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**REDACTED VERSION
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11 *(Additional Counsel for Plaintiffs Listed in Signature Block)*

12 UNITED STATES DISTRICT COURT FOR THE
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 Zachary NIGHTINGALE; Courtney
16 McDERMED; Cheryl DAVID; Pao LOPA;
17 Maribel CARANDANG,

18 Plaintiffs,

19 v.

20 U.S. CITIZENSHIP AND IMMIGRATION SERVICES;
21 U.S. IMMIGRATION AND CUSTOMS
22 ENFORCEMENT; U.S. DEPARTMENT OF
23 HOMELAND SECURITY,

24 Defendants.

No. 3:19-cv-03512-WHO

**Plaintiffs' Notice of Motion
and Motion for Summary
Judgment**

Date: December 9, 2020

Time: 2:00 P.M.

Judge William H. Orrick

1 PLEASE TAKE NOTICE that on December 9, 2020, at 2:00 p.m. at the above-
2 entitled court located at the San Francisco Courthouse, Courtroom 2 of the 17th floor, 450
3 Golden Gate Avenue, San Francisco, CA 94102, with the Honorable District Judge
4 William H. Orrick presiding, Plaintiffs Zachary NIGHTINGALE, Courtney McDERMED,
5 Cheryl DAVID, Pao LOPA, and Maribel CARANDANG will, and hereby do, move this
6 Court for summary judgment and injunctive relief pursuant to Federal Rules of Civil
7 Procedure 56 and 65.
8

9 This motion is based on the attached Memorandum of Points and Authorities, the
10 pleadings, records and files in this action, and such other evidence and argument as may
11 be presented at the time of hearing. A proposed order accompanies these filings.
12

13 Respectfully submitted,

14 s/ Trina Realmuto

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25 Admitted *pro hac vice*

26 Dated this 30th day of September, 2020.
27

28 Plfs.' Summary J. Mx.

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 Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AIC (Sept. 28, 2016)4
 Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POLICY INST. (July 2020)6

I. INTRODUCTION

1
2 Plaintiffs and class members (hereinafter “Plaintiffs”) are noncitizens and attorneys
3 challenging the systemic failure of Defendants U.S. Citizenship and Immigration Services
4 (“USCIS”), U.S. Immigration and Customs Enforcement (“ICE”), and U.S. Department of
5 Homeland Security (“DHS”) to respond to their requests for Alien Registration Files (“A-Files”)
6 within the statutory deadlines mandated by the Freedom of Information Act (“FOIA”). A-Files
7 contain information critical to an individual’s ability to legalize status, defend against deportation,
8 obtain citizenship, and travel. Defendants serve both as the custodians of A-Files and as prosecutors
9 in removal proceedings and adjudicators of applications for immigration benefits. Yet, Defendants’
10 delays deprive Plaintiffs of the information they need to defend against removal, obtain benefits,
11 and gain citizenship. Plaintiffs are not aware of any other agency that allows one party to
12 unilaterally control evidence in an adversarial proceeding, depriving the other party of meaningful
13 access to it. Defendants’ recent changes to A-File FOIA processing do not resolve these issues.

14
15
16 Plaintiffs seek an order declaring this pattern or practice unlawful, permanently enjoining
17 Defendants from violating FOIA, ordering the elimination of existing backlogs within thirty days,
18 requiring regular reporting to class counsel, and providing any other relief the Court deems proper.
19 Absent such relief, Defendants will continue to irreparably harm Plaintiffs’ ability to represent their
20 clients or themselves in defending against deportation and seeking immigration benefits.

II. BACKGROUND

A. THE CERTIFIED CLASSES

21
22
23
24 This class action challenges Defendants’ pattern or practice of failing to comply with the
25 statutory deadlines set forth in FOIA to respond to noncitizens’ requests for A-Files. On October
26 15, 2019, this Court found that class certification was “appropriate in these extraordinary
27 circumstances” and, accordingly, certified the following two classes:
28

1 **USCIS Class:** All individuals who filed, or will file, A-File FOIA requests with
2 USCIS which have been pending or will be pending, with USCIS for more than 30
3 business days without a determination.

4 **ICE Referral Class:** All individuals who filed, or will file, A-File FOIA requests
5 with USCIS that USCIS has referred, or will refer, to ICE and which have been
6 pending, or will be pending, for more than 30 business days from the date of the
7 initial filing with USCIS without a determination.

8 ECF 47 at 2, 6, 19. Plaintiffs move for summary judgment as the record demonstrates Defendants'
9 systematic failure to respond to A-File FOIA requests within the statutory timeframes.

10 **B. DEFENDANTS' LEGAL OBLIGATIONS**

11 Through FOIA, Congress obligated agencies to make determinations on FOIA requests
12 within, at most, thirty business days, including when USCIS refers all or a portion of the request to
13 ICE. 5 U.S.C. §§ 552(a)(6)(A), (B); 6 C.F.R. §§ 5.4(d)(3), (g). The law is clear and unequivocal in
14 its mandate. 5 U.S.C. § 552(a)(6)(A)(i) (“Each agency, . . . , shall—(i) determine within 20 days . . .
15 after the receipt of any such request whether to comply with such request and shall immediately
16 notify the person making such request . . .”); 5 U.S.C. § 552(a)(6)(B)(i) (stating that, in “unusual
17 circumstances,” an agency may extend its response time by “no more than ten working days,”
18 provided it sends the requestor “written notice”).

19 Congress recognized the importance of timely conveying the information sought through
20 FOIA. When Congress initially enacted a ten-day time limit for responding to FOIA requests, it
21 recognized that “information is often useful only if it is timely” and that the purpose of the time
22 limit was to require agencies “to respond to inquiries . . . within specific time limits.” H. REP. NO.
23 93-876, at 126 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6267, 6271. When Congress extended
24 the deadline to twenty business days, it again recognized “[l]ong delays in access can mean no
25 access at all,” and again urged agencies to “respond to requests in a timely manner.” H. REP. NO.
26 104-795, at 16-23, *as reprinted in* 1996 U.S.C.C.A.N. 3459, 3466; *see also Gilmore v. U.S. DOE*,
27 33 F. Supp. 1184, 1187–88 (N.D. Cal. 1998) (discussing legislative history of FOIA deadlines);
28

1 *Our Child. Earth Found. v. Nat'l Marine Fisheries Serv.*, No. 14-1130 SC, 2015 U.S. Dist. LEXIS
 2 94997, at *24–26 (N.D. Cal. July 20, 2015) (same). Although courts recognize that resources for
 3 FOIA compliance may be “heavily taxed,” that excuse does not give agencies “carte blanche” to
 4 violate the statute. *Our Child. Earth Found.*, 2015 U.S. Dist. LEXIS 94997, at *27. Rather, it is
 5 incumbent on agencies to “inform Congress of the additional resources needed to fully comply with
 6 the FOIA.” H. REP. NO. 104-795, *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3472.¹

