UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, *et al.*, Plaintiffs, v. Joseph R. Biden, President of the United States of America, *et al.*, Defendants.	Civil Action No. 20-1419 (APM)
MOHAMMED ABDULAZIZ ABDULBAGI MOHAMMED, *et al.*, Plaintiffs, v. Andrew J. Blinken, Secretary, U.S. Department of State, *et al.*, Defendants.	Civil Action No. 20-1856 (APM)
CLAUDINE NGUM FONJONG, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, President of the United States of America, *et al.*, Defendants.	Civil Action No. 20-2128 (APM)
AFSIN AKER, *et al.*, Plaintiffs, v. Joseph R. Biden, President of the United States of America, *et al.*, Defendants.	Civil Action No. 20-1926 (APM)

MORAA ASNATH KENNEDY, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, President of the United States of America, *et al.*, Defendants.	Civil Action No. 20-2639 (APM)

AKER, MOHAMMED, FONJONG, AND KENNEDY PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants, in their Motion for Summary Judgment, attempt to argue the law without apparently having read the law. Plaintiffs, to the contrary, maintain their positions originally propounded in their Complaints and Motions for Preliminary Injunction, granted by this Court in a September 4, 2020, Order. Defendants' basis for their assertions are facts not part of the certified administrative record or any evidence properly before this Court. Plaintiffs, despite having a massive amount of hardship evidence, need none of it to show that Defendants have unreasonably delayed their visa adjudications, implemented their *ultra vires* No Visa Policy, and read the former president's Proclamations as license to override Congressional mandates. Plaintiffs now oppose Defendants' Motion for Partial Summary Judgment and move for summary judgement on their own behalf.

II. BACKGROUND

Congress created the Diversity Visa program with the Immigration Act of 1990. Congress intended this program to increase diversity in the United States by providing immigrant visas to nationals of countries with historically low rates of immigration to the United States. Public Law 101-649; 8 U.S.C. § 1153(c). The State Department can issue up to 55,000 diversity visas per fiscal year. 8 U.S.C. § 1151(e). Selectees are chosen through a "lottery" system with similar odds of winning; in Fiscal Year 2018, for example, 14.7 million qualified people entered for those 55,000 visas. Dkt. 123 at 6. After September 30, 2020, the remaining visas permanently expire. *See id.*

Defendants have repeatedly expressed animus towards this program and former Defendant Trump campaigned on a promise to ban the entry of Muslims to the United States. *See generally* Dkt. 170 at ¶¶ 2148–2166 for now-deleted Presidential Tweets. On March 20, 2020, due to COVID-19, the State Department suspended "routine visa services," continuing to provide "emergency and mission critical visa services." *See* Certified Admin. R. ("CAR"), ECF 103-1, at 12–14. Beginning July 15, posts were to begin a phased reopening. CAR 35. Nevertheless, on April 22, 2020, former Defendant Trump signed Presidential Proclamation 10014, suspending entry of immigrants into the United States under the purported authority of 8 U.S.C. §§ 1182(f)

and 1185(a). Former Defendant Trump extended PP 10014 at its expiration with Presidential Proclamation 10052; neither Proclamation provided justification for suspending entry of diversity visa selectees; neither Proclamation purported to suspend the adjudication of their visas.

Nevertheless, Defendant State Department issued a No Visa Policy, suspending issuance of essentially all visas, especially visas to people in Plaintiffs' positions. *See* ECF 123 at 12–14. In total, the State Department issued only approximately 12,000 Fiscal Year 2020 diversity visas. *See id.*

III. PROCEDURAL HISTORY

Plaintiffs in *Mohammed v. Blinken* filed their Complaint on July 10, 2020. Plaintiffs in *Fonjong v. Biden* filed their Complaint on August 5, 2020. Plaintiffs in *Kennedy v. Biden* filed their Complaint on September 18, 2020. All three actions were consolidated, by this Court, with *Gomez v. Biden, Aker v. Biden,* and (partially) *Panda v. Wolf*. *See Gomez v. Trump,* No. 20-cv-1419-APM, ECF 79. Plaintiffs in each action (with the exception of *Kennedy*) filed motions for preliminary injunctions and/or temporary restraining orders which this Court heard on August 27, 2020. On September 4, 2020, this Court ruled on Plaintiffs' various motions, largely granting them relief pending final judgment. This Court issued an Amended Order on September 14, 2020, due to Defendants' careless implementation of this Court's September 4, 2020 Order. Pursuant to this Court's orders, Defendants filed a Report on Good Faith Efforts to Implement the Preliminary Injunction on September 25, 2020, and Plaintiffs requested further relief on the same day. Defendants filed a second Report on September 29, 2020, and this Court issued an Order on September 30, 2020, reserving only 9,095 diversity visas pending final judgement in these consolidated cases.

IV. LEGAL STANDARD FOR SUMMARY JUDGEMENT

Rule 56 requires a court to grant summary judgment, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law[,]" Fed. R. Civ. P. 56(a). "[I]n APA cases, the summary judgment standard functions slightly differently, because the reviewing court generally . . . reviews the agency's decision as an appellate

court addressing issues of law." *Ashtari v. Pompeo*, No. 19-cv-3797 (APM), 2020 U.S. Dist. LEXIS 197813, at *6–7 (D.D.C. Oct. 23, 2020) (citing *Policy & Research, LLC v. United States HHS*, 313 F. Supp. 3d 62, 74 (D.D.C. 2018)). "Stated another way, the entire case on review is a question of law, and only a question of law." *Ashtari* at *6 (citing *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226, 300 U.S. App. D.C. 263 (D.C. Cir. 1993) (cleaned up)). "Accordingly, whether the issue is one of reviewability or otherwise, the court must limit its review to the administrative record and the facts and reasons contained therein to determine whether the agency's action was consistent with the relevant APA standard of review." *Ashtari* at *6–7.

Under Rule 56 of the Federal Rules of Civil Procedure, a court shall issue summary judgment where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). That standard "does not apply," however, in cases such as this one involving review of final agency action under the APA. *Itserve All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 29 (D.D.C. 2020) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006)). In such cases, "the agency resolves factual issues to arrive at a decision that is supported by the administrative record," and summary judgment is "the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the [Administrative Procedure Act] standard of review." *Coal. for Common Sense in Gov't Procurement v. United States*, 821 F. Supp. 2d 275, 280 (D.D.C. 2011), aff'd, 707 F.3d 311 (D.C. Cir. 2013). Summary judgment is "an appropriate procedure for resolving a challenge to a federal agency's administrative decision" when, as here, "review is based upon the administrative record." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995) (citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977).

