UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AFSIN AKER, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, President of the United States of America, *et al.*, Defendants.	Civil Action No. 20-1926 (APM)

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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR EMERGENCY INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs ask the Court for emergency injunctive relief addressing diversity visa applicants whose visas are set to expire in March 2021 prior to the expiration of Proclamation 10014. The government is aware of the issue presented and is considering on an expedited basis actions that can address these concerns. Presidential Proclamation 10014 is under active review by the new Administration. That process will conclude before the end of the month.

Putting aside efforts to address these concerns by Defendants, the relief sought here falls outside the scope of the relief sought in the operative complaints in this consolidated action. Plaintiffs' make this request 44 days after they had notice that the presidential proclamations at issue in this litigation would be extended beyond the expiration date of their visas, *see* 86 Fed. Reg. 417 (Dec. 31, 2020). They seek an emergency injunction to "set[] aside the Department of Homeland Security's policy of omitting an express 'national interest' exception for holders of expiring fiscal year 2020 diversity visas." They ask this Court to direct DHS to "promptly … issue new guidance that accounts for the interests of fiscal year 2020 diversity visa holders," to order the appropriate agencies to "equitably extend[] the validity of fiscal year 2020 diversity visas until after DHS has issued such guidance[,]" and to order the Government "under the All Writs Act" to "treat visas issued and renewed pursuant to [the Court's preliminary injunction order, ECF No. 123] as having been issued as of the date that this Court renders its final judgment in this action." ECF No. 201 at 2. But the Court should deny Plaintiffs' request at the threshold because the emergency relief they seek is beyond the authority of this Court, outside of the scope of the relief sought in the operative complaints, and their delay in filing cuts against any claims of time sensitive, emergency relief. Moreover, Plaintiffs have no likelihood of success on the merits of their claims for four reasons.

First, Plaintiffs fail to challenge any final agency action. Second, the All Writs Act, 28 U.S.C. § 1651(a), does not provide Plaintiffs with a basis for relief. Third, the Court lacks jurisdiction to review the agencies' discretionary determination on who may qualify for a National Interest Exception to Proclamations 10014 and 10052 (and proclamation waivers are available in any event on a case-by-case basis). Fourth, the Court lacks jurisdiction to contradict the Immigration and Nationality Act ("INA") and issue the equitable relief that Plaintiffs seek. Additionally, Plaintiffs' asserted injury is outside of the scope of the claims in consolidated action, and the public interest factors favor the Government. For these reasons, the Court should deny Plaintiffs' request for emergency injunctive relief.

Finally, the *Gomez* plaintiffs' additional request for an "order directing Defendants either to provide notice to absent class members of significant developments in this case, or in the alternative to provide class counsel with absent class members' contact information" is not time sensitive issue or procedurally proper, and the Court should order the plaintiffs to make a separate request for the specific relief they seek.

LEGAL STANDARD

In deciding whether to grant emergency injunctive relief, the Court must consider (1) whether there is a substantial likelihood that plaintiffs will succeed on the merits of their claim, (2) whether plaintiffs will suffer irreparable injury in the absence of an injunction, (3) the harm to defendants or other interested parties, and (4) whether an injunction would be in the public interest. *See N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 13 (D.D.C. 2009).

ARGUMENT

A. The Court can deny Plaintiffs' request for emergency injunctive relief on two threshold bases.

The Court can deny Plaintiffs' request for emergency injunctive relief on two threshold bases: 1) Plaintiffs ask the Court for emergency injunctive relief that falls outside the scope of the relief sought in the operative complaints in this consolidated action; and 2) Plaintiffs' delay in filing cuts against injunctive relief.

