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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' NOTICE OF MOTION
AND COMBINED SEVENTH
COMPLIANCE REPORT AND MOTION
FOR PARTIAL STAY OF INJUNCTION**

Hearing Date: October 26, 2022

Time: 2:00 p.m.

Hon. William H. Orrick

1 PLEASE TAKE NOTICE that on October 26, 2022 at 2:00 p.m.,¹ before the Honorable
2 William H. Orrick of the United States District Court for the Northern District of California,
3 Defendants will move this Court for a temporary, partial stay of the Court's injunction issued on
4 December 17, 2020. *See* ECF Nos. 89–90.

5 Specifically, Defendants seek a six-month stay of the Court's injunction with respect to Track
6 1 and Track 2 requests. Defendants do not seek to stay the injunction as to Track 3 requests. And
7 they do not seek to stay their obligation to submit quarterly reports to the Court. The basis for
8 Defendants' motion is set forth in the accompanying Combined Seventh Compliance Report and
9 Memorandum of Points and Authorities, and the Ninth Declaration of Tammy M. Meckley. A
10 proposed order is attached.

11 Dated: September 15, 2022

Respectfully submitted,

12
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¹ Due to the significant overlap in the issues, and for the convenience of the parties and the
26 Court, Defendants intend to file a stipulation or administrative motion to consolidate this hearing
with the previously scheduled Case Management Conference set for October 25, 2022 at 2:00 p.m.

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21 H.R. Rep. No. 104-795 (1996), *reprinted in* 1996 U.S.C.C.A.N. 344810

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INTRODUCTION

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3 In granting summary judgment to Plaintiffs, this Court emphasized that delays in responding
4 to FOIA requests for A-files have “real life consequences,” including “undermin[ing] the fairness of
5 immigration proceedings” and depriving class members of information necessary “to defend against
6 removal, to obtain benefits, and to gain citizenship.” Order Granting Summ. J. at 1, ECF No. 89
7 (“SJ Order”). The Court recently reiterated these concerns, finding that access to A-Files is
8 “necessary for appropriate due process.” Minute Order, ECF No. 135.
9

10 Defendants take these concerns very seriously and have worked assiduously to address them.
11 For requesters in immigration proceedings, such as those challenging removal or contesting
12 detention (*i.e.*, Track 3), only one A-File request is currently past due, and USCIS’s average
13 processing time is only approximately 19.47 business days. *See* Ninth Declaration of Tammy M.
14 Meckley (“9th Meckley Decl.”) ¶ 16c. And for other requesters—those applying for immigration
15 benefits or to obtain citizenship or requesting their A-Files for any other reason (*i.e.*, Tracks 1 and
16 2)—USCIS is only slightly behind schedule, and has average processing times of approximately 23
17 and 27.78 business days. *Id.* ¶¶ 16a, 16b. Accordingly, although as explained below USCIS’s
18 backlog has increased this quarter, Defendants have worked hard to ensure that their performance
19 does not meaningfully impact class members’ due process interests or otherwise create unfairness
20 in the immigration system.
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23 Defendants nonetheless acknowledge that their backlog this quarter has increased to
24 approximately 5,361 requests, an unfortunate reality resulting from extraordinary external
25 circumstances. *Id.* ¶ 15. Put simply, USCIS over the past six months has been flooded with a
26 dramatic and unprecedented number of requests for A-Files, far in excess of prior time periods and
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1 the agency’s projections. *Id.* ¶¶ 8–13. For the second quarter in a row, USCIS has received more
2 than 80,000 A-File requests, putting the agency on pace to have received approximately 34,183 more
3 A-File requests over the last six months than it did during the same period last year. *Id.* ¶ 12. In the
4 face of this increase, USCIS has processed more records than ever before—approximately 88,325
5 requests this quarter, and over the past six months approximately 33,656 more requests than the
6 same period the year prior. *Id.* ¶ 13. USCIS has responded with long-term improvements, including
7 authorizing the hiring of 49 new FOIA processing personnel, but the agency needs additional time
8 to complete the onboarding and training process for those positions. *Id.* ¶ 23. Further, USCIS has
9 recently approved a \$15 million budget increase for its FOIA office, which will fund the hiring of
10 an *additional* 34 personnel, as well as other investments in the FOIA program. *Id.* ¶ 31.

