UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al., **Plaintiffs,** **v.** **DONALD J. TRUMP, et al.,** **Defendants.**	Case No. 20-cv-01419 (APM)
MOHAMMED ABDULAZIZ ABDUL MOHAMMED, et al., **Plaintiffs,** **v.** **MICHAEL R. POMPEO, et al.,** **Defendants.**	Case No. 20-cv-01856 (APM)
AFSIN AKER, et al., **Plaintiffs,** **v.** **DONALD J. TRUMP, et al.,** **Defendants.**	Case No. 20-CV-01926 (APM)

CLAUDINE NGUM FONJONG, et al., **Plaintiffs,** **v.** **DONALD J. TRUMP, et al.,** **Defendants.**	)	Case No. 20-cv-02128 (APM)
CHANDAN PANDA, et al., **Plaintiffs,** **v.** **CHAD F. WOLF, et al.,** **Defendants.**	)	Case No. 20-cv-01907 (APM)

DEFENDANTS' SUPPLEMENTAL BRIEF

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ARGUMENT

Defendants file this memorandum in response to the Court's request for supplemental briefing regarding the Plaintiffs' requests for equitable relief for diversity visa ("DV") applicants beyond the end of Fiscal Year 2020 on September 30, 2020.

Congress, through the Immigration and Nationality Act ("INA"), has mandated that that individuals selected in the DV lottery are not eligible to receive a diversity visa after the end of the fiscal year, 8 U.S.C. § 1154, and that the Executive Branch is expressly barred from issuing visas to ineligible applicants. *Id.* § 1153(e)(2). Because clear statutory authority bars the issuance of diversity visas after the close of the fiscal year, this Court lacks discretion to issue the equitable relief the Plaintiffs request. *U.S. v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483, 496 (2001); *I.N.S. v. Pangilinan*, 486 U.S. 875, 883–84 (1988).

I. The Court Lacks Jurisdiction to Grant Plaintiffs' Requested Relief.

Plaintiffs request that the Court order that visa numbers be held for beneficiaries of the Fiscal Year 2020 DV lottery beyond the close of the fiscal year. But, the Court lacks jurisdiction to grant this equitable relief. The Supreme Court has made clear that even "when district courts are properly acting as courts of equity, they have discretion *unless a statute clearly provides otherwise*." *Oakland Cannabis Buyers' Co-Op*, 532 U.S. at 496 (emphasis added). Indeed, "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Id.* at 497 (quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978). Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. *Id.*, at 194–95.

Here, numerous statutes proscribe this Court's discretion to fashion any equitable remedy to either "hold" numbers for FY2020 DV applicants beyond or direct that any FY2020 DV applicant be issued a visa under that program after September 30, 2020.

A. Congress, through the INA, has mandated that diversity visas be issued before the end of the fiscal year.

By statute, eligibility for a diversity visa lasts only through the end of the specific fiscal year[1] for which an alien was selected: Aliens selected in the DV lottery "shall remain eligible to receive such visa only through *the end of the specific fiscal year for which they were selected*." 8 U.S.C. § 1154 (a)(1)(I)(II) (emphasis added); Diversity 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(e)(2) (emphasis added); "Under no circumstances may a consular officer issue a visa or other documentation to an alien *after the end of the fiscal year during which an alien possesses diversity visa eligibility*." 22 C.F.R. § 42.33(a)(1) (emphasis added). *See also,* 22 C.F.R. § 42.33(f) ("[D]iversity immigrant visa numbers ... will be allotted only during the fiscal year for which a petition to accord diversity immigrant status was submitted and approved. *Under no circumstances will immigrant visa numbers be allotted after midnight of the last day of the fiscal year for which the petition was submitted and approved*.") (emphasis added).

In short, the INA's plain text imposes a limitation on DV eligibility based on the close of the fiscal year. In addition to the plain text of the statute, Congressional intent behind limiting the issuance of DVs to the fiscal year for which the applicant is selected is demonstrated by comparing provisions in the INA that account for the rolling-over of unused numbers in other immigrant visa categories but not immigrant visas issued under the DV program. *See* 8 U.S.C. § 1151(c)–(e).

[1] The Federal Government's fiscal year begins on October 1 of each year and ends on September 30 of the following year. *See* 31 U.S.C. § 1102.

