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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION**

Zachary NIGHTINGALE, *et al.*,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, *et al.*,

Defendants.

No. 3:19-cv-03512-WHO

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR PARTIAL STAY OF
INJUNCTION**

**Hearing Date: October 25, 2022
Time: 2:00 p.m.
Hon. William H. Orrick**

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INTRODUCTION

Defendants moved for a time-limited, partial stay of the Court’s injunction because they face unprecedented and extraordinary circumstances: more incoming A-File FOIA requests than ever before, increasing at a rate not seen in a decade, and far outpacing USCIS’s expert predictions. Notwithstanding these external factors, however, Defendants are pleased to report that, since they filed their motion a month ago, USCIS has reduced its A-File FOIA backlog almost entirely, from approximately 5,361 requests to approximately 197. *See* Tenth Declaration of Tammy M. Meckley (“10th Meckley Decl.”) ¶ 6. This is a significant improvement that demonstrates Defendants’ good faith efforts to comply with the Court’s injunction even as they seek to stay it in part for a limited time. Combined with the numbers Defendants had already reported for requesters with upcoming immigration proceedings—practically no Track 3 requests in the backlog¹ and an average processing time of only approximately 19.47 business days—Defendants have shown both reasonable progress and due diligence.

Even with the recent elimination of most of USCIS’s backlog, however, a temporary stay of the injunction as to Track 1 and Track 2 requests remains necessary. USCIS continues to receive an exceptionally high volume of A-File requests, and there is substantial uncertainty about whether the sharp increases in requests will ebb moving forward. A partial stay would provide necessary flexibility in the event USCIS cannot maintain its low backlog, at least until the agency can fully onboard and train its dozens of new staffers and begin to implement its \$15 million in new resources.

To be clear, regardless of whether the Court orders a partial stay, Defendants intend to

¹ The one Track 3 request in backlog status at the time of Defendants’ Seventh Compliance Report and Motion has now been completed. The current Track 3 backlog is zero. *See* 10th Meckley Decl. ¶ 6.

1 continue working hard to process requests within the FOIA’s statutory deadlines and to avoid
2 adverse impacts on class members’ due process interests. But a temporary, partial stay as to Track
3 1 and Track 2 requests would allow Defendants the time required to onboard and train their new
4 personnel, with the goal of sustaining compliance over the long-term. In the meantime, the
5 injunction would remain in effect as to Track 3 requests, and Defendants would continue to report
6 to the Court on a quarterly basis. For these reasons, a partial stay until March 15, 2023 should be
7 granted.
8

9 ARGUMENT

10 **I. Both the FOIA’s “Safety Valve” Provision and Federal Rule of Civil Procedure** 11 **60(b) Provide Grounds to Temporarily and Partially Stay the Court’s Injunction.**

12 In moving for a temporary, partial stay of the Court’s injunction, Defendants invoked the
13 FOIA’s “safety valve” provision, 5 U.S.C. § 552(a)(6)(C). Plaintiffs argue that doing so was
14 improper, and that Defendants must instead rely on Federal Rule of Civil Procedure 60(b), which
15 governs requests for relief from a final judgment or order. Pls.’ Opp. 8–11. However, the Court’s
16 injunction required Defendants to adhere to the FOIA’s statutory deadlines, and the “safety valve”
17 provision is the proper vehicle to request relief from that judicial requirement. In any case, the Court
18 need not address this issue because, for the reasons discussed below, Defendants’ motion satisfies
19 both standards.
20

21 **a. The FOIA’s “Safety Valve” Provision is the Proper Vehicle for Defendants’** 22 **Request.**

23 Upon a showing that “exceptional circumstances exist” and an agency “is exercising due
24 diligence” in responding to requests, the FOIA’s “safety valve” provision authorizes courts to allow
25 the Government “additional time to complete its review” of relevant records. 5 U.S.C.
26

1 § 552(a)(6)(C). That is precisely what Defendants request in their motion: that, for six months,
2 USCIS be permitted “additional time to complete its review” of records in response to Track 1 and
3 Track 2 FOIA requests. Plaintiffs contend that § 552(a)(6)(C) does not apply because, as a formal
4 matter, Defendants are requesting relief from an injunction. Pls.’ Opp. 10-11. But the Court’s
5 injunction requires Defendants to “adhere to the statutory deadlines for adjudicating A-File FOIA
6 requests,” Order Granting Summ. J. at 27, ECF No. 89 (“SJ Order”), and § 552(a)(6)(C) indisputably
7 authorizes this Court to order relief from those deadlines. Only by ignoring the substance of the
8 injunction can Plaintiffs argue that the “safety valve” provision does not apply.
9