V. LAW AND ARGUMENT

A. There is No Genuine Dispute of Material Fact

On August 8, 2020, Defendants produced "the complete amended administrative record containing all policies, guidance, directives, orders, cables, or communications by the United States Department of State that implement, carry out, or administer Proclamations 10014 and

10052 at issue in this litigation." Brianne Marwaha Dec. ¶1; ECF No. 103-1. All of the undisputed facts in Section II, supra, are drawn from Defendants' records—considering the entirety of the materials before this Court—and this Court's orders. Unless Defendants can somehow impeach their own record, there are no material facts for a jury to find and the only remaining issues in this case are issues of law. Indeed, the crux of this dispute seems to be Defendants' belief that a challenge to implementation of an executive action is a challenge to the executive action itself, either ignoring what they learned in their administrative law classes or having never learned administrative law at all. *Cf.* ECF 189 at 1. Moreover, because of the Court's role in considering summary judgement in a case governed by the APA, the "entire case on review is a question of law, and only a question of law." *Ashtari* at *6 (quoting *Marshall Cty. Health Care Auth.* at 1226) (cleaned up). Where, as here, "the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Wyo. Outdoor Council v. Dombeck*, 148 F. Supp. 2d 1, 7 (D.D.C. 2001) As shown below, the undisputed facts support each of Plaintiffs' claims, and Plaintiffs are therefore entitled to relief as a matter of law. Fed. R. Civ. P. 56(a).

B. The Doctrine of Consular Nonreviewability is Inapplicable

As the court has already recognized, "[h]ere, all Plaintiffs challenge the State Department's refusal to review and adjudicate their pending visa applications or issue or reissue a visa due to the Proclamations. None challenge an affirmative visa "determination." The doctrine of consular nonreviewability therefore does not foreclose review of their claims." ECF No. 123, Order (citing *Patel*, 134 F.3d at 931–32; , citing *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 114–15 (D.D.C. 2020)).

C. Defendants' Actions Are Clearly Reviewable

This Court, as it held in its September 4, 2020, Order, is not foreclosed from reviewing *agency actions* taken to implement Presidential Proclamations 10014 or 10052. ECF 123; *see Chamber of Commerce of the United States v.* Reich, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1326-27 (1996). Even where an Executive action is "essentially that of the President," the action is not shielded from judicial review. *Id.*; *see Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992).

Defendants have not here merely ministerially implemented presidential action, and their actions are therefore reviewable. *Cf. Public Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 552 (D.C. Cir. 1993).

D. Defendants' Actions Are Not Entitled to Any Deference

Defendants contend that their interpretation of section 1182(f) is entitled to *Skidmore* deference. ECF 189-1 at p. 26–27. *Skidmore* deference only requires that a court give "the Department's interpretation a measure of deference proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). To support the contention that their interpretation should be entitled deference, Defendants point to the "thoroughness evident in the agency's consideration, the validity of its reasoning, and its consistency with earlier pronouncement." ECF 189-1 at p. 27. All of these should be rejected.

First, the administrative record does not demonstrate that Defendants took any consideration of historical precedent in the implementation of PP 10014. *See generally* CAR. Defendants' support of a historical precedent is found in a post hoc declaration by Edward Ramotowski. ECF 189-2. But this extra-record declaration makes no mention that this was taken into consideration in the formulation of Defendants implementation of PP 10014. Rather, the declaration was blatantly created in contemplation of litigation and therefore should not be weighed in this Court's determination whether to afford Defendants' interpretation deference.

Second, Defendants turn to the "validity of their interpretation." However, any reading of 1182(f) clearly demonstrates that the Defendants' interpretation contradicts the statute as it is plainly read. *See Callaway v. DenOne LLC*, No. 1:18-cv-1981, 2019 U.S. Dist. LEXIS 37732 (N.D. Ohio Mar. 8, 2019). Defendants interpretation of the statute is so strained that they now attempt to equate entry and excludability, presumably because they both start with the letter "e," and cite to obscure sections of a bill creating the "Automated Visa Lookout System." Closer examination of that law finds that the bill sought to ensure that visas were not issued to those found

excludable, or now inadmissible. To find this obscure bill relevant requires the same strained reading that entry and inadmissibility are the same—a position that this Court and others have flatly rejected. Pub. L. 103-236, Sec. 140(c)(1)(A) (the Visa Lookout System "maintains information about the excludability of aliens").

Finally, Defendants point to the consistency of their erroneous interpretation. This court need not and should not find that a long history of getting it wrong should be give deference in light of the clear contradiction with a plain reading of 1182(f). But even if this Court were to find that the historical analysis should be give some weight, there is no indication that Defendants have ever interpreted 1182(f) to allow for the categorical finding of ineligibility to issue a visa to entire visa categories. As such, the historical interpretation is insufficient to give it *Skidmore* deference.

E. No-Visa Policy Violates the APA

Defendants implementation of the "No-Visa Policy" violates the APA because Defendants cannot identify any statutory authority that would permit the suspension of visa processing. Neither Proclamation directs the State Department to suspend the processing and issuance of visas and nothing in the INA or the State Department' s implementing regulations give Defendants such power. Thus, Defendants' No-Visa Policy circumvents the INA, and usurps consular officers' sole and express statutory authority to issue visas to qualifying applicants.

F. APA's No-Visa Policy is Not in Accordance with the Law and In Excess of Statutory Authority

Agency action is "final" for purposes of the APA when it "mark[s] the consummation of the agency's decision-making process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear,* 520 U.S. 154,177–78 (1997) (internal quotation marks omitted). Importantly, "it is well established that interpretative guidance issued without formal notice and comment rulemaking can qualify as final agency action." *Arizona v. Shalala,* 121 F. Supp. 2d 40, 48 (D.D.C. 2000) (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000), *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d

1317, 1321 (D.C. Cir. 1988), and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435–38 (D.C. Cir. 1986)).

