UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ; MIRNA S.; AND VICENTA S., Plaintiffs, v. DONALD J. TRUMP, President of the United States of America, et al., Defendants.	Civil Action No. 1:20-cv-1419

DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

This Court should deny Plaintiffs' request for an extraordinary, nationwide temporary restraining order that would enjoin a Presidential action: The Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak ("COVID-19 Labor Proclamation" or "the Proclamation"), 85 Fed. Reg. 23,441 (Ex. 1). In this Proclamation, the President lawfully exercised his broad authority to temporarily suspend or limit for a 60-day period the admission of certain aliens as immigrants to the United States, while the Nation addresses the harms to the labor market and the country that have been caused by the devastating COVID-19 pandemic.

Plaintiffs are U.S. citizens and lawful permanent residents (LPRs) who sponsor child immigrant petition beneficiaries seeking immigrant visas. The beneficiaries are foreign family members, who turn 21 years old this month, and who claim that if they do not receive their visas and enter the United States before their birthday, they will "age out" of their visa eligibility. Plaintiffs contend that "Defendants' enforcement of the Proclamation against Plaintiffs . . . will cause immense and irreparable harm if not enjoined: Should they age out, Plaintiffs will forever lose their present opportunity to obtain visas and rejoin their families . . . ." TRO Mot. 20. Plaintiffs cannot satisfy any of the requirements necessary for a TRO.

First, Plaintiffs cannot demonstrate that they have a substantial likelihood of success on the merits. At the threshold, Plaintiffs' claims are non-justiciable because of mootness and lack of standing. Two of the three beneficiaries at issue have been determined to be eligible for national interest exceptions under the Proclamation and have been issued immigrant visas. The claims of the Plaintiffs petitioning for those beneficiaries are therefore moot. And any alleged injury relating to the third and sole remaining beneficiary has no causal connection to the Proclamation: that

beneficiary faces obstacles to obtaining a visa that have nothing to do with the Proclamation—including a lock-down in his home country that has frustrated his ability to obtain a visa interview. So the Plaintiff petitioning on that beneficiary's behalf lacks standing.

Even if Plaintiffs' claims were justiciable, their requests for emergency relief fail as a matter of law for multiple, independent reasons. First, under Supreme Court precedent, the Administrative Procedure Act (APA) does not provide Plaintiffs with a cause of action to seek judicial review of a Presidential Proclamation. The President is not an agency, and his actions are not subject to the APA under binding Supreme Court precedent. Plaintiffs also fail to identify a final agency action that the Court can review. Even if they could do so, review would still be precluded by the doctrine of consular nonreviewability—the D.C. Circuit has held that federal courts lack authority to review consular decisions or policies that govern those decisions. And even if Plaintiffs could somehow get past all of those fatal defects in their purported claims against the government, they still cannot prevail because the President lawfully issued the Proclamation under his broad statutory authority to suspend the entry of certain aliens based on his finding that their entry would be detrimental to the interests of the United States. *See* 8 U.S.C. §§ 1182(f), 1185(a). On March 13, 2020, the President declared that the COVID-19 outbreak in the United States constituted a national emergency. *See* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, 85 Fed. Reg. 15,337-38 (Mar. 13, 2020). In the four weeks following that declaration, "more than 22 million Americans filed for unemployment." 85 Fed. Reg. at 23,441. The President determined that, "without intervention," the United States would face "a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand," including from new immigrants. *Id*. The Proclamation is a

lawful response to the significant harm caused by this national emergency. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018),

Second, Plaintiffs fail to show irreparable harm attributable to the Proclamation. There is no injury at all for the two beneficiaries who have already received national interest exceptions and immigrant visas. And for the alleged harm related to the third beneficiary, Plaintiffs fail to establish a direct causal link between the injury and the Proclamation. Because this beneficiary has been under government lockdown, he has not completed the medical evaluation that would be necessary for a visa interview with the consulate irrespective of the Proclamation. Moreover, his ability to receive a visa depends on whether his father can travel to this foreign country and receive his own visa during this global pandemic.

Third, enjoining the Proclamation would be contrary to the public interest. If this Court were to set aside a lawful Presidential Proclamation issued to address a specific threat to the American workforce during a time of national emergency, the negative repercussions for the public would be both great and irreversible. The Proclamation addresses the catastrophic harms being inflicted on the U.S. labor market and the Nation because of the ongoing COVID-19 national emergency. A nationwide TRO would cut at the heart of the President's broad legal authority over the border at a time when that authority is essential. Thus, the balance of the equities weigh decisively against a TRO.

Finally, there is no basis in law or equity to support Plaintiffs' request for a nationwide injunction. Instead, relief must be tailored to the injury asserted by the plaintiffs and cannot properly extend further under Article III, equitable principles, or the APA. The fact that Plaintiffs have pleaded class claims also does not justify nationwide relief, as doing so would disregard key protections provided by Federal Rule of Civil Procedure 23. This Court has not certified a class,

and only one of the three Plaintiffs even has a claim that is not moot. If temporary relief were warranted, this Court could grant relief to those specific Plaintiffs that would be adequate to address their injuries without enjoining the Proclamation more broadly. Thus, the universal injunctive relief requested by Plaintiffs is contrary to law.

For these reasons, the Court should deny Plaintiffs' TRO motion in its entirety.

BACKGROUND

A. The Family-Based Immigrant Visa Process and the Child Status Protection Act.

United States citizens and LPRs may petition for an immigrant visa on behalf of certain categories of relatives so that those relatives may immigrate to the United States and become permanent residents themselves. *See* 8 U.S.C. §§ 1153(a), 1154(a)(1). To do so, the petitioning U.S. citizen or LPR files a Form I-130, Petition for Alien Relative, with United States Citizenship and Immigration Services (USCIS). On this form, the petitioning relative must establish that she is a U.S. citizen or LPR and that she has a qualifying relationship with the beneficiary. 8 C.F.R. § 204.1(a). Once the agency is satisfied that the petitioner has met her burden, USCIS approves the I-130 petition. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 46-48 (2014) (citing 8 U.S.C. § 1154(b)).

An approved petition does not, however, necessarily mean that the beneficiary may immediately apply for an immigrant visa. Instead, the approved petition is given a priority date and classified in the appropriate category depending on the immigration status of the petitioning relative and the petitioning relative's relationship with the beneficiary. Immigrant visas are always available for "immediate relatives"—beneficiaries who are the spouses, parents, and unmarried children under the age of 21 of U.S. citizens. 8 U.S.C. § 1151(b)(2)(A)(i). All other family relationships are classified in "preference" categories. For these preference categories, Congress

imposes annual limits on the number of available visas. 8 U.S.C. §§ 1151(c)(1), 1152, 1153(a)(1)-(4). Demand for family-preference category visas frequently exceeds the congressionally established number of available visas. *Cuellar de Osorio*, 573 U.S. at 48.

The system is "first-come, first-served" within each preference category, meaning that an immigrant visa number becomes available to a beneficiary based on the priority date of her approved I-130 petition. 8 U.S.C. § 1153(e)(1); *Cuellar de Osorio*, 573 U.S. at 48; 8 C.F.R. § 204.1(b); 22 C.F.R. § 42.53(a). The amount of time the beneficiary must wait depends on supply and demand within a given category, and some beneficiaries may wait years before a visa in a given preference category becomes available. *Cuellar de Osorio*, 573 U.S. at 50. When the visa becomes current or is about to become current, the National Visa Center (NVC) notifies the beneficiary, who may then begin the application process for an immigrant visa. The NVC then schedules the beneficiary for a visa interview at the appropriate United States Embassy or Consulate. *See* 8 U.S.C. § 1202(a), (e); 22 C.F.R. § 42.62. Under this legal regime, a beneficiary will not necessarily remain in the same visa-preference category during the pendency of her petition. For example, while waiting for a visa to become available in a family-preference category, a beneficiary who initially qualified as a "child" may have turned 21 and "aged-out" into a different family-preference category. *See Cuellar de Osorio*, 573 U.S. at 45.