10 Nor does it matter that Defendants are making their request after a judgment and permanent
11 injunction have been entered. The “safety valve” provision contains no such temporal limitation,
12 and indeed it specifically authorizes courts to “retain jurisdiction” while allowing the agency to
13 complete its review of records. *See* 5 U.S.C. § 552(a)(6)(C)(i). Although some cases have applied
14 the provision to a production schedule “prior to final judgment,” Pls.’ Opp. 11, that does not create
15 a rule prohibiting Defendants from invoking it post-judgment. And at least in this case, there is no
16 practical difference between a pre-judgment production schedule and the Court’s post-judgment
17 injunction. Both require the Government to respond to open FOIA requests that are subject to
18 litigation—the exact sort of requirement from which the “safety valve” offers relief in exceptional
19 circumstances.
20
21

22 Contrary to Plaintiffs’ argument, the “safety valve” provision also is not limited to litigation
23 involving individual FOIA requests. This Court has already assumed that the provision is
24 “applicable to the pattern or practice claims in this case.” *See* SJ Order 15 & n.10. Plaintiffs do not
25 dispute that in *Gilmore v. United States Department of Energy*, the court described how
26

1 § 552(a)(6)(C) can apply “[w]here a pattern or practice of late responses is alleged,” 4 F. Supp. 2d
2 912, 925 (N.D. Cal. 1998), or that in *Mayock v. Nelson*, the Ninth Circuit remanded a pattern or
3 practice claim for further fact-finding on whether the Government could satisfy § 552(a)(6)(C) on
4 the merits, thus indicating that the provision at least applies in the first instance, 938 F.2d 1006,
5 1006–08 (9th Cir. 1991). Instead, Plaintiffs re-state their view that the FOIA’s use of singular nouns
6 such as “a person” and “a request” means the provision applies only where a single FOIA request is
7 at issue. *See* Pls.’ Opp. 9–10. But by that logic, Plaintiffs could not bring their pattern or practice
8 claims in the first place, as those claims necessarily involve multiple persons and multiple requests.
9 Pattern or practice claims are a judicially created cause of action not described in the text of the
10 FOIA statute at all. Plaintiffs cannot rely on an implied cause of action and then deny the
11 applicability of an express statutory defense merely because it does not mention that same cause of
12 action.
13
14

15 Defendants acknowledge that Federal Rule of Civil Procedure 60(b) lists grounds on which
16 courts may relieve a party from a “final judgment, order, or proceeding.” *See* Fed. R. Civ. P. 60(b).
17 However, Rule 60(b) is not the exclusive means by which to seek relief from a court’s previous
18 order. *See* Fed. R. Civ. P. 60(d)(1) (“[Rule 60] does not limit a court’s power to . . . entertain an
19 independent action to relieve a party from a judgment, order, or proceeding[.]”). Here, the more
20 specific provision—§ 552(a)(6)(C)—is the more appropriate vehicle for Defendants’ motion
21 because it provides the exact relief they seek: additional time to respond to certain requests at issue
22 in this case in light of exceptional circumstances, Defendants’ due diligence, and reasonable progress
23 in reducing their backlog.
24
25
26

1 **b. Rule 60(b) Provides Alternative Grounds for a Temporary, Partial Stay.**

2 Even if the “safety valve” provision does not provide a basis for Defendants’ requested relief,
3 Rule 60(b) indisputably does. Rule 60(b) permits courts to relieve a party from a final judgment or
4 order because, among other reasons, “applying it prospectively is no longer equitable,” or “any other
5 reason that justifies relief.” Fed. R. Civ. P. 60(b)(5)–(6). For the same reasons Defendants satisfy
6 the FOIA’s “safety valve” provision—including the dramatic increase in requests, USCIS’s recent
7 progress in reducing its backlog, and the need to train newly hired personnel—Defendants also
8 satisfy Rules 60(b)(5) and (b)(6).
9

