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-MAU

PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' PROPOSED REVISED ADJUDICATION PLAN

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INTRODUCTION

As permitted by the Court's November 30, 2022 Order, ECF No. 190, Plaintiffs submit their objections to Defendants' Proposed Revised Adjudication Plan ("Proposed Plan"), ECF No. 207-1. Plaintiffs take no issue with many of Defendants' proposed changes to the Approved Adjudication Plan, ECF No. 113-1, but object to modifications (the "Contested Changes") that would subvert the Court's ruling. Instead of hewing to the Court's directive to propose a new plan with limited modifications justified by changed circumstances, Defendants attempt to relieve themselves of key plan obligations and commit to no more than the status quo, all without demonstrating valid justifications for the Contested Changes. Even if Defendants were to comply perfectly with the Proposed Plan, it would take them over three years, or potentially indefinitely longer, to adjudicate class members' already unreasonably delayed SIV applications.

Class members require effective relief without further delay. Plaintiffs have therefore attached to this filing a revised plan that omits the Contested Changes and, where appropriate, replaces them with the text of the Approved Adjudication Plan ("Previous Plan") or alternative text that Plaintiffs believe is consistent with the Court's order. *See* Exhibit 1.[1] Plaintiffs request that the Court reject the Contested Changes and enter the plan attached as Exhibit 1 as soon as possible to ensure that class members can begin to benefit from the relief the Court has ordered.

ARGUMENT

The Court should reject the Contested Changes. Defendants bear the burden to establish that changes they seek are justified by and suitably tailored to a significant change in

[1] Exhibit 2 is a redline comparison of Exhibit 1 and Defendants' Proposed Plan (as further modified by the parties' agreement and an additional change made by Defendants alone, as reflected in Exhibits 3 and 4), with explanations of the differences. All numbered exhibits are attached to the Declaration of Deepa Alagesan ("Alagesan Decl."), attached to this memorandum.

circumstances, but they have not even attempted to carry that burden here. Beyond this evidentiary deficiency, Defendants impermissibly disregard the Court's order by proposing changes that eliminate required elements of the plan and are not tied to the factual developments that the Court concluded could warrant modification of the Previous Plan.

I. DEFENDANTS FAIL TO MEET THEIR EVIDENTIARY BURDEN TO JUSTIFY THE CONTESTED CHANGES.

The Contested Changes should be rejected for the threshold reason that Defendants have not met their evidentiary burden to support them. As the party seeking modification of the relief previously ordered by the Court, Defendants bear the burden of showing "a significant change" in circumstances that renders parts of the existing plan "substantially more onerous" or "unworkable because of unforeseen obstacles," *N.L.R.B. v. Harris Teeter Supermarkets*, 215 F.3d 32, 35 (D.C. Cir. 2000) (applying Rule 60(b)(5)) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 377, 384 (1992)), or "a controlling or significant change in the facts . . . since the submission of the issue to the court" that makes aspects of the existing plan unjust, *Banks v. Booth*, 518 F. Supp. 3d 57, 62, 64 (D.D.C. 2021) (under Rule 54(b), "it must be the case that[] some sort of injustice will result if reconsideration is refused") (cleaned up). Defendants must also show that the modifications they propose are "suitably tailored to the changed circumstance[s]." *Afghan & Iraqi Allies v. Blinken* ("*Afghan & Iraqi Allies III*"), No. 18-CV-1388 (TSC), --- F. Supp. 3d. ---, 2022 WL 17338049, at *3 (D.D.C. Nov. 30, 2022) (quoting *Rufo*, 502 U.S. at 393); *see also Salazar by Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018) ("[A] court should do no more than is necessary to resolve the problems created by the change in circumstance." (internal quotation marks omitted)). Their burden must be met with evidence, as the Court cannot "simply [] rubber-stamp an enjoined party's unsupported self-assessment" of whether "changed circumstances warrant relief." *Nat'l L. Ctr. on Homelessness*

& Poverty v. U.S. Dep't of Veterans Affs., 842 F. Supp. 2d 127, 131 (D.D.C. 2012) (quoting *Horne v. Flores*, 557 U.S. 433, 447 (2009)).

Defendants did not submit any evidence with their Proposed Plan and appear to rest solely on the declarations that they submitted with their Motion for Relief, ECF No. 163, to support the Contested Changes. As discussed in detail in Plaintiffs' concurrently filed Motion to Strike, the discovery process revealed that several of these declarations are wholly unreliable. *See* Mot. to Strike 7–9, 13–15. More critically, because the declarations were written and signed months before the Proposed Plan was conceived, they cannot speak to whether the particular changes that Defendants propose are suitably tailored to any justifications for changing the Previous Plan.[2] Nor did Defendants even attempt to draw those connections in filing the Proposed Plan. *See* Notice of Lodging, ECF No. 207. The Contested Changes should therefore be rejected for the baseline reason that there is no evidence in the record to justify them.

