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

REPLY IN SUPPORT OF PLAINTIFFS' RENEWED MOTION TO PARTIALLY LIFT STAY OF PROCEEDINGS

For the unsettling span of two years, six months, and twenty-two days, this case has been stayed, denying Plaintiffs the day in court to which they are entitled. While Defendants acknowledge that they bear the burden of justifying such an indefinite stay, they do not meaningfully attempt to meet that burden.

Defendants' primary assertion—that they would be inconvenienced by the "hardship" of litigation—is inadequate to justify such a protracted delay. Moreover, their claim that legal complexities provide a reason for inaction is untenable. Any justiciability issues can be addressed in summary judgment briefing, and most of the claimed complexities are illusory. Equally unavailing is the speculative claim that new rules might one day moot this case. In short, none of the justifications Defendants offer for indefinitely denying Plaintiffs any resolution of their claim that the Rule was illegally promulgated comes close to meeting their burden.

Finally, Defendants summarily dismiss Plaintiffs' harms and make the incredible assertion that a final ruling from this Court would be meaningless. This Court should not allow Defendants to deprive Plaintiffs of their long-overdue day in court based on such conclusory claims.

I. CONTINUING THE STAY WOULD BE AN ABUSE OF DISCRETION.

A. Defendants Have Not Met Their Burden of Establishing a Need for a Continued Stay.

"[T]he Supreme Court [has] instructed that a court abuses its discretion in ordering a stay 'of indefinite duration in the absence of a pressing need.'" *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 731-32 (D.C. Cir. 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)); *see also SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, 940 F. Supp. 2d 10, 15 (D.D.C. 2013) ("[A] request for an indefinite stay must not only demonstrate 'hardship or inequity,' but also be justified by a 'pressing need.'" (citations omitted)). Defendants do not dispute this standard, nor do they deny that they are seeking a stay of indefinite duration. And they cite no authority for their argument that being "forced to spend time on the litigation," Opp. 23, establishes a pressing need. On the contrary, this supposed harm—the only possible harm they identify—does not warrant a stay of *any* duration. That ends the matter, and the stay must be lifted. Continuing it under these circumstances would be an abuse of discretion. *See Belize*, 668 F.3d at 734; *McSurely v. McClellan*, 426 F.2d 664, 671-72 (D.C. Cir. 1970) (vacating the District Court's stay where the case was more than two years old).[1]

1. There Is No "Pressing Need" for the Indefinite Stay Defendants Seek.

A stay "is sufficiently indefinite to require a finding of a pressing need" when it has "the legal effect of preventing [a party] from proceeding with [its] claims in federal court for an indefinite period of time, potentially for years." *Belize*, 668 F.3d at 732 (second alteration in

[1] *See also Barton v. District of Columbia*, 209 F.R.D. 274, 278 (D.D.C. 2002) (A court's discretion "may be abused 'by a stay of indefinite duration in the absence of a pressing need.'" (citation omitted)); *Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-1996 (BAH), 2022 WL 1102200, at *4 (D.D.C. Apr. 13, 2022) ("Ordering a stay of "'indefinite duration in the absence of a pressing need'" would amount to an abuse of discretion." (citation omitted)); *SEUI Nat'l Indus. Pension Fund v. UPMC McKeesport*, No. 22-cv-249 (TSC/GMH), 2022 WL 3644808, at *2 (D.D.C. Aug. 24, 2022) (same).

original) (citation omitted). Here, Plaintiffs have already waited "for years," and Defendants are asking to continue the delay "for an indefinite period of time," *id.*, namely, until an unknown future date when new rules are promulgated that might moot the case. No one knows when these new rules will be unveiled—much less finalized—and Defendants have not denied that it could be months or years from now. *See* Opp. 6 (acknowledging that their projected timetables are only "aspirational"). A stay lasting until an unspecified, speculative future date is an indefinite stay.[2]

While never disputing that they seek an indefinite stay, Defendants claim that "all of the cases [Plaintiffs] cite involve stays pending litigation in another fora of claims related to those brought by the plaintiffs." Opp. 24. That is not true. *See* Mot. 12 (citing *Asylumwork*, 2021 WL 2227335, at *4-5, as denying indefinite stay "pending outcome of rulemaking proceedings"); *id.* (citing *Deloitte*, 940 F. Supp. 2d at 12-15, as denying indefinite stay "pending resolution of agency administrative proceeding"). Moreover, Defendants fail to explain why waiting indefinitely for the conclusion of rulemaking is different from waiting indefinitely for the conclusion of litigation, and they cite no authority to that effect. Rulemaking can be just as prolonged and indefinite as litigation, as Defendants' own efforts here amply demonstrate.