In 2002, Congress passed the Child Status Protection Act (CSPA), *see* Pub. L. No. 107-208, to protect certain beneficiaries who were minors when their sponsors filed their petitions but risked "aging out" due to administrative processing delays (*i.e.*, the time it takes USCIS to adjudicate the petition). Certain provisions under CSPA "prevent an alien from 'aging out' because of—but only because of—bureaucratic delays: the time Government officials spend reviewing (or getting around to reviewing) paperwork at . . . the front and back ends of the immigration process."

Cuellar de Osorio, 573 U.S. at 53. Notably, if a beneficiary's CSPA age is under 21 and she has sought to acquire an immigrant visa by, for example, submitting an online application or paying her immigrant-visa-application fees—steps taken prior to appearing for an in-person interview or even completing the application—then the beneficiary will maintain her CSPA age, so long as the beneficiary does not marry and the petitioner maintains her immigration status. 9 Foreign Affairs Manual (FAM) 502.1-1(D)(6).

B. The COVID-19 Pandemic and the COVID-19 Labor Proclamation.

The COVID-19 pandemic has presented serious and unique challenges for countries around the world. The United States government has taken a range of steps to respond to the pandemic and stem the spread of the virus. The State Department has, for example, sought to protect its employees and the public while maintaining mission-critical services. On March 20, 2020, the State Department announced that it would "temporarily suspend routine visa services at all U.S. Embassies and Consulates," but noted that "emergency and mission critical visa services" would continue as resources allow. U.S. Department of State–Bureau of Consular Affairs, *Suspension of Routine Visa Services*, https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html (last visited June 10, 2020). That announcement remains in effect. *Id.*

About a month after that announcement, on April 22, the President signed the COVID-19 Labor Proclamation. *See* Presidential Proclamation 10014, Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 Fed. Reg. 23,441 (Apr. 27, 2020). The President issued the Proclamation to address the severe damage to the economy caused by the COVID-19 virus in the United States, especially the rising unemployment rate from the virus and the policies that have been necessary to mitigate its spread. *Id*. Unemployment claims have reached "historic levels"—

between March 13, when the President declared a national emergency, and April 11, "more than 22 million Americans have filed for unemployment." *Id*.

As the President explained, administering our immigration system during the pandemic requires "be[ing] mindful of the impact of foreign workers on the United States labor market, particularly in an environment of high domestic unemployment and depressed demand for labor," as well as "conserv[ing] critical State Department resources so that consular officers may continue to provide services to United States citizens abroad." 85 Fed. Reg. 23,441. "[W]ithout intervention, the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand." *Id*. An excess labor supply "is particularly harmful to workers at the margin between employment and unemployment," as they are the ones "likely to bear the burden of excess labor supply disproportionately." *Id*. Recently, "these workers have been disproportionately represented by historically disadvantaged groups, including African Americans and other minorities, those without a college degree, and the disabled." *Id*.

Once immigrants are admitted as LPRs, they are immediately eligible "to compete for almost any job," and the "vast majority of immigrant visa categories do not require employers to account for displacement of United States workers." 85 Fed. Reg. 23,441. For example, there is typically no way to direct "new residents to particular economic sectors with a demonstrated need not met by the existing labor supply" so that "already disadvantaged and unemployed Americans" would be protected "from the threat of competition for scarce jobs from new lawful permanent residents." *Id*. Although "some employment-based visas contain a labor certification requirement," that certification, issued long before the visa is granted, would not "capture the status of the labor market today." *Id.* at 23,442.

In addition to these labor impacts, the Proclamation addresses other harms caused by continuing immigration during this 60-day period. First, "introducing additional permanent residents when our healthcare resources are limited puts strain on the finite limits of our healthcare system at a time when we need to prioritize Americans and the existing immigrant population." *Id*. The Proclamation also recognizes burdens abroad on the State Department, explaining that "[e]ven with their ranks diminished by staffing disruptions caused by the pandemic, consular officers continue to provide assistance to United States citizens." *Id*. Thus, the Proclamation serves to "conserve critical State Department resources so that consular officers may continue to provide services to United States citizens abroad." *Id*.

To address these complex challenges, the President issued the COVID-19 Labor Proclamation under, *inter alia*, 8 U.S.C. § 1182(f) and § 1185(a), and suspended entry into the United States, for 60 days, of intending immigrants abroad who did not already have a valid immigrant visa or travel document as of the date the Proclamation was signed, April 23, 2020. 85 Fed. Reg. 23,442, §§ 1, 2(a). The Proclamation exempts individuals who are already in the United States, LPRs, and several categories of intending immigrants. 85 Fed. Reg. 23,442, § 2(b).[1] The Proclamation also exempts any intending immigrant "whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney

[1] These categories include individuals who apply for visas to work as healthcare professionals, COVID-19 researchers, or other COVID-19 essential workers, and their spouses and children; any individual applying for an EB-5 immigrant investor visa; any spouse of a U.S. citizen; anyone under age 21 who is the child of a U.S. citizen or is coming to the United States to be adopted; members of the United States Armed Forces, and their spouses and children; and nationals of Afghanistan and Iraq who are applicants for "Special Immigrant Visas" in the SI or SQ classifications, and their spouses and children.

General or his designee," or "whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees." *Id*.

The Proclamation expires on June 22, 2020. 85 Fed. Reg. 23,443, §§ 4, 5. By June 12, 2020, the Secretary of Homeland Security, upon consultation with the Secretaries of State and Labor, will recommend to the President whether to continue or modify the Proclamation, and then the President will decide if such action is necessary. *Id*. The State Department posted notice online, which explains that, as with the earlier notice informing the public of the suspension of routine visa services at U.S. consular posts worldwide, "as resources allow, embassies and consulates will continue to provide emergency and mission critical visa services for applicants who may be eligible for an exception under this presidential proclamation." U.S. Department of State–Bureau of Consular Affairs, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, https://travel.state.gov/content/travel/en/News/visas-news/Proclamation-Suspending-Entry-of-Immigrants-Who-Present-Risk-to-the-US-labor-market.html (last visited May 6, 2020).

Notably, the State Department's mission-critical or emergency services that remain available during the suspension of routine visa services due to the COVID-19 pandemic, as well as the Proclamation, include the processing of immigrant visa applications where the applicant would soon turn 21 and age out of her immigrant visa classification, so long as resources permit. Ex. 2, Marwaha Decl., ¶¶ 2, 4. During this period, consular sections at U.S. embassies and consulates have scheduled emergency interviews for visa applicants at risk of aging out. *Id*., ¶ 5. Such emergency interviews may include consideration of a national-interest exception, and the consular officer makes the determination of eligibility for the exception on a case-by-case basis. *Id*.

C. Procedural History.

1. The Complaint.

On May 28, 2020, the three Plaintiffs filed this putative class action lawsuit. Plaintiffs described the putative class as consisting of:

> All individual immigrant sponsors with approved immigrant visa petitions for a child, including for derivative child relatives in applicable preference categories, with a "current" priority date while the Proclamation is in effect; and whose sponsored child or sponsored derivative child relative is subject to the Proclamation and will, as a result of the Proclamation, age out of his or her current visa preference category by turning 21 years old while the Proclamation remains in effect.

Compl., ECF No. 1, ¶ 118. The complaint asserts that the COVID-19 Labor Proclamation is illegal and should be enjoined nationwide with respect to "Defendants . . . from implementing or enforcing any part of the Proclamation so as to deny or refuse consideration of Plaintiffs' . . . visa petitions on behalf of their children [or derivative child relatives]." *Id.* at 51, Prayer for Relief. Plaintiffs, on behalf of each individual plaintiff and the putative class, assert the following three causes of action: (1) the implementation of the Proclamation is an arbitrary and capricious violation of the APA because it was based on legal error, failed to consider all relevant factors, and lacked rational explanation, *id.*, ¶¶ 129-138; (2) the Proclamation is contrary to law and *ultra vires* under the APA because it contravenes Congress' goal of preserving family unity *id*., ¶¶ 139-146; and (3) the Proclamation violates due process because, by preventing the consideration of the visa petitions, it forecloses family reunification without legal process. *Id.* ¶¶ 147-154. Along with various other relief, Plaintiffs further request declaratory relief that "the Proclamation is unlawful and invalid as to Plaintiffs and their children . . . ." *Id*. at 52.