Defendants policy and implementation thereof satisfies both *Bennet* factors, in that they rest their policy on what they believe is a statutory requirement, and it has resulted in "thousands of otherwise qualified visa applications not being processed or issued. Even applicants who may qualify for an exception to the Proclamations are further subjected to additional "eligibility requirements for decisions on diversity visa applications that cannot be . . . found in the statutes, regulations, or executive orders governing their adjudications." *See Mohammed* PI Mem. at 21; *see* CAR 167–74. "That is paradigmatic final agency action. *See Cal. Cmtys. Against Toxics v. EPA*, 934F.3d 627, 637 (D.C. Cir. 2019) (Finality is determined "based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it."); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding final agency action where "the entire Guidance, from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates"); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 (D.C. Cir. 1986) ("[A]n agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review." (cleaned up))."

Defendants argue in this case that the No Visa Policy does not constitute final agency action because the "legal consequences that Plaintiffs challenge flows from the Proclamations, not action by the State Department," Defendants' Opposition to Plaintiffs' Motions for a Preliminary Injunction ("Defs. Opp'n") at 31, ECF 94, and that the No-Visa Policy is an automatic consequence of 8 U.S.C. § 1201(g) and does not violate the APA. *See* Defs.' Opp'n at 42–44; *see also* CAR 156 ("All [covered, non-exempt] cases must be refused under INA [§ 1201(g)] until further guidance is received from the Department."). And now, Defendants baselessly assert that Plaintiffs are challenging "the State Department's longstanding interpretation of the statute"; rather, Plaintiffs are challenging Defendants' interpretation beginning on April 14, 2020, after the issuance of Presidential Proclamation 10014. ECF 189 at

2. Defendants repeatedly assert that this case is legally the same as one in which plaintiffs appeal a visa denial or removal action, failing to notice that plaintiffs claim no right to appeal a consular officer's decision to grant or deny a visa. *See, e.g.*, ECF 189 at 14–15. Defendants erroneously believe that suspension of entry under 8 U.S.C. § 1182(f) renders visa applicants ineligible for visa issuance. *See, e.g.*, ECF 189 at 15.

It matters that Plaintiffs challenge the No Visa Policy rather than individual visa adjudications: individual visa adjudications are nonreviewable while the No Visa Policy is reviewable as final agency action. *Cf.* ECF 189 at 15–16. Plaintiffs do not "challenge the 'terms and conditions upon which [aliens] may come to this country,'" but the policies governing visa adjudications. ECF 189 at 16. This basic distinction reveals that Defendants either fail to understand the Administrative Procedure Act or are litigating in bad faith.

G. Defendants Have No Statutory Authority to Suspend DV-2020 Adjudication Under Either the Presidential Proclamations or the Immigration and Nationality Act

The Proclamations only speak to the *entry* of immigrants and certain nonimmigrants into the country, and the authorities cited by the Proclamations also only address entry, and not processing or issuance. *See* 8 U.S.C. § 1182(f) (empowering the President to "suspend the *entry* of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the *entry* of aliens any restrictions he may deem to be appropriate"); 8 U.S.C. § 1185(a) ("[I]t shall be unlawful . . . for any alien to depart from or *enter* . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."). As such, the "Proclamations themselves do not dictate Defendants' No-Visa Policy" ECF 123 at 60, nor give Defendants the authority they claim to have to suspend visa processing.

Defendants' argument as to the alleged authority granted by 8 U.S.C. § 1201(g) in that "[n]o visa . . . shall be issued to an alien if . . . it appears to the consular officer . . . that such alien

is ineligible to receive a visa or other such documentation under section 1182, fails under the same flawed reasoning. Defendants mistakenly interpreted "inadmissibility for entry into the United States" under § 1182(f) as equating "ineligibility to receive a visa" under § 1201(g), Defs.' Opp'n at 42–44, ignoring "the basic distinction between admissibility determinations," or entry determinations, and "visa issuance that runs throughout the INA." *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 & n.3 (2018). 8 U.S.C. § 1201(g) only precludes visa issuance to persons "ineligible to *receive a visa*" under Section 1182, not to persons who are only ineligible *to enter* the United States. 8 U.S.C. § 1201(g) (emphasis added)."

Defendants cite to the Supreme Court's decision in *Trump v. Hawaii*, holding that "any alien who is inadmissible under § 1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as 'ineligible to receive a visa." *Hawaii*, 138S.Ct. at 2414 (quoting § 1201(g)); Defs.' Opp'n at 43. Nevertheless, the Court does not hold that the President's suspension of entry under § 1182(f) renders a person ineligible to receive a visa. In fact, the Court takes great care to distinguish between entry and visa issuance, *see Hawaii*, 138 S. Ct. at 2414. As Defendants' reliance rests on the interchangeability of the notions of entry and issuance, this argument also fails for the same reasons above.

Defendants' last-ditch effort to justify their unlawful policy was to claim that "applying the Proclamation to require issuance of visas but deny entry into the United States would only result in administrative confusion." Defs.' Opp'n at 44. However, "[a] visa does not guarantee entry into the United States; it only confers the right to travel to a port of entry and apply for admission to enter the country." *Almaqrami v. Pompeo*, 933 F.3d 774, 776 (2019). No visa holders are guaranteed entry into the U.S., but consular officers are still required to do their jobs and adjudicate and issue visas to eligible visa applicants.

Defendants, under the unlawful interpretation that the Proclamations legally required it, ordered consular offices and embassies to suspend processing and adjudication for otherwise qualified visa applicants not exempted or excepted from the Proclamation. *See e.g.*, CAR 24

(instructing that "[o]nly [visa] applicants that post believes may meet an exception to the [Proclamation], including the national interest exception, and that constitutes a mission-critical category should be adjudicated at this time," and clarifying that officers "may not issue any [visas] that are not also excepted under [this Proclamation]"); CAR 38 ("Presidential Proclamation 10052 suspended the issuance of nonimmigrant visas in the H-1B, H-2B, L, and J-1 . . . classifications until December 31, 2020, with certain exceptions. . . . Posts should NOT resume routine processing of these visa classifications, unless the applicant qualifies for an exception under this or any subsequent Proclamation, until given a specific instruction to do so."); CAR36 (providing similar instructions for immigrant visas); Luster Decl. ¶ 5 (explaining that "[p]ursuant to guidance from the Department on . . . the implementation of P.P. 10014 and P.P. 10052," no "additional diversity visa case appointments with [consular] posts have been scheduled," and "only when a consular post reaches Phase Three of the Diplomacy Strong Framework may the post resume diversity visa case processing, and only for cases that appear to be eligible for an exception to P.P. 10014"). Since neither the proclamations nor § 1201(g) of the INA gave the authority for Defendants to suspend visa processing, both of which they expressly relied on, the creation and implementation of the No Visa Policy amounts to final agency action.