8 **C. THE IMPORTANCE OF A-FILES AND HARM CAUSED BY DELAYED RECEIPT**

9 The FOIA deadlines imposed by Congress provide an essential safeguard for Plaintiffs who
 10 require a copy of their A-Files to pursue immigration benefits or defend themselves or their clients
 11 against removal.² *See generally* Exh. A1, Supplemental Declaration of Zachary Nightingale
 12 (“Supp. Nightingale Decl.”); Exh. A2, Declaration of Matthew Hoppock (“Hoppock Decl.”); Exh.
 13 A3, Declaration of Laura St. John (“St. John Decl.”); Exh. A4, Declaration of Andrea Sáenz
 14 (“Sáenz Decl.”); Exh. A5, Declaration of Sabrina Damast (“Damast Decl.”); Exh. A6, Declaration
 15 of Hans Meyer (“Meyer Decl.”); *see also* ECF 28-3–28-16. For example, A-Files include critical
 16 records of past interactions between the individual and DHS; records of prior entries, admissions,
 17 or removal orders; records of past statements; and records of past applications filed by the
 18 noncitizen or on the noncitizen’s behalf. *See, e.g.*, Hoppock Decl. ¶¶9–12, 15–18; Damast Decl.
 19 ¶¶11–13, 15; Sáenz Decl. ¶¶8–9; St. John Decl. ¶6; Meyer Decl. ¶7; Supp. Nightingale Decl. ¶2.
 20 Where an individual is a victim of an immigration scam, *see, e.g.*, Hoppock Decl. ¶13, mentally
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24 _____
 25 ¹ *Cf. Pereira v. Sessions*, 138 S. Ct. 2105, 2118–20 (2018) (rejecting the agency’s invocation
 26 of “administrative realities of removal proceedings” to avoid compliance with clear statutory
 27 language, concluding, “[a]t the end of the day, given the clarity of the plain language, we apply the
 28 statute as it is written”) (internal quotation marks omitted).

² “An A-File, or Alien File, is the official Government record that contains information
 regarding noncitizens as they pass through the US immigration and inspection process.” Exh. B,
 Compliance Review of U.S. Citizenship and Immigration Services, U.S. Department of Homeland
 Security Freedom of Information Act Program, at Bates 81744.

1 incompetent, or suffering from extreme trauma, *see, e.g.*, St. John Decl. ¶¶5–6, 9; Sáenz Decl. ¶12,
 2 the A-File may be the only means available to discern their immigration history.

3 A-Files are especially critical to individuals in removal proceedings. A-File records inform
 4 whether detained individuals—most of whom are unrepresented—can contest charges of alienage
 5 or removability, are eligible for release on bond, and/or are eligible for relief from removal.³ *See*
 6 Supp. Nightingale Decl. ¶¶2, 4, 16; Hoppock Decl. ¶¶9–12, 15; St. John Decl. ¶6; Sáenz Decl. ¶8;
 7 Damast Decl. ¶¶4, 5, 12; Meyer Decl. ¶¶6, 9. Indeed, without access to the information in A-Files,
 8 attorneys and pro se individuals are at a distinct disadvantage as the ICE prosecutor has access to
 9 and uses this information in prosecuting the case. Hoppock Decl. ¶14; Sáenz Decl. ¶¶9, 16; Supp.
 10 Nightingale Decl. ¶4. Consequently, attorneys either must seek continuances to await the results of
 11 the FOIA request or risk going to trial without the A-File. *Accord* Supp. Nightingale Decl. ¶6
 12 (noting that ICE prosecutors oppose motions to continue to await response to A-File FOIA
 13 requests). For detained individuals, continuances result in longer detention, which, for some, is
 14 intolerable and leads them to forsake meritorious claims in order to end detention. St. John Decl.
 15 ¶¶10–12; Sáenz Decl. ¶13; Supp. Nightingale Decl. ¶16; Hoppock Decl. ¶26; Meyer Decl. ¶7. If
 16 the immigration judge (“IJ”) denies the continuance, or the case moves forward without the A-File,
 17 attorneys and their clients must examine documents from the A-File for the first time at trial when
 18 DHS submits them. Hoppock Decl. ¶14; Damast Decl. ¶13.

19 Defendants admit the importance of A-Files. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 ³ Notably, persons in removal proceedings are not entitled to appointed counsel, *see* 8 U.S.C.
 26 § 1229a(b)(4)(A), unless an IJ deems them incompetent, *Franco-Gonzalez v. Holder*, No. CV 10-
 27 02211 DMG (DTBx), 2013 WL 8115423, at *1–2 (C.D. Cal. Apr. 23, 2013). Thus, most must
 28 defend themselves pro se against a trained ICE prosecutor. *See* Ingrid Eagly & Steven Shafer,
Access to Counsel in Immigration Court, AIC (Sept. 28, 2016), <https://tinyurl.com/zogzjsw>
 (“Nationally, only 37 percent of all immigrants secured legal representation in their removal
 cases. . . . Only 14 percent of detained immigrants acquired legal counsel.”).

1 [REDACTED]
 2 [REDACTED]; Exh. E, DHS
 3 FOIA Backlog Reduction Plan 2020-2023 (Nov. 8, 2019), at Bates 88274–75 (“Requestors need
 4 [A-File] records for personally critical and often time-sensitive reasons—they might be applying
 5 for benefits, facing deportation, or challenging their employment termination. . . . A-Files document
 6 the life of immigrants in the United States.”).⁴ As Defendants acknowledge:

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 [REDACTED]. The Ninth Circuit also recognizes the importance of A-Files,
 15 concluding that: “We are unable to imagine a good reason for not producing the A-file routinely
 16 without a request.” *Dent v. Holder*, 627 F.3d 365, 375 (9th Cir. 2010). And Defendants have
 17 implemented no process other than FOIA by which persons in removal proceedings can obtain their
 18 immigration records.⁵ Thus, to date, FOIA is the only mechanism for persons—even those placed
 19

20 _____
 21 ⁴ See also Exh. F, Deposition of James V.M.L. Holzer (“Holzer Depo.”) at 56:10–57:16; Exh.
 22 C, Letter from Director of OGIS (Dec. 31, 2019), at Bates 3–4 (questioning “why FOIA is being
 23 used in immigration proceedings as the primary mechanism for accessing A-files”); [REDACTED]

24 ⁵ Defendants’ witnesses claim that noncitizens can access their A-Files via *Touhy* motions,
 25 subpoenas, and criminal proceedings. See Exh. G, Deposition of Catrina Pavlik Keenan (Aug. 12,
 26 2020) (“Keenan Depo.”), at 61:18–62:8; Exh. H, Deposition of Tammy Meckley (Sept. 3, 2020)
 27 (“Meckley Depo.”), at 95:20–96:1; Holzer Depo. 130:10–12, 132:3–13, 139:3–16. However,
 28 *Touhy* motions are generally inapplicable to individuals facing removal in immigration
 proceedings. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 6 C.F.R. §§ 5.41–
 5.45; see also Supp. Nightingale Decl. ¶¶7–10. In addition, attorney attempts to subpoena A-Files
 regularly are denied, see, e.g., Hoppock Decl. ¶21, and criminal proceedings are not a source of A-
 Files as not all individuals have been in criminal proceedings and any such criminal records are not

1 in removal proceedings—to obtain a complete copy of their A-File. Supp. Nightingale Decl. ¶¶3,
 2 7–10; Hoppock Decl. ¶¶19, 42; St. John Decl. ¶¶8, 14; Sáenz Decl. ¶7; Damast Decl. ¶¶6–8; Meyer
 3 Decl. ¶5; [REDACTED]
 4 [REDACTED]
 5 [REDACTED]; *see Dent*, 627 F.3d at 374 (stating government position that “the only way [a person in
 6 removal proceedings] would be entitled to get the [A-]file would be a [FOIA] request”).⁶

8 Because there is no adequate substitute for an A-File, and it can only be accessed through
 9 FOIA, adherence to FOIA’s timeframes is critical. This is especially true given Defendants’ efforts
 10 to broaden the population of individuals subject to removal, *see Sarah Pierce & Jessica Bolter,*
 11 *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the*
 12 *Trump Presidency*, MIGRATION POLICY INST. 36–48 (July 2020) (listing the Trump administration’s
 13 efforts to subject more individuals to removal and to increase immigration detention). Defendants’
 14 failure to timely respond to A-File FOIA requests creates an information asymmetry that precludes
 15 Plaintiffs from challenging unlawful removal orders or protracted detention.

