimately accepted or rejected at intake centers, known as USCIS Lockboxes, based on the new filing requirements.

CASA litigation and preliminary injunction implementation

13) On September 11, 2020, three weeks after the change to 8 C.F.R. § 208.7(a)(1) became effective, the U.S. District Court for the District of Maryland issued a preliminary injunction ("PI") which enjoined the enforcement of the Timeline Repeal Rule and certain aspects of the Broader Asylum EAD Rule, but only for individual members of organizations Casa de Maryland, Inc (CASA) and Asylum Seekers Advocacy Project (ASAP). *Casa de Maryland v. Mayorkas*, 2020 WL 5500165 (D. Maryland 2020).

14) Because the changes to 8 C.F.R. § 208.7(a)(1) were enjoined in *CASA* as to CASA and ASAP members, USCIS considers individual CASA and ASAP members who filed an asylum-based initial Form I-765 on or after August 21, 2020 to be class members in the *Rosario* litigation ("CASA/ASAP members"). Any individual who filed prior to August 21, 2020 whose employment authorization application has not yet been adjudicated is also a *Rosario* class member. All other applicants who file an initial I-765 based on a pending asylum application are processed under the Timeline Repeal Rule as well as the Broader Asylum EAD rule, and are not *Rosario* class members.

15) Implementation of the *CASA* court's PI proved challenging for numerous reasons. Form I-765s do not require individuals to include evidence of membership in CASA and ASAP. This meant that initially, USCIS had no mechanism to identify individuals entitled to relief under the *CASA* PI. Thus, USCIS engaged in discussions with *CASA* plaintiffs regarding implementation, and particularly, a mechanism for USCIS to identify CASA/ASAP members entitled to relief under that court's ruling.

16) Accordingly, some CASA/ASAP member applications accumulated while the *CASA* parties negotiated aspects of implementation of the PI. Those implementation efforts continued through approximately the end of October 2020.

17) All initial Form I-765 applications for asylum seekers are filed at an intake facility known as the Dallas Lockbox,[1] and adjudicated at the Texas Service Center (TSC). Distinguishing *Rosario* class members (based on membership in CASA or ASAP) from non-members at the Dallas Lockbox requires manual review that is more time-consuming than processing prior to the *CASA* court's injunction. However, USCIS continues to identify process improvements and provide training to individuals at the Dallas Lockbox and OIDP employees who review Lockbox-received applications for processing so that *Rosario* class members' applications are identified and prioritized for adjudication expeditiously.

18) Once applications are accepted through the intake process at the Dallas Lockbox and ingested into USCIS' electronic systems, they are electronically routed to the TSC for adjudication. Just like the Dallas Lockbox and OIDP staff, the TSC faces significant operational challenges in prioritizing *Rosario* class members' cases, but has employed a number of process improvements to accelerate adjudications. It has also conducted trainings to ensure that adjudicative staff understands how to identify *Rosario* class members and prioritize these cases.

19) An ongoing challenge for USCIS is that some CASA/ASAP members make filing errors on their applications that lead to difficulties in identifying them in a timely manner. For instance, some individuals erroneously pay the biometrics fees required of non-CASA or ASAP members (i.e. non-*Rosario* class members), despite not being required to do so under the *CASA*

[1] USCIS Lockboxes are operated by a financial agent overseen by USCIS' Office of Intake and Document Production (OIDP).

PI. This error makes it harder for USCIS to identify these cases during initial intake to ensure proper routing and requires additional agency time and resources.

20) I understand that individuals may also join CASA and ASAP at any time to obtain the benefits of the PI. Over the months since the PI was issued, the proportion of initial Form I-765s by asylum seekers who are members of those organizations has grown, meaning the volume of cases USCIS has to prioritize under the *CASA* PI has been increasing over time, even if overall numbers of applications have not.

21) USCIS continues to process pending initial Form I-765s filed by asylum-seekers due to the backlog created by the *CASA* PI negotiations and initial implementation. USCIS also continues its efforts to timely process and adjudicate initial Form I-765s of *Rosario* class members that filed applications after the identification mechanisms for the *CASA* PI were implemented.

22) USCIS acknowledges that the current processing rates are slower than the processing times reflected in prior status reports. USCIS believes this is largely due to continued efforts to clear the backlog of cases that accumulated while the parties in *CASA* developed an identification mechanism for CASA and ASAP members. Other factors, described below, exacerbated the challenges caused by the *CASA* PI.

Additional agency challenges

23) USCIS relies on fees paid by immigration applicants and petitioners for its funding. On May 15, 2020, USCIS notified Congress of a projected budget shortfall caused by the COVID-19 pandemic and requested emergency funding of $1.2 billion. *See* Deputy Director for Policy Statement on USCIS' Fiscal Outlook, available at *https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook* (last accessed March 9,

2021). Since that time, USCIS' financial outlook has somewhat improved, due to limited Congressional action and increased immigration filings. However, significant fiscal challenges remain and USCIS is currently operating under a hiring freeze and reduced contracting operations.