2. Mirna S. and M.T.S.

Plaintiff Mirna S., who obtained a U-visa in 2013 and adjusted her status to LPR in 2018, filed an I-929 petition to sponsor M.T.S., her daughter, for an immigrant visa. TRO Mot. 11.

M.T.S. turns 21-years old on June 23, 2020. *Id*. The Department of State's Consular Consolidated Database (CCD)[2] reflects that the U.S. Consulate General in Ciudad Juarez, Mexico, granted an expedited immigrant visa appointment for M.T.S., scheduled for May 29, 2020. Ex. 3, Dus Decl., ¶ 2. M.T.S. appeared for her in-person interview in support of her immigrant visa application. *Id*., ¶ 3. At the interview, the consular officer determined that M.T.S. qualified for an immigrant visa, but was ineligible due to the Proclamation's restriction on entry. *Id*. The consular officer, however, pursued a national-interest waiver, as provided for in the Proclamation, on M.T.S.' behalf. *Id*. CCD records indicate that the State Department approved M.T.S.' national interest waiver on June 4, 2020, and on the same day, the consulate general requested M.T.S. to produce her Mexican passport so her case could be processed to conclusion. *Id*., ¶¶ 4-5. On June 9, 2020, the consular officer determined that M.T.S. established her eligibility for a national interest exception and issued M.T.S.'s visa. *Id*. ¶ 6.

3. Gomez and Alondra.

Plaintiff Domingo Arreguin Gomez, a LPR, filed an I-130 petition with USCIS in 2016 on behalf of his wife. Ex. 4, Second Dus Decl., ¶ 2. His wife's application included her daughter (Gomez's stepdaughter), Alondra, as a derivative child beneficiary. *Id*., ¶ 5. Alondra turns 21-years old on June 15, 2020. The CCD reflects that, on April 20, 2020, and May 28, 2020, the United States Consulate General in Ciudad Juarez, Mexico, informed Alondra that it had determined that she qualified for relief under CSPA that would allow her to immigrate to the United States even after she turns 21 years old. *Id*., ¶¶ 6-7. The determination that Alondra qualified for CSPA was

[2]The CCD is the State Department's records database for non-immigrant and immigrant visas adjudicated at U.S. embassies and consulates overseas and information on petitions approved by and provided to the Department by USCIS. *E.g.*, Ex. 3, ¶ 1. These records are accessible to consular officers at U.S. embassies and consulates worldwide. *Id*.

based on State Department records that indicated that she submitted an immigrant visa application in September 2019. *Id*., ¶ 5. On June 4, 2020, the U.S. Consulate General found that the earlier determination that Alondra was a child under CSPA was incorrect because she had not actually filed an immigrant visa application in September 2019 and had not taken any other steps to seek to acquire LPR status within a year of the visa becoming available, as required under 8 U.S.C. § 1153(h)(1). *Id*., ¶ 9. The U.S. Consulate General then contacted Alondra on June 5, 2020, to schedule an expedited visa interview on June 9, 2020. *Id*., ¶ 10. On June 9, 2020, the consular officer determined that Alondra established her eligibility for a national-interest exception under the Proclamation and issued her visa. *Id*., ¶ 11.

4. Vicenta S. and W.Z.A.

Plaintiff Vicenta S. is a U.S. citizen of Salvadoran origin. TRO Mot. 17. She sponsored her son, the principal beneficiary, as well as derivative beneficiaries, including her grandson, W.Z.A., for family-preference immigrant visas. TRO Mot. 17; Ex. 5, Bent Decl., ¶ 4. The visa date assigned to W.Z.A. and his father has been current since January 2016. Ex. 5, ¶ 5. W.Z.A. turns 21-years old on June 30, 2020. On March 5, 2020, the consular section of the U.S. Embassy in San Salvador sent an email to W.Z.A.'s father that explained that W.Z.A. did not qualify for CSPA relief and needed to enter the United States by June 30, 2020. *Id.* 5, ¶ 6. The email provided information regarding the visa application process, which explained how to make an appointment, schedule the necessary medical examination, and obtain all required paperwork necessary for the visa interview. *Id*. Although Vicenta S.' beneficiaries, which included W.Z.A. and his father, scheduled a visa appointment for April 30, 2020, the embassy emailed W.Z.A.'s father on April 1, 2020, to inform him that the appointment was cancelled due to COVID-19, and provided information on how to request an emergency appointment. *Id*., ¶ 8.

The embassy was unable grant W.Z.A. an emergency appointment due to the pandemic: In response to COVID-19, El Salvador has been under a government-imposed lock-down quarantine, in which no one is allowed on the streets except to buy food and medicine. *Id*., ¶ 9. Although the State Department suspended routine visa services in response to COVID-19, the embassy granted and prioritized emergency appointments to individuals at risk of aging out. *Id*., ¶ 13. During this period, the embassy was unable to process immigrant visas applications without a completed medical examination. *Id*., ¶¶ 9, 11-12; 9 FAM 504.4-7. The medical examination is statutorily required to determine visa eligibility. Ex. 5, ¶ 11. The embassy has no record that W.Z.A. had completed his required medical examination to be qualified for an immigrant visa. *Id*., ¶ 9. El Salvador's quarantine prevented panel physicians from conducting the required medical examinations for immigrant visa applicants. *Id*., ¶ 9. The embassy had expected a gradual re-opening starting June 8, 2020, but El Salvador extended the quarantine to June 15, 2020. *Id*., ¶ 9.

The embassy has engaged with W.Z.A. on his next steps in the process. Panel physicians have confirmed that medical examinations will resume when El Salvador lifts the quarantine. *Id*. One panel physician indicated that he intended to open for limited medical appointments on June 16, 2020. *Id*., ¶ 14. On June 10, 2020, the embassy emailed W.Z.A.'s father to schedule appointments for medical examinations and in-person interviews. *Id*. The embassy is currently attempting to schedule appointments for the week of June 15, 2020. *Id*.

W.Z.A.'s father, however, must also be eligible for a visa. Because W.Z.A. is the derivative beneficiary of his father, who is the principal beneficiary, in order for W.Z.A. to receive a visa, his father must also have his visa application positively adjudicated. *See generally* 8 U.S.C. § 1153(d). According to Plaintiffs, W.Z.A.'s father is married, lives in the United States, owns a tow company, and possesses an unlawful presence waiver. Pls' Ex. H, ¶¶ 5, 7; Pls' Ex. I, ¶ 2.

5. The TRO.

On June 2, 2020, Plaintiffs filed an emergency motion for a TRO seeking to enjoin "Defendants' enforcement of the Proclamation as it applies to visa applicants with approved visa petitions who are in danger of aging out while the Proclamation is in effect." TRO Mot. 2, ECF No. 21. Plaintiffs argue that they are likely to succeed on the merits of their first cause of action, which claims that the implementation and enforcement of the Proclamation is arbitrary, capricious, and not in accordance with law under the APA. *Id.* at 23-32. Plaintiffs did not raise any arguments regarding the likelihood of success on the merits in connection to their *ultra vires* and due process claims. *See generally id*.