13 The FOIA statute includes a “safety valve” to provide an agency additional time to process
14 records when facing “exceptional circumstances.” *Open Am. v. Watergate Special Prosecution*
15 *Force*, 547 F.2d 605, 610 (D.C. Cir. 1976); *see* 5 U.S.C. § 552(a)(6)(C). As the D.C. Circuit
16 explained in the leading case on the issue, “exceptional circumstances” justify a stay when an agency
17 “is deluged with a volume of requests for information vastly in excess of that anticipated by
18 Congress, when the existing resources are inadequate to deal with the volume of such requests within
19 the time limits of [the statute], and when the agency can show that it ‘is exercising due diligence’ in
20 processing the requests.” *Open Am.*, 547 F.2d at 616. That rationale applies here, where USCIS is
21 working diligently to process more A-File requests than ever before but needs additional time to
22 onboard and train new personnel to address the recent surge in requests.

25 Defendants therefore seek a six-month, partial stay of the Court’s injunction as to Track 1

1 and Track 2 requests only, to allow USCIS time to reduce its current backlog. Defendants do not
2 seek to stay the injunction as to Track 3 requests, which implicate immigration proceedings. And
3 they do not seek to stay the requirement to report to the Court on a quarterly basis. Defendants have
4 conferred with Plaintiffs, who indicate they oppose this request. For the reasons set forth herein,
5 Defendants' motion should be granted.
6

7 BACKGROUND

8 This is a certified class action in which this Court held that Defendants engaged in an
9 unlawful pattern or practice of failing to make timely determinations on FOIA requests for A-Files.
10 On December 17, 2020, following briefing and oral argument, this Court entered summary judgment
11 in favor of Plaintiffs on their FOIA pattern or practice claims and issued a nationwide injunction
12 against Defendants. *See* SJ Order at 27; Judgment at 1–2, ECF No. 90. The injunction established
13 the following three requirements:
14

- 15 a. Adhere to FOIA Timing Requirements: Defendants are permanently
16 enjoined from further failing to adhere to the statutory deadlines for
17 adjudicating A-File FOIA requests, as set forth in 5 U.S.C. §§ 552(a)(6)(A)
18 and (B);
- 19 b. Eliminate the Backlogs: **Within sixty (60) days** of this order, defendants
20 shall make determinations on all A-File FOIA requests in USCIS's and ICE's
21 backlogs; [and]
- 22 c. Quarterly Compliance Reports: Until further order, defendants shall provide
23 this court and class counsel with quarterly reports containing information
24 regarding the number and percentage of A-File FOIA requests that were filed
25 and timely completed as well as the number and percentage of cases that
26 remain pending beyond the twenty or thirty-day statutory periods,
27 respectively 5 U.S.C. §§ 552(a)(6)(A) and (B). The first compliance report is
28 due **within ninety (90) days** of this order.

1 SJ Order at 27; Judgment at 1-2.

2 The Court made clear that Defendants were not required to achieve 100% compliance with
3 the injunction, but were instead required to achieve “substantial compliance within sixty (60) days”
4 of the Order. SJ Order at 24.

5 In the several months following the December 2020 injunction, Defendants undertook
6 tremendous efforts to reduce their backlogs and improve their FOIA processing times. In the first
7 90 days under the injunction, USCIS reduced its backlog by 97%, from approximately 21,986
8 requests to approximately 574. 1st Compliance Report, ECF No. 97. ICE eliminated its A-File
9 backlog entirely by the end of the second quarter—a result made possible by the interagency
10 memorandum of agreement between ICE and USCIS signed in 2020 and renewed in subsequent
11 years.²