24) Due to the hiring freeze, the TSC has not been able to replace staff who have retired, quit, transferred, or otherwise moved on from their positions. While the TSC continues to prioritize the workload for potential *Rosario* class members, the hiring freeze and decrease in experienced and trained adjudicators has created a significant resource strain.

25) Additionally, around the same time the *CASA* parties agreed to an identification mechanism for CASA/ASAP members, USCIS implemented a long-planned move to a new processing system, the Electronic Immigration System (ELIS), to ingest and adjudicate relevant Form I-765s.

26) Also, around the same time, exposures and illness due to the COVID-19 pandemic led to increased absences among the TSC workforce. This issue led to delays in training staff to use ELIS. Now that USCIS has transitioned to ELIS, absences have decreased, and adjudicators become proficient in ELIS, delays due to the technological transition should diminish.

27) In February 2021, Texas was affected by winter weather that led to closures and delays in mail delivery and processing. Unfortunately, all relevant Form I-765s are centralized for intake at the Dallas Lockbox and then for adjudication at the TSC. Closures and delays related to the winter weather may have a short-term negative impact on processing times.

Improvement Plan

28) USCIS has spent considerable time and effort identifying impediments that led to slower processing times, as described in detail above. Now that those impediments are identified,

USCIS has already implemented and continues to take additional steps to reduce processing times for *Rosario* class members.

29) For instance, OIDP, the Dallas Lockbox and TSC have made adjustments to their processes in the last few months to ensure that *Rosario* class members are promptly identified for priority intake and adjudication.

30) USCIS is currently engaged in a concerted backlog reduction effort, in which it seeks to become current in its adjudication of initial Form I-765s for asylum seekers. This effort has included reallocating USCIS resources and continued monitoring to streamline the identification and processing of relevant adjudications at the Dallas Lockbox and Texas Service Center.

31) I declare under penalty of perjury that the foregoing is true and correct.

Executed this ___10____ day of March, 2021, at Camp Springs, MD.

CONNIE L NOLAN Digitally signed by CONNIE L NOLAN
Date: 2021.03.10 13:32:16 -05'00'

Connie Nolan
Acting Associate Director, SCOPS
U.S. Citizenship and Immigration Services
Camp Springs, MD

Exhibit D

To Declaration of Zachary Manfredi in Support of Plaintiffs' Motion for Summary Judgment or, in the Alternative, to Modify Preliminary Injunction

CASA de Maryland, Inc. v. Mayorkas, No. 8:20-cv-2118

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT, *et al.*,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants.

Case No. 2:15-cv-00813-JLR

RESPONSE TO MOTION FOR CIVIL CONTEMPT AND TO ENFORCE PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR: April 16, 2021

ORAL ARGUMENT REQUESTED

U.S. DEPARTMENT OF JUSTICE
OFFICE OF IMMIGRATION LITIGATION
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

Plaintiffs seek to hold U.S. Citizenship and Immigration Services ("USCIS") in contempt for violating this Court's July 26, 2018 injunction requiring that USCIS adjudicate initial applications for asylum-related employment authorization documents within 30-days, as set out by 8 C.F.R. § 208.7(a)(1). It is undisputed that USCIS was in substantial compliance with this Court's order through August 2020. ECF No. 171 at 1. The current controversy stems largely from a separate lawsuit concerning regulatory amendments to 8 C.F.R. § 208.7(a)(1) that took effect on August 21, 2020. In this separate lawsuit, *CASA de Maryland, Inc., et al. v. Mayorkas, et al.,* 8:20-cv-02118-PX (D. Md., filed July 21, 2020) ("the *Maryland Litigation*"), a district court enjoined, among other things, USCIS's amendment to 8 C.F.R. § 208.7(a)(1) relating to the 30 day processing time frame after the regulation took effect, but limited the scope of the injunction to members of the two organizational plaintiffs in that lawsuit. Thus, this case involves the unusual situation in which the scope of this Court's injunction turns on the applicability of an injunction issued by another court.

This Court should not hold USCIS in contempt because the parties to the *Maryland Litigation* requested the district court's assistance in resolving their dispute as to the implementation of the preliminary injunction entered in that litigation. Processing delays stemming from that negotiation period, along with other challenges, led to an ongoing accumulation of cases that are pending longer than 30 days. USCIS is in the process of executing a plan addressing the current backlog within the next 90 days. Under these circumstances, this Court should not find USCIS in contempt and should decline to order USCIS to eliminate the backlog within 90 days as Plaintiffs request. ECF No. 171 at 10. There is another reason this Court should deny Plaintiffs' Motion for Civil Contempt and to Enforce Permanent Injunction ("Motion for Civil Contempt"); it relies heavily on declarations that, on their face, indicate that the declarant lacks personal knowledge of the matters asserted. *See* Fed. R. Evid. 602; *see Barrowman v. Wright Med. Tech. Inc.*, No. C15-0717JLR, 2017 WL 4161688, at *3 (W.D.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

Wash. Sept. 19, 2017); *see also Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th Cir. 2012) ("Declarations must be made with personal knowledge"). As a result, these statements are not a proper basis for finding USCIS in contempt or for awarding sanctions.