Ultimately, Defendant State Department's "longstanding understanding that the INA requires the refusal of visas to persons subject to the suspension of entry or restrictions imposed by the President under 8 U.S.C. § 1182(f)" misconstrues Defendants' own "understanding." ECF 189 at 16. Defendants' "understanding" is based on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 1182(a), which only deals with people explicitly ineligible to receive a visa under the statute. Defendants' arguments that because other statutes equate "denial of entry" with ineligibility to receive a visa is a non-sequitur: the other statutes cited are entirely separate from § 1182(f) and have no bearing on its interpretation. *Cf.* ECF 189 at 22.

All the record "clearly shows" is that the State Department determined to implement the President's desire to ban immigrants. *Cf.* ECF 189 at 16. The State Department's "long-held interpretation that denials are required" apparently is not important to Defendants, who did not even attempt to deny visas categorically to Diversity Visa selectees after this Court's September 4, 2020, order; rather, Defendants delayed a few days and then began adjudicating (i.e., issuing and denying) visas without complaint. *Cf.* ECF 189 at 17.

If Congress had intended 1182(f) to be excludable and ineligible for visa issuance, they would have placed it under 1182(a) or used the preamble language for 1182(a), like they did in 1182(e). Also, 1182(a) is exclusive without expandability. Ineligible immigrants are defined by 1182(a), not 1182 as a whole.

The only thing Defendants succeed in arguing in their section titled "The INA requires consular officers to refuse visas to aliens whose entry is suspended under Section 1182(f)" is that people must prove they are not excludable before being admitted to the United States, a proposition no party contests. *See* ECF 189 at 17. The very page cited by Defendants to argue that *Hawaii* held in their favor actually holds the opposite: there is a "basic distinction between admissibility determinations and visa issuance that runs throughout the INA." *Hawaii*, 138 S. Ct. at 2414. Moreover, the "magic section" cited by Defendants in support of their proposition is 8 U.S.C. § 1182, which *explicitly dictates* that individuals subject to subsection (a) are "ineligible to receive visas." 8 U.S.C. § 1182(a). That subsection is entirely separate from § 1182(f), which does not contain a similar proviso. Not even a strained reading of *Hawaii* can lead a reasonable mind to believe that inadmissibility means ineligibility to receive a visa. *Cf.* ECF 189 at 18.

Defendants next proceed to put the cart before the horse by arguing that because a visa would allow a holder to *attempt* entry into the United States in violation of the Proclamations at issue, it would be unlawful for Defendants to issue visas. ECF 189 at 18–19. This argument is akin to Defendants saying that because gasoline can be used to attempt arson, it is unlawful to sell gasoline. A visa may "confer[] the right to attempt to lawfully enter the United States," but therein

lies the key: all visa holders have the right to do is "attempt to lawfully enter the United States," something they could not do under PP 10014 or PP 10052. *Cf.* ECF 189 at 19.

Defendants' strained construction of 8 U.S.C. § 1101(16) and (26) reveal that they either have no ability to interpret statutes and/or that they do not understand the English language. Section 1101 does not dictate entry requirements and nowhere defines "eligible," leading to the plain meaning of the language: "eligible immigrant" means an immigrant eligible to receive a visa "properly issued by a consular officer." 8 U.S.C. § 1101(16).

Contrary to Defendants' assertion that the FAM requires visa refusal for applicants subject to § 1182(f), a plain reading of 9 FAM 301.4-1(a) says otherwise: "The basis on which applicants must be denied visas are established by law, as part of the Immigration and Nationality Act (INA)." Section 1182(f) is not a basis, on its own, for visa refusal, and the Presidential Proclamations at issue in this case do not suspend, nor purport to suspend, visa adjudications. Defendants' "examples" in support of their argument are cases where there were visa applicants were still under various forms of administrative processing—or cases which held the contrary of their attempted argument. *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 114–15 (D.D.C. 2020), clearly stated that "Defendants overlook that the consular nonreviewability doctrine applies only to decisions actually made by consular officers. … But when the suit challenges inaction, 'as opposed to a decision taken within the consul's discretion,' there is jurisdiction." (quoting *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 290 (D.D.C. 2016)); *Didban v. Pompeo*, 435 F. Supp. 3d 168, 173–74 (D.D.C. 2020) (same); *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 41 (D.D.C. 2020) (same); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 92-93 (D.D.C. 2020) (same); *Ghadami v. DHS*, No. 19-cv-00397, 2020 WL 1308376, at *4–5 (D.D.C. Mar. 19, 2020) (same); *Jafari v. Pompeo*, 459 F. Supp. 3d 69, 74 (D.D.C. 2020) (same); *Sarlak v. Pompeo*, No. 20-35, 2020 U.S. Dist. LEXIS 101881, at *7–8 (D.D.C. Jun. 10, 2020) (same).[1] Defendants' string-cite of cases either do not cite 1182(f) or cite

[1] Defendants assert that "[i]n none of these cases did the Court question the legality of a visa denial based upon 1182(f)," without mentioning that wasn't challenged in any of their cited cases.

it only as the basis of the Proclamation at issue in *Hawaii v. Trump*, discussing that Section not at all and certainly not addressing refusal to adjudicate visas.

No confusion "would occur if an alien receives a visa despite being prohibited from entering by the Proclamations and then attempts to enter the United States." ECF 189 at 26. Visa holders would use their resources wisely and not attempt to enter knowing that they would be refused entry after spending significant resources on travel for themselves and their family. Even if they did, they would simply be turned away at the border, a common practice. Customs and Border Protection officers at ports of entry already have to double-check restrictions and, due to Defendants' numerous restrictions, bans, exemptions, exceptions, and waivers, are already subject to a "burden."

