UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*, Plaintiffs, v. ALEJANDRO MAYORKAS, *et al.*, Defendants.	Civil Action No. 1:21-cv-124-TSC

PLAINTIFFS' RENEWED MOTION
TO PARTIALLY LIFT STAY OF PROCEEDINGS

Plaintiffs Tahirih Justice Center and Ayuda, Inc. respectfully renew their motion to partially lift the stay of proceedings in this case. As before, Plaintiffs request permission to proceed with Counts 1-3 of their Complaint, which allege that the asylum rule at issue here must be vacated in its entirety because the purported Acting Secretary of Homeland Security who approved it had no authority to hold that position.

For more than a year, Chad Wolf ran one of the federal government's largest and most powerful departments, approving a series of radical policies, without Senate confirmation or any statutory authority to wield that power. One of those new policies was the rule at issue here, which seeks to eviscerate the statutory asylum protections that Congress created to fulfill the nation's obligation to shelter immigrants fleeing persecution. (*See* Compl. ¶ 1, ECF No. 1, Jan. 14, 2021.)

When Plaintiffs agreed to stay this case in February 2021, President Biden had recently ordered Defendants to take specific remedial actions concerning the government's asylum policies within set deadlines. President Biden's deadlines came and went. Now two and a half years after this case was stayed, Defendants have yet to propose the new rules that Defendants represented would address the rule at issue in this case. There is no end in sight—merely an ever-shifting set

of revised timetables that Defendants admit are purely "aspirational," and at the June status hearing, under questioning from this Court, Defendants' counsel acknowledged that they cannot provide any firm deadlines for the issuance of those proposals. Defendants have not committed to rescinding the asylum rule in its entirety, and the limited information that has emerged about their plans suggests that they now intend to retain parts of the rule—all of which undermines the prospect that Plaintiffs' claims will be mooted by their new rules, whenever they materialize.

As Plaintiffs have said before, this cannot go on forever. Plaintiffs have a right to their day in court, and there is no justification for continuing the stay indefinitely. As the proponents of a continued stay, Defendants bear the burden of showing its necessity. And as this Court suggested during the June status hearing, at this point Defendants are effectively asking for an indefinite stay, as other courts have recognized in similar circumstances. A party seeking an indefinite stay must identify a "pressing need" for it. And in all cases, if there is even a "fair possibility" that a stay may harm the opposing party or anyone else, the party seeking the stay must show "hardship or inequity" in being required to go forward—and must demonstrate that this hardship or inequity outweighs any harm to the other side.

Defendants cannot satisfy these burdens. The only supposed hardship they previously identified in being required to move forward was an unsupported claim that litigating this case would divert the attention of personnel who would otherwise be working on their rulemakings. Not only is that claim implausible, it would be insufficient to justify a stay regardless, as the case law makes clear. Moreover, the Court of Appeals and district courts within this Circuit have repeatedly denied requests to stay cases indefinitely pending the resolution of prospective rulemakings, other administrative proceedings, or related litigation.

After two years of missed deadlines, there is no way to know when any of Defendants' promised rulemakings will be published, much less when they will be finalized and take effect. Nor is there any way to know whether those rulemakings will actually moot Plaintiffs' claims. Meanwhile, the nebulous status of the asylum rule—preliminarily enjoined by the *Pangea* litigation, but fully integrated into the Code of Federal Regulations—forces Plaintiffs to spend considerable extra time discerning which regulations are actually in effect. This state of affairs also continues to mislead courts, to the detriment of the immigration system as a whole. Moreover, prolonged uncertainty about if and when the asylum rule may go into effect is tangibly hindering Plaintiffs' ability to appraise the strength of prospective new cases and thereby select new clients and make the commitments often necessary to obtain funding. All told, there is more than a "fair possibility" that continuing the stay will harm Plaintiffs and others.

Conversely, Defendants will suffer no hardship from being required to litigate Plaintiffs' appointment-based claims, and doing so will promote judicial efficiency. The government has briefed the legality of Chad Wolf's tenure more than a dozen times already, and nearly ten judicial opinions have analyzed the relevant issues in depth. If Plaintiffs prevail on those claims, it will end this case, avoiding the need to resolve Plaintiffs' many other complex allegations that the asylum rule is invalid under the Administrative Procedure Act and other authorities, (*see* Compl. ¶¶ 191-404), as well as any questions about whether Defendants' newly issued rules (if they ever materialize) have truly mooted each of those claims. If Plaintiffs do not prevail on their appointments claims, it will at least significantly narrow the issues in this case.

There are strong odds, however, that Plaintiffs *will* prevail. Every court so far has agreed, without hesitation, that Chad Wolf and his predecessor Kevin McAleenan held the position of Acting Secretary unlawfully, rendering their official acts a nullity. The government's contrary

arguments amount to "interpretative acrobatics" that contradict "the plain language" of the relevant legal authority, *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 20-21 & n.6 (D.D.C. 2022), essentially boiling down to a "tortured" insistence "that the text means something other than what it says," *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020). So flimsy are the government's arguments that they arguably "lack a good-faith basis in law or fact." *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 973 (N.D. Cal. 2021).

Two and a half years ago, Plaintiffs consented to a stay in good-faith reliance on the prospect that the incoming administration and new agency leadership would take timely action concerning the asylum rule, as indicated by President Biden's then-recent executive order. Last year, Plaintiffs wrote that their "willingness to afford the new administration time to rescind the Rule is no reason to continue denying them their day in court . . . 658 days later (and counting)." (Reply at 3, ECF No. 43, Nov. 28, 2022.) It has now been 885 days—and counting. And Defendants have "still produced virtually nothing but an assurance that . . . they will eventually generate something that 'they expect' will moot all of Plaintiffs' claims." (*Id.*)

If a plaintiff's good-faith willingness to agree to a stay forever barred that plaintiff from having its claims heard, perverse incentives would ensue that would undermine, not enhance, judicial economy. As precedent makes clear, however, that is not the law. Instead, the burden lies with Defendants to show a pressing need for the indefinite stay they seek—or at the very least, to show hardship or inequity from having to litigate this case that overrides Plaintiffs' harm. Defendants cannot satisfy that burden. And at this point, the most promising path toward resolving this case swiftly is to partially lift the stay and allow Plaintiffs' appointments claims to proceed.

