IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*, Plaintiffs, v. ALEJANDRO N. MAYORKAS, *et al.* Defendants.	No. 22-cv-10808-ADB Leave to File Granted On: October 30, 2023.

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF
THEIR MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 101)

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Introduction

Plaintiffs showed a likelihood of success on the merits of their claim that U.S. Citizenship and Immigration Services' adoption of a new policy for Afghan humanitarian parole ("HP") cases in November 2021 was "not in accordance with law" and "arbitrary and capricious," in violation of the Administrative Procedure Act. In their Opposition, Defendants do not contend that USCIS engaged in the contemporaneous reasoned decision-making the APA requires (Count I) and do not respond at all to Plaintiffs' "not in accordance with law" argument (Count II). Instead, they focus on reconstructing a narrative, after the fact, about the November 2021 Policy. But that effort is unsupported by the record and untethered to any contemporaneous reasoning that could overcome Plaintiffs' arbitrary-and-capriciousness claim. With their lives and wellbeing in the balance, the moving Plaintiffs have shown that they are entitled to preliminary injunctive relief requiring their cases to be determined under pre-November 2021 standards.

I. The Court May Determine Whether The Agency Action At Issue In This Case—USCIS's November 2021 Policy Change For Afghan HP—Violates The APA

This Court previously affirmed its jurisdiction to decide Plaintiffs' APA challenge to the change in policy for Afghan HP, and determined that the APA's arbitrary and capricious standard applies. ECF No. 73 at 17, 19. Defendants provide no basis to disturb this ruling, and do not dispute that the November 2021 Policy is a final agency action otherwise subject to the APA.

II. The November 2021 Policy Was Arbitrary And Capricious (Count I)

Plaintiffs showed a likelihood of success on the merits of their claim that USCIS did not meet the APA's reasoned decision-making requirements in adopting its November 2021 Afghan HP policy, making it arbitrary and capricious. In response to Plaintiffs' arguments about the *absence* of reasoning to support the policy change, the Defendants focus on attempting to rewrite the narrative—presenting the policy as a change that benefitted rather than harmed Afghans. This

post hoc recharacterization is unsupported by the record and, in any event, cannot overcome USCIS's failure to provide the contemporaneous reasoned decision-making that the APA requires.

A. Defendants Do Not Argue That USCIS Engaged In Reasoned Decision-Making

The Opposition confirms the absence of any contemporaneous reasoning and consideration that could be adequate to support the November 2021 Policy. The available record materials show that—after a period in which USCIS approved 95% of Afghan HP cases—the agency adopted a policy barring HP approvals for those still in Afghanistan, with two elements. First, USCIS instructed adjudicators that, in the absence of certain factors, such parole applications "generally will be denied." Second, even if an applicant was "eligible for parole," an adjudicator was constrained to either deny or administratively close the case, but could not grant it. *See* ECF No. 102 at 6-9 (quoting USCIS-33). Under the Policy, approvals of Afghan HP cases overall fell to less than 1% of adjudications, *id.* at 9, statistics Defendants do not dispute.

Plaintiffs demonstrated—based on the available record—that the Policy was arbitrary and capricious in at least three ways.[1] First, USCIS failed to satisfy the basic requirement to display awareness that it was adopting a new policy and show good reasons for the new policy. Second, USCIS adopted the Policy without consideration of the relevant factors because it did not consider any alternatives before it removed the authority of adjudicators to grant in-country Afghan cases. Third, USCIS failed to comply with its obligation to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns. The available record reveals none of those steps. ECF No. 102 at 17-21.

[1] Plaintiffs reserve the right to raise other arbitrary-and-capriciousness arguments on a full record at summary judgment.

If Plaintiffs were wrong about the *absence* of reasoning to support the Policy—or about whether the agency had adequately considered alternatives, or reliance interests—Defendants could have pointed to contemporaneous records of the agency's reasoning. They did not. Nor do they argue that USCIS actually did any of those things.

