IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-01419
MOHAMMED ABDULAZIZ ABDUL MOHAMMED, et al., Plaintiffs, v. MICHAEL R. POMPEO, et al., Defendants.	Civil Action No. 1:20-cv-01856
AFSIN AKER, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-01926
CLAUDINE NGUM FONJONG, et al., Plaintiffs, v. DONALD J. TRUMP, Defendants.	Civil Action No. 1:20-cv-02128
CHANDAN PANDA, et al., Plaintiffs, v. CHAD F. WOLF, Defendants.	Civil Action No. 1:20-cv-01907

GOMEZ PLAINTIFFS' REPLY MEMORANDUM
IN FURTHER SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants do not deny that the Proclamations are based on false premises, and are so irrational that they could not have resulted from the "find[ing]" that § 1182(f) expressly requires. Nor could they, given DHS's agreement (85 Fed. Reg. 46788, 46798 (2020)) that:

> DHS knows that immigrants make significant contributions to the U.S. economy…. [I]mmigrants are an important source of labor in the United States and contribute to the economy. … [I]mmigrants are crucial for agriculture, construction, healthcare, hospitality, almost all industries, immigrants are a source of future U.S. labor growth, many immigrants are successful entrepreneurs…..

Defendants instead contend that the President has unrestrained discretion in immigration matters, unchecked by either the separation of powers or the nondelegation doctrine. And they say that the President's *and* the agencies' actions are unreviewable under the APA.

The sum of these extravagant assertions is that the President has power to delete the INA and replace it with irrational legislation that his own party could not pass through Congress, and that no one is allowed to challenge him in court. That is wrong. Executive action is subject to judicial review. And with that basic premise established, the executive actions in this case are unlawful and ought to be enjoined—promptly, before they permanently deprive thousands of people of the American Dream that Congress provided them.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

A. Plaintiffs Have Shown A Substantial Likelihood Of Standing

Defendants do not deny that Plaintiffs' injuries (*see* ECF 53-1, at 19-20) are *legally* sufficient to establish standing. Nor do they deny that these injuries are traceable to their actions (*see id.* at 21; ECF 66, at 2-3, 8-9). Defendants' remaining arguments against standing fail.

Injury. "A preliminary injunction may be granted based on … less extensive evidence than in a trial on the merits," *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004), and

Defendants' citation (ECF 94, at 17) confirms that an "affidavit" is sufficient "evidence" to establish the necessary facts at this stage. *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) ("*EPIC*"). Plaintiffs' declarations (*see* ECF 53-1, at 12-20 (summarizing same)) are thus sufficient to carry their evidentiary burden: They attest to specific facts under oath; Defendants do not dispute their contents or present evidence calling any of the averments into doubt; and the facts so attested establish injury-in-fact.

Defendants cite *Nguyen v. Dep't of Homeland Sec.*, 2020 WL 2527210 (D.D.C. May 18, 2020), but that case is inapposite: The plaintiffs did not address standing in their motion, let alone produce extensive declarations like those that Plaintiffs have supplied here. *See id.* at *4. Defendants assert (ECF 94, at 19) that the declarations are not "record evidence" under *Nguyen*, but the Court in *Nguyen* took issue with plaintiffs' reliance on "allegations" in the complaint, not to sworn statements made in supporting evidentiary declarations. Defendants cite no authority—there is none—to support the suggestion that Plaintiffs were required to produce copies of e-mails and business records, whose specific contents are set forth in the declarations. Plaintiffs have shown a "substantial likelihood of standing" for a preliminary injunction. *EPIC*, 878 F.3d at 377.[1]

***Redressability*.** Defendants argue (ECF 94, at 20) that the diversity-visa plaintiffs' injuries are not redressable because "[e]ven if the Court were to enjoin the Proclamations, visa processing and issuance are affected by the State Department's suspension of routine visa services … as well as visa processing backlogs, which render it unlikely that the diversity visas at issue could be processed or adjudicated by September 30." That is wrong, because Plaintiffs have asserted claims that would avoid those purported barriers to visa adjudication. *See* 53-1, at 45; ECF 66; SAC

[1] In an abundance of caution, Plaintiffs have requested leave to submit documentary evidence, in case the present evidentiary record is deemed insufficient despite satisfying the standard in *EPIC*.

¶ 338; *infra* pp. 5-25. If the Court grants relief, the diversity visa Plaintiffs will secure "emergency" or "mission critical" visa processing so that their visas are adjudicated by September 30; or their visa numbers will be reserved and available for adjudication at a later date.[2]

Defendants' statement that an order requiring them to promptly adjudicate visa applications "would have no practical effect" on their behavior (ECF 94, at 22) is surprising. More to the point, it is not supported by evidence: Defendants' witnesses do not say that it is *impossible* to timely process *even one* of the Plaintiffs' applications. Such a claim would be implausible given their treatment of the original Plaintiffs' and Mr. Saleh's beneficiaries. *See* Naim Decl. ¶ 4-9.

Defendants assert (ECF 94, at 20) that Plaintiffs have not shown that they "can meet their burden of establishing eligibility for a visa 'to the satisfaction of the consular officer'" at a visa interview (quoting 8 U.S.C. § 1361). But Plaintiffs are not required to make such a showing. They are seeking a *procedural* remedy—removal of unlawful barriers to adjudication—and therefore they are not required to prove that the agency would actually grant the visas in order to establish standing. "The requirements for standing differ where … plaintiffs seek to enforce procedural (rather than substantive) rights. … Plaintiffs need not demonstrate that but for the procedural violation the agency action would have been different. Nor need they establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiff's interest." *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (citation omitted). Plaintiffs, moreover, have attested that their applications are complete, that the underlying visa petitions have been approved where appropriate (which "establish[es] prima facie entitlement to status," *see* 9

[2] While the non-diversity visa Plaintiffs have not yet asserted claims for relief from the COVID-19 Guidance, they do not face the deadline that Defendants cite as barring redressability. Relieving these Plaintiffs' beneficiaries from the Proclamations would allow them to obtain visas as consulates permit. Defendants rightly do not argue that these Plaintiffs' injuries are not redressable.

FAM 502.1-2(C); 9 FAM 402.10-9(A), 9 FAM 402.12-6(A)), and that Plaintiffs are aware of nothing that would prevent visas from issuing.[3] There is a substantial likelihood of standing.

Defendants suggest (ECF 94, at 24) that the procedural-injury rules do not apply because Plaintiffs "assert a substantive right to receive visas," but they misread the sentence of the FAC (¶ 341) on which they rely: Plaintiffs do not ask the Court to compel Defendants to *grant* their visas, but seek restoration of their "*eligibility*"—*i.e.*, their status as "legally qualified" (*Eligible*, Black's Law Dictionary (11th ed. 2019)) for diversity visas—and an order directing Defendants "to process and to adjudicate [the applications] on or before September 30, 2020." ECF 66-2.

Defendants assert (ECF 94, at 24) that the procedural-injury test does not apply because Plaintiffs supposedly have not identified "any specific agency action." Defendants do not cite any case holding that this is a prerequisite, and the premise is untrue. As detailed below, the agency actions are Defendants' application of the Proclamations and the COVID-19 Guidance to diversity visa winners so as to prevent their applications from being adjudicated before the statutory deadline. The procedural injury is Defendants' wrongful denial of Plaintiffs' statutory right to have their visa applications adjudicated. Plaintiffs need not show that the visas would be granted in order to obtain an order requiring that they be adjudicated. *Mendoza*, 754 F.3d at 1010.