FACTUAL AND PROCEDURAL BACKGROUND

On January 14, 2021, Plaintiffs filed their complaint against the U.S. Department of Homeland Security ("DHS"), the U.S. Department of Justice ("DOJ"), and several of their officers

and agencies (together, "Defendants"). Plaintiffs allege that the rule promulgated at 85 Fed. Reg. 80,274 (Dec. 11, 2020) (the "Global Asylum Rule," the "Mega Rule," or the "Rule") must be vacated as unlawful under the Administrative Procedure Act ("APA") and held void under the Federal Vacancies Reform Act ("FVRA") because the purported Acting Secretary of DHS who approved it, Chad Wolf, had no authority to hold that position under the Homeland Security Act, the FVRA, or the Constitution's Appointments Clause. Plaintiffs also allege that the Rule violated the Immigration and Nationality Act, the Convention Against Torture and other international law obligations, the Administrative Procedure Act, and the Equal Protection Clause of the Fourteenth Amendment. (*See generally* Compl.) A nationwide preliminary injunction enjoining the Rule in its entirety was entered by the Northern District of California on January 8, 2021.[1]

On January 28, 2021, this Court ordered the parties to meet and confer on "1) whether the current dispute ha[d] been mooted or the parties anticipate that it will be mooted [by the change of administration]; 2) whether the parties wish to stay this action for any reason . . . ; or 3) whether the parties agree that this litigation should continue as anticipated." (Minute Order, Jan. 28, 2021.) A few days later, on February 2, 2021, President Biden issued an executive order directing his agency officials to review various immigration policies, with specific instructions to the Attorney General and the Acting Secretary of Homeland Security to "promulgate joint regulations" within 270 days of the order—October 30, 2021—regarding at least one issue relevant to the Rule.[2] In

[1] *See Pangea Legal Servs.*, 512 F. Supp. 3d 966; Order Re Preliminary Injunction, *Immigr. Equal. v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09258-JD (N.D. Cal. Jan. 8, 2021), ECF No. 55.

[2] *See* Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/.

light of these developments, Plaintiffs stipulated to a stay to "allow incoming Department leadership time to consider the issues in this case and to review the Rule." (Joint Stipulation to Hold Case in Abeyance at 1, ECF No. 16, Feb. 8, 2021.) The Court entered a stay on February 9, 2021, requesting a joint status report by May 10, 2021. (Minute Order, Feb. 9, 2021.)

In early May 2021, the Parties agreed to a continued stay. (Joint Status Report, ECF No. 17, May 7, 2021.) The Court ordered the stay continued but requested another joint status report by August 9, 2021, and every 30 days thereafter. (Minute Order, May 9, 2021.)

To meet President Biden's February 2021 directive, Defendants identified on July 11, 2021, three sets of anticipated rulemakings in the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions ("Unified Agenda") published by the Office of Information and Regulatory Affairs:

- Set 1: "Procedures for Consideration of Asylum, Withholding of Removal, and CAT Protection by Asylum Officers," under DOJ RIN[3] 1125-AB20 and DHS RIN 1615-AC67, with a deadline for Interim Final Rule by June 2021;
- Set 2: "Asylum and Withholding Definitions," under DOJ RIN 1125-AB13 and DHS RIN 1615-AC65, with a deadline for NPRM by October 2021; and
- Set 3: "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," under DOJ RIN 1125-AB14, with a deadline for NPRM by May 2022.

Defendants did not meet the deadlines set out in the Spring 2021 schedule, nor were the rulemakings promulgated by the November 2021 deadline set by President Biden.

In the Parties' November 2021 joint status report, Plaintiffs stated that they did "not intend for the litigation to be stayed indefinitely," but because "the Departments represent[ed] that they

[3] RIN refers to the Regulation Identifier Number.

have been, and continue to [be], mak[ing] completing their review a priority," Plaintiffs consented to extend the stay. (Joint Status Report at 2, ECF No. 22, Nov. 8, 2021.)

Ten more months passed, and despite Defendants' representations that progress was ongoing and review of the Rule was a priority (*see* Joint Status Reports, ECF Nos. 23, 24, 26, 27, 28, 30, 32, 33, 34, 35), Defendants did not meet the deadlines in the Unified Agenda.

On September 23, 2022, Plaintiffs filed a motion to partially lift the stay of proceedings. (*See* Mot., ECF No. 37, Sept. 23, 2022.) Defendants filed their opposition brief on November 7, 2022, and identified an additional relevant rulemaking by the DOJ:

- Set 4: "Evidentiary Hearings on Applications for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture," under DOJ RIN 1125-AB22.

In their opposition, Defendants represented that they were "engaged in rulemaking that they expect will moot out the cases challenging the Rule." (Opp. Br. at 7, ECF No. 42, Nov. 7, 2022.)

On December 1, 2022, the Court noted that it was "troubled by the length of the stay in this case," but denied Plaintiffs' motion without prejudice, in "favor [of] waiting until the end of May 2023, to observe whether Defendants have completed prospective rulemakings." (Minute Order, Dec. 1, 2022.) The Court stated that if "Defendants do not finalize their three prospective rulemakings by May 31, 2023," Plaintiffs could file a renewed motion to lift the stay. (*Id.*)

By June 2023, Defendants had not published any of the prospective rulemakings they identified in opposing Plaintiffs' motion or in their previous joint status reports, and they could not provide the Court a date by which they would finish their review and issue proposed rules. (*See* Transcript of June 2, 2023 Hearing ("Transcript"), at 4:5-10.) Moreover, in the June 1, 2023 Joint Status Report and at the June 2, 2023 Hearing, Defendants no longer represented that these rulemakings were a "priority," advising instead that the Departments have "many competing priorities" but would "continue to work on the rulemakings." (Transcript at 4:2-4.) In the Fall

2022 Unified Agenda, Defendants shared that "[i]n some circumstances, the Departments have decided to republish changes made in the Global Asylum Rule without amendment."[4]

The Spring 2023 Unified Agenda was published in mid-June, and all deadlines have been yet again pushed back:

	Spring 2021	**Fall 2021**	**Spring 2022**	**Fall 2022**	**Spring 2023**
Set 1: DOJ RIN 1125-AB20 DHS RIN 1615-AC67	06/2021	03/2022	05/2023	07/2023	09/2023
Set 2: DOJ RIN 1125-AB13 DHS RIN 1615-AC65	10/2021	11/2021	08/2022	03/2023	09/2023
Set 3: DOJ RIN 1125-AB14	05/2022	08/2022	05/2023	06/2023	*Merged with 1125-AB13.*
Set 4: DOJ RIN 1125-AB22[5]	--	12/2021	08/2022	03/2023	11/2023

At the Status Hearing, the Court noted the absence of any firm deadlines for Defendants' prospective rulemakings and suggested that, at this point, Defendants are effectively asking for an indefinite stay. The Court has allowed Plaintiffs to file a renewed motion to lift the stay. (*See* Transcript at 10:20-24 Minute Order, June 2, 2023.)

LEGAL STANDARD

District courts have inherent authority to stay their proceedings, *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), "with a view toward the efficient and expedient resolution of cases," *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016). The *Landis* decision sets forth the applicable standards.

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[4] *See Particular Social Group and Related Definitions and Interpretations for Asylum and Withholding of Removal*, Office of Information and Regulatory Affairs (Fall 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1615-AC65.