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14 USCIS maintained a low backlog and near-perfect compliance with FOIA’s deadlines for the
15 second and third quarters of 2021. 2nd Compliance Report, ECF No. 104; 3d Compliance Report,
16 ECF No. 113. In the fourth quarter of 2021, due to factors such as end-of-year leave, limited
17 overtime, and competing priorities, USCIS’s backlog temporarily increased to approximately 2,978
18 requests. 4th Compliance Report, ECF No. 119. However, USCIS promptly addressed those issues,
19 and, in the first quarter of 2022, reported an A-File backlog of only around 120 requests. 5th
20 Compliance Report, ECF No. 125. In other words, in four of the first five quarters under the Court’s
21 injunction, USCIS reported a *de minimis* backlog—a particularly impressive result given that the
22 agency’s backlog prior to the injunction was over 20,000 requests.
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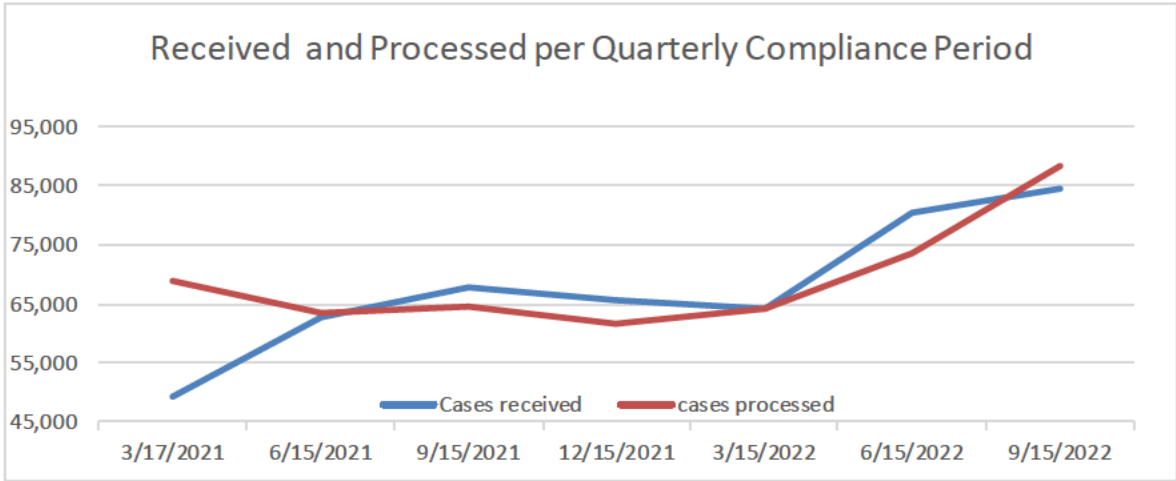
25 ² Most recently, on August 23, 2022, ICE and USCIS renewed their Memorandum of
26 Agreement for Fiscal Year 2023. 9th Meckley Decl. at 2 n.1.

1 In the second and third quarters of 2022, however, USCIS experienced an unexpected and
2 dramatic increase in incoming A-File requests. After having already seen a 20.04% increase in
3 requests in Fiscal Year 2021, USCIS is on track this fiscal year for an *additional* 25-30% increase.
4 9th Meckley Decl. ¶ 10. Indeed, for two quarters in a row now, USCIS has received over 80,000
5 requests—with approximately 84,484 requests having been received just this quarter. *Id.* ¶ 12.
6 USCIS has never previously received such a volume of A-File requests, which has far exceeded the
7 agencies’ models and projections. *Id.* ¶ 8. Over the last two quarters alone, USCIS has received
8 approximately 34,183 *more* A-File requests than the same period last year.³ 9th Meckley Decl. ¶ 12.

9
10 USCIS has worked hard to keep pace with this stunning increase in requests, and, indeed,
11 has nearly succeeded in doing so. The agency is now processing more FOIA requests than ever
12 before, including approximately 88,325 this quarter, and over the last two quarters approximately
13 33,656 *more* than the same period last year. *Id.* ¶ 13. The below chart demonstrates the steep
14 increases both in requests received and requests processed:
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25 ³ As previously explained, USCIS in addition received nearly 6,000 non-duplicative requests
26 which had been misrouted to ICE. *See* Notice, ECF No. 131; 6th Compliance Report, ECF No. 132;
9th Meckley Decl. at 4 n.3.

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Id. ¶ 13.

Notwithstanding USCIS’s efforts, due to the sharp increase in requests, a backlog has accumulated over the past two quarters, most recently totaling approximately 5,361 requests. *Id.* ¶ 15. Critically, however, only one of the approximately 5,361 requests in the backlog is from a Track 3 requester—in other words, for requesters who show they have an upcoming immigration proceeding, only one request is currently past due.⁴ *Id.* ¶ 5. In addition, the backlog represents less than 3.3% of total requests received over the past 6 months, and the requests in the backlog turn over relatively quickly. That is, despite a timely completion rate of only approximately 55.62 percent this quarter, USCIS’s average processing times for Track 1 and Track 2 requests are roughly 23 and 27.78 business days, respectively. *Id.* ¶¶ 16a, 16b. This means that even for requesters *not* in immigration proceedings, any delays they experience are relatively short and do not meaningfully interfere with their access to the immigration system.

⁴ Undersigned counsel has been informed that as of the time of this filing, the one Track 3 FOIA case in backlog status is in transit to the National Records Center.