1. The relief that Plaintiffs' request is outside the scope of the relief requested in the operative complaints.

The Court should deny Plaintiffs' motion for an emergency injunction because the relief they seek is outside of the scope of the relief the plaintiffs requested in the operative complaints in this consolidated action. "[A] proper motion for a preliminary injunction seeks to enjoin *the action that the complaint alleges is unlawful* prior to the completion of the litigation, and without such a connection between the claim and requested injunction, there is simply no jurisdictional basis for the Court to grant preliminary relief." *Bird v. Barr*, No. 19-CV-1581 (KBJ), 2020 WL 4219784, at *2 (D.D.C. July 23, 2020) (emphasis in original; citations omitted). "[A] preliminary injunction is *not* … a generic means by which a plaintiff can obtain auxiliary forms of relief that may be helpful to them while they litigate unrelated claims." *Id.* A district court "only possesses the power to afford preliminary injunctive relief that is *related* to the claims at issue in the litigation …." *Id.* (emphasis in original). "Even when a motion for a preliminary injunction is predicated on a complaint, if the motion raises issues different from those presented in the complaint, the court has no jurisdiction over the motion." *LeBoeuf, Lamb, Greene & MacRae, LLP. v. Abraham*, 180 F. Supp. 2d 65, 69 (D.D.C. 2001). If a court never rules that the "conduct asserted in the underlying complaint" is likely to be unlawful, then there is no basis to issue an injunction of conduct not challenged in the complaint. *See De Beers Consol. Mines v. United States*, 325 U.S. 212, 219 (1945) (the issuance of preliminary relief "presupposes or assumes . . . that a decree may be entered after a trial on the *merits* enjoining and restraining the defendants from certain future conduct")

(emphasis added). Indeed, such a ruling would be an abuse of discretion. *See Pac. Radiation Oncology, LLC*, 810 F.3d at 637 (movant "could not prove the likelihood of success requirement of the preliminary injunction analysis because the [] violations alleged in the motion were not contained within the actual complaint"); *accord Colvin v. Caruso*, 605 F.3d 282, 300 (6th Cir. 2010) (plaintiff "had no grounds to seek an injunction pertaining to allegedly impermissible conduct not mentioned in his original complaint").

Plaintiffs' emergency motion fails to satisfy this crucial jurisdictional requirement because it does not seek to enjoin an action that the operative complaints allege is unlawful—namely the failure to issue a categorical national interest exemption to current holders of diversity visas. *See Bird*, 2020 WL 4219784, at *2. Plaintiffs' motion requests, in pertinent part: "[A]n injunction setting aside [DHS's] policy of omitting an express 'national interest' exception for holders of expiring fiscal year 2020 diversity visas, and directing DHS promptly to issue new guidance that accounts for the interests of fiscal year 2020 diversity visa holders." ECF 201 at 2. In requesting DHS guidance that "accounts for the interests of fiscal year 2020 diversity visa holders" Plaintiffs seek an order directing DHS to issue a blanket national interest exception for 2020 diversity visas holders whose visas will expire on or before March 31, 2021.

The operative complaints fail to allege that diversity visa holders are entitled to a blanket national interest exception from DHS. The operative *Aker* complaint mentions, but does not elaborate on the national interest exception. *Aker, et al. v. Trump, et. al.*, 20-cv-01926-JDB (D.D.C. July 21, 2020) ¶ 3. The *Fonjong*, *Kennedy*, and *Mohammed* complaints are devoid of allegations concerning DHS's application of the national interest exception. To the extent that they contain allegations concerning the national interest exception, they aver simply that the State Department did not adequately consider the application of a national interest exception to diversity visa holders.

See Fonjong, et al., v. Trump, et al., 20-cv-01419-APM (D.D.C. Oct. 29, 2020), ECF No. 165 ¶¶ 1164, 1169-72; *Kennedy, et al. v. Trump*, et al., 20-cv-02639-APM (D.D.C. Sept. 23, 2020), ECF No. 13 ¶¶ 9740, 9742-43; *Mohammed, et al. v. Trump, et al*., 20-cv-01419-APM (D.D.C. Nov. 2, 2020), ECF 70 ¶¶ 2189, 2194-97.