LEGAL STANDARD

A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). An injunction should be entered only "upon a clear showing that the [movant] is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, the moving party must demonstrate (1) that it is likely to succeed on the merits of its claims; (2) that it is likely to suffer an irreparable injury in the absence of injunctive relief; (3) that the balance of equities tips in its favor; and (4) that the proposed injunction is in the public interest. *Id.* at 20. The same substantive standards apply for both temporary restraining orders and preliminary injunctions. *See, e.g.*, *Sterling Commercial Credit-Michigan, LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011) (denying motion); *Hall v. Johnson*, 599 F. Supp. 2d 1, 4 (D.D.C. 2009) (same); *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (same).

ARGUMENT

A. Plaintiffs fail to demonstrate a substantial likelihood of success on the merits.

Plaintiffs are not likely to succeed on the merits of their APA claim, for three independent reasons. First, Plaintiffs' claims are non-justiciable because the claims are moot and Plaintiffs lack standing. Second, even if Plaintiffs' claims are justiciable, their request for relief fails as a matter of law because the APA does not provide the Court with a basis for judicial review of the President's Executive Orders. Third, even if Plaintiffs could identify a valid cause of action to challenge the COVID-19 Labor Proclamation, they still cannot prevail because the President lawfully issued the Proclamation under his broad authority to suspend the entry of certain aliens based on his finding that their entry would be detrimental to the interests of the United States.

1. Plaintiffs' claims are non-justiciable.

All three Plaintiffs and their respective beneficiaries lack Article III standing. Initially, consular officers have determined that M.T.S. and Alondra are eligible for national interest exceptions to the Proclamation and have issued their immigrant visas. Ex. 3, ¶ 6; Ex. 4, ¶ 11. Accordingly, for Plaintiffs Gomez and Mirna S., the Proclamation cannot plausibly interfere with their reunification with Alondra and M.T.S., respectively. Thus, for Plaintiffs' claims with respect to these two beneficiaries, "relief sought has been obtained, [so] there no longer is a live controversy and the case must be dismissed as moot." *Cueto v. Director*, 584 F. Supp. 2d 147, 149 (D.D.C. 2008); *see Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). W.Z.A. is therefore the sole remaining beneficiary at issue in this case. But Plaintiff Vicenta S.' request for relief fails at the threshold because she

has alleged no concrete and particularized injury that is fairly traceable to the Proclamation and that this Court could redress.

Article III of the Constitution requires that a plaintiff appearing before a federal court have "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (citations and quotations omitted). Built on separation-of-powers principles, standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To satisfy the "'irreducible constitutional minimum' of standing" under Article III, a plaintiff must demonstrate that she has: "(1) an 'injury in fact' that is 'concrete and particularized' as well as 'actual or imminent'; (2) a 'causal connection' between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, 'that the injury will be redressed by a favorable decision.'" *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The party invoking federal jurisdiction bears the burden of establishing these elements. *See Lujan*, 504 U.S. at 561.

In particular, in the context of a temporary restraining order or preliminary injunction, courts "require the plaintiff to show a substantial likelihood of standing under the heightened standard for evaluating a motion for summary judgment." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity* ("*EPIC*"), 878 F.3d 371, 377 (D.C. Cir. 2017) (internal quotation marks and citation omitted). A plaintiff seeking such extraordinary relief, therefore, "cannot rest on mere allegations, but must set forth by affidavit or other evidence specific facts that, if taken to be true, demonstrate a substantial likelihood of standing." *Id.* (cleaned up) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

"[B]ecause standing is a necessary predicate to any exercise of the Court's jurisdiction, the plaintiff and its claims have no likelihood of success on the merits, if the plaintiff lacks standing." *Arpaio v. Obama*, 27 F. Supp. 3d 185, 207 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015) (citations omitted). Similarly, an absence of standing "dooms the plaintiff's ability to show irreparable harm." *Id.* Thus, when plaintiffs lack standing, the Court must deny a preliminary-injunction motion and dismiss the case outright. *Id.*

Indeed, in a prior challenge to the same Proclamation, this Court denied a TRO based on lack of standing. *Nguyen v. U.S. Dep't of Homeland Security*, — F.Supp.3d —, 2020 WL 2527210 (D.D.C. May 18, 2020). Specifically, this Court found that the plaintiffs had failed to present any evidence to support their motion for a TRO. *Id*. at *4. And even after considering the evidence that the plaintiffs belatedly submitted in their reply, this Court nonetheless found that the plaintiffs had failed to establish that their alleged "harms are traceable to the Proclamation, or that [the plaintiff'] requested relief would redress them." *Id*.

Here, Plaintiffs allege that child visa beneficiaries aging out of their visa classification would cause the "loss of opportunity to reunite with their family members in the United States." TRO Mot. 21. W.Z.A. will age out (turn 21 years old) on June 30, 2020. As in *Nguyen*, however, Plaintiffs have failed to introduce record evidence to establish standing: they "have not met their burden of demonstrating that it is substantially 'likely, as opposed to merely speculative,'" that the Proclamation caused their injuries, and that this Court can redress those injuries by granting the TRO. *See Nguyen*, 2020 WL 2527210 at *6 (internal citations omitted).

a. Plaintiffs lack standing because they fail to establish causation.

To establish causation, a plaintiff must show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The injury must be "fairly traceable to the

challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id*. Plaintiffs attempt to establish causation by theorizing "that the reason [W.Z.A.] ha[s] yet to receive [an] emergency interview appointment[ ], despite falling within the definition of applicants warranting emergency services, is the State Department's current policy of refusing even emergency visa services to applicants covered by the Proclamation." TRO Mot. 22 (quotation marks omitted). In other words, Plaintiffs allege causation by claiming that the Proclamation is the reason why the State Department denied W.Z.A. an emergency interview.

That is not so. This speculative theory falls well short of showing a substantial likelihood of causation. *See EPIC*, 878 F.3d at 377. In fact, despite their substantial burden, Plaintiffs tellingly fail to supply any record evidence that the State Department denied W.Z.A.'s request for an emergency interview due to the Proclamation. *See Nguyen*, 2020 WL 2527210 at *5 ("Presumably, if [the] [d]efendants had ceased processing [the] [p]laintiffs' and their families' visa applications, similar paper trails would exist.").

Rather, U.S. Embassy San Salvador's inability to schedule an expedited appointment for W.Z.A. was due to the circumstances in the country of El Salvador and the lack of any indication that W.Z.A. had completed the required medical examination. Ex. 5, ¶¶ 9, 11. El Salvador is under lockdown quarantine due to COVID-19. *Id*., ¶ 9; *see also* U.S. Department of State, U.S. Embassy in San Salvador, El Salvador – (May 24, 2020), available at https://sv.usembassy.gov/covid-19-information/. The quarantine has prevented the embassy's panel physicians from performing required medical examinations for immigrant visa applicants. Ex. 5, ¶ 9. The medical examination, however, is statutorily required to determine W.Z.A.'s visa eligibility. *Id*., ¶ 9. Although the embassy has scheduled emergency interviews, the embassy cannot process immigrant visas applications without the completed medical examination. *Id*., ¶ ¶¶ 9, 11-12; 9 FAM 504.4-7.

Accordingly, because W.Z.A. had no record of a completed medical examination to be qualified for an immigrant visa—a requirement entirely unrelated to the Proclamation, *see* 9 FAM 504.4-7—the consulate did not schedule W.Z.A. for an expedited interview. *See* Ex. 5, ¶¶ 9-11. Thus, any refusal on the part of the embassy to grant W.Z.A. an emergency interview had nothing to do with the Proclamation.