17 **III. STANDARD OF REVIEW**

18 Summary judgment is warranted where “the movant shows that there is no genuine dispute
 19 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
 20 56(a). The moving party bears the burden of demonstrating that they are entitled to summary
 21

22
 23 _____
 24 necessarily complete A-Files. Moreover, notwithstanding the Ninth Circuit’s recognition of the
 25 importance of A-Files, efforts to obtain documents under *Dent* have failed. Supp. Nightingale Decl.
 26 ¶5; Hoppock Decl. ¶20; St. John Decl. ¶¶14–16; Sáenz Decl. ¶7; Damast Decl. ¶¶6–8.

27 ⁶ *See also* 8 C.F.R. § 1208.12(b) (stating that an asylum applicant may seek documents
 28 through a FOIA request, but is not entitled to conduct discovery directed towards federal agencies
 or officers); *Matter of Henriquez Rivera*, 25 I. & N. Dec. 575, 579 (BIA 2011) (rejecting IJ
 determination that DHS is required to provide the court with an applicant’s complete record from
 USCIS); *Matter of Benitez*, 19 I. & N. Dec. 173 (BIA 1984) (noting that the immigration courts
 need not honor requests for discovery); Hoppock Decl. ¶21 (immigration court requires proof that
 an A-File FOIA request was submitted and records withheld before issuing a subpoena for A-File).

1 judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Once the moving party has done
 2 so, the burden shifts to the nonmovant to make a “sufficient showing on an essential element of her
 3 case with respect to which she has the burden of proof” to survive summary judgment. *Id.* at 323.
 4 Where the only issue is a legal question, summary judgment is proper. *See, e.g., Partridge v. Reich*,
 5 141 F.3d 920, 923 (9th Cir. 1998) (agency’s statutory interpretation is a question of law).
 6

7 **IV. ARGUMENT**

8 **A. USCIS AND ICE HAVE A PATTERN OR PRACTICE OF FAILING TO MAKE 9 TIMELY DETERMINATIONS ON A-FILE FOIA REQUESTS**

10 **1. USCIS Has a Pattern or Practice of Failing to Comply with the FOIA Statute**

11 USCIS has a pattern or practice of failing to make timely determinations on A-File FOIA
 12 requests, reporting a backlog for each of the last eight years. As evidenced below, USCIS’ backlog
 13 has increased in recent years—growing from 16,247 in FY2015 to 25,446 in August 2020.
 14

15 **USCIS HISTORICAL BACKLOG**

16 DATE	RECEIVED	BACKLOG	SOURCE⁷
FY2012	117,787	10,727	FY2012 DHS FOIA Report at 19, 20, Exh. I1
FY2013	132,797	3,394	FY2013 DHS FOIA Report at 18, Exh. I2
FY2014	143,794	5,026	FY2014 DHS FOIA Report at 19, Exh. I3
FY2015	162,986	16,247	FY2015 DHS FOIA Report at 20, Exh. I4
FY2016	166,732	35,763	FY2016 DHS FOIA Report at 19, 20, Exh. I5
FY2017	190,941	37,887	FY2017 DHS FOIA Report at 19, Exh. I6
FY2018	191,804	41,329	FY2018 DHS FOIA Report at 21, Exh. I7
June 19, 2019 – <i>Nightingale v. USCIS</i> filed			
September 2019 – USCIS invokes “unusual circumstances” in all Track 2 and 3 A-File FOIA Requests ⁸			FY2018 DHS FOIA Report at 27, Exh. I8; Defs.’ Resp. to Interrogatory (“ROG”) (Dec. 13, 2019), ROG 16 at 9, Exh. J
FY2019	200,174	14,773	FY2019 DHS FOIA Report at 14, 27, Exh. I8
June 30, 2020		21,160	Defs.’ Resp. to ROG (July 29, 2020), ROG 21 at 2–3, Exh. K
Aug. 31, 2020		25,446	Meckley Depo. 49:16.

25
 26 ⁷ References to the “DHS FOIA Report” are to the Freedom of Information Report to the Attorney General of the United States and the Director of the Office of Government Information Services, which are available by fiscal year at <https://www.dhs.gov/foia-annual-reports>. The relevant portions of those reports accompany this motion as Exhibit I.

27
 28 ⁸ This policy change to USCIS’ backlog calculation removed 2,338 cases from the FY2019 backlog. Exh. I8, FY2019 DHS FOIA Report at 27.

1
2 As of August 31, 2020, USCIS had a FOIA backlog of approximately 25,446 cases.
3 Meckley Depo. 49:16. Although USCIS has attempted to streamline FOIA processing through the
4 Freedom of Information Act (FOIA) Immigration Records System (“FIRST”), discussed *infra*
5 Section IV.B.1, it continues to carry a large FOIA backlog. In fact, from June through August 2020,
6 USCIS’ backlog increased by more than 6,000 cases. *Compare* [REDACTED]
7 [REDACTED], *with*
8 [REDACTED]
9 [REDACTED].

10
11 Ninety-nine percent of the total FOIA requests USCIS receives are A-File FOIA requests,
12 Meckley Depo. 49:1–5; 51:12–16, and, accordingly, A-File requests “account for the largest
13 portion of DHS’s FOIA backlog.” Exh. N, Defs.’ Resp. to Pls.’ First Set of Requests for Admission,
14 at 6–7. Over a year after this lawsuit was filed, USCIS processing times have not changed
15 significantly for Track 2 cases, the complex track where USCIS processes most A-File requests.
16 *Compare* ECF 1 at 6 ¶26 (“[T]he average processing time for an A-File FOIA request was between
17 55 and 90 days.”), *with* Meckley Depo. at 152:8–15 (“[V]ery proud to say that . . . our average
18 processing time for . . . Track 2 is 71 [days].”). FOIA requests for A-Files often take significantly
19 longer than the average timeframe, typically languishing in the backlog for several months or over
20 a year. *See* Supp. Nightingale Decl. ¶¶11, 14 (reporting over seven month delays); Hoppock Decl.
21 ¶22 (“[M]any months or years.”); St. John Decl. ¶8–9 (three to six months for “basic” requests, and
22 often over a year); Sáenz Decl. ¶11 (“[M]onths or even years.”); Damast Decl. ¶9 (six months to
23 over a year); Meyer Decl. ¶5 (reporting “six months to over a year” for USCIS files and “twelve to
24 twenty-four months” for ICE documents); *see also* ECF 28-3–28-16 (attorney declarations in
25 support of class certification). .

