IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

Case No. 1:22-cv-10808-ADB

HON. J. ALLISON D. BURROUGHS

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' SECOND MOTION TO COMPEL EXPEDITED PRODUCTION OF THE ADMINISTRATIVE RECORD

Dated: November 18, 2022

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INTRODUCTION

On May 25, 2022, Plaintiffs filed their redacted Complaint, alleging that Plaintiffs—a group of Afghan nationals and their U.S.-based family members and friends—had suffered unreasonable delay in the adjudication of their parole applications (Form I-131, Application for Travel Document), or had their humanitarian parole applications denied, despite Plaintiffs' belief that parole should have been granted. Despite Plaintiffs' express acknowledgement that the chances of humanitarian parole were statistically low (Compl. ¶ 39), Plaintiffs nonetheless concluded that only surreptitious new policies—based on their information and belief—could have resulted in the denial of their discretionary humanitarian parole applications. *See* Compl. ¶ 192. Alternatively, the Complaint could be read to allege that the evacuation from Afghanistan and U.S. Customs & Border Protections' (CBP) parole of 70,000 Afghans mid-evacuation somehow created a new binding "policy" across components at U.S. Citizenship & Immigration Services (USCIS), and so notice-and-comment was required to end the evacuation. *Id.* ¶¶ 28, 36, 48, 54.

Either way, on November 4, 2022 (ECF #48), Plaintiffs filed a second motion requesting expedited record production, which was largely cut-and-copied from the first one filed June 2, 2022. ECF #26. The second motion asks the Court to pre-emptively order that all records be filed within two weeks after the motion to dismiss is decided, and to require that Defendants report now on the agencies' record collection, compilation, review, and certification processes, all to ameliorate Plaintiffs' counsels' threadbare "concerns" about records and/or extra-record discovery that they have yet to see or show entitlement to. ECF #48 at 1, 9.

As already fully briefed (ECF #41), there are serious jurisdictional and pleading-sufficiency defects in this case. Plaintiffs, who allege claims under the Administrative Procedure Act ("APA") alone, are not legally entitled to administrative records under the APA until they have shown that: (1) the Court has Article III jurisdiction, and (2) that they have a right to

administrative review under the APA. These issues reasonably require the Court's resolution before the agencies are required to engage in arduous privilege review, certification, and production of agency records. What's more, this tracks the rule in every federal case: that merely filing a complaint does not open the doors to discovery. Plaintiffs would have it otherwise, however, and their second motion to expedite seeks reconsideration of the Court's rejection of their first motion to expedite, a ruling which was as sound then as it is now. Plaintiffs' request for meta-record reporting is not only entirely meritless, but their demands for documents relating to the agency's uses of the discretionary parole authority under § 1182(d)(5)(A) over the last year completely betray that their purported "policy" claims are untethered to any discrete action. Plaintiffs' second motion should thus be denied.

PROCEDURAL BACKGROUND

On May 25, 2022, Plaintiffs filed their redacted, pseudonymous Complaint (ECF 1). Soon thereafter, Plaintiffs filed their First Motion to Compel Expedited Production of the Administrative Record, requesting an order that record production for the then-unknown persons be completed by June 24, 2022. ECF # 26 at 5. At Plaintiffs' request, the Court set a hearing for June 9, 2022.

In the June 9 hearing, Defendants explained that Plaintiffs would not disclose their identities to Defendants even after assurances that Defendants would comply with the *ex parte* pseudonym order, and yet still moved to compel expedited production of the administrative record anyway. June 9 Tr. 5:17-6:11. Defendants also noted their intention to move to dismiss the case, and "respectively suggest[ed] to the Court it may be more efficient to consider that motion to dismiss before we do further briefing on the expedited administrative record issue if administrative records are not needed or never produced in this case." *Id.* at 9:14-20. The Court agreed. *Id.* at 9:21 ("THE COURT: That's fine."). The Court further explained that—in any event—there was a "zero percent chance" that the Court would "order the government to turn over all their

administrative policies and the like without them knowing who the plaintiffs are…. It's just not fair. For all I know, these people in the normal course would be approved or disapproved tomorrow." *Id.* at 9:21-10:6; 11:8-16 ("I'm not going to make them go on a fishing expedition to try to figure out who your clients are."). Plaintiffs' counsel then implored the Court to reconsider its denial of Plaintiffs' first motion to compel expedited production if Plaintiffs finally ceased withholding their true identities to Defendants. *Id.* at 10:18-21. The Court declined (*id*. at 10:22-11:3), and suspended briefing on Plaintiffs' first motion to expedite. *Id.* at 12:10-14 ("Is the Court suspending further briefing on the motion to expedite the administrative record pending that conference? THE COURT: Yes."). After the June 9 hearing, Plaintiffs disclosed their identities.

In a follow-up hearing on July 7, 2022, Defendants reported that it had made progress on identifying and collecting the A-files following Plaintiffs' June 9 identifications. July 7 Tr. at 4:25-5:9. Still, however, Defendants maintained that the Court should address the threshold jurisdictional and APA applicability issues "first before the agency has to go through the full extent of the time-consuming process to fully collect and produce any administrative records." *Id*. at 4:25-5:21. Defendants explained that, for example, the same staff involved in adjudicating humanitarian parole applications would be diverted towards collecting, redacting, and certifying A-files, and this diversion would be unnecessary if the Court agreed with Defendants on the threshold issues. *Id.* at 6:16-7:3. Aside from the A-files, Defendants further explained that the "amorphous nature of the claim" that the end of the U.S. evacuation from Afghanistan or its downstream effects were reviewable "policies" created serious questions about what the administrative record would be, and then how to collect it. *Id.* at 8:2-14. The Court agreed. *Id.* at 8:15. The Court advised Plaintiffs that they would likely be entitled to the A-files if the case moves forward; but even without the motion to dismiss, it was "less clear" that Plaintiffs would be entitled to fish for documents outside

of the A-files. *Id.* at 9:20-22. The Court cautioned that Defendants would be "short string in terms of production" of the A-files if the motion to dismiss were denied. *Id.* at 7:18-8:1.

