IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CASA DE MARYLAND, INC., *et al*.

Plaintiffs,

v.

MAYORKAS, *et al*.

Defendants.

Civil No. 20-2118-PX

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS (I) FOR SUMMARY JUDGMENT ON THEIR HOMELAND SECURITY ACT CLAIM AND (II) TO MODIFY PRELIMINARY INJUNCTION

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Defendants' opposition to Plaintiffs' motion for summary judgment on their Homeland Security Act claim, ECF No. 123 ("Opp'n"), does not identify a single disputed material fact. Nor do Defendants dispute that the Broader EAD Rule is not severable, or that the remedy at final judgment is vacatur of the final rule in its entirety as to all asylum applicants. Defendants largely direct their arguments to standing, but their challenge to all five Plaintiffs' organizational standing fails to engage with the record evidence establishing such standing, and their position that Plaintiffs CASA and ASAP lack associational standing is based on misapplication of controlling law. On the merits of the Appointments claim, Defendants just rehash the same arguments that this Court—and at least four others—have already considered and rejected, and they fail to identify any facts or law that would lead to a different conclusion.

Likewise, Defendants' opposition to Plaintiffs' motion to modify the preliminary injunction concedes that Plaintiffs have demonstrated changed circumstances that permit modification. Defendants do not seriously dispute Plaintiffs' evidence of continuing irreparable harm. With respect to the Broader EAD Rule, Defendants fail to identify any harm to the government or the public interest that weighs against expanding relief to enjoin all the rule's provisions as to all asylum seekers. Finally, Defendants' arguments against expanding the scope of relief as to the Timeline Repeal Rule are belied by the record, and in any event, the legal basis for limiting relief is no longer present.

ARGUMENT

I. Plaintiffs Are Entitled to Judgment on Their Homeland Security Act Claim

a. All Five Plaintiffs Have Organizational Standing Based on Direct Harm

The Fourth Circuit's panel decision in *CASA de Maryland v. Trump* narrowed the organizational standing law in this circuit, and vacatur of that decision restored the controlling

precedent under which courts have consistently found organizational standing in circumstances comparable to those here. *See* ECF No. 107-1 ("Mot.") at 6–10; *see also Nw. Immig. Rights Proj. v. USCIS*, 496 F. Supp. 3d 31, 47–48 (D.D.C. 2020) (CASA had *Havens* standing to challenge rule that would reduce its revenue by increasing the number of members who qualified for financial hardship waivers from membership dues and program fees, and would reduce the number of members CASA could assist). Organizational standing in this case is fully consistent with *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012), given that Plaintiffs' existing mission-driven programming has been directly and adversely impacted by Defendants' unlawful actions, and the resulting diversion of Plaintiffs' resources was necessary to continue providing such programming and was not voluntary. *See* Mot. at 6–8; *see also* Pls.' Reply Mem., ECF No. 47 at 12–13 (explaining why Plaintiffs' injuries were not the result of voluntary budgetary choices); *CASA de Maryland v. Trump*, 971 F.3d 220, 266 (4th Cir. 2020) (King, J., dissenting) ("[W]e predicated our *Lane* decision on the fact that the organization had alleged *only* that the new law resulted in a voluntar[y] expenditure of its resources," and "the organization did not allege that the new law impaired its organizational mission."); *Nw. Immig. Rights Proj.*, 496 F. Supp. 3d at 49 ("[T]he challenged laws need not themselves compel Plaintiffs into action; it is enough that they perceptibly impair the organizations' missions in a manner that makes their overall task more difficult." (internal quotation marks and alterations omitted)). Defendants failed to respond to Plaintiffs' arguments and asserted that the *CASA* opinion was not material to the Court's conclusion, *see* Opp'n at 2–4—notwithstanding the Court's multiple citations to and quotations of *CASA* in discussing its conclusions on standing, *see* ECF No. 69 ("Opinion") at 19–21.

b. Plaintiffs Have Associational Standing Based on Harm to Their Members

To establish associational standing, an organization must show that: "(1) its own members

would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). At summary judgment, Plaintiffs must demonstrate standing by "set[ting] forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); Fed. R. Civ. P. 56(c). This Court previously held that Plaintiffs ASAP and CASA had established associational standing to assert their HSA claim, relying on (*inter alia*) Plaintiffs' "detailed declarations regarding the structure and function of their organizations and the challenged rules' impact on selected members." Opinion at 18, 22–25.