Moreover, the relief that Plaintiffs request is improper. ECF No. 171 at 10-12. Plaintiffs request that this Court modify its permanent injunction to specify a compliance rate of 95% for the adjudication of applications for an initial employment authorization document based on a pending asylum application on Form I-765 ("C8 applications"). But this Court has already ruled that such relief would "not be appropriate" and there is no basis for reconsidering this ruling in the present context. ECF No. 145 at 5. Plaintiffs also ask that this Court modify the parties' Agreed Implementation Plan ("Implementation Plan") to require that USCIS issue receipt notices within 48 hours and to "streamline" the dispute resolution mechanism agreed to by the parties. ECF No. 171 at 11-12. There is no basis for awarding this additional relief, especially because 8 C.F.R. § 208.7(a)(1) – the regulation that is the basis of the current litigation – does not address either of these topics. For these additional reasons, this Court should decline to award the relief requested by Plaintiffs.

BACKGROUND

On July 26, 2018, this Court entered summary judgment against the Government and enjoined the Defendants "from further failing to adhere to the 30-day deadline for adjudicating employment authorization document applications, as set out by 8 C.F.R. § 208.7(a)(1)." ECF No. 128 at 1-2; *see also* ECF No. 127 at 12 (ordering USCIS to provide status reports every six months). In order to carry out this injunction, the parties negotiated the Implementation Plan, which this Court subsequently adopted. *See* ECF Nos. 137; 134-1; *see id*. at 1-2 (setting forth the parties' agreed dispute resolution mechanism for "individual cases that remain pending beyond

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

30-days").[1] This Court ordered additional briefing on whether it "should specify specific rates of compliance for employment authorization document (EAD) adjudication as part of an implementation order . . . ." ECF No. 137 at 1. On March 20, 2019, this Court declined to dictate a specific rate of compliance, explaining that doing so would constitute a "modification to the court's injunction." ECF No. 145 at 5 (citing *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992) for the proposition that a party seeking to modify an injunction bears the burden of establishing that a significant change in circumstances warrants a revision of the injunction).

As Plaintiffs recognize, through August 2020, USCIS substantially complied with this Court's order, adjudicating no less than 96% of all initial asylum EAD applications within 30 days. ECF No. 171 at 2. On June 22, 2020, USCIS published a new rule, amending 8 C.F.R. § 208.7(a)(1) by eliminating the 30-day processing deadlines, effective August 21, 2020. *See* ECF No. 164 at 1 (citing "Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications," 85 Fed. Reg. 37,502-37,546 (June 22, 2020) ("Timeline Repeal Rule)); ECF No. 170-2, Declaration of Connie Nolan ¶ 9 (discussing this rule). After discussions between counsel, the parties reached an agreement regarding the impact of the Timeline Repeal Rule. ECF No. 164. Specifically, the parties agreed that this Court's injunction (under the then existing version of 8 C.F.R. § 208.7(a)(1)) continued to apply to those applicants who filed prior to the August 21, 2020 effective date, but that there would "not be any new class members after that date" if the Timeline Repeal Rule took effect on August 21, 2020. ECF No. 164 (citing ECF No. 162 5); ECF No. 170-2 ¶ 11.

Although the Timeline Repeal Rule initially took effect on August 21, 2020, ECF No. 171 at 3, it was the subject of a separate lawsuit, referenced as the *Maryland Litigation*. *See* ECF No. 124 3-4. In the *Maryland Litigation*, two public interest organizations, Casa de Maryland,

[1] The Implementation Plan also provided that USCIS would provide monthly status reports to Plaintiffs' counsel through the date of the filing of the first six-month report with the Court, ECF No. 134-1 ¶ 3(d) which was filed on January 25, 2019. ECF No. 144.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

Inc. ("CASA") and Asylum Seekers Advocacy Project ("ASAP") challenged both the Timeline Repeal Rule and an additional rule unrelated to the current litigation entitled "Asylum Application, Interview, and Employment Authorization for Applicants," 85 Fed. Reg. 38,532-38,628 (June 26, 2020) ("Broader EAD Rules"). ECF No. 70, Order, Ex. 1 at 1. On September 11, 2020, a district court in Maryland entered a preliminary injunction enjoining both rules, but limiting the scope of the preliminary injunction to members of CASA and ASAP (a result that neither party requested). Ex. 1 ("Maryland September 2020 PI Order"); *see also Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020) (motion granted in part and denied in part); ECF No. 170-2 ¶ 13 (describing the order). "Because the changes to 8 C.F.R. § 208.7(a)(1) were enjoined . . . as to CASA and ASAP members, USCIS considers individual CASA and ASAP members who filed an asylum-based initial Form I-765 on or after August 21, 2020 to be class members in the *Rosario* litigation." ECF No. 170-2 ¶ 14.