B. Consular Nonreviewability Does Not Apply Absent A Final Visa Decision

Defendants agree that "Plaintiffs have not been 'refused' visas." ECF 94, at 50; *see* ECF 53-1, at 22. The judicial doctrine of consular nonreviewability simply "does not apply" in this situation, "where the government has not made a final visa decision," *P.K. v. Tillerson*, 302 F. Supp. 3d 1, 11 (D.D.C. 2017) (collecting cases). Plaintiffs have explained as much three times (ECF 21, at 34-36; ECF 37, at 16-17; ECF 53-1, at 21-22), but Defendants persist in ignoring the

[3] *See, e.g.*, Bushati Decl. ¶¶ 11, 15-17; Iwundu Decl. ¶¶ 3-5; Karpes Decl. ¶¶ 7-8; Koirala Decl. ¶ 2; Kinteh Decl. ¶¶ 2, 7; Nakamura Decl. ¶ 10.

relevant authorities (ECF 94, at 27-29). Their argument remains frivolous and should be rejected.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

On the merits, Defendants err in asserting (ECF 94, at 25) that the motions "rest[] entirely on claims against the proclamations under the APA." In addition to APA claims, Plaintiffs assert *direct* challenges to the Proclamations on grounds that they are invalid under § 1182(f) and under separation-of-powers and nondelegation principles. ECF 53-1, at 22-33; ECF 66, at 7-8. Such claims are cognizable without resort to the APA. *See Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir.), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Doe v. Trump*, 418 F. Supp. 3d 573, 587-88 (D. Or. 2019) (reviewing challenges to prior proclamation). And the Court has inherent authority to enjoin unlawful executive action. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-89 (1952); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

A. The Proclamations Do Not Satisfy The Statutory "Findings" Prerequisite

1. As the opening brief explained (ECF 53-1, at 21), "the substantive scope of [the President's § 1182(f)] power is not limitless." *Doe v. Trump*, 957 F.3d 1050, 1066 (9th Cir. 2020). It is bounded by the express statutory "prerequisite," *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018), that the President can suspend entry into the country only if he first "*finds*" that such entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added). The plain meaning of the word "finds" demands a rational justification—"a legally sufficient evidentiary basis," Fed. R. Civ. P. 50(a)(1), showing that the government actor "seriously weighed the benefits" of his action against its costs, *United States v. Bikundi*, 926 F.3d 761, 776-77 (D.C. Cir. 2019), and establishing that he made "a[] rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Defendants do not dispute the ordinary meaning of "finds." And where a "word is 'undefined in [the] statute, we give the term its ordinary meaning.'" *United States v. Halliburton*

Co., 954 F.3d 307, 310 (D.C. Cir. 2020) (citation omitted). Defendants assert (ECF 94, at 35) that the authorities defining "find" are "inapposite," but they do not explain why. Nor could they: the word has an ordinary meaning, and it means the same thing here. *See, e.g.*, *Hamilton v. Lanning*, 560 U.S. 505, 514 (2010) (interpreting "projected" by reference to use in multiple statutes).[4]

Congress could have used a different word (*e.g.*, "deems") if it had meant something other than "finds." Indeed, Congress used "deems" later in the same sentence of § 1182(f), showing that it understood the words differently. *See, e.g.*, *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) ("where [Congress] uses different language in different provisions of the same statute, we must give effect to those differences"). Congress determined "to counteract substantive openendedness with procedural strictness," *see Zedner v. United States*, 547 U.S. 489, 508-09 (2006), mandating that the President make a "find[ing]"—*i.e.*, undertake a rational assessment of the world—before he may he adopt those "[entry] restrictions he may deem to be appropriate," 8 U.S.C. § 1182(f).

Addressing the specific question here, the Ninth Circuit ruled in the challengers' favor. *See Doe*, 957 F.3d at 1066-67. As Plaintiffs explained (ECF 53-1, at 23-24), *Doe*—like this case—arose in the "domestic economic" context, where the absence of "national security and foreign affairs justifications" means that the President's "power is … circumscribed." 957 F.3d at 1067. In this context, § 1182(f)'s findings requirement is not satisfied by a Proclamation "issued with virtually no factual findings, minimal reasoning, and an extremely limited window for public comment." *Id*. Defendants' response (ECF 94, at 39 n.8) is feeble: The fact that the Ninth Circuit *also* found no irreparable harm, *Doe*, 957 F.3d at 1058-59, does not diminish the persuasive value

[4] *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (cited in ECF 94, at 36), only reconfirms the plain meaning of "finds." The statute required an official to examine the passengers of landing ships, "and if on such examination there should be found" persons falling within a category of inadmissibility, "such persons shall not be permitted to land." *Id.* at 661. Although the officer was "the sole and exclusive judge" of the facts, *id.* at 660, the statute was clear in expressing the ordinary understanding of the word "found"—it requires an "examination" of the issues.

of its statutory analysis. Defendants do not deny that the Ninth Circuit's reasoning dictates invalidation of the Proclamations here. This Court should adopt the Ninth Circuit's approach.

Defendants assert (ECF 94, at 35) that "Plaintiffs fail to address the [purported] body of case law on Presidential findings." But none of Defendants' cases (*id.* at 32, 35) involved a "find[ings]" requirement like the one in § 1182(f). The statute in *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), did not require "findings," but allowed the President to approve tariff changes "if in his judgment" it was "necessary" based on an "investigation of the commission." *Id.* at 376-77. His discretionary "*judgment*" was not subject to substantive review, *see id.* at 379-80, but that is not the issue here. The Supreme Court did not suggest that the same result would have followed if there had been no "*investigation*." There was likewise no "findings" requirement in *Dalton v. Specter*, 511 U.S. 462 (1994)—the statute conferred unbounded discretion to "approve or disapprove … the Commission's recommendations" regarding military base closures. *Id.* at 465. And in *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010), "the President's compliance with" a statutory requirement to make certain "determin[ations]" was "not at issue." *Id.* at 1342-43. The reason that "any claim that the Presidential proclamation does not produce rate neutrality is not subject to judicial review," *id.* (quoted in ECF 94, at 35), was that the statute "d[id] not make rate neutrality a condition of the President's decision"—that is, the President *was not required* to make a "rate neutrality" determination at all. *Id.* at 1342-43.

Defendants wrongly argue (ECF 94, at 34) that *Hawaii* "preclude[s]" the § 1182(f) claim. The quotation on which they principally rely (*id.*) concerned the plaintiffs' *Establishment Clause* claim—which was subject to a narrow standard of review. *See* 138 S. Ct. at 2416-21. On the *statutory* claim, the Supreme Court did *not* bar review of whether the President had satisfied the "prerequisite" (*id.* at 2408) to make a rational "find[ing]." The Court decided the challenge *on the merits*—ruling that the proclamation satisfied the "find[ings]" requirement by "setting forth

extensive findings describing how deficiencies in the practices of select foreign governments … deprive the Government of" information necessary to the vetting process. *Id.* at 2408-09. In *this* case, the President did *not* make the requisite "find[ings]." *See Doe*, 957 F.3d at 1067.

Defendants misunderstand (ECF 94, at 34) *Hawaii*'s statement that a "searching inquiry into the persuasiveness of the President's justifications is inconsistent with [§ 1182(f)] and the deference traditionally accorded the President in [the foreign-policy] sphere," 138 S. Ct. at 2409. The Court's point was that, where the President had made a "find[ing]" that was "more detailed than any prior [§ 1182(f)] order," the judiciary could not second-guess his "'chosen method'" of responding to the facts found—particularly "'in the context of international affairs and national security,' [where] he is 'not required to conclusively link all of the pieces in the puzzle.'" *Id.* (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993), and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010)). But this case does not implicate foreign policy, so the President is *not* entitled to the "deference traditionally accorded" to him in that sphere. *See id.* And no "searching inquiry into the persuasiveness of the President's justifications" is necessary to conclude that the President in *this* case made no more than an *assertion*, a "mere reference to 'some rough justice basis'"—not a *finding*. *See Bikundi*, 926 F.3d at 776-77 (citation omitted).