1 Defendants nonetheless recognize that the Court’s injunction requires substantial compliance
2 with the FOIA’s statutory deadlines, and are undertaking long-term efforts to eliminate the backlog
3 and prevent it from increasing again in the future. Most significantly, USCIS has conducted
4 substantial hiring to fill 49 recently authorized permanent positions. *Id.* ¶ 23. This quarter, 31 new
5 staff members entered on duty to the FOIA program, and an additional ten will be entering on duty
6 shortly. *Id.* ¶ 24. Before these new hires can operate efficiently, however, they must undergo months
7 of training and mentorship. *Id.* ¶¶ 26–27. Such newly hired staff typically do not contribute in a
8 significant way to A-File processing for nearly four months once training begins, and up to six
9 months when retraining is necessary. *Id.* ¶ 27. Accordingly, USCIS does not anticipate reaping the
10 benefit of these new hires for several more months at a minimum. *Id.* ¶ 28.

13 With a view to maintaining resources into the future, USCIS also recently approved a \$15
14 million FOIA budget enhancement for Fiscal Year 2023, which begins October 1, 2022. *Id.* ¶ 31.
15 That enhancement will fund 34 additional new FOIA positions, continue overtime and contractual
16 personnel resources, and fund continued technological enhancements to the USCIS FOIA processing
17 system, FIRST. *Id.* ¶ 31.

19 More immediately, USCIS has made additional efforts to shore up its resources and increase
20 its efficiencies in the short term, including:

- 21 • Detailing six additional personnel from other parts of USCIS to the FOIA office this
22 reporting period, and continuing to accept FOIA assistance from two DHS
23 contractors. *Id.* ¶ 19.
- 24 • Utilizing approximately 19,233.5 hours of overtime this reporting period—
25 approximately 1,540 more than the previous quarter. *Id.* ¶ 20.
- 26 • Extending a contract for FOIA assistance and increasing the month-to-month

1 performance requirements of that contract by 50%. *Id.* ¶ 21.

- 2 • Initiating the process to create and hire a new Supervisory Training Instructor
3 position, which will focus on improving the quality and efficiency of training for
4 FOIA processors. *Id.* ¶ 26.
- 5 • Investing in a third-party integration project, which will allow frequent A-File
6 requesters to submit requests directly from their own case management systems. *Id.*
7 ¶ 29.

8 While USCIS cannot make precise predictions regarding its future backlog figures due to the
9 unpredictability of incoming FOIA receipts, it anticipates that once its current crop of newly
10 authorized hires is fully onboarded and trained over the next several months, it will be far better
11 positioned to tackle the current backlog and the record number of incoming requests, putting the
12 agency back on track to report low backlog numbers and high compliance rates in the future. *Id.*

13 ¶ 33.

14 LEGAL STANDARD

15 Upon receipt of a properly submitted FOIA request, an agency generally must determine
16 within twenty business days “whether to comply with such request” and then must notify the
17 requestor of its determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). An agency may
18 extend this deadline by ten business days in “unusual circumstances.” *Id.* § 552(a)(6)(B)(i). If the
19 agency does not satisfy the statutory time limits, the requestor “shall be deemed to have exhausted
20 his administrative remedies” and may file suit in federal district court. *See id.* § 552(a)(6)(C)(i).
21 The Court, while retaining jurisdiction over the action, may “allow the agency additional time to
22 complete its review of the records” upon a showing that “exceptional circumstances exist and that
23 the agency is exercising due diligence in responding to the request.” *Id.* This provision “was put in
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1 as a safety valve” in recognition that FOIA’s time limits might prove unworkable. *Open Am.*, 547
2 F.2d at 610.

3 In *Open America*, the D.C. Circuit held that an agency is entitled to additional time to process
4 a FOIA request under § 552(a)(6)(C) when it “is deluged with a volume of requests for information
5 vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal
6 with the volume of such requests within the time limits of subsection (6)(A), and when the agency
7 can show that it ‘is exercising due diligence’ in processing the requests.” 547 F.2d at 616; *see also*
8 *Gilmore v. DOE*, 4 F. Supp. 2d 912, 925 (N.D. Cal. 1998) (“By statute, an agency may be excused
9 from compliance with the FOIA time limits where exceptional circumstances exist and the agency
10 is proceeding with due diligence to process all requests.”); *Oglesby v. Dep’t of Army*, 920 F.2d 57,
11 64 (D.C. Cir. 1990) (“Frequently, if the agency is working diligently, but exceptional circumstances
12 have prevented it from responding on time, the court will refrain from ruling on the request itself
13 and allow the agency to complete its determination.”); *Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir.
14 1976) (adopting concurring opinion from *Open America*).