[5] *See Evidentiary Hearings on Applications for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture*, Office of Information and Regulatory Affairs (Spring 2023), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1125-AB22. This regulation was identified for the first time in Opp. Br. at 4, n.3 (filed Nov. 7, 2022). Notably, this is not one of the regulations identified as relevant to the Rule within the Unified Agenda.

Belize Soc. Dev., Ltd. v. Gov't of Belize, 668 F.3d 724, 731 (D.C. Cir. 2012). Those same standards apply whether a court is asked to issue a stay or lift a stay. *See Jud. Watch, Inc. v. U.S. Dep't of Just.*, 57 F. Supp. 3d 48, 50 (D.D.C. 2014); *SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, 940 F. Supp. 2d 10, 12 (D.D.C. 2013); *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003).

Under *Landis*, "[t]he proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299 U.S. at 255); *see Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 20 (D.D.C. 2019); *Nat'l Indus. for Blind v. Dep't of Veterans Affs.*, 296 F. Supp. 3d 131, 134 (D.D.C. 2017). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (internal citation omitted). "It is instead an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.*

"[I]f there is even a fair possibility that the stay . . . will work damage to some one else," the party requesting a stay "must make out a clear case of hardship or inequity in being required to go forward." *Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971) (quoting *Landis*, 299 U.S. at 255); *see Ctr. for Biological Diversity*, 419 F. Supp. 3d at 20 (same); *accord Garcia v. Acosta*, 393 F. Supp. 3d 93, 110 (D.D.C. 2019); *Barton v. District of Columbia*, 209 F.R.D. 274, 278 (D.D.C. 2002); *Nat'l Indus. for Blind*, 296 F. Supp. 3d at 137-38. "Ultimately, a court's stay order 'must be supported by a balanced finding that such need overrides the injury to the party being stayed.'" *SEIU Nat'l Indus. Pension Fund v. UPMC McKeesport*, No. 22-cv-249 (TSC/GMH), 2022 WL 3644808, at *3 (D.D.C. Aug. 24, 2022) (quoting *Belize*, 668 F.3d at 732 (citation and internal quotations omitted)); *see Dellinger*, 442 F.2d at 787 ("Any protracted halting or limitation of plaintiffs' right to maintain their case would require not only a showing of

'need' . . . but would also require a balanced finding that such need overrides the injury to the parties being stayed.").

A "fair possibility" of injury does not, of course, require certainty of injury. It demands only a reasonable risk that injury is occurring or will occur. *See Garcia*, 393 F. Supp. 3d at 110-11 ("In light of the uncertainties regarding the contemplated NPRM . . . and the risk that the existing policy . . . will cause Plaintiffs concrete harm in the near future, the balance of equities tips decidedly against staying the litigation."); *Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-1996 (BAH), 2022 WL 1102200, at *5 (D.D.C. Apr. 13, 2022) (relying on "the evolving risk" faced by the plaintiffs in denying a stay).

"The march of time alters the equities that courts are required to weigh in assessing the appropriateness of pausing litigation." *Hulley*, 2022 WL 1102200, at *5. Thus, even if a stay was reasonable when entered, it may become unreasonable to maintain: "an order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate." *Belize*, 668 F.3d at 732 (quoting *Landis*, 299 U.S. at 257). A plaintiff "may be required to submit to delay," but only if the delay is "not immoderate in extent." *Jones*, 520 U.S. at 707 (quoting *Landis*, 299 U.S. at 256). "Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint." *Dietz*, 579 U.S. at 48; *see Dellinger*, 442 F.2d at 787 ("[T]he stay order was immoderate in extent and hence invalid . . . .").

Moreover, "if the stay is of 'indefinite duration,'" the standard is even higher: the party seeking the stay "must establish a 'pressing need' for it." *Deloitte*, 940 F. Supp. 2d at 12 (quoting *Landis*, 299 U.S. at 255); *see id.* at 15 ("[A] request for an indefinite stay must not only demonstrate hardship or inequity, but also be justified by a pressing need." (citation and quotation marks

omitted)); *Belize*, 668 F.3d at 731-32 ("In *Landis*, the Supreme Court instructed that a court abuses its discretion in ordering a stay 'of indefinite duration in the absence of a pressing need.'" (quoting *Landis*, 299 U.S. at 255)). And notably, an indefinite stay requires a showing of pressing need *regardless* of whether there is a fair possibility of damage to someone else. *Id.* at 732. It is "sufficient" that an indefinite stay causes "undue delay" in pursuing a plaintiff's claims, "preventing [the plaintiff] from proceeding with its claims in federal court for an indefinite period of time, potentially for years." *Id.*

Thus, "[o]rdering a stay of 'indefinite duration in the absence of a pressing need' would amount to an abuse of discretion." *Hulley Enters.*, 2022 WL 1102200, at *4 (quoting *Belize*, 668 F.3d at 732); *see UPMC McKeesport*, 2022 WL 3644808, at *2. Accordingly, when district courts have imposed indefinite stays without identifying a "pressing" need for them, the Court of Appeals has reversed, holding that these stays "exceeded the proper exercise of discretion by the district court." *Belize*, 668 F.3d at 733; *see also McSurely v. McClellan*, 426 F.2d 664, 672 (D.C. Cir. 1970) (vacating indefinite stay); *cf. Jones*, 520 U.S. at 707 ("[I]t was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial."). "Of course the District Court has a broad discretion in granting or denying stays . . . . This discretion, however, may be abused 'by a stay of indefinite duration in the absence of a pressing need.'" *McSurely*, 426 F.2d at 671 (quoting *Landis*, 299 U.S. at 255); *see Barton*, 209 F.R.D. at 278.

A stay is "sufficiently indefinite to require a finding of a pressing need," *Belize*, 668 F.3d at 732, whenever its termination hinges on the resolution of a separate proceeding that has no clearly discernable end point. *E.g.*, *id.* at 733 (holding that the requirement of pressing need was

triggered by a stay "pending foreign litigation of indefinite duration"); *McSurely*, 426 F.2d at 671 (requirement triggered by stay pending resolution of related criminal cases). This includes situations where, as here, a requested stay would last as long as an administrative proceeding or rulemaking process of unknown duration. *See Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH), 2021 WL 2227335, at *4-5 (D.D.C. June 1, 2021) (requirement triggered by stay pending outcome of rulemaking proceedings); *Deloitte*, 940 F. Supp. 2d at 12-15 (requirement triggered by stay pending resolution of agency administrative proceeding).

To sum up: (1) Because Defendants seek to continue the stay over Plaintiffs' objection, Defendants bear the burden of showing that circumstances justify a continued stay; (2) If Defendants are seeking a stay of indefinite duration (which they are, *see infra* Part II.A.1), they must establish a "pressing need" for the stay; (3) Regardless of whether the requested stay is indefinite, if there is even a "fair possibility" that it will harm Plaintiffs, their clients, or anyone else, Defendants must make out a clear case of hardship or inequity in being required to go forward; (4) Even if Defendants make a clear showing of hardship or inequity, continuing the stay is improper, unless this Court finds that such hardship or inequity overrides the injury to Plaintiffs.