II. THE CONTESTED CHANGES EXCEED THE PARAMETERS FOR MODIFICATION SET BY THE COURT'S ORDER.

Even setting aside the evidentiary issues discussed in Part I, the Contested Changes should be rejected because they fall outside the limited scope of modifications permitted by the Court's order. The Court specified that Defendants' new plan must include the basic elements of the Previous Plan, account for the addition of new class members since May 2020, and propose changes necessitated by "changes in internal processes," "increased caseload[,] and difficulty scheduling in-person applicant interviews." *Afghan & Iraqi Allies III*, 2022 WL 17338049, at *3, 5–6. Defendants ignored these parameters when they proposed the Contested Changes, which not

[2] In addition, the Declaration of Peggy Petrovich, ECF No. 163-4, should not be considered. The parties agreed that, absent additional discovery, Defendants would not rely on the declaration because Plaintiffs were unable to depose Ms. Petrovich due to her personal circumstances. *See* Joint Status Rep., ECF No. 205, at 3.

only remove required plan elements, but also lengthen performance standards, alter reporting requirements, and impose obstacles to enforcement for reasons unrelated to the bases for modification allowed by the Court.[3]

A. Defendants omit required elements of the plan.

The Court's order required that the plan include "timing benchmarks for the government-controlled steps of the SIV adjudication process"; "a methodology for identifying class members" (which "shall include Plaintiffs who have joined the class before and after May 21, 2020"); and "tracking and reporting requirements." *Id.* at *5. In the Proposed Plan, Defendants propose eliminating timeframes at major steps of the SIV application process for Afghan applicants—Step 4 (Chief of Mission ("COM") approval) and Step 9 (interview scheduling)—as well as scrapping class identification and reporting. These proposals disregard the Court's order, are not supported by cognizable justifications, and would fail to ensure that class members' applications are adjudicated within any reasonable timeframe.

(1) <u>COM Adjudication – Afghan SIV Step 4</u>
"COM staff processes and reviews the COM application or appeal package and DS-157 petition for special immigrant status, and the COM Designee makes a decision. The applicant is automatically informed of the decision." Proposed Plan at 7.

Previous Plan Standard	Defendants' Proposal	Plaintiffs' Position
"The COM Committee will adjudicate an application or appeal within **120 days** of receipt from the NVC. . . ."	"COM Designee will adjudicate **4,500 completed applications and/or appeals per quarter**."	The standard should include a timeline of **120 calendar days for adjudication and notification**, with Defendants given until **November 30, 2023** to come to compliance with that timeline.

Defendants' proposal to change the performance standard from an adjudication timeframe to a throughput standard at Step 4 in the Afghan SIV Plan contradicts the Court's

[3] Below, Plaintiffs present Defendants' proposals as modified by the parties' agreement and by an additional correction from Defendants. *See* Alagesan Decl. ¶¶ 7–10; Exs. 3, 4.

order that each government-controlled step include a "timing benchmark[]." *Afghan & Iraqi Allies III*, 2022 WL 17338049 at *5; *see* Proposed Plan at 7. This is no minor omission: Requiring agencies to complete the unreasonably delayed action on a court-ordered timeframe is the core relief in unreasonable delay lawsuits. *See Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 85 (D.D.C. 2015) (collecting cases). As this Court has recognized, the plan's timing benchmarks are vital to ensuring that class members' applications are promptly moving through the SIV application process and towards final adjudication. *See* Order, ECF No. 106, at 2–3.

A timeframe is especially critical at Step 4 because the State Department has eschewed first-in, first-out processing at this step and instead adopted a prioritization scheme that fast-tracks or slow-rolls applications based on the nature of the applicant's employment. *See* 9 Foreign Affairs Manual 502.5-12(B)(b)(9); *see also* Ex. 13, 49:23–51:1; Ex. 5, 157:19–158:22; Ex. 15 (State Department memo regarding prioritization scheme). Under this scheme, the State Department spends only one day a week processing the longest-pending applications from the lower priority tiers—and before 2022, it was not even doing that.[4] *See* Ex. 5, 162:9–163:4; *see also id.* 26:11–27:5; Ex. 16 (State Department memo modifying prioritization scheme). A throughput standard, combined with Defendants' refusal to identify class members who have been pending for over nine months, *see infra* Part II(A)(3), would risk allowing class members to be stuck indefinitely at this initial stage of the SIV application process while new waves of higher priority applicants bypass them. The problem is not hypothetical: according to Defendants' data, which omits pending applications and thus does not reflect actual wait times, between September 2021 and March 2022 the highest priority COM applications were