That is why, as Plaintiffs explained (and Defendants did not refute), "courts in this District have repeatedly denied requests to postpone litigation until the anticipated promulgation of new rules or the resolution of administrative proceedings." Mot. 27; *see Garcia v. Acosta*, 393 F. Supp. 3d 93, 110 (D.D.C. 2019) (rejecting stay based on allegations that "the Department 'is currently engaged in rulemaking . . . the results of which could substantially affect the entire nature of the

[2] *See, e.g.*, *Belize*, 668 F.3d at 733 ("pending . . . litigation of indefinite duration"); *McSurely*, 426 F.2d at 671 (pending "final resolution . . . of [related] criminal cases"); *United States v. Philip Morris USA Inc.*, 841 F. Supp. 2d 139, 141 (D.D.C. 2012) (pending litigation that could take "at least one or more years"); *Deloitte*, 940 F. Supp. 2d at 13, 15 (pending administrative proceeding that could last more than "300 days"); *Asylumworks v. Mayorkas*, No. 20-cv-3815 (BAH), 2021 WL 2227335, at *4-5 (D.D.C. June 1, 2021) ("pending the outcome of . . . rulemaking proceedings," which could be "a year from now" (citation omitted)).

case'" (citation omitted)); *Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 21 (D.D.C. 2019) (rejecting stay until an agency "expects to have 'issued its proposed new rule'" (citation omitted)); *Am. Hosp. Ass'n v. Dep't of Health & Hum. Servs.*, No. 18-cv-2112 (JDB), 2018 WL 5777397, at *2 (D.D.C. Nov. 2, 2018) (rejecting stay "pending the outcome of the government's proposed rule"). Defendants do not cite a single decision that supports putting a case on hold, indefinitely, pending the government's promised issuance of a new rule.

This is an open-and-shut question. An indefinite stay requires a pressing need. Defendants seek an indefinite stay. They offer no pressing need. As a result, Plaintiffs need not make any further showing or identify any other "damage" to their interests beyond this "undue delay." *Belize*, 668 F.3d at 732. The stay must be lifted.

2. There Is No "Hardship or Inequity" in Requiring Defendants to Go Forward.

Even if the stay requested here were not indefinite, the result would be the same. Defendants have not met the standard for a stay of *any* duration.

Defendants acknowledge that the burden is on them to show "a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to some one else." Opp. 7 (quoting *Landis*, 299 U.S. at 255). Despite that, they wait more than 20 pages before discussing the harm they allegedly will suffer if the stay is lifted—a discussion that consists of two paragraphs. *See* Opp. 23. And the only ostensible harm they come up with is that "the time spent litigating this case would impede [their] ability to work on the rulemaking." *Id.*

Defendants cite no authority from any court for the proposition that having to spend time litigating a case qualifies as "a clear case of hardship or inequity." The reason is obvious: every defendant would always be entitled to a stay under that logic. Defending a suit always means that

counsel "will be forced to spend time on the litigation that could have been spent on" other priorities, Opp. 23, and litigation against DHS officials always requires "coordination within and between DOJ and DHS," *id.* That is not a hardship, much less an inequity, and still less "a clear case" of either. Plaintiffs have shown that the courts consistently reject such arguments. *See* Mot. 18-19.[3] Defendants have no response.

Defendants also offer only bare assertions to back up their premise that "requiring litigation would harm the Departments' rulemaking effort." Opp. 24. Although Plaintiffs expressed justifiable skepticism of that claim, *see* Mot. 18, Defendants continue to provide nothing but "conclusory" assertions that litigation "is likely to cause interference" with their efforts—an approach that other courts have recognized "falls far short of the showing of 'hardship'" required. *Horn v. District of Columbia*, 210 F.R.D. 13, 16 (D.D.C. 2002) (citations omitted). This is not the first time an agency has claimed 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." *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21 (quoting agency's motion to stay). And here too, the government does not explain in any detail "how defense of this suit, which falls largely to lawyers at the Department of Justice, will divert substantial [agency] resources." *Id.* at 22. Instead, it gestures vaguely at "the extent of coordination required in a case such as this." Opp. 24.