ARGUMENT

At the request of the Court, Plaintiffs present two arguments. First, this Court may adjudicate Plaintiffs' claims notwithstanding the preliminary injunction of the Rule in the Northern District of California. That preliminary injunction does not deprive this Court of jurisdiction over Plaintiffs' claims, and in similar circumstances, the District Court for the District of Columbia has adjudicated challenges to administrative rules that were already enjoined nationally by another district court.

Second, the stay must be lifted. Continuing the stay would amount to an indefinite denial of Plaintiffs' ability to vindicate their rights and have their day in court. For two years, Defendants

have missed their "aspirational" deadlines for the new rules they have promised. They are no longer even willing to represent that these rulemakings remain a priority. Thirty months after this case was stayed to "allow incoming Department leadership time to consider the issues in this case and to review the Rule," (ECF No. 16 at 1), Defendants still cannot give firm dates even for the publication of their initial proposals for new rules. Much less can they guarantee when those rules will be finalized, or what changes will be required by the notice-and-comment process. Still less can Defendants guarantee when (or if) their new rules will go into effect once promulgated, given the possibility of litigation targeting those new rules. All told, the anticipated rules may not even materialize within this President's term in office, if at all. And crucially, there is no way of knowing whether Defendants' promised rules, if they do materialize, will actually moot Plaintiffs' claims.

Defendants cannot show any plausible hardship or inequity in being required to litigate the appointment-based claims in Counts 1-3 of the Complaint, much less the "pressing need" they must identify to justify a stay of indefinite duration. Those claims have already been litigated more than a dozen times in other courts, greatly simplifying Defendants' task in defending them here, and producing a wealth of judicial precedent analyzing the relevant issues. Meanwhile, Plaintiffs continue to suffer harm as result of the Rule, as do their clients and other participants in the immigration system. Plaintiffs have waited two and a half years for Defendants to rescind or replace the illegally issued rule challenged here. Neither Plaintiffs nor this Court can know when Defendants will promulgate new rules, or whether such rules will resolve Plaintiffs' claims. Under these circumstances, continuing the stay would be an abuse of discretion.

I. THIS COURT HAS THE AUTHORITY TO ADJUDICATE PLAINTIFFS' CHALLENGES TO THE VALIDITY OF THE RULE.

During the June Status Hearing, the Court questioned whether it has the authority to adjudicate Plaintiffs' claims in light of the nationwide preliminary injunction entered in the *Pangea* case, and whether it would be prudent to do so. The answer to both questions is yes.

The existence of a nationwide preliminary injunction does not deprive this Court of jurisdiction over Plaintiffs' claims, for "nationwide injunctions do not 'deprive[ ] other courts . . . of [offering] different perspectives on important questions.'" *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 24 (D.D.C. 2018) (alteration in original) (citation omitted). Accordingly, it is not unusual for district courts to adjudicate the legality of rules or policies that have already been preliminarily enjoined by another court. Indeed, it is not even unusual *in cases involving the illegality of Chad Wolf's unlawful tenure at DHS*. *See Asylumworks*, 590 F. Supp. 3d at 27 (vacating DHS rules for being improperly promulgated under Wolf, after preliminary injunction had already issued in the District of Maryland); *Nw. Immigr. Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 83 (D.D.C. 2020) (preliminarily enjoining DHS rule as unlawfully approved by Wolf, after preliminary injunction had already issued in the Northern District of California), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021).

Nor is there any prudential reason to avoid adjudicating such claims. As one court within this District has explained:

> If courts were to conclude . . . that an order granting a nationwide, preliminary injunction in one district was sufficient to shut down all other, similar litigation, the resolution of important questions would be left to a single district court and to a single circuit, losing the benefit of the 'airing of competing views' on difficult issues of national importance.

Nw. Immigr. Rts. Project, 496 F. Supp. 3d at 81 (quoting *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay)).

Thus, in other cases beyond the two noted above, courts in this District have independently adjudicated challenges to immigration policies while nationwide injunctions were already in place elsewhere. For example, in *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018), the court issued a final judgment related to the Deferred Action for Childhood Arrivals ("DACA") program, despite nationwide preliminary injunctions having been issued by the Northern District of California and the Eastern District of New York. *See Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018) *aff'd*, 908 F.3d 476 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409-10 (E.D.N.Y. 2018). Notwithstanding those preliminary injunctions, the court vacated DHS's new DACA-related policy. *NAACP*, 298 F. Supp. 3d at 216. There is no reason to avoid following a similar path here.

II. THE STAY SHOULD BE LIFTED.

A. Defendants Cannot Show Any Hardship or Inequity in Being Required to Litigate Plaintiffs' Appointments Claims, Much Less a "Pressing Need" for an Indefinite Stay.

1. Defendants Are Seeking an Indefinite Stay, which Requires a Pressing Need.

As this Court suggested during the June 2 Status Hearing, at this point Defendants are effectively requesting an indefinite stay of this case. (*See* Transcript at 4:15-16.) Two and a half years after the case was stayed to allow the incoming administration to reconsider the Rule, there is still no reliable timetable for the promised new rules, and Defendants are unable to represent that such rulemakings remain a priority. When asked at the Status Hearing for "any projected, expected dates" for publishing their proposed new rules, Defendants provided none, stating only that the "Spring 2023 Unified Agenda" would soon provide "the aspirational dates for when those rulemakings will be published." (Transcript 4:5-10.) The Spring 2023 Unified Agenda has since been published, and all deadlines have been pushed back yet again.

On similar facts, the Court of Appeals has concluded that a party was seeking an "indefinite" stay, requiring a showing of "pressing need." *Belize*, 668 F.3d at 732. In *Belize*, the district court stayed a case "pending foreign litigation of indefinite duration." *Id.* at 733. Because the district court articulated no pressing need for such a stay, the Court of Appeals held that, under *Landis*, the stay "exceeded the proper exercise of discretion by the district court." *Id.* As *Belize* made clear, a stay "is sufficiently indefinite to require a finding of a pressing need" when "the record fails to show either what a 'resolution' of [the] case would entail *or when such a resolution is likely to be reached*." *Id.* at 732 (emphasis added); *see also Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262 (11th Cir. 2000).

Likewise, in *McSurely*, the Court of Appeals identified "a stay of indefinite duration," which called for "a pressing need," when a district court stayed a civil action until after the final resolution of related criminal proceedings. 426 F.2d at 671 (quoting *Landis*, 299 U.S. at 255). Because the district court failed to justify "a stay of such potentially long duration," the Court of Appeals vacated the stay order. *Id.* at 671-72. As the court emphasized, a stay "is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits." *Id.* at 671 (quoting *Landis*, 299 U.S. at 257).