[4] Newer applications may also jump the queue if their employment is verified through a process that matches certain applicants who worked for select employers to government records or if a consular section requests to expedite adjudication. *See* Ex. 13, 51:3–54:13.

adjudicated in an average of 35 or 61 days, whereas the lowest priority were adjudicated in an average of 395 days. *See* Declaration of Melissa Schubert ("Schubert Decl."), ECF No. 163-5, ¶ 14; *see* Ex. 5, 153:1–25. But the Court has made clear that Defendants' decision to adopt a prioritization scheme does not absolve them from complying with the Congressionally imposed nine-month timeframe for *all* applicants. *See Afghan & Iraqi Allies v. Pompeo*, 334 F.R.D. 449, 465 (D.D.C. 2020), and it cannot justify abandoning the timing benchmark at this step, either.

Even if this proposal were not plainly foreclosed by the Court's order, Defendants have not justified eliminating any outer limit for COM adjudication. The influx of SIV applicants after August 2021 referenced by Defendants, *see* Notice of Lodging at 1, does not justify changing the standard from a timeframe to a throughput. *See* Ex. 13, 56:12–57:7 (testifying that the influx does not affect the State Department's ability to report processing times). Nor does the State Department's belief that using a timeframe would not accurately measure how efficiently the Afghan SIV Unit is working because it includes the time applications are pending in their control before the unit starts actively reviewing them. *See id.* 41:11–44:8. The performance standard under the adjudication plan is not intended to be an efficiency metric for how quickly the Afghan SIV Unit is reviewing each case from the moment it starts review to completion. Rather, it is intended to capture the time that class members are waiting for government decision—and that certainly includes the time that an applicant waits for the Afghan SIV Unit to begin review of their case. *See id.* 43:21–46:19.

Moreover, Defendants have not justified the pace of adjudication that they propose. The 4,500 applications-per-month standard that Defendants seek to set for themselves reflects the status quo. *See id.* 46:20–47:13 (4,500 is roughly the number of cases ASIV has been processing each quarter); *see also* Exs. 18, 19, 20. At that pace, it would take the State Department 3.5 years

to adjudicate the approximately 67,000 COM applications presently before them—and only if no new applications arrive and jump the queue.[5] Ex. 13 47:14–48:2, 48:22–49:17. The plan would be meaningless if it permitted Defendants this much additional time to move the already-delayed applications to the next phase of the process. The adjudication plan that the Court enters must set a standard that requires Defendants to improve class member wait times and ensures that applications move swiftly through the remainder of the application steps. It is up to Defendants to decide how they do so, whether through dedicating additional resources or finding further processing efficiencies. *See id.* 48:16–20 (describing State Department's intent to commit more resources); Schubert Decl. ¶ 4 (discussing past decision to add resources to increase staffing after February 2021); *id.* ¶ 10 (describing project allowing for automatic matching of applicants to government employment records to facilitate verification process); Ex. 5, 64:7–16 (anticipating 60 new contractor positions).

Whatever difficulty the application increase may pose, Defendants have not shown that eliminating the 120-day timeframe is a suitably tailored solution. *See N.L.R.B.*, 215 F.3d at 35. Defendants' elimination of application backlogs at other steps in the process demonstrates that the increased caseload is not insurmountable. *See* Declaration of Catherine McGeary ("McGeary Decl."), ECF No. 188-1, ¶ 5. Accordingly, a more suitable proposal would be to allow the State Department additional time to come into compliance with the 120-day timeframe to account for the influx of applications. Plaintiffs believe that a reasonable modification would be to allow the State Department one year from the Court's order, or no later than November 30, 2023, to take actions to come into compliance with the 120-day timeframe.

[5] In fact, class members have reported waiting this long for a COM decision even before the recent application increase. *See* Declaration of W, ECF No. 169-25 ¶¶ 9–11.

(2) Interview Scheduling – Afghan SIV Steps 8, 9 (Previous Plan Step 11)
The applicant informs the State Department of where they can appear for an interview. The State Department schedules the interview. See Proposed Plan at 7–8.

Previous Plan Standard	Defendants' Proposal	Plaintiffs' Position
NVC was required to notify the applicant of an interview date within **10 days** of determining that the case is ready to proceed to an interview. The interview date had to be the next available interview within **60 calendar days** of the notice, unless the applicant requested a different interview location or interview time or there were reasonable circumstances for the delay as explained in the progress reports.	Defendants added a step for Afghans to notify NVC of an alternate location for an interview. Upon such notice, "NVC will provide an interview date to the applicant within 60 calendar days. However, at posts where the demand for interview slots exceeds capacity, NVC will provide an interview date to the applicant within 60 calendar days of the availability being reported to NVC."	Defendants' proposal does not guarantee class members any timeline for being interviewed, as Defendants are not obligated to create interview capacity. Defendants' proposal also does not include a timeframe for notifying class members of the need to contact NVC to request a different interview location.

