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 – MICHAEL R. POMPEO, et al., Defendants.	Case No. 18-cv-01388-TSC **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' SUPPLEMENT IN FURTHER
SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

In moving for a preliminary injunction, Plaintiffs[1] demonstrated that Defendants, by their own admission, regularly flout the nine-month timeline imposed by Congress for processing Special Immigrant Visas (***SIVs***), all while Plaintiffs face imminent threats to their lives due to the support they provided to the U.S. government. To understand the full measure of delays Class Members face, Plaintiffs sought, and were granted by this Court, discovery into the data underlying the average wait times published in Defendants' public reports.

This new evidence shows that the delays are far worse than Plaintiffs and the public previously knew. Plaintiffs submit this Supplement in further support of their Motion for a Preliminary Injunction to present this new evidence, which confirms that Plaintiffs are likely to prevail on the merits of their unreasonable delay claim. Given that Defendants' opposition to Plaintiffs' motion for a preliminary injunction is based on legal, not factual, arguments, the core of which this Court already rejected in its Memorandum Opinion denying Defendants' Motion to Dismiss, see Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Pompeo, No. 18-CV-01388 (TSC), 2019 WL 367841, at *9-10 (D.D.C. Jan. 30, 2019),

[1] ***Plaintiffs*** as used in this memorandum refers to the named plaintiffs and members of the class certified for the purpose of resolving Plaintiffs' motion for a preliminary injunction. See Mem. Op., ECF No. 47, at n. 1. In its Order dated January 30, 2019, this Court provisionally certified a class of "all people who have applied for an Afghan or Iraqi SIV pursuant to the Afghan Allies Protection Act of 2009, Pub. L. 111-8, 123 Stat. 807, or the Refugee Crisis in Iraq Act of 2007, Pub. L. 110-181, 122 Stat. 395, by submitting an application for Chief of Mission approval, and whose applications have been awaiting government action for longer than nine months" for the resolution of Plaintiffs' motions for expedited discovery and a preliminary injunction. ECF 48. This brief also uses ***Class Members*** to refer to members of the Class.

the new evidence revealing the magnitude of the delays demonstrates that preliminary relief is warranted.

Six years after Congress enacted amendments to the Afghan Allies Protection Act (***AAPA***) and the Refugee Crisis in Iraq Act (***RCIA***) requiring that Defendants adjudicate SIV applications within nine months, government data demonstrates that there are at least 7,700 Class Members whose applications have already been pending for longer than the nine-month statutory benchmark for the government to conclusively adjudicate their applications. Of those, over 5,300 have waited an average of 2.5 years for Chief of Mission (***COM***) approval—which is only the first phase in Class Members' SIV application process. Over 2,300 have waited, on average, three years to complete the remaining steps—excluding the time these applicants spent awaiting COM approval. Meanwhile, deposition testimony demonstrated that Defendants conceal from Congress and the public the full extent of the delays across the class by systematically undercounting the processing times they publish in their congressionally-mandated quarterly reports. This serves to shield Defendants from accountability for their duties under the SIV authorizing statutes.

Where, as here, Defendants have acted in flagrant disregard of statutory mandates notwithstanding the threat of irreparable harm to Plaintiffs' lives and livelihoods, judicial intervention is necessary to right the course. The data and evidence obtained in discovery further demonstrates the need for Plaintiffs' requested preliminary injunction: the egregious delays in the adjudication of the SIV applications violate any conceivable "rule of reason" based on the nine-month timeframe that Congress provided. Despite the dangers that Plaintiffs face each and

every day and amidst ever worsening threats in Afghanistan and Iraq,[2] more and more applications continue to lag behind the congressional mandate. Accordingly, Plaintiffs respectfully request that the Court issue the requested preliminary injunction.

II. FACTUAL BACKGROUND

As discussed in Plaintiffs' opening and reply briefs, which are reincorporated here by reference, in 2013, Congress amended the statutes authorizing the Afghan and Iraqi SIV programs. Recognizing that persistent delays in adjudication of SIV applications undermine the efficacy of Afghan and Iraqi SIV programs, particularly in light of the daily threats SIV applicants face to their lives and the lives of their families, Congress imposed a nine-month timeframe for the adjudication of SIV applications. See AAPA § 602(b)(12)(B); RCIA § 1242(c)(2); see also Afghan & Iraqi Allies, 2019 WL 367841, at *2; Mem. in Supp. of Prelim. Inj., ECF No. 34, at 7-10 ("PI"). To make sure that Defendants complied with this nine-month requirement, Congress required that Defendants publish quarterly reports presenting data on the total number of applications that are pending due to the failure to receive COM approval, complete processing of an applicant's I-360 petition to the USCIS, conduct a visa interview, or issue the visa; the average wait times at each stage; and "the efficiency improvements made" in SIV processing, which include "the reasons for the failure to process any applications that have been pending for longer than 9 months" (***Joint Reports***). AAPA § 602(b)(13); RCIA § 1248(g).

