IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AFGHAN AND IRAQI ALLIES UNDER SERIOUS THREAT BECAUSE OF THEIR FAITHFUL SERVICE TO THE UNITED STATES, ON THEIR OWN AND ON BEHALF OF OTHERS SIMILARLY SITUATED, Plaintiffs, – against – ANTONY BLINKEN, *et al.*, Defendants.	Case No. 18-cv-01388-TSC

PLAINTIFFS' REPLY IN SUPPORT OF THEIR
CROSS-MOTION TO ENFORCE AND CLARIFY THE COURT'S ORDERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Defendants continue to obscure the nature of this case and the relief to which Plaintiffs are entitled: This is a lawsuit by a class of SIV applicants who seek judicial intervention under the Administrative Procedure Act to ensure that their delayed applications are concluded promptly. Defendants do not deny that thousands of class members still await final decisions, including thousands who were beneficiaries of the adjudication plan that the Court ordered in 2020. Nor do they provide any indication that if and when this Plan—which the Court has since stayed—is restored, Defendants will properly implement it. Defendants would have the Court believe that what happens to these specific applicants does not matter if Defendants can point to efforts to improve the SIV program on the whole. But that is not how the law of unreasonable delay works.

Plaintiffs have filed their cross-motion to enforce and clarify the Court's orders in further pursuit of prompt, final decisions on class members' applications. W., for example, one of thousands of the Plan's beneficiaries whose applications remain pending, has been in post-interview administrative processing for over ten months (i.e., three hundred days), with no assurances of when that process will be resolved. *See* Greene Decl. Ex. 24 ("W. Decl.") ¶ 27, ECF No. 169-25; *see also* Greene Decl. Ex. 26 ¶¶ 24-25, ECF No. 169-27 (Iraqi applicant who has been in administrative processing since 2016). In the meantime, W. and his family "live in fear and uncertainty," with their "lives in danger every day that [they] remain in Afghanistan." W. Decl. ¶¶ 28, 33. Defendants' most recent public quarterly report that—notwithstanding the delays W. is facing—Defendants completed administrative processing for a collection of other applicants in an average of forty-nine days is cold comfort; the public quarterly reports, unlike the Court orders W. seeks to enforce, confer no rights. *See* Dep'ts of State and Homeland Sec., *Report to Congress on Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program* 5 (2022), https://travel.state.gov/content/dam/visas/SIVs/Report%20of

%20the%20Afghan%20SIV%20Program_FY2022%20Q2.pdf (statistic for Afghan applicants who completed administrative processing between January and March 2022). For their part, SIV applicants who have entered the class since the Plan was proposed—including S., who has been waiting for well over nine months simply to receive a case identification number at the first stage of the process, *see* Greene Decl. Ex. 25 ("S. Decl.") ¶¶ 4-6, ECF No. 169-26—need to understand the scope of the Court's summary judgment order so that they may obtain or seek judicial recourse for the unreasonable delay they too are suffering.

The Court should lift the stay and enforce and clarify its orders to restore relief to the Plan's beneficiaries, ensure that the purpose of the Plan is fulfilled, and allow those who have entered the class since May 21, 2020 (and thus are not covered by the Plan) to obtain or at least seek relief. Referral to a magistrate judge will ensure that any new plans are efficiently developed and reliably implemented and thus mitigate further delay and harm to the class.

ARGUMENT

I. THE COURT SHOULD GRANT PLAINTIFFS' ENFORCEMENT MOTION TO PROTECT THE BENEFICIARIES OF THE PLAN.

Plaintiffs have sought enforcement of the Court's orders to ensure that once the Plan is restored, the Plan's beneficiaries—members of the class as of May 21, 2020, when the Plan was proposed—receive the full benefits of the Court's orders. *See* Pls.' Cross-Mot. to Enforce & Clarify the Court's Orders 41-43, ECF No. 169 ("Pls.' Cross-Mot."). Defendants do not dispute that thousands of the Plan's beneficiaries still await final adjudication of their applications, that Defendants made numerous tracking and reporting errors while the Plan was in place that led to further delays, or that the gap in reporting due to the stay will impede the ability of the Court and Plaintiffs to measure Defendants' progress when the Plan is restored. *Compare* Pls.' Cross-Mot. 7-16, 41-43 *with* Defs.' Opp'n. to Pls.' Cross-Mot. 36-40, ECF No. 173 ("Defs.' Opp."). Instead,

Defendants seek to delay resolution of Plaintiffs' motion to enforce with baseless arguments that contradict their arguments on appeal and argue, again without support, that if the Court reaches the merits it should deny Plaintiffs' motion notwithstanding the problems Plaintiffs raise. The Court should reject these arguments and grant Plaintiffs' enforcement motion.