Defendants' modifications to the interview scheduling step for Afghan class members similarly lack the "timing benchmark[]" required by the Court order. *Afghan & Iraqi Allies III*, 2022 WL 17338049, at *5. Their proposed standard—to offer an interview date within 60 calendar days—is conditioned upon the State Department making interview dates available to Afghan SIV applicants. There is nothing in the Proposed Plan that requires consular posts to make such capacity available, so the standard effectively requires the State Department to offer an interview date only once it chooses to do so. The standard thus does not assure that class members will receive an interview date within any timeframe.

Defendants have not justified lengthening or eliminating the timeframe at this step based on the changed circumstances recognized by the Court—difficulties with scheduling in-person interviews or the increase in SIV applications following the U.S. withdrawal from Afghanistan. *Afghan & Iraqi Allies III*, 2022 WL 17338049 at *3, *5. By Defendants' own admission, the Afghan class members who reach Step 9 are the subset of applicants who are able to leave the

country and notify the National Visa Center ("NVC") of their ability to appear at another embassy.[6] Ex. 11, 388:6–389:3. Thus, applicants' own obstacles to leaving Afghanistan have no bearing on Defendants' ability to meet the existing timeframes at this step. *See* Ex. 9, 133:11–134:3 (applicants' inability to leave Afghanistan is the State Department's "biggest challenge" in moving them forward in the SIV application process). Further, because only Afghan applicants who are able to leave the country can be interviewed, the increase in SIV applications following the U.S. withdrawal from Afghanistan is not reflected in a corresponding increase in interviews. *See* Ex. 11, 388:6–389:3.

Instead of modifying the plan to account for the changed circumstances recognized by the Court, Defendants proffer two ill-founded reasons for the changes. First, Defendants seek to align the performance standard with the State Department's practice of scheduling interviews monthly based on each consular post's determination of how much interview capacity to make available for that month. *Id.* 431:22–432:15, 433:4–434:20, 439:11–440:16. But this practice existed when the Previous Plan was in effect, *id.* 432:16–433:15, and the plan nevertheless imposed a fixed timeframe within which the State Department was required to schedule class members' interviews. Defendants' desire to have more discretion—and to do no more than the status quo—is not a legitimate justification for modifying the Previous Plan. *Cf. N.L.R.B.*, 215 F.3d at 35 (finding no basis to modify injunction where defendant did "no more than complain about harms inherent in all injunctive restraints").

[6] The newly added Step 8 provides that Afghan applicants must notify NVC that they can appear at an embassy outside of Afghanistan to move forward in the process to Step 9. *See* Proposed Plan at 7–8. While Plaintiffs do not object to the addition of Step 8, there is no step in the plan that dictates when Defendants will inform class members that they need to complete Step 8 in order to receive an interview. Plaintiffs object to the lack of any timing standard for this notification and propose including language in Step 7 that ensures applicants are informed of this new step by the time they complete Step 7.

Second, Defendants have stated that they seek to revise the performance standard at this step because of the worldwide interview backlog that resulted from the pandemic. *See* Ex. 11, 432:16–434:20. But Defendants' own declarant asserted that the State Department is scheduling interview dates for Afghan SIV applicants within the next monthly scheduling cycle. *See* Declaration of Neal Vermillion, ECF No. 163-7, ¶¶ 4, 14. And State Department policy currently directs embassies to prioritize scheduling SIV interviews ahead of other immigrant visa interviews. *See* Ex. 17 at 3; *see also* Ex. 7, 95:2–17. It is therefore not apparent why Defendants need to modify the standard, other than, presumably, to give themselves the flexibility to deprioritize Afghan SIV applications in the future. The Court should not permit this change.

(3) Class member identification methodology

In the Proposed Plan, Defendants omit any class member identification methodology altogether and instead state that they will include all SIV applicants in their reporting. Although Plaintiffs have no objection to this change as it pertains to Iraqi applicants (all of whom are presumably class members), Plaintiffs object to Defendants' bid to forgo any attempt at identifying Afghan class members.