On July 11, 2022—just over a month after receiving Plaintiffs' identities and the unredacted complaint, and half the time permitted by Fed. R. Civ. P. 12(a)(3)—Defendants filed a dispositive motion to dismiss in accordance with Plaintiffs' desired expedited briefing schedule. ECF #41. On August 2, 2022, the Court held a hearing and took the motion under submission. ECF #46. In the hearing, Defendants again reiterated that Plaintiffs are not entitled to an administrative record without proving jurisdiction or without showing the APA's applicability. Aug. 2 Tr. 33:6-15 ("we don't get to record review under 706 unless or until the Court determines that both 701(a)(1) and (a)(2) are inapplicable.… plaintiffs are not entitled to an administrative record where they have not shown that the APA applies in this case. THE COURT: Okay. I think I understand."). Still, Defendants acknowledged the Court's view that the agencies would be on a shortened production timeline for the A-Files if the Court denies the motion to dismiss. *Id.* at 33:16-34:1. The Court did not order Defendants to produce, nor did the Court invite briefing on Plaintiffs' first motion to expedite production. *See id.*

Despite Defendants' repeated acknowledgments of the Court's expectations should the motion to dismiss be denied (*id.*; ECF #49-1 at 3-4), Plaintiffs have repeatedly tried to intervene in the agencies' compilation, review, and certification processes. *Id.* at 4-5. Paired with their broad document requests, Plaintiffs threatened to run to the Court with premature "questions about the completeness of the administrative record that the government is compiling" if those demands went unheeded (*id.*), notwithstanding the Court's on-record doubts that it was "less clear" (July 7 Tr. 9:20-22) that Plaintiffs would be entitled to anything beyond their own A-files if the case survives. Undeterred, Plaintiffs issued unconstrained document demands relating to the

administration of the entire parole program, including other applicants' adjudications, and declared that their expedition "goes beyond documents related to each individual Plaintiff's humanitarian parole application" and Defendants' production "must include, for example, pertaining to, at least," the "standard[s] applied to such applications and others similarly situated, including materials reflecting the consideration or adoption of policies regarding USCIS's treatment of humanitarian parole applications filed by Afghan nationals since August of 2021; the agency's decisions with regard to the policies for issuing Requests for Evidence, Notices of Intent to Deny, and Denials; and the timing of adjudications of Afghan humanitarian parole applications, including the decisions to stop adjudicating the applications and to deprioritize cases." ECF #49-1 at 3-4.

In response, Defendants reminded Plaintiffs that they had yet to demonstrate entitlement to record review, and that even if so, an agency decisionmaker is the only individual in the position to determine what they did or did not consider during the course of a decision. *See id*. As such, Defendants explained that meeting-and-conferring on Plaintiffs' broad requests for documents provided no benefit to either party or the Court, as "meeting and conferring about plaintiffs' potential grounds for dissatisfaction with yet-to-be-produced record(s) is premature." *Id.* at 2. Still, as Defendants explained, "[i]f the Court determines that an administrative record(s) is necessary, we'll be happy to engage with you then on a rolling production schedule, means of sending you the record(s), etcetera. Until that time, any such discussion would be conjectural and accomplish little." *Id.* Still unsatisfied, Plaintiffs now petition for the Court to interfere in and require reporting on collection methods, privilege review, and the certification process—in other words, meta-record discovery—which is outside the scope of any decisional record itself.

Finally, it is notable that Plaintiffs' emails and two premature motions do not focus on any discrete decision or applicant, but instead demand an abundance of documents about USCIS's

usage of its humanitarian parole discretion over the last year. And what's more, the Court is currently considering if it even has jurisdiction, and whether the APA permits such broad programmatic challenges, given 5 U.S.C. §§ 701(a), 702, 704, 706(1), 8 U.S.C. §§ 1182(d)(5)(A), 1252(a)(2)(B). *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)."). Plaintiffs' motions and emails betray that they are not out to support claims they have, but are asking for license to fish for claims they do not.

FACTUAL DEVELOPMENTS

Since Defendants' motion to dismiss was filed, factual developments have come to light that validate the Court's procedural posture here. While the Court encouraged production of the A-files concurrent with the consideration of the motion to dismiss (July 7 Tr. 9:20-23), the Court also acknowledged the likelihood that USCIS processing was ongoing in the normal course as a factor against expedited production. June 9 Tr. 10:1-6. As such, these updates are relevant to the Court's consideration of whether USCIS should divert resources away from adjudicating humanitarian parole applications to reviewing potentially unnecessary records for both privilege and completeness to mollify Plaintiffs' counsel, whose claims are being considered for dismissal.

On July 8, 2022, the Roes' Form I-131s were conditionally approved and notifications of this decision were sent to the Roes on July 18, 2022. Declaration of John W. Bird (Nov. 17, 2022), Chief of the Humanitarian Affairs Branch (HAB) of the Refugee, Asylum and International Operations Directorate (RAIO) of USCIS ("Bird Decl.") at ¶ 5. The conditional approval followed the Roes' responses to the Requests for Evidence ("RFEs") sent on May 10, 2022. Compl. ¶ 101. Following the verification of their identities and collection of biometrics for additional security vetting at a consular post, the Roes were issued boarding foils on November 2, 2022. Bird Decl. ¶ 5. The Roes appear to lack a continued stake in this case.