A. Defendants' Attempt to Delay Consideration of Plaintiffs' Enforcement Motion Is Baseless.

Having represented to the D.C. Circuit that this Court "remains available to adjudicate [Plaintiffs'] motion to enforce," Defendants now argue that this Court may not adjudicate it. *Compare* Defs.-Apellees' Opp'n. to Mot. for Summ. Reversal 6, D.C. Cir. Doc. No. 1954423 *with* Defs.' Opp. 37-39. In fact, nothing precludes this Court from deciding Plaintiffs' enforcement motion. *See* Pls.' Cross-Mot. 41 n.18.

Defendants first take issue with the timing of Plaintiffs' motion, contending without citing any authority that Plaintiffs should have requested that the Court lift the stay before filing their motion to enforce. *See* Defs.' Opp. 38. But Plaintiffs have requested that the Court lift the stay of the Plan and their ability to enforce it *nunc pro tunc* as of June 24, 2022, the date of their filing. *See* Pls.' Cross-Mot. 41 n.18; Proposed Order 1-2, ECF No. 169-28. And even if Plaintiffs had not made this request, the Court would have the authority to grant such relief *sua sponte*, as the court did in *Marsh v. Johnson*, 263 F. Supp. 2d 49 (D.D.C. 2003); there, the court considered two motions filed by the defendant, even though the defendant never asked the court to lift an existing stay of proceedings. *See id.* at 52-53 (*sua sponte* lifting the stay *nunc pro tunc* and explaining that the stay "d[id] not pose a significant obstacle"). Defendants' own choice to delay proceedings by seeking leave to respond to a stayed order of this Court through a separate filing—while they developed their litigation strategy and worked on declarations—does not amount to contrary authority. *See* Defs.' Opp. 38 (citing Defendants' approach "when they wished to respond to the

Court's minute order on mooting events"); *see also* Joint Status Report 2-3, 11, 19-21, May 13, 2022, ECF No. 162 (ultimately conceding that the developments Defendants sought leave to bring to the Court's attention did not actually "rise to the level of mooting the case").[1]

Defendants next point to Plaintiffs' pending appeal to argue that the Court is barred from lifting the stay. *See* Defs.' Opp. 38-39. But Plaintiffs do not ask this Court to modify the April 28, 2022 order from which they have appealed—which denied their motion to lift the stay *nunc pro tunc* as of March 17, 2022 and granted Defendants' motion to extend the stay "until further order of the court." Minute Order, Apr. 28, 2022; *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (providing that a notice of appeal divests the district court of control only "over those aspects of the case involved in the appeal"). Rather, they request that this Court exercise its authority, explicitly reserved by the April 28, 2022 order, to issue a "further order" lifting the stay in light of events that have occurred since that order was entered. *See* Pls.' Cross-Mot. 41 n.18 (pointing to Defendants' subsequent filings); *cf. Decatur Liquors, Inc. v. District of Columbia*, No. Civ.A 04-1971(RMC), 2005 WL 607881, at *2-3 (D.D.C. Mar. 16, 2005) (acknowledging that a district court could change course notwithstanding an appeal of its "initial determination" in case of "changed circumstances"). A further order of this Court lifting the stay *nunc pro tunc* as of June 24, 2022, as Plaintiffs have requested, would not prevent the D.C. Circuit from evaluating the propriety of the Court's April 28, 2022 decision to extend the stay and deny Plaintiffs' request for *nunc pro tunc* relief as of March 17, 2022: the question on appeal would remain whether the stay