15 As part of the Electronic Freedom of Information Act Amendments of 1996, Congress
16 amended 5 U.S.C. § 552(a)(6)(C)(i) by adding the following subsection:

17 (ii) For purposes of [5 U.S.C. § 552(a)(6)(C)], the term “exceptional circumstances”
18 does not include a delay that results from a predictable agency workload of requests
19 under this section, unless the agency demonstrates reasonable progress in reducing
20 its backlog of pending requests.

21 5 U.S.C. § 552(a)(6)(C)(ii). Congress made clear its intention that—consistent with *Open*
22 *America*—courts would grant stays to agencies faced with a large volume of FOIA requests,
23 clarifying that even a “predictable agency workload of requests” constituted “exceptional
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1 circumstances” when an agency could demonstrate that it was making “reasonable progress” in
2 reducing its backlog. *See* H.R. Rep. No. 104-795, at 24 (1996), *reprinted in* 1996 U.S.C.C.A.N.
3 3448, 3467 (noting that the FOIA Amendments were “consistent” with the holding in *Open*
4 *America*).

5 As relevant here, courts have found that an agency can demonstrate “reasonable progress” in
6 many ways, including by actively seeking to increase resources and improving technology. *See*,
7 *e.g.*, *CareToLive v. FDA*, No. 2:08-CV-005, 2008 WL 2201973, at *5 (S.D. Ohio May 22, 2008)
8 (“To establish reasonable progress, courts generally have considered a range of factors, including
9 requests for additional funding, modernizing practices and equipment, and initiatives tied directly to
10 backlog reduction.”); *see also Gilmore*, 4 F. Supp. 2d at 925 (noting that “exceptional
11 circumstances” do *not* include “a normal, predictable workload . . . at least without a showing that
12 the agency unsuccessfully sought more FOIA resources from Congress or attempted to redirect its
13 existing resources”) (emphasis added).

14 Following *Open America*, courts in this and other circuits have regularly issued orders
15 extending the time to respond to FOIA requests, including orders granting stays of several years in
16 length or otherwise permitting agencies several years to process documents under exceptional
17 circumstances. *See, e.g., Fox v. DOJ*, No. CV-94-4622 JMI (JRX), 1994 WL 923072, at *1–2 (C.D.
18 Cal. Dec. 14, 1994) (FBI showed need for stay of five years); *Piper v. DOJ*, 339 F. Supp. 2d 13, 16
19 (D.D.C. 2004) (FBI showed need for stay of two years); *Williams v. FBI*, No. 99-3378 (AK), 2000
20 WL 1763680, at *3 (D.D.C. Nov. 30, 2000) (stay of approximately one and a half years); *Jud. Watch*
21 *of Fla., Inc. v. DOJ*, 102 F. Supp. 2d 6, 9 & n.1 (D.D.C. 2000) (“By order dated August 25, 1998,
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1 this court granted the FBI an Open America stay, affording the FBI until June 8, 2000 to respond to
 2 JWF’s request.”); *Democracy Forward Found. v. DOJ*, 354 F. Supp. 3d 55, 63 (D.D.C. 2018)
 3 (“These proceedings shall be stayed [from December 7, 2018] until January 13, 2019, and this court
 4 will retain jurisdiction over this matter.”); *Nat’l Sec. Archive v. SEC*, 770 F. Supp. 2d 6, 9 (D.D.C.
 5 2011) (granting one-year stay); *Elec. Frontier Found. v. DOJ*, 517 F. Supp. 2d 111, 121 (D.D.C.
 6 2007) (same); *Energy Future Coal. v. OMB*, 200 F. Supp. 3d 154, 163 (D.D.C. 2016) (granting stay
 7 of six months); *Elec. Priv. Info. Ctr. v. DOJ*, No. 02-0063 (CKK), 2005 WL 6793645, at *6 (D.D.C.
 8 Aug. 31, 2005) (granting stay of nearly a year).