2. On the substance, Defendants assert that "the plain text of the Proclamation indicates that the President made a 'finding' that 'the entry into the United States of persons' described in the relevant provisions 'would be detrimental to the interests of the United States'" (ECF 94, at 35-36 (quoting SAC Ex. C, at 38264)). But the mere incantation of "find" is not "the end of the matter" (*contra id.* at 36), because the statute requires the President to actually *make a finding*.[5]

[5] Defendants also argue (ECF 94, at 37) that § 1182(f) does not require a proclamation to "explain the basis of [the President's] finding in detail." But even if the President need not set forth his full rationale *in the proclamation itself*, that would not relieve him of the prerequisite to make rational

Plaintiffs are likely to show that the President did not make the requisite findings, because ***it is undisputed that the President's purported "findings" are false***. Plaintiffs supplied the Court with the declarations of four highly credentialed economists and numerous citations to academic and popular publications showing that the Proclamations' premises are untrue (*see* ECF 53-1, at 24-29 (summarizing evidence)). Defendants present zero contrary evidence. Plaintiffs would likely prevail at summary judgment: This Court would assume that "the facts identified by the moving party" are "admitted," because Defendants have not attempted to controvert them. L. Civ. R. 7(h)(1); *see, e.g.*, *Levinthal v. F.E.C.*, 219 F. Supp. 3d 1, 3-4 (D.D.C. 2016).

First, with respect to the immigrant entry suspension, Plaintiffs explained (ECF 53-1, at 24-29) that the Proclamations' premise (that immigrants take jobs from U.S. workers) is not only false, but *directly contrary* to the consensus understanding of everyone to have carefully studied the issue—*including DHS itself*. As DHS recently averred in the Federal Register, "immigrants make significant contributions to the U.S. economy"; they "are an important source of labor in the United States and contribute to the economy"; they "are crucial for agriculture, construction, hospitality, almost all industries"; they "are a source of future U.S. labor growth"; and "many immigrants are successful entrepreneurs." 85 Fed. Reg. at 46798. The Proclamations thus have it backwards: immigration contributes to economic growth,[6] *adding* jobs *on top* of those occupied by the immigrants themselves, "without 'crowding out' any native-born workers." Peri Decl. ¶ 9.[7]

Defendants do not contest these facts, nor do they acknowledge DHS's refutation of the President. They assert (ECF 94, at 33) that the President's "goal" was protecting U.S. workers

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findings. If not set forth on a proclamation's face, the basis for the President's findings nevertheless ought to be identifiable when the proclamation is challenged in litigation.

[6] *See, e.g.*, Hunt Decl. ¶ 11; Peri Decl. ¶¶ 10, 12.

[7] *See also, e.g.*, Nowrasteh Decl. ¶¶ 27-28; Sparber Decl. ¶ 12; ECF 53-1, at 26-29 & nn.22-27.

"'from the threat of competition for scarce jobs from new [green card holders],'" but that aspiration is not a *finding*. It is *conjecture*, an appeal to "rough justice" based on no evidence and contrary to everything known to economics. Defendants do not even claim that the conjecture is true. Nor do they introduce evidence from which the President could rationally have arrived at it.

Second, with respect to nonimmigrants, Plaintiffs explained (ECF 53-1, at 25-26) that the June Proclamation fails to connect the cited unemployment figures to the President's assertion that foreign workers would threaten U.S. employment. The Proclamation conflates broad *industries* in which unemployment has risen with the *jobs* that nonimmigrant workers would occupy if admitted. Those are not the same. The President's statistics about *industries* thus do not show that foreign workers are "a significant threat to employment opportunities for Americans" (SAC Ex. C, at 38263-64). The undisputed evidence shows that "the Proclamations will only serve to penalize the economic recovery" (Peri Decl. ¶ 20), and that excluding workers is "counterproductive to [the] stated goal of protecting [U.S.] workers and aiding the post-COVID economic recovery" (Nowrasteh Decl. ¶ 8).[8] And many foreign workers (*e.g.*, those on L visas) perform functions that cannot be transferred to U.S. workers—a fact of which the Proclamations take no account.

Defendants appear to concede (ECF 94, at 38) that "the President did not demonstrate that 'actual *jobs* that would otherwise go to U.S. workers' will instead go to foreign workers." They instead assert (*id.*) that asking for such a showing "would lead to the absurd conclusion that a President must … allow … the loss of U.S. jobs to foreign workers" before issuing a Proclamation. But that is not Plaintiffs' argument. The President need not allow a detriment to transpire before taking preventive measures. But he must rationally "find" that a detriment is likely prior to invoking § 1182(f). That requires consideration of evidence, and some basis to believe that the

[8] As Plaintiffs explained, a recession does not affect this conclusion. *See* ECF 53-1, at 28; Peri Decl. ¶ 15; Sparber Decl. ¶ 14; Nowrasteh Decl. ¶ 19. Defendants do not rebut this fact, either.

facts found are true. *Cf. United States v. Brown*, 631 F.3d 638, 648 (3d Cir. 2011) ("we do not take seriously someone who claims X is true but cannot provide any reason for thinking it so"). Plaintiffs have shown a likelihood that the President did not meet this minimal threshold.

Defendants' position amounts to a claim that the President is free under § 1182(f) to suspend immigration under plainly false pretenses, and in any manner he chooses. That alarming proposition is not the law. Plaintiffs are likely to succeed in showing that the statutory "find[ings]" prerequisite is unsatisfied, and that the Proclamations are unlawful.

B. Defendants' Actions Violate The Separation Of Powers

1. The President may invoke § 1182(f) based on considerations that are "not covered by one of the categories in [§] 1182[]." *See Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (Ginsburg, J.). But he cannot "'override' a provision of the INA," or limit entry where "Congress has already spoken … on the issue" to be addressed. *Doe*, 418 F. Supp. 3d at 594, 597 (quoting *Hawaii*, 138 S. Ct. at 2411). The President thus cannot abuse § 1182(f) to "eviscerate[] the statutory scheme" governing entry criteria. *Doe*, 957 F.3d at 1064. Here, as in *Doe*, "Congress has already spoken in § 1182[] on the issue of limiting … admissibility based on the potential" effects on the labor market. *See* 418 F. Supp. 3d at 597. Defendants have no answer to *Doe*.

Defendants assert (ECF 94, at 44) that *Hawaii* "preclude[s]" a separation-of-powers claim. But *Hawaii* did not even involve such a claim. And Defendants drastically overread *Hawaii* in contending (*id.*) that the Court there held "that the President has the authority to suspend entry of foreign nationals who are otherwise admissible under other provisions of the INA"—*of course* § 1182(f) grants the President *some* power; otherwise the provision would have no effect. The separation-of-powers question is whether these particular Proclamations reach so far into an area of congressional legislation as to "eviscerate[] the statutory scheme." *Doe*, 957 F.3d at 1064.

These Proclamations reach too far. Defendants misleadingly suggest (ECF 94, at 44-45)

that the alleged conflict is only with § 1182(a)(5), but the Proclamations wipe away a vast and complex scheme set forth in *dozens* of provisions and sub-provisions explicating the role that labor-market concerns should (and should not) play in regulating admission. *See* ECF 53-1, at 30-31 (cataloging relevant provisions). The Proclamations purport to override this scheme for an arbitrary period set at the President's whim. *See* SAC Ex. C, at 38264. The President has thus named himself the arbiter of whose labor is in the "national interest," arrogating to the Executive alone the power to (re)determine an issue on which multiple Congresses have already spoken.