Defendants do not dispute that CASA and ASAP "easily satisfy" the second and third standing requirements, *see id*. at 23, but they argue that Plaintiffs submitted insufficient evidence to meet the first requirement, *see* Opp'n at 6–7. Specifically, Defendants argue that Plaintiffs were required to show that the members identified when the case was filed were, in fact, ultimately harmed by the Broader EAD Rule. *Id.* They are wrong, however, because "the injury [alleged at the time of case filing] need not be actualized" for a plaintiff to have standing. *Davis v. Fed. Elec. Com'n*, 554 U.S. 724, 734 (2008) ("While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). In *Davis*, the injury the plaintiff alleged when he filed suit—that his opponent for elected office would receive campaign contributions on more favorable terms because of the plaintiff's plans to spend a certain

amount of personal funds—was never actualized because his opponent ultimately declined to receive the available benefit. *Id.* Nonetheless, the Supreme Court affirmed that the plaintiff had standing because at the time he filed the suit, there was a "realistic and impending threat of direct injury." *Id.* at 734–35.

This Court has already determined that record evidence establishes that five CASA and ASAP members had standing to sue in their own right when this case was filed, *see* Opinion at 18, 22–25, 58; under *Davis*, it does not matter whether the injuries that were threatened at the time of filing were later actualized, 554 U.S. at 734.[1] At the time of filing, the CASA and ASAP members had already submitted or planned to submit their asylum applications, *see* ECF No. 24-4 ¶¶ 25–28; ECF No. 24-5 ¶¶ 22–29, and each member faced the prospect of "concrete and particularized injury" caused by the Broader EAD Rule, *see id.*; ECF No. 24-6 ¶¶ 9–16 (outlining specific burdens the Broader EAD Rule would impose on asylum seekers); ECF No. 24-7 ¶¶ 11–34 (same); ECF No. 24-8 ¶¶ 17–22 (same). Defendants have not identified any disputed issue of fact that is material to associational standing; the facts have not changed since the Court decided this issue in the preliminary posture; and Defendants do not challenge the Court's previous legal conclusion that those facts were sufficient to confer associational standing. *See* Opinion at 23.

Defendants also argue that establishing associational standing requires more than satisfying the three *Hunt* factors, cited above. Defendants would add a fourth factor, requiring Plaintiffs to prove as well that they are the "functional equivalent" of a membership organization with all the indicia of membership present in *Hunt*. *See* Opp'n at 4–7. But that additional inquiry is relevant

[1] *See also Nat'l Ass'n for Advancement of Multijurisdiction Prac. v. Holder*, No. 1:14-CV-2110-RJC, 2015 WL 13158479, at *3–4 (D. Md. Aug. 18, 2015) (plaintiffs challenging attorney admission rules had injury sufficient to establish standing where they asserted that they would apply for admission if doing so were not futile), *aff'd*, 826 F.3d 191 (4th Cir. 2016).

only where a plaintiff—such as the state agency representing apple growers and dealers in *Hunt*—"lacks traditional voluntary membership or any actual members," but nonetheless seeks to bring suit based on injury to its constituents. *Students for Fair Admissions v. Univ. of N. Carolina*, No. 1:14CV954, 2018 WL 4688388, at *4 (M.D.N.C. Sept. 29, 2018). Where, as here, it is undisputed that CASA and ASAP are voluntary membership organizations, *see* ECF No. 24-4 ¶ 3 ("CASA is a non-profit 501(c)(3) membership organization . . . with more than 100,000 members."); ECF No. 24-5 ¶¶ 5–9 (describing ASAP membership and how members join the organization),[2] the associational standing test requires no more.[3] Indeed, Defendants' reading of *Hunt* is "at odds with decades of decisions since *Hunt* that have not applied the indicia of membership test to organizations which, on their face, are voluntary membership organizations."[4] *Students for Fair Admissions*, 980 F.3d at 184; *see, e.g.*, *Equity in Athletics v. Dept. of Edu.*, 639 F.3d 91, 99 (4th Cir. 2011) (applying only the three-factor *Hunt* test "[w]here, as here, the plaintiff is an organization bringing suit on behalf of its members"); *accord N. Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020); *Int'l Refugee Assistance Project v. Trump*,

[2] Defendants have never disputed that CASA and ASAP are traditional voluntary membership organizations, and indeed, Defendant DHS accepts evidence of CASA or ASAP membership as prima facie evidence that an asylum-seeking applicant qualifies for the benefits of this Court's preliminary injunction. *See* ECF No. 121-5 ¶ 20.

[3] *See e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157, 164, 183–84 (1st Cir. 2020) (indicia of membership analysis is not required for voluntary membership organization) (pet. for cert. docketed March 1, 2021); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 29 (D.D.C. 2009) (same); *Cal. Sportfishing Prot. All. v. Diablo Grande*, 209 F. Supp. 2d 1059, 1066 (E.D. Cal. 2002) (same); *Students for Fair Admissions*, 2018 WL 4688388, at *4–5 (same and collecting cases).

[4] Defendants' citation to *Sorenson Communications, L.L.C. v. FCC*, Opp'n at 5, is inapposite. In that case—unlike here—the plaintiff organization was not a voluntary membership organization, provided only "conclusory and general assertions about the nature of the association," and in any event, failed to identify any individual constituent with standing in their own right. 897 F.3d 214, 225 (D.C. Cir. 2018).