[1] Further, Defendants themselves took this approach only selectively, moving for a stay immediately notwithstanding that the stayed order to which they sought leave to respond requested information on "any portion or portions of this case which the parties wish[ed] to stay for any reason." *Compare* Defs.' Mot. for Leave 1, ECF No. 155 ("Defendants also request that the Court continue the stay of litigation and the Approved Adjudication Plan while it reviews these submissions and until it orders otherwise."), *with* Minute Order, May 27, 2021.

was properly in place from March 17, 2022 through June 23, 2022, and whether Defendants should be required to file a progress report for that period. Nor, as Defendants seem to recognize at least with respect to their own motion to vacate or modify, would a ruling by this Court on the nature of the stayed relief interfere with the D.C. Circuit's evaluation of the propriety of the initial stay determination. *Contra* Defs.' Opp. 38.[2]

Even if Plaintiffs' appeal did divest this Court of the power to lift the stay immediately, Defendants are incorrect that the Court could "at most" deny Plaintiffs' request without prejudice or defer it. *See* Defs.' Opp. 39. Under Federal Rule of Civil Procedure 62.1, the Court may, and should, exercise a third option: namely, to "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a)(3). Plaintiffs would then be required to "promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1" and this Court would be permitted to decide the motion if the D.C. Circuit remanded for that purpose. Fed. R. Civ. P. 62.1(b), (c).

The Court should lift the stay and decide Plaintiffs' enforcement motion.

B. Enforcement of the Court's Orders Is Necessary to Ensure that Members of the Class as of May 21, 2020 Receive the Full Benefits of Those Orders.

Upon lifting the stay, the Court should enforce its orders to ensure that the Plan's beneficiaries receive not only some relief, but the full benefits of the Court's orders. Defendants do not grapple with the substance of Plaintiffs' arguments, including Defendants' numerous violations of the Court's orders and the harms of the stay. *See* Pls.' Cross-Mot. 7-16, 41-43. Rather,

[2] Plaintiffs disagree with Defendants' contention on appeal that the D.C. Circuit lacks jurisdiction, but if Defendants are correct, this would be yet another reason their argument here is meritless. *Compare, e.g.*, Defs.-Apellees' Mot. to Dismiss, D.C. Cir. Doc. No. 1959209 (arguing that the Court's order is not subject to appeal), *with* Defs.' Opp. 39 (acknowledging that if the order was not properly appealed, this Court would not be divested of jurisdiction but suggesting that this is a "narrow exception[]" that does not apply).

Defendants argue that the Court should deny Plaintiffs' motion for unsupported technical reasons and betray their own misunderstanding of the nature of this unreasonable delay lawsuit and the Court-ordered relief. *See* Defs.' Opp. 36-40.

1. Relief Is Warranted Regardless of the Standard the Court Applies.

As Plaintiffs explained, and as Defendants do not dispute, the Court has inherent authority to issue further orders to enforce a prior injunction. *See* Pls.' Cross-Mot. 41-42; Defs.' Opp. 36-38. Having argued at the threshold that the Court may not consider Plaintiffs' motion because it is an enforcement motion barred by the Court's stay, Defendants change tack for purposes of the merits. They contend that Plaintiffs are not actually seeking enforcement but rather modification, that Rule 60(b) applies,[3] and that the Court should deny Plaintiffs' motion without considering its substance because Plaintiffs supposedly did not put a Rule 60(b) motion before the Court. *See* Defs.' Opp. 37-40; *see also* Joint Stipulation ¶ 8, Oct. 19, 2021, ECF No. 144 ("Oct. 2021 Joint Stip.") (staying only Plaintiffs' ability to enforce).

Plaintiffs are seeking enforcement of the Court's orders. *See Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 985 F. Supp. 2d 23, 28 n.4 (D.D.C. 2013) (declining to apply Rule 60(b)(5) because plaintiff did not seek "relief" from the Court's order, *see* Fed. R.