This proposal fails on its face to comply with the Court's order, which required Defendants to develop a methodology for identifying class members, including those who joined the class before and after May 21, 2020. *See Afghan & Iraqi Allies III*, 2022 WL 17338049, at *5. The Court's order required the methodology for good reason: Without class identification, the Court will not be able to monitor Defendants' progress in adjudicating the most-delayed cases or to shape remedies that are geared towards them. The distinction between class members and non-class member applicants is all the more important because Defendants do not process applications on a first-in, first-out basis. *See supra* Part II(A)(1). And Defendants' proposal not to identify class members has effects beyond reporting. For instance, at the administrative

processing step, Defendants propose to ask third-party agencies to expedite SIV applications generally, meaning that class members' unlawfully delayed cases will not be prioritized. *Compare* Proposed Plan at 9 (Afghan SIV Step 11) *with* Previous Plan at 7–8 (previously Step 13). Ultimately, this case is not about establishing general oversight of the SIV program, but about ensuring that long-delayed applications—even those that Defendants have designated as lower priority and therefore continue to languish well beyond the nine months set by statute—are promptly adjudicated.

Defendants attempt to justify this omission by reference to "limitations on data systems" and associated burdens related to progress reporting. Proposed Plan at 2–3, 12. But these limitations and burdens are not new—they existed at the time the Previous Plan was adopted. *See* Ex. 11, 528:22–25; *see also* Ex. 14, 55:1–8, 141:1–23, 157:5–158:17 (prior 30(b)(6) witness testifying in 2019 to same systems limitations). The Court has already rejected Defendants' efforts to modify the Previous Plan based on these tracking and reporting burdens and did not allow Defendants another opportunity to leverage them as a justification for modification. *See Afghan & Iraqi Allies III*, 2022 WL 17338049, at *3, *6. Indeed, it is well-established that litigation-related burdens are not a cognizable justification for modifying court-ordered relief. *See LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84, 102 (D.D.C. 2010) ("The costs of monitoring [an injunction] . . . are not properly considered to be obstacles" warranting modification); *N.L.R.B.*, 215 F.3d at 36 ("[H]urdles inherent in a consent decree's entry do not count as 'obstacles[.]'").

Defendants admit that they *could* continue to implement their previous identification methodology for the class before May 21, 2020, and that they could use a similar methodology

for those who joined the class more recently.[7] *See* Ex. 11, 529:2–530:13, 543:9–22. They simply do not *want to do so*, because it requires them to manually add a tracking identifier to each class member's case at several stages of processing. *Id.* 517:10–520:2; Ex. 12, 42:2–8. Tracking class members for relief purposes is an unexceptional part of a remedial process in a class action case,[8] and if anything, the burdens of doing so have decreased since the Previous Plan was entered, on account of systems improvements. *See* Ex. 11, 538:6–538:16; Ex. 8, 156:25–157:7 (systems change will "significantly reduce the reporting burdens" on USCIS); Ex. 12, 35:11–37:23 (explaining how new semi-automated system will improve accuracy of reporting by USCIS).

The State Department also points to burdens arising from the need to meet and confer with Plaintiffs regarding discrepancies in Defendants' data. Ex. 11, 540:15–542:4. But by drawing Defendants' attention to such discrepancies, Plaintiffs learned that some class members' applications were lost or unaccounted for, including 31 Iraqi SIV applications that the State Department "did not realize . . . were . . . pending action." Notice of Lodging Corrected Progress Reports, ECF No. 149; *see also* Declaration of Olivia Greene, ECF No. 169-1, ¶ 22. As explained above, the burdens inherent in complying with the injunction—including ensuring that Plaintiffs and the Court are provided with accurate data and correcting oversights that resulted in additional delays for class members—are not grounds for modification. *See N.L.R.B.*, 215 F.3d at 35–36.

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[7] As the parties recognized in 2020 when proposing the Previous Plan, due to the manner in which Defendants maintain records, no class identification methodology will be perfect. *See* Previous Plan at 1 n.1. However, the parties set parameters to identify class members that largely captured applicants who had been awaiting government action for over nine months, *id.*, and worked together over the period the Previous Plan was in effect to identify class members who were not initially captured. An equivalent methodology should be used here.

[8] *See, e.g.*, Order, *Kirwa v. U.S. Dep't of Def.*, No. 17-cv-1793, ECF No. 37 (D.D.C. Nov. 16, 2017), ECF No. 55 (Dec. 15, 2017) (requiring Department of Defense to identify class members and provide biweekly status reports).

The Court should therefore order Defendants to use the same class identification methodology for Afghan class members as before, but with modified dates. Defendants should maintain the class member identification tags that they applied under the Previous Plan and apply additional tags to include more recent class members through November 30, 2022, the date of the Court's order directing a new plan. *See Afghan & Iraqi Allies III*, 2022 WL 17338049, at *5.