That does not cut it, and Defendants cite no precedent accepting such arguments. Moreover, as discussed above, even a plausible claim about the diversion of attorney resources does not "make out a clear case of hardship or inequity." *Landis*, 299 U.S. at 255. Without that

[3] *E.g.*, *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 21 ("being required to defend a suit, without more, does not constitute 'a clear case of hardship or inequity'" (citation omitted)); *Deloitte*, 940 F. Supp. 2d at 15 (having to "litigate . . . two very different proceedings simultaneously" imposes "no significant burden"); *Asylumworks*, 2021 WL 2227335, at *6 ("[T]he expenditure of resources in proceeding with the litigation" is "wholly insufficient to warrant a stay.").

showing, which is Defendants' burden to make, continuing the stay would be an abuse of discretion.

II. JUDICIAL EFFICIENCY FAVORS LIFTING THE STAY.

A. Justiciability Issues Can Be Addressed in Summary Judgment Briefing and Need Not Delay the Case.

Defendants argue that the stay should not be lifted because they have not had an opportunity to present "arguments regarding jurisdiction and justiciability," such as whether Plaintiffs have standing. Opp. 9-10. Defendants further argue that standing is complex "in light of the Supreme Court's recent decision in [*United States v.*] *Texas*." *Id.* at 10. But this Court can address standing and any other justiciability questions on summary judgment, as courts routinely do. And Defendants offer no reason to think that standing is particularly complex here: as shown below, *United States v. Texas* is irrelevant. The most efficient way to proceed is therefore to allow briefing on summary judgment to address any justiciability issues in addition to the legality of Chad Wolf's appointment. "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).

"The potential jurisdictional issue the government has flagged—plaintiffs' standing—may equally be considered at the summary judgment stage." *Am. Hosp. Ass'n*, 2018 WL 5777397, at *3 n.3; *see id.* at *2 (rejecting request to stay case and defer summary judgment briefing to "consider the defenses the government intends to assert pursuant to Federal Rule of Civil Procedure 12"). Indeed, federal courts often address justiciability issues such as standing on summary judgment. *See, e.g.*, *Gomez v. Biden*, Nos. 20-cv-01419 (APM) et al., 2021 WL 3663535, at *5-11 (D.D.C. Aug. 17, 2021) (deciding various justiciability issues on summary judgment, including standing, mootness, and principles of non-reviewability), *appeal filed*, No. 21-5288

(D.C. Cir. Dec. 16, 2021); *Gov't of Province of Manitoba v. Zinke*, 273 F. Supp. 3d 145, 162 (D.D.C. 2017) (addressing substantive claims alongside defendants' claim that plaintiff lacked standing); *All. for Nat'l Health U.S. v. Sebelius*, 775 F. Supp. 2d 114, 119 (D.D.C. 2011) (addressing on summary judgment the "threshold question" of "whether the plaintiffs have standing to bring this action"); *see also E. Bay Sanctuary Covenant v. Biden*, No. 18-cv-6810 (JST), 2023 WL 4729278, at *6 (N.D. Cal. July 25, 2023) (addressing plaintiffs' standing on summary judgment), *appeal filed*, No. 23-16032 (9th Cir. July 26, 2023).

Even Defendants concede that following the same course would be appropriate here. *See* Opp. 8 ("Defendants are entitled to raise any grounds for dismissal and to challenge the justiciability of the case, whether through such a response [to the complaint] or motions *or during the summary judgment briefing* . . . ." (emphasis added)).

Moreover, the only possible justiciability objection Defendants have flagged (standing) is not likely to be time-consuming.[4] "The United States Supreme Court has made plain that 'a concrete and demonstrable injury to [an] organization's activities[,]with the consequent drain on the organization's resources' . . . suffices for standing." *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (first alteration in original) (citation omitted); *see id.* at 1094-95 (holding that a nonprofit had organizational standing on this basis). Thus, nonprofits like Tahirih and Ayuda have been organizational plaintiffs in cases like this one, and courts have recognized they have standing to do so. *E.g.*, *Nw. Immigrant Rts. Project v. USCIS*, 496 F. Supp. 3d 31, 45-48 (D.D.C. 2020)

[4] Defendants also write that the "unique jurisdiction-limiting provisions" of 8 U.S.C. § 1252 may affect "whether the Court has jurisdiction to consider Plaintiffs' claims." Opp. 9. The Supreme Court has squarely resolved, however, that Section 1252 "does not deprive the lower courts of all subject matter jurisdiction," but rather affects only their authority "to grant a particular form of relief." *Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022).