883 F.3d 233, 262 (4th Cir. 2017) (*en banc*), *vacated on other grounds*, 138 S. Ct. 2710 (2017).

Even if the functional equivalent analysis applied, CASA and ASAP would easily meet it, based on the undisputed evidence that each organization "represents" its constituents and "provides the means by which they express their collective views and protect their collective interests." *Hunt*, 432 U.S. at 345. CASA has more than 100,000 members, including "thousands of asylum seekers and asylees" who have filed or plan to file for work authorization. ECF No. 24-4 ¶¶ 3–6, 9–10. CASA's members pay membership fees,[5] and "provide ongoing input on, establish, and approve the organization's long-term strategic priorities and policies" in their roles as members of its board and by participating in its Leadership Council and other committees. *Id.* ¶¶ 7–8. In support of its mission focused on "building power and improving the quality of life in low-income immigrant communities," CASA engages in immigrants' rights advocacy at the national and local levels. *Id*. ¶¶ 4, 6. On such facts, a court in this district held that CASA is a "prototypical example[]" of a membership organization with associational standing. *CASA de Maryland v. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 771 (D. Md. 2018) (challenging rescission of DACA program), *aff'd in part on other grounds*, 924 F.3d 684, 701 n.14 (4th Cir. 2019).

Likewise, ASAP has more than 4,000 members who "set the priorities and goals for [its] systemic reform and advocacy work" by identifying which "advocacy goals are important to them and should be a priority for ASAP." ECF No. 24-5 ¶¶ 4–5, 7, 12. The organization also

[5] Defendants request that the Court take judicial notice of changes to the CASA website, Opp'n at 21–22, but those changes were made after this case was filed and so are irrelevant to standing. *See Davis*, 554 U.S. at 734. Moreover, the short, online form Defendants reference does not establish that CASA's national members do not pay membership dues; to the contrary, those members pay dues.

provides legal aid in support of its mission focused on supporting asylum seekers. *Id*. ASAP decided to focus on the rules challenged in this case based on "serious concern" expressed by members when the rules were first proposed. *Id.*

Defendants do not challenge or dispute any of Plaintiffs' evidence. And they cite no authority for their argument that the functional equivalent analysis imposes irrationally strict and formalistic demands such as proof that "members who are on the organization's board have been impacted" by the challenged actions. Opp'n at 6. Plaintiffs have met their burden under *Hunt*.

c. Chad Wolf Lacked Legal Authority to Serve as Acting DHS Secretary When He Issued the Broader EAD Rule

Every argument that Defendants make to support the former putative Acting Secretary's authority to promulgate the Broader EAD Rule has already been rejected by this Court and every other court to consider the issue. *See* Mot. at 10–13. Defendants have not provided new authority to support their assertion that this Court erred when it concluded that Chad Wolf lacked authority to serve as the Acting Secretary of DHS when he issued the Broader EAD Rule. *See* Opinion at 39–45. Wolf's putative tenure as Acting Secretary of DHS violated the Homeland Security Act, 6 U.S.C. § 113, and because Wolf acted "in excess of . . . authority" and not "in accordance with law," 5 U.S.C. §§ 706(2)(A), (C), the Broader EAD Rule was promulgated in violation of the Administrative Procedure Act (APA) and Plaintiffs are entitled to judgment on their claim. Fed. R. Civ. P. 56(a).

Defendants again urge this Court to ignore the substance of Secretary Nielsen's revisions to Delegation 00106 and to focus exclusively on the two-page, partially redacted April 9, 2019

Order ("Memorandum"[6]) that Nielsen signed purporting to authorize those revisions. *See* Opp'n at 11–14. But as this Court previously held, even Nielsen's Memorandum does not support Defendants' position.[7] *See* Opinion at 43–44 (finding that "the plain meaning of Nielsen's order" was clear, and it did not render Mr. McAleenan the lawful Acting Secretary).[8]

On its face, Secretary Nielsen's Memorandum purports to do no more than amend Annex A of Delegation 00106. *See* Opinion at 41–42; *Pangea Legal Servs. v. Dep't of Homeland Sec.,* No. 20-CV-09253-JD, __ F. Supp. 3d __, 2021 WL 75756, at *5 (N.D. Cal. Jan. 8, 2021) ("The plain language of the Nielsen Order did not designate the CBP Commissioner, McAleenan, as the next person to take on the duties of DHS Secretary."); Mot. at 11–12 (collecting cases). Notwithstanding Defendants' exhortations to the contrary, passing reference to an "order of succession" does not supplant the plain text of Secretary Nielsen's Memorandum, which only

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[6] Defendants now refer to this document as Nielsen's "Order." *See* Opp'n at 7–13. Given that the parties and the Court previously used the term "Memorandum" to describe the document, *see, e.g.*, Defs.' Opp'n to Pls.' Mot. to Stay or for Prelim. Inj., ECF No. 41 at 27 & n.9; Pls.' Reply Mem., ECF No. 47 at 10–11; Opinion at 43, Plaintiffs retain that term here to ensure that it is clear to the Court that this is the same document addressed in prior rounds of briefing.

