

**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

PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO SUBMIT A REPLY BRIEF

Pursuant to Local Rule 7.1(b)(3), Plaintiffs move unopposed for leave to file a reply brief in support of their Renewed Motion to Compel Expedited Production of the Administrative Record (ECF No. 47). Defendants requested that their position be reported as: “Defendants defer to the Court’s discretion as to whether Plaintiffs should be granted leave to file a reply.”

Good cause exists to grant leave to reply. Defendants’ 20-page Opposition—twice the length of Plaintiffs’ brief—makes numerous assertions regarding Plaintiffs’ claims. *See* ECF No. 55. Among other things, Defendants assert that Plaintiffs’ motion is a request for reconsideration, that Plaintiffs lack a basis other than speculation for the allegations in the complaint, and that Defendants face challenges in understanding the scope of the administrative record that they are compiling. Defendants even attack the motives of Plaintiffs’ counsel. The proposed Reply brief will help to clarify and better focus the issues for more efficient and accurate adjudication of the motion. Plaintiffs respectfully submit that their additional briefing will be beneficial to the Court in assessing the merits of the parties’ dispute regarding the administrative record. For these reasons, Plaintiffs respectfully request leave to submit their proposed reply brief, attached as **Exhibit A**. A declaration accompanying that proposed brief is attached as **Exhibit B**.

Dated: November 22, 2022

Respectfully submitted,

PLAINTIFFS

By their attorneys,

/s/ Susan M. Finegan

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Susan J. Cohen (BBO #553353)

John F. Quill (BBO #632216)

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Local Rule 7.1(a)(2) Certification

Plaintiffs' counsel have conferred with Defendants' counsel regarding this motion.

Defendants do not oppose this motion.

Dated: November 22, 2022

/s/ Susan M. Finegan

Susan M. Finegan

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
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No. 22-cv-10808-ADB

**REPLY IN SUPPORT OF RENEWED MOTION TO COMPEL EXPEDITED
PRODUCTION OF THE ADMINISTRATIVE RECORD**

Defendants have asserted for months that they are diligently compiling the administrative record. In an effort to work cooperatively and to narrow any contested issues, Plaintiffs have repeatedly reached out to Defendants in the hope of reaching a shared understanding about at least some components of that record. In response Defendants say they cannot possibly know which records to compile; that they regard as a “[f]ishing [e]xpedition” any suggestion that the administrative record should contain records of the policies challenged in this case; and that they regard Plaintiffs’ outreach not as good faith and professional collegiality but rather as an improper effort to “intervene” and “meddle[.]” ECF No. 55 at 4, 15, 17.

By staking out a position that they will neither search for records relating to the challenged policy nor discuss doing so with Plaintiffs’ counsel, Defendants’ submission confirms that this Court’s intervention is the only way to ensure the preparation of a timely and complete administrative record. This Court should grant Plaintiffs’ request that Defendants submit a progress report and that Defendants ultimately produce that record within two weeks of any order by this Court denying the Defendants’ motion to dismiss.

I. As alleged in the complaint, USCIS changed its standards for the processing of Afghan humanitarian parole applications.

At the heart of this case is Plaintiffs' claim that in the fall of 2021 the U.S. Citizenship and Immigration Services altered its standards for adjudicating Afghan humanitarian parole cases, and that this alteration did not comply with the Administrative Procedure Act. While continuing to advance an altogether different account of Plaintiffs' claims,¹ Defendants' counsel have taken the unusual step, in support of a motion to dismiss, of putting forward an unsworn assertion that no such alteration occurred. *See* Aug. 2, 2022 Tr. at 6:14-15, 10:1-2. Defendants further posit that Plaintiffs surely filed this lawsuit based on a "subjective perception" of the facts rather than pre-suit research and investigation. ECF No. 55 at 16, 17. That is incorrect.