10 Plaintiffs admit that “Rule 60(b) specifically addresses the relief that Defendants now seek,”
11 Pls.’ Opp. 11, though they ask the Court to deny any Rule 60(b) motion as untimely because it comes
12 “more than a year” after the Court’s summary judgment decision, Pls.’ Opp. 9 (quoting Fed. R. Civ.
13 P. 60(c)(1)). The one-year deadline, however, applies only to motions filed pursuant to Rule
14 60(b)(1), (b)(2), and (b)(3).² See Fed. R. Civ. P. 60(c)(1). Defendants’ stay request is justified under
15 Rule 60(b)(5) and (b)(6), which do not have specific deadlines but “must be made within a
16 reasonable time.” See *id.* Because Defendants filed their motion at the same time that an
17 unprecedented deluge of requests created the need for their requested stay, Defendants’ motion is
18 timely. See *United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (“What constitutes
19 reasonable time depends on the facts of each case.”). Accordingly, while the FOIA’s “safety valve”
20 provision is the best vehicle for Defendants’ motion, the requested stay is also justified under Rule
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25 ² Rule 60(b)(1) governs motions for relief based on mistake, inadvertence, surprise, or
26 excusable neglect; 60(b)(2) governs such motions based on newly discovered evidence; 60(b)(3)
27 governs such motions based on fraud, misrepresentation, or misconduct by another party. See Fed.
28 R. Civ. P. 60(b)(1)–(3).

1 60(b).

2 **II. A Temporary, Partial Stay of the Court’s Injunction is Warranted.**

3 Notwithstanding USCIS’s recent near-total elimination of its backlog, a six-month, partial
 4 stay of the Court’s injunction with respect to Track 1 and Track 2 requests remains necessary.
 5 USCIS is still in the process of onboarding and training its dozens of newly hired FOIA processors,
 6 and it is just now beginning to implement its new \$15 million budget increase. Allowing the agency
 7 a period of time to implement these critical investments will best position it for sustainable
 8 compliance moving forward. To be clear, Defendants do not seek to “disregard[] the statutory
 9 timeline” for FOIA requests. Pls.’ Opp. 2. Just the opposite, Defendants are making every effort to
 10 process requests within the statutory deadlines, and they will continue to do so. But due to the
 11 overwhelming increase in requests over the past two quarters, there is substantial uncertainty about
 12 whether USCIS can maintain its low backlog in the short-term, at least until it completes its current
 13 training process. For the reasons set forth below, a temporary, partial stay is warranted.

14 **a. Defendants Face Exceptional Circumstances Warranting a Partial Stay.**

15 Plaintiffs deny exceptional circumstances are present because requests have been increasing
 16 for years, *see* Pls.’ Opp. 14, but certain fundamental facts are not in dispute: over the past two
 17 quarters, USCIS has received more A-File requests than ever before, more than 80,000 in each
 18 quarter. Ninth Declaration of Tammy M. Meckley (“9th Meckley Decl.”) ¶ 11, ECF No. 138-1.
 19 And in Fiscal Years 2021 and 2022, the number of A-File requests received by USCIS increased by
 20 approximately 20.04% and 28.9%³ respectively, the highest rates of increase in the past decade. *Id.*

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 25
 26 ³ At the time Defendants filed their Seventh Compliance Report and Motion, there were two

1 ¶ 10. Those facts alone demonstrate that Defendants are facing “exceptional circumstances”
2 sufficient to warrant a partial stay. *See, e.g., Daily Caller v. State*, 152 F. Supp. 3d 1, 12 (D.D.C.
3 2015) (finding “dramatic one-year increase” in FOIA requests of nearly 20% “certainly removes the
4 present increase from the ambit of a ‘predictable agency workload’”). Plaintiffs contend that
5 Defendants should have predicted these increases because more than a decade ago, in Fiscal Years
6 2010 and 2011, Defendants experienced increases of 28.10% and 26.27%, respectively. Pls.’ Opp.
7 15. But the increases those years were far smaller in an absolute sense because total requests at that
8 time were roughly one-third what they are today. *See id.* at 14 (chart of annual increases in requests).
9 Thus, even if Defendants were to take the “long-term view” as Plaintiffs suggest, Pls.’ Opp. 15, in
10 no prior year—including FY 2010 and FY 2011—have Defendants seen an increase as sizeable as
11 the nearly 68,000-request increase in Fiscal Year 2022.
12