[7] Moreover, Defendants' focus on the original Johnson Order ("DHS Delegation No. 106, Revision No. 8") and the timing of § 113(g)(2)'s enactment is misplaced. Opp'n at 7–14. Although Defendants did not previously present Revision 8 to the Delegation Orders to this Court, they have presented it to every subsequent court to analyze this issue, and each court reached the same conclusion as this Court: that neither McAleenan nor Wolf ever validly assumed the office of Acting Secretary. *See, e.g.*, *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 124 (E.D.N.Y. 2020) (discussing and reviewing Revision 8 to Delegation No. 00106); Mot. at 11–12; *see also* ECF No. 51-1 (GAO report reviewing DHS Delegations and reaching the same conclusion); *La Clinica de la Raza v. Trump*, No. 19-CV-04980-PJH, 2020 WL 7053313, at *6–7 (N.D. Cal. Nov. 25, 2020) (same). In any event, Revision No. 8 is simply the governing DHS Orders of Succession and Delegation, which were in place prior to Secretary Nielsen's revisions. The subsequent purported revisions to those orders—by Nielsen and McAleenan—were made only by reference to that document and presupposed its validity. Pls.' Sept. 2 Ltr. Br., ECF No. 66 at 5.

[8] *See also* Pls.' Reply Mem., ECF No. 47 at 10–11; Pls.' Aug. 26 Ltr. Br., ECF No. 62 at 1–2; Pls.' Sept. 2 Ltr. Br., ECF No. 66 at 5 (responding to the Court's question as to "what force and effect should be given to Delegation 00106").

amends Annex A. *See* Opinion at 44.[9]

Defendants' contention that every court to reach this conclusion "mistakenly relied on the wrong document," Opp'n at 11, is nonsensical. Defendants presented Nielsen's signed Memorandum to each of the courts to consider this issue, and every court concluded that it did not make McAleenan the Acting Secretary.[10] *See, e.g.*, *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020) (analyzing and rejecting Defendants' interpretation of the April 9, 2019 Nielsen Memorandum as "tortured" and contrary to its plain text); *Pangea*, 2021 WL 75756, at *4–5 (explicitly adopting the *Batalla Vidal* court's analysis of the Memorandum); Mot. at 11–12. This Court explained its conclusion at length last September, and that conclusion remains just as valid today: "the Government provides no authority for this Court to eschew the plain meaning of Nielsen's order and divine her intent as meaning something else." Opinion at 44.

d. Vacatur of the Broader EAD Rule in Its Entirety Is the Remedy at Final Judgment

Defendants do not dispute that vacatur is the appropriate remedy at final judgment. *See* Mot. at 13. Nor do Defendants respond to Plaintiffs' case law and analysis demonstrating that the Broader EAD Rule is not severable. *See* Mot. at 13–16. Instead, Defendants merely quote the Court's preliminary injunction opinion, *see* Opp'n at 24, which held only that Plaintiffs had not met their burden "at th[at] stage" to "explain[] how the remaining rules are unable to function

[9] *See also* Pls.' Aug. 26 Ltr. Br., ECF No. 62-1 at 1–2 ("Defendants have no sensible explanation for their position that invocation of § 113(g)(2) provides authority to amend the orders of delegation and succession, but is insufficient to support an amendment to the order of delegation alone.").

[10] Indeed, when Defendants mostly recently made this same argument, the *Pangea* Court questioned whether Defendants were arguing in good faith. *See Pangea Legal Servs. v. Dep't of Homeland Sec.*, No. 20-CV-09253-JD, 2021 WL 75756, at *4 (N.D. Cal. Jan. 8, 2021).

independently from the enjoined rules," Opinion at 68 (internal quotation marks omitted). Plaintiffs' most recent motion fills the gap the Court identified previously, *see* Mot. at 13–16, and Defendants provide no response whatsoever to that explanation.

II. Modification of the Preliminary Injunction Is Necessary and Appropriate

a. It Is Undisputed That Plaintiffs Meet the Changed Circumstances Standard

As an initial matter, Defendants concede that the vacatur of the *CASA* panel opinion constituted a change in controlling law, *see* Opp'n at 16, which satisfies the changed circumstances standard, *see* Mot. at 17–19.

The standard is also satisfied by the irreparable harm that the processing delays are causing to Plaintiffs, their members, and their clients, which—as shown by undisputed evidence—are caused at *least* in substantial part by the Asylum EAD Rules and the limited scope of this Court's preliminary injunction. Indeed, Defendants concede that the limited scope of the preliminary injunction resulted in processing delays, *see* Nolan Decl. of June 3, 2021 ("6/3/21 Nolan Decl.), ECF No. 121-5 ¶ 18 (manual processes DHS used at intake and at SCOPS to implement the injunction "added delays to the adjudication process").