[2] See, e.g., Siobhan O'Grady, Hope dwindles for cease-fire in Afghanistan at end of Ramadan, WASHINGTON POST (June 3, 2019), https://wapo.st/2HRwRUQ?tid=ss_mail&utm_term=.; Abdul Qadir Sediqi & Sayed Hassib, Car bomb targets U.S. convoy in Afghan capital, several casualties, REUTERS (May 31, 2019), https://wapo.st/2QxGYkt?tid=ss_mail&utm_term=.23c9e22f4009; Edward Wong, U.S. Orders Partial Evacuation of Embassy in Baghdad, N.Y. TIMES (May 15, 2019), https://nyti.ms/2Q1AoSW.

In moving for a preliminary injunction, Plaintiffs argued that although the average processing times as reported in the congressionally-mandated reports regularly exceed nine months, those figures likely undercount the backlog and delays experienced by Afghan and Iraqi SIV applicants. See PI at 12. Court-ordered expedited discovery has now confirmed that over 5,300 Class Members awaiting COM approval—a single part of the SIV application process—have waited an average of two and a half (for Afghan) to five (for Iraqis) years for adjudication of their COM applications, while over 2,300 Class Members waiting in the remaining steps have waited, on average, three years for a final adjudication (excluding the period these Class Members spent awaiting COM approval). See Declaration of Laura Onken (***Onken Decl.***) ¶¶ 13, 44. Because the data produced by Defendants separates these two phases of the application process—COM approval and the remainder of the process—and, according to Defendants, there is no means to connect the two, Plaintiffs cannot demonstrate the full magnitude of the delays from start to finish.[3] Nonetheless, at minimum, 7,700 pending applications have waited in a subset of government-controlled steps for averages often ranging in the years, not months.

[3] Defendants do not maintain any information, other than an applicant's name and date of birth, that would allow them to link the record of an SIV applicant's COM application to the records kept for later stages of the SIV application process. See Declaration of Rebecca Curwin (***Curwin Decl.***) Ex. 6 (Transcript Volume I of Deposition of Lareina Ockerman, dated April 4, 2019) at 146:20-23; id. Ex. 10 (Defendants' Responses and Objections) at 17. Accordingly, Plaintiffs separately analyzed the processing times for Chief of Mission approval and the remainder of the application process, which includes, among other things, USCIS's adjudication of an applicant's I-360 petition, State's scheduling of an interview, and administrative processing.

A. Data Produced by Defendants Reveals that, On Average, Class Members Currently Awaiting COM Approval Have Already Waited Two and a Half to Five Years for Defendants to Adjudicate their COM Applications.

The SIV application process begins when an individual submits an application for COM approval, after which Defendants must verify the applicant's qualifying employment. Defendants' data shows that Defendants have already deemed over 6,600 Afghan COM applications complete but have not yet rendered a decision. See Onken Decl. ¶ 13. At least 5,300 of those 6,600 pending applicants, or 80%, are Class Members: they have already waited over nine months for a decision on their COM applications. See Onken Decl. ¶ 13.[4] On average, these Class Members have waited 2.5 years and counting since the date they submitted their COM applications.[5] See Onken Decl. ¶ 13.

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[4] Plaintiffs' analysis calculates the starting date for the wait time for any step in the SIV application process as of the later of the date that an applicant began that phase of the SIV application process or December 26, 2013, the date on which the nine month timeline became effective. See Onken Dec. ¶ 9 n. 4. The first two milestones in Defendants' COM data are the date an application was filed and the date the National Visa Center (***NVC***) verified that the application was complete. Plaintiffs measured average wait times based on the date of submission, not the date an application was recorded as complete. The latter average would undercount Defendants' processing time because, by State's own admission, a COM application that was complete at the time it was received would not be deemed complete in State's database until it reviewed the documents for completeness at a later point in time. See Curwin Decl. Ex. 7 (Transcript Volume II of Deposition Lareina Ockerman, dated April 16, 2019) at 237:19-25. Separately, the date on which an application is deemed complete is unreliable because counsel for Defendants represented that the field listing the date an application was deemed complete may be updated after the COM application is determined to be complete, see Curwin Decl. Ex. 9 (Email from Joseph F. Carilli dated May 1, 2019), which would artificially reduce the calculation of how long an applicant waited for Defendants to review their COM application.

