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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RASHA MUZAHEM ALWAN AL SALIHI,

Plaintiff,

v.

ANTONY BLINKEN, in his official capacity as Secretary of State, et al.,

Defendants.

Case No. 3:23-CV-00718-MMA-AHG

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

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INTRODUCTION

This is a case about prolonged family separation caused by Defendants' unreasonable delay. It is undisputed that Plaintiff Rasha Muzahem Alwan Al Salihi ("Ms. Al Salihi") filed an application to reunite with her husband more than six years ago. It is also undisputed that Defendants have a duty to decide Ms. Al Salihi's application and, if her husband is eligible, to admit him to the United States as a refugee, where he will be reunited with his family. Defendants admit that Congress gave the Department of Homeland Security ("DHS") sole authority over refugee admissions: authority which it delegated to its component agencies. That the filing of this lawsuit finally spurred Defendant Jaddou, Director of the U.S. Citizenship and Immigration Services ("USCIS") to take an action that allows Ms. Al Salihi's application to move to the next step of processing does not render her claims moot. And because the follow-to-join refugee admissions process must be viewed as a single process, the U.S. Department of State ("State Department"), which acts as USCIS's agent to facilitate refugee processing where USCIS does not have a physical presence, is also accountable for the continuing delays. Together, Defendants have an ongoing legal obligation to decide Ms. Al Salihi's application within a reasonable time. The Court should deny Defendants' bid to avoid responsibility for their continuing delay.

BACKGROUND

I. DHS and USCIS Are Responsible for Applications for Refugee Follow-to-Join Status.

Defendants' description of the follow-to-join refugee process, *see* Mot. at 3-4, is generally correct, but ignores three key facts: (1) that refugees have the right to family reunification; (2) that DHS is responsible for adjudicating applications exercising that right; and (3) that the process cannot be split up into two, separate processes.

A. Refugees Have a Right to Family Reunification

Refugees in the United States, like Ms. Al Salihi, have the right to apply for and be reunited with their spouse and unmarried children in the United States. The Refugee Act of 1980 provides that the spouse or child of a refugee "**shall**...be entitled to the same admission status as such refugee if...following to join[] such refugee and if the spouse or child is admissible." 8 U.S.C. § 1157(c)(2) (emphasis added). Unlike most other immigration applications, approval of an application for refugee status under the follow-to-join process is nondiscretionary. *See Kingdomware Tech. v. United States*, 579 U.S. 162, 171-72 (2016) (the word "shall" imposes a mandatory duty). Thus, if the beneficiary of a refugee follow-to-join application is both (1) the qualifying spouse or child of a refugee, and (2) admissible under U.S. immigration laws, they must be granted refugee status. 8 U.S.C. § 1157(c)(2); *see also* 8 C.F.R. § 207.7(a) (eligible follow-to-join beneficiaries "shall be granted refugee status"). Refugee status is granted on the date that the beneficiary is physically admitted to the United States. USCIS Policy Manual, Vol. 7, Part L, Ch. 2.[1]

While some beneficiaries of a refugee follow-to-join application may have independently sought refugee status through the I-590 refugee application process, beneficiaries of a refugee follow-to-join application do not need to have an independent refugee claim: they derive refugee status by virtue of their relationship to the refugee applicant in the United States (also called the "petitioner"). *See* DHS Office of Immigration Statistics, Annual Flow Report at 6 (Jan. 2018).[2] Thus, the same individual can be eligible for refugee status through the I-590 process and as a beneficiary of a follow-to-join application through the I-730 process, however, benefits under the follow-to-join process are non-discretionary and beneficiaries are subject to a narrower list of grounds of inadmissibility compared to other immigrants. *See* 8 U.S.C. § 1157(c)(3).

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[1] https://www.uscis.gov/policy-manual/table-of-contents (last Oct. 3, 2023).

[2] *Available at* https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016_0.pdf.