Specifically, section 1151(c) provides the total annual number for family preference cases, which includes the unused number of employment-based visa numbers from the previous fiscal year. Section 1151(d) sets the total number of employment preference immigrants for a fiscal year, which will include the unused number of family preference visas from the previous fiscal year. But, Congress provided no rollover for DVs. *Id*. § 1151(e). Clearly, Congress knew how to provide for roll-over eligibility beyond the fiscal year, and it unequivocally declined to do so for DVs. *Compare id*. §§ 1151(c), (d) *with* § 1151(e). This unambiguous provision clearly provides "the judgment of Congress, deliberately expressed in legislation." *Oakland Cannabis*, 532 U.S. at 497.

Congress's intent behind the September 30th issuance deadline for diversity visas is reinforced by its history of providing relief via legislation to individuals who lost their DV opportunity due to the fiscal year deadline because of unique circumstances. *E.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. Law No. 104-208, § 637, Div. C, Title VI-C, 110 Stat. 3009-546, 3009-704 (Sept. 30, 1996) (DV applicants affected by administrative errors); Pub. Law 105-360, § 1, 112 Stat. 3276 (Nov. 10, 1998) (DV applicants affected by embassy bombings); PATRIOT Act of 2001, Pub. Law 107-56, § 422(c), 115 Stat. 272 (Oct. 26, 2001) (DV applicants affected by 9/11 attacks).

* * *

In addition to the plain text and structure of the relevant INA provisions, these examples confirm that even when there are exigent circumstances attributable not to the applicant but instead to government error or actions of third parties, there is unfortunately no remedy for an otherwise qualified DV applicant who could not receive a visa number during the fiscal year to potentially obtain a DV after the fiscal year has ended. This is, however, consistent with Congress's mandate

in the INA that diversity visas not be issued beyond the end of the fiscal year and an exercise of Congress's judgment. *Oakland Cannabis*, 532 U.S. at 497.

B. The Court lacks jurisdiction to issue equitable relief contrary to the INA.

Even assuming that the Court's equitable jurisdiction is properly invoked, its authority to craft equitable relief ends where Congress has already spoken. *Id*. at 496. Congress has spoken here, and numerous courts have recognized this statutory barrier in the visa eligibility context. Indeed, the Supreme Court has explained that:

> [T]he power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers. "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."

I.N.S. v. Pangilinan, 486 U.S. 875, 883–84 (1988) (quoting *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893), *Rees v. Watertown*, 86 U.S. [19 Wall.] 107, 122 (1874), and *United States v. Ginsberg*, 243 U.S. 472, 474, (1917)); citing *Thompson v. Allen County*, 115 U.S. 550, 555 (1885); 1 J. Story, Equity Jurisprudence § 19 (W. Lyon ed. 1918); 28 U.S.C. § 1361; and 28 U.S.C. § 1651.

As Judge Wilkins explained in *Am. Hosp. Assoc. v. Price*, "just as a court may not require an agency to break the law, a court may not require an agency to render performance that is impossible." 867 F.3d 160, 167 (D.C. Cir. 2018) (citing *Ala. Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979); *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974)). "The reasoning is simple and intuitive: it is not appropriate for a court—contemplating the equities—to order a party to jump higher, run faster, or lift more than she is physically capable." *Id.*; *see also United States ex rel. Newman v. City & Suburban Ry. of Wash.*, 42 App. D.C. 417, 420–21 (D.C. Cir. 1914) ("In the absence of such express authority, the writ here sought, if issued, would be a nullity. *It is of no*

concern that delay may be imputed to the railway company, since the duty sought to be imposed has been made by act of Congress impossible of performance. *The writ of mandamus will not issue to compel the performance of that which cannot be legally accomplished*." (emphases added)). What was true more than a century ago is still true today: "A Court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law[.]" *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (citing *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893); *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874)).

Even though the State Department is precluded by statute from issuing FY 2020 diversity visas past September 30, 2020, the Plaintiffs would have this Court direct the Department to treat their past applications "as if" they were still in the same temporal window. But after September 30, 2020, that temporal window will have come and gone. *See, e.g.*, *Zixiang Li v. Kerry*, 710 F.3d 995, 1002 (9th Cir. 2013) ("It does not matter whether administrative delays and errors are to blame …. Any other interpretation of the statute would allow statutory limits on levels of immigration in a particular fiscal year to be exceeded[.]" (footnotes omitted)). And the D.C. Circuit's case law instructs that courts may not craft an equitable remedy where a legislative temporal window has already closed. *See Antone v. Block*, 661 F.2d 230, 235 (D.C. Cir. 1981) (holding that a district court's remedial powers "are necessarily limited by a clear and valid legislative command counseling against the contemplated judicial action").