[3] This is also inconsistent with Defendants' position that Rule 60(b) does not govern their own request for relief from the Court's orders because the orders are subject to review under Rule 54(b). *See, e.g.*, Defs.' Opp. 4-7, 22. Defendants do not acknowledge this and instead accuse Plaintiffs of being inconsistent in light of Plaintiffs' position in opposition to Defendants' motion. *See* Defs.' Opp. 39. But contrary to Defendants' suggestion, there is no tension in Plaintiffs' position that developments since the Court ordered the Plan—namely, numerous violations of the Court's orders and the nearly year-long stay of the Plan—warrant further relief in their favor, and that the "key facts remain the same" when it comes to the Court's liability analysis under *TRAC*, *see* Pls.' Cross-Mot. 28; *see also id.* at 19-27 (explaining why, similarly, Rule 60(b) relief is not warranted in Defendants' favor). Whether something is a "significant" change or "key" fact cannot be determined in the abstract; it has everything to do with the specific legal question the Court is addressing. *See* Pls.' Cross-Mot. 28 (noting that whether something is "significant" depends on "the extent to which it is material to the key questions in dispute").

Civ. P. 60(b), but rather "to ensure that [the order] achieve[d] its intended results"). But as Plaintiffs previously noted, *see* Pls.' Cross-Mot. 42 n.19, even if their request for supplemental relief is construed as a request for a modification under Rule 60(b)(5) rather than as a request for enforcement, relief is warranted to "prevent evasion and ensure effectuation of the [Court's] order[s]" given Defendants' violations of the Court's orders and the lengthy stay of the Plan. *Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018). Defendants provide no authority or explanation for why Plaintiffs' framing of their motion is insufficient to bring their challenge before the Court. *Contra* Defs.' Opp. 39-40 (holding up Defendants' deficient request, *see* Pls.' Cross-Mot. 19-27, as a supposed model of a "properly supported motion to modify"). Indeed, the Court could analyze Plaintiffs' motion under Rule 60(b)(5) even if Plaintiffs had not specifically cited that rule. *See, e.g.*, *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 226 (D.D.C. 2011) (construing Rule 54(b) motion as Rule 60(b) motion when Rule 60(b) mentioned on reply); *Comput. Pros. for Soc. Resp. v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996) (observing that a court can construe an untimely Rule 59(e) motion as a Rule 60(b) motion if it "states grounds for relief under the latter rule"). Regardless of the standard that the Court applies, the Court should grant Plaintiffs' motion.

2. Defendants' Violations of the Court's Orders and the Length of the Current Stay Provide Ample Grounds to Grant Plaintiffs' Enforcement Motion.

Plaintiffs have pointed to numerous requirements of the Court's orders that Defendants have violated because of their deficient tracking and reporting. These include: (1) the Court's summary judgment order that the Plan be a vehicle for "promptly processing and adjudicating the applications of current class members," ECF No. 76 ("Summ. J. Order"), at 1; (2) its April 2020 enforcement order that the Plan provide "[a] clear basis by which the court and Plaintiffs can evaluate Defendants' progress in remedying the unreasonable delay," ECF No. 106 ("Apr. 2020

Order"), at 2; and (3) its June 2020 order not only that Defendants meet specific performance standards, but also that they submit progress reports describing their performance by specific deadlines, *see* ECF No. 113-1 ("Approved Adjudication Plan"), at 7-8. *See* Pls.' Cross-Mot. 7-11, 42-23. And Plaintiffs have explained that an accounting is necessary to mitigate the harms of the gap in reporting caused by the stay of the Plan and to ensure that the Court and Plaintiffs can in fact "evaluate Defendants' progress." *See* Pls.' Cross-Mot. 41-42; *see also* Approved Adjudication Plan 7-8 (presuming regular reports).