The problem is illustrated by the State Department's wildly complicated August 12 guidance regarding the Proclamations' "national interest" exceptions (AR 167-74). That guidance announces new criteria for H-1B visas (AR 169-70) under which an applicant must satisfy two of five criteria—one of which has subparts, and another of which dictates an arbitrary 15% premium over the statutory prevailing wage (*see* 8 U.S.C. §§ 1182(p), 1182(t)(1)(A)(II)). It sets up similarly stringent requirements (AR 170-74) for other nonimmigrant categories. And it decides that a 20-year-old facing an age-out deadline should be admitted in the "national interest" (AR 174), but that diversity lottery winners and most family members of U.S. citizens and LPRs continue to be excluded. These are acts of legislation, not execution of the laws. *Congress has already occupied this field*. The President cannot invoke § 1182(f) to "eviscerate[] the statutory scheme," *Doe*, 957 F.3d at 1064, by replacing the legislature's judgments with his own policy preferences "in direct contravention to a statute passed by Congress after Congress's 'exhaustively considered,' and 'deliberate and deliberative process.'" *Doe*, 418 F. Supp. 3d at 597 (citations omitted).

Defendants alternatively argue (ECF 94, at 45) that "the Proclamations acknowledge the existing limitations imposed by Congress and specifically explain why the statutory solution is insufficient." But the constitutional scheme does not allow the President to look at what Congress has done, decide that it is "insufficient," and then do something else entirely. As Defendants agree

(*id.*), "the Executive Branch" is not allowed "to undo the operation of laws duly enacted by Congress and signed by the President, outside the process prescribed by Article I" (citing *Clinton v. City of New York*, 524 U.S. 417 (1998)). If Congress cannot give the President a line-item veto, *see Clinton*, 524 U.S. at 438, it cannot authorize him to erase a detailed statutory regime built up through decades of legislation, and replace it with new laws based on demonstrably false conjectures about domestic policy. "The President simply does not have the constitutional authority to amend a statute." *Doe*, 418 F. Supp. 3d at 597 (citing *Clinton*, 524 U.S. at 438).

2. Independently and in combination, the Proclamations and the State Department's application of its COVID-19 Guidance to diversity-visa applicants violate the separation of powers because they "'override' a provision of the INA." *Doe*, 418 F. Supp. 3d at 594 (citing *Hawaii*, 138 S. Ct. 2411). Specifically, the Proclamations and the COVID-19 Guidance purport to override the INA's express provision that diversity visa lottery winners "***shall remain eligible*** to receive [a] visa only through the end of the specific fiscal year for which they were selected." 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added); *see* ECF 66, at 7-8; SAC ¶ 338. Defendants assert (ECF 94, at 49) that this text "mandates only that the agency *stop* adjudicating diversity visa applications at the end of each fiscal year," but that is only half the story: While eligibility ends each year on September 30, lottery winners "***shall remain eligible***" until that date. "Congress's use of the word 'shall' … evidences a clear legislative mandate"; "[i]f Congress [had] sought to give … discretion to eliminate [visa eligibility] it could have used less rigid language to achieve that result." *Sierra Club v. E.P.A.*, 705 F.3d 458, 467 (D.C. Cir. 2013); *see, e.g.*, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) ("shall" connotes an "obligation impervious to … discretion"). No statute allows the President to terminate Plaintiffs' statutory visa eligibility.

If left unchecked, Defendants will do exactly that. They assert that "the Proclamations render Plaintiffs 'ineligible to receive visas' for the remainder of the fiscal year" (*e.g.*, ECF 94, at

47 (citation omitted)), and that the COVID-19 Guidance has the same effect by "prevent[ing] … issuance or processing" of diversity visas—even as other visas, including for time-pressured age-out cases, are being processed worldwide on an "emergency" or "mission critical" basis (*e.g.*, *id.* at 21; AR 36-37, 257). And Defendants' communication with individual applicants has been even clearer: "DV-2020 was cancelled by the Proclamation of the President." *E.g.*, Tleubayeva Decl. Ex. A. Defendants' declaration that all 2020 lottery winners are "ineligible" for visas, their claim to have "cancelled" the program, and their refusal to adjudicate visas before the deadline are unlawful attempts to "'override' a provision of the INA." *Doe*, 418 F. Supp. 3d at 594.[9]

C. The Proclamations Violate The Nondelegation Doctrine

Plaintiffs explained (ECF 53-1, at 32-33) that if the President's § 1182(f) authority is not cabined by the "find[ings]" requirement or the separation of powers, then it is so unbounded as to violate the nondelegation doctrine. Defendants do not identify any "intelligible principle to guide the [Presidents's] use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

Defendants instead argue (ECF 94, at 45-46) that the nondelegation doctrine is inapplicable "because '[t]he exclusion of aliens is a fundamental act of sovereignty' that 'is inherent in the executive power to control the foreign affairs of the nation'" (quoting *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)). But that reading of *Knauff* cannot be correct. It would mean that the President could invoke *executive* power to rewrite *legislation*. This interpretation flies in the face of the Supreme Court's recognition that the formulation of "[p]olicies pertaining

[9] Defendants cite the Proclamations as authority for taking these actions (*see* ECF 94, at 47), but the Proclamations are backed only by § 1182(f), which permits only a temporary *suspension* of entry, *i.e.*, a "defer[ral] till later." *Hawaii*, 138 S. Ct. at 2409. Section 1182(f) does *not* authorize a proclamation permanently "cancel[ing]" any program. The COVID-19 Guidance is untethered to any statute; whatever authority the State Department may have over consular operations, it cannot cease operations for more than half the year without any provision to protect the time-sensitive rights of diversity visa lottery winners.

to the entry of aliens … *is entrusted exclusively to Congress*," a principle that is "about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added).

Defendants misread *Knauff*. Their quotation elides the Supreme Court's explanation that the right to regulate exclusion of foreign nationals "*stems … from legislative power*." 338 U.S. at 542 (emphasis added). And Defendants fail to acknowledge the source of the President's authority in this area: his "inherent power *to control the foreign affairs* of the nation." *Id.* (emphasis added). *Knauff* recognized an inherent executive power *only* in contexts that implicate the President's foreign-affairs authority. This makes sense, because the statute in that case was expressly limited to "the national emergency of World War II." 338 U.S. at 544. The narrow delegation of authority in the foreign affairs context posed no nondelegation concerns because the President has inherent power *in that sphere*. *See Doe*, 418 F. Supp. 3d at 592. But that "does not support the conclusion that the current version of § 1182(f) does not present any nondelegation issues" when the President invokes it in a "wholly domestic context." *Id.* The President has little or no inherent power in that context, so when he purports to "use[] § 1182(f) to engage in *domestic* policymaking, without addressing any foreign relations or national security issue," nondelegation applies. *Id.*

Defendants dismiss the district court's thorough analysis in *Doe*, asserting in a single sentence (ECF 94, at 39) that the ruling "was wrong and contrary to *Knauff*." But the district court persuasively explains why differing facts render its decision consonant with *Knauff*: The nondelegation doctrine does not apply in foreign-affairs matters like *Knauff*, but it *does* apply in domestic matters like *Doe* and this case. *See* 418 F. Supp. 3d at 592.[10]

[10] Defendants assert (ECF 94, at 46) that "the Ninth Circuit declined to adopt the district court's non-delegation theory" in *Doe*, but that was because the court of appeals had identified other infirmities in the proclamation. *See Doe*, 957 F.3d at 1062-67. Constitutional avoidance counseled

Defendants err in suggesting (ECF 94, at 39) that limiting entry is always "a constitutional foreign-affairs function." The Ninth Circuit "reject[ed]" this claim, because a proclamation does not "implicate[] the President's foreign affairs powers simply because [it] affects immigrants." *Doe*, 957 F.3d at 1067. As the district court explained, "the text of Article I and more than two centuries of legislative practice and judicial precedent make clear" that "the Constitution vests Congress, not the President, with the power to set immigration policy." 418 F. Supp. 3d at 592; *see* U.S. Const. Art. I § 8 (Congress has power to "regulate Commerce with foreign Nations" and to establish a "uniform Rule of Naturalization").[11] "If the fact that immigrants come from other countries inherently made their admission foreign relations subject to the President's Article II power, then all of this law would be superfluous." *Doe*, 418 F. Supp. 3d at 592-93.