Although Alondra's case is now moot, it shares the same theory of causation as W.Z.A.'s case, and State Department records regarding her case illustrate the frailty of Plaintiffs' key allegation. Emails from the U.S. Consulate General in Ciudad Juarez, as well as State Department's CCD records, reflect that on April 20 and May 28, 2020, the consulate informed Alondra that she qualified for CSPA "[t]herefore, we will not be scheduling an expedited appointment at this time." Ex. 4, ¶¶ 6-7. Thus, the consulate's refusal to schedule an expedited appointment for Alondra was not due to the Proclamation, but because it had incorrectly determined that she qualified for CSPA, and therefore did not require an expedited interview since the consulate believed that she would not be at risk of aging out of her visa category. *Id*., ¶¶ 6-9. Plaintiffs' own declaration submitted in support of their TRO motion corroborates this explanation. Pls' Ex. F, ¶ 10.[3] Significantly, April 20, 2020, the date of the first email, predates the Proclamation, which shows that the consulate's denials of Alondra's requests for expedited interviews based on the CSPA were entirely unrelated to the Proclamation. And, notably, as soon as the consulate realized its error, it expeditiously scheduled Alondra for an interview, where the consular officer determined that Alondra established her eligibility for a national-interest exception under the Proclamation and issued her visa. *Id*., ¶¶ 10-11.

[3] Plaintiffs neither cite this statement anywhere on the face of their moving papers, nor plead this fact in their complaint.

In sum, Plaintiffs have not shown that the Proclamation was ever a basis to deny a request for an emergency interview. *See Nguyen*, 2020 WL 2527210 at *5 ("Plaintiffs have not adduced any evidence that their injuries are attributable to the Proclamation or its implementation and enforcement, rather than other factors that are unchallenged in this action. For two of the Family-Based Visa Plaintiffs . . . delays in their family members' visa processing appear to be due to hiccups with their applications unrelated to the Proclamation."). Thus, Plaintiffs lack standing because they have failed to establish causation.

b. Plaintiffs lack standing because they fail to establish redressability.

To establish redressability, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal citations and quotations omitted); *Florida Audubon Soc.*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) ("Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff."). Causation and redressability are "closely related" concepts, which typically "overlap as two sides of a ... coin." *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997).

Plaintiffs assert that their "injuries would likely be redressed by a favorable decision in this case." TRO Mot. 22. Specifically, Plaintiffs make the following argument without any citation to their declarations:

> [I]njunctive relief against Defendants' enforcement of the Proclamation would redress all three Plaintiffs' injuries by removing *the only apparent barrier* to their beneficiaries being treated as "emergency" cases who would receive expedited interview and processing in advance of their 21st birthdays. And because there is no other basis on the record to believe that any of Plaintiffs' beneficiaries would be denied a visa on the merits . . .

TRO Mot. 22-23 (emphasis added).

Any injury with respect to W.Z.A. is not redressable by this Court's grant of a TRO. *See Nguyen*, 2020 WL 2527210 at *6 ("Plaintiffs cannot demonstrate that an order preventing Defendants from implementing or enforcing the Proclamation, is substantially likely to redress their injuries because, as discussed, Plaintiffs have not shown that their injuries are caused by the Proclamation or its implementation. Simply put, the court cannot remedy an injury that is not caused by the challenged action before it.") (internal citations and quotations omitted).[4] Again, the circumstances surrounding COVID-19 and El Salvador's quarantine, which has been extended to June 15, 2020, have frustrated efforts to facilitate the processing of W.Z.A.'s application for reasons that have nothing to do with the Proclamation. *See* Ex. 5, ¶ 9. A TRO enjoining the Proclamation would not help W.Z.A. obtain a visa before he ages out because the TRO cannot, for example, lift the quarantine in El Salvador.

While the embassy is in the process of scheduling appointments for W.Z.A. in the hopes that the quarantine is lifted and medical examinations resume, *id.*, ¶ 14, the TRO would not redress any of Plaintiff Vicenta S.' alleged harms if W.Z.A. does not qualify for a visa. In the event circumstances allow for W.Z.A.'s visa application to be processed, the consular officer would need to find that W.Z.A. qualifies for an immigrant visa using a list of affirmative qualifications and potential ineligibilities. *See generally* 9 FAM 301.1-2. Despite Plaintiffs' burden to establish a substantial likelihood that Vicenta S.'s injury would be redressed by a TRO, Plaintiffs have not shown any evidence to demonstrate that a consular officer is substantially likely to find W.Z.A. eligible for an immigrant visa on the date of his visa interview (in the event that the situation in El Salvador allows for an interview) so that he may be issued a visa by his age-out date of June 30,

[4] Regarding M.T.S. and Alondra's situation, as discussed above, there is nothing for this Court to redress since their cases are moot.

2020. *See Nguyen*, 2020 WL 2527210 at *6 ("[the plaintiffs'] family members' visa applications currently require additional information before they can be processed. A favorable decision here cannot remedy those issues."). All that Plaintiffs can say to try to meet their burden is "there is no other basis on the record to believe that any of Plaintiffs' beneficiaries would be denied a visa on the merits . . ." without any citation to any of their supporting documents. *See* TRO Mot. 23.

Finally, yet another hurdle exists for W.Z.A.: he is a derivative beneficiary whose visa application must be adjudicated along with that of his father, who is the principal beneficiary of Vicenta S's petition. *See* Ex. 5, ¶ 4. Under 8 U.S.C. § 1153(d), "when a visa becomes available to the petition's principal beneficiary, one also becomes available to h[is] minor child." *Cuellar de Osorio*, 573 U.S. at 45. However, Section 1153(d) provides that "a derivative's fate is tied to the principal's: If the principal cannot enter the country, neither can h[is] children." *Cuellar de Osorio*, 573 U.S. at 49. W.Z.A. is eligible for LPR status only through Section 1153(d), which allows for a child of an alien who qualifies for LPR status under 8 U.S.C. 1153(a), (b), or (c) to receive the same immigrant status as his parent. Thus, until the consulate issues W.Z.A.'s father a visa, it cannot issue a visa to W.Z.A. *See* 8 U.S.C. § 1153(d); *Cuellar de Osorio*, 573 U.S. at 48 ("the child can piggy-back on his qualifying parent in seeking an immigrant visa—although . . . he may not immigrate without her.").

All of this leads to another problem. According to the Vicenta S.' declaration, W.Z.A.'s father is living and working, with his wife, in the United States on an unlawful presence waiver. Pls' Ex. H, ¶ 7; Pls' Ex. I, ¶ 2. If these assertions are true, then there is a high degree of uncertainty whether W.Z.A.'s father is willing or able to travel to El Salvador to have his visa application adjudicated. Significantly, this is a risky proposition for W.Z.A.'s father because if he is found ineligible for a visa, his unlawful presence waiver could be automatically revoked, jeopardizing

his ability to return to the United States. 8 C.F.R. § 212.7(e)(14)(i). According to Vicenta S., she depends on W.Z.A.'s father for care, since she states that her "extreme hardship" was the basis for his waiver. Pls' Ex. H, ¶ 7; Pls' Ex. I, ¶ 2. Even if W.Z.A.'s father is willing to shoulder the life-changing risk, it is also far from clear to what extent it is even possible for W.Z.A.'s father to travel to El Salvador in time.

Thus, Vicenta S. lacks standing because she fails to establish redressability.

* * *

In sum, no Plaintiff has standing to proceed, and two Plaintiffs' claims are moot. The Court should deny their TRO motion on threshold justiciability grounds alone.

2. Plaintiffs' request for emergency relief fails as a matter of law because the Court cannot review the Proclamation under the APA.

Even if Plaintiffs could establish standing, their request for relief fails as a matter of law for several reasons.

a. The APA cannot review Presidential actions.

Plaintiffs' TRO Motion rests entirely on their claim that the Proclamation is arbitrary and capricious in violation of the APA. *See* TRO Mot. 18-19, 28-38. But the APA applies to *agency* action, and the President is not an agency. The Supreme Court has conclusively established that this Court cannot review Presidential actions, such as the COVID-19 Labor Proclamation, under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (the President's actions "are not subject" to the requirements of APA); *see also Dalton v. Specter*, 511 U.S. 462, 468 (1994) ("The APA does not apply to the President"); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 553 (D.C. Cir. 1993) ("The President's actions are not 'agency action' and thus cannot be reviewed under the APA"). Therefore, under binding Supreme Court and Circuit precedent, Plaintiffs cannot

demonstrate a likelihood of success on the merits, and the Court can deny the TRO for that reason alone. *See, e.g.*, *Louhghalam*, 230 F. Supp. 3d at 36 (denying a TRO motion because the plaintiff could not demonstrate a substantial likelihood of success with respect to a challenge to an Executive Order, which is not subject to APA review).

b. Review of national-interest exceptions is barred by consular nonreviewability.