On May 27, 2022, the Form I-131s filed by Basel Boe on behalf of Badi Boe, Bahar Boe, Barakat Boe, and Baharak Boe on September 9, 2021 were denied by USCIS. Bird Decl. ¶ 7. On June 27, 2022, the Basel Boes filed Form I-290Bs (Notices of Appeal or Motion) with USCIS seeking reconsideration of the May 27, 2022 denials of their humanitarian parole applications. *Id*. On August 18, 2022, the Basel Boes submitted additional evidence in support of their motions for reconsideration. *Id.* As of filing, their motions remain pending with USCIS. *Id*. As of May 27, 2022, the Basel Boes' claims of unreasonably delayed USCIS action on their Form I-131s became moot when USCIS issued a decision. *See* Compl. ¶ 155.

On July 7, 2022, the Form I-131s filed by Baddar Boe on behalf of Baktash Boe, Benesh Boe, Basim Boe, Basir Boe, and Burhan Boe on September 21, 2021 were denied by USCIS. Bird Decl. ¶ 8. On August 9, 2022, the Baddar Boes filed Form I-290Bs motioning for reconsideration and reopening of their humanitarian parole denials. *Id*. These motions remain pending with USCIS. *Id*. As of July 7, 2022, the Baddar Boes' claims of unreasonably delayed USCIS action on their Form I-131s became moot when USCIS issued decisions. *See* Compl. ¶ 155.

The Moe group is the only family group where a decision on their parole applications are still pending. Bird Decl. ¶ 9. On November 10, 2022, USCIS issued an RFE to Malik Moe for each beneficiary (Marwa, Malia, and Medina) to request additional evidence needed to complete the adjudications. *Id*. Malik Moe's RFE responses are due by February 8, 2023. *Id.*

LEGAL STANDARD

I. Motion for Reconsideration

"While the Federal Rules do not provide for a motion to reconsider, a district court has the inherent power to reconsider its interlocutory orders. . . ." *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 61 n.2 (1st Cir. 2008) (internal marks omitted). However, "[m]otions for reconsideration are not to be used as 'a vehicle for a party to undo its own procedural failures [or] allow a party to

advance arguments that could and should have been presented to the district court prior to judgment.'" *United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009) (quoting *Iverson v. City of Boston*, 452 F.3d 94, 104 (1st Cir. 2006)). "Instead, motions for reconsideration are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust." *Id.* (citing *Marie v. Allied Home Mortg. Corp*., 402 F.3d 1, 7 n. 2 (1st Cir. 2005)). Granting reconsideration is "an extraordinary remedy which should only be used sparingly." *Palmer v. Champion Mortg*., 465 F.3d 24, 30 (1st Cir. 2006). "A motion for reconsideration should be granted only if the court has patently misunderstood a party or there is a significant change in the law or facts since the submission of the issues to the court by the parties." *O'Donnell v. Robert Half Int'l, Inc*., 534 F. Supp. 2d 173, 178 (D. Mass. 2008).

II. Motion for Expedited Record Production/Discovery

Generally, courts have "broad discretion… to manage scheduling" according to the needs of a case. *Williams v. Monarch Mach. Tool Co.*, 26 F.3d 228, 230 (1st Cir. 1994). Those needs vary between cases, and change depending on the procedural posture. "Resolution of a motion to dismiss generally does not require discovery[.]" *Cortés-Ramos v. Martin-Morales*, 956 F.3d 36, 45 (1st Cir. 2020). It is blackletter law that merely filing a complaint does not automatically open the doors to discovery. Indeed, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should… be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting 5 Wright & Miller § 1216, at 233-234).

Bearing in mind the Supreme Court's admonitions, courts facing motions to expedite administrative record production should look to whether plaintiffs have "demonstrate[d] an urgent

and compelling need" for it, and whether the circumstances provide a good cause "to deviate from the normal course[.]" *Momenta Pharm., Inc. v. Teva Pharm. Indus.*, 765 F. Supp. 2d 87, 90 (D. Mass. 2011). "Good cause exists" if the request is "'reasonable[]... in light of all of the surrounding circumstances,' including 'the purpose for the discovery, the ability of the discovery to preclude demonstrated irreparable harm, the plaintiff's likelihood of success on the merits, the burden of discovery on the defendant, and the degree of prematurity.'" *Jimenez v. Nielsen*, 326 F.R.D. 357, 361 (D. Mass. 2018). Courts "ordinarily defer discovery while a motion to dismiss is pending." *Id.* This practice is supported by Supreme Court precedent, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Rule 8… does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."), *Twombly*, 550 U.S. at 558, and applies no less to this case.

ARGUMENT

Plaintiffs' latest motion demonstrates that they are more interested in unnecessary motions practice than in a speedy resolution to this case, and seek to draw the Court's time and attention away from deciding the pending Motion to Dismiss. Given that their first motion to expedite failed, the Court should construe Plaintiffs' motion as one for reconsideration of the Court's prior orders deferring litigation on their first motion to compel expedited production. *E.g.*, June 9 Tr. 8:17-11:16. Not only were the Court's prior orders not requiring record production legally sound, they have been validated by subsequent developments, some of which the Court itself predicted. *Id.* at 10:1-6. So even if Plaintiffs' motion to reconsider were reviewed *de novo*, it fails on its face.