[5] All figures showing number of and wait times for currently pending COM applications are calculated as of the date Defendants produced the COM data, April 18, 2019. See Onken Decl. ¶¶ 4, 12. All figures showing the number of and wait times for applications pending in the remaining steps of the SIV application process are calculated as of May 30, 2019, the date Defendants produced the remaining data. See Onken Decl. ¶¶ 21, 27, 32, 39.

For Iraqis, the numbers are worse. As the deadline to submit an Iraqi COM application was September 30, 2014, there are now only 14 Iraqi applicants with pending COM applications that the government has deemed complete, all of whom have waited longer than nine months and are Class Members. See Onken Decl. ¶ 13. These Class Members have waited, on average, over five years for an initial decision on their COM applications. See Onken Decl. ¶ 13.

Applicants whose initial COM applications are denied have the opportunity to appeal those denials, see AAPA § 602(b)(2)(D)(i); RCIA § 1244(b)(4)(B)(i)(I), with Defendants historically granting half of COM appeals. These applicants face even greater delays. There are currently approximately 6,300 applicants with pending COM appeals who have already waited at least nine months after Defendants recorded their COM appeals as complete—which is nearly all (94%) applicants awaiting adjudication of an appeal. See Onken Decl. ¶ 20. These Class Members have waited for a decision on their appeals for, on average, two years and eight months for Afghan applicants and three years and eight months for Iraqi applicants.[6] See Onken Decl. ¶ 20.

Combining the historical average wait time for adjudicated COM applications (315 days for Afghans and 411 days for Iraqis, see infra at 6) with the current wait times for pending appeals (991 days for Afghans and 1,341 days for Iraqis, see supra at 6), an Afghan who appeals the denial of a COM application could wait three years and six months before a

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[6] This measure undercounts the time a COM appeal is within Defendants' control, because Defendants do not log the date an appeal is submitted—only when the appeal is deemed complete. See Curwin Decl. Ex. 10 (Defendants' Responses and Objections); Curwin Decl. Ex. 7 at 240:6-11.

final adjudication, while an Iraqi SIV applicant could wait nearly five years.[7] See Onken Decl. ¶¶ 10, 20. Assuming the approximately 50% historical appeal success rate holds true, over 3,300 applicants with pending COM Appeals will ultimately receive approval following an appeal, but only after waiting many years to proceed to the next step.

Current COM applications and appeals are not outliers. As above, for all adjudicated COM applications, since 2013, the average time from submission of a COM application to adjudication has been 315 days for Afghans and 411 days for Iraqis. See Onken Decl. ¶ 20. Of the 20,802 adjudicated Afghan COM applications, nearly half—9,400 COM applicants—waited longer than nine months from the date they submitted their applications for State to make a decision on their COM applications. See Onken Decl. ¶ 10. Of the 2,475 adjudicated Iraqi COM applications, 70%—1,700 COM applicants—waited longer than nine months from the date they submitted their applications. See Onken Decl. ¶ 10.

Well over 5,000 Afghan Class Members have already spent an average of 2.5 years awaiting COM approval—and this represents only the first phase of the SIV application process. Those who ultimately receive COM approval will still need to wait for Defendants to, among other things, adjudicate their I-360 petitions, schedule visa interviews, and complete administrative processing before completing the application process. Delays at these remaining stages are equally egregious.

B. Data Produced by Defendants Reveals That Over 2,300 Class Members Have Already Waited, on Average, Three Years for Final Adjudication, Excluding Time Spent Awaiting COM Approval.

Having already potentially waited a year—or several years—to receive COM

[7] Defendants' data does not include a separate field with the appeal decision date, so it is not possible to link the time an applicant spends pursuing an initial application with the time spent pursuing an appeal for all appealed COM denials.

approval, an applicant then must endure even longer wait times to complete the remaining stages of the SIV adjudication process (Steps 7 through 13). These steps start with an applicant's submission of an I-360 petition, after which the applicant must complete a DS-260 application, attend a visa interview, and await administrative processing all before completing the process and receiving a decision on their SIV application. Of those applicants currently pending in these post-COM stages, at least 89%—over 2,300 applicants—are Class Members; their applications have remained in Defendants' control for at least nine months during these steps alone, and they have waited an average of three years for Defendants to complete these steps.[8] See Onken Decl. ¶ 44.