Not only is USCIS required to continue to adjudicate initial C8 applications filed by this group of applicants within 30 days, it is also required to adjudicate initial and renewal C8 filed applications filed by this group of applicants in compliance with the Maryland September 2020 PI Order, which enjoined several other amended C8 eligibility criteria, essentially creating two different sets of rules for the adjudication of such applications.[2] Ex. 1 at 2 (citing 8 C.F.R. §§ 208.3(c)(3); 208.7(a)(1)(i), (ii), (iii)(E) & (F), (iv)(E), (b)(1)(i); 208.10; 274a.12(c)(8)), 13(a)(1); 8 C.F.R. § 208.7(a)(1)(i)); *see* ECF No. 170-2 ¶ 15 (describing some of the challenges involved in implementing this order, including the fact that "Form I-765s do not require individuals to include evidence of membership in CASA and ASAP"). On October 9, 2020, USCIS updated its website in light of the Maryland September 2020 PI Order. ECF No. 172 ¶ 25.

[2] For example, as modified, 8 C.F.R. § 208.7(a)(1)(iii)(E) provides that applicants must wait 365 days from the date of filing an asylum application to apply for, and be granted, an EAD, unless they are CASA and ASAP members, in which case, prior rules apply whereby asylum applications must been pending for a minimum of 180 "clock" days, not including delays caused or requested by the applicants. Ex. 1 at 2.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

However, the parties to the *Maryland Litigation* disagreed about how the Maryland September 2020 PI Order should be implemented, including specifically, what steps USCIS was required to take to identify members of CASA and ASAP given that these two organizations could not provide a list of their members. ECF 76, Letter dated Oct. 9, 2020, Ex. 2; *see also* ECF No. 172 ¶ 24 (explaining that the Maryland Plaintiffs believed that USCIS's proposed plan implementing the September 2020 PI Order violated the order). As a result of this disagreement between the parties, USCIS requested a status conference. *Id*. at 1 (providing a proposed plan for implementation but agreeing not to move forward with the plan until the district court ruled). On October 19, 2020, the district court orally clarified the scope of the Maryland September 2020 PI Order. *See* ECF 83, Letter dated Oct. 21, 2020, Ex. 3 at 1-2 (summarizing what transpired at the status conference). The district court further found that USCIS's plan was reasonable and requested that the parties confer further regarding implementation. *See id*.; *see also* ECF No. 172 ¶ 28 (stating that the district court "accepted" USCIS's plan). Additional discussions between counsel in the *Maryland Litigation*, resulted in the resolution of a number of issues regarding implementation. ECF No. 172 ¶¶ 30-31. However, USCIS continues to process cases that have accumulated beyond the 30-day timeframe, stemming from the delayed implementation, as well as other factors. ECF No. 170-2 ¶¶ 16, 21-27. These factors include the agency's financial challenges, the COVID-19 pandemic, and processing changes related to technological updates. *Id*. at ¶¶ 6, 23-26.

There have been significant discussions between the parties in the *Maryland Litigation*, as well as between counsel in the present litigation regarding a wide array of issues related to the adjudication of initial C8 EAD applications. On March 10, 2021, USCIS submitted to this Court a compliance report, including a declaration that, among other things, outlined USCIS's improvement plan for addressing the current backlog. ECF No. 1702-2 ¶¶ 28-30. Connie Nolan,

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

the Acting Associate Director of Service Center Operations, further assured this Court that "USCIS is committed to improving its processing times." *Id*. at ¶ 6.

After additional discussion between counsel in the *Maryland Litigation*, on March 23, 2021, the parties submitted a Joint Status Report, in which USCIS advised that it was reallocating resources "for up to 90 days in order to address a backlog of ASAP and CASA members' initial I-765(c)(8) applications" and agreed to provide the Maryland plaintiffs with an additional report. ECF No. 104, Joint Status Report, Ex. 4 ¶ 8. Two days later, the Plaintiffs filed the Motion for Civil Contempt in this action. ECF No. 171.

LEGAL STANDARD

"Civil contempt . . . consists of a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply." *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 945 (9th Cir. 2014). A party "should not be held in contempt if [its] action appears to be based on a good faith and reasonable interpretation of the court's order." *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006).

The party alleging civil contempt must demonstrate that the party violated the court's order by clear and convincing evidence. *Inst. of Cetacean Rsch.*, 774 F.3d at 945; *see In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) ("[t]he party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by clear and convincing evidence, not merely a preponderance of the evidence"). Substantial compliance with the court order is a defense to civil contempt, and is not vitiated by a few technical violations where every reasonable effort has been made to comply. *In re Dual-Deck Video,* 10 F.3d at 695; *see Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986) (explaining that substantial compliance with a court order is a defense to an action for civil contempt).