B. DHS Has Exclusive Authority Over Refugee Processing and Admissions

Only DHS can make determinations regarding refugee admissions, including for follow-to-join refugees. *See* 8 U.S.C. § 1157(c)(1); 6 U.S.C. § 271(b)(3); *see also* Mot. at 3. DHS has delegated responsibility for most stages of refugee follow-to-join processing to USCIS, a component agency of DHS, *see* 8 C.F.R. §§ 207.7(d), (f), (g); whereas U.S. Customs and Border Protection ("CBP"), another component agency of DHS, makes the final decision to admit the beneficiary of an approved refugee follow-to-join petition, *see* 8 U.S.C. § 1225(a)(1); 8 C.F.R. § 235(f)(1). Although USCIS outsources part of its responsibility over follow-to-join processing to the State Department in countries where it does not have a Field Office, it retains authority over the follow-to-join process. *See* 9 FAM 203.5-2(a)(6) (consular officers "act as agents of USCIS" to "facilitate [follow-to-join] processing abroad and to verify the eligibility of the approved beneficiaries").

C. The Follow-To-Join Process Must Be Viewed As a Single Process With Two Phases

Contrary to Defendants' suggestion, the follow-to-join application process cannot be split into two separate processes, each under the control of a different agency. *Cf.* Mot. at 5. It is a single process with two phases, and it involves ongoing collaboration between all Defendants. *See* Am. Compl. ¶¶ 24-42 (describing follow-to-join process).

1. Phase 1: Initial Adjudication of the I-730 Petition

To begin an application for refugee status through the follow-to-join process, a refugee in the United States files a Form I-730 Refugee/Asylee Relative Petition ("I-730 petition" or "I-730") with USCIS for each eligible family member. USCIS must approve the petition if the petitioner: (1) entered the United States as a refugee; (2) is filing for their qualifying spouse or child; and (3) is filing within two years of admission. 8 C.F.R. § 207.7(d), (e).

Once USCIS determines that the beneficiary is a qualifying family member, it approves

the I-730 petition. *See* 8 C.F.R. § 207.7(f)(2). This approval is conditional because it is contingent on subsequent verification that the beneficiary is eligible and admissible under U.S. immigration laws. *See* 9 FAM 203.5-2(a)(6). An approved I-730 petition does not end the follow-to-join process or entitle the beneficiary to refugee status.

2. Phase II: Consular Processing and Admission to the United States

After USCIS approves the I-730 petition, it must determine whether the beneficiary is admissible and eligible to travel to the United States. The beneficiary is admissible if they are not subject to certain statutory bars. *See* 8 U.S.C. § 1157(c)(3).

In countries with a USCIS Field Office, USCIS makes admissibility determinations and handles further case processing (including scheduling and conducting an interview, conducting security checks, and facilitating medical checks). 9 FAM 203.5-3(b)(3). In countries like Turkey, where Defendants have sent Ms. Al Salihi's petition and where there is no USCIS Field office, consular officers at the U.S. Embassy "act as agents of USCIS" to carry out these tasks. 9 FAM 203.5-2(a)(6). But USCIS is still responsible for processing applications for refugee status under the follow-to-join process to completion. *See, e.g.,* Am. Compl. ¶ 36 (when the State Department initiates security checks for follow-to-join beneficiaries, USCIS remains responsible for resolving any questions that may arise during the security and background check process).

Because DHS has sole authority to grant refugee status, the State Department cannot approve or deny an application for refugee status under the follow-to-join process. *See* 8 U.S.C. § 1157(c)(2). If consular officers identify any doubts about whether the beneficiary is admissible or has a qualifying relationship to the petitioner, they must return the petition to USCIS for reconsideration (a process known as a "consular return"). 9 FAM 203.6-7(c); 9 FAM 203.5-2(a)(6). Following a consular return, USCIS has three options: (1) reaffirm the I-730 petition and send it back to the U.S. Embassy; (2) issue a request for additional evidence to prove eligibility;

or (3) issue a notice of intent to deny ("NOID"). 9 FAM 203.6-9(f). If the petitioner does not respond to the NOID with sufficient evidence to overcome USCIS's doubts about the beneficiary's eligibility, USCIS will deny the I-730 petition, thereby ending the follow-to-join application process. *See* 8 C.F.R. § 103.2(b)(13)(i). This denial constitutes final adjudication of an application for refugee status under the follow-to-join process.

If a consular officer confirms that the beneficiary is eligible and admissible, the overseas post issues a travel packet and boarding foil that allow the beneficiary to travel to the United States. 9 FAM 203.6-8. The follow-to-join application process ends when CBP admits the beneficiary of an approved I-730 petition to the United States as a refugee, fulfilling the mandate of 8 U.S.C. § 1157(c)(2).