(granting preliminary injunction in favor of three organizational plaintiffs on Chad Wolf appointment claim).

The assertion that *United States v. Texas*, 143 S. Ct. 1964 (2023), has any bearing on Plaintiffs' standing is absurd. That case involved "both a highly unusual provision of federal law and a highly unusual lawsuit," and the "narrow" decision "simply maintains the longstanding jurisprudential status quo." *Id.* at 1974-75. Specifically, *Texas* "raise[d] only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law[.]" *Id.* at 1975. The plaintiffs "essentially want[ed] the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests." *Id.* at 1968. But the Court "has previously ruled that a plaintiff lacks standing to bring such a suit," *id.* at 1970 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)), and that 50-year-old precedent "remains the law today," *id.*; *see id.* at 1973 (stating that the plaintiffs' "novel standing argument" would "entail expansive judicial direction of the Department's arrest policies" and declining to send the judiciary "down that uncharted path"). "Monetary costs are of course an injury," but a lawsuit seeking to control "when the Executive Branch elects *not* to arrest or prosecute" "is not the kind redressable by a federal court," because "courts generally lack meaningful standards for assessing the propriety of enforcement choices." *Id.* at 1970-72.

Texas did not address, let alone alter, the long-standing jurisprudence governing organizational standing, on which Plaintiffs' claims are based. *See E. Bay Sanctuary Covenant*, 2023 WL 4729278, at *6. While Defendants may challenge Plaintiffs' standing, that challenge is unlikely to tax this Court's resources.

B. This Court Does Not Need to Address the Complications that Defendants Attribute to 8 U.S.C. § 1252(f).

Defendants spill much ink on three questions they say this Court "will have to grapple with" if the stay is lifted—all involving 8 U.S.C. § 1252(f) ("Limit on injunctive relief"). *See* Opp. 11-16. This is a red herring, and Defendants are seeking to manufacture complexity where none exists. Section 1252(f) limits *injunctive* relief, not vacatur under the APA, vacatur under the FVRA, or declaratory relief. Because Plaintiffs seek those remedies, none of the questions Defendants raise about Section 1252(f) need ever be addressed.

Defendants cite no authority for their contention that "vacatur is practically equivalent to an injunction," and therefore precluded by Section 1252(f). *See* Opp. 17; *see also E. Bay Sanctuary*, 2023 WL 4729278, at *8 ("Plaintiffs seek vacatur under the APA, not an injunction. Though Defendants argue that the Section 1252(f)(1) bar also applies to vacatur, they cite no binding authority on this point, and this Court is not aware of any."). Indeed, all authority is to the contrary.

"Vacatur is the normal remedy under the APA, which provides that a reviewing court 'shall . . . set aside' unlawful agency action." *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) (alteration in original) (quoting 5 U.S.C. § 706(2)); *see United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (Under the APA, "[t]he ordinary practice is to vacate[.]"). Likewise, "the general rule [is] that actions taken in violation of the FVRA are void *ab initio*." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017) (citation omitted); *accord SW Gen., Inc. v. NLRB*, 796 F.3d 67, 71 (D.C. Cir. 2015) (citing 5 U.S.C. § 3348(d)); *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 26 (D.D.C. 2022) (vacating rule under both the FVRA and the APA). None of this is novel or unsettled.

Section 1252(f) has no plausible effect on vacatur. "By its plain terms, and even by its title, that provision is nothing more or less than a limit on *injunctive* relief." *Reno v. Am.-Arab*

Anti-Discrimination Comm., 525 U.S. 471, 481 (1999) (emphasis added). It "prohibits lower courts from entering *injunctions* that *order* federal officials *to take or to refrain from taking actions*." *Biden v. Texas*, 142 S. Ct. 2528, 2538 (2022) (emphasis added) (quoting *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2060 (2022)); *see id.* at 2539 (explaining that Section 1252(f)'s title, "Limit on injunctive relief," "makes clear the narrowness of its scope").