26
27
28 Backlog reduction efforts over the last decade have been unsuccessful. USCIS has

1 consistently relied on paying outside contractors to supplement its federal workforce to chip away
2 at the backlog. Meckley Depo. 86:1–9 (“[B]acklog contract. . . has been in place for several
3 years.”); *id.* at 190:4–7 (contracting for processing approximately 27,500 cases in fiscal year 2020);
4 [REDACTED]. When resources are available, USCIS has paid FOIA processors
5 overtime, Meckley Depo. 197:5–11; 200:7–9, but with limited success, Exh. P, USCIS 2017 FOIA
6 Backlog Reduction Plan, at Bates 47415 (reporting that unlimited FOIA overtime had “[n]o
7 discernable impact” or resulted in “[s]light increase in FOIA cases processed” over a two-month
8 period in 2017; mandatory overtime would have only “minimal impact” on the backlog).

9
10 USCIS also has referred portions of the A-File to ICE, thereby allowing USCIS to close its
11 portion of the request. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]. In so doing, USCIS effectively moved its backlog to ICE because the FOIA deadline runs
15 from USCIS’ receipt of the request and does not restart upon its referral to ICE. 6 C.F.R. § 5.4(g)
16 (2019). [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] *See also infra* Section IV.B.2.

22 In September 2019, USCIS changed the method by which it calculates the statutory period
23 for adjudicating FOIA requests, categorically invoking “unusual circumstances” in *all* Track 2 and
24 Track 3 A-File FOIA requests to give itself an extra ten business days to make a determination on
25 A-Files requests before they can fall into the backlog. Meckley Depo. 165:1–15; Exh. J, Defs. Resp.
26 to ROG 16 at 9. “For the month of September, 2019 (end of FY 2019), USCIS . . . invoked ‘unusual
27 circumstances’ 12,438 times.”), USCIS now automatically allots an additional ten days to the base-
28

1 line twenty-day statutory period, interpreting a regulation with specific criteria establishing
2 “unusual circumstances” to apply to all A-File requests. Meckley Depo. 165:1–15 (confirming that
3 USCIS has “buil[t] in the 10-day extension automatically to Track 2 and Track 3 requests”).
4 Congress could not have intended agencies to categorically invoke “unusual circumstances” under
5 5 U.S.C. § 522(a)(6)(B)(i), and, thus, effectively extend the twenty-day statutory deadline to thirty
6 days.
7

8 The large number of FOIA requests to USCIS does not appear to be slowing. *See* USCIS
9 Historical Backlog Chart, *supra* at 7. And chronic problems with no imminent solutions continue
10 to slow the FOIA process. USCIS cannot, for example, quickly gather A-Files from the various
11 field locations where they might be located when the FOIA request arrives. Meckley Depo. 226:13–
12 227:20 (stating that some USCIS field offices do not have the technology to scan documents and
13 thus must mail the file to the National Records Center where it is scanned prior to processing). In
14 addition, the digitization of on-line immigration forms—a technological advancement USCIS
15 claims will further streamline the A-File FOIA process—applies only to seven of approximately
16 150 USCIS forms and has no imminent timeline for completion. Meckley Depo. 135:16–136:10;
17 141:6–10.
18

19 Moreover, despite the ballooning backlog, USCIS does not include compliance with the
20 timelines for FOIA adjudication in its yearly department goals or use statutory timeframes as a
21 metric for evaluating employees’ performances. Meckley Depo. 179:1–17. In fact, USCIS takes
22 the position that setting goals to process FOIA requests within statutory timeframes is not an
23 appropriate method for measuring success. Meckley Depo. 182:8–183:14. This approach to
24 evaluating agency success extends to contract processors where, after outsourcing its FOIA
25 processing to a private contractor, USCIS neither manages the contract staffs’ day-to-day work nor
26 evaluates staff performance. Meckley Depo. 190:15–21.
27
28

1 These past unsuccessful approaches are the primary methods USCIS will use moving
2 forward as it faces the backlog in the remainder of 2020 and into 2021. Meckley Depo. 86:1–87:21
3 (describing that current plans to address the backlog include “backlog contract” with outside vendor
4 and continued “interface” with USCIS on-line forms). And USCIS now has added tens of thousands
5 of A-File ICE documents to its caseload—committing, through the recently signed Agreement with
6 ICE, *see infra* Section IV.B.2, to process all ICE A-File documents. Meckley Depo. 70:17–18
7 (USCIS sent 86,000 referrals to ICE in 2019); 71:1–8.

9 Moreover, USCIS is at the mercy of the public to fund its FOIA program. Unlike most
10 agencies, 97 percent of USCIS’s budget is from fees it charges individuals requesting immigration
11 benefits. *See Budget, Planning and Performance, USCIS* (Feb. 24, 2020),
12 <https://www.uscis.gov/about-us/budget-planning-and-performance>. Nearly all USCIS, including
13 its FOIA program, is funded exclusively from fees received. As the Director of OGIS aptly stated:
14 “In a time of reductions in agency budgets, we will likely see an increase in FOIA backlogs.” Exh.
15 C, at Bates 4.

17 USCIS’s longstanding backlogs in processing A-File FOIA requests and Defendants’ past
18 conduct evince that, left to its own devices, USCIS will not remedy these harmful delays.

19 **2. ICE Has a Pattern or Practice of Failing to Comply with the FOIA Statute**

21 ICE also has a years-long pattern or practice of failing to meet FOIA’s statutory deadlines,
22 as evidenced by its annual backlogs, which have increased steadily since FY2015. Unlike USCIS,
23 ICE has not changed how it defines a backlogged FOIA request and defines it as one that has been
24 pending for more than twenty business days without a determination. Keenan Depo. 109:9–10.
25 While ICE has reported a fluctuating backlog at the close of every fiscal year since at least FY2012,
26 as indicated below, the number of backlogged cases has ballooned out of control in recent years.
27
28

ICE HISTORICAL BACKLOG

DATE	RECEIVED	BACKLOG	SOURCE ⁹
FY2012	24,073	2,443	FY2012 DHS FOIA Report at 19, Exh. I1
FY2013	34,161	4,714	FY2013 DHS FOIA Report at 18, Exh. I2
FY2014	85,081	56,863	FY2014 DHS FOIA Report at 19, Exh. I3
FY2015	44,748	555	FY2015 DHS FOIA Report at 20, Exh. I4
FY2016	63,385	471	FY2016 DHS FOIA Report at 19, 17, Exh. I5
FY2017	47,893	391	FY2017 DHS FOIA Report at 19, Exh. I6
FY2018	70,267	(1,332) ¹⁰	FY2018 DHS FOIA Report at 21, Exh. I7
FY2018		18,375	Defs.' Response to ROG 21 at 2–3, Exh. K
June 19, 2019 - <i>Nightingale v. USCIS</i> filed			
FY2019	64,231	(1,493) ¹¹	FY2019 DHS FOIA Report at 14, 27, Exh. I8
FY2019		60,616	Defs.' Response to ROG 22 at 3, Exh. K
June 30, 2020		62,471	Defs.' Response to ROG 24 at 4, Exh. K
Aug. 11, 2020		56,661	Keenan Depo. 179:15-19.