H. Defendants' No-Visa Policy Unlawfully Usurps Consular Authority to Issue Visas

There is no statutory authority to order consular officers to stop processing visas or to stop issuing qualifying visas. Defendants cannot rely on the same unsupported position that Plaintiffs' inadmissibility under § 1182(f) renders them ineligible "to receive a visa for the purposes of 8 U.S.C. § 1201(g)(1)." Defendants have contended that the No Visa Policy does not "usurp consular officers' sole and express statutory authority to issue visas." Defs.' Opp'n at 43–44. However, there is no statutory authority that permits Defendants to instruct consular officers to suspend the processing and adjudication of visa application. In fact, the INA expressly deprives the Secretary of State of "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas," 8 U.S.C. § 1201(a)(1). The INA reserves that authority for consular officers, stating that "[a]ll immigrant visa applications," and "[a]ll nonimmigrant visa applications" "shall be reviewed and adjudicated by a consular officer." 8 U.S.C. § 1202(b), (d) and "[a] consular officer may issue" visas to individuals who have "made the proper application therefore." *Id.* § 1201(a)(1).

Because no statute or authority empowers Defendants to suspend visa issuance and adjudication, Defendants No-Visa Policy is "not in accordance with the law" and "in excess of statutory . . . authority." 5 U.S.C. § 706(2).

I. APA's No-Visa Policy is Arbitrary and Capricious

Agency action that "stands on a faulty legal premise and [lacks] adequate rationale" is arbitrary and capricious. *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[A]n order may not stand if the agency has misconceived the law."). The Administrative Record gives no justification for Defendants' No-Visa Policy except for the misplaced assumption that it is required by the Proclamations and § 1201(g). *See, e.g.*, CAR 24, 26, 28, 36, 38. Defendants offered no rational explanation for the policy, nor did they consider the serious consequences the policy would impose on DV-2020 selectees, when they distributed the policy. Neither have Defendants offered a rational explanation for their policy since this Court enjoined it.

J. Defendants' No-Visa Policy is Agency Action without Observance of Procedure

Defendants changed the law in crafting their No Visa Policy and now argue that their policy is merely interpretive. ECF 123 at 67. Specifically, Defendants changed the law by suspending issuance of nonexempt visas and subjecting potentially exempt visas to additional requirements. *See id.* The INA expressly deprives the Secretary of State of the authority to suspend visa adjudication. § 1202(a), and if there was authority to suspend visa adjudication, the Defendants have not met the requirements for any exception to the APA's requirement of Notice and Comment Rulemaking.

K. Exclusion of DV from Mission Critical is Arbitrary and Capricious

Under § 706(2), the Defendants' COVID guidance was final agency action: it was the consummation of decisionmaking and imposed significant legal consequences. Moreover, in issuing and implementing their guidance, the Defendants failed to consider an important aspect of the problem. ECF 123 at 74. The March COVID guidance excluded diversity visas from the

"mission critical" category, and even after Defendants resumed routine visa services, they placed diversity visa applications in the lowest priority. Defendants never meaningfully considered the irreparable harm resulting from their willful failure to adjudicate diversity visas, and the record provides no explanation of the exclusion of diversity visa applications from the "mission critical" designation. Ultimately, there is no reasoned consideration of the irreparable harm Defendants have caused diversity visa applicants.

The administrative record reveals no justification for Defendants' No-Visa Policy except the incorrect assumption that is compelled by the proclamation and section 1201(g). See e.g., CAR 24, 26, 28, 36, 38. In promulgating the No-Visa Policy, Defendants offered no rational explanation for the policy, nor did they account for the serious consequences to DV 2020 selectees. Now, Defendants offer a post-hoc rationale that cannot be found in the administrative record, and should be rejected.

L. Defendants Have Breached Their Mandatory Duty to Adjudicate Plaintiffs' Visas Within a Reasonable Time

Defendants have a mandatory duty to adjudicate Plaintiffs' visa applications within a reasonable time. 5 U.S.C § 555(b) (requiring agencies to, "within a reasonable time … conclude the matter presented to it"); *Nine Iraqi Allies*, 168 F. Supp. at 293 n. 22, 295–96 (holding that plaintiffs had stated a claim for unreasonable delay in processing their immigrant visa applications given agencies' mandatory duty to adjudicate visa applications). At the time of this filing, Defendants have already abrogated their mandatory duty by failing to adjudicate the vast majority of Plaintiffs' visas applications prior to the end of Fiscal Year 2020.

1. Unreasonable Delay Warrants the issuance of a Writ of Mandamus

The D.C. Circuit, in *Telecommunications Research & Action Center v. FCC* ("TRAC"), established guidelines for determining whether an agency delay warrants mandamus compelling the agency to act. 750 F.2d 70, 77–78 (D.C. Cir. 1984). "In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious

as to warrant mandamus." *Id.* at 79. Courts consider six guiding factors when answering this question:

(1) whether agency timelines comported to a "rule of reason;"

(2) whether there are Congressional timetables or indications of speed in enabling statutes that may supply content for the rule of reason;

(3) whether the delays place human health and welfare at stake;

(4) whether compelling agency action would cause a detriment to/ burden? agency activities of a higher or competing priority;

(5) whether the nature and extent of the interests prejudiced by delay are sufficiently great; and

(6) whether there is any impropriety lurking behind agency lassitude (not a necessary finding).

See id.

2. Rule of Reason and Congressional Timetable or Indication of Speed

The Immigration Act of 1990 and its implementing regulations and policies provide a clear timetable and indication of speed of adjudication. The DV program's implementing statute imposes an absolute, unyielding deadline of September 30th for the adjudication and issuance of diversity visas. 8 U.S.C. 1154(a)(1)(I)(ii)(II). This Statute clearly specifies that visas are to be made available to eligible selectees and must be issued before the deadline. *Id*; *see also* 9 FAM 502.6-4(b)(3)(a), *Diversity Visa Application Validity*; ECF No. 123, at 68–69 (quoting *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012)) ("Here, '[t]he specificity and relative brevity' of the September 30 deadline manifest Congress's intent that the State Department undertake good-faith efforts to ensure that diversity visas are processed and issued before the deadline."). The September 30, 2020 adjudication deadline for DV2020 has already passed.