Unlike an injunction, vacating a rule does not "order federal officials" to do anything—it does not "tell[] someone what to do or not to do." *Aleman Gonzalez*, 142 S. Ct. at 2060 (citation omitted). Vacatur merely removes a source of authority on which officials could otherwise have relied for the legality of their actions. *Cf. Armstrong v. Exec. Off. of President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (judgment declaring agency action unlawful is not enforceable by contempt). Defendants' unsupported claim that vacatur is "coercive relief," Opp. 17, is simply wrong.[5]

Notably, Defendants do not even argue that Section 1252(f) precludes *declaratory* relief—and for good reason. "Section 1252(f) prohibits only injunctions . . . . It does not proscribe issuance of a declaratory judgment[.]" *Make The Rd. N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020). Indeed, "[t]he Supreme Court has specifically held that Section 1252(f) does not bar declaratory relief." *Id.* (citing *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019)); *see also Armstrong*, 1 F.3d at 1289 ("Though it may be persuasive," a declaratory judgment "is not ultimately coercive." (quoting *Steffel v. Thompson*, 415 U.S. 452, 471 (1974))).

[5] In fact, vacatur and injunctions are governed by different standards precisely because of the latter's coercive force. An injunction is an "additional," "drastic[,] and extraordinary remedy," available only "[i]f a less drastic remedy . . . such as partial or complete vacatur" is insufficient. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010); *see N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) (where vacatur is available, issuing an injunction is "anomalous"); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 36-37 (D.D.C. 2020) (denying injunction but vacating agency directives under the FVRA).

If Plaintiffs succeed on the merits—like every other plaintiff challenging Chad Wolf's tenure has—they will be entitled to relief. The supposed complications that Defendants cite concerning Section 1252(f) are irrelevant and do not undermine the efficiency of lifting the stay.

C. New Rules Will Not Necessarily Moot the Case.

Defendants say they continue to "work on new rulemaking that they expect would moot this litigation once final," Opp. 8, and they seem to assume that the promulgation of new rules will inevitably moot this case. But Defendants can provide no information about the content of these rules, no credible timeline for their publication, and no assurance that they will survive the notice-and-comment process and any court challenges. Thus, Defendants cannot guarantee that their new rules will *ever* become final—or that, if they do, they will actually moot Plaintiffs' claims.

Instead, Defendants merely claim that their long-promised rules are "likely to moot" and raise the "potential for mootness." Opp. 8-9. This does not meet Defendants' burden to justify further delay. *See Am. Hosp. Ass'n*, 2018 WL 5777397, at *2 (denying stay because "it is not certain the proposed rulemaking . . . will moot the case" and the agency "cannot guarantee that the proposed rule . . . will become final at all, as [the agency] is required to consider any comments made before it issues a final rule" (citation omitted)). These vague expectations only highlight Defendants' refusal to commit to replacing the Rule in its entirety and underscore that Defendants are requesting an indefinite stay.

Contrary to Defendants' unsupported assumption, properly issuing new rules will not inevitably moot all of Plaintiffs' claims. Those claims will be moot if, and only if, the Rule is repealed and replaced in its entirety. *See* Mot. 30. If Defendants' new rules fail to do that, the extent to which these rules moot each of Plaintiffs' varied claims will itself raise complex questions that this Court would have to resolve—followed by adjudicating whatever claims survive. *See*

Ctr. for Biological Diversity, 419 F. Supp. 3d at 23 (even if the agency meets its "ambitious schedule," its new rules "would have to fully remedy each of Plaintiffs' claims . . . to render them moot" (citation omitted)).

Thus, even if Defendants finalize new rules—which is far from certain—this Court may still have to address the legality of the original Rule, and if the Court waits, it will have to address mootness issues as well. But if the Court finds in favor of Plaintiffs with respect to their appointments claims, it will not have to address the remaining issues. "Defendants have failed to make a clear showing that a stay would necessarily result in *any* efficiency gains at all, much less the significant savings that would warrant the imposition of such a substantial delay." *Nat'l Indus. for Blind v. Dep't of Veterans Affs.*, 296 F. Supp. 3d 131, 143 (D.D.C. 2017).

As discussed earlier, Defendants identify no pressing need for a stay or any hardship or inequity in having to go forward. Their "only argument in favor of a stay invokes the interests of judicial economy. That is not enough, especially where it is not 'certain' that the 'proposed rulemaking . . . will moot the case.'" *Garcia*, 393 F. Supp. 3d at 110 (alteration in original) (quoting *Am. Hosp. Ass'n*, 2018 WL 5777397, at *2).