II. Defendants Delay in Processing Ms. Al Salihi's Application Has and Continues to Cause Irreparable Harm.

Ms. Al Salihi and her family, including her husband, Naser Sameer Naji ("Mr. Naji"), and their daughter, Rose, applied for refugee status through the I-590 process to escape Iraq after Ms. Al Salihi's father was killed and her family was targeted by insurgents. Am. Compl. ¶ 1. Ms. Al Salihi and her daughter were approved for refugee status and resettlement in the United States in 2016, but Mr. Naji's refugee application was denied. *Id.* ¶¶ 13, 14. Although Mr. Naji sought reconsideration of USCIS's denial of his application for refugee status, the family became separated when Ms. Al Salihi and their daughter were forced to leave Iraq for the United States or risk losing their opportunity to be resettled as refugees. *Id.* ¶ 15. Ms. Al Salihi and their daughter were resettled as refugees in August 2017; Mr. Naji had to stay behind, still awaiting a decision on his request for reconsideration. *Id.* ¶¶ 15,16. In October 2017, USCIS responded to the request for reconsideration and granted Mr. Naji a reinterview—a tacit acknowledgement that error may underlie its denial of refugee status. *Id.* ¶ 17. But USCIS has never scheduled the reinterview and Mr. Naji remains in Iraq, separated from Ms. Al Salihi and their daughter. *Id.* ¶¶

18, 19.

Shortly after being resettled in the United States, Ms. Al Salihi filed an I-730 petition on behalf of Mr. Naji. Am. Compl. ¶ 43. The petition had been pending nearly three years when, in September 2020, Ms. Al Salihi sought assistance from the Office of the Citizenship and Immigration Services Ombudsman ("USCIS Ombudsman") because she had not received any update from USCIS about the status of her petition. *Id.* ¶ 44. A few months later, in April 2021, USCIS sent Ms. Al Salihi a notice stating it intended to deny her petition based on "derogatory information" regarding Mr. Naji. *See id.* ¶ 45. The notice did not provide any details about the "derogatory information," but indicated that USCIS would disclose the information if Mr. Naji signed a consent for release form and provided Ms. Al Salihi with an opportunity to respond to the notice with additional information before USCIS definitely denied the petition. *See id.* ¶¶ 46-47. Ms. Al Salihi returned the consent for release form, signed by Mr. Naji, but USCIS never disclosed the "derogatory information" to Ms. Al Salihi. *See id.* ¶¶ 51, 54, 57.

Without the benefit of any details regarding the basis of USCIS's intent to deny her petition, Ms. Al Salihi submitted a response to the notice within the required time. *See id.* ¶¶ 50, 52, 54. In her response, Ms. Al Salihi explained that she believed that the "derogatory information" that USCIS referenced in the notice was the same information that had caused USCIS to deny Mr. Naji's refugee application, and that while USCIS granted Mr. Naji a reinterview in response to his request for reconsideration of his refugee application, Mr. Naji had never been given the opportunity of a reinterview. *See id.* ¶¶ 53-55. Thus, notwithstanding USCIS's agreement to reconsider the basis of its denial of Mr. Naji's refugee application, it appeared USCIS intended to deny Ms. Al Salihi's I-730 petition on the very same basis.

Ms. Al Salihi waited for almost two years after submitting her response to the notice without any substantive developments from USCIS. *See id.* ¶ 57. She filed this lawsuit in April

2023. Shortly thereafter, USCIS conditionally approved Ms. Al Salihi's I-730 petition. Ms. Al Salihi's application for reunification with Mr. Naji is in the process of being transferred to the U.S. Embassy in Ankara, Turkey. *See* Mot. at 6; *see also* Am. Compl. ¶ 58.

STANDARD OF REVIEW

A court should dismiss a complaint under Rule 12(b)(1) only if it determines that it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). When Defendants argue that the claims are moot, they bear the heavy burden of showing that "it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added) (internal quotation marks omitted); *see also In re Palmdale Hills Property, LLC,* 654 F.3d 868, 874 (9th Cir. 2011) ("The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide.") (internal quotation marks omitted).