Following these precedents, district courts in this Circuit have also recognized that requested stays were "indefinite" under similar circumstances. *See, e.g.*, *United States v. Philip Morris USA Inc.*, 841 F. Supp. 2d 139, 141 (D.D.C. 2012) (finding a stay that would last "at least one or more years" pending resolution of another civil case, with additional time for further review, to be "lengthy and indefinite"). In *Deloitte*, for instance, a party opposed the lifting of a stay and requested that it be extended pending resolution of an administrative agency proceeding. 940 F. Supp. 2d at 12. The court found that such a stay "would, as a practical matter, be indefinite and

could easily extend for a significant period of time." *Id.* at 15. Because the requested stay would persist for at least a year, without an ascertainable end date, "for all intents and purposes, [the] request [was] for an indefinite stay." *Id.* Likewise, in *Asylumworks*, the court found that the government's requested stay "pending the outcome of [certain] rulemaking proceedings" would be "of indefinite duration and otherwise immoderate" where that outcome was not anticipated until "a year from now barring potential delays." 2021 WL 2227335, at *5 (internal quotations omitted).

For two and a half years already, Plaintiffs have waited in vain for Defendants to meet their ever-shifting "aspirational" deadlines to issue proposed rulemakings. Yet Defendants have nothing to show for it—not even a firm promise of when any of their proposed rulemakings will be unveiled. Despite that, Defendants ask for an unspecified (i.e., indefinite) amount of additional time, without providing a termination date or any credible assurance that the end is near. Because further delaying the resolution of this case would have "the legal effect of preventing [Plaintiffs] from proceeding with [their] claims in federal court for an indefinite period of time, potentially for years," Defendants are seeking an indefinite stay. *Belize*, 668 F.3d at 732 (citation omitted).

2. Defendants Cannot Identify any Pressing Need for a Stay, or Even any Hardship or Inequity in Being Required to Go Forward.

Because Defendants are seeking an indefinite stay, they must show a "pressing need" for it. And even if the requested stay were not indefinite, Defendants would still need to identify "hardship or inequity" in being required to move forward, because there is a fair possibility that a continued stay will harm Plaintiffs and others (as discussed *infra*, Part II.B). Defendants cannot make either showing.

In opposing Plaintiffs' first motion to partially lift the stay, Defendants identified only a single purported harm they would suffer from having to litigate this case.[6] It does not come close to satisfying their high burden. Defendants claimed that "the time spent litigating this case would impede Defendants' ability to expedite work on the rulemaking as some personnel are involved with both and will be forced to spend time on the litigation that could have been spent on the rulemaking." (Opp. Br. at 25.)

This is not plausible. Plaintiffs are seeking only to litigate their claims concerning the legitimacy of Chad Wolf's tenure as Acting DHS Secretary under the vacancies laws and the Appointments Clause. These claims are wholly separate from the substance of asylum law or the formulation of immigration policy. They can be briefed and argued by Department of Justice litigators who need only be familiar with the law concerning appointments and vacancies along with the details of Chad Wolf's tenure—issues that have been litigated by the Department of Justice in at least fifteen other cases already. *See infra* at Part II.A.2. There is no reason to believe that retracing these well-trodden steps will divert significant attention from Defendants' rulemaking efforts.

In similar circumstances, other courts have found that such "conclusory" claims of "likely . . . interference" fall "far short of the showing of hardship" that is required. *Horn v. District of Columbia*, 210 F.R.D. 13, 16 (D.D.C. 2002) (alteration in original); *see also Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21-22 (rejecting agency's claim that it would have to "divert resources to this litigation that could be used to implement the same kinds of meaningful measures that Plaintiffs claim to seek," along with its request for a "litigation free window for [the

[6] Defendants also discussed two consequences they claimed would follow if they *lose* this case (*see* ECF 42, Opp. Br. at 32), but such consequences are irrelevant to the stay analysis.

agency] to complete these new initiatives," because the agency "does not explain how defense of this suit, which falls largely to lawyers at the Department of Justice, will divert substantial [agency] resources"); *Deloitte*, 940 F. Supp. 2d at 15 ("There is no significant burden placed on Deloitte by requiring it to litigate these two very different proceedings simultaneously.").

Even if it were true that defending this litigation could divert personnel from rulemaking, that does not establish any hardship or inequity, much less pressing need. The mere "expenditure of resources in proceeding with the litigation" is "wholly insufficient" to justify a stay. *Asylumworks*, 2021 WL 2227335, at *6; *see Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21 ("[B]eing required to defend a suit, without more, does not constitute a clear case of hardship or inequity." (citation and quotation marks omitted)). This is "particularly true of counsel for the United States, the richest, most powerful, and best represented litigant" in the courts. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). Moreover, any diversion of resources that might be required because Defendants still have not formulated their proposed rules two and a half years after this case was stayed is "self-created, because the agencies have decided not to prioritize [this] issue." *Ctr. for Biological Diversity v. NOAA Fisheries*, No. 21-cv-00345-KAW, 2021 WL 3771784, at *3 (N.D. Cal. Aug. 23, 2021) (finding a short-staffage excuse unpersuasive where the defendants sought a seventeen-month stay and "fail[ed] to adequately explain why they have not made more progress").

In short, Defendants have not described this supposed harm with any specificity or explained why it warrants continuing a stay that has already lasted two and a half years. Nor could they, because requiring the Justice Department to brief the same issues it has already briefed many times before is not the kind of hardship or inequity that could justify a stay of *any* duration. It certainly does not supply the "pressing need" required for an indefinite stay. Defendants "must

bear the burden . . . of making obvious the need," *Landis*, 299 U.S. at 257, and their claims about staff diversion—apparently their *only* claim of harm—fails to do so. "Defendants do not even hint at any true hardship that they would have the potential of facing in the absence of a stay." *Nat'l Indus. for Blind*, 296 F. Supp. 3d at 141.

Because Plaintiffs have a right to vindicate their claims in court, and because Defendants can identify no pressing need for the indefinite stay they seek—or any hardship at all—this Court must deny their request and lift the stay. Doing so will also serve judicial efficiency and address continuing harms to Plaintiffs, as the next section explains.

B. Harm to Plaintiffs and Judicial Efficiency Further Demand Lifting the Stay.

1. The Rule Is Harming Plaintiffs and Others Notwithstanding the *Pangea* Preliminary Injunction.

After this Court issued its January 2021 Minute Order, inquiring whether the parties wished to stay the action, Plaintiffs agreed to a stay in good-faith reliance on the prospect that Defendants would timely act on the challenged Rule, as indicated in President Biden's then-recent executive order. Plaintiffs agreed to extend the stay in good-faith reliance on Defendants' projected estimates for their proposed rulemakings. Time has shown that Plaintiffs' reliance was misplaced. More than halfway through the President's term, the "incoming" Department leadership, (ECF No. 16 at 1), has still produced no visible results, and its counsel have stopped averring that the promised rulemakings even remain a priority. Meanwhile, the uncertain legal status of the [Rule] complicates Plaintiffs' ability to select new clients, represent existing clients, and apply for funding. Moreover, the fact that the Rule's wide-reaching changes to immigration and asylum law remain on the books continues to mislead courts and practitioners. There is more than a "fair possibility" that perpetuating this state of affairs will harm Plaintiffs, their clients, and others.