I. Plaintiffs' "Renewed" Motion Plainly Requests Reconsideration.

When determining whether a motion seeks reconsideration, the Court looks to the relief it requests, not its styling. When a second motion asks the Court to reconsider its prior ruling(s) on the first motion without leave to do so and without substantially-changed circumstances, it is a motion for reconsideration. *United States v. Tsarnaev*, No. 13-10200-GAO, 2015 U.S. Dist.

LEXIS 24, at *7 (D. Mass. Jan. 2, 2015) ("Although it is not styled as such, the defendant's second motion for a change of venue is essentially a motion for reconsideration.").

Here, Plaintiffs' second motion asks the Court to revisit its treatment of Plaintiffs' first motion to expedite, filed on June 3, 2022. The Court relieved Defendants of briefing a response to that motion (June 9 Tr. 12:10-14), and encouraged—but did not order—Defendants to produce the A-files until the Court decides the motion to dismiss. July 7 Tr. 9:20-23. For this reason, the second motion—much of which is copy-and-pasted from the first (*Compare* ECF #26 *with* ECF #48)—should be evaluated as a motion for reconsideration, as it asks the Court to revisit its treatment of their first motion. *United States v. Chapman*, No. CR 14-1065 JB, 2015 U.S. Dist. LEXIS 176598, at *86 (D.N.M. Aug. 28, 2015) ("While [plaintiff] calls his request a request to renew his prior motion, it is more like a motion to reconsider. He is renewing the motion to ask the Court to reconsider its original ruling."). Plaintiffs' regurgitation of their first motion presents nothing new or compelling, much less an ample basis to grant the "extraordinary remedy" of reconsideration. *Palmer*, 465 F.3d at 30. Instead, "plaintiffs simply repeat certain arguments they previously made in support of the original motion… cite to no evidence… in the 'renewed' motion, apparently intending for the court to revisit the prior motion…. This is nothing more than a request that the court reconsider its prior ruling." *Daniel F. v. Blue Shield*, No. C 09-2037 PJH, 2015 U.S. Dist. LEXIS 81553, at *11-12 (N.D. Cal. June 22, 2015).

Plaintiffs' copy-and-paste brief points to no intervening change in law or circumstance since their first motion. To wit, the only change in circumstance is Plaintiffs' disclosure of their identities. Indeed, one major reason for the Court's rejection of Plaintiffs' first motion was Plaintiffs' refusal to disclose their identities to the Court or Defendants in the first place. June 7 Tr. 9:21-10:6; 11:8-16. While Plaintiffs have now—as opposed to when their first motion was

filed—disclosed their identities to Defendants, this does not amount to a changed circumstance warranting reconsideration. *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 595 (6th Cir. 2002) (reconsideration "does not permit litigants and their counsel to evade the consequences of their legal positions and litigation strategies, even though these might prove unsuccessful, ill-advised, or even flatly erroneous."). Thus, Plaintiffs' second motion should be evaluated as a motion to reconsider, and it should be denied on that basis because it fails to present any basis for such relief.

II. Even if Considered *De Novo*, Plaintiffs' Second Motion Lacks Good Cause and Should be Denied.

A. The Motion is Premature: Threshold Issues Must be Resolved First.

Whether a record review case or a civil discovery case, threshold Article III jurisdiction and civil pleading requirements apply just the same. When evaluating claims that an agency has violated the APA, "the task of the reviewing court is to apply the appropriate… standard of review… to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party."). Of course, "the relevant inquiry" in APA cases is "whether the administrative record sufficiently supports the agency's decision." *Atieh v. Riordon*, 727 F.3d 73, 76-77 (1st Cir. 2013). However, if the Court lacks jurisdiction, or the APA provides no cause of action, that inquiry is never reached.

Jurisdiction is a threshold issue that must be resolved first. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "[T]he requirement of subject-matter jurisdiction… is nonwaivable and delimits federal-court power[.]" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). And even if jurisdiction were shown, the principle that "a plaintiff must state a plausible claim

before she can invoke a right to discovery" (*Parker v. Landry*, 935 F.3d 9, 18 (1st Cir. 2019)) applies the same in cases with APA claims as it does to any other.[1] *Iqbal*, 556 U.S. at 678-79.

Indeed, the Supreme Court has strongly suggested that courts resolve threshold issues before engaging with the record disputes that Plaintiffs launch into here. In *In re United States*, the Supreme Court vacated a Ninth Circuit order that denied the government's petition for a writ of mandamus directing the district court to resolve threshold issues before requiring the government to "complete" an administrative record with the plaintiffs' long list of documents. *In re United States*, 138 S. Ct. 443 (2017). As the Supreme Court explained, "the District Court should have… first resolved the Government's threshold arguments (that the Acting Secretary's determination… is unreviewable because it is 'committed to agency discretion,' 5 U. S. C. §701(a)(2), and that the Immigration and Nationality Act deprives the District Court of jurisdiction). Either of those arguments, if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *Id.* at 445. The same sentiment applies in equally here, particularly given the similarity of the arguments.