A defendant may challenge a plaintiff's jurisdictional allegations in one of two ways: a facial or factual attack. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack accepts the truth of plaintiff's allegations but asserts that they are insufficient to establish jurisdiction. *See Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). In this case, Defendants bring a facial attack because their 12(b)(1) motion does not rely on any facts beyond those alleged in the complaint. Defendants' 12(b)(1) motion is based on the singular fact that USCIS has approved Plaintiff's I-730 petition, *see* Mot. at 5, which Plaintiff alleged in the complaint, *see* Am. Compl. ¶ 58. Thus, the Court should treat the motion to dismiss Defendants Mayorkas and Jaddou as it would a motion under 12(b)(6) and draw all reasonable inferences in Plaintiff's favor as well as disregard Defendant's extrinsic evidence. *See Pride*, 719 F.3d at 1133.

A court should deny a motion to dismiss under Rule 12(b)(6) if the allegations, viewed in the light most favorable to the non-moving party, state a plausible claim for relief. *Ashcraft v.*

Iqbal, 556 U.S. 662, 678 (2009); *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002). In ruling on a 12(b)(6) motion, the court generally does not consider extrinsic evidence, relying on "only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *see also Weday v. Mayorkas*, No. 2:21-cv-01595-RSM-JRC, 2022 WL 1143227, at *4 (W.D. Wash. Mar. 22, 2022), *rec. adopted*, 2022 WL 1136803 (Apr. 18, 2022) (declining to consider the parties' declarations in 12(b)(6) motion to dismiss plaintiff's unreasonable delay claim). Here, Defendants rely on the Declaration of Rebecca Austin only two times, both in support of their 12(b)(6) motion. *See* Mot. at 2-3 (citing declaration to explain that the State Department's National Visa Center received Ms. Al Salihi's approved I-730 petition from USCIS and forwarded the petition to the U.S. Embassy Ankara). The Court should not consider Defendants' extrinsic evidence for purposes of deciding the 12(b)(6) motion.

ARGUMENT

I. Ms. Salihi's Claims Against Defendants Mayorkas and Jaddou Are Not Moot.

Defendants argue that Ms. Al Salihi's claims are moot, but they cannot meet the heavy burden of showing "there is no effective relief remaining for a court to provide." *In re Palmdale Hills Property, LLC,* 654 F.3d at 874 (internal quotation marks omitted). Ms. Al Salihi has not received the relief she requested, which this Court has the power to grant. Under the Refugee Act, Ms. Salihi is entitled to reunite with her husband if he is eligible and admissible. 8 U.S.C. § 1157(c)(2). Until Defendants either admit Mr. Naji as a refugee or finally deny Ms. Al Salihi's I-730 petition, they have not finally adjudicated her family reunification application. *See* Am. Compl., Req. for Relief ¶ 2. Defendants have not carried their burden to demonstrate mootness and the Court should deny their motion to dismiss under Rule 12(b)(1).

A. Ms. Al Salihi Has Not Received the Relief to Which She is Entitled.

Defendants misrepresent the relief Ms. Al Salihi requests as limited to the initial adjudication of her I-730 petition, *see* Mot. at 5, ignoring the plain language of the Amended Complaint. Ms. Al Salihi seeks injunctive and declaratory relief related to the adjudication of her family reunification application, which the Amended Complaint defines as "encompass[ing] both conditional approval of the Form I-730 petition[] *and final approval of the application[] following overseas processing*." Am Compl. ¶ 27 (emphasis added). Defendants complain that USCIS only has authority over the first decision, *see* Mot. at 5, but there is no dispute that DHS has sole authority to allow or deny Mr. Naji admission to the United States as a refugee. *See* 8 U.S.C. § 1157(c) [3]; *see also* Mot. at 3. And Mr. Naji cannot be admitted to the United States until a final determination of admissibility is made, which has indisputably not yet occurred. *See* Mot. at 4, 6. Defendants cannot show that there is no relief the Court could grant as to Plaintiff's claims against DHS. *See* Mot. at 5 (lumping DHS and USCIS together and relying on the fact that "USCIS has already adjudicated the I-730 petition" to argue that Plaintiff's claims are moot as to both). This alone provides a sufficient basis to deny Defendants' 12(b)(1) motion as to Defendant Mayorkas.