A court may not order any equitable relief that would require the issuance of diversity visas after the end of the applicable fiscal year for plaintiffs outside of the United States. "[C]ourts have consistently recognized that they are not necessarily empowered to relieve would-be immigrants from the profound frustration and disappointment that the [diversity visa] process can create...." *Smirnov v. Clinton*, 806 F. Supp. 2d 1, 24 (D.D.C. 2011), *aff'd*, 487 F. App'x 582 (D.C. Cir. 2012).

"[W]hen midnight strikes at the end of the fiscal year, those [diversity visa] applicants without visas are out of luck. Although this deadline may appear 'unforgiving, this strict interpretation of the diversity visa statute has been adopted by every circuit court to have addressed the issue.' ... Plainly stated, the mandamus and declaratory relief sought by [the plaintiff]—the *nunc pro tunc* processing of his Diversity Visa application after the relevant fiscal year—is statutorily barred." *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276, 282–83 (D.D.C. 2018), *aff'd sub nom. Yung-Kai Lu v. Pompeo*, No. 18-5066, 2018 WL 5919254 (D.C. Cir. Oct. 19, 2018) (quoting *Mogu v. Chertoff*, 550 F.Supp.2d 107, 109 (D.D.C. 2008); citing *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006); *Coraggioso v. Ashcroft*, 355 F.3d 730, 734 (3d Cir. 2004); *Carrillo–Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003); *Nyaga v. Ashcroft*, 323 F.3d 906, 914 (11th Cir. 2003); and *Iddir v. INS*, 301 F.3d 492, 501 (7th Cir. 2002)).

"Federal district courts do not have subject matter jurisdiction over moot cases." *Zapata v. I.N.S.*, 93 F. Supp. 2d 355, 358 (S.D.N.Y. 2000) (citing *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir.1999) and *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir.1993). Thus, in *Zapata*, the court found that it had no power to issue an injunction requiring issuance of diversity visas because the fiscal year had ended. *Id*. Similarly, the court also found that it had no power to order the State Department to reserve diversity visas from the next fiscal year for the plaintiffs because 8 U.S.C. § 1154 only makes aliens eligible to receive diversity visas through the end of the fiscal year for which they were selected. *Id*. The court explained that "[t]he plain meaning of § 1154 is that after the fiscal year has ended on September 30, no diversity visas may be issued *nunc pro tunc* based on the results of the previous fiscal year's visa lottery." *Id*.

The D.C. Circuit has acknowledged that "[c]ourts are often asked to intervene in disputes over diversity visas, and the end of the selection FY does often render those cases moot."

Almaqrami v. Pompeo, 933 F.3d 774, 780 (D.C. Cir. 2019). *Almaqrami* acknowledges that a diversity visa plaintiff who sues after the applicable fiscal year has ended does "not have a statutory right to the requested visa and the government does not have a duty to issue her one," nor does a plaintiff who "files suit before the selection FY ends but the court fails to act on that request until after September 30." *Id.*

Some district courts have, however, required agencies to adjust the status of diversity-visa lottery selectees who were already within the United States after the fiscal year ended. *See, e.g.*, *Przhebelskaya v. U.S. Bureau of Citizenship & Immigration Servs.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999). *Almaqrami* stated that in such cases, where before the end of the applicable fiscal year the "plaintiff files suit and the court grants some relief—but not the visa—before October 1" it was "not implausible" that a court "might lawfully take steps to compel the government to process the plaintiff's application and issue her a diversity visa anyway." *Almaqrami*, 933 F.3d at 780-781. The *Almaqrami* court did not definitively determine whether such equitable relief would be permissible, holding that it was a merits question to be remanded to the district court. *Id*. at 781, 784.

The equitable relief that Plaintiffs are seeking is precluded by statute and thus not permissible in this case. *Przhebelskaya* and *Paunescu* are not applicable because neither involved the issuance of visas to foreign nationals overseas by a State Department consular official, but instead involved courts exercising equitable authority with respect to individuals within the United States. As then-Judge Ruth Bader Ginsburg explained for the D.C. Circuit: "By ... authorizing the Attorney General (and, under his delegation, Immigration Service officers) to grant permanent resident status, Congress afforded aliens *present in this country* on nonimmigrant visas a marked

advantage over the alien who could receive an immigrant visa only from a consular officer abroad." *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988) (emphasis added).