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

ARGUMENT

1. USCIS should not be held in contempt for processing delays stemming, in part, from the parties' good faith disagreement as to how the Maryland September 2020 PI Order should be implemented, especially because USCIS now has a plan in place to address the current backlog within 90 days.

This Court should not find USCIS in contempt of court. It is undisputed that USCIS was in substantial compliance with this Court's order through August 2020, ECF No. 171 at 1, and counsel for the parties have been able to resolve a number of issues without court intervention. *See, e.g.*, ECF No. 134-1 (reflecting the agreed Implementation Plan); ECF No. 164 (resolving the parties' dispute about the impact of the Timeline Repeal Rule); ECF Nos. 168, 169 (resolving the parties' dispute at to EAJA fees); ECF No. 124 at 5 (resolving subsequent concerns by Plaintiffs regarding USCIS's website and "auto-response" emails to class members).[3] The current backlog of initial asylum EAD applications stems, in part, from processing delays that arose when the parties in the *Maryland Litigation* were, initially, unable to reach an agreement as to how the Maryland September 2020 PI Order should be implemented. ECF No. 170-2 ¶ 6; Ex. 2 (generally); *see also* ECF No. 172 ¶ 24. It is black letter law that a party should not be held in contempt if its "action appears to be based on a good faith and reasonable interpretation of the court's order." *Reno*, 452 F.3d at 1130. Rather

[3] To explain the context of the Plaintiffs' concerns about the website, the Implementation Plan required that USCIS make certain changes to its website. ECF No. 134-1 ¶ 3(c). That occurred. Subsequently, on October 9, 2020, USCIS changed its website to provide notice of the Maryland September 2020 PI Order. ECF No. 172 ¶ 25 (describing the changes). On December 8, 2020, Plaintiffs' counsel contacted undersigned counsel about two issues: (i) additional changes to the website, and (ii) "auto-response" emails from USCIS that were not correct in light of the Maryland September 2020 PI Order. ECF No. 175 ¶ 7. The undersigned counsel responded that day, requesting clarification, and two days later, on December 10, 2020, advised that USCIS was working on addressing those two issues. Plaintiffs acknowledge that those two issues raised in the December 8 email were "resolved" in January 2021, ECF No. 171 at 5, and are not the basis of the present motion. On January 15, 2020, Plaintiffs' counsel emailed the undersigned counsel about widespread delays in the adjudication of initial asylum-related employment authorization documents. ECF No. 175 ¶¶ 13-15. The undersigned addressed that issue in an email on February 5, 2020. *Id*. at ¶ 19.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

than simply proceeding with its proposed plan to implement the Maryland September 2020 PI Order, USCIS instead requested a status conference with the district court in order to allow the district court an opportunity to address the matter. Ex. 2 at 1. These actions were reasonable and in good faith, especially given that USCIS did not know which applicants were members of CASA and ASAP or even have a sense of how many members these two organizations had. *See id.* at 1-2; *see also* ECF No. 172 ¶ 28 (acknowledging that the district court "accepted" USCIS's plan).

Although USCIS's prior actions to address processing delays were unsuccessful for the reasons set forth in the Nolan Declaration, ECF No. 170-2 ¶ 6, USCIS now has a plan in place to address the current backlog within 90 days. *Id.* ¶¶ 28-30; *see* Ex. 5, Declaration of Ernest Destefano, ¶¶ 4-10 (describing this plan in greater detail). This is having an impact as demonstrated by the attached Compliance Report, which indicates that USCIS has adjudicated more C8 EAD applications in the month of March than in November, December, January, and February combined. Ex. 6.[4] For these reasons, this Court should not find USCIS in contempt and should not impose sanctions. In the alternative, if this Court finds USCIS in contempt, it should, in the exercise of its discretion, decline to award sanctions. *Distributors Ass'n Warehousemen's Pension Tr. v. Foreign Trade Zone 3, Inc.*, No. C 05-1161 SBA, 2009 WL 975786, at *1 (N.D. Cal. Apr. 9, 2009) ("Should a court find a party in contempt, it has discretion in deciding whether to impose sanctions").

In their Motion for Civil Contempt, Plaintiffs argue that USCIS was on notice that the Timeline Repeal Rule might be enjoined and, thus, should have anticipated the Maryland September 2020 PI Order. ECF No. 171 at 1-2. But this misses the point. The parties disagreed as to the implementation of the Maryland September 2020 PI Order and it was reasonable to seek

[4] It is true that, as of March 31, the compliance rate has not significantly improved. But that is because USCIS has to adjudicate "older" applications before turning its focus on "newer" ones.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

guidance from the district court under these circumstances. Moreover, although USCIS was on notice that CASA and ASAP were seeking to enjoin the Timeline Repeal Rule, USCIS did not know that the district court would grant partial relief, only enjoining certain elements of the Broader EAD Rules, along with the Timeline Repeal Rule, but limit its injunction to members of CASA and ASAP (including members who joined these organizations after the date of the injunction). ECF No. 170-2 ¶¶ 20. CASA and ASAP did not seek this relief in their Complaint and the district court's ruling raised a number of practical difficulties with implementation. Ex. 2 (describing these issues).