Defendants do not dispute the facts that Plaintiffs present. Instead, they apparently rely on the stay of the Plan to assert that Plaintiffs' evidence is "stale" and that Defendants are not "currently violating" any specific provision. Defs.' Opp. 33, 40 n.2; *see also id.* at 24, 37. But past violations provide ample support for enforcement of court orders. *See, e.g.*, *Nat'l L. Ctr. on Homelessness & Poverty v. U.S. Veterans Admin.*, 765 F. Supp. 1, 7 (D.D.C. 1991) (citation to three instances in which injunction was violated supported enforcement). And Defendants point to no intervening action or event that would remedy the problems that Plaintiffs cite. *See, e.g.*, Pls.' Cross-Mot. 8, 30, 38 (noting that "Defendants freely admit that they have not developed a way to tell how long they take to adjudicate any SIV application"); Defs.' Opp. 33 (claiming that Defendants do not have a way to track and report on processing times across government-controlled stages). Defendants' callous dismissal as "speculation" of Plaintiffs' concern that, absent enforcement, additional applications might be lost, *see* Defs.' Opp. 37, ignores Defendants' history of mismanagement, including their ongoing failure to acknowledge applications filed as long ago as the summer of 2021, and goes to the heart of the problem: when the government controls a process, applicants and their counsel depend on the government to keep sound records and provide meaningful and accurate reporting. *See* Pls.' Cross-Mot. 43; S. Decl. ¶¶ 4-7, 9 (no

case number for applications filed in August 2021); Ex. F to Br. of Ass'n of Wartime Allies & Veterans for Am. Ideals as Amici Curiae ("Lucier Decl.") ¶¶ 12-14, ECF No. 171-1, at 63 (no case numbers for applications filed as early as July 2021).

Defendants' further contention that certain general "developments" since the Plan was entered in 2020 preclude enforcement represents either a deliberate effort to confuse the issue or a fundamental misunderstanding of the nature of the Court's orders, including the Plan. *See* Defs.' Opp. 37-38 ("developments" like "many improvements and resource investments" "underscore that Plaintiffs have not shown any noncompliance"). Plaintiffs are SIV applicants who have sought to vindicate their rights under the Administrative Procedure Act to decisions on their specific applications following unreasonable agency delay. The Court's orders and the Plan focus on bringing those already unreasonably delayed applications to a conclusion by setting performance standards for the remainder of Defendants' processing. The thirty-one Iraqi class members whose cases were lost were entitled to, and deprived of, the benefits of the Plan's performance standards. *See* Pls.' Cross-Mot. 11 (citing Defendants' failure to account for these class members across all four reporting cycles). The applicants whose locations and case statuses Defendants incorrectly recorded were entitled to, and deprived of, the benefits of the Plan's performance standards. *See* Pls.' Cross-Mot. 10 (citing Defendants' erroneous assertion that a class member's I-360 petition had been revoked and their confusion regarding the location of applicants and their interviews). And unless the Plan is restored, Defendants provide an accounting, and Defendants accurately track and report on their performance, the Plan's beneficiaries will have no way to ensure that their applications will be concluded promptly. The Court should grant Plaintiffs' enforcement motion.

II. THE COURT SHOULD GRANT PLAINTIFFS' CLARIFICATION MOTION AND, IF APPROPRIATE, ENFORCE ITS SUMMARY JUDGMENT ORDER TO ENSURE THAT THE REMAINING CLASS MEMBERS OBTAIN, OR AT LEAST ARE ABLE TO SEEK, RELIEF.

The Court should also clarify its summary judgment order so that the remaining members of the class—that is, Afghan SIV applicants[4] who entered the class after May 21, 2020 and are thus not beneficiaries of the Plan—may obtain, or at least seek, relief. *See* Pls.' Cross-Mot. 43-45. Plaintiffs represent a certified class of "*all people* who have (1) applied for an Afghan or Iraqi SIV . . . and (2) whose applications have been awaiting government action for longer than 9 months." Order, Feb. 5, 2020, ECF No. 89 ("Class Certification Order") (emphasis added). More recent applicants continue to experience egregious delays, including waits exceeding nine months to receive even preliminary review of their applications. *See* Pls.' Cross-Mot. 29-30 & n.11; S. Decl. ¶¶ 4-7, 9 (reporting applicants' wait of over nine months without a case number); Lucier Decl. ¶¶ 9-16 (describing egregious delays and agency carelessness). But anyone who entered the class after May 21, 2020 is not benefitting from the Court's injunctive relief, which required Defendants to propose a plan for "promptly processing and adjudicating the applications of current class members," Summ. J. Order 1; the Plan that the parties proposed and that the Court ordered applies only to individuals who were "current" members of the class on the date the Plan was proposed.