Allegations in the *Gomez* Second Amended Complaint (ECF 111) are likewise deficient. Although the second claim in the *Gomez* Second Amended Complaint concerns the national interest exception, *see* ECF 111, at 94-96, as clarified by the *Gomez* summary judgment motion, Plaintiffs' alleged injury is that Defendants' application of the National Interest Exception denied Plaintiffs "a meaningful opportunity to seek a 'national interest' exception under intelligible criteria." ECF 195-1 at 46. In other words, Plaintiffs' complaints address only the opportunity to apply for a visa (which plaintiffs have, together with a case-by-case assessment of a national interest request) and do not reach the issue of admission into the United States to avoid expiration.

The allegation that Defendants denied diversity visa applicants the opportunity to *apply for* a national interest exception is fundamentally different and disconnected from Plaintiffs' new requested injunction for DHS to issue a blanket national interest exception for DV-2020 holders to enter the United States. Without a connection between Plaintiffs' claims and requested injunction, this Court lacks a jurisdictional basis to grant preliminary relief.

2. Plaintiffs' unexplained delay in filing their motion weighs heavily against the entry of emergency injunctive relief.

Plaintiffs waited a long time to seek emergency relief relating to this issue. They knew 44 days ago that the proclamations would be extended to expire after visas would expire. *See* 86 Fed. Reg. 417 (Dec. 31, 2020). And, the Court held status conferences on January 19 and 29, 2021 (the first at Plaintiffs' request) on how the case should proceed, and Plaintiffs specifically raised the issues they raise now in their motion. But Plaintiffs further delayed filing their motion for another

15 days after those conferences. Courts have repeatedly held that this type of voluntary procrastination weighs heavily against the entry of a preliminary injunction. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("In considering the balance of equities among the parties, we think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request"); *Brown v. D.C.*, 888 F. Supp. 2d 28, 32-33 (D.D.C. 2012) ("[T]his delayed timeline establishes that …[plaintiff] had plenty of notice that her … employment would end, an alleged harm that she now asks this Court to halt via the extraordinary remedy of a preliminary injunction"). The Court should reach the same conclusion here.

B. Plaintiffs have no likelihood of success on the merits.

1. Plaintiffs have failed to identify a final agency action for the Court to review.

Judicial review under the APA is limited to "final agency action." 5 U.S.C. § 704. The "final agency action" requirement involves two steps. First, Plaintiffs must identify an "agency action." *See id*. § 551(13) (defining "[a]gency action" to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."; *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) (elaborating). Second, the challenged agency action must be "final." This means that the agency action must (1) "mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature" and (2) be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations omitted). Thus, for example, an agency letter that is "purely informational in nature" does not constitute final agency action. *See, e.g.*, *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004) (recognizing that the letter "imposed no obligations and denied no relief").

In their emergency motion, Plaintiffs argue that the State Department's August 12, 2020 guidance constitutes final agency action. ECF 201-1 at 4-5 (citing *Gomez v. Trump*, 2020 WL 5367010, at *5 (D.D.C. Sept. 4, 2020); CAR 173-74); *see id*. at 13 (contending "[t]hat guidance represents the completion of the decisionmaking process"). But the August guidance, by its terms, presents "a *non-exclusive* list of the types of travel that *may* be considered to be in the national interest." *See, e.g.,* CAR 168. It does not mark the consummation of the decision-making process and does not determine the "rights or obligations" of the Plaintiffs. All DV-2020 applicants were eligible to demonstrate their eligibility for a national interest exemption at the time of their visa interview, and the fact that DV-2020s are not included as a categorical exemption does not mean that they could not be considered for an exemption on an individual basis. For this threshold reason, Plaintiffs cannot demonstrate a substantial likelihood of success on the merits on their APA claim.