Even more damning, Defendants' own evidence demonstrates that the adjudication of (c)(8) EAD applications now takes *three times as long per application* as it did before the Broader EAD Rule went into effect. *Compare id.* ¶ 12 ("[T]here are 53 full time employees assigned to the initial C8 EAD workload," and "[o]n average, an officer has . . . an approximate completion per hour rate of 1.5."), *with* ECF No. 124-3 (Office of the Citizenship & Immigration Services Ombudsman, Annual Report to Congress 2019), Administrative Record (AR) at 842–43 (describing Immigration Service Officers who "were used to completing 4-5 [(c)(8) EAD] cases per hour"). The fact that processing now takes three times longer should have been anticipated

given that, as a result of the Broader EAD Rule (including the non-enjoined provisions), Form I-765(c)(8) now has more questions, and asylum seekers must submit more documentation, and legal arguments, to demonstrate their eligibility. *See* Oasis II Decl. ¶ 9 (Form I-765 "has more questions and is longer as a result of the new rules" and takes 30-60 minutes longer to complete); *id.* ¶ 10 (clients must often submit additional documentation as a result of the new rules, such as affidavits describing how they entered the country); Pangea II Decl. ¶ 7 (applications include "cover letters setting out legal arguments why our clients are eligible for and should be granted work authorization under the new rules"); *see also* Mot. at 20 n.16.[11]

b. The Broader EAD Rule Should Be Enjoined in Its Entirety as to All Asylum Seekers

If the Court determines in its discretion not to grant Plaintiffs' summary judgment motion, Plaintiffs respectfully request that the Court expand the scope of preliminary relief to enjoin all provisions of the Broader EAD Rule as to all asylum seekers to address the continuing irreparable harm to Plaintiffs.[12] *See* Mot. at 17–21. As described, *supra* Part I(a),(b) & (d), Plaintiffs have demonstrated two independent legal bases for expanding the scope of relief: (i) Plaintiffs have standing to challenge every provision of the rule; and (ii) the rule is not severable. Defendants fail to respond meaningfully to Plaintiffs' *Havens* arguments, and do not dispute that as a matter of law, the Broader EAD Rule is not severable. *See* Mot. at 6–10, 13–16. Nor do they dispute

[11] Defendants' argument that "any issues concerning processing delays . . . are outside the scope of this lawsuit," Opp'n at 18, is rather oblivious: as this Court has held, Plaintiffs suffer irreparable harm because of delays in work authorization. *See* Opinion at 59 ("[E]very additional day these individuals wait will visit[] on them crippling dependence on the charity and good will of others," and may threaten their "ability to seek asylum in the first instance.").

[12] The preliminary injunction rests on two independent findings that Plaintiffs are likely to succeed, one of which relates to the merits of Plaintiffs' APA claim. *See* Opinion at 45–58.

that in practice, the rule is not severable. *See id*. at 16 n.12, 20. And although Defendants concede that controlling precedent after the vacatur of the *CASA* panel opinion "permits a district court to issue a nationwide injunction," Opp'n at 16, they do not distinguish Plaintiffs' cases; nor do Defendants dispute or even address this Court's conclusion that "uniform preliminary relief seems especially warranted" in this case, Opinion at 64; *see* Mot. at 19. In short, Defendants have no response to the ample legal authority that supports expanding the scope of relief.

Similarly with respect to irreparable harm, Defendants do not challenge or dispute any of Plaintiffs' evidence demonstrating that Plaintiffs have and continue to directly suffer irreparable harm caused by the Broader EAD Rule. *See* Mot. at 8–10. Rather, Defendants deride ASAP's second declaration—identifying specific members affected by each provision of the rule—as based on "hearsay and speculation," but identify only two provisions of the Broader EAD Rule for which they claim irreparable harm is insufficiently supported—in one case because the ASAP member had not yet been convicted on pending criminal charges that would render him ineligible for a (c)(8) EAD under the Broader EAD Rule, ECF No. 107-7 ¶ 29, and in the other because the client, after experiencing delay in receiving work authorization as a result of the rule, was granted asylum, *id*. ¶ 32. *See* Opp'n at 25.

As an initial matter, the Fourth Circuit has held that hearsay is admissible in support of a preliminary injunction motion. *See G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016) (district court erred in excluding hearsay evidence on a preliminary injunction motion because "the nature of evidence as hearsay goes to weight, not preclusion" in that context (internal quotations omitted)), *vacated on other grounds*, ___ U.S. ___, 137 S. Ct. 1239 (2017). Moreover, Defendants' argument misses the point: Plaintiffs' evidence demonstrates that the Broader EAD Rule continues to irreparably harm ASAP itself (as distinct from its members):

because of each provision of the Broader EAD Rule, ASAP "must expend significantly more time and resources" to continue to provide EAD application assistance, forcing it to redirect resources away from other mission-driven programming. *See* ECF No. 107-7 ¶¶ 34–48.