Of the data relating to applicants pending post-COM approval, wait times for those who have attended an interview and await final adjudication—and thus have reached the very final stage of the SIV process—best illustrate the overall delays that SIV applicants face in order to receive a visa. Virtually all of those in this final stage (98%) are Class Members, indicating that almost any one of them who will ultimately receive an SIV will have waited over the statutory mandate of nine months. See Onken Decl. ¶ 44. Factoring in the nearly 11 months that the government has historically taken to adjudicate COM applications, and the average of three years for the post-COM stages of the process, this means that any of these Class Members who are ultimately issued visas could have waited as many as four years or more to receive that visa. See Onken Decl. ¶¶ 10, 44.

[8] Defendants' post-COM data does not distinguish between Afghan and Iraqi applicants. Therefore, all figures for post-COM stages in the SIV application process are for Afghan and Iraqi applicants combined. Due to Defendants' inability to link their data, this universe does not include applications that may not have yet waited nine months after receiving COM approval but have spent nine months awaiting government action if the time spent awaiting COM approval were added to the time spent awaiting government decision-making in the remaining steps. Similarly, the average processing times do not include COM application processing time.

Data on applications for which Defendants already rendered a final decision shows that these applicants also waited substantially longer than nine months for final adjudication. Half of SIV applications that received final adjudications after an interview spent at least nine months in Defendants' control for post-COM processing; the average post-COM processing time for those applications was one year and four months. See Onken Decl. ¶ 44.

C. Defendants' Deposition Testimony Confirms that their Statutorily-Mandated Reports Systematically Undercount Average SIV Processing Times.

Congress requires Defendants to publish "average wait times for an applicant" at various stages of the SIV application process in the Joint Reports. In moving for a preliminary injunction, Plaintiffs identified methodological flaws and undercounts apparent from the face of these Joint Reports, see PI at 12, which reflect Defendants' lackluster effort to purportedly comply with the congressional requirement to publish "average wait times for an applicant" at various stages of the SIV application process. See RCIA § 1248(f)(2)(g); AAPA § 602(b)(12); Curwin Decl. Ex. 8 (October 2018 Afghan Joint Report). Consistent with the delays reflected in Defendants' source data, see supra at 4-8, Defendants' deposition testimony concerning the preparation of the Joint Reports demonstrates the unreliability of those reports, on the one hand, and the substantial undercount of the actual delays faced by SIV applicants, on the other.

In October 2018, Defendants reported a total average processing time of 587 days. See Curwin Decl. Ex. 8 at 4. Plaintiffs now know that all currently pending COM applicants have already awaited an average of two years for a decision from State since submission of their COM applications. See Onken Decl. ¶ 13. All applicants waiting in the post-COM stages have waited an average of nearly three years for final adjudication. Id. ¶ 44.

Defendants' deponents revealed at least some of the reasons for that undercount: notwithstanding an unambiguous legislative obligation to publish average wait times, Defendants

do not, in fact, report arithmetic averages at each stage but rather employ their own unilateral conception of what constitutes an average for each of the government-controlled steps of the SIV application process. Although Plaintiffs cannot know each source of Defendants' undercount, Defendants' deposition testimony and the data produced by Defendants show that these problems pervade Defendants' "average" calculation at each government-controlled step. A sample of those problems is described below:

- In Step 2, which supposedly represents the time NVC takes to review COM application materials for completion, Defendants present a figure that is completely untethered to actual processing times. Instead, it reflects the average length of time it takes NVC to respond to any communication from SIV applicants, regardless of topic. See Curwin Decl. Ex. 7 at 275-78 (stating that this figure is "based on response times generally" and could include response times for other types of inquiries).

- Meanwhile, also in Step 2, Defendants fail to keep accurate data that would allow them to reliably calculate the amount of time it actually takes NVC to review COM application materials, and this time is excluded from its reported averages.

- In Step 4, adjudication of COM applications, Defendants calculate not the total average but the average of a sample of 40-50 applications. See Curwin Decl. Ex. 7 at 280-281. There is no methodology for determining that sample size. Id. at 282:17-19. Instead, it is a constant number and not a percentage of the total adjudicated applications, as would be statistically acceptable. Id. Moreover, State manually reviews the cases in the sample to exclude time during which State seeks information from third-parties, such as employers from whom State seeks verification of application materials.[9]

[9] Although State appeared to justify excluding days it may wait for additional information from third parties from its calculation as being outside the government's control, see Curwin Decl. Ex. 7 at 298:4-15, the statute speaks in terms of "government controlled steps," not "government controlled days." See Reply in Supp. of Mot. for Prelim. Inj., ECF No. 44, at 8. The fact that Defendants may be awaiting a response from non-applicant third parties does not change that Step 2 is a government-controlled step, especially since State is often waiting for verification from other government entities and contractors.