2. The All Writs Act does not provide a basis for the relief that Plaintiffs seek.

Plaintiffs are unlikely to succeed on the merits of their emergency motion because the All Writs Act ("AWA"), 28 U.S.C. § 1651(a), does not provide them with a basis for the relief they seek. "The All Writs Act provides that the federal courts 'may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'" *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (quoting 28 U.S.C. § 1651(a)). The AWA, however, "is not itself a grant of jurisdiction." *Id*.. It also does not absolve a party seeking an injunction from satisfying the factors for preliminary relief. *See Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004). The AWA allows courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). It "does not erase *separate* legal requirements for a given type of claim." *Makekau v. Hawaii*, 943 F.3d 1200, 1204 (9th Cir. 2019). The Act only "authorizes a federal court to issue such commands ... as may

be necessary or appropriate to effectuate and prevent the frustration of orders it has *previously issued* in its exercise of jurisdiction *otherwise obtained*." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). While the AWA empowers courts "to issu[e] process in aid of its existing" jurisdiction, it does not empower courts to "enlarge that jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). The AWA "does not authorize" federal courts "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). And, a "district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004).

Here, Plaintiffs assert that they properly invoke the AWA to avoid frustration of the Court's prior orders that resulted in the issuance of more than 7,000 DV-2020 visas being issued. ECF 201-1 at 12 (citing *Gomez I*, 2020 WL 5367010, at *30, *38). But the resolution that Plaintiffs request would also frustrate the same order by the Court which upheld the Proclamations' lawfulness by requiring DHS to exempt Plaintiffs from enforcement of those Proclamations' central purpose—barring entry to limit the number of people eligible to seek employment in the United States while the COVID-19 pandemic wreaks havoc on the economy. Moreover, the Government's decision on whether or not to rescind the Proclamations at issue is far from certain. *See, e.g.*, Ex. A, 2/10/21 Tr. at 8:16-22. If the Government were to rescind the Proclamations, the issue would be rendered moot.

Second, Plaintiffs argue that invocation of the AWA is "appropriate to preserve this Court's and the D.C. Circuit's ongoing jurisdiction to hear and decide Plaintiffs' claims on the merits." ECF 201-1 at 13. An AWA injunction is improper where Plaintiffs give the Court no basis to

"explain how its jurisdiction was, or could be, threatened by the conduct [they ask the Court to] enjoin[ ]." *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1257 (11th Cir. 2006). This Court, however, has already acted to preserve its jurisdiction on the merits of Plaintiffs' claims by reserving 9,050 DV-2020 numbers, and presumably summary judgment briefing on the merits would proceed even if the Proclamations had not been extended on December 31, 2020. Moreover, if the Court granted Plaintiffs the relief they are requesting in their emergency motion, the result would likely moot their appeal to the D.C. Circuit challenging the Proclamations, and accordingly the preservation of that appeal is no reason to exercise jurisdiction here. The AWA is a tool for preserving jurisdiction over the claims, not to remedy unrelated allegations of purported wrongs. *See F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). Thus, the AWA does not provide a basis for the relief that Plaintiffs seek.

3. The Court lacks jurisdiction to review the agencies' discretionary determination on National Interest Exception waivers.

Fundamentally, Plaintiffs are asking for this Court to provide them with blanket national-interest waivers under the Proclamations. That is not permissible under the APA because despite the presumption of reviewability, *see* 5 U.S.C. § 702, the statute explicitly excludes review "to the extent that … agency action is committed to agency discretion by law," *id*. § 701(a)(2). "[R]eview is not to be had if the [law] is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Even if presidential proclamations could be subjected to APA review (which they cannot), the national-interest exceptions now sought after by Plaintiffs is directly at odds with *Chaney*. This means the Plaintiffs do not even have an APA cause of action to pursue blanket national-interest waivers.

This is confirmed by *Zhu v. Gonzales*, 411 F.3d 292, 295–96 (D.C. Cir. 2005). In that case, the court of appeals evaluated an analogous national-interest waiver provision in 8 U.S.C. § 1153(b)(2)(B). *Zhu* first noted that a provision need not specifically use the term "discretion" to bring a decision within the jurisdictional bar. 411 F.3d at 294–95. It was enough that the statute entrusted the decision to the Attorney General's "expertise and judgment unfettered by any statutory standard whatsoever." *Id.* at 295. Thus, the court held that national-interest waivers are "entirely discretionary." *Id.* (statute provided that the "Attorney General 'may grant asylum' to aliens who qualify ... but need not"); *accord Poursina v. USCIS*, 936 F.3d 868, 870–72 (9th Cir. 2019) (same); *Mousavi v. USCIS*, 828 F. App'x 130, 133 (3d Cir. 2020) (Bibas, J.) (same). The language of the Proclamations in this case is conditional and discretionary.