Defendants' arguments over the past several months and the text of the Court's summary judgment order belie their contention that Court's order is unambiguous and should not be clarified. *Contra* Defs.' Opp. 33-36. If the Court granted relief to all members of the certified class as they became "current class members," the Court should clarify this and enforce the summary judgment order by directing Defendants to propose a supplemental plan. If the Court did not grant

[4] The Iraqi program closed to new applicants in 2014. *See* Pls.' Cross-Mot. 14 & n.5.

relief to applicants who became "current class members" after the Plan was proposed, the Court should clarify this as well so that those applicants may seek relief.

A. The Court Should Clarify the Meaning of "Current Class Members."

As Defendants do not dispute, "courts in this Circuit have encouraged parties to file motions for clarification when they are uncertain about the scope of a ruling." *All. of Artists & Recording Cos. v. Gen. Motors Co.*, 306 F. Supp. 3d 413, 418 (D.D.C. 2016); *see* Defs.' Opp. 34. Contrary to Defendants' assertion, *see* Defs.' Opp. 36, Plaintiffs do not seek to "expand the class," the scope of which is defined by the Court's class certification order, *see* Fed. R. Civ. P. 23(c)(1)(B), but rather to avail themselves of this well-established clarification procedure to understand the relief that the Court's summary judgment ruling confers. *See All. of Artists & Recording Cos.*, 306 F. Supp. 3d at 418-19 ("entertaining such motions seems especially prudent if the parties must implement the ruling at issue at subsequent stages of the litigation").

The sense in which the Court used the adjective "current" is not clear from the Court's summary judgment order, which directed Defendants to, "within thirty days of the [future] resolution of the class certification dispute," "submit a plan for promptly processing and adjudicating the applications of current class members." Summ. J. Order 1; *see also* Pls.' Cross-Mot. 43-45. Because of the limitations of Defendants' recordkeeping, the Plan that the parties ultimately proposed relied on a series of proxies to identify a fixed group of "current class members" as of the date of the proposal. *See* Pls.' Cross-Mot. 44 n.20. But the Court, which included no cutoff date in the class definition, *see* Class Certification Order, could equally have used the word "current" not to impose a cutoff date for relief but to make clear that the plan was to remedy unreasonable delay only once a person became a "current class member" (and not to proactively minimize delay for a person at risk of becoming a class member in the future). Contrary to Defendants' suggestion that the parties have not previously acknowledged this ambiguity, *see*

Defs.' Opp. 33, the parties highlighted the disconnect between the Plan's scope and the class definition when embarking on settlement to "pursue the possible resolution of this case." Oct. 2021 Joint Stip. 3. Then, they informed the Court that any such resolution "would include, among other things, a revised or new plan . . . for the prompt processing and adjudication of *all* class members' SIV applications." *Id.* (emphasis added); *see also* Pls.' Cross-Mot. 44.

Defendants argue that the summary judgment order is unambiguous and should not be clarified given the parties' proposal, and the Court's approval, of the Plan. *See* Defs.' Opp. 33-35. But what an order means is not up to the parties or dependent on later events; it is a function of the language of the order and the Court's intent when it issued that order. *See, e.g.*, *All. of Artists & Recording Cos.*, 306 F. Supp. 3d at 419 (focusing on the language of the Court's ruling); *Select Specialty Hosp.-Denver, Inc.*, No. 10-1356 (BAH), 2021 WL 4262652, at *7 (D.D.C. Sept. 20, 2021) (noting that "the court is generally the authoritative interpreter of its own remand" and is guided by the "text of the Order" and "its relevant opinions" (cleaned up)); *see also Kirwa v. U.S. Dep't of Def.*, 315 F. Supp. 3d 266, 268 (D.D.C. 2018) ("[T]he fact that defendants have to expend resources to identify and track class members is not a reason to exclude class members who clearly fall within the definition of class."). And contrary to Defendants' assertion, Plaintiffs' decision to pursue clarification now because of the practical problems the ambiguity is creating as new applicants enter the class does not mean that clarifying the scope of the term "current class members" in the Court's order requires the Court to grapple with new facts. *See N. Air Cargo v. U.S. Postal Serv.*, 789 F. Supp. 2d 120, 123 (D.D.C. 2011) (declining to clarify when "the issue presented by defendant would require the Court to entertain new factual and legal issues" (internal quotation marks omitted)); *contra* Defs.' Opp. 35 (citing *N. Air Cargo*). The Court should clarify its summary judgment order so that class members who are not beneficiaries of the Plan may obtain

relief as provided in that order, or at least seek relief through other means if the Court did not intend to include them within the order's scope.