10 While this case involves pattern or practice claims rather than individual FOIA requests,
 11 courts in this circuit have applied *Open America* and the “exceptional circumstances” principles in
 12 pattern or practice cases. See *Gilmore*, 4 F. Supp. 2d at 925 (pattern or practice case citing *Open*
 13 *America*); *Mayock v. Nelson*, 938 F.2d 1006, 1008 (9th Cir. 1991) (same); see also SJ Order at 15
 14 (assuming “that the ‘exceptional circumstances’ and ‘due diligence’ defenses are applicable to the
 15 pattern or practice claims in this case”).⁵

17 ARGUMENT

18 Defendants move for a six-month, partial stay of the Court’s injunction with respect to Track
 19 1 and Track 2 requests only, so that USCIS can complete the onboarding and training process for its
 20

21
 22 ⁵ This Court’s summary judgment order noted that the district court in *Mayock* found it
 23 “doubtful” that § 552(a)(6)(C) was “really intended by Congress to answer the problems presented
 24 by” a pattern or practice case. SJ Order at 14 (quoting *Mayock v. INS*, 714 F. Supp. 1558, 1565
 25 (N.D. Cal. 1989)). But it is no surprise that § 552(a)(6)(C) does not mention pattern or practice
 26 claims, as such claims are a judicially created cause of action not mentioned in the FOIA statute at
 all. In any case, the Ninth Circuit reversed the district court decision in *Mayock*, finding genuine
 disputes of material fact while citing both § 552(a)(6)(C) and *Open America*. See *Mayock*, 938 F.2d
 at 1007–08.

1 dozens of newly hired FOIA processors. The unparalleled increase in A-File FOIA requests
2 constitutes “exceptional circumstances” warranting a stay. At the same time, the agency has
3 demonstrated “due diligence” by addressing the due process and fairness concerns that animated the
4 Court’s injunction, as well as by hiring more than 30 new FOIA processors just this quarter (with
5 more on the way), authorizing a \$15 million budget increase, investing in new technology, and
6 utilizing thousands of hours of overtime. Likewise, USCIS has made “reasonable progress” in
7 reducing its backlog, as demonstrated by the fact that the agency is currently processing more FOIA
8 requests than ever before and has reported low backlogs in the majority of quarters under the Court’s
9 injunction. The request for a partial stay should be granted.

11 **I. Defendants are Operating Under Exceptional Circumstances.**

12 **a. USCIS is Flooded with a Volume of FOIA Requests Vastly in Excess of that**
13 **Anticipated by Congress.**

14 As explained above, USCIS has recently experienced a stunning surge in A-File FOIA
15 requests. The agency is on track to receive 25-30% more requests this year than in Fiscal Year
16 2021—a year in which the agency had already experienced an approximately 20.04% increase from
17 Fiscal Year 2020. 9th Meckley Decl. ¶ 10. While USCIS expected that requests would increase as
18 the country rebounded from the COVID-19 pandemic and in the wake of a presidential election—
19 and USCIS invested in personnel and technology in anticipation of such an increase—none of its
20 forecasts predicted such a sharp rise in requests. *Id.* ¶¶ 8, 10. Indeed, from Fiscal Years 2012 to
21 2017, USCIS FOIA receipts increased an average of only 10.2% year-over-year, with the largest
22 increases experienced during FY 2013 (12.74%) and FY 2017 (14.51%). *Id.* ¶ 8. Fiscal Years 2018
23 and 2019 saw smaller increases, of 0.45% and 4.36%, respectively. *Id.* ¶ 9. And in Fiscal Year
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1 2020, likely due to the COVID-19 pandemic, receipts fell by 2.12%. *Id.* Thus, at no point in recent
2 history has USCIS experienced increases comparable to the most recent two fiscal years. And in no
3 prior quarter has USCIS received as many requests as in the most recent two quarters—over 80,000
4 each. Unlike at summary judgment—where the Court concluded Defendants’ increasing workload
5 was “predictable”—USCIS is currently undergoing a “sudden spike in cases” that could not have
6 been predicted based on the agency’s prior experience. SJ Order at 15; *cf. Democracy Forward*
7 *Found.*, 354 F. Supp. 3d at 61 (“[W]hile the number of FOIA requests steadily increased from 2008
8 to 2016, the increases in the last two years have far exceeded what OIP experienced during that
9 earlier period.”). As a result, the volume of incoming FOIA requests vastly exceeds not only the
10 expectations of Congress, but the expert forecasts of the agency that processes more FOIA requests
11 than any other in the federal government.⁶

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14 **b. USCIS’s Existing Resources Are Insufficient to Address Incoming Requests.**

15 As noted, in response to the unprecedented rise in requests, USCIS is now processing more
16 A-File FOIA requests than at any point in its history, including approximately 88,325 requests during
17 the most recent compliance period. 9th Meckley Decl. ¶ 13. Nonetheless, while USCIS’s processing
18 capacity has increased, the number of requests over the past two quarters has increased faster. *See,*
19 *e.g., id.* ¶¶ 12–13 (explaining that while over the past six months USCIS has processed
20 approximately 33,656 more requests than the same period last year, the agency has also received
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24 ⁶ The only prior fiscal years with comparable percentage increases were over a decade ago,
25 when the number of incoming requests overall was much smaller. *See id.* at 3 n.2 (explaining that in
26 Fiscal Year 2010, USCIS experienced a 28% increase, from 71,426 to 91,503 annual requests, and
in Fiscal year 2011, USCIS experienced an 26.2% percent increase, from 91,503 to 115,545 annual
requests).