- In Step 7, adjudication of I-360 petitions, Defendants intentionally exclude applicants who remained in this step for the longest period on the basis that those applicants underwent additional background checks. See Curwin Decl. Ex. 5 (Deposition of Jeremiah Afuh, Volume II) at 189:13-20.

- In Step 11, representing interview wait times, Defendants' figure completely omits the 6-8 weeks between the date on which an applicant is notified that State has scheduled their interview and the date on which that interview actually takes place. See Curwin Decl. Ex. 6 at 154, Ex. 7 at 288-291.

- In Steps 3, 5, and 12, Defendants report a constant value from quarter to quarter, not an average rooted in actual data. See Curwin Decl. Ex. 7 at 279:7-23; 285:11-25 (Step 3); 286:6-10 (Step 5); 293:9-23 (Step 12).

- Defendants do not appear to capture in the Joint Reports the time the consular officer takes to render a final decision on an SIV application, given that this final step in the process is characterized as "applicant controlled." See Curwin Decl. Ex. 8 at 3.

The Joint Reports have additional flaws that contribute to the undercount. The total processing time as defined by Defendants excludes COM appeals, which alone can take years to adjudicate. See supra at 5-6. Furthermore, as Plaintiffs have previously noted, Defendants' Joint Report calculations include only applications that moved on to the next step in the reporting quarter, leaving uncounted applicants who may have been pending for years in the same step. See PI at 12.[10]

[10] Notably, as of the dates Defendants produced the data, over 7,000 applicants had been pending only in their current step for longer than nine months (not including time spent awaiting government action in previous steps): 5,300 awaiting an initial COM determination, 29 awaiting adjudication of their I-360 petitions, 35 awaiting interview scheduling, and 1,640 awaiting completion of administrative processing. See Onken Decl. ¶¶ 13 ,28, 33, 40. Another 6,300 awaited a decision on their COM appeal. See Onken Decl.¶ 20.

III. ARGUMENT

A preliminary injunction is warranted where: (1) the plaintiff is "likely to suffer irreparable harm in the absence of preliminary relief"; (2) the plaintiff is "likely to succeed on the merits"; (3) the "balance of equities" tips in their favor; and (4) "an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). To show likelihood of success on an unreasonable delay claim brought under the Administrative Procedure Act (***APA***), 5 U.S.C. § 706(1), a plaintiff must show that a government Defendant has a nondiscretionary duty to act and that the factors offered in Telecomm. Res. & Action Ctr. v. FCC (***TRAC***), 750 F.2d 70 (D.C. Cir. 1984) favor relief, which include: (1) the length of the delays governed by a "rule of reason," (2) the presence of a congressional timetable, (3) whether the agency action affects human health or welfare, (4) competing agency priorities, and (5) the "nature and extent of interests prejudiced by the delay." TRAC, 750 F.2d at 80.[11] The court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" Id.

Plaintiffs' opening brief showed that they meet this standard: named Plaintiffs, and Class Members, remain embroiled in uncertainty and face daily threats to their safety all while Defendants delay adjudication of Plaintiffs' SIV applications well beyond the congressionally-mandated timeline. See PI at 14-25.

The findings from discovery detailed above reaffirm this showing. Specifically, the length of delays evident from the data produced by Defendants, particularly in light of the existence of the nine-month congressional timetable, demonstrates that Plaintiffs are likely to

[11] This Court has already found that Defendants have a nondiscretionary duty to adjudicate SIV applications, including COM applications. See Afghan & Iraqi Allies, 2019 WL 367841, at *8, 10.

succeed in their claims asking this Court to declare Defendants' delays unreasonable and to compel Defendants to adjudicate SIV applications promptly. Relief is particularly warranted here because Defendants have consistently disregarded their congressional reporting obligations by presenting the public with an undercount of existing delays. Given Defendants' extreme delays in adjudicating pending SIV applications all while SIV applicants fear for their lives, not only are Plaintiffs likely to prevail on the merits of their claim for declaratory relief, but considerations of equity and the public interest compel the issuance of a preliminary injunction in this case.