In fact, in an email to the office of a U.S. Senator, the agency *itself* acknowledged that it retroactively imposed "new qualifications" for Afghan humanitarian parole applications in the fall of 2021. *See* Exhibit 1 to the Declaration of Adriana Lafaille ("Lafaille Decl."). As illustrated in that email, by November 2021 USCIS was using the "new qualifications" to take the extraordinary step of *withdrawing* previously-granted humanitarian parole approvals in order to re-adjudicate the cases at issue in that document under the new agency criteria.² If it were correct, as has been vouched, that there was never a policy change, then this document would not exist. But it does.

¹ Defendants have at times argued this case as though Plaintiffs challenge the merits of the agency's adjudication of their individual applications. *See, e.g.*, ECF No. 55 at 1, 19. Plaintiffs challenge the agency action that implemented heightened standards for use across *all* Afghan cases, including theirs. *See, e.g.*, ECF No. 44 at 2-7, 9-17; ECF No. 1 at 36-37 (relief requested). Because Plaintiffs' claim is that new standards are unlawfully being applied, simply allowing the remaining applications and appeals to be adjudicated "in the normal course," as Defendants urge, would require resolving the merits of this case in favor of the government. *See* ECF No. 55 at 18-19.

² Consistent with this document, the complaint alleges that "USCIS even withdrew approvals or conditional approvals that it had previously granted, contending that they required re-review under the new criteria." ECF No. 1 at ¶ 57. Plaintiffs have redacted the case numbers and names of the people involved, none of whom are parties to this case. Counsel for the government is being provided with an unredacted copy of the document upon filing.

II. Defendants’ submission suggests that an administrative record of the agency action at the center of this case—USCIS’s change in its standards for the processing of Afghan humanitarian parole applications—is *not* being compiled.

In seeking to confer with Defendants, and in filing the present motion, Plaintiffs seek to ensure that—if the motion to dismiss is denied—Defendants will promptly compile and disclose documents reflecting the adoptions of these “new qualifications” as part of the administrative record. Plaintiffs have emphasized that the administrative record relevant to this case is not merely the files of the individual applications at issue. Those individual files are unlikely to shed meaningful light on whether USCIS complied with the APA in adopting new standards that would govern tens of thousands of cases, including Plaintiffs’ cases.

Instead, the administrative record for this case must include the record of USCIS’s decision to adopt “new qualifications” in the fall of 2021. That administrative record is vital to this case because these “new qualifications”—*i.e.*, that change in adjudication standards—are at the center of the complaint. Plaintiffs allege that these new standards include rules that both bar approvals for those who are in Afghanistan, and that make it more difficult for those outside of Afghanistan to be approved. ECF No. 1 at ¶¶ 55-56. Plaintiffs’ complaint challenged these new adjudication standards, along with accompanying procedural changes, as being adopted in violation of the APA. *Id.* ¶¶ 54-67, 176-93.³

In response to urging by the Court and inquiries by the Plaintiffs, the government has for months claimed to be “expeditiously” compiling that record. *See* Aug. 2 Tr. at 34:1; *see also* ECF No. 49-1 at 2. But what administrative record is it compiling? Defendants have refused to say. At the same time, Defendants have denied that USCIS ever changed its standards, *see, e.g.*, Aug. 2,

³ Plaintiffs also challenge the unreasonable delays in adjudicating their applications. ECF No. 1 at ¶¶ 194-200. Plaintiffs dispute that the claims in the complaint are unclear, but stand ready to confer in good faith with Defendants and provide any clarifications the Court deems warranted.

2022 Tr. at 6:14-15, 10:1-2, all while professing continued confusion about the proper scope of the record, *see, e.g.*, ECF No. 55 at 17. As a result, it is difficult to imagine that the government could be compiling an adequate administrative record of the challenged fall 2021 changes to USCIS’s standards and procedures for adjudicating Afghan humanitarian parole applications.

III. This Court’s intervention would ensure that Defendants produce a record that will allow for a prompt adjudication of the issues in this case.