Turning to the balance of the equities, Defendants fail to identify *any* harm to the government or the public interest if the Broader EAD Rule is enjoined in its entirety as to all asylum seekers: all of Defendants' arguments and evidence regarding the harms that would purportedly flow from an expanded injunction are specific to the Timeline Repeal Rule. *See* Opp'n at 20–24; 6/3/21 Nolan Decl. ¶¶ 9–17. Defendants claim that the factors weighing against an expanded preliminary injunction are (i) "the fact that DHS plans to engage in rulemaking related to the two rules at issue," Opp'n at 26—notwithstanding that Defendants have conceded that final rules will not be issued until June 2022, at the earliest, ECF No. 116 at 2; and (ii) "the parties have agreed upon a briefing schedule[]" for cross-summary judgment motions *on the Timeline Repeal Rule*, Opp'n at 26. DHS's plan to engage in new rulemaking related to the Broader EAD Rule, and specifically, its announcement that it may "rescind" that rule,[13] suggests that the government will suffer no harm if the rule is enjoined. Moreover, even if these claims rose to the level of cognizable "harms"—and they do not—any harms certainly would not outweigh the ample undisputed evidence of the continuing irreparable harms to Plaintiffs, their members, and their clients caused by the Broader EAD Rule. *See* Mot. at 8–10.

Finally, Defendants imply (but do not actually argue) that the fact that the Broader EAD

[13] *See* Department of Homeland Security / U.S. Citizenship & Immigration Services, Unified Agenda, *Rescission of "Asylum Application, Interview & Employment Authorization" Rule and Change to "Removal of 30 Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization"*, RIN 1615-AC66 (Spring 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1615-AC66.

Rule has been in effect for months converts the Court's prohibitory injunction into a mandatory one. *See* Opp'n at 26. This argument is squarely foreclosed by controlling precedent under which a preliminary injunction's tendency to preserve the status quo determines whether it is prohibitory or mandatory, with the status quo defined as "the last uncontested status between the parties which preceded the controversy."[14] *Pashby v. Delia*, 709 F.3d 307, 319–20 (4th Cir. 2013) (internal quotation marks omitted) (rejecting agency's argument that having challenged policy in place for months changed the status quo). Indeed, the fact that various provisions of the Broader EAD Rule have been in place for eight months and Defendants have not identified a single concrete harm that would result from enjoining the rule in its entirety weighs strongly in favor of granting Plaintiffs' motion.[15]

c. The Timeline Repeal Rule Should Be Enjoined as to All Asylum Seekers

Defendants make three arguments against modifying the preliminary injunction as to the Timeline Repeal Rule: that (i) Plaintiffs cannot demonstrate irreparable harm because the current injunction provides them with complete relief; (ii) USCIS cannot comply with its own prior regulation, in place since 1995, that requires processing of initial (c)(8) EAD applications in 30 days, and therefore an expansion of the injunction would not benefit Plaintiffs; and (iii) an expansion of the injunction would be contrary to the public interest because it would harm other benefits applicants. Opp'n at 17–24. Defendants are wrong on all counts.

[14] What is more, the Court issued its preliminary injunction after the challenged rules had gone into effect, relying on Defendants' representations that they would not argue "that somehow the ship has sailed because there's a new status quo." Tr. of Oral Argument at 102:25–103:1.

[15] Nor did Plaintiffs sit on their rights; they expeditiously sought modification of the preliminary injunction once this Court regained jurisdiction after the mandate issued on the dismissed cross-appeals. *See* Mot. at 4.

***(i) Irreparable Harm*:** With respect to their first argument, Defendants incorrectly assert that even if Plaintiffs have *Havens* standing, there is no reason to expand the scope of relief beyond CASA and ASAP members. Opp'n at 16. Because Plaintiffs have organizational standing, *see supra* Part I(a), there is no legal basis upon which to restrict relief to members of CASA and ASAP; what is more, the undisputed harms that Plaintiffs suffer are specific to their status as organizations and are not remedied by relief afforded to members alone. *See* Mot. at 6–10; *see, e.g.*, ECF No. 107-6 ¶¶ 5–12 (discussing the Asylum EAD Rules' "direct, negative impact on Oasis's programming," and noting that if the Timeline Repeal Rule and other provisions had not been enjoined, clients' ability to pay low bono fees would have been further reduced); ECF No. 107-5 ¶¶ 7–16 (Asylum EAD Rules "have forced [Pangea] to devote significantly more resources" to its EAD application assistance programming, diverting resources away from other legal representation and advocacy programs, which impacts Pangea's grant funding). Defendants' suggestion that Plaintiffs' clients can simply become CASA or ASAP members to avoid harm, *see* Opp'n at 16, likewise ignores the harms the Plaintiff organizations suffer, including that applying for membership for every client, or processing large swaths of new member applications, also diverts time and resources away from other programming.