Plaintiffs' challenge to the President's executive action, and the State Department's discretion in handling national-interest waivers, are also precluded by principles of consular nonreviewability. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999). The INA carefully cabins judicial review, and no provision of the INA permits judicial review of consular decisions or policies that govern those decisions. *See* 8 U.S.C. § 1252.

The doctrine of consular nonreviewability recognizes that Congress has empowered consular officers with the authority to issue or refuse an application for a visa made overseas. *See* 8 U.S.C. §§ 1104(a), 1201(a), (g). "[T]his Circuit has been very clear that the doctrine of consular nonreviewability is the rule not the exception." *Udugampola v. Jacobs*, 795 F. Supp. 2d 96, 103 (D.D.C. 2011). This rule is rooted in "ancient principle of international law that the 'power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government'" *Id*. (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972))). "[W]here Congress entrusts discretionary visa-processing ... in a consular officer ... the courts cannot substitute their judgments for those of the Executive." *Allen v. Milas*, 896 F.3d 1094, 1105 (9th Cir. 2018) (citing *Mandel*, 408 U.S. at 769–70).

Plaintiffs therefore cannot state a claim for relief under the INA or the APA to challenge consular officers' visa determinations or a Presidential Proclamation directing the manner in which

the Executive Branch makes those visa determination. First, the APA does not apply "to the extent that ... statutes preclude judicial review," 5 U.S.C. § 701(a)(1), which is "determined not only from [the statute's] express language, but also from the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). It is well established in the D.C. Circuit that the text, structure, and history of the INA all compel the "unmistakable" conclusion that "the immigration laws 'preclude judicial review' of the consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1160. Indeed, Congress has specifically foreclosed APA review even for aliens subject to exclusion orders present in the United States, *see Allen*, 896 F.3d at 1157–62, because allowing such suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1966). Thus, visa denials are "not subject to judicial review ... unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159. And as mentioned, no provision of the INA permits judicial review of a claim like Plaintiffs' here. Second, the APA leaves intact other "limitations on judicial review," 5 U.S.C. § 702(1), including the "doctrine of consular nonreviewability," which predates the passage of the APA. *Saavedra Bruno*, 197 F.3d at 1160.

Because Plaintiffs can point to no statutory provision that overrides the doctrine of consular nonreviewability in this setting, it does not matter how Plaintiffs style their claim: "An APA challenge based on a consular official's visa denial falls well within the scope of the consular nonreviewability doctrine, as interpreted by the D.C. Circuit." *Baan Rao Thai Rest. v. Pompeo*, No. 19-cv-58, 2019 WL 3413415, at *2 (D.D.C. July 29, 2019) (citing *Saavedra Bruno*, 197 F.3d at 1162, and *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 6 (D.D.C. 2009) (holding that the

APA "provides no basis for challenging consular visa decisions")). Plaintiffs' APA challenge is an impermissible attempt to end-run around this doctrine, and courts that have recently considered similar challenges have rejected them. *See, e.g.*, *Allen*, 896 F.3d 1094, 1107 (9th Cir. 2018) ("We agree with the D.C. Circuit's analysis and conclusion in *Saavedra Bruno*" that plaintiffs may not challenge the denial of a visa under the APA).

That the Complaint names several federal agencies, alleging that they are involved in implementing the COVID-19 Labor Proclamation, *see* ECF No. 1, makes no legal difference. Consular nonreviewability also shields those agencies' decisions to deny visas, or their participation in the visa process. And in any event, actions taken by an executive branch agency to implement a Presidential Proclamation, pursuant to discretionary authority that was committed to the President, are unreviewable under the APA—*all* presidential orders are necessarily implemented through Executive branch agencies. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017) (collecting cases, and reasoning that when the President retains final authority pursuant to the Constitution or a valid statute, "presidential acquiescence constitutes an exercise of discretion that gives effect to the delegee's actions" and thus, the action is unreviewable under the APA), *opinion amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018), *as amended on denial of reh'g* (Mar. 6, 2018), and *aff'd*, 883 F.3d 895 (D.C. Cir. 2018), *as amended on denial of reh'g* (Mar. 6, 2018). It would be "absurd" to suggest that the President himself must personally carry out an action in order for the APA's limitation on judicial review to apply. *Tulare Cty.*, 185 F. Supp. 2d at 28–29.

By way of illustration, in *Detroit Int'l Bridge*, a district court concluded that Congress had delegated authority to approve international bridges to the President, rather that the State Department, and that, therefore, these approvals were not subject to APA review even given the

State Department's role in implementing the Presidential decision. *See Detroit Int'l Bridge*, 189 F. Supp. 3d at 104. As the court noted, had Congress intended to ensure the reviewability of permit approvals, it could have delegated the authority directly to the Department of State and not to the President. *Id*. But because the statutory delegation of authority was to the President, judicial review under the APA was not permitted. *See id*. Similarly, here, Congress has expressly authorized the President, not the State Department, to suspend immigration into the United States. *See* 8 U.S.C. § 1182(f); *see also id*. § 1185(a)(1) ("[I]t shall be unlawful ... for any alien to ... enter ... the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."). These statutes account for the President's inherent authority under Article II to control the border. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (the President's authority to exclude aliens in predecessor to section 1182(f) "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation").

Thus, when the President exercises his discretionary authority under these statutes, this exercise of discretion is not subject to APA review simply because the President relies on agencies, such as the State Department, to carry-out his decision. *See Detroit Int'l Bridge*, 189 F. Supp. 3d at 104; *Tulare Cty.*, 185 F. Supp. 2d at 28–29. For this reason, Plaintiffs cannot state a claim under the APA against either the President or any agency with respect to the COVID-19 Labor Proclamation.

c. Plaintiffs have alleged no final agency action.

Plaintiffs' claims against the State Department suffer from an additional fatal defect: They have failed to identify any specific agency action, let alone any final agency action, by the Department of State, that they wish to challenge. In their complaint, Plaintiffs allege only that

"Defendants' implementation of the Proclamation, including through informing visa applicants of the Proclamation and its operation, will result in a direct impact on the rights of qualified prospective immigrants and constitute final agency action(s) within the meaning of the Administrative Procedure Act." Compl., ¶ 131. At most, it would appear that Plaintiffs challenge the posting of notice regarding the Proclamation. *See* TRO Mot. 34 ("The State Department has stated publicly that only 'applicants who may be eligible for an exception under this presidential proclamation' will receive visa services while the Proclamation is effective.").[5] The APA provides a cause of action to "[a] person suffering legal wrong because of *agency action*, or adversely affected or aggrieved by *agency action.*" 5 U.S.C. § 702 (emphases added). An "agency action" is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." *Id.* § 551(13). Review under the APA is further limited to "*final agency action* for which there is no other adequate remedy in a court." *Id.* § 704 (emphasis added). Plaintiffs falter under these statutory provisions.

To start, Plaintiffs identify no agency action. The D.C. Circuit has "long recognized that the term agency action is not so all-encompassing as to authorize us to exercise judicial review over everything done by an administrative agency." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19–20 (D.C. Cir. 2006) (a budget request did not constitute "agency action" within the meaning of 5 U.S.C. § 702) (quotations and citations omitted). The D.C. Circuit has concluded, for example, that an agency letter did not constitute agency action because "it was

[5] Similarly, to the extent Plaintiffs complain about the State Department not applying a categorical exception for all age outs (TRO Mot. 34 n.15), such a claim fails because the Proclamation recognizes no such categorical exclusion and there is no nondiscretionary duty to apply such an exception. *See generally Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2003)

purely informational in nature; it imposed no obligations and denied no relief." *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004).