The Supreme Court's views aside, courts in this circuit routinely consider the pendency of a motion to dismiss to weigh against granting such requests. *Fortuna v. Winslow Sch. Comm.*, No. 1:21-cv-00248-JAW, 2021 U.S. Dist. LEXIS 209785, at *2 (D. Me. Oct. 31, 2021); *Wilcox Indus.*

[1] Plaintiffs cite D.D.C. LCvR. 7(n), which states "[i]n cases involving the judicial review of administrative agency actions, unless otherwise ordered…, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following … the answer… or simultaneously with… a dispositive motion, whichever occurs first." However, "it is the general practice of [] courts in this District to waive compliance with LCvR 7(n)(1) where, as here, 'the administrative record is not necessary for [the court's] decision.'" *Eljalabi v. Blinken*, No. 21-1730 (RC), 2022 U.S. Dist. LEXIS 125055, at *9 n.3 (D.D.C. July 14, 2022) (quoting *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279 (D.D.C. 2018)); *Keyhanpoor v. Blinken*, --- F. Supp. 3d ----, 2022 U.S. Dist. LEXIS 175453, at *2 n.1 (D.D.C. Sep. 28, 2022); *Palakuru v. Renaud*, 521 F. Supp. 3d 46, 50 n.6 (D.D.C. 2021).

Corp. v. Hansen, 279 F.R.D. 64, 72 (D.N.H. 2012). The Court should follow the sound guidance from *In re United States*, 138 S. Ct. 443 (2017) and resolve threshold issues first.

B. Plaintiffs' Purpose—to Preemptively Litigate Record Disputes—Is Not Good Cause.

While *In re United States* dealt with supplementation rather than production, this case is analogous because Plaintiffs seek reporting on and judicial supervision of record compilation, long before any bad faith or improper behavior has been shown. ECF #48 at 6. Indeed, Plaintiffs' demand that "this Court require the government, in the interim, to provide an update to the Court regarding its progress towards compiling the administrative record, including an index and description of the materials that they have compiled to date, and an explanation of the scope of the material yet to be compiled" is not only highly irregular and completely unwarranted, but it is also for the *express* purpose of litigating "disputes regarding the timing and scope of the administrative record now" before the motion to dismiss has been decided, and before the records have been reviewed, certified, and produced. ECF #48 at 2. It is unclear how this procedure would result in any efficiency, and the Court cannot presume, as Plaintiffs have, that their yet-unfiled motion for extra-record discovery—on records Plaintiffs have yet to show entitlement to—would prevail on the merits. *See Int'l Junior Coll. of Bus. & Tech., Inc. v. Duncan*, 802 F.3d 99, 114 (1st Cir. 2015) ("…we do not allow supplementation of the administrative record without specific evidence (*i.e.*, a 'strong showing') of the agency's 'bad faith or improper behavior.'").

The Court also cannot order reporting or discovery into the agencies' record compilation, review, certification, and production processes simply because Plaintiffs have declared their "concern" and their intent to move for extra-record discovery if their unilateral criteria for record completeness are not met. *See McWaters v. FEMA*, No. 05-5488, 2006 U.S. Dist. LEXIS 109871, at *14 (E.D. La. Jan. 11, 2006). The agency's certification of the record is entitled to a presumption of administrative regularity, and Plaintiffs cannot bypass their burdens on a motion to supplement

by pre-emptively challenging the completeness of the record (ECF #48 at 1), sight unseen. *McWaters*, 2006 U.S. Dist. LEXIS 109871, at *14 ("Extra-record discovery to complete the record, if necessary, should not be broad ranging, since the primary function of such discovery is to offer assurance that the administrative record is complete *in areas where completeness is suspect*." (emphasis in original)). "The discovery plaintiff's seek to conduct on an expedited basis is broad-ranging and may well be obviated by the production of the administrative record. Indeed, the agency's designation of the administrative record is entitled to a presumption of administrative regularity." *Id.* Threadbare "concerns" backed by serial motions do not entitle Plaintiffs to relief, including meta-record reporting and discovery, especially given Plaintiffs' tacit acknowledgment that they are owed nothing unless or until the motion to dismiss is denied. ECF #48 at 10.

In fact, the only justification offered is that "expedited production of the administrative record is warranted in order to help Plaintiffs avoid succumbing to a significant threat of irreparable harm." ECF #48 at 7. For this, Plaintiffs cite to the Roes (*id.*), notwithstanding USCIS exercised its unreviewable 8 U.S.C. § 1182(d)(5)(A) discretion to conditionally approve their Form I-131s months ago. But even if the Roes' claims were live (Bird Decl. ¶ 5), Plaintiffs do not explain how broad discovery into the processing of parole requests filed by and/or on behalf of Afghan nationals generally would help to resolve the motion to dismiss,[2] nor is there any explanation why litigating record disputes prematurely would speed the resolution of this case.

[2] Plaintiffs claim that they "possess evidence[] that the government silently changed its qualifications for Afghan humanitarian parole applications in the fall of 2021," ECF #48 at 1, but have not offered it in the Complaint, in opposition to Defendants' motion to dismiss, or moved for a preliminary injunction. If true, it would undermine their claim for an expedited record production. *Leone v. King Pharm., Inc.*, No. 2:10-CV-230, 2010 U.S. Dist. LEXIS 121553, at *11 (E.D. Tenn. Nov. 16, 2010). More troublingly, it would also suggest that Plaintiffs have *elected* to leave the Court and Defendants to guess at what discrete action they purport to challenge.

C. Plaintiffs' Fishing Expedition Goes Beyond the Record, and Should be Denied.

In their second motion, Plaintiffs do not hide that they seek discovery "beyond documents related to each individual Plaintiff's humanitarian parole application" and into, "for example, the record(s) pertaining to, at least, the agency's [alleged] change in the standard applied to such applications and others similarly situated, including materials reflecting the [alleged] consideration or adoption of policies regarding USCIS's treatment of humanitarian parole applications filed by Afghan nationals since August of 2021; the agency's [alleged] decisions with regard to the policies for issuing Requests for Evidence, Notices of Intent to Deny, and Denials; and the timing of adjudications of Afghan humanitarian parole applications, including the [alleged] decisions to stop adjudicating the applications and to deprioritize cases." ECF #49-1 at 4-5. Of note, these broad discovery requests are not tied to any discrete agency action, nor any particular applicant.