"When evaluating stays, courts must . . . consider 'the danger of denying justice by delay.'" *Marti v. Iberostar Hoteles y Apartamentos S.L.*, 54 F.4th 641, 651 (11th Cir. 2022) (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964)). A plaintiff "suffers an ever-mounting harm from each passing month without an opportunity to present [its] arguments in court." *Id.* As widely acknowledged, therefore, "[t]he march of time alters the equities that courts are required to weigh in assessing the appropriateness of pausing litigation." *Hulley*, 2022 WL 1102200, at *5; *see infra* at 10-11 (collecting authorities).

More specifically, a stay that denies plaintiffs their day in court for multiple years exceeds the bounds of reasonableness. *See Landis*, 299 U.S. at 256-57 ("Already the proceedings in the District Court have continued more than a year. With the possibility of an intermediate appeal . . . a second year or even more may go by . . . . Relief so drastic and unusual overpasses the limits of any reasonable need . . . ."); *Barton*, 209 F.R.D. at 278 ("[G]ranting a stay would be unfair . . . and would unnecessarily delay a case that has trudged along for more than two-and-a-half years without even passing the motion to dismiss stage. . . . [T]he court refuses to delay this case any longer . . . ."); *Hulley*, 2022 WL 1102200, at *9 ("A continued stay while [related legal proceedings] unfold over another few years will preclude the [plaintiffs] from proceeding with their claims . . . with no ascertainable end in sight . . . a stay in these circumstances is unjustifiable" (citations and quotation marks omitted)).

The inherent harm of unreasonable delay is exacerbated here by the immediate problems that Plaintiffs and others must contend with so long as the Rule remains in a prolonged state of limbo—preliminarily enjoined but fully integrated into the asylum and immigration provisions throughout the Code of Federal Regulations. The nebulous status of the many regulatory changes brought about by the Rule complicates efforts by courts and advocates to understand which

regulations are in effect and which are not. At the same time, uncertainty about if and when the government will replace the Rule—and with what—frustrates Plaintiffs' efforts to assess the merits of prospective new cases, hindering their ability to select new clients and make the kinds of commitments often necessary to obtain grant funding. Simply put, when immigration practitioners and judges alike cannot easily determine what the law is, this takes a toll—not only on them, but also on the individuals caught upon the immigration and asylum system, for whom mistakes and delay can have life-changing results.

A prolonged lack of clarity about the Rule's status imposes tangible costs on Plaintiffs and the communities they serve. Although the Rule is enjoined and accordingly the regulations in place prior to the Rule remain the governing law, the changes made by the enjoined Rule appear as current, operative law in the official electronic version of the Code of Federal Regulations maintained by the federal government.[7] An internet search for "8 C.F.R. § 208.13" (for example) leads to a government website containing no indication that parts of the listed regulations are enjoined.[8] (*See* Exhibit A, Tahirih Declaration at ¶ 9.) Nor does the Cornell Legal Information Institute website flag that any of the subsections are enjoined. (*See id.*) The inaccuracy of such information online has led to at least one Plaintiff advocate to report that her pro bono team had to redraft a section of an asylum brief after learning they had based an argument on a provision of an enjoined regulation. (*See* Ex. A at ¶ 10.) In fact, Plaintiffs have experienced "increasing resistance

[7] *See Code of Federal Regulations (CFR), 1996 to Present*, GovInfo, https://www.govinfo.gov/help/cfr#about (last visited July 14, 2023); *Code of Federal Regulations*, Nat'l Archives & Records Admin., https://www.ecfr.gov/ (last visited July 14, 2023).

[8] *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, Federal Register, https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review (last visited July 14, 2023).

and even refusal among law firms" to "represent clients *pro bono* in both affirmative and defensive claims for asylum" because of the status of the Rule. (*Id.* at ¶ 8.)

Federal courts are also being misled, repeatedly citing the changes made by the Rule as operative law. Circuit courts across the country, for example, have cited provisions that simply do not exist in the regulations without the Rule. *See, e.g.*, *Carmona-Gonzalez v. Garland*, No. 23-3317, 2023 U.S. App. LEXIS 11826, at *5 (6th Cir. May 12, 2023) (citing and quoting language from 8 C.F.R. § 1208.13(b)(3)(iii), which is enjoined in its entirety); *Fuad v. Garland*, No. 22-845, 2023 WL 3335725, at *2 (9th Cir. May 10, 2023) (citing enjoined regulation 8 C.F.R. § 1208.13(b)(3)(iii)); *Escobar Guerra v. Garland*, No. 21-70292, 2022 WL 563246, at *1 (9th Cir. Feb. 24, 2022) (citing § 1208.13(b)(3)(iii), which is enjoined entirely by the preliminary injunction); *Bhandari v. Garland*, 847 F. App'x 257, 259 (5th Cir. 2021) (citing §§ 1208.13(b)(3)(iii)-(iv), also completely enjoined by the preliminary injunction); *Padilla-Franco v. Garland*, 999 F.3d 604, 608 (8th Cir. 2021) (same); *Guatemala-Pineda v. Garland*, 992 F.3d 682, 685 (8th Cir. 2021) (same). (*See also* Exhibit B, Ayuda Declaration, at ¶ 10.)

Prolonged uncertainty about whether and when the Rule, or portions of it, will go into effect is also costing Plaintiffs and their communities time and resources. For example, as discussed in Plaintiffs' previous motion to partially lift the stay, the demand for legal services from Plaintiffs exceeds their resources. (*See* Mot. at 13; *see also* Ex. A at ¶ 3; Ex. B at ¶ 5.) Accordingly, in considering new clients, Plaintiffs must assess the merits of their cases, as well as those of Plaintiffs' existing clients. Many of these cases involve issues affected by the Rule, and Plaintiffs are unable to determine whether those claims are viable now, in the near future, or the far future—and therefore are also unable to accurately assess how much work should be expected for each case. (*See* Ex. A at ¶ 4; Ex. B at ¶ 10.)

Moreover, Plaintiffs rely extensively on grant funding and donations, many of which require proof of "deliverables." Those deliverables often revolve around the number of cases that Plaintiffs commit to handling, and the continued uncertainty around the law precludes Plaintiffs from providing a number that would benefit their applications. (*See* Ex. B at ¶¶ 12-18.)

Also, because Defendants are choosing to review and address the Rule in four separate proposed rulemakings, Plaintiffs are burdened with the time-consuming effort of "stay[ing] abreast of the anticipation and publication of new rules, policies, and other developments that [may] relate [in part] to the content of the . . . Rule." (Ex. A at ¶ 12.) Plaintiffs are forced to play jigsaw just to know which parts of the Rule the Departments may rescind, keep, or modify, and a missing piece of the puzzle can have devastating effects on the people Plaintiffs serve. Moreover, advising other advocates—a key feature of Tahirih's services—now requires more frequent review "to ensure that they have not become obsolete or inaccurate." (Ex. A at ¶¶ 4, 6.)