As of August 11, 2020, ICE's backlog stood at 56,661 FOIA requests. Keenan Depo. 179:15–19. The “vast majority” of ICE's backlogged FOIA requests are for A-Files. Keenan Depo. 72:18–22. Currently, ICE's A-File backlog consists only of requests that were filed prior to June 1, 2020, the date on which USCIS and ICE implemented a new Memorandum of Agreement (“MOA”). See [REDACTED]; Keenan Depo. 178:1–4. All of ICE's backlogged A-File FOIA requests originated with USCIS as the custodian of A-Files. Keenan Depo. 78:13–22.

ICE readily admits that the volume of FOIA requests it receives is too great for its FOIA staff to handle. Keenan Depo. 114:16–18 (“Well, we've always had more cases than we have people to do.”); *see also id.* 47:14–21. Every year, the ICE FOIA division has asked for additional funding to hire more FOIA staff, without success. Keenan Depo. 48:10–49:2; 188:8–189:3

⁹ See *supra* note 7.

¹⁰ DHS' annual report did not account for 17,043 referrals from USCIS. Exh. I7, FY2018 DHS FOIA Report at 6; Exh. K, Defs.' Resp. to ROG 21 at 2–3. The actual backlog was 18,375.

¹¹ DHS' report did not account for 59,123 referrals from USCIS. Exh. I8, FY2019 DHS FOIA Report at 14; Exh. K, Defs.' Response to ROG 22 at 3. The actual backlog was 60,616.

1 (explaining that “FOIA is not an appropriated line item budget by Congress,” and thus, requests
2 for additional FOIA funding are viewed as “taking funds away from other parts of the mission of
3 ICE”—“money . . . appropriated by Congress for Homeland Security investigations and
4 enforcement and removal operations”). While an estimated seventy-seven staff would be needed
5 to handle all FOIA requests, Keenan Depo. 48:10–18, ICE’s FOIA staffing level has remained at
6 about forty-two for at least the past five fiscal years. Keenan Depo. 28:3–8 (43 staff in FY2015);
7 43:1–5 (42 staff in FY2020).

9 Over the years, ICE has attempted to reduce the backlog through a patchwork of short-term
10 fixes—overtime, staff detailed from other departments, and contract support—none of which have
11 succeeded in the long-term. First, every year ICE budgets for overtime for processing backlogged
12 FOIA cases, generally \$50,000. Keenan Depo. 115:17–19. For FY2021, ICE doubled the budgeted
13 amount for overtime. Keenan Depo. 116:12–14. ICE also has employed “tiger teams that will have
14 a bunch of people pushing to get a whole bunch done in a shorter period of time.” Keenan Depo.
15 113:21–114:2. ICE has never evaluated whether its use of overtime is a cost-effective method to
16 address the backlog, Keenan Depo. 121:1–5, and its continued reliance on overtime has had no
17 lasting impact on the backlog. Second, ICE periodically requests that ICE employees from other
18 departments be detailed to work in the FOIA department. Keenan Depo. 197:11–198:14 (describing
19 process). Recently, these requests have been unsuccessful. Keenan Depo. 197:12–14.

22 Finally, to supplement its in-house staff, ICE routinely contracts for assistance with FOIA
23 processing. Faced with a backlog in FY2015 like the current one, ICE succeeded in reducing it to
24 555, but only with the assistance of 120 contractors at a cost of \$6.2 million. Exh. T, Compliance
25 Review of ICE FOIA, at Bates 73992, 73995–96, 74003. ICE did not employ anywhere near that
26 many contractors in FY2019 or FY2020, and thus was not successful in reducing the backlog.
27 Currently, for example, through three contracts, it has forty-one additional processors—[REDACTED]

1 [REDACTED] *See id.*; Exh. U, Def. ICE’s Resp. to Pls.’ Third Set of Interrogatories,
2 ROG 5 at 4; [REDACTED]; Keenan
3 Depo. 182:7–12; 200:4–11. Additionally, in 2020, DHS stepped in, permitting ICE to benefit from
4 two of its contracts with a total assistance of thirty-two additional processors. Keenan Depo. 182:7–
5 12; 200:4–15; 223:16–20. Thus, ICE had contract support from only forty-one processors in
6 FY2020, as compared to 120 in FY2015.

8 Concerned about how this Court might rule in the present case, ICE made additional efforts
9 to reduce the backlog beginning in the second half of FY2019. *See, e.g.*, [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]. In early 2020, the FOIA
21 department propounded numerous suggestions for eliminating the current backlog “internally.”
22 Keenan Depo. 237:16–243:13; *see, e.g.*, [REDACTED]; [REDACTED]. Ultimately, the
23 MOA with USCIS and some assistance from DHS’ contracts were the alternatives chosen. Keenan
24 Depo. 243:16–20.

26 Despite ICE’s enhanced efforts in FY2020, ICE projects that its backlog will not be
27 eliminated until January 2022. Keenan Depo. 201:11–17. This projection depends entirely on both
28

1 the success and renewal of the MOA with USCIS going forward. Furthermore, renewal of the MOA
2 is entirely dependent on ongoing funding authorization, which is not guaranteed. If the MOA fails,
3 ICE will not be able to keep up with future filings and will face a further increase in the backlog.

4 **3. DHS Abdicated Its Responsibility to Oversee USCIS and ICE's FOIA Compliance**

5 DHS is responsible for the coordination, direction, and oversight of its component agencies
6 with respect to their compliance, or failure to comply, with class members' requests under FOIA.
7 Holzer Depo. 21:3–10; Exh. Y, Statement of James V.M.L. Holzer at Congressional Subcommittee
8 Hearing, at 6–7. Indeed, DHS plays a particularly critical role given that A-Files are composed of
9 records generated by component agencies within DHS. Exh. B, at Bates 81744; Keenan Depo.
10 79:9–14 (describing A-File as a “tri-bureau document” with records from USCIS, ICE and CBP).
11 While USCIS is the designated custodian of A-Files, many documents in an A-File originate from
12 ICE or CBP. Exh. B, at Bates 81744. For example, CBP generates documents of prior entries and
13 exits, and ICE generates documents related to enforcement actions. *See, e.g.*, Keenan Depo. 94:9–
14 13 (explaining how A-File records could belong to either ICE or CBP). Copies of prior applications
15 and petitions generally are within USCIS's possession.