In their Complaint, Plaintiffs alleged that because (at the time) only the Roes received an RFE (Compl. ¶ 101) and no groups were granted parole—even though they admit such was statistically probable (Compl. ¶ 39)—that these facts were, on "information and belief," indicative of surreptitious new policies that purportedly mandated the summary denial of their Form I-131s. *See* Compl. Plaintiffs then leapt to the conclusion that "USCIS implemented new standards used to adjudicate requests for humanitarian parole on behalf of Afghans" and "on information and belief, USCIS altered these standards without publicly announcing the change or providing a reasoned basis for it." *Id.* at ¶¶ 179-80. By virtue of these bald conclusions alone, Plaintiffs claim an entitlement to search for anything they can challenge vis-à-vis USCIS's usage of § 1182(d)(5)(A) parole authority dating back to last summer. *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.").

Indeed, it is evident from Plaintiffs' discovery requests that they do not challenge any discrete agency action, but rather seek judicial intervention and discovery into the use of discretionary parole authority generally. Driven by their subjective perception that more Afghans (including Plaintiffs) *should* be granted humanitarian parole, Plaintiffs summarily conclude that it *would be so* absent secret new policies. *See* Compl. However, like *Brnovich v. Biden*, No. CV-21-01568-PHX-MTL, 2022 U.S. Dist. LEXIS 172729, at *31 (D. Ariz. Sep. 23, 2022)—a case in which Arizona challenged a purported "policy of programmatically mass-granting parole to unauthorized aliens" based on its perception that § 1182(d)(5)(A) parole was being overused (rather than underused, as alleged here)—"Plaintiffs do not challenge a particular, discrete agency action, but rather some generalized and amorphous conception of Defendants' detention and parole policies[.]" *Id.* The *Brnovich* court thus concluded that "broad decisions not to detain all undocumented aliens, and to parole a large number of undocumented aliens, are not challengeable under the APA absent additional allegations." *Id.* The *Brnovich* reasoning applies equally on the other side of the coin. The Court cannot accept Plaintiffs' "policy" postulations for what they perceive as a low parole rate for Afghans as the functional equivalent of a discrete agency action. *Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022) (courts cannot "postulat[e] the existence of an agency decision wholly apart from any 'agency statement of general or particular applicability… designed to implement' that decision."); *Whitewater Draw Nat. Res. Conserv. Dist. v. Mayorkas*, 5 F.4th 997, 1012 (9th Cir. 2021) ("Plaintiffs cannot obtain review of all of DHS's individual actions pertaining to, say, 'employment-based immigration' in one fell swoop by simply labeling them a 'program.' Plaintiffs either must identify a particular action by DHS that they wish to challenge under the APA, or they must pursue their remedies before the agency or in Congress."); *ACLU v. NSA*, 493 F.3d 644, 678 (6th Cir. 2007) ("The plaintiffs challenge the NSA's warrantless

interception of overseas communications, … failure to comply with FISA's warrant requirements, and… presumed failure to comply with FISA's minimization procedures. This is conduct, not 'agency action.'"). Decisional records are anchored to discrete *decisions*, not Plaintiffs' subjective conceptions about DHS's exercises of unreviewable § 1182(d)(5)(A) parole discretion.

As Plaintiffs challenge amorphous parole policies, the existence of which is rooted in their subjective perception that Afghans are paroled too infrequently—or alternatively, claiming that CBP's decisions to parole 70,000 Afghans from military installations was not actually a hurried evacuation from Afghanistan, but instead a new and permanent "policy" binding across-components on USCIS—Defendants are tasked with compiling a record tied to no specific decision, but rather a broad record of USCIS's § 1182(d)(5)(A) parole authority usage since August 2021. This is no easy task, let alone one that should be expedited, or meddled in, before the Court rules on Defendants' dispositive motion.

D. Resolution of the Motion to Dismiss Will Determine the Scope of the Record.

Agencies tasked with end-runs around *Lujan* and *Norton* face a palpable burden in discerning the scope of the administrative record. This is particularly true here where Plaintiffs' unfocused and conclusory allegations make it extraordinarily difficult to determine the proper scope of an administrative record absent an anchoring discrete agency action. For example, the Complaint could be read as demanding that USCIS continue evacuating Afghanistan at the extraordinary rates that the broader U.S. government and military did August 2021, and that USCIS paroling at any rate short of 70,000 Afghans every few weeks constitutes a reviewable change in "policy," notwithstanding the circumstances under which those 70,000 Afghans were paroled, and ignoring also that those 70,000 were paroled by CBP from, *i.e.*, U.S. military installations and other sites, *not* by USCIS from abroad. Compl. ¶ 28 ("CBP ultimately paroled approximately 70,000 Afghans from U.S. military bases and other sites around the world into the

United States."); ¶ 48 ("On information and belief, these early approval trends reflected USCIS's recognition that many Afghan beneficiaries left behind by the U.S. evacuation presented urgent humanitarian reasons warranting a grant of humanitarian parole under then-existing standards."); ¶ 54 ("Instead, knowing that tens of thousands of Afghans would qualify for humanitarian parole under then-existing standards, USCIS abandoned those standards and adopted new ones."). Alternatively, the Complaint could be read to summarily claim that their statistically-likely parole denials could only be attributable to a furtive new policies, notwithstanding the apparent contradictions. *E.g.*, Compl. ¶¶ 39, 182 ("USCIS also unlawfully decided to amend or ignore the provision of its Policy Manual that [purportedly] requires issuing an RFE or NOID before denying any application…"); 101 ("…USCIS sent Rasul three RFEs asking for a long list of additional Evidence…."). The Court agreed the amorphous nature of the claims—which are unfocused on any decision, but rather DHS's parole authority usage before, during, and after Kabul's fall—makes it difficult to place where the record would start or end, or what it should cover. July 7 Tr. 7:18-8:14. How the Court reads any surviving claims will be instrumental in scoping the record.