As a result, Plaintiffs' attorneys must spend considerable time monitoring the Rule's state of play, and the challenge of assessing the merits of cases leads to turning away increasing numbers of clients, perpetual revision of case strategies, difficulty in advising service-seekers and clients, working harder to place fewer cases with pro bono partners, providing additional guidance to pro bono attorneys when cases are placed, and managing more asylum cases in-house. All of these tasks contribute to escalating stress and burnout among Plaintiffs' attorneys, which harms Plaintiffs and their missions. (*See* Ex. A at ¶ 11; Ex. B at ¶¶ 19-24.)

Simply put, the *Pangea* injunction is not a complete or sustainable solution to the problems caused by the Rule's illegal promulgation. Perpetually keeping a drastic set of changes to the nation's asylum laws in a state of legal limbo does more than create a fair possibility of harm—it generates complexity, confusion, and uncertainty that materially hinders Plaintiffs' work and the

functioning of the immigration system as a whole. None of this should have happened, because Chad Wolf had no legal authority to approve the Rule, as every court to consider the matter has agreed. Just like the litigants in those other cases, Plaintiffs are entitled to their day in court to make that case here. They should not be expected to give Defendants any more time than the two and a half years they have already patiently waited.

2. Continuing the Stay Would Undermine, Rather than Promote, Judicial Efficiency.

"[J]udicial economy . . . favors swift adjudication," *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262, 270 (D.D.C. 2022), and is served by "narrowing the issues in [an] action," *Campaign for Accountability v. U.S. DOJ*, 280 F. Supp. 3d 112, 115 (D.D.C. 2017). If Chad Wolf lacked authority to serve as Homeland Security Secretary, as every court has concluded, then the entire Rule must be vacated under the APA and held void under the FVRA. (*See* Compl. ¶¶ 422-431.) Resolving that discrete issue has the potential to end this case without requiring this Court to consider the Complaint's many complex allegations that the Rule is otherwise contrary to law, is unsupported by reasoned decision-making, and was promulgated without adequate time for notice and comment. (*See* Compl. ¶¶ 191-404.) At the very least, disposing of these claims would significantly narrow the issues in the case.

Defendants' should be particularly well-equipped to litigate these claims because they have done so in at least fifteen prior cases.[9] Plaintiffs' counsel, likewise, has experience litigating this

[9] *See* Defs.' Supp. Post-Hearing Filing at 7-12, *A.B.-B. v. Morgan*, No. 1:20-cv-00846-RJL (D.D.C. June 1, 2020), ECF No. 25; Defs.' Suppl. Br. at 4-13, *ASISTA Immigr. Assistance, Inc. v. Albence*, No. 3:20-cv-00206-JAM (D. Conn. Oct. 13, 2020), ECF No. 58; Defs.' Mot. to Dismiss at 30-41, *Don't Shoot Portland v. Wolf*, No. 1:20-cv-2040-CRC (D.D.C. Oct. 15, 2020), ECF No. 24; Mem. in Opp'n to Mot. for Prelim. Inj. at 24-28, *Make the Rd. N.Y. v. McAleenan*, No. 1:19-cv-02369-KBJ (D.D.C. Nov. 2, 2020), ECF No. 62; Mem. in Support of Defs.' Opp. to Pls.' Mot. for Partial Summ. J. at 5-14, *New York v. U.S. Dep't of Homeland Sec*., No. 1:19-cv-07777-GBD (S.D.N.Y. Nov. 17, 2020), ECF No. 249. *See also Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 21-22, (D.D.C. 2022); *Behring Reg'l*

issue, having participated as *amicus* or co-counsel in two-thirds of those cases. Multiple judicial opinions have now extensively discussed the legal issues involved and are available to this Court as persuasive authority. The government's most recent filing defending Wolf's legitimacy, submitted in January 2023, continues to make the same arguments that the government has been advancing all along—suggesting that there are no new arguments to consider.[10] And while this Court will reach its own decision if it adjudicates the merits of Plaintiffs' claims, it is notable that every court to address the matter has concluded without hesitation that Wolf's tenure was unauthorized by law, rendering his actions a nullity.

Given all this, elongated briefing schedules should not be necessary if the stay is partially lifted, enabling this Court to move quickly to "narrow[] the issues in [the] action" and thereby promote judicial economy. *Campaign for Accountability*, 280 F. Supp. 3d at 115.

Defendants' preferred alternative is for Plaintiffs and the Court to continue waiting—hoping that, at some indefinite point in the future, Defendants will successfully promulgate new rules that will moot each of Plaintiffs' claims. At this point, that is no longer a tenable option, and other courts have rejected similar requests. As one put it: "Postponing the resolution of the issues raised in this case for some indefinite time does not comport with the efficient and timely judicial

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Ctr. LLC v. Wolf, 544 F. Supp. 3d 937, 943-44 (N.D. Cal. 2021), *appeal dismissed sub nom. Behring Reg'l Ctr. LLC v. Mayorkas*, No. 21-16421, 2022 WL 602883 (9th Cir. Jan. 7, 2022); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020); *Casa de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020), *appeal dismissed sub nom. Casa de Md., Inc. v. Mayorkas*, Nos. 20-2217 (L), 20-2263, 2021 WL 1923045 (4th Cir. Mar. 23, 2021); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 533-36 (N.D. Cal. 2020); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep't of Homeland Sec.*, No. 4:20-cv-08897-KAW, 2022 WL 4596611 (N.D. Cal. Aug. 10, 2022), *appeal filed*, No. 22-16552 (9th Cir. Oct. 11, 2022); *La Clinica de La Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL 6940934, at *12-14 (N.D. Cal. Nov. 25, 2020) (to be reported in F. Supp. 3d); *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 69-70; *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 975 (N.D. Cal. 2021); Order at 3, *Manzanita Band of the Kumeyaay Nation v. Wolf*, No. 20-5333 (D.C. Cir. Nov. 23, 2020), Doc. No. 1872824 (Millett, J., dissenting in part).

[10] Br. for Appellants, *Gonzales & Gonzales Bonds & Ins. Agency, Inc., v. U.S. DHS*, No. 22-16552 (9th Cir. Jan. 5, 2023).

resolution of matters before the federal courts. Allowing a case to languish for years on this Court's docket would not serve the interest of this Court or the parties involved." *DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 31 (D.D.C. 2002); *see also Stone v. Trump*, 402 F. Supp. 3d 153, 162 (D. Md. 2019) (declining to continue a stay that would "further delay resolution of [a] case" because doing so "would not promote judicial economy"). In one sense, it will always seem more efficient for a court to take no action on a case in hopes that another proceeding will moot it. "This appeal to 'economy,'" however, "would prove too much. It would support a district court stay of proceedings in a case whenever the same question is involved before another [decision-maker]." *Dellinger*, 442 F.2d at 787.