A. Discovery Has Revealed the Magnitude of Processing Delays, Which Violates the "Rule of Reason" and Favors Relief.

As shown in Plaintiffs' opening brief, publicly available data and the experiences of the named Plaintiffs exemplified egregious processing delays. See PI at 10-11, 19. The information obtained in discovery demonstrates that, in fact, the magnitude of the delays faced by the named Plaintiffs is typical of that faced by Class Members, and judicial intervention is needed. These delays, see supra at 4-8, confirm that the first two TRAC factors relating to the "rule of reason," which evaluate the extent of the delay as compared to congressional intent, weigh in favor of judicial intervention. See PI at 19-20 (collecting cases holding that government defendants violated the "rule of reason" for delays of similar magnitude).

Congress directed Defendants to complete the adjudication of SIV applications from start to finish within nine months. See PI at 7-10. Class Members with pending COM applications wait, on average, **2.5 years for a decision on those COM applications alone, more than three times the statutory timeline**. See supra at 5. And this is only the first stage in the SIV application process. Those applicants who ultimately receive COM approval will join the pool of applicants waiting in the remaining steps. Class Members in those remaining steps,

who have already waited for and received COM approval but have not received a final adjudication, have waited for a final adjudication from Defendants for an additional **three years, on average, more than four times the statutory timeline**. Such extreme delays violate any "rule of reason" governing agency action and merit relief. See, e.g., In re People's Mojahedin Org. of Iran, 680 F.3d 832, 837-38 (ordering relief for delay of over three times the statutory timeframe); Sai v. Dept. Homeland Sec., 149 F. Supp. 3d 99, 120-21 (D.D.C. 2015) (ordering relief for delay of over five times the statutory timeframe).

Moreover, in opposing Plaintiffs' motion for a preliminary injunction, Defendants suggested that current delays cannot violate the rule of reason because they can be justified under AAPA § 602(b)(4)(B), which permits Defendants to take longer than nine months "in high-risk cases for which satisfaction of national security concerns requires additional time." Opp'n to Mot. Prelim. Inj., ECF No. 42, at 6-9 ("Opposition"). Because this Court has already rejected this very argument, no further consideration is warranted. See Afghan & Iraqi Allies, 2019 WL 367841, at *11 (refusing to dismiss Plaintiffs' claims based on mere existence of statutory exception for high-risk cases); see also Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Kerry, 168 F. Supp. 3d 268, 295 (D.D.C. 2016) ("For all of these reasons, the Court concludes that adjudication of Plaintiffs' SIV applications within a reasonable time is non-discretionary, that judicially manageable standards exist to measure the Government's performance of its duty, and that the national security exception does not undermine these conclusions."). Nevertheless, Defendants' deposition testimony further highlights the fallacy of this argument because the government does not designate high-risk cases but rather considers all applications "high-risk" until the end of the application process, when it determines otherwise. See Curwin Decl. Ex. 6 at 207:15-22 ("Once the, the process has

concluded, that would be the point at which we have determined that, that the application is not high risk."). Thus, Defendants are not relying on the high-risk exception: they are treating every application similarly as they are processed regardless of whether the application is ultimately designated as high-risk at the time of adjudication (at which point it presumably is denied) or not (at which point it presumably is granted). Defendants' argument about the high-risk exception thus boils down to an attempt to have the exception swallow the rule and renders the mandates of the AAPA, RCIA, and APA meaningless. See Nine Iraqi Allies, 168 F. Supp. 3d at 294-95 ("Congress would not have adopted this rule-and-exception structure if it expected the exception to apply in every case . . . The Government's reading would allow the national security exception to swallow the nine-month rule in its entirety.").

B. Defendants' Continued Disregard of Statutory Mandates Favors Relief.

The overwhelming evidence of Defendants' disregard for both the nine-month timeframe and their reporting obligations strongly favors relief. See, e.g., In re Aiken Cty., 725 F.3d 255, 266 n.12 (D.C. Cir. 2013) ("In the face of such deliberate and continued agency disregard of a statutory mandate, our precedents strongly support a writ of mandamus."); In re Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir. 1991) ("Where the agency has manifested bad faith, as by. . .asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities."); Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 232 (E.D.N.Y. 2006) ("the length of delay . . . now five years, alone raises questions about the good faith of the FDA" in light of the 180-day statutory period). First, despite the warning in 2016 in Nine Iraqi Allies that "adjudication of the plaintiffs' SIV application[s] within nine months was non-discretionary," delays in adjudicating SIV applications persist. See supra at 6-8; see also Afghan & Iraqi Allies, 2019 WL 367841, at *11 (citing Nine Iraqi Allies, 168 F. Supp. at 295).