Defendants' one argument regarding arbitrary-and-capriciousness appears to be that it "*would not have been* arbitrary and capricious" for Defendants to decide to bar grants of Afghan HP cases as a way to conserve resources that would be wasted approving cases for noncitizens who—as Defendants now claim—"rarely complete consular processing." ECF No. 117 at 20-21. But "an agency's action must be upheld, if at all, on the basis articulated by the agency itself" at the time of its decision. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Defendants point to no indication in the record that USCIS was motivated to conserve resources in this manner when it adopted the November policy.[2]

B. Defendants' Post Hoc Recharacterization Of The November 2021 Policy Is Unsupported By The Record And Does Not Reflect Any Contemporaneous, Reasoned Decision-Making

Defendants' primary response to the arbitrary-and-capricious showing appears to be that the November 2021 Policy purportedly helped rather than hurt Afghans. They contend:

> (1) In August 2021 USCIS approved dozens of people for parole who were otherwise unqualified to receive it, in order to attempt to help them get airlifted out of Afghanistan.

[2] Moreover, Defendants' factual assertion that in-country Afghan beneficiaries "rarely complete consular processing" is contrary to the record before the agency in November 2021. At that time USCIS knew, from its experience with the approximately 80 people whose cases had been approved in August and early September 2021, that many (at least 19) got to third countries. *See* ECF No. 102 at 20; *see also* USCIS-22 (some had been airlifted). Defendants' contrary assertion is based on a March 2022 report that people whose cases were *administrative closed after* the November 2021 Policy did not complete processing. ECF No. 117 at 21 (citing USCIS-604-05). But knowledge of these *consequences* of the November 2021 policy was necessarily unavailable to the agency in or before November 2021. And the fact that individuals with administratively closed cases did not risk travel to a third country only shows the ill-advised nature of the November 2021 Policy; it does not suggest that individuals *approved* for HP would not attempt to travel.

> (2) After the airlift, USCIS returned to the standards in effect before the airlift, under which HP grants in protection-based cases are limited. The new policy differed from pre-existing HP standards only in ways favorable to Afghans.

See ECF No. 117 at 5-10, 16-20. But Defendants' new gloss on the events of 2021 distorts the factual record—and has little to do with the question of whether the agency engaged in reasoned decision-making when adopting new rules for Afghan HP. Plaintiffs have shown that they did not.

August 2021 approvals: Defendants contend that the high approval rate in August 2021 reflected not the merits of Afghans' cases under pre-existing HP standards, but a deviation from that standard in order to aid in the airlift. *See, e.g.*, ECF No. 117 at 18. For starters, although August 2021 is a significant focus of the Opposition, Plaintiffs do not challenge USCIS conduct in August 2021. *Cf. id.* at 17. They challenge the policy adopted in November 2021. The short time period from August to early September 2021 has some relevance because it is the only time that USCIS adjudicators applied pre-existing generally-applicable HP policies to the specific context of Afghans seeking safety from the Taliban. Thus, when Plaintiffs ask for their applications to be adjudicated under the standards in effect on August 31, 2021, they are asking for case-by-case adjudication and application of lawful guidance in effect at that time, before the challenged November 2021 Policy.

As to Defendants' fact assertions, the record does not support the contention that the difference between the 95% grant rate in August and the 1% grant rate after November is solely (or even partially) attributable to airlift, and not to any prejudicial change in standards in November 2021. Adjudicators in August were instructed to *expedite* Afghan HP cases. USCIS-947. But there is no record showing adjudicators being instructed to depart from pre-existing standards, and no

indication that adjudicators received any Afghan-specific guidance.[3] In fact, approvals continued *after* the airlift concluded. In light of the evacuation's end, adjudicators were instructed to stop automatically expediting Afghan cases. USCIS-740. But the threat to those left behind had not changed, nor the fact that refugee processing would be inadequate to address it. *See* USCIS-631 (noting ongoing lack of access to refugee admissions via "USRAP"). Thus, the record produced to date shows that, even after the airlift, adjudicators continued adjudicating—and approving—Afghan HP cases until instructed to stop a few days later. *See* ECF No. 106 at ¶ 10 & Ex. 1 (September 3, 2021 approvals); USCIS-713 (referring to an approval on September 7, 2021).

The November 2021 Policy: Defendants next contend that, in November 2021, USCIS returned to previous standards, except for two changes purportedly helpful to Afghans. ECF No. 117 at 7-10, 16. But the record does not support Defendants' characterization of these changes.