As in *Doe*, the Proclamations here purport to "deal[] with a purely domestic economic problem," alleged labor-market slack. 957 F.3d at 1067. Defendants are thus mistaken in arguing (ECF 94, at 39) that the Proclamations are permitted because they were issued "in response to a national emergency triggered by a worldwide crisis." The "emergency" is a domestic matter. It is a subject for legislation.[12] Congress cannot delegate to the President its legislative authority in this area. Because § 1182(f) fails to supply an "intelligible principle," *Gundy*, 139 S. Ct. at 2123, Plaintiffs are likely to show that any attempted delegation is invalid. *See Doe*, 418 F. Supp. 3d at 590-92.

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against invalidating § 1182(f)'s statutory delegation of authority, despite the district court's "forceful" analysis. *Id.* at 1067. The same principle favors a restrained reading of § 1182(f) here. *See Rothe Dev., Inc. v. U.S. Dep't of Defense*, 836 F.3d 57, 68 (D.D.C. 2016).

[11] As *amici* Immigration Law Professors explain, § 1182(f)'s "uniform" use "for almost 70 years" (prior to the proclamation enjoined in *Doe*) has been in foreign affairs only. ECF 92, at 4.

[12] *See* Pub. L. No. 116-123, 134 Stat. 146 (2020); Pub. L. No. 116-127, 134 Stat. 178 (2020); Pub. L. No. 116-136, 134 Stat. 281 (2020); Pub. L. No. 116-139, 134 Stat. 620 (2020).

D. The State Department's Actions Are Final, Reviewable, And Unlawful

Plaintiffs have explained (ECF 53-1, at 34-38; ECF 66, at 4-7) that the State Department has acted arbitrarily and capriciously in its visa policies. Defendants, for their part, do not claim to have acted rationally. They instead assert that their conduct is immune from review. They are wrong. The State Department has undertaken two final agency actions: It has ceased adjudicating visa applications based on the Proclamations, and it has adopted a policy of refusing to treat diversity visa winners as "emergency" or "mission critical" cases under the COVID-19 Guidance despite the impending visa-issuance deadline. Each of those actions is reviewable and unlawful.

1. The State Department's Policy Of Refusing To Adjudicate Visa Applications Is Final Agency Action

The State Department has completed final agency action by declaring Plaintiffs and class members ineligible to receive visas under the Proclamations, and by adopting a policy to refuse adjudication of their visa applications on that basis. This policy is distinct from and not required by the terms of the President's *entry* suspensions under § 1182(f) (*see* ECF 53-1, at 34 n.34), and it therefore constitutes "final agency action" even under Defendants' interpretation of that term.

Defendants assert that the "legal consequences" here "flow from the Proclamations, not action by the State Department" (ECF 94, at 31),[13] because (they say) the INA dictates that "a visa may not be issued" to a person subject to the Proclamations (*see id.* at 42-44). That argument is incorrect. It rests on two premises: (i) a visa may not issue if the applicant "is ineligible to receive a visa … under section 1182," 8 U.S.C. § 1201(g), and (ii) a person subject to a § 1182(f) proclamation is "ineligible to receive a visa." But premise (ii) is false. The text of § 1182(f), captioned "Suspension of ***Entry***," refers only to ***entry***, never mentioning visas: "Whenever the

[13] Defendants do not dispute that they have completed the "decisionmaking process" and are imposing "legal consequences" (visa ineligibility). *Bennett v. Spear*, 520 U.S. 156, 177-78 (1997).

President finds that the ***entry*** of any aliens …. would be detrimental to the interests of the United States, he may by proclamation … suspend the ***entry*** of … aliens …, or impose on the ***entry*** of aliens any restrictions he may deem to be appropriate" (emphases added).[14] A person subject to a § 1182(f) suspension is thus barred from ***entering*** the country, but he is not ineligible for the separate step of ***obtaining a visa***. This is not a trivial difference. It is "the basic distinction … that runs throughout the INA." *Hawaii*, 138 S. Ct. at 2414.[15]

Defendants try to get around this error in their argument by asserting that "'aliens who are inadmissible under the following paragraphs' (including § 1182(f)) '*are ineligible to receive visas*.'" ECF 94, at 43 (quoting 8 U.S.C. § 1182(a)). But this is false. All the work is done by the parenthetical "(including § 1182(f))," which is not in the statute. "The problem with [Defendants'] approach is the one that inheres in most incorrect interpretations of statutes: It asks [the Court] to add words to the law…." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015). In fact, the statute *distinguishes* between (*e.g.*) "*subsection* (a)" and (*e.g.*) the numbered "*paragraphs* (2) or (3) of subsection (a)." *E.g.*, 8 U.S.C. §§ 1182(b)(3), (d)(1), (d)(4), (k). The referents of "the following paragraphs" in *subsection* 1182(a) are thus the numbered *paragraphs* in *subsection* 1182(a) itself.[16] *Subsection* 1182(f) is *not* a "paragraph" within *subsection* 1182(a)'s meaning, and does not trigger the visa-ineligibility clauses in §§ 1182(a) and 1201(g).

Defendants identify no authority adopting their antitextual reading of the INA. They cite

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[14] Section 1185(a)(1), cited in ECF 94, at 43, likewise says nothing about visas.

[15] *See also, e.g.*, *Ford*, 629 F.3d at 206 ("where [Congress] uses different language in different provisions of the same statute, we must give effect to those differences"); *Murphy Expl. & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001) ("when 'construing a statute we are obliged to give effect, if possible, to every word Congress used'") (citation omitted).

[16] Each of those *paragraphs* (unlike *subsection* 1182(f)) contains the phrase "is inadmissible," tying back to subsection 1182(a)'s prefatory paragraph. *E.g.*, 8 U.S.C. §§ 1182(a)(1)(A), (2)(A)-(E), (3)(A)-(G), (4)(A), (5)(A)-(C), (6)(A)-(G), (7)(A)-(B), (8)(A)-(B), (9)(A)-(C), (10)(A)-(E).

the Foreign Affairs Manual to assert that "[t]he State Department's practice … has … been to treat aliens covered by Presidential orders under [§] 1182(f) as ineligible for visas" (ECF 94, at 43), but the available text *does not mention visas at all*—it just describes the President's authority "to suspend ***entry*** into the United States." *See* 9 FAM 302.14-3(B) (emphasis added).[17]

Because § 1182(f) pertains only to entry, the Proclamations cannot render anyone ineligible for a visa. Thus, the State Department's determination to cease adjudicating visas (and to declare applicants ineligible) constitutes agency action (and an act of overreach) that is distinct from the President's Proclamations. The Proclamations suspended *entry*, but the *State Department* stopped adjudicating visas. *See, e.g.*, AR 20, 32, 38, 156. The latter action is final and APA-reviewable.[18]

With final agency action thus identified, Plaintiffs will likely prevail on the merits. Defendants make no real effort to defend their policy, and the administrative record does not reveal any justification for it.[19] The policy is thus arbitrary and capricious, particularly in view of the

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[17] Defendants cite (ECF 94, at 43) the statement in *Hawaii* that "any alien who is inadmissible under § 1182 … is screened out as 'ineligible to receive a visa,'" 138 S. Ct. at 2414—but as explained in text, the Supreme Court was careful to distinguish "between admissibility determinations and visa issuance." *Id.* A § 1182(f) proclamation affects only *entry*, and only temporarily. Such a proclamation does not bear on visa eligibility, which is governed by § 1182(a).

[18] This is true whether the State Department's action is viewed as adopting a new policy, or as adopting an interpretation of the Proclamations and § 1182(f). "[F]inal agency action" "cover[s] comprehensively every manner in which an agency may exercise its power," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001), and embraces both a "guideline or guidance," *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000), and "an agency's interpretation of the law," *Ciba-Geigy Corp. v. E.P.A*, 801 F.2d 430, 435 (D.C. Cir. 1986).