As to USCIS, Defendants argue that approving Ms. Al Salihi's I-730 petition discharges its obligation under the Refugee Act and there is no further relief the Court could order. *See* Mot. at 5. Defendants are wrong. Preliminary adjudication of the I-730 petition does not complete USCIS's role in adjudicating Ms. Al Salihi's follow-to-join application. *See, e.g.*, *Doe v. Risch,* 398 F. Supp. 3d 647, 653, 659 (N.D. Cal. 2019) (ordering relief against USCIS and the State Department where the I-730 petition was already "preliminarily approved" by USCIS at the time

[3] Although the statute refers to the "Attorney General," authority was transferred to the Secretary of Homeland Security upon creation of DHS. *See* 8 U.S.C. § 1103(a); *see also* 9 FAM 203.5(a)(1) (DHS has "exclusive[]" authority to "adjudicate and process" refugee applications). The Secretary of DHS transferred this authority to USCIS. 6 U.S.C. § 271(b)(3); *see also* 9 FAM 203.5(a)(2).

the lawsuit was filed); *see also* Am. Compl. ¶ 37-38, 63-64 (describing ongoing duties USCIS has to adjudicate Ms. Al Salihi's family reunification application).

Afghan and Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Pompeo is on point. There, the State Department had completed the first phase of processing plaintiff's visa application by approving her Chief of Mission application, after which her visa application went to USCIS for further adjudication. No. 18-cv-01388 (TSC), 2019 WL 367841, at *8 (D.D.C. Jan. 19, 2019) (internal citations omitted). The court found that "[w]hile a final decision [on plaintiff's visa application], favorable or unfavorable, would render her claims moot, her progression through the process while this case has been pending does not." *Id.* Like the Chief of Mission approval in *Afghan & Iraqi Allies*, USCIS's preliminary approval of Ms. Al Salihi's I-730 petition does not moot her claim that Defendants have unreasonably delayed a decision on her application for family reunification through the follow-to-join process.

For this reason, *United States v. Hovsepian*, which Defendants rely on for the proposition that USCIS has provided Ms. Al Salihi full relief, *see* Mot. at 5, is inapposite. In *Hovsepian*, defendants had acted "definitively in the plaintiffs' favor" by granting their applications for U.S. citizenship. 359 F.3d 1144, 1161 (9th Cir. 2004). There was nothing further for USCIS to do. By contrast, here, USCIS's approval of Ms. Al Salihi's petition is only preliminary and conditioned on a subsequent finding that the petition's beneficiary, Mr. Naji, is admissible. *See* Background Part I.C.; *Risch,* 398 F. Supp. 3d at 659; *Afghan & Iraqi Allies*, 2019 WL 367841, at *8.

USCIS's attempt to split the follow-to-join process into separate pieces to argue that, having approved Ms. Al Salihi's petition, it is no longer responsible, is also unavailing. *See* Mot. at 5. Simply because USCIS does not maintain a physical presence in Iraq (where Mr. Naji resides) or Turkey (where Defendants have elected to send Ms. Al Salihi's approved petition for consular processing) does not relieve it of its duty to ensure prompt processing by consular

officers acting "as agents of USCIS." *See* 9 FAM 203.5-2(6). In a similar context, a district court refused to dismiss the plaintiffs' unreasonable delay claims against USCIS and the State Department where the I-730 petitions were already approved and the petitions remained pending at the U.S. Embassy in Ethiopia for interview scheduling. *See Weday*, 2022 WL 1143227, at *4-5. Since USCIS retains authority over Ms. Al Salihi's application, it remains liable for ongoing delays and this court can order effectual relief. *See Hong Wong v. Chertoff*, 550 F.Supp.2d 1253, 1259 (W.D. Wash. 2008) (in context of application for adjustment of status where USCIS awaited name check results from the FBI, USCIS could not absolve itself of responsibility for continuing delay based on its abdication of part of the process to the FBI given that USCIS was ultimately assigned the duty to adjudicate the application).

B. Even If Approval of the I-730 Petition Could Moot Claims Against USCIS, Exceptions to Mootness Apply.

Even if the Court were to find that approval of the I-730 petition could moot claims against USCIS, Ms. Al Salihi's claims would fall under exceptions to mootness for voluntary cessation and/or actions capable of repetition, yet evading review. "[A] defendant claiming that its voluntary compliance moots a case bears the burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). "Whether similar events occurred in the past is potentially dispositive of the application of the 'capable of repetition yet evading review' exception." *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior*, 870 F. Supp. 2d 943, 960 (E.D. Cal. 2012) (internal citations omitted); *see also Demery v. Arpaio,* 378 F.3d 1020, 1027 (9th Cir. 2004) (repeated past conduct on multiple occasions taken as evidence of likely repetition).