B. Defendants propose longer performance standards without justification.

At multiple steps in the Proposed Plan, Defendants seek to lengthen performance standards for reasons largely unrelated to the grounds for modification recognized by the Court. As Defendants have not shown that the proposed timeframes are tailored to any legitimate justifications, the Court should reject these changes.

(1) <u>Instruction Packet – Afghan SIV Step 5/ Iraqi SIV Step 7 (Previous Plan Step 8)</u>
NVC sends an instruction packet to applicant requesting standard immigrant visa documentation, including Form DS-260. See Proposed Plan at 4, 7.

Previous Plan Standard	Defendants' Proposal	Plaintiffs' Position
"Upon receipt of the petition from USCIS, the NVC will send an instruction packet to the applicant within **5 days**."	"Upon receipt of [the petition], NVC will send an instruction packet to the applicant within **15 business days.**"	The standard should remain **5 calendar days**, with an option to report compliance in the equivalent number of business days.

Defendants propose giving NVC 15 business days to send applicants a standard email at the initial step of the immigrant visa application process. *See* Proposed Plan at 4, 7. As the parties agreed that the performance standards in the Previous Plan were measured in calendar days, *see* Ex. 19 at 1–2, this change results in a weeks-long delay at this simple step. Defendants argue that this change is necessary to make the plan consistent with its contract with LDRM, the private company that manages SIV processing for NVC, and for "prudent planning" in anticipation of future application increases. Ex. 11, 349:19–350:3, 357:8–14. Neither justification holds water.

First, the State Department's desire to align the court-ordered relief with the terms of its contract with a private party is not a changed circumstance justifying modification of the plan. Nor is Defendants' 15-business-day proposal even consistent with the contractual requirement. The contract with LDRM has set a 10-business-day performance requirement at this step since before the Previous Plan. *See* Ex. 18 at 16; Ex. 11, 332:11–21.

Second, Defendants' interest in "prudent planning" is not what the Court contemplated when determining that an increased caseload could justify new timing benchmarks. The State Department only speculates that there may be a future increase in caseload (which they have not estimated) that might have an impact on processing times (which they have not projected). *See* Ex. 11, 349:2–351:13, 351:23–352:21 (admitting any increase would depend on a variety of factors, such as the rate of COM approval of cases). But the Court should not adjust performance standards simply because Defendants anticipate that they might fail to meet them at some point in the future. The standards are intended to address Defendants' consistent failure to process the applications of class members in a reasonable amount of time, not to reflect Defendants' adjudication pace in the absence of the Court's intervention.

In any event, Defendants have failed to show that a three-fold extension of the timeframe is "suitably tailored" to this speculated increase, *Rufo*, 502 U.S. at 393, given that the step requires NVC only to send an email to the applicant with a template "Welcome Letter." 9 Foreign Affairs Manual 504.4-2(A)(2)(b)(1); *see* Ex. 11, 354:9–355:5. LDRM is currently meeting its contractual deadlines at this step. *See* Ex. 11, 370:10–372:9, 565:16–25. This change is particularly unjustified with respect to the small number of remaining Iraqi class members, for whom Defendants propose lengthening the timeline solely because of a potential increase in

other types of applications. *See id.* 500:2–503:5. The standard at this step should therefore remain 5 days for both Afghan and Iraqi class members.

(2) Steps modified from calendar days to business days

NVC-controlled steps. Plaintiffs object to Defendants' proposal to lengthen performance standards at several NVC-controlled steps by changing "days"—previously measured in calendar days—to "business days." *Compare* Proposed Plan at 3, 5–8 *with* Previous Plan at 3–7 (changing timeframe from days to business days at Iraqi SIV Steps 2, 3, 9, 10 and Afghan SIV Steps 2, 7). According to Defendants, the change is intended solely for "clarity" between the parties and, again, for "consistency" with the NVC's preexisting contract with LDRM. Ex. 11, 310:25–311:18, 370:18–371:2, 495:12–496:4, 506:3–13. These rationales should be rejected because they do not relate to any justification for modifying the plan recognized by the Court and, in any event, do not withstand scrutiny.

First, Defendants' desire to achieve "clarity" does not support changing the performance standard from calendar days to business days. The parties previously met and conferred over this precise issue with respect to the Previous Plan and removed any doubt that compliance is to be measured in calendar days. *See* Ex. 19 at 1–2. The remainder of the Proposed Plan uses calendar days, as do Defendants' reports to Congress on the SIV program. *See* Exs. 20, 23. If what Defendants seek is clarity, the steps should be modified to indicate "calendar days." Plaintiffs are further amenable to providing Defendants with an option to report compliance using the equivalent number of business days (for example, 15 calendar days or 10 business days).