Moreover, Defendants concede that their implementation of the Court's injunction has caused processing delays, *see supra* 11, but they reject as "moot" Plaintiffs' argument that modifying the injunction would address this problem. *See* Opp'n at 19. The argument is not moot, however, and Defendants' submissions do not demonstrate otherwise. Most notably, Defendants have not shown that they have resolved the processing delays resulting from implementation of the preliminary injunction. *See* 6/3/21 Nolan Decl. ¶¶ 19–20 (averring that technological improvements have "increase[d] efficiency" and describing additional "labor-

intensive" manual task required for "cases impacted by the PI" that is "in the process of" being transitioned to another USCIS component). Indeed, Defendants concede that implementing the limited scope preliminary injunction continues to require additional manual review that takes at least multiple business days to accomplish. *See* Opp'n at 19 n.9; ECF No. 108-5 ¶ 3 (DeStefano Decl., filed in Rosario *v. USCIS*, No. 15-0813-JLR (W.D. Wash.)) (noting that USCIS manually reviewed approximately 200–500 cases daily before Fall 2020, but as of April 2021 manually reviews approximately 1,500–2,000 cases daily, and suggesting that the manual review process adds three business days on average to processing). In short, Defendants do not dispute the evidence showing that the Timeline Repeal Rule causes processing delays that irreparably harm members and causes unique irreparable harms to Plaintiff organizations.

***(ii) Processing Delays*:** As to their second argument, Defendants claim that at their current capacity, they are unable to comply with their own regulation and process all incoming (c)(8) EAD applications within 30 days. *See* Opp'n at 20. But as described *supra* 11–12, the Nolan declaration demonstrates that USCIS officers now take three times as long to adjudicate each (c)(8) EAD application as they did before the Asylum EAD Rules went into effect.[16] This

[16] Specifically, Nolan attests that the TSC has "53 full time employees," each of whom has "140 adjudicative hours available per month," and "100% of their adjudicative time" is dedicated to the initial (c)(8) EAD application caseload. 6/3/21 Nolan Decl. ¶¶ 12, 16. She attests that USCIS has—for the last 24 months—received an average of 18,700 initial (c)(8) EAD applications per month. *Id.* ¶ 12. Before the Asylum EAD Rules went into effect, USCIS officers adjudicated 4-5 applications per hour, *see* AR 842–43, such that at TSC's current capacity, its officers could adjudicate approximately 33,390 initial (c)(8) EAD applications per month (53 full-time employees x 140 adjudicative hours per month x 4.5 applications per hour = 33,390 applications per month)—nearly double the number of applications it receives. But, because officers now take approximately three times as long to adjudicate each application (as a result of the unlawful Broader EAD Rule), Nolan attests that TSC's "capacity to adjudicate initial C8 EADs would be approximately 11,000 per month," (53 x 140 x 1.5 = 11,130)—which is well below the number it receives each month. *See* 6/3/21 Nolan Decl. ¶ 12.

fact alone appears to explain why the Texas Service Center (TSC) has been unable to process all initial (c)(8) EAD applications in 30 days—notwithstanding that it processed 97 percent of such applications within 30 days during the 18 months before the Asylum EAD Rules took effect. *See* Mot. at 5. That Defendants' implementation of the Broader EAD Rule compounds the delays resulting from the Timeline Repeal Rule demonstrates why both rules must be enjoined or vacated in their entirety as to all asylum seekers in order to meaningfully restore the status quo ante vis-à-vis the Timeline Repeal Rule.[17]

With respect to the existing backlog, Defendants imply that the current processing situation is unsustainable and that expanding the injunction would further divert resources from other product lines. Opp'n at 22–24. As an initial matter, Defendants' current diversion of resources—to bring DHS into compliance with the *Rosario* injunction—should conclude by next month by Defendants' own account. *See* ECF No. 108-4 at 1 (Defendants' opposition to Plaintiffs' contempt motion, filed in *Rosario*) (As of April 12, 2021, "USCIS is in the process of executing a plan addressing the current backlog within the next 90 days."). That backlog—according to Defendants—is "largely due" to the agency's implementation of this Court's preliminary injunction and the agency's implementation of the Broader EAD Rule.[18] *See* ECF No. 108-3, Nolan Decl. of March 10, 2021 (filed in *Rosario*) ¶¶ 6, 22.

Defendants suggest that a second backlog of non-member applications will overwhelm the

[17] The evidence of compounded delays further supports this Court's holding that USCIS erred in failing to consider the combined effect of the Asylum EAD Rules. *See* Opinion at 51–53.