There is an additional problem with Plaintiffs' Motion for Civil Contempt: it relies heavily on declarations in which the declarant lacks any personal knowledge of the matter asserted. Under Rule 602, a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602; *see Barrowman*, 2017 WL 4161688, at *3 (explaining that under Rule 602 a witness "must do more than assert a fact as true to show that he possesses personal knowledge of that fact"). Here, Plaintiffs submitted declarations in which the declarants state what they have heard from other unnamed individuals who purportedly have knowledge of the facts asserted.[5] Thus,

[5] *See, e.g.*, ECF No. 172; Evall Decl., ¶ 33 ("We soon became aware that many ASAP and/or CASA members were reporting that their initial EAD applications had been pending for more than 30 days"); ECF No. 173, Torres Decl., ¶ 12 ("Of the members who have contacted CASA … most have reported"); ¶ 13 ("Members report …"); ECF No. 174, Reddy Decl., ¶ 20 (indicating what a "growing number" of members report); ¶ 24 (conveying what was reported to the declarant); ¶ 32 ("ASAP members, their attorneys, and ASAP staff have reported"); ¶ 34 ("a number of members have reported"); ECF No. 175, Theriot-Orr Decl., ¶ 12 ("During the first three weeks of January, I and other class counsel began to receive additional complaints …"); ¶13 ("During the same time period, I also heard multiple reports of class members whose applications were delayed beyond the 30 days"); ¶ 14 ("On January 21, 2021, I learned from ASAP that they had received widespread reports of delays …"); ¶ 21 (conveying what the declarant had heard from an attorney who in turn had heard from one of his or her unnamed clients); ¶ 22-24 (conveying what the declarant had heard from other attorneys). To be clear, the declarations also reference certain communications between counsel. Obviously, the declarants

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

on its face, these declarations consist of hearsay. As a result, these statements are inadmissible and are not an appropriate basis for holding USCIS in contempt or for awarding sanctions. *See Hexcel Corp.*, 681 F.3d at 1063. For these reasons, this Court should not find USCIS in contempt and should not order it to clear the current backlog within 90 days.

2. In the alternative, this Court should not award the relief requested by Plaintiffs.

The purpose of civil contempt is to "coerce obedience to a court order . . . ." ECF No. 171 at 12 (citing *Gen. Signal Corp.*, 787 F.2d at 1380); *Turner v. Rogers*, 564 U.S. 431, 441 (2011) ("Civil contempt . . . seeks only to coerce the defendant to do what a court had previously ordered him to do") (citations and quotations omitted). Here, Plaintiffs improperly seek to use a Motion for Civil Contempt to broaden the scope of this Court's injunction and impose additional requirements on USCIS beyond what this Court ordered and the parties agreed to in their Implementation Plan. ECF No. 171 at 10-12. This is not appropriate, as more fully set forth below:

Compliance Rate – This Court should deny Plaintiffs' request for an order specifying a rate of compliance. ECF No. 171 at 10. This issue has already been briefed by the parties and, as the Court recognized, "adding such a provision to the injunction when the court has already specified that Defendants are to submit status reports at regular intervals would be an improper modification to the court's injunction." ECF No. 145 at 5. As this Court previously explained, the "adoption of specific rates of compliance would not be appropriate because such rates would invite the possibility of arbitrary enforcement actions that would fail to take into account the reasonable steps that Defendants take to comply with the court's order." *Id.* at 6. There is no basis for seeking reconsideration of this Court's March 20, 2019 order through filing a Motion for Civil Contempt. Rather, if Plaintiffs want to modify this Court's permanent injunction they

---

have personal knowledge as to communications they participated in. But to the extent Plaintiffs ask this Court to rely on facts contained in the communications that the declarant has no personal knowledge of, this is improper under Rule 602.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

should file a motion for modification, assuming they meet the heavy burden on demonstrating a significant change in law or fact. *See id*. (describing this standard).