Immigration law has always distinguished between applicants for permanent residence from within the country (like the *Przhebelskaya* and *Paunescu* plaintiffs), and those from without. Before 1935, neither statute nor administrative practice permitted foreign nationals to obtain an immigrant visa or status if they were already in the United States. Instead, to achieve reclassification from nonimmigrant (temporary) to immigrant (or lawful permanent resident ("LPR") status — commonly referred to as a "green card"), the applicant had to leave the country and, in the ordinary course, apply to a United States consular officer abroad for an immigrant visa. *See* 8 U.S.C. § 202(a) (1934). "To reduce the hardship and inconvenience of this 'depart and seek reentry' procedure, the Immigration Service devised a 'pre-examination plan' which made accessible to some aliens a less expensive process: after screening by immigration officials here, the alien could travel briefly to Canada and there acquire from a United States consular officer the sought-after immigrant visa." *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988) (citing S. Rep. 1515, 81st Cong., 2d Sess. 603 (1950); 8 C.F.R. § 142 (Supp. 1941)).

With the INA's enactment in 1952, "8 U.S.C. § 1255, enabled an alien, under specified conditions, to obtain an immigrant visa 'without the necessity of leaving the United States.'" *Id.* (citing H.R. Rep. 2096, 82d Cong., 2d Sess. 128 (1952); U.S.C. Cong. & Admin. News 1952, p. 1653). Specifically, Section 1255(a) provides that adjustment of status is available to foreign nationals who, among other requirements, have already been inspected and admitted or paroled into the United States. That was the scenario confronting USCIS and the INS in *Przhebelskaya* and *Paunescu*, respectively. Those cases thus did not involve the separation-of-powers and foreign affairs issues of a court reaching beyond this country's borders to provide a foreign national with

a visa to apply for entry to the United States. *Cf. Ruston v. U.S. Dep't of State*, 29 F. Supp. 2d 518, 523 (E.D. Ark. 1998) (courts lack power to compel the State Department to rescind revocation of a visa because such relief would, in effect, give a court power to issue visas, a power it does not have). As the Supreme Court explained,

> For more than a century, this court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' Because decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of *changing political and economic circumstances*,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'"

Trump v. Hawaii, 138 S. Ct. 2392, 2418–19 (2018) (emphasis added) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) and *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952).

Moreover, neither *Przhebelskaya* nor *Paunescu* are applicable because in both cases the application files were already substantially complete before the court ordered the government to take action, and the only reason the applications were not approved before the end of the fiscal year was because of administrative errors. In *Paunescu*, the diversity visa applicant had already been interviewed by the INS on February 23, 1998—more than seven months before the end of the fiscal year; the plaintiff alleged that he was told at his February interview that he needed to resubmit his fingerprints, but "that absent the fingerprint problem his application would have been approved." *Paunescu*, 76 F. Supp. 2d at 898. In *Przhebelskaya*, the alien submitted her diversity visa application (and for those of her husband and daughter) on April 14, 2003. USCIS denied her application on April 24, 2003 and denied her motion for reconsideration on May 8, 2003. On July 8, 2003, USCIS voluntarily reopened the case after the alien had filed an action for mandamus

relief in federal district court. On September 24, 2003 the alien's and her family members' applications were complete, except for a required FBI background check, and the district court issued an order compelling complete adjudication of the applications. The FBI completed its background check on September 26, 2003, making the applications complete and ready for approval. Because of an administrative mistake, however, the applications were not approved before the end of the fiscal year. *Przhebelskaya*, 338 F. Supp. 2d at 402.

Defendants are not aware of any case where a court has ordered the government to process DV applications after the end of the fiscal year for an applicant who was merely selected and remains at some non-final phase of the immigrant visa process overseas. Granting equitable remedies in this case would be an unprecedented and massive expansion of courts' involvement in the Congress's express provisions governing the executive branch's exercise of its constitutionally granted powers and its lawful exercise of judgment about the how to properly carry out those powers.

II. Reasonable Equitable Relief Should be Limited to Providing Additional Time for Applicants to Establish Eligibility for Applications Made By September 30, 2020.

As demonstrated, Supreme Court precedent curtails the Court from exercising equitable jurisdiction to craft remedies in violation of statute, and therefore the Court lacks discretion to reserve DV numbers beyond the close of the fiscal year. But, if the Court were able to exercise equitable discretion, it should be limited to providing additional time for applicants to establish eligibility for applications made by September 30, 2020, and *should not* take into account the impacts of the COVID-19 pandemic on visa processing at U.S. consular posts around the world during Fiscal Year 2020. Appropriate relief would provide a very brief period of additional time for applicants who have made an application to a consular officer by the end of Fiscal Year 2020

but require additional time to establish visa eligibility, for example by providing statutorily required medical examinations or documents,. During this brief extension, State would schedule no new DV-2020 cases and would focus resources to completing the adjudication process for those DV-2020 applicants who made applications to consular officers before the end of the fiscal year. Moreover, any equitable relief provided should not prioritize Plaintiffs ahead of other DV-2020 selectees pursuant to the statutory scheme defined by Congress. *See* 8 U.S.C. § 1153(e)(2) (providing that diversity visas "shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved").