First, Defendants contend that the no approvals policy for in-country Afghan cases merely continued prior policy of denying HP to applicants in countries without U.S. consulates, and that the policy of allowing for administrative closure of in-country cases was therefore "generous" to Afghans. But Defendants do not deny that the November 2021 Policy was unprecedented in *barring* approvals for those in Afghanistan. Prior to November 2021, being in a country without a consulate was a negative *discretionary* factor, but it could be overcome, including when an individual "could get to another location." USCIS-571. In fact, it *was* overcome in at least one case

[3] The record reflects that certain *procedural* and vetting requirements were eased. USCIS-718. It also reflects that, after the fact, two leaders at USCIS disagreed about whether certain *substantive* standards for HP had been eased, or whether those standards were satisfied in light of the situation of Afghan applicants. *Id.*; *see also* ECF No. 102 at 4 n.3. But as relevant to the legal issue here, the record does not reflect that USCIS ultimately made any judgment about whether standards had been eased in August 2021, or considered that judgment in adopting the November 2021 Policy.

in the days after the airlift. *See* ECF No. 106 at ¶¶ 5, 7, 10 & Ex. 1.[4] It is undisputed that after November 2021, *no* Afghans in Afghanistan could be granted HP, no matter how likely it was that they would be able to leave the country if HP were granted. In light of that unprecedented categorical bar, administrative closure was *not* a generous benefit.

Moreover, as relevant to Plaintiffs' arbitrary-and-capriciousness claim, Defendants point to nothing in the record that suggests that any November 2021 changes were designed to benefit Afghan applicants, and offer only their post hoc interpretation. Moreover, as Plaintiffs have argued, nothing in the record reflects that, prior to adopting the categorical bar in November, USCIS considered or acknowledged how such a bar would deviate from prior policy, whether Afghans would be able to reach a third country for processing, or any alternatives.

Second, Defendants contend the instruction that pending Afghan cases should "generally be denied" after November 2021 simply echoed pre-existing general instructions to use parole "sparingly" and grant protection-related HP "only in limited circumstances." ECF No. 117 at 9 (quoting USCIS-54, 347, 400). Thus, Defendants argue the Policy differed from that baseline only in adding a list of "strong positive factors" unique to Afghans. ECF No. 117 at 7-8.

Yet the policies are not equivalent, logically or factually. The pre-existing standard allowed USCIS adjudicators to conclude—as they had in August and early September 2021—that the indisputably life-and-death situation faced by Afghan applicants *was* the kind of limited circumstance in which HP approvals were warranted. But the new policy pre-determined that question, instructing that approvals should be vanishingly rare not as a general global matter, but

[4] USCIS records also contain other examples of approvals of parole for individuals in countries without consulates. *See* ECF No. 107 at ¶ 28 & Ex. 2 at 10-11. And USCIS has demonstrated it is capable of waiving any consular processing requirement altogether, as it did for Ukrainian beneficiaries of a special parole program. *See* ECF No. 107 at ¶¶ 22-24.

specifically as to Afghans fleeing the Taliban. This was a dramatic change, and was not meaningfully offset by the inclusion of positive factors. Defendants have made much of the fact that such positive factors "had no precedent in any pre-existing generally-applicable guidance document," ECF No. 94 at 6, and that "Afghans alone," and no other HP applicants, could benefit from these "generous" factors. ECF No. 117 at 7. That argument is paradoxical. Only Afghan cases, and no others in the world, would be forced to start out from a presumption that their specific circumstance was *not* among the limited circumstances in which HP is warranted.

If more were needed to undermine the notion of the generosity of the November 2021 policy for Afghans, it is in the outcomes. No matter what benchmark one uses—the 95% grant rate for Afghans in August 2021 or the 13% grant rate for all protection-based cases in the years prior, or the 36% grant rate for HP overall in years prior, *see* USCIS-620 at 621—the November 2021 was disastrous for Afghan applicants. The policy change ushered in 7,294 denials over an eight month period that saw just 79 approvals—an approval rate of just 1%. *See* ECF No. 107 at 8.

Plaintiffs, of course, do not contend that USCIS is obligated to grant parole at a particular rate. USCIS can set policy—and change policy—with regard to HP. But the APA requires the agency to acknowledge the changes it is making, and provide reasoned decision-making that considers reliance and reasonable alternatives to the changes being contemplated. Because Defendants do not even contend that USCIS contemporaneously complied with that mandate, Plaintiffs are likely to succeed on the merits of their arbitrary-and-capriciousness claim.