16
17
18 DHS concedes that “FOIA backlogs have continued to be a systemic problem at DHS” and
19 that “[r]equests for A-file material comprise the vast majority of DHS's FOIA workload.” Exh. E
20 at Bates 88275–76; *see also* Exh. Z, Talking Points on FOIA Operations at DHS (June 5, 2019), at
21 Bates 103827. Moreover, DHS acknowledges that allowing component agencies to individually
22 attempt to respond to A-File requests exacerbates the problem: DHS has repeatedly pointed to “the
23 challenges created by decentralized operations.” Exh. E at Bates 88281; *see also* ██████████
24 ██████████. Indeed, DHS admits that “[t]he
25 solutions Components regularly rely on—hiring contractors, authorizing overtime, and initiating a
26 surge as the end of the fiscal year draws near—only serve to improve statistics temporarily.” Exh.
27
28

1 E at Bates 88279, [REDACTED]
2 [REDACTED]. DHS further admits that these solutions simply push the backlog to other
3 agencies. *See* Holzer Depo. 161:15–17 (“It’s kind of like the whack a mole problem, as it were,
4 that we were talking about there.”); *id.* at 165: 11–13 (“So all you’ve done is push, like I said, you
5 push one backlog to another part of the Department.”). “In order to improve . . . the DHS FOIA
6 program needs a unified approach that accounts for differences in the type and volume of requests
7 received across the agency.” Exh. E at Bates 88281; Exh. Z at Bates 103831 (“Increased
8 centralization has also helped contain and reduce the backlog.”). DHS is charged with the critical
9 role of mediating conflicting component agency approaches and ensuring greater coordination.
10 Holzer Depo. 109:5–113:1; Exh. Y at Bates 37 (“I think that we have played a vital role in having
11 those discussion over the years.”); *cf.* [REDACTED].
12
13

14 DHS is thus responsible for directing and coordinating a response among its component
15 agencies that they will comply with the statutory timelines. This comes as no surprise to
16 Defendants, as they recognize that [REDACTED]
17 [REDACTED]
18 [REDACTED] “This inability to control the backlog
19 has sparked seven Government Accountability Office (GAO) engagements, three Inspector
20 General engagements, eight OGIS engagements, two Congressional hearings, and countless media
21 stories.” Exh. E at Bates 88280–81 (footnotes omitted). Despite these inquiries and the numerous
22 recommendations stemming from them, the FOIA backlogs continue to be a “systemic problem at
23 DHS.” *Id.* at Bates 88276. And it is class members who continue to suffer, year after year, the
24 inevitable consequences of DHS’s failure to ensure that component agencies timely produce A-
25 Files. *See* [REDACTED]
26 [REDACTED]. Ultimately, DHS shares responsibility
27
28

1 with its component agencies for the chronic failure to comply with the FOIA statute.

2 **B. DEFENDANTS' EFFORTS TO INCREASE EFFICIENCIES ARE INSUFFICIENT**

3 **1. FIRST Does Not Resolve USCIS's Untimely FOIA Determinations**

4 In May 2018, USCIS introduced FIRST, a new system for submitting FOIA requests that
5 USCIS claims will help decrease its FOIA backlog. *See* Press Release, USCIS, *USCIS Expands*
6 *FIRST: A Fully Digital FOIA System* (June 25, 2019), <https://tinyurl.com/y64akn9x>. FIRST allows
7 requestors to, after creating an account, submit A-File FOIA requests online and receive the results
8 electronically. *See* Meckley Depo. at 52:9–10, 53:4–9. While FIRST is a step in the right direction,
9 it does not resolve USCIS's processing delays because of its narrow focus and problems with its
10 implementation.
11

12 While FIRST focuses on making the FOIA intake and delivery process more efficient, it
13 fails to address what USCIS acknowledges is the most time-consuming steps in between: document
14 retrieval and processing. Meckley Depo. 123:5–11; 229:16–230:1. When a FOIA request is
15 received, an Intake Specialist uploads the request and locates the A-File. Meckley Depo. 166:7–
16 167:7, 114:20–115:8. This does not take long. Meckley Depo. 122:6–18. Rather, it is the retrieval
17 and processing of the A-File that is time-consuming. Documents may be stored in multiple
18 locations across the country, including the National Records Center, off-site commercial storage
19 vendors, or “hundreds of different field offices.” Meckley Depo. 115:15–116:13, 123:5–11. Most
20 of these documents are papers that must be scanned; yet, not all field offices have scanning
21 capabilities and, thus, must mail the physical files to USCIS to be scanned.¹² Meckley Depo.
22 226:13–227:10; Exh. E at Bates 88275. The FOIA processor's work—reviewing the records for
23 release or redactions—does not begin until all A-File records are scanned into FIRST. Meckley
24
25
26

27 ¹² Although USCIS contracts to transport these files, USCIS' witness did not know which
28 courier it uses, even though shipment via FedEx, United Parcel Service, or the U.S. Postal Service
likely impacts the time it takes to transport documents. Meckley Depo. 257:17–258:1; 261:1–10.

1 Depo. at 113:4–15. This FOIA processing also is time-consuming. Meckley Depo. 229:16–21 (“I
2 can’t even guess how long it takes from the time a processor has it in his or her queue till when it’s
3 completed”). Yet, FIRST does not reduce the inefficiencies in the retrieval process. Nor does it
4 address the time it takes FOIA processors to review and redact information once it is received. *See*
5 Meckley Depo. 114:6–14 (admitting that FIRST has not changed post-intake processing).
6 Defendants could address those issues by, for instance, creating electronic records, ensuring that
7 field offices have scanning capacity, or hiring more FOIA processors. Thus, while FIRST may
8 introduce some efficiencies, it elides the main source of FOIA processing delays and, accordingly,
9 is not alone sufficient to address USCIS’s statutory violations.
10

11 FIRST’s efficacy is also hampered by problems with its implementation. Namely, FIRST
12 does not function as intended. Attorney Matthew Hoppock has “never been able to successfully
13 submit a FOIA request through FIRST” despite numerous attempts to resolve the issue due to
14 problems with USCIS’s “poor password management system.” Hoppock Decl. ¶¶27–36. FIRST is
15 “inaccessible” and, due to the ongoing problems, Hoppock has continued to submit A-file FOIA
16 requests via email. Hoppock Decl. ¶36. Internal USCIS reports further document problems with
17 FIRST. *See, e.g.*, Exh. CC, USCIS FOIA Reduction Project (Apr. 7, 2020) (“FIRST slows down
18 overall FOIA process,” and USCIS must “[m]itigate FIRST risks with Dev Team and end user
19 learning curve.”); Exh. DD, USCIS FOIA Reduction Project (Feb. 11, 2020) (same). As of July
20 2020, internal reports stated that “FIRST development [was] slowed by remediation actions” and
21 that “[a]dditional testing and code reviews” were required. Exh. EE, USCIS FOIA Reduction
22 Project (July 7, 2020). In particular, USCIS reported that, due to a “FIRST data security incident,”
23 it had to request that 344 individuals return or destroy records. *Id.* Despite these problems, USCIS
24 does not provide a mechanism to provide feedback on FIRST, and USCIS is unaware of any
25 negative feedback from the requester community. Meckley Depo. 249:1–7; 253:1–4.
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1 In addition, FIRST is largely underutilized due to USCIS’s failure to involve the public and
2 to adequately publicize it. USCIS did not solicit requestor input in developing FIRST, *compare*
3 Meckley Depo. 246:4–8, *with* Meckley Depo. 253:1-4. And immigration attorneys continue to
4 submit FOIA requests via email rather than FIRST. *See* Supp. Nightingale Decl. ¶¶11–14; Hoppock
5 Decl. ¶36; Meyer Decl. ¶4. FOIA requests through FIRST made up only 28 percent of total requests
6 in the first quarter of FY2020. Exh. DD. Thus, FIRST does not resolve USCIS’s delays in
7 responding to A-File FOIA requests.
8