In this case, Section 3(b)(iv) of Proclamation 10052 specifically states that the entry suspension shall not apply to "any alien whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees." 85 Fed. Reg. at 38,265. Proclamation 10052 further explicitly states that "Aliens covered by section 3(b)(iv) of this proclamation, under the standards established in section 4(a)(i) of this proclamation, shall be identified by the Secretary of State, the Secretary of Homeland Security, or their respective designees, *in his or her sole discretion*." *Id*. (emphasis added); *see also Make the Road N.Y. v. Wolf*, 962 F.3d 612, 633–34 (D.C. Cir. 2020) (ruling that agency "judgment is committed to agency discretion by law and, under Section 701 of the APA, there is no cause of action to evaluate the merits of the Secretary's judgment under APA standards."). Because the determinations for national-interest waivers are governed solely by the Proclamations, which themselves reinforce how these decisions are discretionary, the Plaintiffs' transmogrified APA claim for such waivers is unreviewable.

Nor may Plaintiffs resort to the argument that there are statutory standards to guide the Court for reviewability. *See Chaney*, 470 U.S. at 830 (noting how there are "no meaningful standard which to judge the agency's exercise of discretion."). In fact, multiple decisions of this district court have ruled against this argument when evaluating the decisionmaking for waivers from other presidential proclamations with similar language. *See, e.g., Kangarloo v. Pompeo*, 480 F. Supp. 3d 134, 140 (D.D.C. 2020) ("The processing of waiver requests is therefore likely 'committed to agency discretion' and unreviewable under the APA."); *Joorabi v. Pompeo*, 464 F. Supp. 3d 93, 102 (D.D.C. 2020) (similar); *Jafari v. Pompeo*, 459 F. Supp. 3d 69, 76 (D.D.C. 2020) (similar). Accordingly, the *Gomez* Plaintiffs' claim regarding the implementation of the Proclamations' national-interest exception fails as a matter of law.

4. The Court lacks jurisdiction under the Immigration and Nationality Act to issue the equitable relief that Plaintiffs seek.

Plaintiffs ask this Court to step into the shoes of U.S. consular officers, ignore the Immigration and Nationality Act ("INA"), State Department regulations, and the Foreign Affairs Manual ("FAM") and extend "the validity of [class members'] fiscal year 2020 diversity visas." The relief that Plaintiffs seek would require the State Department to *replace*[1] the FY 2020 diversity visas issued to the plaintiffs and class members by the September 30, 2020 fiscal year deadline in

[1] The terms "reissue" or "reissuance" of visas (including diversity visas) as used by Plaintiffs throughout this litigation appear nowhere in the INA, the State Department's implementing regulations or the Foreign Affairs Manual ("FAM"). Rather, agency regulations and the FAM explicitly permit consular officers only to "replace" or issue "replacement" visas in very limited circumstances. *See* 22 C.F.R. § 42.74; 9 FAM 504.10-5. For instance, 22 C.F.R. § 42.74 states that a consular officer "may issue a replacement visa" to a diversity immigrant if the alien is unable to use the visa during the period of its validity due to reasons beyond the alien's control and "the visa is issued during the same fiscal year in which the original visa was issued …." Likewise, 9 FAM 504.10-5 states that if a consular officer is "satisfied that an applicant will be or was unable to use an immigrant visa (IV) during its validity period because of reasons beyond the applicant's control and for which the applicant is not responsible," then the officer "may issue a replacement visa with the originally allocated visa number within the same fiscal year."

accordance with the Court's preliminary injunction order with new diversity visas with new validity periods. The Court lacks authority under the INA, State Department regulations, and the FAM to grant such an unprecedented request.