Here, the State Department's decision to provide notice to the public on its website of the COVID-19 Labor Proclamation and the exceptions contained in the Proclamation does not constitute agency action, because it is "purely informative in nature." *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427. By its terms, the Proclamation would have gone into effect even if the Department of State had never provided any notice of it, and the public undoubtedly benefits when the State Department provides accurate, up-to-date information about the visa process. *See* 85 Fed. Reg. 23,444. In the absence of any agency action identified by Plaintiffs, judicial review under the APA is not available.

Even if the State Department's notice were agency action, it would still not constitute "final agency action" within the meaning of 5 U.S.C. § 704 and, thus, it would still not be subject to judicial review. To constitute "final agency action," an action both must "mark the consummation of the agency's decisionmaking process" and "must be one 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) (citations and quotations omitted); *see also Franklin*, 505 U.S. at 796-97 ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties") (citations and quotations omitted).

Here, the decision by the State Department to provide notice regarding the COVID-19 Labor Proclamation does not mark the consummation of an agency's decision-making process and there are no legal consequences that flow from that decision. *See Bennett*, 520 U.S. at 177–78. The legal consequences that Plaintiffs challenge in this case flow from the Proclamation, not action by the State Department, and as just mentioned, the Supreme Court has held that Presidential actions

are not subject to challenge under the APA. *See Franklin*, 505 U.S. at 796-97. Plaintiffs have therefore failed to allege final agency action that is subject to judicial review under the APA.

3. The COVID-19 Labor Proclamation is lawful.

Beyond the threshold barriers discussed above, Plaintiffs also cannot prevail on the merits because the President lawfully issued the COVID-19 Labor Proclamation. "The exclusion of aliens is a fundamental act of sovereignty" that is grounded in the legislative power and also "inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The Supreme Court "ha[s] long recognized the power to ... exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *see also Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring) ("the President has *inherent* authority to exclude aliens from the country") (emphasis original).

The COVID-19 Labor Proclamation is a valid exercise of, *inter alia*, the broad authority Congress granted the President in 8 U.S.C. § 1182(f) to suspend entry of aliens based on his determination that their entry would be detrimental to the national interest. Section 1182(f) provides that "[w]henever the President finds that the entry of ... any class of aliens into the United States would be detrimental to the interests of the United States, he may ... suspend entry of ... any class of aliens ... or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f); *see also id*. § 1185(a)(1) ("[I]t shall be unlawful ... for any alien to ... enter ... the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."). Where, as here, the President "acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate." *Youngstown Sheet*

& Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). And, as the Supreme Court has recognized, section 1182(f) "exudes deference to the President in every clause" and "entrusts to the President the decisions whether and when to suspend entry," "whose entry to suspend," "for how long," and "on what conditions." *Hawaii*, 138 S. Ct. at 2408.

The President lawfully exercised this authority after "determin[ing] that the entry, during the next 60 days, of certain aliens as immigrants would be detrimental to the interests of the United States." 85 Fed. Reg. 23,442; *see Hawaii*, 138 S. Ct. at 2408 (explaining that the "sole prerequisite" to this "comprehensive delegation" is that the President find that entry of the covered aliens would be detrimental to the interests of the United States). The Proclamation sets out the President's reasons for finding that entry of certain intending immigrants would be detrimental to the United States during the economic recovery following the COVID-19 pandemic, with the goal of increasing access to the labor market for American workers, particularly those who are "at the margin between employment and unemployment." 85 Fed. Reg. 23,441. The President also explained that immigrants, upon admission as LPRs, are immediately eligible "to compete for almost any job," and thus "already disadvantaged and unemployed Americans" are left unprotected "from the threat of competition for scare jobs from new lawful permanent residents." *Id*. And, the President added, allowing additional immigrants to enter during this time of economic recovery would further strain "the finite limits of our healthcare system at a time when we need to prioritize Americans and the existing immigrant population." *Id.* at 23,442. It would further strain State Department resources abroad during a period when many of those posts must remain closed. *Id.*

Plaintiffs argue that the Proclamation is invalid because "Defendants . . . have not 'articulated a satisfactory explanation for [their] action' inasmuch as there is no evident 'rational connection between the facts found and the choices made.'" *See* TRO Mot. 28 (internal citations

omitted). The plaintiffs challenging the presidential proclamation at issue in in *Hawaii* made a very similar argument, but the Supreme Court squarely rejected it, holding that the "sole prerequisite" to the "comprehensive delegation" contained in section 1182(f) is that the President find that entry of the covered aliens would be detrimental to the interests of the United States. *Hawaii*, 138 S. Ct. at 2408; *see also id*. at 2409 (explaining that past Presidential proclamations had stated in as little as "one sentence why suspending entry of members of the Sudanese government and armed forces" was in the interests of the United States).

As the Court explained in *Hawaii*, the statute does not permit litigants to "challenge" a Presidential entry-suspension order "based on their perception of its effectiveness and wisdom," because Congress did not permit courts to substitute their own assessments "for the Executive's predictive judgments on such matters, all of which are delicate, complex, and involve large elements of prophecy." *Hawaii*, 138 S. Ct. at 2421 (citations and quotations omitted); *see also id*. at 2409 (rejecting a "searching inquiry into the President's judgment"). Whether the President's chosen method of addressing a perceived risk to the interests of this country "is justified from a policy perspective" is irrelevant, because he need not "conclusively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions." *Id*. at 2409 (citations omitted).

The Supreme Court's reasoning in *Hawaii* precludes Plaintiffs' challenge here. Plaintiffs disagree with the President about the "effectiveness and wisdom" of the COVID-19 Labor Proclamation, because they contend that it would not be effective in addressing U.S. interests. For example, Plaintiffs repeatedly press the following argument:

> There is no evidence that Defendants undertook anything approaching the required level of consideration before . . . determining to apply the Proclamation in a manner that will cause many 20-year-olds . . . to age out of their current visa eligibility. Had they done so, it is improbable that Defendants could rationally have concluded that excluding a finite number of young people from the country . . . would have

> sufficient benefits to justify the immense suffering their policy imposes on a few individuals.

TRO Mot. 2. But such an argument is not a proper legal basis for enjoining Presidential action under section 1182(f), as the Supreme Court made clear in *Hawaii*, 138 S. Ct. at 2409, 2421. The Court expressly recognized that a health emergency might be an appropriate basis for suspending entry under § 1182(f). *See id*. at 2415 (rejecting interpretation of § 1182(f) that the President would not be permitted to "suspend entry from particular foreign states in response to an *epidemic*…") (emphasis added). Moreover, the Supreme Court and D.C. Circuit have both upheld Presidential authority under § 1182(f) in contexts unrelated to terrorism and threats to national security. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160-61 (1993) (addressing a challenge to a proclamation addressing the "continuing illegal migration by sea of a large numbers of undocumented aliens"); *Abourezk v. Reagan*, 785 F.2d 1043, 1049 (D.C. Cir. 1986) (recognizing that the President "may act pursuant to section 1182(f) to suspend or restrict 'the entry of any aliens or any class of aliens' whose presence here he finds 'would be detrimental to the best interests of the United States.'"), *aff'd by an equally divided Court*, 484 U.S. 1 (1987). The cramped view of the President's authority that Plaintiffs advance is directly contrary to binding Supreme Court and D.C. Circuit precedent.

The present case involves a national emergency based on the devastating effects of the global pandemic on the domestic labor market. Under Supreme Court precedent, the COVID-19 Labor Proclamation is a lawful exercise of the President's authority under § 1182(f).

* * *

In sum, Plaintiffs cannot demonstrate a substantial likelihood of success on the merits.

B. Plaintiffs fail to demonstrate that they suffer from any immediate or future irreparable harm that is directly attributable to the COVID-19 Labor Proclamation.