[19] Defendants assert (ECF 94, at 43) that policy does not usurp consular officers' authority to issue visas, *see* 8 U.S.C. §§ 1104(a), 1201(a)(1), but this contention is premised on Defendants' misconstruction of § 1182(f). Under the correct construction, § 1182(f) does not authorize the President or the State Department to prohibit visa issuance.

Nothing in the record supports Defendants' claim (ECF 94, at 44) that "[a]pplying the Proclamation to require issuance of visas but deny entry into the United States would only result in administrative confusion." Nor is there any basis for the suggestion that DHS personnel do not grasp "the basic distinction between admissibility determinations and visa issuance that runs throughout the INA." *Hawaii*, 138 S. Ct. at 2414.

harms it imposes on Plaintiffs and their beneficiaries *that extend beyond the Proclamations' end-date*. These are "important aspect[s] of the problem," *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020), and "matter[s] of importance under the statute," *Gresham v. Azar*, 950 F.3d 93, 102 (D.C. Cir. 2020). The State Department's failure to consider such issues leaves its decision "lack[ing] any coherence," and it therefore "cannot withstand judicial review." *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006).

The State Department's no-visa policy is also "not in accordance with law" and "in excess of statutory … authority," 5 U.S.C. §§ 706(2)(A), (C) because its sole justification is the unlawful Proclamations. Defendants are incorrect in contending that such APA review is barred because it implicates the Proclamations: The fact that an agency's action is "based on the President's [Proclamation] hardly seems to insulate [it] from judicial review under the APA," *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996), and "insofar as [Defendants] have incorporated the Proclamation[s] by reference into their action, [this Court] may consider the validity of the agency's … action," *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018); *see Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 120 (D.D.C. 2020) (APA permits "suits against … officials charged with carrying out … [a] Proclamation"); ECF 37, at 9-10 (collecting cases). While the President is not an "agency," *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), every other Defendant is subject to the APA's "basic presumption of judicial review." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019). There is no exception to that presumption for cases in which an agency acts at the President's behest.[20]

[20] Defendants are wrong to suggest (ECF 94, at 25) that "*all* presidential orders are necessarily implemented through Executive branch agencies": In *Franklin* itself, review was unavailable because the action having legal consequences was undertaken *by the President himself*. *See* 505 U.S. at 797 ("the action that creates an entitlement … is the President's statement to Congress"); *accord Dalton v. Specter*, 511 U.S. 462, 469 (1994) (no APA review of action "taken by the

The D.C. Circuit has declined to endorse the analysis in Defendants' cases (ECF 94, at 25-26), which are at odds with *Reich* and the weight of authority in the immigration context.[21] Indeed, the D.C. Circuit indicated in *Tulare* that if the plaintiff had alleged the agency's "acts with sufficient specificity," it could have "overcome th[e] bar" on review of presidential action "by challenging the non-presidential actions of the Forest Service." 306 F.3d at 1143; *see Moghaddam*, 424 F. Supp. 3d at 120. Other courts have rejected the reasoning in Defendants' cases as well.[22]

Under Defendants' proposed rule, the courts would have no power to review a Presidential order directing the Secretary of Commerce to seize the Nation's steel mills, *contra Youngstown*, 343 U.S. at 582. Their position (ECF 94, at 25-26) is that *only* APA review is proper to review such an order, and yet *neither* the President's order nor the Secretary's action pursuant thereto is subject to APA review. That is wrong. The Proclamations are subject to judicial review, either directly or through APA challenges to agency implementation.[23] And for reasons set forth above, Defendants' actions are likely to be found unlawful on the merits.

2. The State Department's Policy Not To Treat Diversity Visa Selectees As "Emergency" Or "Mission Critical" Cases Is Final Agency Action

The State Department has also undertaken final agency action by adopting a policy not to treat diversity visa applicants as "emergency" or "mission critical" cases under the COVID-19

President, when he submit[ted] his certification of approval to Congress"). Thus, there *do* exist circumstances calling for direct action by the President. *Those* actions are not APA-reviewable, but where an agency has responsibility for the action in question, the APA calls for review. *See Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993). This is such a case.

[21] *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 903 (D.C. Cir. 2018) (affirming on alternative ground); *Tulare Cty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002) (similar).

[22] *See, e.g., Protect Our Cmties. Found. v. Chu*, 2014 WL 1289444, at *6 (S.D. Cal. Mar. 27, 2014); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 n.3 (D. Minn. 2010).

[23] Defendants misconstrue the colloquy at oral argument on the TRO motion (ECF 94, at 27). Plaintiffs' counsel did not concede any point, but responded without certainty to a hypothetical posed by the Court based on facts that were not present in the case.

Guidance. That action is not supported by any proclamation, so it is the agency's action alone. And the administrative record confirms that the State Department's official, formal policy is *not* to treat diversity visa applicants as "emergency" or "mission critical" cases notwithstanding the statutory September 30 deadline: official policy is to give diversity visas the very *lowest* priority among all visa categories—meaning that applications cannot be adjudicated *at all* until a consular post has reached the third of three reopening phases, and even then only after *all* other visa categories have been processed. AR 38, 257. This policy is final agency action that impairs the diversity visa Plaintiffs' rights by preventing adjudication of their visa applications. *See, e.g.*, *Barrick Goldstrike Mines*, 215 F.3d 48. Defendants do not argue otherwise.

Defendants also do not defend the State Department's policy on its merits. Nor could they, for it is irrational and unlawful. ECF 66, at 4-7. Indeed, when asked why diversity visa applicants are not given the same "mission critical" treatment as age-outs despite being in a materially identical situation, counsel stated: "I don't have an answer to that." *See* SAC ¶ 297.

Defendants are wrong in asserting (ECF 94, at 29 n.6) that "there is no … duty to consider [diversity visa applicants] as emergency/mission critical under the State Department's COVID-19 guidance." As Plaintiffs explained (ECF 66, at 6-7), "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction…." *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). Defendants identify no "relevant distinction" between age-outs and the diversity-visa Plaintiffs. The State Department "must … make an exception" to the COVID-19 Guidance for diversity visa applicants. *Id.*[24]

[24] Defendants distort the record in asserting (ECF 94, at 30 n.6) that this claim is untimely on grounds that "the necessary information" to support it supposedly "has been publicly available on the State Department's website since June." Although the text of the COVID-19 Guidance itself

E. Plaintiffs Are Likely To Succeed On Their Unlawful Withholding, Unreasonable Delay, And Mandamus Claims

Plaintiffs adopt the arguments in *Mohammed*, *Aker*, and *Fonjong* with respect to the unlawful withholding, unreasonable delay, and mandamus claims (*see* ECF 66, at 8). In addition:

1. Defendants argue (ECF 94, at 48-51, 58) that these claims "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take" (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)), and that no statute compels the State Department to adjudicate visa applications. But Defendants fail to acknowledge 8 U.S.C. § 1202(b), which mandates: "***All*** immigrant visa applications ***shall be reviewed and adjudicated*** by a consular officer" (emphases added); *see also* 22 C.F.R. § 42.81(a). Again, "the word 'shall' … evidences a clear legislative mandate," *Sierra Club*, 705 F.3d at 467, which imposes an "obligation impervious to discretion," *Maine Cmty.*, 140 S. Ct. at 1320, and "makes the directive to [adjudicate visa applications] mandatory." *N.R.D.C. v. E.P.A.*, 755 F.3d 1010, 1019 (D.C. Cir. 2014). Adjudication of applications is thus a "discrete agency action that [the State Department] is required to take." *Norton*, 542 U.S. at 63-64. Relief under 5 U.S.C. § 706(1) and mandamus are therefore available. *See, e.g.*, *Sai v. D.H.S.*, 149 F. Supp. 3d 99, 119-21 (D.D.C. 2015) (granting § 706(1) order based on requirement that agency "shall" act, 6 C.F.R. § 15.70(g)(1)).