III. Any Equitable Remedy Should Consider the Substantial Legal and Operational Justifications for State Department's Pre-Injunction Practice.

Defendants respectfully present to the Court the legal foundations justifying its pre-injunction practice with regard to visa applicants who are barred from entry subject to Presidential Proclamations issued pursuant to 8 U.S.C. §§ 182(f) and 1185(a)(1).[2]

Presidential Proclamations and Executive Orders pursuant to these authorities that have been applied by the Department of State as bars to visa issuance, in many cases, specifically delegate to the Secretary of State or consular officers the authority to determine or adjudicate waiver or exception requests.[3]

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[2] For a summary of Presidential Proclamations invoking Section 1182(f), *see* Ben Harrington, Theresa A. Reiss, Cong. Research Serv., LSB10458, Presidential Actions to Exclude Aliens under INA § 212(f) (2020).

[3] *See, e.g.*, Pres. Proc. 9645 (*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats*), Sept. 27, 2017 (the President acting pursuant to Section 1182(f) and granting a consular officer authority to grant a waiver that "will be effective both for the issuance of a visa and for any subsequent entry on that visa"); Pres. Proc. No. 8697 (*Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses*), August 4, 2011 (the President acting pursuant to Section 1182(f) and delegating to the Secretary of State primary responsibility for identifying persons subject to the proclamation, implementing the proclamation, and for determining national interest exceptions).

It is important to note that once an alien applies for a visa, the consular officer is required to either issue the visa or deny the application. *See* 22 C.F.R. §§ 41.121(a) (nonimmigrant visas) and 42.81 (immigrant visas). The officer does not have the authority to "hold" the application in abeyance pending a waiver determination. If the President has barred an alien from entry under Section 1182(f), but the consular officer lacks the legal authority under the INA to deny the application, the consular officer must issue the visa even though the alien will be denied entry to the United States. In that scenario, the consular officer would have to issue a visa with an annotation indicating that the alien is barred from entry – in essence, an annotation invalidating the visa until either a waiver is granted or until the relevant Presidential Proclamation or Executive Order expires.

This scenario exemplifies significant implications both legally and operationally because a visa may not be issued by the consular officer if the applicant "is ineligible to receive a visa . . . under section 1182." 8 U.S.C. § 1201(g). In fact, by statute, "whenever a United States consular officer issues a visa for admission to the United States, that official shall certify, in writing, that a check of the Automated Visa Lookout System, or any other system or list which maintains information about the *excludability* of aliens under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], has been made and that there is *no basis under such system for the exclusion of such alien*." (emphasis added). Thus, in imposing screening requirements on consular officers, Congress has essentially prohibited consular officers from issuing a visa to any alien who is "excludable" under the INA. This clearly shows that Congress does not distinguish between the concepts of visa eligibility and exclusion from entry. Indeed, consular officers can suffer serious personnel consequences as a result of issuing a visa to an alien for whom there is a "basis for exclusion." The Department of State's Foreign Affairs Manual (FAM) specifically requires consular officers

to comply with this statute through ongoing Visa Lookout Accountability (VLA) requirements. 9 FAM 307.3-1.

Furthermore, the presidential proclamations at issue here, like most proclamations, invoke as authority both 8 U.S.C. §§ 1182(f) and 1185(a). The most pertinent portion of 1185(a) is that "it shall be unlawful for any alien to ... *attempt* to … enter the United States except under such … orders … as the President may prescribe." (emphasis added). As the D.C. Circuit has noted, a visa gives an alien permission to arrive at a port of entry and to apply for lawful admission. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999) (citing 8 U.S.C. § 1201(h)). Thus, a visa confers the right to attempt to lawfully enter the United States. If restrictions imposed under section 1182(f) and 1185(a) cannot be used to deny a visa, aliens will be able to attempt entry despite the President's direct orders that they shall be prohibited from doing so.