More specifically, courts in this District have repeatedly denied requests to postpone litigation until the anticipated promulgation of new rules or the resolution of administrative proceedings. *See Deloitte*, 940 F. Supp. 2d at 14 ("Not only has Deloitte failed to establish that requiring it to litigate this case while the Administrative Proceeding is pending will subject it to 'hardship or inequity,' the balance of the interests as a whole do not support extending the stay."); *Garcia*, 393 F. Supp. 3d at 110 (holding that "a stay is unwarranted" based on an "inchoate plan to issue an NPRM" and allegations that "the Department is currently engaged in rulemaking . . . the results of which could substantially affect the entire nature of the case"). There are several reasons why.

To start, postponing litigation until some indefinite point in the future cannot prevent or cure the harm that occurs in the meantime. *See id.* ("In light of the uncertainties regarding the contemplated NPRM discussed above, and the risk that the existing policy and practice . . . will cause Plaintiffs concrete harm in the near future, the balance of equities tips decidedly against staying the litigation."); *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21 (rejecting stay that

would last until an agency "expects to have issued its proposed new rule" because "it is not clear how issuing a new [plan] at least nine months from now will alleviate the interim harm just described," especially because "the July 2020 date is merely a goal and not a hard deadline" (internal quotations omitted)).

Second, there is no way to know whether Defendants' new rules—the content of which remains unknown—will actually moot Plaintiffs' claims, if and when those rules are finally promulgated. *See id.* at 23 ("Even if NMFS is able to comply with its self-described 'ambitious schedule' for the new [plan], it would have to fully remedy each of Plaintiffs' claims outlined above in order to render them moot. And, of course, the Service cannot now commit to the conclusion it will reach in that [plan]."); *Am. Hosp. Ass'n v. Dep't of Health & Human Servs.*, No. 18-cv-2112 (JDB), 2018 WL 5777397, at *2 (D.D.C. Nov. 2, 2018) ("The Court declines to stay the case pending the outcome of the government's proposed rule. As the government notes, it is not certain the proposed rulemaking . . . will moot the case." (internal quotations omitted)); *Garcia*, 393 F. Supp. 3d at 110 (appeals to "the interests of judicial economy" are "not enough, especially where it is not certain that the proposed rulemaking . . . will moot the case" (alteration in original) (internal quotations omitted)); *Asylumworks*, 2021 WL 2227335, at *5 ("Defendants argue that the case should be stayed pending the outcome of the rulemaking proceedings. Yet, this reason for a proposed stay is premised on speculative administrative changes . . . that may fall far short of providing any relief sought by plaintiffs." (citation and internal quotation marks omitted)).

If Defendants' new rules do not rescind or replace the Rule in its entirety, which is the only condition that would moot Plaintiffs' claims, judicial efficiency will have been gravely undermined by forcing Plaintiffs to wait several years before beginning the process of briefing their claims. *See Nat'l Indus. for Blind*, 296 F. Supp. 3d at 142 (finding "it is not at all clear that

there would be any gains in judicial economy under the circumstances presented here," where "there is considerable uncertainty regarding whether or not the Federal Circuit will actually reach the legal issue that is common to these cases"). "If that is the result, then this case would begin again on square one after having been held in abeyance for a year or more . . . and no efficiency gains would have been realized from having required Plaintiffs to 'stand aside[.]'" *Id.* at 142-43 (quoting *Landis*, 299 U.S. at 255).

Experience over the past two years has shown that Defendants' "aspirational" deadlines for issuing new rulemaking are completely unreliable. Thus, Defendants can make no credible promises about when the promised new rules will appear—militating against an indefinite stay until that time. *See Am. Hosp. Ass'n*, 2018 WL 5777397, at *2 ("Nor is it certain that the proposed rulemaking . . . will become final by that date."); *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 23 ("In addition, it is far from clear that [the agency] will be able to stick to this schedule."). Whenever those proposals do appear, the rulemaking process will be far from over: Defendants will have to allow time to respond to notice and comment, requiring further delay, and the results of that process could drastically alter the content of the final rules—enhancing the risk that they will not, in fact, moot each of Plaintiffs' claims. *See Am. Hosp. Ass'n*, 2018 WL 5777397, at *2 ("HHS cannot guarantee that the proposed rule . . . will become final at all, as HHS is required to consider any comments made before it issues a final rule.") (citing *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987)). And even if Defendants do succeed in promulgating final rules during this administration that would entirely moot Plaintiffs' claims, there is no guarantee that those rules will ever go into effect, given the prevalence of litigation over immigration policies and the use of nationwide injunctions.

Forcing Plaintiffs to continue standing idly by amid these mounting risks, month after month, year after year, when their claims could be resolved or narrowed by adjudicating a discrete set of issues that have been handled without difficulty in over a dozen other district courts around the country, would neither promote judicial efficiency nor reflect the balance of equities in this case.

Defendants bear the burden of showing that there is a pressing need for a stay—or at least that requiring them to litigate these claims would cause them hardship or inequity that overrides any injury to Plaintiffs and others. Because they cannot do so, continuing the stay over Plaintiffs' objections would be an abuse of discretion.

3. This Case Is Not Mooted by Potential Rulemaking.

Finally, this case is not mooted by potential rulemaking. A pending proposed rule—not to mention the *threat* of one—cannot render a case moot. As Plaintiffs have explained, challenges to the Rule would be moot if, and only if, the Rule is repealed and replaced by the agencies or vacated by another court (Mot. at 5.) *See Ctr. for Biological Diversity*, 419 F. Supp. 3d at 23. Defendants have not committed to replacing the Rule in its entirety, and their limited public comments so far suggest that they may even intend to leave portions of the Rule in place.

Critically, so long as the existing rule "remains on the books . . . , the parties retain 'a concrete interest' in the outcome of this litigation, and it is not 'impossible for a court to grant any effectual relief . . . to the prevailing party.'" *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018) (second alteration in original) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). This can hold true even after agencies finalize and implement a proposed rule, especially where "that proposed rule does not purport to rescind the [existing] Rule." *Id.* In fact, in the Fall 2022 Unified Agenda, Defendants explicitly noted they plan to republish certain changes without

amendment. Thus, until Defendants promulgate final rules that address all of the provisions of the Rule at issue here, this case is not mooted.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully ask this Court to partially lift the stay that has been in force since February 2021. Defendants have no pressing need for an indefinite stay, and requiring them to litigate Plaintiffs' appointments-based claims will cause them no hardship or inequity that could outweigh the harms experienced by Plaintiffs and the communities they serve. Plaintiffs are entitled to their day in court and their opportunity to challenge Chad Wolf's illegally promulgated Rule.

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Respectfully submitted,

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