9 **2. The New Memorandum of Agreement Does Not Resolve the Problem**

10 On June 1, 2020, USCIS and ICE implemented the MOA to streamline processing ICE
11 records within an A-File. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 To the extent this MOA remains in place, it will—for FOIA requests filed after June 1,
19 2020—resolve one aspect of the agencies’ delays in responding to A-File FOIA requests: ICE’s
20 delays in processing its own records. However, it does not address, much less resolve, ICE’s
21 existing, pre-June 1, 2020 backlog or USCIS’ long-standing inability to timely process records
22 within A-Files. Furthermore, there is nothing requiring the agencies to renew this agreement in
23 future years and its continued existence is speculative, at best. *See* Meckley Depo. 131:19–132:10
24 (stating that USCIS was still planning its 2021 budget); *see also* Keenan Depo. 154:5–157:20.
25

26 First, the MOA does not resolve the situation for class members whose A-File FOIA
27 requests are in ICE’s backlog. As of August 11, 2020, ICE had a backlog of 56,661 FOIA requests,
28

1 the majority of which were for A-Files. Keenan Depo. 179:15–19. ICE admits that it cannot process
2 this entire backlog until January 2022. Keenan Depo. 201:11–19. Sixteen additional months is
3 entirely too long for ICE to process class members’ A-File requests. Second, the MOA does not
4 address the resource issues which led to USCIS’ years-old backlog. *See supra* Section IV.A.1. To
5 the contrary, the MOA increases USCIS’ workload by requiring that USCIS’ FOIA processors now
6 also process ICE records. In fact, since implementing the MOA on June 1, 2020, USCIS’ backlog
7 grew by almost [REDACTED]. Compare [REDACTED]
8 [REDACTED], with [REDACTED]. This is exactly the
9 “whack a mole” problem that DHS’s witness identified. Holzer Depo. 161:15–16.

11 Finally, there is no guarantee that Defendants will continue the MOA beyond FY2021.
12 ICE’s FY2022 budget, which is already set, does not allocate funding to implement the MOA.
13 Keenan Depo. 155:6–20; 201:6-7. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 [REDACTED]. Given these
23 restrictions, the MOA is insufficient to defeat the need for injunctive relief. “It is well settled that
24 a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its
25 power to determine the legality of the practice.” *Friends of the Earth, Inc. v. Laidlaw Env’t. Servs.*
26 *(TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and citation omitted); *see also*
27 *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (“We presume that a government entity is
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1 acting in good faith when it changes its policy . . . but when the Government asserts mootness based
 2 on such a change it still must bear the heavy burden of showing that the challenged conduct cannot
 3 reasonably be expected to start up again.”).

4 **C. A COMPREHENSIVE REMEDY IS NEEDED**

5 Both declaratory and permanent injunctive relief is needed to provide sustainable relief.
 6 Defendants do not deny that there is a systemic problem and that USCIS and ICE fail to make
 7 timely determinations on A-File FOIA requests. *See supra* Part IV. However, despite three prior
 8 lawsuits raising similar nationwide pattern-or-practice claims in the immigration FOIA context,
 9 Defendants have not yet achieved compliance with the law, let alone sustainable compliance.¹³

10 District courts have broad, equitable powers to enforce the terms of FOIA. In *Renegotiation*
 11 *Board v. Bannerkraft Clothing Co.*, the Supreme Court held that, “[w]ith the express vesting of
 12 equitable jurisdiction in the district court by [5 U.S.C.] § 552(a), there is little to suggest, despite
 13 the Act’s primary purpose, that Congress sought to limit the inherent powers of an equity court.”
 14 415 U.S. 1, 20–21 (1974). The Court’s conclusion was supported by the “broad language of the
 15 FOIA,” “the truism that Congress knows how to deprive a court of broad equitable power when it
 16 chooses so to do,” and the district court’s role as the “enforcement arm” of FOIA. *Id.* at 19–20; *see*
 17 *also Long v. U.S. IRS*, 693 F.2d 907, 909–10 (9th Cir. 1982) (reversing the denial of prospective
 18 injunction prohibiting agency from continuing to withhold and delay disclosure of non-exempt
 19 documents and instructing the court to “carefully draft[]” an injunction to “insure against lengthy
 20 documents and instructing the court to “carefully draft[]” an injunction to “insure against lengthy
 21 documents and instructing the court to “carefully draft[]” an injunction to “insure against lengthy
 22 documents and instructing the court to “carefully draft[]” an injunction to “insure against lengthy
 23 documents and instructing the court to “carefully draft[]” an injunction to “insure against lengthy

24 ¹³ *See Hajro v. USCIS*, 811 F.3d 1086, 1094 (9th Cir. 2016) (USCIS and DHS Secretary);
 25 *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991) (Immigration and Nationality Service); *Brown v.*
 26 *U.S. Customs & Border Prot.*, 132 F. Supp. 3d 1170 (N.D. Cal. 2015) (DHS and U.S. Customs and
 27 Border Protection (“CBP”). In *Brown*, the parties agreed to settlement before the court adjudicated
 28 the motion for class certification, in large part because during the course of the litigation CBP
 reduced its backlog from 34,307 in FY2015 to 3,187 as of June 24, 2016. *See Settlement Agreement, Brown v. CBP*, No. 15-cv-01181-JD (N.D. Cal. 2016), <https://tinyurl.com/y5qj3qur>. Absent a permanent injunction, however, CBP’s backlog subsequently increased to 10,466 requests as of FY2019. Exh. I8, FY2019 DHS FOIA Report at 29.

1 delays in the future”); *Payne Enters. v. United States*, 837 F.2d 486, 495 (D.C. Cir. 1988) (ordering,
2 on remand, declaratory relief and consideration of prospective injunction to remedy the Air Force’s
3 practice of refusing to release bid abstracts in violation of FOIA); *Hajro v. USCIS*, 811 F.3d 1086,
4 1103 (9th Cir. 2016) (recognizing the viability of a FOIA pattern-or-practice claim).

5 As the Ninth Circuit has explained, courts may issue an injunction to cure an agency’s
6 refusal to abide by a deadline where that “injunction is necessary to effectuate the congressional
7 purpose behind the statute.” *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir.
8 2002). In *Badgley*, the Ninth Circuit affirmed a district court’s injunction mandating that the U.S.
9 Fish and Wildlife Service comply with a twelve-month statutory deadline in the Endangered
10 Species Act for determining whether to list a species as endangered. *Id.* at 1170, 1176–77; *see also*
11 *Rosario v. USCIS*, 365 F. Supp. 3d 1156, 1160–63 (W.D. Wash. 2018) (issuing permanent
12 injunction requiring USCIS to comply with deadline in a federal regulation, citing *Badgley*).

13 A permanent injunction is appropriate here because Congress’ purpose is clear. Congress
14 mandated that the public have timely access to information. *See supra* Section II.B. FOIA’s
15 deadlines are not discretionary, as the statute’s text demonstrates. *See* 5 U.S.C. §§ 552(a)(6)(A)(i),
16 (B)(i) (providing that agencies “shall” make a determination within twenty business days and may
17 extend this deadline for “no more than ten working days” in “unusual circumstances”). Congress’s
18 use of “shall” imposes a “discretionless obligation[,]” *Lopez v. Davis*, 531 U.S. 230, 241 (2001),
19 and “generally indicates a command that admits of no discretion on the part of the person instructed
20 to carry out the directive,” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661
21 (2007) (quoting *Ass’n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)).