Second, Defendants' desire for consistency with the LDRM contract does not support this modification, as Defendants cannot rely on a preexisting contract to justify a substantive change to the performance standard. Moreover, several of the proposed timeframes are *longer* than those provided under the contract. *See* Ex. 11, 282:19–25. For example, Defendants propose to

lengthen the timeframe for NVC's processing of SIV application materials from 15 (calendar) days to 15 business days, but the LDRM contract requires the company to perform these steps within 10 business days (or the equivalent of 15 calendar days). *See* Proposed Plan at 3, 5, 7 (Step 2; Iraqi SIV Step 9/ Afghan SIV Step 7); Ex. 18 at 16; Ex. 11, 318:2–319:21, 370:10–372:9, 504:15–505:11. Not only that, but LDRM is now in compliance with this standard, having managed the surge of COM emails following the U.S. withdrawal from Afghanistan, Ex. 11, 370:10–372:9; Ex. 6, 159:18–160:8, 168:11–15, and Defendants' own witness is confident that NVC will be able to meet the standard for COM processing going forward, *see* McGeary Decl. ¶ 5 ("Going forward, NVC intends to maintain a 10-business day turnaround time for emails sent to [the COM application] inbox."). Although there may always be a "possible increase in volume" of SIV applications in the future, Ex. 11, 377:22–24, 505:5–7, that speculation alone does not provide Defendants support for padding their performance standards at various steps in the Proposed Plan.[9]

Step to initiate administrative processing. Defendants have likewise not justified changing the timeframe within which the State Department must initiate administrative processing—a step that does not involve NVC and is therefore not covered by the LDRM contract—from 5 calendar days to 5 business days. *See* Proposed Plan at 5, 8 (Iraqi SIV Step 11, Afghan SIV Step 10). Defendants represented to Plaintiffs that no substantive changes were intended to the administrative processing step, *see* Ex. 24 at 1, and their witnesses confirmed that the administrative processing steps remain the same as before for SIV applicants who are able to

[9] Proposing longer timeframes for Iraqi applicants is particularly unwarranted given that there are only a few hundred applicants left in the pipeline, all of whom have been pending years after the program sunset in 2014. Ex. 23 at 3 n.6.

be interviewed, *see* Ex. 10, 20:23–21:1; Ex. 9, 106:3–16. The Court should therefore reject this unexplained change from calendar days to business days.

C. Defendants propose unjustified changes to reporting.

Plaintiffs also object to several changes Defendants propose regarding progress reports that appear entirely unconnected to cognizable justifications.

(1) Extension of time to file progress reports

Defendants propose to file their progress reports 30 days, rather than 10 days, after the end of each reporting period because of purported burdens associated with reporting. *Compare* Proposed Plan at 10 *with* Previous Plan at 8; *see* Ex. 11, 546:15–547:17; Ex. 12, 34:19–36:4. Any such burdens, however, existed at the time the parties developed the Previous Plan and are not permissible justifications for modification. *See supra* Part II(A)(3); *see also* Ex. 12, 36:5–17 (under Previous Plan, USCIS was able to provide on-time and accurate data even with the 10-day reporting deadline). Nevertheless, Plaintiffs would be amenable to changing the deadline for the progress reports to 20 days after the reporting period.

(2) Reduction in frequency of progress reports

Defendants propose filing progress reports every 180 days (rather than every 90 days) "[i]f Defendants meet their standards for four consecutive quarters." *Compare* Proposed Plan at 10 *with* Previous Plan at 8. Defendants have not justified this change and appear to misapprehend what actual progress would look like in this case. Class members will not benefit from the court-ordered relief merely because Defendants meet the performance standards for several quarters; instead, the plan's purpose will be achieved only when Defendants complete processing the fixed universe of unreasonably delayed SIV applications covered by the plan (i.e., those of class members through November 30, 2022). Any reduction in reporting frequency must be contingent on a meaningful reduction in the number of applicants in the class.

(3) Removal of progress report data points

Defendants' Proposed Plan also specifies that they will not report certain data regarding COM appeals at Step 4. *Compare* Proposed Plan at 14 (excluding appeals from the number of applications that were pending at the beginning and end of the reporting period and that entered the step during the reporting period). This differs from the Previous Plan, which tracked appeals. *See* Previous Plan at 12 (not excluding appeals); Ex. 13, 81:22–83:20, 85:12–17 (class member identification tags applied to appeals). The State Department maintains that reporting on COM appeals that are not yet adjudicated is difficult due to systems issues that cause the count to be somewhat overinclusive or underinclusive. *See id.* 59:11–62:4, 75:6–20, 83:24–85:1, 86:13–87:6. But this modification is not connected to any changed circumstance and Defendants have not shown that reporting on COM appeals the way they did previously—even if the data is imperfect—is infeasible. *See id.* 85:12–17 (State Department was able to include appeals in January 2023 Progress Report by using existing tags). Nor is excluding *all* pending appeals from the reporting at this step a suitably tailored response to the asserted systems limitations, as it will replace what may be imperfect reporting with *no* reporting. The Court should reject this change so that the status of class members at Step 4 is reported as completely as possible.