E. The Court's Procedural Calls have been Validated.

As noted *supra*, the Roes' Form I-131s were conditionally approved by USCIS on July 8, and they were issued boarding foils on November 2, 2022. Bird Decl. ¶ 5. The Boe groups were denied, and have since filed reconsideration motions that are currently pending with USCIS. *Id.* ¶¶ 7-8. The Moes were issued RFEs on November 10, 2022, with responses due in February 2023, and their Form I-131s remain pending with USCIS. *Id.* ¶ 9. Consistent with the Court's observation that Plaintiffs' cases could well be processed in the normal course, this was indeed what happened, and all but the Moes' cases have been decided. June 9 Tr. 9:21-10:6; Bird. Decl.

As such, premature or expedited production of the Roes' records would have served no purpose other than to burden Defendants, as USCIS conditionally approved their Form I-131s in

the normal course. Bird Decl. ¶ 5. Although the Boes have decisions, they also have administrative motions pending, which could result in new decisions. Bird. Decl. ¶¶ 7-8. It is not clear what efficiency would be gained from requiring production of the Boes' decisional records, considering the concrete possibility that those decisions could be upended if their administrative motions are granted. Lastly, the Moe groups lack a decision, but records pertaining to the purported delay in their case would likely have to continually be "completed" to account for new evidence submitted in response to the recent RFEs. Finally, considering that the Boes' and Moes' records continue to be used and considered by USCIS, the Court should consider whether productions of these records and cross-motions for judgment on the administrative record (MJARs) is a wise use of resources when the Boes and Moes continue to be processed the normal course.

Thus, if the Court denies the motion to dismiss, the Court should enter a staggered briefing schedule for record filing and cross-MJARs as to the Does and Noes, as the Boes are pursuing administrative remedies and the Moes have until February 2023 to respond to the RFEs. If reopening is denied to either Boe group or a denial issued to the Moes, the Court could immediately thereafter schedule cross-MJARs on their parole denials. Resolving the individual cases—which have clearly-scoped records centered on discrete Form I-131 decisions—is likely to resolve all claims most efficiently. *E.g.*, *Banner Health v. Sebelius*, 797 F. Supp. 2d 97, 117 (D.D.C. 2011).

If the Court thereafter entertains the purported "policy" challenge to DHS's use of § 1182(d)(5)(A) discretion, the Court should order Plaintiffs to file a notice of "the precise contours of [their] claims" by "identifying, in bullet-point format, each circumscribed, discrete agency action that Plaintiffs intend to challenge in this action,… with citations to the Code of Federal Regulations or the Federal Register, as appropriate." *Id*. This threshold showing imposes no more a burden to Plaintiffs than is necessary to sustain the case. *Norton*, 542 U.S. at 64 ("a claim under

§ 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."). As it is Plaintiffs' burden—not Defendants'—to identify the discrete agency actions to be litigated, Defendants are unobligated to produce documents without the identification of a discrete agency action to anchor the record.

At base, the most efficient way forward is to await the Court's ruling on the motion to dismiss, not to tarry with premature record disputes and murmurings of premature extra-record discovery motions. Indeed, this approach has already rendered the production of the Roes' records unnecessary, simply by an intervening exercise of unreviewable discretion to authorize parole under § 1182(d)(5)(A) in the Roes' favor during processing in the normal course. And even if the Court denies the motion to dismiss, the Court's decision is likely to narrow the issues to be litigated. *E.g.*, *Assoc. Mortg. Bankers, Inc. v. Carson*, 279 F. Supp. 3d 58, 65 (D.D.C. 2017) (partially denying motion to dismiss, permitting APA claim only "insofar as Count I challenges the [ALJ's] decision as arbitrary and capricious"); *Banner Health*, 797 F. Supp. 2d at 117 (partially denying motion to dismiss, but noting "the Court has identified the discrete agency actions that remain at issue in this action", and tailoring procedures to "reduce the scope of the administrative record that would need to be compiled and narrow the parties' focus to the key claims at issue."). Like their first motion, Plaintiffs' second motion has not shown good cause, wastes judicial resources by distracting the Court from the fully-briefed motion to dismiss, and it should be denied.

CONCLUSION

Plaintiffs' second motion should be treated as one for reconsideration, and denied for failure to show reconsideration is warranted. Even reviewed *de novo*, the motion should be denied for failure to show good cause.[3]

[3] The Court might also consider issuing an order to show cause why the Roes' claims, at least, should not be dismissed for mootness.

Dated: November 18, 2022

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

DATED: November 18, 2022

/s/ David J. Byerley
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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

DECLARATION OF JOHN W. BIRD

Pursuant to 28 U.S.C. § 1746, I, John W. Bird, hereby declare as follows:

1. I am the Chief of the Humanitarian Affairs Branch (HAB) of the Refugee, Asylum and International Operations Directorate (RAIO) of U.S. Citizenship and Immigration Services (USCIS). I have held this position since April 2016. Prior to becoming the HAB Chief, I served as USCIS Deputy Chief of Staff, DHS Attaché to the European Union and NATO, and before that Deputy Chief of USCIS International Operations where I was responsible for operations including oversight of the humanitarian parole portfolio. I joined USCIS (legacy Immigration and Naturalization Service) in November 1994 as an Asylum Officer in Newark, New Jersey. In my current position, I supervise the USCIS, RAIO, International and Refugee Affairs Division, Refugee and International Operations, Humanitarian Affairs Branch which is responsible for adjudication of parole applications.