Defendants have instead continually sought to avoid any review of their ongoing obligation to comply with the nine-month timeframe. For example, no doubt in an attempt to moot the case, Defendants sped named Plaintiffs through the SIV application process. See Defs.' Supp. Opp'n Class Cert., ECF No. 59-1, at 2. And, Defendants premised the defense in this action on arguments already rejected by a court in this district, see Nine Iraqi Allies, 168 F. Supp. at 295, and delayed discovery and resolution of this case by asserting frivolous arguments to support their decision to refuse to produce information that this Court already ordered be produced. See Order Grant. Pls.' Mot. Exped. Disc., ECF No. 49, at 4-5 (Jan. 30, 2019); Minute Order Grant. Pls.' Mot. Compel (April 11, 2019). These efforts to avoid review compound the impact of Defendants' systemic failure to comply with congressionally-imposed deadlines.

Second, although Defendants' chief argument in opposing relief is that they have discretion over processing and Congress can and does exercise oversight over processing times, see Opp'n at 9, Defendants' own conduct in publishing inaccurate reports of processing delays, see supra at 9-10, renders Congressional oversight impossible. Defendants have gone so far as to assert that "[t]he reporting requirements in the statute are clear indications that Congress is exercising its oversight." Opp'n at 9. Yet, Defendants have systematically failed to comply with those very requirements and have instead produced quarterly reports that are, at best, riddled with errors—each of which undercounts the actual wait faced by the SIV applicants. See supra at 8-11. Moreover, Defendants maintain data on SIV applications from which they could more accurately calculate processing delays, see supra at 4-8, much as Plaintiffs have done here, showing delays of three or more years. Yet, Defendants inexplicably continue to employ flawed methodologies that substantially undercount delays and obstruct congressional oversight

efforts.[12] Defendants' disregard for their obligations to promptly adjudicate SIV applications and to accurately report on their failure to do so publicly obfuscates the magnitude of delays, hinders congressional oversight, and reinforces the need for judicial intervention to address processing delays. See, e.g., In re Aiken Cty., 725 F.3d at 266 n.12; Tummino, 427 F. Supp. 2d at 231–32; cf. In re Barr Labs., Inc., 930 F.2d at 76.

C. Plaintiffs' Requested Preliminary Injunction Is the Appropriate Relief Here.

Given the egregiousness of SIV processing delays, and because Plaintiffs meet the remainder of the preliminary injunction factors, including a likelihood of irreparable harm, see PI at 14-16, 18-25, the Court should find that Plaintiffs are likely to succeed on the merits of their unreasonable delay claim.

With such a finding, the Court may, and should, order that Defendants propose a schedule for adjudicating applications pending longer than nine months in government-controlled steps and submit compliance reports to the Court every 30 days thereafter. This is a "relatively modest" request that is directly in line with what courts in this Circuit routinely order in similar circumstances, and thus entirely appropriate here. See, e.g., Cobell v. Norton, 240 F.3d 1081, 1108-09 (D.C. Cir. 2001) (approving a remedy that required quarterly status reports and judicial monitoring); see also Cockrum v. Califano, 475 F. Supp. 1222, 1240 (D.D.C. 1979)

[12] Defendants could also easily modify their systems to maintain more accurate data but simply choose not to. For example, Defendants represented in discovery that they do not maintain a single unique identifier for individuals that would allow them to track their applications, and thus processing delays, across multiple steps of the SIV application process. See Curwin Decl. Ex. 10 at 17. Rather, they use three separate unique identifiers at different stages of the application process that are not logged in an easily retrievable manner across databases. See id. Ex. 6 (Transcript Volume 1 of Deposition of Lareina Ockerman, dated April 4, 2019) at 58-59, 138-39, 145-46. This data-keeping method is inefficient, indefensible, and easily remedied.

(declaring delays unreasonable and ordering that defendants devise a plan to address the unreasonable delays).