By statute, eligibility for a diversity visa lasts only through the end of the specific fiscal year 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.

"[J]ust 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." *Am. Hosp. Assoc. v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2018) (citations omitted). "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). 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) (citations omitted).

The State Department is thus precluded by statute from replacing FY 2020 diversity visas after September 30, 2020. *See* 8 U.S.C. §§ 1153(e)(2), 1154 (a)(1)(I)(II). *See also* 22 C.F.R. § 42.74; 9 FAM 504.10-5. Plaintiffs' FY 2020 diversity visas are no longer in the proper temporal window, which closed on September 30, 2020. *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"). And, "courts 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); *Cf. 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) ("[W]hen midnight strikes at the end of the fiscal year, those [diversity visa] applicants without visas are out of luck."). Accordingly, the Court lacks the jurisdiction to extend the validity of class members FY 2020 diversity visas.

C. Plaintiffs' claim of irreparable injuries are outside of the scope of the injuries asserted in the operative complaints.

The D.C. Circuit "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The injury "must be both certain and

great; it must be actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The Supreme Court has recognized, a preliminary injunction is used "to grant immediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines*, 325 U.S. at 220. Thus, a court "cannot grant preliminary relief on claims not pleaded in the complaint." *Steele v. United States*, No. 1:14-CV-1523 (RCL), 2020 WL 7123100, at *7 (D.D.C. Dec. 4, 2020). Here, the injuries that the Plaintiffs assert in their emergency motion are outside the scope of the injuries asserted in the operative complaints. The Supreme Court recognizes that a plaintiff's unnecessary delay in asking for preliminary relief weighs against their request. *Benisek*, 138 S. Ct. at 1944. Here, as Defendants have discussed, Plaintiffs waited until now to challenge agency guidance that has been publicly available since August 12, 2020. On this basis alone, the Court should deny Plaintiffs' emergency request. Plaintiffs contend that they believed that the new administration would rescind the challenged Proclamations before the expiration of their visas. ECF No. 201-1 at 3 (citing a news report dated Jan. 28, 2021). But a litigant's hope that there might be a change in policy is not an appropriate basis for seeking the extraordinary remedy of a second emergency injunction.

Moreover, the ultimate injury Plaintiffs claim here —being unable to enter the United States—would be remedied by a final judgment in their favor should they prevail on their legal theory that they are entitled to obtain a visa after the fiscal year ends. To be sure, the government believes that theory is incorrect as discussed above. But Plaintiffs must ultimately prevail on their legal theory to obtain final relief, and should not benefit in balancing the injunctive factors from the fact that their legal theory is flawed.

D. The equitable factors favor the Government.

The final factors required for injunctive relief—balancing of the equities and the public interest—merge when the Government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Any order that grants "particularly disfavored" relief by micro-managing executive agencies' vested control over a statutory program, or enjoining them from administering entry requirements they are in charge of enforcing, constitutes irreparable injury and weighs heavily against the entry of injunctive relief. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977); *see also Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981); *Fla. EB5 Investments, LLC v. Wolf*, 443 F. Supp. 3d 7, 14 (D.D.C. 2020). For this additional reason, Plaintiffs' request for a preliminary injunction re-writing the agency's national interest exemptions is unwarranted.

E. The Court should deny the *Gomez* Plaintiffs' request for information.

The *Gomez* plaintiffs request an "order directing Defendants either to provide notice to absent class members of significant developments in this case, or in the alternative to provide class counsel with absent class members' contact information[.]" ECF No. 201 at 2. Plaintiffs, however, provide no authority to support that this request for information to "notify absent class members regarding this case," ECF No. 201-1 at 15, is time sensitive and satisfies the high burden necessary for emergency injunctive relief. *See N. Mariana Islands*, 686 F. Supp. 2d at 13. On this basis, and because Plaintiffs' request is procedurally improper, the Court should order the plaintiffs to make a separate request for the specific relief they seek.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for emergency injunctive relief in its entirety.

Dated: February 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 17, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

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