Defendants delayed adjudication of all Plaintiffs' diversity visas for between seven and eight months (from March to September), but critically, they delayed the adjudication for 51

Mohammed, 33 *Fonjong*, and 863 *Kennedy* DV selectee plaintiff families until after the September 30 deadline. "[R]easonable time for agency action is typically counted in weeks or months, not years," and certainly not in eradicating the prospect of adjudication. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). As this Court has already recognized, "surely a delay that results in the permanent loss of a statutory benefit is not reasonable." ECF No. 123, at 69. Without this Court's intervention, Plaintiffs would have forever lost their opportunity to immigrate to the United States. Courts have routinely ordered the Department of State to adjudicate delayed immigrant visa without a timetable. *See, e.g.*, *Thomas v. Pompeo*, 438 F.Supp.3d 35, 43 (D.D.C. Feb. 7, 2020); *Afghan and Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Pompeo*, 2019 WL 367841, at *11 (D.D.C. Jan. 30, 2019) (denying a motion to dismiss by government alleging time defendant was tasked to adjudicate plaintiffs' visa applications was unreasonable).

The DOS's effective extinguishment of the diversity visa program for 2020 selectees, "simply by sitting on its hands and letting all pending diversity visa applicants time out," "plainly frustrates the congressional intent" behind the INA. ECF 123, at 69; *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837; *see* 8 U.S.C. §§ 1151(3) and 1153(c)(1)(A).

Implementing regulations and DOS policy also clarify that the processing and interview must be done with haste due to the statutory deadline for the adjudication of the visa. *See supra* Sections (II)(E)(1)-(3)), Diversity *Visa Adjudication Process*.

First, the INA mandates that "diversity immigrants *shall* be allotted visas each fiscal year." 8 U.S.C. § 1153(c)(1); INA § 203(c)(1) (emphasis added). After the Attorney General determines the allotment per country and region, immigrant visas "*shall* be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved." 8 U.S.C. § 1153(c)(1); INA § 203(c)(1) (emphasis added).

Then, Department policy sets forth a scheduling timeline based on the availability of the visa. The Department "will schedule an appointment for a documentarily qualified applicant when his or her regional lottery is about to be current." 9 FAM 592.6-4(2) (creating a duty to schedule

diversity visas before they are current). Because Congress and the Department have set a timetable for the adjudication of diversity visas and Department policy creates a mandatory adjudication of those visas pursuant to this timetable and because the September 30 deadline has already passed, Defendants have breached their non-discretionary duties. The Department intentionally failed in its duties, and the only remedy is for this Court to order issuance of all unissued visas to the yearly cap.

Plaintiffs' case is stronger than all of the aforementioned cases because Defendants deviated from the INA and federal regulations and unlawfully implemented policies, procedures, and programs to withhold the adjudication of Plaintiffs' diversity visas. Defendant Pompeo issued guidance on July 8, 2020, suspending visa issuance in misinterpretation of PP 10014 and PP 10052. Order at 12; CAR at 38. Moreover, even where DV selectees were eligible for an exception, their cases were given the lowest priority for processing. CAR at 38; Order at 72–73. Furthermore, Plaintiffs' case is stronger than the aforementioned cases because, despite this Court's orders to "expeditiously process and adjudicate DV-2020 diversity…applications," the deadline for processing passed, ECF. No. 123, at 84, and absent this Court's final adjudication in their favor, Plaintiffs will have no chance to immigrate to the United States. Given the time-sensitive nature of the diversity visa program and its termination by Defendants through the implementation of a No-Visa Policy, these two factors weigh heavily in favor of Plaintiffs.

Finally, there is no prejudice to any non-Plaintiffs because most non-diversity visa applications are not time-sensitive and all DV-2020 selectees who had not received their immigrant visa on or before April 23, 2020, are members of the class in the consolidated case of *Gomez*. ECF No. 151, at 24, 26. All of these factors weigh in favor of Plaintiffs claims.

3. Human Health and Welfare are at stake.

Delay is "less tolerable" in cases like this one, where "human . . . welfare" is "at stake." TRAC, 750 F.2d at 80. Plaintiffs have suffered immense harm documented in declarations filed with their Motion for Preliminary Injunction—not least of which the immeasurable harm of being unable to immigrate or visit the United States and their families here during a global pandemic

with no end in sight. Due to the dramatic loss of opportunity and the clear danger in remaining in their native countries, this factor clearly tips in the favor of the Plaintiffs.

4. Competing Priorities and Nature of Delay.

The effects "of expediting delayed action on agency activities of a higher or competing priority" are minimal. *TRAC* at 80 (citations omitted). Consular sections at embassies around the world had resumed adjudications of immigrant visa applications for applicants not subject to PP 10014 and PP 10052's suspension of entry. CAR at 35; Order at 70. Defendants, although neglecting Plaintiffs' visa adjudications, have admittedly "committed to processing visa services that are deemed 'mission-critical'" and provide no adequate explanation of why they do not consider DV-2020 visa applications to be mission critical—moreover, even when reopening posts, Defendants considered DV-2020 applications low-priority. Marwaha Decl. ¶ 8; CAR 17, 35; Order at 8–9; Def. Sup. Not., ECF 120, at 3. Also, if the court finds in Plaintiffs' favor, the interest of other visa applicants will not be prejudiced because the adjudication of most of those applications is not time-sensitive. This is especially true if the Court orders the resumption of processing and adjudication of the 9,095 DV numbers reserved with a reasonable amount of time for Plaintiffs and Defendants to complete the process alike, such as September 30, 2021. The timely adjudication of Plaintiffs' immigrant visa applications, given the drastic consequences of the failure to issue their visas prior to the September 30, 2020 deadline and the legal limbo in which Plaintiffs patiently wait, clearly outweigh the current competing priorities and tips in the favor of the Plaintiffs.[2]

[2] Defendants have argued that they are unable to process family-preference cases because of the diversity visa cases awaiting processing while simultaneously arguing, in this case, that they cannot process diversity visas because of the family-preference cases awaiting processing in this case. *Compare* ECF 94 at 53–54 *with Young v. Trump*, No. 3:20-cv-07183-EMC, Dkt. 23 at 20–21 and oral arguments from December 7, 2020 Young hearing on Motion for Preliminary Injunction. They cannot pit visa applicants against each other to justify refusing to adjudicate any visas.