13
14 Plaintiffs insist that compliance with the injunction today is “less onerous” than it was during
15 the first 60 days under the injunction. Pls.’ Opp. 12. Substantially complying with the requirement
16 to eliminate ICE’s and USCIS’s backlogs within 60 days while also processing incoming requests
17 was indeed extraordinarily burdensome. But it is an apples-to-oranges comparison to the
18 circumstances facing the agencies today, given that the number of incoming requests now is much
19 higher than it was in late 2020 when the injunction issued. In any case, the fact that Defendants did
20 not seek a stay of the injunction in 2020 does not preclude a finding of exceptional circumstances
21 now, when USCIS is experiencing the largest increase in requests in recent years. Moreover,
22

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25 weeks remaining in Fiscal Year 2022, and Defendants estimated that the fiscal year would end with
26 a 25%–30% increase over FY 2021. 9th Meckley Decl. ¶ 10. Consistent with that estimation,
27 USCIS’s current (though non-final) assessment is that it ultimately received approximately 303,188
28 requests in FY 2022—almost 68,000 more requests than in FY 2021, an increase of approximately
28.9%. 10th Meckley Decl. ¶ 5 n.1.

1 Defendants were able to substantially comply with the injunction in its first months largely by
2 temporarily detailing more than 100 refugee officers to USCIS’s FOIA office. *See* 3rd Declaration
3 of Tammy Meckley ¶ 16, ECF No. 97-1. For good reason, USCIS has determined that onboarding
4 and training new permanent staff is the better course to achieve sustainable compliance rather than
5 once again diverting significant resources away from the processing of refugee and asylum
6 applications—a key operational function
7

8 Finally, even if the recent dramatic increases in A-File requests could be considered
9 “predictable,” USCIS has made “reasonable progress” in reducing its backlog, and thus a finding of
10 exceptional circumstances is warranted. *See* 5 U.S.C. § 552(a)(6)(C)(ii). As noted, since filing the
11 partial stay motion on September 15, 2022, USCIS has worked to improve its compliance with the
12 injunction even at the same time as it sought to stay that injunction in part. The result has been a
13 near elimination of USCIS’s A-File backlog, from approximately 5,361 requests to approximately
14 197, a reduction of approximately 96.3% in one month. 10th Meckley Decl. ¶ 6. Combined with
15 the progress Defendants had already made since the injunction issued, *see* Defs.’ Mot. 14–15, ECF
16 No. 138, USCIS’s current backlog figure removes any doubt that Defendants have made “reasonable
17 progress.”
18
19

20 Because Defendants face the most dramatic increase in A-File FOIA requests in at least the
21 last decade, and because Defendants have made “reasonable progress” in reducing their backlogs,
22 exceptional circumstances are present.⁴
23

24 ⁴ In the background section of their brief, Plaintiffs discuss administrative modifications that
25 USCIS made, after undergoing notice-and-comment rulemaking, to Form G-639, which is an
26 optional form for submitting a FOIA request to USCIS, as well as to the FIRST interface for

1 **b. USCIS is Exercising Due Diligence in Responding to A-File FOIA Requests.**

2 Defendants recognize the Court’s serious concern that delays in responding to A-Files can
3 “undermine[] the fairness of immigration proceedings” and deprive class members of information
4 necessary “to defend against removal, to obtain benefits, and to gain citizenship.” SJ Order 1. For
5 this reason, Defendants have undertaken significant efforts to ensure that their handling of A-File
6 FOIA requests does not impact requesters’ due process interests or otherwise create unfairness in
7 the immigration system, with the following results:

- 9 • For requesters who show an upcoming immigration proceeding—whether “contest[ing]
10 charges of alienage or removability . . . [seeking] release on bond, and/or . . . [seeking] relief
11 from removal,” *id.* at 5—USCIS’s average response time is approximately 19.47 business
12 days, and not a single request is currently past the statutory deadline (*i.e.*, in the backlog).
13 *See* 9th Meckley Decl. ¶ 16c; 10th Meckley Declaration ¶ 5 n.1.
- 14 • For all other requesters—including those applying for immigration benefits or to obtain
15 citizenship, or requesting their A-Files for any other reason—USCIS has average processing
16