Plaintiffs seek to ensure the timely and complete production of the administrative record because they continue to face dire and life-threatening circumstances. Yet Defendants’ Opposition claims that Plaintiffs are “more interested in unnecessary motions practice than in a speedy resolution to this case.” Opp. at 9. At best, this is a puzzling claim. Plaintiffs promptly filed humanitarian parole applications in the early fall of 2021. And, after suffering the delay and changed standards that form the basis of their complaint, Plaintiffs have pressed this case in a bid to find safety from the Taliban for themselves and/or their loved ones. They continue to seek a timely resolution of the issues in this case because, one year later, the beneficiaries of these applications continue to live in fear of the knock on the door. This case—and all of Plaintiffs’ best efforts to expedite it—are a bid for survival.⁴

As a threshold matter, this renewed motion is not a request for reconsideration because the Court never ruled on Plaintiffs’ prior motion. *Cf.* Fed. R. Civ. P. 60 (concerning “relie[f]” “from a[n] order”). Instead, the Court declined to rule on Plaintiffs’ original request to produce the record by June 24 in order to permit the parties to make further progress before the July 7 conference. June 9 Tr. 5:7-8, 7:5-14; 10:2-14; *see also* Dkt. 48 at 2-4.

⁴ Plaintiffs are pleased to inform the Court that the “Roe” beneficiaries have arrived in the United States. Plaintiffs anticipate dismissing their claims. Plaintiffs do not concede, however, that the approval of these humanitarian parole applications occurred “in the normal course.” *See* ECF No. 55 at 20.

With regard to the substance of their opposition, other than generalized arguments in favor of a “wait and see” approach, Defendants do not provide any reason why this Court should not place some guardrails—and at least some time limit—on the government’s production of the administrative record, and require a progress report.

First, the government does not state any specific reason why it should not be ordered to produce the record within two weeks of any order on the motion to dismiss. It does not, for example, argue that another timeframe would be more appropriate. Nor does it provide any assurance that it will expeditiously produce an adequate record if the motion to dismiss is denied, such that no time limit is needed. To the contrary, the government’s opposition suggests it is *not* making meaningful efforts to compile a complete record—efforts which it apparently views as wasteful notwithstanding the ongoing dangers faced by Plaintiffs. This merely underscores that a deadline may be the only way to ensure that the administrative record is promptly produced.

Second, the government does not provide any reason why it should not be ordered to take the simple, reasonable step of shedding light on the anticipated timing and scope of the record being compiled. The report Plaintiffs seek is made necessary by the government’s repeated contradictory claims—on the one hand, that it is compiling a record “expeditiously” as the Court has suggested, and on the other hand, that it does not know what the record should contain. Plaintiffs have attempted to meet and confer with the government for months to understand what the government is producing and what further clarity it needs. But the government has made clear that only Court intervention can cause it to engage with Plaintiffs. Accordingly, it is now appropriate for the government to be required to provide information to the Court, and for the Court to determine, at a status conference or otherwise, the appropriate time and manner of

resolving any disputes about the proper scope of the administrative record.⁵

IV. Conclusion

For these reasons, Plaintiffs respectfully request that this Court (1) require Defendants to submit the detailed status update (or recurring updates) described in Plaintiffs' motion, ECF No. 47, and (2) order Defendants to furnish Plaintiffs with the complete, certified administrative record within two weeks of the date that the Court issues any order denying Defendants' motion to dismiss in whole or in part.

Dated: November 22, 2022

Respectfully submitted,

/s/ Susan M. Finegan

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Susan J. Cohen (BBO #553353)

John F. Quill (BBO #632216)

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⁵ The Court should not grant the government's requests for bifurcated and other submissions, which are not the subject of any pending motion or discussion by the parties.

Exhibit B

**IN THE UNITED STATES DISTRICT COURT
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RASUL ROE, *et al.*,

Plaintiffs,

v.

ALEJANDRO N. MAYORKAS, *et al.*

Defendants.

No. 22-cv-10808-ADB

DECLARATION OF ADRIANA LAFAILLE

1. I am an attorney licensed to practice in Massachusetts and am counsel of record in the above-captioned case.

2. Plaintiffs' complaint alleges that, in the fall of 2021, USCIS altered its standards for adjudicating Afghan humanitarian parole applications. This alteration, the complaint alleges, took USCIS from a policy under which it approved most if not all of the Afghan humanitarian parole cases adjudicated between August and early September 2021, to a new policy under which the vast majority of applications are denied. *See* ECF No. 1 at ¶¶ 47-48, 54-60.