Monthly Reporting – This Court previously ordered USCIS to provide six-month compliance reports, ECF No. 127 12, and USCIS further agreed to provide additional monthly reports to Plaintiffs' counsel through the date of the filing of the first six-month report with the Court, ECF No. 134-1 ¶ 3(d), which was filed on January 25, 2019. ECF No. 144. USCIS has complied with these obligations and advises that it will provide to Plaintiffs' counsel additional reports, in the same format as the March 10 report, for April and May.[6]

Receipt Notices – Plaintiffs request that this Court order USCIS to provide receipt notices to class members within 48 hours. ECF No. 171 at 12. The issuance of receipt notices is neither addressed in 8 C.F.R. § 208.7(a)(1) nor this Court's injunction and is outside of the scope of the current litigation. Thus, this Court should not impose this additional obligation on USCIS. Moreover, beginning on February 19, 2021, USCIS undertook action to issue receipt notices more promptly. *See* Ex. 5 ¶ 3. Additionally, Plaintiffs' request for issuance of receipt notices relies heavily on hearsay statements contained in the Torres, Reddy, and Theriot-Orr Declarations. *See, e.g.*, ECF No. 173, Torres Decl., ¶¶ 12-14; ECF No. 174, Reddy Decl., ¶¶ 24, 32, 34; ECF No. 175, Theriot-Orr, ¶¶ 21-24; ECF No. 171 at 6.[7] As set forth above, under

[6] The Third Status Report was submitted to this Court on February 21, 2020, ECF No. 148, meaning the Fourth Status Report was due August 21, 2020. This report was emailed to Plaintiffs' counsel on August 10 (in advance of the August 21, 2020 deadline) but not filed with the Court until September 10, 2020. ECF No. 167. Plaintiffs do not argue that this technical violation is a basis for holding the Government in contempt, nor can they because they were not prejudiced by the September 10 filing given that (i) they received the report before the deadline, and (ii) they concede that the Government was in substantial compliance at the time. *See* ECF No. 171 1.

[7] This request is also based on the Huebner Declaration, ¶ 9 ("Until around late February or early March of this year, the majority of our clients' pending I-765 applications had not received receipt notices"). ECF No. 176. Although this statement is not necessarily, on its face hearsay, it is unclear how the declarant has personal knowledge of the matter asserted. In any event, USCIS

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

Federal Rules of Evidence 602, these statements are not an appropriate basis for awarding additional relief. *Barrowman*, 2017 WL 4161688, at *3. For these additional reasons, this relief is not warranted.[8]

Dispute Resolution Mechanism – Plaintiffs request that this Court modify the agreed upon dispute resolution mechanism contained in the Implementation Plan. ECF No. 124 at 6, 12. For the reasons previously stated, a motion for civil contempt is not the proper mechanism for seeking this relief. Moreover, while there may have been instances of USCIS representatives providing incorrect information to class members in telephone calls, ECF No. 171at 6, USCIS has already taken steps to address this problem. *See* Declaration of Bret Gregg, Ex. 7 ¶¶ 4-6. USCIS will take additional remedial action as necessary.

CONCLUSION

WHEREFORE, this Court should deny Plaintiffs' Motion for Civil Contempt.

took action on February 19, 2021 to address the delays in issuing receipt notices referenced in this declaration. *See* Ex. 5 ¶ 3.

[8] There appears to be at least some instances in the delay in obtaining a receipt notice is the result of the applicant not complying with the filing instructions. *See* Ex. 5 ¶ 3.

U.S. DEPARTMENT OF JUSTICE
P.O. BOX 868, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 532-4107

DATED April 12, 2021

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

JEFFREY S. ROBINS
Deputy Director

By: *s/ Aaron S. Goldsmith*
Aaron S. Goldsmith
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Washington, D.C. 20044
Tel.: (202) 532-4107
Email: aaron.goldsmith@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

By: *s/ Aaron S. Goldsmith*
Aaron S. Goldsmith
Senior Litigation Counsel
United States Department of Justice

Exhibit E

To Declaration of Zachary Manfredi in Support of Plaintiffs' Motion for Summary Judgment or, in the Alternative, to Modify Preliminary Injunction

CASA de Maryland, Inc. v. Mayorkas, No. 8:20-cv-2118

The Honorable James L. Robart

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Wilman GONZALEZ ROSARIO, *et al.,* Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al*. Defendants.	CASE NO. 2:15-cv-00813-JLR **DECLARATION OF ERNEST DESTEFANO**

I, Ernest DeStefano, declare and say:

1) I am the Chief of the Office of Intake and Document Production (OIDP).

2) In my position, I oversee the design and maintenance of USCIS forms for internal and public use, production of secure identification documents, and receipt of USCIS applications and any associated filing fees at three lockbox locations.

Issuance of Receipt Notices

3) USCIS has experienced delays in the receipting of some applications for employment authorization based on a pending Form I-589, Application for Asylum and for Withholding of Removal (called a "(c)(8) application" because of its eligibility category under 8 CFR 274.12(c)(8)), due to a myriad of factors:

- In accordance with USCIS filing instructions for Form I-765, Application for Employment Authorization, applicants may apply by mailing their (c)(8) applications through the U.S. Postal Service to the designated PO Box or by using FedEx, UPS, and

DHL to deliver such applications to the Dallas Lockbox street address. Previously, when (c)(8) applications arrived at the Dallas Lockbox, USCIS recognized that they were not easily distinguishable from the larger I-765 application pool. USCIS made modifications to the I-765 address instructions on its website and engaged in discussions with the Lockbox servicer to rectify this issue.