17

18 requesting A-Files online. *See* Pls.’ Opp. 6–7. While Plaintiffs assert that these modifications
19 somehow discourage requests for A-Files, *id.* at 6, they in fact *encourage* such requests by
20 specifically listing numerous documents contained in the A-File, something the form did not
21 previously do. Indeed, over the last six months—the same period in which USCIS modified the
22 form—the agency has received more FOIA requests seeking A-File records than ever before, many
23 of which include requests for entire A-Files. In any event, having failed to raise their concerns
24 during either of the two public comment periods for the form modifications, Plaintiffs have waived
25 any rights they may have had to challenge those actions. *See generally Unemployment Comp.*
26 *Comm’n v. Aragon*, 329 U.S. 143, 155 (1946) (courts decline to consider issues not raised before an
27 agency as to not “deprive[] the [agency] of an opportunity to consider the matter, make its ruling,
28 and state the reasons for its action”); *Nw. Coalition for Alternatives to Pesticides v. United States*,
544 F.3d 1043, 1057 (9th Cir. 2008) (“[W]e have no authority to reverse an agency decision based
on an objection that was not raised [before the agency].”) (Ikuta, J., concurring in part and dissenting
in part).

1 times of approximately 23 business days (Track 1) and 27.78 business days (Track 2), and
2 only approximately 197 requests are currently past the statutory deadline. 9th Meckley Decl.
3 ¶¶ 16a–16b; 10th Meckley Decl. ¶ 6.

- 4 • Even for the minority of requests that end up in the backlog, those requests typically remain
5 in the backlog for only a short period of time, as made clear by the average processing times
6 of under 30 business days for both Track 2 and 3 requests.

7
8 In light of this data, Defendants respectfully submit that the most significant concerns animating the
9 Court’s summary judgment decision are being addressed. Combined with USCIS’s recent near-
10 elimination of its backlog, the above data demonstrates due diligence in responding to requests.

11 Plaintiffs nonetheless criticize Defendants’ management of their FOIA operations,
12 rephending them for not implementing resource increases sooner, for regular turnover of staff, and
13 for the temporary accumulation of misrouted requests with ICE. Pls.’ Opp. 16–19. As with any
14 large organization, the USCIS FOIA office at times faces setbacks, whether a loss of personnel,
15 discovery of an error, or an unexpected increase in workload. The relevant consideration, however,
16 is how the organization responds to and addresses problems when they occur. Here, USCIS has
17 responded with a hiring surge of nearly 50 personnel that Plaintiffs acknowledge is “extensive,” Pls.’
18 Opp. 12, along with a \$15 million budget enhancement that will fund an additional 34 new personnel
19 plus other investments in the FOIA program, 9th Meckley Decl. ¶ 31. Once fully implemented,
20 these measures will better position USCIS to stay on top of future unexpected increases in requests,
21 and, in the meantime, demonstrate Defendants’ good faith and due diligence.

22
23
24
25 **c. A Six-Month, Partial Stay Would Not Harm Class Members.**

26 Finally, contrary to Plaintiffs’ assertion that a stay would harm “the interests of persons

1 requiring copies of their A-files,” Pls.’ Opp. 19, Defendants do not intend to relax their efforts to
2 meet statutory deadlines even if a stay is granted. Regardless of the stay, Defendants will continue
3 to work hard to timely respond to FOIA requests for A-Files. Nonetheless, although USCIS is now
4 processing more A-File requests than ever before, there is considerable uncertainty about whether
5 requests will continue to increase at an extraordinary rate before Defendants can fully train their new
6 personnel. The purpose of the stay is thus to provide necessary flexibility in the event USCIS cannot
7 maintain its recent success in reducing its backlog over the short-term—something it will endeavor
8 to avoid. And to the extent the backlog does increase again between now and March 15, Defendants
9 will strive to ensure requests are in the backlog for only a short period of time, to avoid undermining
10 the fairness of the immigration system or class members’ due process interests.
11

12
13 Because Defendants have met the legal requirements for a temporary, partial stay—whether
14 analyzed under the FOIA’s “safety valve” provision or Rule 60(b)—Defendants’ motion should be
15 granted.

16 **CONCLUSION**

17 For the foregoing reasons, Defendants respectfully request that the Court grant its motion for
18 a temporary, partial stay of the injunction.
19

20
21 Dated: October 12, 2022

Respectfully submitted,

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23 Principal Deputy Assistant Attorney General

24 ELIZABETH J. SHAPIRO
25 Deputy Branch Director

26 /s/Matthew Skurnik

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