D. Defendants propose unjustified changes to enforcement.

Defendants propose several unjustified changes that further reveal their resistance to be bound by this Court's order and take their obligations seriously. The discovery process revealed that Defendants implemented few, if any, changes to their processing in order to comply with the Previous Plan. For example, while the Previous Plan was in effect, State Department staff prioritized Afghan COM applications exclusively by the applicant's employment tier and did nothing to prioritize the longest-pending applications. *See* Ex. 5, 26:11–27:22, 162:9–163:4 (explaining that prior to 2022, unit staff were not able to deviate from the prioritization scheme,

which could have led to lower priority cases "laying around never getting seen"). Nor does it appear that Defendants meaningfully changed their staffing levels at key steps in the process in response to the plan. *See* Ex. 6, 137:9–138:17 (prior to the announcement of the U.S. withdrawal from Afghanistan in 2021, NVC's SIV staffing increases had been "comparatively minor"); *compare* Schubert Decl. ¶ 4 (8 Afghan COM staff as of February 2021) *with* Ex. 14, 82:25–83:5 (about 10 permanent staff in April 2019). This only confirms the importance of maintaining, if not strengthening, the enforcement mechanisms present in the Previous Plan.

(1) "Endeavor[ing]" to meet performance standards

In the preamble to the revised adjudication plan standards, Defendants added language stating that they "will *endeavor* to meet the performance standards." Proposed Plan at 3 (emphasis added). To the extent this language seeks to relieve Defendants of their obligation to comply with the timelines under the plan, this modification is not supported by any legitimate justification and is inconsistent with the plan's purpose. The plan is a binding injunction to address Defendants' unlawful conduct, not a set of aspirations. The Previous Plan did not contemplate that every failure by Defendants to meet the performance standards will lead to Court intervention—as Defendants are aware, seeing that they failed to meet performance standards in every reporting period, *see* ECF Nos. 120-1, 133-1, 137, 138—but it did not consider Defendants to be in compliance merely because they "endeavor[ed]" to do so. As the Court has already refused to terminate the relief it has ordered, it should not condone a successive attempt by Defendants to be released from their obligations.

(2) Limitations on enforcement

The Proposed Plan also includes modifications that would inhibit the Court's ability to enforce compliance with the performance standards and class members' ability to seek judicial relief. Defendants do not cite any changed circumstances to justify these proposals; instead, these

modifications appear reflective of Defendants' consistent unwillingness to take their obligations under the plan seriously.

Waiver of right to seek judicial relief. Under Defendants' proposal, Plaintiffs would waive their right to seek judicial relief if they do not notify Defendants about a compliance issue within 14 days of receiving the progress reports. *See* Proposed Plan at 10–11. The Previous Plan contemplated that the parties would abide by a procedure for resolving disputes, *see* Previous Plan at 8–9, but this newly added waiver provision would have harsh practical consequences. Defendants' noncompliance will not always be apparent from the face of the progress report, *see supra* Part II(A)(3), and it is not feasible to expect class counsel to identify all possible performance issues within 14 days, particularly given the challenges inherent in contacting class members. This waiver provision would thus needlessly undermine class members' ability to enforce Defendants' obligations under the plan.

Addition of substantial compliance standard. The Proposed Plan permits Plaintiffs to challenge Defendants' failure to meet the performance standards only if Defendants have not "substantially complied" with the plan. *Compare* Previous Plan at 9 *with* Proposed Plan at 10. In addition to being unjustified by any changed circumstances, this change is problematic because the standard is undefined. If issues regarding Defendants' performance arise, the parties are likely to disagree over what it means for Defendants to "substantially compl[y]" with the plan. Proposed Plan at 10. Particularly when combined with Defendants' proposal to report on all SIV applicants rather than only class members, there is a real concern that Defendants may assert that they have substantially complied with the plan even if long-pending cases are languishing past the timing standards. If some class members are left behind with no recourse for the

unreasonable delays they continue to experience, the purpose of the plan is not being fulfilled, regardless of whether Defendants have achieved 'substantial compliance' overall.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court decline to approve Defendants' Proposed Revised Adjudication Plan and instead enter the revised adjudication plan attached as Exhibit 1.

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Respectfully submitted,

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