- Due to the COVID-19 contagion, employees taking annual and sick leave, and staff being quarantined as a result of diagnosis/exposure to COVID-19 and contact tracing, and social distancing measures put in place, the Lockbox cannot schedule the same levels of staffing that it could prior to mid-March 2020. Reduced staffing levels has decreased processing capacity.
- Under the Service Level Agreement with the contracted servicer who opens mailings at Lockbox facilities, the contracted servicer processes mailed applications within three business days of receipt at the Dallas Lockbox. After the servicer processes (c)(8) applications, OIDP manually reviews each initial (c)(8) application submitted without a biometrics fee for membership in CASA or ASAP to determine whether the applicant is a *Rosario* class member, among other things. Currently, this process, from received date to completion of OIDP's manual review takes approximately six business days. As briefly mentioned in the previous paragraph, another challenge contributing to delays is the significant increase in (c)(8) applications that USCIS must manually review since the Fall 2020 as part of the implementation of the preliminary injunction issued in *Casa de Maryland. v. Wolf*, No. 8:20-cv-02118-PX (D. Md. Sep. 11, 2020). Manual review requires evaluating applicants' class membership evidence and tracking the data on

spreadsheets. Prior to the Fall 2020, USCIS manually reviewed approximately 200-500 (c)(8) applications per day.

- Since the Fall 2020, USCIS manually reviews on average anywhere between 1,500-2,000 (c)(8) applications each day. This increase is due to the exemption from the biometric services fee and the 30-day processing requirement available to *CASA/ASAP* class members.
- Despite the instructions on the USCIS website, which before and after the February 19, 2021 website instruction updates directed (c)(8) applicants to mail their filings to the Dallas Lockbox specifically, some (c)(8) applicants do not file with the USCIS Dallas Lockbox, as required for (c)(8) applications, and/or fail to include the appropriate ATTN label for those mailed via courier. Applications filed at the wrong Lockbox or without the proper attention labels will experience receipting delays that are not caused by USCIS.

Improvement Plan

4) USCIS has implemented several process improvements that will lead to more efficient processing of (c)(8) applications. In addition to working towards reducing the current backlog of pending applications, USCIS is currently engaged in the following process improvement efforts:

5) On February 19, 2021 USCIS updated the mailing instructions on its website (https://www.uscis.gov/i-765-addresses). The website now clarifies that certain I-765 applications sent via courier to the Dallas Lockbox must contain the "Attn: I-765 C08 (650888)" label. USCIS made this change to improve the agency's ability to extract (c)(8) applications from the larger pile of incoming I-765 applications and to prioritize them for processing.

6) USCIS is expanding its Lockbox space to allow for more Lockbox employees and contractors to process applications while keeping safe social distancing measures in place. This is in addition to measures already taken to relocate certain functions off the production floor to increase available space. USCIS has also adjusted staffing shifts from three 8-hour shifts, five days per week, to two 10-hour shifts, six days per week, and runs Sunday overtime shifts.

7) USCIS is also engaged in ongoing discussions with the Lockbox service provider to improve their ability to identify, scan, and enter the data of (c)(8) applications after they arrive at the Lockbox. This includes regularly refining internal processes to increase efficiency, such as reconciling against additional reports and addressing gaps and training/coaching needs.

8) USCIS has also implemented several measures aimed to improve information directed towards (c)(8) applicants. OIDP added language specific to *CASA/ASAP* and *Rosario* class members to receipt notices and the online Fee Calculator, which assists applicants in filing correctly so that they may be quickly identified as *CASA/ASAP* members. Scripts used by the USCIS Contact Center to respond to (c)(8) case processing inquiries have been updated, and OIDP regularly coordinates with the External Affairs Directorate to revise language on the USCIS website and to provide language for public engagement stakeholder so that applicants have clear information on how to properly file as *CASA/ASAP* members. OIDP's customer service team is now better able to recognize email inquiries from the affected population when the terms "CASA/ASAP" or "Rosario" are included in the subject line.

9) All I-765 applicants are required to submit two passport-style photographs. Currently, OIDP ships (c)(8) initial applicant photos to the Texas Service Center, where they must be located and manually scanned and uploaded prior to proceeding to the next phase of processing.

USCIS is improving this process in May 2021 by transitioning responsibility for I-765 (c)(8) initial photo scanning to OIDP, relieving the Texas Service Center from performing this function.

10) In an effort to reach optimal compliance and reduce delays that could contribute to the current backlog, USCIS is continuing to work to identify areas for improvement at the Dallas Lockbox for efficiently processing incoming (c)(8) applications.

11) I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of April, 2021, at Camp Springs, MD.

Ernest DeStefano

Ernest DeStefano
Chief, Office of Intake and Document Production
U.S. Citizenship and Immigration Services
Camp Springs, MD