Regardless of which of these exceptions the Court applies, Ms. Al Salihi's claims should not be dismissed for mootness. By moving Ms. Al Salihi's family reunification application to the

next stage of processing, USCIS voluntarily ceased the inaction that she complained of, but given USCIS's past dilatory conduct, Ms. Al Salihi has a reasonable expectation that the harms she alleged will be repeated. *See Demery*, 378 F.3d at 1027. USCIS has repeatedly delayed action on Ms. Al Salihi's family's case. First, USCIS granted Mr. Naji a reinterview six years ago, but never scheduled it. *See* Am. Compl. ¶¶ 17-18. Next, USCIS took no action on Ms. Al Salihi's I-730 petition for nearly three years, until the USCIS Ombudsman became involved, prompting the agency to issue a notice of intent to deny. *Id.* ¶¶ 43-45. Then, being in receipt of Ms. Al Salihi's response to the notice for nearly two years, USCIS took no action until after Ms. Al Salihi initiated this lawsuit. *Id.* ¶¶ 52, 57. And USCIS has still never disclosed the purported "derogatory information" upon which its notice of intent to deny was allegedly based. *Id.* ¶ 54. The filing of this case prompted the only action that has meaningfully advanced Ms. Al Salihi's petition in the six years it has been pending. Based on this record, Defendants cannot show it is "absolutely clear" that they will continue to subject Ms. Al Salihi to additional delays at future stages of processing without court ordered relief. *See Friends of the Earth*, 528 U.S. at 190.

Furthermore, it is hardly speculative, as Defendants claim, Mot. at 8, to suggest that Ms. Al Salihi's petition may be returned to USCIS for reconsideration. USCIS previously indicated its intent to deny her petition by issuing a notice of intent to deny. If an issue regarding a security or background check arises during the assessment of Mr. Naji's admissibility, *only* USCIS can resolve it. *See* Background Part I.C.2. Although USCIS approved Ms. Al Salihi's I-730 petition following commencement of this lawsuit, it is conceivable that a consular officer could re-raise concerns related to the purported "derogatory information" that caused both Mr. Naji's I-590 refugee application and Ms. Al Salihi's I-730 petition (at least initially) to be denied. Ms. Al Salihi's family reunification application is still being processed and there is no guarantee that consular officers will find that her husband is admissible and eligible to travel. Thus, it remains

more than possible that her application will be returned to USCIS and subject to even further delay, depriving Ms. Al Salihi of her right to final adjudication. Indeed, Defendants actions to date suggest that is the most probable outcome if their motion is granted.

II. Ms. Al Salihi Has Stated a Claim Against the State Department.

To argue that the State Department is not responsible for delays, Defendants focus on the time since the National Visa Center received and transferred Ms. Al Salihi's I-730 petition and ignore the six years she has already waited to be reunited with her husband. *See* Mot. at 7. But the delays in the follow-to-join process must be assessed as a whole. *See* Argument Part I.A. The State Department, which functions like a USCIS contractor, cannot escape liability for delays earlier in the process, and courts within this district have already rejected the argument that there is no duty to schedule a consular interview within a particular timeframe, *cf* Mot. at 6. Because Defendants delayed processing Ms. Al Salihi's application for six years and counting, she has stated a plausible claim against all Defendants.

A. Delays Must Be Viewed as a Whole, From Date of Filing to Admission.

As explained previously, the Court should reject Defendants' attempt to avoid liability for delays by splitting up the follow-to-join process into two separate pieces. In an analogous context, a D.C. district court held that the State Department's approval of the plaintiff's Chief of Mission application—a threshold determination that an applicant is eligible for SIV status—did not moot her claim that the State Department and USCIS unreasonably delayed adjudicating her SIV application. *Afghan & Iraqi Allies*, 2019 WL 367841, at *8. USCIS had not yet received the plaintiff's application, *see i.d.*, so she could not plead facts about what USCIS had "done or failed to do" after receiving her application, *see* Mot. at 6, yet the court found she had standing against USCIS based on the agencies' collective failure to provide a "final decision[] on [her] SIV application[]" within a reasonable period. *Afghan & Iraqi Allies*, 2019 WL 367841, at *8.