Defendants suggest (ECF 94, at 47, 48, 50) that relief is "premature" because Plaintiffs have not yet "completed and executed a visa application before a consular officer." But that is only because the State Department has refused to schedule (or reschedule) visa interviews, even

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was public, Plaintiffs have explained (ECF 66, at 2-3; ECF 76, at 2-4, 6) that there was no public evidence of the State Department's policy not to treat diversity visa applicants as "emergency" or "mission critical" cases under the Guidance's express exceptions. Defendants only disclosed this policy at the August 7 status conference, and only revealed that diversity visa applicants are the lowest of all priorities when they produced the administrative record on August 17. Plaintiffs' counsel can hardly be faulted for trusting the State Department to adhere to its duty "to treat like cases alike," *Westar*, 473 F.3d at 1241, by treating diversity visa applicants like age-outs.

for applicants (including the *Gomez* Plaintiffs) whose applications are otherwise complete. This refusal violates the regulatory requirement that "[e]very" visa applicant "***shall*** be required to appear" for an interview, 22 C.F.R. § 42.62(a) (emphasis added)—again, a mandatory requirement that the State Department "***shall***" conduct interviews. More broadly, the State Department cannot evade its mandatory duty to "review[] and adjudicate[]" "[a]ll … visa applications" by refusing to permit the predicate step of formally executing otherwise complete applications. *Cf.* Scalia & Garner, Reading Law: The Interpretation of Legal Texts § 30 (2012) (explaining the "common sense" predicate-act canon). To the contrary, by refusing to allow visa applicants to complete their applications, the State Department is breaching its mandatory duty to review and adjudicate those applications. The State Department should be compelled to allow Plaintiffs and class members to complete their applications, and then to review and adjudicate those applications under § 1202(b).

2. The State Department also owes a duty under the APA: "[W]ithin a reasonable time, each agency ***shall*** proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (emphasis added). As the D.C. Circuit has held, § 555(b) means that agencies are "obligated *under the APA* to respond to" matters presented to them, and to do so "within a reasonable time." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (granting mandamus). Given this obligation *under the APA*, any absence of a substantive mandate is "beside the point." *Id.*

The State Department has unreasonably delayed in "conclud[ing] [the] matter[s] presented to it" by at least the diversity visa Plaintiffs. Defendants' contrary arguments are wrong.

First, it beggars belief for Defendants to assert (ECF 94, at 53) that there is no "timetable." There is an explicit statutory deadline. 8 U.S.C. § 1154(a)(1)(I)(ii)(II). While that provision may not mandate visa adjudication, it imposes an obvious "indication of the speed with which it expects the agency to proceed" under § 1202(b). *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 836-37 (D.C. Cir. 2012) (quoted in ECF 94, at 52; granting mandamus). "The specificity and the

relative brevity of the [September 30] deadline manifests the Congress's intent that the [State Department] act promptly" to ensure that visas are issued *before* the deadline. *Id.* The State Department's "failure to act" in the face of the statutory cutoff "plainly frustrates the congressional intent and cuts strongly in favor of granting … mandamus" or relief under § 706(1). *See id.* at 837. Defendants' only supposedly contrary case is *Ghadami v. Dep't of Homeland Sec.*, 2020 WL 1308376 (D.D.C. Mar. 19, 2020)—but that case involved a *family-based* visa petition, for which there was no deadline. *See id.* at *2, *8. *Ghadami* does not speak to the urgent situation here.

Second, Defendants concede (*see* ECF 94, at 53) that Plaintiffs' "human … welfare" will be "prejudiced by delay" beyond September 30. *See Mojahedin*, 680 F.3d at 836-37. Defendants assert (*see* ECF 94, at 53-54) that the prejudice is reasonable because Plaintiffs are "ineligible to receive visas for the remainder of the fiscal year," but that premise is wrong. *See supra* pp. 13-14.

Third, although Defendants note the timeframes for adjudication of other visa applications (ECF 94, at 53-54), they cite no evidence that adjudicating diversity visas would harm other applicants—let alone that any harm would exceed the harm that the diversity visa Plaintiffs face.

Finally, while the Court need not find impropriety to grant relief, *see Mojahedin*, 680 F.3d at 837, Defendants' claim of innocence (ECF 94, at 54) is dubious. Having tried and failed to end the diversity-visa lottery through legal means (*e.g.*, ECF 53-1, at 5 & n.3), the Administration is using the pandemic as a pretext to unlawfully end-run Congress and the INA via *en masse* pocket veto. This Court ought not countenance such an abuse of putative authority.

III. DEFENDANTS FAIL TO REFUTE PLAINTIFFS' IRREPARABLE HARM

Defendants admit (*sub silentio*) that the diversity visa Plaintiffs will suffer great and irreparable harm without relief. Their arguments with regard to the other Plaintiffs all fail.

A. With respect to the family-based visa Plaintiffs, Defendants falsely assert (ECF 94, at 68) that "Plaintiffs fail to acknowledge the significant backlog of family-based immigrant visa

categories." Plaintiffs noted the issue (*see* ECF 53-1, at 4), but it is not relevant to these Plaintiffs: Each beneficiary has *already* reached the front of his or her queue, so their visas are *immediately* available.[25] Defendants assert (ECF 94, at 69 n.14) that Plaintiffs have not proven "that a consular officer will make a positive determination" on the applications, but Plaintiffs have done all they can—attesting that their beneficiaries' applications are complete, that they have been approved (so that the beneficiaries are "prima facie entitle[d]" to visas, 9 FAM 502.1-2(C)), and that there is no known reason that any application would be denied.[26] *See Doe*, 418 F. Supp. 3d at 598 (finding irreparable harm where plaintiffs were ready for interviews and there was "no indication that they will otherwise fail any of the requirements of § 1182(a)"). Plaintiffs cannot be obligated to prove how consular officers will ultimately decide the applications. *Cf. Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary").

In asserting (ECF 94, at 69) that Plaintiffs "provide no support" for the proposition that family separation constitutes irreparable harm, Defendants ignore the great weight of authority (*see* ECF 53-1, at 39 n.35; ECF 21, at 37-38). And Defendants' argument that Plaintiffs have not proven their injuries ignores the record and defies common sense. Plaintiffs include, among others: a mother and newborn child separated from their husband and father (Pimentel Decl. ¶¶ 1-2, 12-13), a father separated from two minor daughters who no longer have a capable caretaker (Lebron Decl. ¶¶ 3, 7, 24-25), and an elderly woman separated from her son and only caretaker

[25] Abarca Decl. ¶ 2; Alam Decl. ¶¶ 6-7; Jimenez Decl. ¶ 14; Lebron Decl. ¶ 16; Nwankwo Decl. ¶¶ 7, 10; Phelps Decl. ¶ ¶ 3-5; Pimental Decl. ¶ 15; Sinon Decl. ¶ 11.

[26] Abarca Decl. ¶¶ 4,7, 12; Alam Decl. ¶¶ 6-7, 17; Jimenez Decl. ¶¶ 5-6, 14; Lebron Decl. ¶¶ 4-6; Nwankwo Decl. ¶¶ 4-5, 7; 9, 16; Phelps Decl. ¶¶ 3-5; Pimental Decl. ¶¶ 5-9, 15; Sinon Decl. ¶¶ 11-12.