III. PLAINTIFFS AND THE PUBLIC CONTINUE TO BE HARMED.

Defendants argue that "continuing the stay will cause no significant harm to Plaintiffs." Opp. 19. Specifically, they assert that because the Rule is already preliminarily enjoined, a ruling in Plaintiffs' favor would not change the status quo, because "a vacatur order would not itself alter the Code of Federal Regulations." *Id.* at 22. Defendants also contend that the examples of judicial confusion cited by Plaintiffs do not amount to harm because they "do not show any material impact on the outcome of the case." *Id.* at 19. None of these arguments is persuasive.

A. Vacatur Would Relieve Plaintiffs' Harm.

Defendants make the extraordinary claim that vacating a rule is functionally no different from preliminarily enjoining it. That is obviously wrong. Vacating a rule is an administrative law remedy that essentially wipes the rule off the books. It removes the rule's legal effect and renders it null and void. *See Asylumworks*, 590 F. Supp. 3d at 26 ("The plain terms of the FVRA . . . direct[] that unlawful actions under that statute are void *ab initio*, thereby rendering the rules without 'force or effect' and requiring vacatur." (quoting 5 U.S.C. § 3348(d)(1))). Unlike a preliminary injunction, which temporarily halts the enforcement of a rule pending litigation, vacatur erases the rule entirely, resetting the legal landscape to what it was before the rule was enacted. *See Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect[.]").

Defendants imply that even if the Rule is vacated, it would remain in the Code of Federal Regulations (C.F.R.), continuing to create confusion and uncertainty. This is incorrect. When a rule is vacated, agencies are obligated to remove it from the C.F.R. Indeed, DHS has itself remarked that "delaying the ministerial act of restoring the regulatory text in the Federal Register is contrary to the public interest because it could lead to confusion, particularly among the regulated public." *Strengthening the H-1B Nonimmigrant Visa Classification Program, Implementation of Vacatur*, 86 Fed. Reg. 27,027 (May 19, 2021) (removing from the C.F.R. a rule that was vacated by a federal district court several months earlier); *see also Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (updating the C.F.R. to address the vacatur ordered by a federal district court a week earlier). Defendants do not explain why vacatur of this Rule would be any different.

B. Prolonged Confusion about Which Asylum Regulations Are Valid and Which Are Not Harms Plaintiffs and Others.

Defendants also take the astonishing position that no harm results when federal courts erroneously rely on the enjoined Rule because this has not "materially" affected the outcome of a case. Putting aside that it is not always possible to know with confidence what has "materially" affected an outcome, especially in the context of cases decided without published opinions, Defendants plainly cannot guarantee that future errors made in reliance on the Rule will always be immaterial. And such errors can profoundly affect the lives of people involved in immigration proceedings.

Moreover, Defendants do not dispute that the Rule's complex changes to asylum law have created an administrative labyrinth. Because the Rule's provisions are scattered throughout the C.F.R., legal practitioners, immigration personnel, judges, and court staff are compelled to spend significant additional time keeping track of which regulations are currently in effect and which are not. This not only burdens all parties involved, but also contributes to an atmosphere of legal ambiguity, increasing the likelihood of errors and injustices.

* * *

Nearly three years have passed since the Rule was approved by an individual with no authority to make such sweeping changes to the nation's asylum system. This illegal Rule remains integrated throughout the C.F.R. and on the government's official websites, confusing courts and burdening litigators. A court order vacating the Rule would lead to a restoration of the status quo.

Defendants' attempt to stave off judicial scrutiny by pointing to "aspirational" plans that may or may not materialize in the future is not just legally tenuous—it perpetuates harms to Plaintiffs, their clients, and the broader public that result from leaving a massive, legally flawed regulation on the books in the already complicated realm of asylum law. Significantly,

government officials could always point to the possibility of future rule changes or the complexities of litigation as grounds for delaying litigation and denying aggrieved parties their day in court. But because "[t]his appeal to 'economy,' . . . would prove too much," *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971), the case law demands much more. When a court orders a stay "'of indefinite duration in the absence of a pressing need,'" it "abuses its discretion." *Belize*, 668 F.3d at 731-32 (quoting *Landis*, 299 U.S. at 255). If nothing else, partially lifting the stay would allow the Parties to begin briefing the Wolf issues and any justiciability issues Defendants wish to raise, and the Court could then decide those issues when it is most efficient for the Court to do so.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the stay be partially lifted.

Dated: August 31, 2023

Respectfully submitted,

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