B. Defendants' Request for Relief Reflects Their Own Confusion Regarding the Scope of the Court's Order.

In fact, Defendants themselves seem to find the Court's summary judgment order ambiguous because their request for relief—in contradiction with their position on Plaintiffs' cross-motion—presupposes that the order was not limited to a fixed group of applicants. Defendants' principal request is for reconsideration and vacatur on the asserted basis that "[w]hatever might have been the case in 2019 and 2020, the[ir] attached declarations show that Defendants . . . are moving as expeditiously as possible." Defs.' Mot. for Relief 2, ECF No. 163; *see also, e.g.*, Defs.' Opp. 11-12 (urging the Court to overlook delays suffered by class members as of May 21, 2020, "whose applications have been pending the longest," and to focus instead on "the broader SIV population"). And as Plaintiffs have explained, this argument is baseless because regardless of the scope of the order—and even if Rule 54(b) applies—none of the more recent developments that Defendants cite require the Court to disturb its *TRAC* analysis and finding of unreasonable delay. *See* Pls.' Cross-Mot. 27-41.

But if the only applicants at issue are ones who had already experienced unreasonable delay warranting judicial intervention as of 2020, Defendants' arguments make even less sense. Defendants point to no authority for the illogical proposition that delay that was unreasonable in 2019 and 2020 can become reasonable based on later conduct and after applicants have waited for even longer. Rather, courts undertake the *TRAC* analysis to decide when further voluntary efforts by the agency are "too late" and thus "judicial intervention is needed" to see a matter to its conclusion. *See In re Pub. Emps. for Env't Resp.*, 957 F.3d 267, 273 (D.C. Cir. 2020) (explaining that "[a]t some point, promises are not enough"); *see also Telecomms. Rsch. & Action Ctr. v.*

F.C.C. ("*TRAC*"), 750 F.2d 70, 80-81 (D.C. Cir. 1984) (even without reaching the issue of unreasonable delay, concluding that prior "delays are serious enough for [the court] to retain jurisdiction over this case until final agency disposition" and requiring a plan and regular progress reports).

Defendants' characterization of the facts similarly reflects confusion regarding whose SIV applications matter. For example, Defendants tout a July 2022 policy according to which certain applicants will no longer file an I-360 petition with USCIS but instead submit a petition to the State Department in connection with their application for Chief of Mission approval. *See, e.g.*, Defs.' Opp. 1-3. Describing its scope, Defendants assert that the policy affects all but "a small subset of applicants with applications pending before July 20, 2022," and imply that adjudication of I-360 petitions is now a "nonexistent case-processing stage." *Id*. at 3, 26; *see also id.* at 15-16, 18. But if the Court's order applies only to class members as of May 21, 2020—as Defendants contend that it unambiguously does—the supposedly "small subset" of applicants who will continue to file I-360 petitions is largely the subset that matters when it comes to Defendants' request for relief. According to State Department guidance, any applicant who received Chief of Mission approval before July 20, 2022 either must or may continue to file an I-360 petition. *See* Dep't of State, *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government*, https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html (last visited Aug. 15, 2022).

The Court should clarify its summary judgment order.

C. If the Court's Injunctive Relief Encompasses Class Members Who Entered the Class After the Plan Was Proposed, the Court Should Enforce the Order by Directing Defendants to Propose a Supplemental Plan.