(Sinon Decl. ¶¶ 8, 12, 16-18). Defendants' eleventh-hour blow to these Plaintiffs and others (*see* ECF 53-1, at 39-40), after they have waited years for the opportunity the law provides them to live with their families in the United States, easily clears the threshold for irreparable harm.[27]

B. Defendants fail to support their intimation (ECF 94, at 69-71) that the nonimmigrant visa Plaintiffs are protected by the State Department's new "exceptions" to the June Proclamation. Plaintiffs would welcome assurances that all of their beneficiaries will receive visas, but none is on offer. This is not a scenario like the one that arose with respect to the original Plaintiffs' beneficiaries, who were afforded emergency treatment and granted visas with "no 'additional criteria[] or burdens'" (ECF 41, at 15). The "exceptions" here impose new unlawful burdens on the Plaintiffs, requiring expenditure of time and unrecoverable sums to try to satisfy new tests that have no basis in the INA or the regulations. *See* AR 169-173. And the Proclamations will continue to foreclose visa issuance in many cases despite the "exceptions."

Defendants do not seriously dispute the evidence that Plaintiffs will suffer serious, unrecoverable economic losses if they are unable to bring in their sponsored nonimmigrant workers. They argue (ECF 94, at 70) that "[r]ecoverable monetary loss" generally does not constitute irreparable harm, but the losses here are not recoverable: Plaintiffs are aware of no cause of action against the federal government for lost profits owing to unlawful immigration policies. *See Everglades Harvesting & Hauling, Inc. v. Scalia*, 427 F. Supp. 3d 101, 114 (D.D.C. 2019).

Contrary to Defendants' assertion (ECF 94, at 70), Plaintiffs have presented ample evidence that the loss of nonimmigrant workers threatens to destroy their U.S. businesses.[28] These

[27] In contrast to this case, the plaintiffs in *Feng Wang v. Pompeo*, 354 F. Supp. 3d 13 (D.D.C. 2018), did not carry their burden either as a matter of law or as a matter of fact. *See id.* at 26-27.

[28] *See, e.g.*, Gustafson Decl. ¶¶ 2, 16-21 (ASSE); *id.* ¶¶ 2, 32-33 (EurAuPair); Newman Decl. ¶¶ 10-16, 20-21 (Superior Scape); Martin Decl. ¶¶ 7, 17-18 (PowerTrunk); Gorgi Decl. Exs. A-B; Sebagh Decl. ¶ 6, Exs. A, D, G; Gustafson Supp. Decl.¶¶ 4-5; Bless Decl. ¶¶ 6-8, Exs. A-C.

are not "bare allegations" like the "speculative threat of theft" that this Court confronted in *Dallas Safari Club v. Bernhardt*, 2020 WL 1809181, *5 (D.D.C. Apr. 9, 2020). They are *evidentiary attestations under penalty of perjury*, offered by executives who know personally and well the effects of the Proclamations on their businesses. The declarations carry Plaintiffs' burden in the present posture, *see Cobell*, 391 F.3d at 261, and Defendants do not dispute their contents.

Finally, Defendants are wrong in asserting (ECF 94, at 70-71) that Plaintiffs "make no mention of any attempts … to fill employment opportunities with U.S. workers." Preliminary injunction procedure imposes no such requirement. Defendants' claim is also inaccurate: Superior Scape, for example, has fulfilled the requirement to seek U.S. workers before asking to bring in foreign workers, and has continued to seek U.S. employees. *See* Newman Decl. ¶ 5. In other cases (au pairs, foreign exchange programs, employees with specialized knowledge), the nature of the visa dictates that job be filled by a foreign worker, or not at all. Plaintiffs have also invested considerable resources on the nonimmigrant employees who remained trapped overseas due to the Proclamation. *See* Rodnitsky Decl. ¶¶ 13-22; Martin Decl. ¶¶ 11-15; Jepsen Decl. ¶¶ 16-17.

IV. THE BALANCE OF EQUITIES FAVORS INJUNCTIVE RELIEF

Defendants refuse to acknowledge, and do not rebut, the overwhelming evidence that the Proclamations *actively harm* the U.S. economy and U.S. workers. *See* ECF 53-1, at 24-29. Plaintiffs do not "dismiss" the injuries that U.S. workers are suffering as a result of the economic downturn (*contra* ECF 94, at 72), but have conclusively demonstrated that Defendants' policies will not ameliorate those harms. Indeed, those policies will *impair* the recovery and force companies to terminate U.S. workers. *See, e.g.*, Martin Decl. ¶¶17-18; Newman Decl. ¶¶ 10-16, 20-21; Gustafson Decl. ¶¶ 16-20 31-33; Jepsen Decl. ¶¶ 12-13; Sparber Decl. ¶ 5; Hunt Decl. ¶ 6; Peri Decl. ¶ 20; Nowrasteh Decl. ¶ 8.

The extraordinary outpouring of *amicus* support confirms this reality. As *amici* 55 Leading

Companies explain, "visa programs help drive American innovation, competitiveness, and growth, and their suspension—for any amount of time—irreparably harms American workers, businesses, and the economy." ECF 82, at 11; *see* ECF 65-2; *accord* ECF 53-12. In particular, suspending programs allowing high-skilled foreign workers to enter the country "all but ensures that firms will need to hire abroad to fill highly-skilled positions." ECF 82, at 19. Conversely, "allowing multinationals to bring employees into the United States from abroad prevents them from moving their entire operations abroad." *Id.* at 9; *accord* ECF 58, at 18. *Amici* States and Local Governments agree that "[i]mmigrants are job creators and job supporters." The "Proclamations will cause substantial economic harm … including by diminishing revenue collection, dampening small business creation, adversely impacting schools (especially in rural areas and struggling cities), and reducing employment in key sectors of the economy, including essential services." ECF 58, at 8. All of this will make it harder for the economy to recover from COVID-19. *Id.*

Defendants do not dispute that Plaintiffs have also established "indirect hardship to their friends and family members," including to the family-based Plaintiffs' beneficiaries, to the diversity visa Plaintiffs' derivatives, and to the nonimmigrants who are seeking to live and work temporarily in the United States. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). And as *amici* States and Local Governments explain, the benefits of reunification extend well beyond the individuals involved: "Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States." ECF 58, at 21. [29]

[29] Defendants suggest (*see* ECF 94, at 72 n.15) that equity favors them because visa processing is unsafe, but they present no evidence that they cannot safely provide emergency visa processing to diversity visa applicants. Defendants also misrepresent the supplemental PI motion: Plaintiffs do not ask "to enjoin the State Department's suspension of routine visa services" (*contra id.*), but have at this point only requested that diversity visa applicants be afforded the same treatment that is afforded to similarly situated age-outs. *See, e.g.*, ECF 66, at 7 (challenging "refusal to consider diversity visa applicants … as 'emergency' or 'mission critical' cases").

Defendants' suggestion (ECF 94, at 72) that they are harmed by "curtailing the President's flexibility" runs up against the rule that they "cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017). Indeed, the government's "faulty reasoning for its enforcement choice[s] … weighs against it." *Nalco Co. v. E.P.A.*, 786 F. Supp. 2d 177, 189 (D.D.C. 2011).

V. SCOPE OF RELIEF

Classwide Injunctive Relief Is Appropriate. Defendants' argument against classwide relief proceed under the premise that this is merely a "putative" class action. ECF 94, at 75. It is not. Plaintiffs have moved for class certification, and that motion is ripe for decision. When certification is granted, classwide relief will be warranted.

Defendants also disregard that none of the grounds for relief is unique to any individual Plaintiff. If Defendants' actions are invalid as to anyone, they are invalid as to everyone. "[S]ystemwide injunctions" may be granted "when the circumstances warrant them," *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 23 (D.D.C. 2018), and such relief is warranted here. *See, e.g.*, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

Alternative Relief. At a minimum, this Court should direct the State Department to reserve visa numbers so that diversity visas may be granted after September 30. *See P.K.*, 302 F. Supp. 3d at 8-10. While the parties both acknowledge the uncertain status of this form of relief (*see* ECF 94, at 23 n.5), that is a reason to grant *full* relief, as set forth above. But if the Court is unable to resolve the diversity visa Plaintiffs' claims now, it should grant this alternative relief.

CONCLUSION

The motions for a preliminary injunction should be granted.

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Respectfully submitted,

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