III. Defendants Do Not Dispute, Or Even Respond, To Plaintiffs' Argument That The November 2021 Policy Was "Not In Accordance With Law" (Count II)

Defendants do not respond to Plaintiffs' argument that, in categorically barring approvals of all in-country Afghan cases, the November 2021 policy violated the case-by-case decision making requirements of 8 U.S.C. § 1182(d)(5) and USCIS's Policy Manual. *See* ECF No. 102 at

15-16. Instead, Defendants simply imply that the Court dismissed Count II of the complaint. ECF No. 117 at 12. That is incorrect. ECF No. 73 at 26-28, 36. Defendants do cite to the fact that the absence of a U.S. consulate where a parole beneficiary is located was previously a discretionary factor counseling against an HP grant, ECF No. 117 at 4-5, unless an applicant "could get to another location." USCIS-571. Defendants do not dispute, though, that in November 2021 USCIS removed adjudicators' authority to grant HP to those in Afghanistan, leaving them to choose between denying or administratively closing cases. *See* ECF No. 102 at 7-8; USCIS-33, 39. Defendants make no argument that this categorical bar complies with law, and Plaintiffs are thus likely to succeed on the merits of their claim.

IV. The Other Preliminary Injunction Factors Counsel Relief

The remaining preliminary injunction factors all favor relief. Defendants "fully acknowledge the humanitarian crisis" and "the deterioration of country conditions" that Plaintiffs face and do not contest the urgent nature of the moving Plaintiffs' situations. *See* ECF No. 117 at 22; *see also* ECF Nos. 103, 104. But they contend that the irreparable harm Plaintiffs face is irrelevant because the risk of harm is posed by "non-U.S. Government entities" and a preliminary injunction would not "guarantee" Plaintiffs' safety. ECF No. 117 at 22-23. Defendants cite no case, and Plaintiffs are aware of none, supporting the novel argument that a party seeking injunctive relief must be at risk of irreparable harm inflicted directly *by* the defendant, or that alleviation of that risk must be "guaranteed" through issuance of preliminary relief. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (movants must only show they are "likely to suffer irreparable harm in the absence of preliminary relief").

Plaintiffs do recognize that they brought this motion for preliminary relief well into litigation. ECF No. 117 at 23-24. But that does not undermine Plaintiffs' claims of irreparable harm, the factual premise of which are uncontested. The record in this case makes clear that

Plaintiffs have repeatedly attempted to move this case to a resolution on a full record. *See, e.g.*, ECF Nos. 25, 48, 90. Simply put, their situations do not allow them to keep waiting. *See* ECF Nos. 103, 104, 109.

With regard to the government's interest, Defendants' incorrectly assert that Plaintiffs have asked the Court to "seize control over parole authority." ECF No. 117 at 25. But Plaintiffs seek relief for two individual families only. ECF No. 101. That relief would have little, if any, impact on USCIS, but it would give imperiled Plaintiffs the opportunity that they deserve to have their applications considered under the appropriate standards. Even if Plaintiffs sought a "mandatory" injunction—though they do not[5]—the circumstances here amply warrant such relief.

V. Defendants' Citation To Adjudicators' Analysis Helps Illustrate Why A Complete Record Is Important, Even As Plaintiffs Pursue Preliminary Relief

Defendants claim support for their contention that case-by-case consideration of applications is occurring under the November 2021 policy by pointing out that, in the case of two of the Plaintiffs, USCIS denied parole despite a finding of "significant public benefit." ECF No. 117 at 19 (citing records for Badi and Bahar Boe). But in producing these administrative records, Defendants withheld the explanations for the individual denials in each Plaintiff's case, thus preventing Plaintiffs (and this Court) from assessing claims just like the one Defendants now make. *See* ECF No. 91 at 5-10. This only helps to illustrate why Plaintiffs must both continue to seek to

[5] *See Crowley v. Local No. 82*, 679 F.2d 978 (1st Cir. 1982), rev'd on other grounds 467 U.S. 526 (1984). The plaintiffs in *Crowley* alleged that the defendants had rigged a union election. The preliminary injunction set aside the election and established procedures for a new one. *Id.* at 983. The First Circuit affirmed, holding that the "status quo requirement" was "not really applicable," *id.* at 997, because the status quo was not the situation created by the rigged election, but "the Local filled with its elective positions as they were before" the tainted election took place. *Id.* at 995. The same is true here. The status quo is not the situation created by the agency's illegal actions under the November 2021 Policy, but historical agency policy and practice.

ensure that this case can be decided on a full record, and seek preliminary relief to address their dire situations.

Conclusion

Plaintiffs are entitled to the preliminary injunctive relief requested in their Motion.

Dated: October 30, 2023

Respectfully submitted,

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