Courts in this jurisdiction have consistently accepted the use of 8 U.S.C. § 1182(f) as a basis for visa denial. In a series of cases challenging visa refusals and waiver decisions under Presidential Proclamation 9645, courts repeatedly accepted the premise that an alien's visa application may properly be denied pursuant to Section 1182(f). For example, in *Kangarloo v. Pompeo*, ---F. Supp. 3d---, 2020 WL 4569341, at *3 (D.D.C. Aug. 7, 2020), the court stated that the plaintiff's visa refusal "was made under 8 U.S.C. § 1182(f), *which permits consular officers to refuse visas pursuant to presidential immigration restrictions*." (emphasis added). Other courts in this jurisdiction have reached a similar conclusion. *See, e.g.*, *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 114–15 (D.D.C. 2020); *Didban v. Pompeo*, 435 F. Supp. 3d 168, 173–74 (D.D.C. 2020); *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 41 (D.D.C. 2020); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 92–93 (D.D.C. 2020); *Ghadami v. DHS*, No. 19-cv-00397, 2020 WL 1308376, at *4–5 (D.D.C. Mar. 19, 2020); *Jafari v. Pompeo*, ---F. Supp. 3d---, 2020 WL 2112056, at *3 (D.D.C. May 3,

2020); *Sarlak v. Pompeo*, No. 20-35, 2020 WL 3082018, at *3–4 (D.D.C. Jun. 10, 2020).

Additionally, visas will expire before the alien can travel. In some cases, an alien might keep this annotated visa and be able to use it to travel before it expires (leaving open the question of how to nullify the annotation on the visa). But in many cases, the "annotated" visa is going to expire before the alien is authorized to enter the United States (that is, before the waiver is granted or the proclamation expires). The adjudication of waivers and/or national interest exceptions – a responsibility that the proclamations have delegated to consular officers is a time-consuming process which often lasts longer than the typical validity of a visa, and consular officers do not have discretion to lengthen a visa's validity to accommodate a waiver application. The INA specifically limits immigrant visa validity to six months.[4] *See* 8 U.S.C. § 1182(c), and the validity of nonimmigrant visas is based on principles of reciprocity (*i.e.*, reciprocal treatment that other countries accord U.S. nationals). *See* 22 C.F.R. § 41.112(b)(1). In many cases involving nationals from certain countries, reciprocity is limited to three months (*e.g.*, for nationals of Iran, Libya, Syria, Chad). If these visas expire before their waiver or exception request is adjudicated, the INA and agency regulations would require that the applicant re-apply for a visa, pay a new fee (usually ranging between $160 and $330 per person), and re-interview for the visa. As seen in litigation challenging the issuance of waivers under Proclamation 9645, the adjudication of such waiver requests takes time. *See, e.g.*, *Didban*, 442 F. Supp. 3d at 168 (two-year adjudication time was reasonable); *Bagherian*, 442 F. Supp. 3d at 92–93 (twenty-five-month adjudication time was

[4] On the related issue of the temporal length of the validity of medical examinations that has been raised before this Court, *see, e.g.*, ECF nos. 129, 131, medical examinations are generally valid for six months. *See* Centers for Disease Control and Prevention, "Medical Examination: Frequently Asked Questions (FAQs)" https://www.cdc.gov/immigrantrefugeehealth/exams/medical-examination-faqs.html#18. Medical examinations are valid for three months for individuals with "Class A TB with Waiver," Class B1 TB, Pulmonary," "Class B1 TB, Extrapulmonary," and "HIV infection." *See id*. Thus, the length of the validity of medical examinations is based on patient symptoms, not as the *Aker* plaintiffs assert, the country of origin. *See* 9/22/2020 Hr'g Tr. 25-26.

reasonable); *Sarlak*, 2020 WL 3082018, at *1 (twenty-six-month adjudication time was reasonable). In these cases, the applicants would certainly be required to apply for new visas after their "annotated" visas expired. That would cost them a new visa fee and they would have to demonstrate to the satisfaction of a consular office that they remain eligible.

* * *

In sum, Defendants respectfully request that the Court take into consideration the strong legal justification for its longstanding practice prior to the issuance of the preliminary injunction for this case in considering the scope of any equitable relief to be issued.

CONCLUSION

The Court lacks discretion to issue Plaintiffs' requested equitable relief because "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *Oakland Cannabis*, 532 U.S. at 497 (internal citations and quotation marks omitted). Even if such relief were legally authorized, appropriate relief would extend the time period to process applications received by the close of Fiscal Year 2020. Under those circumstances, the Court should nonetheless consider the substantial precedent and global operational considerations in issuing any such relief.

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September 25, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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