[18] While Nolan avers that the "backlog" consists of cases that accumulated while the parties in this case developed an identification mechanism for CASA and ASAP members, *see* ECF No. 108-3, Nolan Decl. of March 10, 2021 (filed in *Rosario*) ¶ 22, Defendants rejected *en masse* at least 22,000 initial (c)(8) applications that accumulated before Defendants implemented their process for distinguishing members from nonmembers, *see* ECF No. 83.

agency if the injunction is expanded, *see* ECF No. 121-5, Nolan Decl. ¶¶ 11–12—but their own evidence shows that they overstate the possible impact. Specifically, Defendants argue that "it would take TSC approximately 5 months" to adjudicate all of the nonmember initial (c)(8) EAD applications currently pending, relying on Nolan's calculation that TSC's adjudicatory capacity is 11,000 applications per month. *See id.* ¶ 12; *supra* n.16. But if this Court vacates or enjoins all provisions of the Broader EAD Rule, TSC's adjudicatory capacity should substantially increase—to more than 33,000 applications per month. *See supra* n.16. Moreover, Defendants' recent efforts to work down the member EAD backlog demonstrate that the agency can and does temporarily divert adjudicatory resources from other service centers to work down backlogs.[19] *See id*. ¶¶ 14, 17 (describing how the Nebraska Service Center is adjudicating initial (c)(8) EAD applications "in the short term" to improve compliance with the *Rosario* injunction).

***(iii) Other Benefits Applicants*:** Defendants aver that working down the member backlog has forced them to redirect resources from other work streams to (c)(8) EAD applications, *see* Nolan Decl. ¶ 16, but USCIS itself chose to prioritize asylum seekers' initial work authorization applications, *see* 62 Fed. Reg. 10,312, 1997 WL 93131 (Mar. 6, 1997) (noting a "chief purpose[]" of (c)(8) EAD regulatory reforms was "to ensure that bona fide asylum seekers are eligible to obtain employment authorization as quickly as possible"). And, while Defendants claim that an expansion of the injunction would *further* divert TSC resources, their argument is nonsensical where 100 percent of TSC's resources are already devoted to (c)(8) EAD applications. *See* Nolan Decl. ¶ 16. Finally, to the extent complying with the 30-day processing rule for all asylum

[19] While Defendants allude to the agency's "current involve[ment]" in three cases related to delays in other immigration-related applications, *see* 6/3/21 Nolan Decl. ¶ 15, none involves court orders requiring Defendants to take actions with respect to delays, and in two of the cases, the next procedural step is for Defendants to answer the complaints later this summer.

seekers would require "more resources than [the agency] would like," the Court has already considered and rejected this argument as unpersuasive where the agency "functioned with [the 30-day processing] deadline since 1995." Opinion at 61–62.

In sum, the undisputed irreparable harms to Plaintiffs can only be addressed by modifying the preliminary injunction, and with the *CASA* limitation on nationwide injunctions vacated, the balance of equities tips markedly in favor of granting Plaintiffs' motion to modify the preliminary injunction as to the Timeline Repeal Rule.

III. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court grant summary judgment on their HSA claim and vacate the Broader EAD Rule in its entirety as to all asylum seekers, or in the alternative, grant modification of the preliminary injunction to enjoin the Broader EAD Rule in its entirety as to all asylum seekers. In addition, Plaintiffs request that the Court grant their motion to modify the preliminary injunction as to the Timeline Repeal Rule to expand the scope of relief to all asylum seekers.[20]

[20] By Order dated May 11, 2021, this Court granted Plaintiffs' request to modify their pending motions, ECF No. 107, such that Plaintiffs' motion to modify the preliminary injunction is no longer in the alternative and applies to both challenged rules, and Plaintiffs' motion for summary judgment on their Homeland Security Act claim is limited to the Broader EAD Rule. *See* ECF No. 118.

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Respectfully submitted,

/s/
Linda Evarts (*pro hac vice*)
Geroline A. Castillo (*pro hac vice*)
Kathryn Austin (*pro hac vice*)
Mariko Hirose (*pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
One Battery Park Plaza, 4th Floor
New York, New York 10004
Tel: (516) 838-1655
Fax: (929) 999-8115
levarts@refugeerights.org
gcastillo@refugeerights.org
kaustin@refugeerights.org
mhirose@refugeerights.org

/s/
Justin B. Cox (Bar No. 17550)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
PO Box 170208
Atlanta, GA 30317
Tel: (516) 701-4233
Fax: (929) 999-8115
jcox@refugeerights.org

Counsel for Plaintiffs

/s/
Zachary Manfredi (*pro hac vice*)
ASYLUM SEEKER ADVOCACY PROJECT
228 Park Avenue S. #84810
New York, NY 10003-1502
Tel: (305) 484-9260
Fax: (646) 968-0279
zachary.manfredi@asylumadvocacy.org

Richard W. Mark (*pro hac vice*)
Joseph Evall (*pro hac vice*)
Katherine Marquart (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
Fax: (212) 351-4035
RMark@gibsondunn.com
JEvall@gibsondunn.com
KMarquart@gibsondunn.com