1 approximately 34,183 more requests than the same period last year). This has led to the agency's
2 present backlog, and the reality that, at least until USCIS's recent hires are fully onboarded and
3 trained, the agency's resources are not yet sufficient to handle all incoming Track 1 and 2 requests.
4 The combination of the deluge of new requests and USCIS's limited resources demonstrates that
5 exceptional circumstances are present here. *See, e.g., Daily Caller v. State*, 152 F. Supp. 3d 1, 12
6 (D.D.C. 2015) (finding "dramatic one-year increase" in FOIA requests of nearly 20% "certainly
7 removes the present increase from the ambit of a 'predictable agency workload'").
8

9 **c. USCIS Has Made Reasonable Progress in Reducing Its FOIA Backlog.**

10 Even if the current volume of FOIA requests constitutes a predictable workload (and as
11 explained above, it does not), USCIS is making reasonable progress in reducing its backlog of
12 pending requests, and thus a finding of exceptional circumstances is warranted. *See* 5 U.S.C. §
13 552(a)(6)(C)(ii) ("the term 'exceptional circumstances' does not include a delay that results from a
14 predictable agency workload of requests under this section, unless the agency demonstrates
15 reasonable progress in reducing its backlog of pending requests"); *cf. Democracy Forward Found.*,
16 354 F. Supp. 3d at 63 ("As noted, because the court finds that 'extraordinary circumstances' exist to
17 warrant a stay, the court need not determine whether OIP has undertaken *reasonable efforts* to reduce
18 its backlog." (emphasis added)).
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21 In assessing whether an agency has made "reasonable progress," courts look not just to the
22 most recent backlog figures, but to the agency's performance over time. *See, e.g., Appleton v. FDA*,
23 254 F. Supp. 2d 6, 10 (D.D.C. 2003) (considering FOIA backlogs across four fiscal years); *Ctr. for*
24 *Pub. Integrity v. State*, No. 05-2313(JDB), 2006 WL 1073066, at *5 (D.D.C. Apr. 24, 2006) ("The
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1 Court agrees that it is reasonable to look beyond a single year in determining whether an agency has
2 made reasonable progress.”). Here, Defendants have made overwhelming reductions in their
3 backlogs since the Court entered the injunction in December 2020. At the time of the injunction,
4 USCIS’s backlog was approximately 21,986 requests and ICE’s backlog was approximately 19,885
5 requests. Since then, ICE has eliminated its backlog entirely, and its backlog remains at zero.
6 USCIS, for its part, has reported backlogs in the hundreds or less in four of the last seven quarters.
7 *See* ECF Nos. 97, 104, 113, 125 (reporting USCIS backlogs of approximately 574, 244, 92, and 120
8 requests, respectively). In the fourth and sixth quarters, USCIS reported backlogs of approximately
9 2,978 and 1,884, respectively—again far less than when the injunction issued. *See* ECF Nos. 119,
10 132. And even now, as USCIS’s backlog has increased to approximately 5,361 requests, it remains
11 less than one fourth of what it was on the date of the injunction, and the average processing times
12 for each track remains under 30 business days. Although USCIS’s backlog has fluctuated, the
13 overall picture easily meets the “reasonable progress” standard.

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16 **II. USCIS is Exercising Due Diligence in Responding To A-File FOIA Requests.**

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18 **a. USCIS Has Worked to Address the Due Process and Fairness Concerns That Animated the Court’s Injunction.**

19 In entering an injunction in this case, this Court explained that “compliance with FOIA
20 deadlines is especially important in the immigration context” because it provides “an essential
21 safeguard” to plaintiffs who need a copy of their A-Files to “pursue immigration benefits or defend
22 themselves or their clients against removal.” SJ Order at 5. Defendants have prioritized those
23 concerns while seeking to process all A-File FOIA requests as quickly as possible. For requesters
24 who show an upcoming immigration proceeding—whether “contest[ing] charges of alienage or
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1 removability . . . [seeking] release on bond, and/or . . . [seeking] relief from removal,” *id.*—only one
2 of their A-File requests is in USCIS’s backlog, and thus only one of their responses is currently past
3 due. In fact, such requesters receive responses to their requests on average within only
4 approximately 19.47 business days. *See* 9th Meckley Decl. ¶ 16c.