In the follow-to-join context, the Court must examine the full duration of Ms. Al Salihi's wait: measured from the time she submitted the I-730 petition in October 2017 until her husband is admitted to the United States. *See Risch*, 398 F. Supp. 3d at 659 (court measured delay from time I-730 petition was filed and found the plaintiff's nearly two-and-a-half-year delay unreasonable). She has plausibly stated a claim for relief based on this six-year delay.

B. Courts Have Repeatedly Rejected Defendants' Argument that There is No Duty to Schedule an Interview Within a Particular Timeframe.

Although Defendants never quite say so directly, they seem to assert that scheduling an interview is discretionary. *See* Mot. at 6. This argument has been rejected in other unreasonable delay cases. *See Weday*, 2022 WL 1143227, at *3 (finding the scheduling of an interview "ministerial" and non-discretionary); *Deressa v. Mayorkas*, No. 2:21-cv-01528-RSM-JRC, 2022 WL 1143374, *3 (W.D. Wash. Mar. 22, 2022), *rec. adopted*, 2022 WL 1136765 (Apr. 18, 2022) (same). As an initial matter, Defendants' admission that an interview is required for determining travel eligibility demonstrates that interview scheduling is a required element of Defendants' duty. *See* Mot. at 6. And Defendants are wrong when they claim that there is "no standard against which the Court can measure whether the agency" has scheduled an interview "within a reasonable time": courts regularly assess agency delays under the Administrative Procedure Act according to the framework discussed below. *Cf.* Mot. at 6; *see also Weday*, 2022 WL 1143227, *5 (finding that whether delay in scheduling interviews is unreasonable is governed by the APA, but is a "fact-intensive inquiry" not properly assessed at the motion to dismiss stage).

C. Ms. Al Salihi Has Stated a Claim for Unreasonable Delay.

In determining whether Defendants have unreasonably delayed required action under the Administrative Procedure Act, courts weigh six factors established by the D.C. Circuit ("TRAC factors"):

(1) the time agencies take to make decisions must be governed by a rule of reason;

> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

See Brower v. Evans, 257 F.3d 1058, 1068-69 (9th Cir. 2001) (adopting the TRAC factor test) (internal quotation marks omitted).

As a threshold matter, Defendants' motion to dismiss should be denied because whether delay is reasonable is a fact-intensive inquiry that is not appropriately decided at the motion to dismiss stage. *See Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *12 (N.D. Cal. Nov. 21, 2014) (denying motion to dismiss that required a *TRAC* analysis); *Hui Dong v. Cuccinelli*, No. CV 20-10030-CBM-(PLAx), 2021 WL 1214512, at *4 (C.D. Cal. Mar. 2, 2021) ("[T]he Court finds it is premature to rule on the issue of whether Plaintiff has satisfied the *TRAC* test at the pleading stage as to Plaintiff's APA claim."). If the Court were to engage in the TRAC analysis at this juncture, however, Ms. Al Salihi has stated a claim.

1. Factors One and Two – Rule of Reason

Although there is no statutory timeframe in which Defendants must adjudicate follow-to-join family reunification applications, courts in this circuit have looked to another immigration statute, 8 U.S.C. § 1571(b), which provides that in general it is the sense of Congress that "processing of an immigration benefit should be completed not later than 180 days after the initial filing of the application." *See Risch*, 398 F. Supp. 3d at 657 (finding the statute tipped TRAC factor 2 in plaintiff's favor); *Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1073 (N.D. Cal. 2014) (same). Courts frequently hold that under normal circumstances, delays of two years—far shorter than the six-year delay that Ms. Al Salihi and her family have faced—are unreasonable as

a matter of law. *See Chen v. Chertoff*, No. C 07-2816 MEJ, 2008 WL 205279, at *3 (N.D. Cal. Jan. 23, 2008) (collecting cases). In the follow-to-join context, where processing delays can lead to "extended family separation," courts' tolerance for delay is especially low. *See, e.g., Risch*, 398 F. Supp. 3d at 657-59 (two-and-a-half-year delay in adjudicating follow-to-join application was unreasonable). Even in more complex cases, such as those involving national security concerns, courts have found delays such as those faced by Ms. Al Salihi unreasonable. *See Islam*, 32 F. Supp. 3d at 1072 (finding delay of almost six years unreasonable notwithstanding fact that delay was related to resolution of whether plaintiff would be granted a waiver for a terrorism-related ground of inadmissibility).