3. Counsel for the government has stated that, "there has been no policy change," and that "the same standards that applied in July 2021 are the same standards that apply today." Aug. 2, 2022 Tr. at 6:14-15, 10:1-2.

4. Defendants' most recent filing again suggests Plaintiffs lack a sound basis for their allegation that USCIS adopted new standards for the adjudication of Afghan humanitarian parole in the fall of 2021. *See* ECF No. 55 at 1, 17, 18.

5. The allegations in the complaint are based on extensive research and review of certain available documents, including the document attached here.

6. Attached is a copy of correspondence between the office of U.S. Senator for Massachusetts, Edward Markey, and a representative of U.S. Citizenship and Immigration Services, with regard to four applications for humanitarian parole. This correspondence was forwarded by Senator Markey's office to the attorney for the U.S.-based petitioner, who later provided me with a copy.

7. I have recently obtained permission to file this document in this case in redacted form, and to provide it to the Defendants in unredacted form.

8. I have redacted names, contact information, and case numbers. My understanding is that the identity of the USCIS representative was redacted before the document was shared with me.

9. In this document, the USCIS representative states that the applications at issue were approved in September 2021. The USCIS representative's November 18, 2021 email also notifies Senator Markey's office that USCIS had withdrawn those approvals due to the implementation of "new qualifications."

10. This document is thus evidence that "new qualifications" for USCIS's adjudication of Afghan humanitarian parole cases were in fact adopted and implemented between September 2021 and November 18, 2021.

11. I am aware that after conditionally approving these four applications on September 3, 2021, and withdrawing these approvals in the fall of 2021, USCIS did ultimately issue new conditional approval notices in January 2022, allowing this family to come to the United States. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Adriana Lafaille
Adriana Lafaille

November 22, 2022
Date

Exhibit 1

[REDACTED]

From: [REDACTED] (Markey) <[REDACTED]@markey.senate.gov>
Sent: Friday, November 19, 2021 12:03 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Markey/[REDACTED]/[REDACTED]/OLA to Staffer

CAUTION: This email originated externally. Use caution when opening attachments or links, especially from unknown senders.

Good afternoon, [REDACTED],

As promised, we reached out to both USCIS and the U.S. Embassy on behalf of [REDACTED]'s family. Please see the response below from USCIS. I will forward the response from Islamabad under separate cover.

Hopefully our outreach helps to move along the review. I would suggest that we give them 30 days. If you haven't heard anything by then, please let me know and we will follow up.

[REDACTED]

Office of Senator Edward J. Markey
975 JFK Federal Building
15 New Sudbury Street
Boston, MA 02203

e: [REDACTED]@markey.senate.gov
p: 617-[REDACTED]

Pronouns: She/Her/Hers

Connect with Senator Markey



From: uscis.dhs.gov
Sent: Thursday, November 18, 2021 4:02 PM
To: [REDACTED] (Markey) <[REDACTED]@markey.senate.gov>
Subject: Markey/[REDACTED]/[REDACTED]/OLA to Staffer

Good Afternoon, [REDACTED],

Thank you for your inquiry on behalf of [REDACTED], regarding a Humanitarian Parole application (Afghanistan) with the following Receipt Numbers: MSC [REDACTED]; MSC [REDACTED]; MSC [REDACTED]; MSC [REDACTED].

We reached out to the Humanitarian Affairs Branch about these cases.

They indicated that they did initially approve these cases in September, however, due to new qualifications following the US operations in Afghanistan, they have had to review these cases again and withdraw approval until all reviews are completed. They are in the process of reviewing the cases.

HAB will communicate directly with the petitioner.

We hope this information is helpful. If you need further assistance, please, let us know.

This email (including any attachments) is intended for the use of the individual or entity to which it is addressed. The information in the e-mail may be sensitive or otherwise protected by applicable law. If you are not the intended recipient, please notify the sender and delete all copies.

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