5 DHS has also sought to minimize delays for requesters not in immigration proceedings,
6 including those “pursu[ing] immigration benefits,” SJ Order at 5, or seeking their A-Files for any
7 other reason. Even now—when USCIS is working to process an unprecedented number of requests
8 in a very short period—the average Track 1 or Track 2 requester is receiving a response within 30
9 business days. *See* 9th Meckley Decl. ¶¶ 16a, 16b (explaining that average processing times for
10 Track 1 and 2 requesters are approximately 23 and 27.78 business days, respectively). USCIS has
11 worked diligently to avoid the sort of “significant negative consequence to plaintiffs” that this Court
12 identified when it issued its injunction, and it will continue to do so, while also working to reduce
13 the current backlog. SJ Order at 23; *cf. Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982) (holding that
14 the “prime consideration” when considering injunctive relief in a FOIA dispute “should be the effect
15 on the public of disclosure or nondisclosure”).

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19 **b. USCIS Has Secured Additional Resources to Help Process A-File Requests But**
20 **Requires Further Time to Train Its New Personnel.**

21 To ensure that it can provide requesters with their A-Files as quickly as possible, USCIS is
22 taking a range of steps to increase the resources and efficiency of its FOIA office. This includes a
23 long-term investment in nearly 50 newly authorized FOIA processing positions. 9th Meckley Decl.
24 ¶ 23. Over the last three months, 31 of these new staffers have entered on duty, and an additional
25 10 will enter on duty shortly. *Id.* ¶ 24. Because A-Files are often complex and contain sensitive
26

1 material, however, these staffers must undergo substantial training before they can operate at full
2 capacity. *Id.* ¶ 26. This training includes “three consecutive weeks of virtual classroom training,
3 followed by 90 days of mentoring that includes 100-percent, page-by-page review and approval of
4 each case processed by the trainee.” *Id.* ¶ 27. Due to the complexity of the subject matter, “newly-
5 hired staff do not contribute towards processing A-files in a significant way for nearly four months
6 once training begins, and sometimes, when re-training is required, up to six months.” *Id.* And
7 “because FOIA trainees are mentored by experienced, high-producing FOIA processors, the FOIA
8 program suffers the loss of its best performing processors” during this training period. *Id.* USCIS
9 anticipates that once its recent group of new hires is fully trained, the agency will be far better
10 positioned to respond to the record increases in requests, and will be “back on track” to report low
11 backlog numbers and high compliance rates in the future. *Id.* ¶ 33.

14 To help ensure sufficient resources down the road, USCIS also recently approved a \$15
15 million budget enhancement that will fund an additional 34 new FOIA positions, as well as continue
16 overtime and contractual personnel resources and fund continued technological enhancements to the
17 USCIS FOIA processing system, FIRST. *Id.* ¶ 31.

19 USCIS’s other efforts—including obtaining detailees from other parts of the agency, utilizing
20 more than 19,000 hours of overtime this quarter, extending and increasing a contract for FOIA
21 processing assistance, investing in a third-party technology integration project, and creating a new
22 training instructor position—all confirm the agency is exercising due diligence. 9th Meckley Decl.
23 ¶¶ 17–31; *see, e.g., Fiduccia v. DOJ*, 185 F.3d 1035, 1041–42 (9th Cir. 1999) (upholding district
24 court finding that the FBI “exercised due diligence because it had requested additional money to
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1 deal with FOIA requests and been turned down, redistributed personnel to deal with the backlog,
2 and was attempting to deal with the backlog in the most efficient manner possible.”).

3 In sum, USCIS faces exceptional circumstances in reducing its A-File FOIA backlog, and
4 has demonstrated due diligence in responding to requests. A six-month partial stay of the injunction
5 as to Track 1 and Track 2 requests through March 15, 2023 while USCIS trains its newly hired
6 personnel is warranted, and fits comfortably within the decisions of other courts to grant stays of up
7 to several years when appropriate. *See, e.g., Jimenez v. FBI*, 938 F. Supp. 21, 31–32 (D.D.C. 1996)
8 (nearly four-year stay granted to process 700 pages).
9

10 **CONCLUSION**

11 For the foregoing reasons, Defendants respectfully request that the Court temporarily stay
12 the Court’s December 17, 2020 injunction in part, with respect to Track 1 and Track 2 requests only,
13 for a period of six months, until March 15, 2023.
14

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Respectfully submitted,

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