If the Court's injunctive relief is not limited to class members as of the time of the Plan's proposal, and provided that the Court lifts the stay, *see supra* I.A., the Court should order

Defendants to fulfill their obligation to "submit a plan for promptly processing and adjudicating the applications of current class members" by ordering Defendants to propose a supplemental plan. *See* Summ. J. Order; Pls.' Cross-Mot. 45. The plan should cover class members not covered by the existing Plan and include a methodology for identifying Afghan SIV applicants if and when they become "current class members." *See also* Apr. 2020 Order 1 (explaining that the plan must include "[a] proposal for identifying class members consistent with the class certification order").

III. THE COURT SHOULD REFER THIS CASE TO A MAGISTRATE JUDGE TO SUPERVISE THE DEVELOPMENT AND IMPLEMENTATION OF ANY NEW PLANS.

The Court should refer this case to a magistrate judge to supervise the development and implementation of any new plans. *See* Pls.' Cross-Mot. 41, 45. In opposing Plaintiffs' motion, Defendants contend that involving a magistrate judge is unnecessary, citing their supposed willingness to field questions on "individual cases," the supposed fact that "Plaintiffs never had to file a motion to enforce in this case," and the participation of the Executive branch and Congress in the SIV program. *See* Defs.' Opp. 40; Mot. for Leave 10 n.1, ECF No. 155. But contrary to Defendants' suggestions, individual troubleshooting cannot substitute for classwide relief, and during the life of the Plan, Defendants failed to address numerous concerns raised by Plaintiffs, including the issues underlying Plaintiffs' cross-motion to enforce. Moreover, the Executive and Congress are involved in every unreasonable delay suit, which necessarily involves congressionally defined rights and a charge of unreasonable delay by the Executive. The relevant question when it comes to judicial intervention is not whether other branches of government are implicated but whether there has been unreasonable agency delay. *See* 5 U.S.C. § 706(1) ("[T]he reviewing court shall . . . compel agency action . . . unreasonably delayed."); *see also TRAC*, 750 F.2d at 80 (giving structure to the analysis).

To date, Defendants have delayed not only their adjudication of Plaintiffs' applications but also Plaintiffs' access to relief. Defendants' initial proposal of a "misguided and inadequate" plan in 2020 set Plaintiffs back by a month at minimum. *See* Apr. 2020 Order 2. Defendants' failure to implement the Plan in compliance with the Court's orders has led to further delays. *See* Pls.' Cross-Mot. 7-15, 41-43. And the parties' five months of unmediated settlement conversations, on which the stay was premised, were fruitless. *See* Joint Status Report 1, 5-6, Mar. 16, 2022, ECF No. 154. Referral to a magistrate judge will mitigate any further delay and harm to the class.

CONCLUSION

For all these reasons, the Court should grant Plaintiffs' cross-motion.

Dated: August 15, 2022
New York, New York

/s/ Kathryn Austin
Kathryn Austin (D.D.C. Bar No. NY0331)
Deepa Alagesan (D.D.C. Bar No. NY0261)
Alexandra Zaretsky (D.D.C. Bar No. NY0434)
Mariko Hirose (D.D.C. Bar No. NY0262)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
One Battery Park Plaza, 4th Floor
New York, New York 10004
Telephone: (516) 296-0688
kaustin@refugeerights.org
dalagesan@refugeerights.org
azaretsky@refugeerights.org
mhirose@refugeerights.org

Melissa S. Keaney (D.D.C. Bar No. CA00064)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
P.O. Box 2291
Fair Oaks, California 95628
Telephone: (916) 546-6125
mkeaney@refugeerights.org

/s/ Justin C. Simeone
Justin C. Simeone (D.D.C. Bar No. 252751)
FRESHFIELDS BRUCKHAUS DERINGER US LLP
700 13th Street, NW, 10th Floor
Washington, D.C. 20005
Telephone: (202) 777-4543
justin.simeone@freshfields.com

Linda H. Martin (D.D.C. Bar No. NY0210)
David Y. Livshiz (D.D.C. Bar No. NY0269)
Wang Jae Rhee (admitted *pro hac vice*)
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
Telephone: (212) 277-4000
Facsimile: (212) 277-4001
linda.martin@freshfields.com
david.livshiz@freshfields.com
wangjae.rhee@freshfields.com

Attorneys for Plaintiffs and the Class