5. Impropriety

Although this court previously declined to make any findings of impropriety, *see* ECF 123 at 71, there is even more evidence of impropriety as of this filing. *See, e.g.*, Order at 9–10, 12–13; Proclamation at 23,443 § 3; CAR at 17, 38, 70, 167–74, 189; Def. Sup. Not., ECF 120, at 3. Defendants have never provided a rational explanation for their actions nor examined the harms to diversity visa lottery selectees or anyone else. Despite this Court's order, Defendants implemented a "Quarantine Requirement" and waited five days—nearly 20% of the time between the September 4, 2020, order, and the September 30, 2020, expiration of all unissued diversity visas—to publish implementing guidance. Even after two injunctions against Defendants, they continued acting in bad faith, telling diversity visa selectees that there was no hope for them to obtain their visas, that they were unable to schedule them, and implementing policies in Ankara and Tbilisi contrary to this Court's orders. Dkt. 146-1, 146-2, 146-3. Moreover, as cited *supra* note 1, Defendants have argued in different venues that they cannot process diversity visas because of the backlog of family-preference visas while simultaneously arguing that they cannot process family-preference visas because of the backlog of diversity visas.

This Court should now find that the President and the Department have acted with impropriety in delaying the Plaintiff's visa applications and find that the factor tips in favor of the Plaintiffs.

M. Plaintiffs Are Entitled to Judgement as a Matter of Law

Each of Defendants arguments in opposition has already been rejected and the Preliminary Injunction orders address each in turn. Plaintiffs have shown they are likely to succeed on all claims above. Because this case is based on the Administrative Procedure Act, this Court's review is one of law and Defendants have clearly breached almost every single duty they owe in circumventing the INA, using entry restrictions to justify their No Visa Policy, and repeatedly discounting, demeaning, and degrading Plaintiffs and those in Plaintiffs' positions.

N. The Number of Visas Available Beyond the 9,095 Previously Reserved in the TRO Should Be Increased Based on Defendants' Bad Faith Behavior.

This Court ordered the Defendants to reserve 9,095 diversity visa numbers after September 30, 2020, pending final adjudication of this matter. ECF No. 151 at *18. This number should be expanded through the equitable powers of this court considering the bad faith of the Department of State as evidenced by Defendants' intentional sloth and outright refusal to move forward with the DV-2021 visa lottery adjudications, even despite the Court's order with respect to the DV-2020 visa lottery. Indeed, in the September 30, 2020, Order, this Court relied on COVID in not issuing visas, but we know now that the Defendants' bad faith—not COVID-19—resulted in the lack of issuances, because Defendants have continued to exercise the same bad faith in refusing to issue visas for DV-2021 applicants, as Plaintiffs have informed this Court.

The presence of bad faith or the absence of good faith may be invoked as a basis for substantive liability and special remedies. *See e.g.*, *Hutto v. Finney*, 437 U.S. 678, 679 (1978) ("[A] losing litigant's bad faith may justify an allowance of fees to the prevailing party."). Under common law, a prevailing party is entitled to an award of fees and expenses when the losing party acts "in bad faith, vexatiously, wantonly or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258–59 (1975); *F.D. Rich Co. v. United States ex rel. Industry Lumber Co*., 417 U.S. 116, 129 (1974). Defendants' conduct is bad faith, whether looked at subjectively or objectively. Objectively speaking, Defendants have lied to this Court. Most businesses operating during the COVID-19 pandemic have found a way to open back up, including this court. Yet, the State Department, unlike sibling agencies such as USCIS, ICE, CBP, EOIR-Immigration Courts, have shut down consular posts and wholesale stopped the adjudication of diversity visas —despite the availability of protection from the virus such as plexiglass shields, masks, social distancing and vaccines. These sibling agencies were able to resume operating and administering immigration benefits because they were not subject to unlawful policies, procedures and practices, like Defendants' No-Visa Policy. Defendants' statements regarding COVID-19 related closures, particularly after the September 30, 2020 order, are meritless and shameful. Their

conduct is neither fair nor reasonable when looked at objectively. They exploited a tragic global pandemic as pretext for implementing a draconian ban on legal immigration into the United States.

Subjectively, DV-2020 lottery selectees would do practically anything the Department of State would have required them to do in order to receive their visa. (Just look at how many globetrotted to US embassies in third countries to be considered for visas following this Court's September 4th order.) The Defendants' choosing to instead stop all transfer of cases from the KCC to the various embassies and consulates around the world shows the Defendants' subjective state of mind. Indeed, after this Court's Order, Defendants simply found a *new* way to deny issuing visas, and that by relying on COVID-19 area restriction proclamations, which this Court found to be invalid bases for denying visa adjudication. Defendants' actions cannot be viewed by the Court as subjective good faith because instead of complying with the spirit of this Court's prior Order, Defendants simply tried to find a way around it. Without intervention from this Court, they would have gotten away with it.

It follows that due to Defendants' bad faith, this Court can award equitable relief to Plaintiffs through its discretionary and broad powers and grant relief to all 2020 Diversity Visa program selectees by ordering Defendants to issue the maximum allowable number of visas under the DV-2020 program. Indeed, as indicated above, across a wide range of cases, federal judges have considered allegations of bad faith in the implementation of their decrees against government actors, *regardless of whether bad faith was alleged in the litigation*. *See, e.g.*, *Hutto,* 437 U.S. at 689–92 (awarding equitable relief in the form of attorney's fees where the Defendants failed in bad faith to cure *previously identified* constitutional violations); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (holding that federal courts have "inherent power to impose . . . a sanction for bad-faith conduct.").

With respect to the Court, Plaintiffs further believe that the 9,095 reserved diversity visas were not enough for the DV-2020 selectee Plaintiffs in this case. Even if COVID-19 were a valid basis for the cut off in adjudications—though it is clear now that Defendants used that merely as a pretext—the basis for finding the correct number of the diversity visas shouldn't have been based

on a reduction of adjudications and also should not have been based on a comparison to the IR-1 and IR-2 categories.

Rather than the use of the IR-1 and IR-2 categories, it is Plaintiffs' position that an award of reserved diversity visas would be much fairer if the Court considered the unique circumstances surrounding the Diversity Visa process. Immediate Relative visas are not really comparable to Diversity Visas in that the former are not limited in time and number. Unlike DV-2020 selectees, Immediate Relative applicants have no annual limit on how many can receive their visas. Unlike DV-2020 selectees, who had to have received a visa by statute on or before September 30, 2020, there is no such limitation for immediate relatives. After these proclamations expire or are rescinded, all immediate relatives will eventually be able to immigrate, assuming they pass adjudicative review by the State Department. Thus, as this court can see, the equities for Immediate Relatives and Diversity Immigrants are not substantially similar.