First, where, as here, an agency defendant has lapsed in its duties and caused egregious delays, courts in this Circuit have required defendants to propose schedules or plans for bringing the timeline of their decision-making process into compliance with governing statutes and APA § 555(b). See Solenex LLC v. Jewell, 156 F. Supp. 3d 83, 85 (D.D.C. 2015) ("[The D.C.] Circuit Court frequently orders recalcitrant agencies to establish schedules, subject to court approval, to finish their reviews and reach final agency decisions."); Cobell, 240 F.3d at 1109 (ordering agencies to propose schedule for addressing class-wide delays); Cockrum, 475 F. Supp. at 1238, 1240 (same); MCI Telecommc'ns Corp. v. FCC (***MCI***), 627 F.2d 322, 345–46 (D.C. Cir. 1980) (requiring the FCC to draft a schedule on which other parties to the proceeding were authorized to file comments); cf. Ensco Offshore Co. v. Salazar, 781 F. Supp. 2d 332, 340 (E.D. La. 2011) (granting a preliminary injunction to compel the adjudication of unreasonably delayed permit applications). This requested relief recognizes that Defendants are best positioned to propose how they will comply with their legislative mandates and is an appropriate first instance remedy for Defendants' unreasonably delayed action. See Cobell, 240 F.3d at 1109 (approving relief that provides "agencies that have acted in an unlawful manner discretion to determine in the first instance, how to bring themselves into compliance.") (internal citations omitted); see also MCI, 627 F.2d at 345 (ordering judicial oversight in effort to "obviate the need for more drastic judicial relief."). It is more efficient for everyone involved if Defendants—the ones with the power to adjudicate these applications and the knowledge of how best to do so—help devise a plan to process SIV applications in a timely fashion.

Second, courts in this Circuit routinely order Defendants to provide ongoing status reports and retain jurisdiction to monitor agency's progress in remediating delays, even where the agency has shown it is actively working to address the delays and even without an explicit finding that the delay is unreasonable. See Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (even "if the district court is unable to conclude that the delay to date has been unreasonable, then it may nevertheless retain jurisdiction over the case in order to monitor the agency's assurances that it is proceeding as diligently as possible with the resources available to it"); TRAC, 750 F.2d at 81 (retaining jurisdiction and implementing reporting requirements without drawing conclusion on mandamus); U.S. Women's Chamber of Com. v. U.S. Small Bus. Admin., No. 1:04-CV-01889, 2005 WL 3244182, at *18 (D.D.C. Nov. 30, 2005) (retaining jurisdiction to monitor adherence to their congressional mandates where agency defendants purported to be taking steps to complete the action unreasonably delayed). Such monitoring is even more appropriate where, as here, delays have been persistent and Defendants have made only anemic efforts to address delays despite a congressional mandate and prior judicial intervention. See supra at 8-10; see also U.S. Women's Chamber of Com., 2005 WL 3244182, at *17 (retaining jurisdiction to monitor agency's progress where Congress had "expressed dissatisfaction with the SBA's delay in completing its obligations under the Act"). Recently, a court in this district granted class-wide preliminary injunctive relief in a case to compel unlawfully withheld certification of class members' applications for special naturalization proceedings and ordered the government to submit detailed bi-weekly status reports that include some of the types of information relevant here, such as a means of identifying each applicant, the date of application, the date of certification, and the date the applicant was notified of the certification. See Kirwa v. U.S. Dept. of Def., 285

F. Supp. 3d 21, 42, 44 (D.D.C. 2017); see also Order regarding status reports at 1, Kirwa v. U.S. Dept. of Def., No. 17-cv-1793 (D.D.C. Dec. 15, 2017) (ECF No. 55); Status Report, Kirwa v. U.S. Dept. of Def., No. 17-cv-1793 (D.D.C. Jan. 3, 2018) (ECF No. 56). Here, it is likewise appropriate for this Court to order detailed status reports and retain jurisdiction to monitor Defendants' efforts to bring themselves into compliance with the law.

In sum, the preliminary injunctive relief Plaintiffs have requested is appropriate and necessary: Plaintiffs are facing irreparable harm, they are likely to prevail on the merits of their unreasonable delay claim, the balance of equities tip in their favor, and an injunction would be in the public interest. See PI at 14-16, 18-25. Defendants have not provided a cognizable argument to the contrary. Because Defendants' delays are business as usual, absent intervention from this Court, Defendants will continue to violate their non-discretionary obligation to adjudicate Plaintiffs' applications within a reasonable time, which is nine months under the AAPA and RCIA. Accordingly, Plaintiffs respectfully request that this Court grant the preliminary injunctive relief requested in their moving brief.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court declare unreasonable Defendants' delay in the processing of Plaintiffs' SIV applications and order Defendants to (1) submit within 30 days a plan for promptly processing and adjudicating the applications, which should be developed with Plaintiffs' input, and (2) submit compliance reports every 30 days thereafter.

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