22 Where, as here, the text and purpose of FOIA creates mandatory deadlines, the Court should
23 compel Defendants to comply with those deadlines and to make determinations on A-File FOIA
24 requests in their backlogs within 20 business days, or 30 in unusual circumstances. *See, e.g., Long*,

1 693 F.2d at 909–10; *Payne Enters.*, 837 F.2d at 494–95; *Rosario*, 365 F. Supp. 3d at 1160-61.¹⁴

2 In addition, the Court should order Defendants to provide class counsel with regular
3 reporting and/or status reports to allow class counsel to monitor compliance with any injunction.
4 Such relief is common in nationwide class actions. *See, e.g., Rosario*, 365 F. Supp. 3d at 1163
5 (requiring USCIS to “submit status report every six (6) months regarding the rate of compliance”);
6 *Garcia v. Johnson*, No. 4:14-cv-01775-YGR, 2015 WL 13387594, at *2 & Exh. 1 (N.D. Cal. Oct.
7 27, 2015) (approving settlement agreement that “ICE shall regularly report to Plaintiffs information
8 on the referral process”); *see also Franco-Gonzalez*, 2013 WL 8115423, at *2.

9
10 Finally, Plaintiffs request that the Court require Defendants to ensure that persons in
11 removal proceedings are provided instruction as to how they may timely obtain copies of their A-
12 Files under FOIA. As explained above, Defendants have acknowledged the serious harm that class
13 members suffer absent timely delivery of their A-Files. *See supra* Section II.C. Other federal
14 agencies with administrative claims proceedings provide open access to individual files. *See, e.g.,*
15 U.S. Social Security Administration, *FOIA: Your Access to Social Security Administration*
16 *Information* (June 26, 2020), <https://www.ssa.gov/foia/> (directing people to go to local office to
17 obtain a copy of their file); 8 C.F.R. § 1.525(b)(1) (permitting a veteran’s representative to inspect
18 claim files at the office where the claim is being processed). Moreover, individuals seeking records
19 from those agencies are not detained.
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22 Defendants rely heavily on websites to notify the public of the ability to request an A-File
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25 ¹⁴ *See, e.g., supra* note 14 (discussing *Brown v. CBP*); *Rosario*, 365 F. Supp. 3d at 1163
26 (complying with thirty-day regulatory deadline for adjudicating employment applications for
27 first-time asylum seekers after court ordered mandatory injunction in nationwide class action);
28 *Garcia v. Johnson*, No. 4:14-CV-01775-YGR, 2015 WL 13387594 (N.D. Cal. Oct. 27, 2015)
(settling nationwide class action seeking compliance with ten-day regulatory deadline to provide
reasonable fear screenings after USCIS agreed to conduct interviews quickly and alter its policies
and procedures); *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1219 (W.D. Wash. 2019)
(ordering USCIS to comply with statutory deadline requiring claims to be processed in 180 days).

1 through FOIA. Keenan Depo. 66:9–67:4 (citing websites and “most immigration attorneys know”);
2 Meckley Depo. 105:1–106:7 (citing website and press release about FIRST). Individuals in
3 detention lack access to reliable internet, printers, or the ability to navigate in English. St. John
4 Decl. ¶13. For individuals without internet access, DHS’ position is that they “have to submit [their]
5 request through the mail the old fashioned way . . .” Holzer Depo. 153:4–10. But Defendants cannot
6 answer how pro se or detained individuals would know to request their files. Holzer Depo. 155:17–
7 156:1 (disclaiming any knowledge of how a detainee in removal proceedings would learn about
8 the process for filing an A-File FOIA); Meckley Depo. 106:12–107:4 (replying that websites and
9 press releases are available “communications mechanisms” in response to question regarding how
10 a pro se or detained individual would learn about the option of filing an A-File FOIA request);
11 Keenan Depo. 68:7–11 (replying that she was “not 100 percent sure” whether web notices are in
12 language other than English). Neither ICE attorneys nor IJs advise noncitizens in removal
13 proceedings of their right to request their A-Files through FOIA. St. John Decl. ¶13; Hoppock Decl.
14 ¶25; Supp. Nightingale Decl. ¶; Meyer Decl. ¶; Damast Decl. ¶14; *see also* Keenan Depo. 67:5–
15 68:5 (no knowledge of whether ICE prosecutors or IJs notify individuals). As such, Defendants do
16 not adequately inform pro se class members of this right. *See Mullane v. Cent. Hanover Bank &*
17 *Trust Co.*, 339 U.S. 306, 314 (1950); *Nozzi v. Hous. Auth.*, 806 F.3d 1178, 1194 (9th Cir. 2015)
18 (stating that notice “must be reasonably certain to actually inform the party, and in choosing the
19 means, one must take account of the capacities and circumstances of the parties to whom the notice
20 is addressed”) (internal quotations marks and citations omitted). Defendants also fail to provide a
21 uniform mechanism that ensures that pro se class members in removal proceedings, especially those
22 who are detained, can exercise their statutory right to file an A-File FOIA. Because they have a
23 statutory right to request A-Files, class members are entitled to a meaningful avenue to obtain them.
24 *Cf. Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (stating that due process requires compliance
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1 with fair procedures prior to any deprivation of a protected interest).

2 Injunctive relief compelling Defendants to timely notify individuals in removal proceedings
3 of their right to request A-Files through FOIA would ensure that Plaintiffs are “actually
4 inform[ed].” *Nozzi*, 806 F.3d at 1178. In addition, injunctive relief allowing detained or pro se class
5 members in removal proceedings to file an A-File FOIA request via a mechanism other than the
6 internet or U.S. mail, *e.g.*, by providing it to ICE at a removal hearing, would ensure that A-File
7 FOIA requests are filed and timely processed. This is especially true given that ICE prosecutors
8 generally possess the A-File during removal proceedings. Hoppock Decl. ¶14; Sáenz Decl. ¶¶9, 16.

9
10 In sum, comprehensive declaratory and injunctive relief is necessary to remedy Defendants’
11 pattern or practice of failing to comply with FOIA’s deadline. This Court has broad equitable
12 powers to issue mandatory and prospective relief, including relief that ensures that class members
13 are able to exercise their statutory right to timely obtain their A-Files through a FOIA request. The
14 Court should employ that power in this case.¹⁵

15 V. CONCLUSION

16 Defendants have a pattern or practice of violating FOIA’s statutory mandate. Plaintiffs
17 ask this Court to retain jurisdiction and to: declare these actions unlawful; permanently enjoin
18 Defendants from violating FOIA; order Defendants to make determinations on requests in the
19 backlog within thirty days and to provide the Court and class counsel with quarterly reports; and
20 to order any additional relief that it deems proper, including, but not limited to, ordering
21 Defendants to provide notice and a uniform procedural mechanism that will ensure that class
22 members in removal proceedings can request and receive A-Files in a timely manner.
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26 ¹⁵ Because this Court can issue injunctive relief pursuant to *Bannercroft* and *Badgley*, it need
27 not apply the six-factor test from *Telecommunications Research & Action Center v. F.C.C. (TRAC)*,
28 750 F.2d 70 (D.C. Cir. 1984). Although applying the *TRAC* test is not appropriate here, since
“Congress has specifically provided a deadline for performance,” Plaintiffs could nevertheless
demonstrate that an injunction is warranted even under *TRAC*. *Badgley*, 309 F.3d at 1177 n.11.

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Respectfully submitted,

s/ Trina Realmuto

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