Given Defendants' bad-faith conduct and the lack of equity in comparing diversity immigrants with immediate relatives, Plaintiffs believe that this Court should increase the number of diversity visas reserved for 2020 Diversity Visa selectees around the world to the maximum allowed by statue—55,000.

O. Continuing Processing for Previous Muslim/Africa Ban 1182(f) Refusals

Plaintiffs also ask this Court to order Defendants to resume processing for DV-2020 selectees who were denied under the Muslim/Africa bans under 1182(f). As this Court explained in its Memorandum and Order granting the injunction against Defendants, Defendants are barred from refusing Plaintiffs' visa applications based upon President Proclamations made under the guise of 1182(f). These Proclamations were *entry* based and did not ever purport to restrict issuance or reissuance of visas to persons in the countries targeted by the Muslim ban. It is also of note that President Biden has already lifted those bans, and Plaintiffs whose visa applications were previously denied under 212(f) should have their visas processed at this time.

P. Reissuance of Expired Visas That Were Issued Both Before the Order and After to Ensure Full Compliance with the Order.

This court previously ordered that

> Defendants may not interpret or apply the Proclamations in any way that forecloses or prohibits embassy personnel, consular officers, or any administrative processing center . . . from processing, reviewing, or adjudicating a 2020 diversity visa or derivative beneficiary application or issuing or reissuing a 2020 diversity or derivative beneficiary visa based on the entry restrictions contained in the Proclamations.

ECF 123 at 84. Yet here we are, almost four months later, with many visas that have been issued both before *and* after the order ready to expire or already having expired *before* the deadline to enter the country has even passed. Defendants are refusing to reissue visas to those visa holders. Defendants' refusal to reissue these visas is not in compliance with the very language contained in the court's initial memorandum granting Plaintiffs' injunction. It is also not in keeping with the spirit of good faith. If Defendants are now allowed to refuse to reissue expired or expiring issues through no fault of the Plaintiffs and *prior* to the deadline for entering the United States, the result would not be equitable. Allowing Defendants to do so would allow them to facially comply with the spirit of the underlying preliminary injunction while ultimately undermining it in the end.

The Supreme Court in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017), conferred upon this court the power to issue broad equitable relief, stating that "a court . . . may mold its decree to meet the exigencies of [a] particular case." The exigencies of this case are so severe in that, if Plaintiffs expired or expiring visas are not reissued, even where there is time left to immigrate within the statutory deadline, they may lose out on their possible sole change to immigrant to the United States. The exigencies here *require* that the court mold relief for these individuals to include reissuance of visas expired or expiring prior to the deadline to immigrate to the United States on the same.

Q. Named Plaintiffs Should Be Given Priority in Visa Issuance

Named Plaintiffs should be given priority over the *Gomez* class members should the Court resume processing of visas. Any inference of unfairness in the disparate allocation of reserved

visas is rebutted by a factual showing that the allocation to named plaintiffs is rationally based on legitimate considerations. *See, e.g.*, *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). First, the named Plaintiffs spent considerable resources supporting the instant litigation. Many plaintiffs sold their homes, cars, or crowdsourced from their families and villages just to finance this litigation. Second, should this Court order Defendants to resume the processing of the 9,095 visas reserved in its Sept. 30 Order, prioritizing named Plaintiffs will still allow adequate relief for the class as named plaintiffs make up a minority of the *Gomez* class. The number of visas reserved are far greater than the number of named Plaintiffs and not all named Plaintiffs will be found eligible to be issued a visa. Third, unlike *Mohammed*, *Fonjong*, *Kennedy*, and *Aker* Plaintiffs, the named DV2020 plaintiffs in *Gomez*– the class representatives –were all issued visas prior to the court certifying the class on September 30, 2020. Lastly, the harms caused to named Plaintiffs include the temporal limitation caused by the suspension of processing. Without adequate time to get medical examinations or appear for an interview, named Plaintiffs, despite their investments, could be disadvantaged despite being prevailing parties in the instant action. Given these considerations, this Court should prioritize named Plaintiffs.

VI. RELIEF REQUESTED

Plaintiffs, through undersigned counsel, respectfully move this Court for the following relief:

(1) an order declaring Defendants' implementation of Presidential Proclamation 10014 and Presidential Proclamation 10052 unlawful;

(2) an order vacating and setting aside Presidential Proclamation 10014 and Presidential Proclamation 10052 and any action taken to implement the Proclamations;

(3) an order declaring the Defendants' "mission critical" and "emergency" designation requirements for adjudication of diversity visa applications unlawful;

(4) an order declaring Defendants' "Diplomacy Strong" policies unlawful;

(5) an order declaring Defendants' No Visa Policy unlawful;

(6) an order mandating the immediate processing and adjudication of Fiscal Year 2020 Diversity Visas;

(7) any other relief, under law or equity, that this honorable Court deems just and proper.

VII. CONCLUSION

Plaintiffs have established that they have a clear right to have their 2020 DV applications adjudicated, that the government has a non-discretionary duty to adjudicate, and Defendants failed to carry out this duty. Plaintiffs have also established that Defendants No-Visa policy as applied to DV2020 is arbitrary and capricious and not accordance with law, and that their exclusion of DV2020 from "mission critical" was arbitrary and capricious, and Plaintiffs were harmed as a result. Furthermore, because the government's duty to adjudicate with a reasonable amount of time is non-discretionary, and because Plaintiffs are challenging the government's inaction as opposed to final decision, consular nonreviewability is inapplicable. Despite Defendants' desire to have the former president's Proclamations hold the power of an ukase, the United States is not a Russian dependency. Additionally, since Plaintiffs have established that there are no disputed material facts, and the Plaintiffs are entitled to judgement as a matter of law, the Court should enter summary judgement in favor of the Plaintiffs.

Dated: February 3, 2021

Respectfully submitted,

/s/ Philip Duclos

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CERTIFICATE OF SERVICE

On the date below, I electronically filed the **AKER, MOHAMMED, FONJONG, AND KENNEDY PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** and all attached exhibits with the Clerk of the United States District Court for the District of Columbia, using the CM/ECF System. The Court's CM/ECF System will send an email electronically to all noticed parties to the action who are registered with the Court's CM/ECF System.

Dated: February 3, 2021

Respectfully submitted,

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