2. I respectfully submit this declaration in support of Defendants' opposition to Plaintiffs' Renewed Motion to Compel Expedited Production of the Administrative Record, filed

in this matter on November 4, 2022. I am familiar with the applications for parole filed on behalf of Plaintiffs known pseudonymously as Rena Roe, Rafi Roe, Rabi Roe, Marwa Moe, Malia Moe, Medina Moe, Nahid Noe, Naser Noe, Nabi Noe, Naji Noe, Baktash Boe, Benesh Boe, Basim Boe, Basir Boe, Burhan Boe, Badi Boe, Bahar Boe, Barakat Boe, Baharak Boe, Amir Doe, Afsoon Doe, Aazar Doe, Abdul Doe, Afshaneh Doe, Ali Doe, Alima Doe, and Permaz Doe, and I provide this declaration based on my review of relevant documents and my personal knowledge.

3. HAB is the USCIS office that adjudicates Forms I-131, Application for Travel Document, requesting parole for urgent humanitarian reasons and/or a significant public benefit, other than those parole applications submitted under a special parole program.

4. Since the complaint was filed on May 25, 2022, there have been case developments in several of plaintiffs' applications for parole.

5. Plaintiffs using the pseudonyms Rena Roe, Rafi Roe, and Rabi Roe are Afghan nationals and beneficiaries of applications for parole to USCIS. On July 8, 2022, their applications for parole were conditionally approved by USCIS and parole authorization memos were sent to the U.S. consular post. A conditional approval notice provides information regarding next steps for processing the parole request, such as scheduling an appointment with the U.S. embassy, biometrics collection, obtaining travel documents, and any conditions the beneficiary must comply with if paroled into the United States. The conditional approval notice informs the petitioner that the beneficiary must complete a Form DS-160 and appear for an appointment with the Department of State consular section at a U.S. embassy or consulate to verify their identity and collect biometrics for additional security vetting. If no derogatory (negative) information or new identity information is found during vetting, the consular section issues a travel document that allows the beneficiary to travel to the United States within 30 days of it being issued. Issuance of the travel

document does not guarantee parole, but it allows the beneficiary to travel to a U.S. port of entry where a CBP officer will inspect the beneficiary and determine whether to authorize parole into the United States. Notices of the conditional approvals were sent to petitioner via email on July 18, 2022. Based on a review of the State Department's Consular Consolidated Database (CCD), a repository of visa records, it shows that travel documents were issued for all three beneficiaries on November 2, 2022.

6. Plaintiffs using the pseudonyms Nahid Noe, Naser Noe, Nabi Noe, and Naji Noe are Afghan nationals who self-petitioned to USCIS for parole. The applications by Nahid Noe and Naser Noe, were denied by USCIS on February 14, 2022. The application by Nabi Noe was denied by USCIS on February 16, 2022. The application by Naji Noe was denied by USCIS on June 6, 2022. Denial notices sent to self-petitioners Nahid Noe, Naser Noe, and Naji Noe in Afghanistan were returned to USCIS as undeliverable.

7. Plaintiffs using the pseudonyms Badi Boe, Bahar Boe, Barakat Boe, and Baharak Boe, are Afghan nationals and beneficiaries of applications for parole to USCIS. Their applications were denied by USCIS on May 27, 2022. Petitioner filed a Form I-290B, Notice of Appeal or Motion, for each beneficiary on June 27, 2022 requesting reconsideration of the denials and later submitted new evidence which was received by HAB on August 18, 2022. The I-290B motions are currently pending with HAB.

8. Plaintiffs using the pseudonyms Baktash Boe, Benesh Boe, Basim Boe, Basir Boe, and Burhan Boe are Afghan nationals and beneficiaries of applications for parole to USCIS. Their applications were denied by USCIS on July 7, 2022. Petitioner filed a Form I-290B, Notice of Appeal or Motion, for each beneficiary on August 9, 2022 requesting reopening and

reconsideration of the denials and submitted new evidence along with the motions. The I-290B motions are currently pending with HAB.

9. Plaintiffs using the pseudonyms Marwa Moe, Malia Moe, and Medina Moe are Afghan nationals and beneficiaries of pending applications for humanitarian parole to USCIS. This is the only family group where a decision on their parole is still pending. USCIS issued a request for additional evidence (RFE) to petitioner for each beneficiary on November 10, 2022 to request additional evidence needed to complete the adjudications. Petitioner's RFE responses are due on February 8, 2023.

10. Plaintiffs using the pseudonyms Amir Doe, Afsoon Doe, Aazar Doe, Afshaneh Doe, Ali Doe, Alima Doe, and Permaz Doe are Afghan nationals and beneficiaries of applications for parole that were denied by USCIS on December 3, 2021. There have been no new developments on these adjudications since the complaint was filed.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury that the foregoing is true and correct.

Executed on: November 17, 2022

JOHN W BIRD Digitally signed by JOHN W BIRD Date: 2022.11.17 16:40:50 -05'00'

John W. Bird
Chief, Humanitarian Affairs Branch
International and Refugee Affairs Division,
Refugee, Asylum, and International Operations Directorate
U.S. Citizenship and Immigration Services