Defendants have not proffered any explanation for their delays in processing Ms. Al Salihi's application. As discussed in Argument, Part I.A., *supra*, the benefit that Ms. Al Salihi seeks—reunification with her husband in the United States—is nondiscretionary: Mr. Naji must be admitted if he has a qualifying relationship and is admissible. *See* 8 U.S.C. § 1157(c)(2). Ms. Al Salihi's application has been pending six years. For purposes of determining whether she has stated a claim, Factors 1 and 2 weigh in her favor.

2. Factors Three and Five – Health and Human Welfare Factors

Defendants do not dispute the significant harm that delayed adjudication has caused Ms. Al Salihi and her family. *See* Mot. at 7-8. Ms. Al Salihi and her daughter have not seen Mr. Naji for six years. Am. Compl. ¶ 21. They worry about Mr. Naji's safety and his health because while he remains in Iraq, he faces danger from violence similar to the danger that led to the death of Ms. Al Salihi's father, and has suffered several health scares a result of living alone without family. *Id.* ¶ 19. For Ms. Al Salihi and her daughter, life in the United States without Mr. Naji has been very difficult and Ms. Al Salihi struggles to raise their daughter on her own and meet her family's financial needs. *Id.* ¶ 20. These harms and the years Ms. Al Salihi and her daughter

have missed with Mr. Naji are irreparable. *See also Risch*, 398 F. Supp. 3d at 657 (interests prejudiced by delayed processing of I-730 petitions are "weighty"). Given everything that is at stake for Ms. Al Salihi, Factors 3 and 4 weigh in her favor and show that she has stated a claim for relief.

3. Factor Four– Competing Priorities

Defendants make no argument for how Factor 4 weighs in their favor and the Court should therefore find that this factor weighs against dismissal or is neutral. *See, e.g., Risch*, 398 F. Supp. 3d at 658 (rejecting defendants' vague assertion that expediting the processing of the plaintiff's application would be unfair in light of the agency's "other duties").

4. Factor Six – Bad Faith

Ms. Al Salihi need not allege, and the Court need not find, that Defendants acted in bad faith to issue a finding of unreasonable delay. *See Telecommunications Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). At a minimum, USCIS's preliminary grant of Ms. Al Salihi's I-730 after almost six years' delay only in aid of arguing mootness to this Court should be viewed with the utmost skepticism. And at least one court within this district found factor 6 weighed in favor of the plaintiff where although "the Court [did] not find that Defendants [] acted in bad faith to cause the delay, neither [did] it find that they [] acted in good faith to address the delay such that judicial intervention [was] rendered unnecessary." *Risch*, 398 F. Supp. 3d at 659. So too here, Defendants conduct militates in favor of judicial intervention to ensure that Ms. Al Salihi's case does not continue to face delays.

D. Ms. Al Salihi Stated a Claim for Relief Under the Due Process Clause.

As discussed above, Mr. Naji must be admitted as a refugee if he is eligible and admissible. *See* 8 U.S.C. § 1157(c)(2). Ms. Al Salihi therefore has a statutorily created, legitimate claim of entitlement to reunification with her husband in the United States. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Defendants cannot deprive Ms. Al

Salihi of this interest without due process of law. *See Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013) (plaintiff had a protected interest in approval of her husband's I-130 petition). Ms. Al Salihi has stated a claim that by failing to timely decide her family reunification application, Defendants violated her procedural due process rights. *See Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) ("If there is irreparable harm from delay, then delay injures, and by injuring deprives.").

CONCLUSION

Ms. Al Salihi has the right to be reunited with Mr. Naji in the United States—not as Defendants would have it, simply a right to a piece of paper stating that he may (or may not) be allowed to join Ms. Al Salihi and their daughter at an unspecified future date. Granting Defendants' motion would insulate Defendants from accountability for their continuing delay, while denying what this Court was established to dispense: justice. We therefore ask the Court to deny Defendants' motion.

DATED: October 6, 2023

Respectfully Submitted,

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