A party moving for a preliminary injunction must demonstrate that he or she is "likely to suffer irreparable harm in the absence of preliminary relief." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) ("The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies") (citations and quotations omitted). A court may not issue "a preliminary injunction based only on a *possibility* of irreparable harm . . . [since] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added).

The "standard for irreparable harm is particularly high in the D.C. Circuit." *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017). If a party makes no showing of imminent irreparable injury, the Court may deny the motion for injunctive relief without considering the other factors. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *Wisconsin Gas Co.*, 758 F.2d at 674 (explaining that because movants could not establish irreparable harm, the court need not address any of the other applicable factors).

This Court has recognized that the following principles apply in determining whether an alleged harm is irreparable:

> First, "the injury must be both certain and great; it must be actual and not theoretical." The party seeking relief must show that the complained-of injury is of such imminence that there is a clear and present need for equitable relief. Second, the movant must "substantiate the claim that irreparable injury is 'likely' to occur." That means a party cannot rely on bare allegations of harm, but instead must come forward with "proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." Third, the moving party must establish causation. That is, it "must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Bd., 280 F. Supp. 3d 118, 122 (D.D.C. 2017) (citing *Wisconsin Gas Co.*, 758 F.2d at 674).

Plaintiffs assert that "separation from one's family constitutes irreparable harm," and that the beneficiaries in this case "will be prevented from joining Plaintiffs and their families for a prolonged and indefinite period" TRO Mot. 37. But Plaintiffs fail to make any showing that this alleged harm "will directly result from the [Proclamation] which [they] seek to enjoin." *See 12 Percent Logistics*, 280 F. Supp. 3d at 122; *see generally* TRO Mot. 36-42.

Vicenta S. cannot show that her separation from W.Z.A. will directly result from the Proclamation.[6] As discussed previously, W.Z.A. is in El Salvador, which is under lockdown quarantine due to the COVID-19 pandemic. Ex. 5, ⁋ 9. Even putting aside the Proclamation, the COVID-19 pandemic and El Salvador's quarantine has presented significant obstacles for W.Z.A.'s visa application. El Salvador's quarantine, which is set to lift on June 15, 2020, has prevented W.Z.A. from completing a mandatory medical examination. Ex. 5, ⁋ 9. Even if W.Z.A. completes the medical exam, Plaintiffs have provided no evidence that a consular officer will make a positive determination regarding the merits of his visa application (besides speculating that "none of [the beneficiaries have] any red flags that would prevent a visa from issuing," TRO Mot. 19). An ineligibility could cause his visa application to be denied permanently or require further administrative action that would delay his ability to obtain a visa. *See Nguyen*, 2020 WL 2527210 at * 5 ("For two of the Family-Based Visa Plaintiffs, . . . delays in their family members' visa

[6] Additionally, W.Z.A. ages out on June 30, 2020, which is beyond the Proclamation's 60-day period (set to expire on June 22, 2020, unless extended). Thus, as of the date of this filing, any claim of irreparable harm with respect to W.Z.A. is speculative. *See generally Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

processing appear to be due to hiccups with their applications unrelated to the Proclamation."); *see generally* 9 FAM 301.1-2.

On top of these points about causation, and as discussed previously, W.Z.A. is in a very tentative situation because he is a derivative beneficiary of his father, who is the principal beneficiary of Vicenta S., the sponsor. Ex. 5; Pls' Ex. H, ⁋ 7. W.Z.A.'s father is currently living in the United States. *See generally* Pls' Ex. H. But under 8 U.S.C. 1153(d), W.Z.A. cannot obtain an immigrant visa until his father receives an immigrant visa. *See Cuellar de Osorio,* 573 U.S. at 48 ("the child can piggy-back on his qualifying parent in seeking an immigrant visa—although . . . he may not immigrate without her."). Significantly, Plaintiffs have failed to adduce whether W.Z.A.'s father is able or willing to go to El Salvador to obtain a visa to enable W.Z.A. to do the same before he ages out. If W.Z.A.'s father is truly relying on his unlawful presence waiver in order to remain in the United States, the stakes are very high for him: if a consular officer finds him ineligible for an immigration visa, his unlawful presence waiver could be automatically revoked under C.F.R. § 212.7(e)(14)(i). By going to El Salvador, W.Z.A.'s father risks his ability to return to the United States, where he has lived since he was 13 years old. Pls' Ex. H, ⁋ 5. And if W.Z.A.'s father takes the risk and is found ineligible for a visa, it would have been all for nothing because W.Z.A. would also be denied a visa by operation of his derivative status. *See Cuellar de Osorio*, 573 U.S. at 49. ("a derivative's fate is tied to the principal's: If the principal cannot enter the country, neither can h[is] children."). Accordingly, given the circumstances, causation is highly doubtful because the causal link between the harm and the Proclamation is so attenuated. Put another way, "Such a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged

acts to the asserted particularized injury." *Florida Audubon Soc.*, 94 F.3d at 670. Plaintiffs do not even try to make the required causation showing. Thus, Plaintiffs fail to establish irreparable harm.

Moreover, the alleged harm of any separation that results from W.Z.A. aging might not be so great or imminent to constitute irreparable harm. *See 12 Percent Logistics*, 280 F. Supp. 3d at 122. The consequences of W.Z.A. aging out of his current visa category means that he may pursue an F2B visa instead. *See* TRO Mot. 5. The estimated wait for this preference category for residents of El Salvador is five years from the time of filing a petition to when the category would become permanent. *Id*. at 18. Plaintiffs' attempts to elevate this degree of harm by asserting that this is "in no way a guaranteed maximum," which is speculative, as is the possibility that Vicenta S. "may not still be around" once W.Z.A. is able to apply again. *See id*. at 38.

In sum, Plaintiffs have failed to meet their burden of demonstrating "a clear showing" of imminent irreparable injury connected to the COVID-19 Labor Proclamation, so the Court can deny their motion without considering the other factors.

C. Considerations of irreparable harm and the equities strongly favor the Government.

The party seeking a TRO must show that the balance of equities tips in his favor and that the injunction is in the public interest. *Winter*, 555 U.S. at 20. The Court "'should pay particular regard for the public consequences'" of injunctive relief. *Id.* at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). These factors strongly favor the government.

If this Court were to set aside a lawful Presidential Proclamation issued to address a specific threat to the American workforce during a time of national emergency, the negative repercussions for the public would be great and irreversible. There is a significant injury in the Courts curtailing the President's flexibility in addressing this global crisis. And as set out in the COVID-19 Labor Proclamation, national unemployment claims have reached "historic levels" over the last several

weeks. 85 Fed. Reg. at 23,441. American workers who are already "at the margin between employment and unemployment" are "likely to bear the burden of excess labor supply disproportionately." *Id*. Continued immigration at the normal rate during this critical time of economic recovery would threaten the ability of those American workers to secure employment. *Id*. at 23,442. Without any evidence to the contrary, Plaintiffs offer conclusory statements denying any effect on the labor market by allowing immigration to continue unabated. *See* TRO Mot. 28. Nor is it any answer to claim, as Plaintiffs do repeatedly, that the admission of a "finite number of 20-year-olds" cannot be said to have an impact on the labor market. *See id*. Every single immigrant is another potential worker taking the job of a member of the American public in a time of job scarcity, especially if the immigrant is a "20-year-old" in prime working years. The American public interest—as opposed to the narrow private interests of Plaintiffs and their family members, and more precisely, the private interests of Vicenta S.—is properly served by allowing the executive branch to protect American workers.

The injury of an injunction would be irreparable, as the Proclamation applies only to limit entry at the border. The Plaintiffs' claim that this injury would be "non-permanent" due to the Secretary of State's ability to simply "revoke his or her visa" is false. *See* TRO Mot. 43, n. 17. A visa merely allows an individual to apply for admission at the border, and can be revoked. *See* 9 FAM 102.1-1; 9 FAM 403.11-4. But once an immigrant visa holder is admitted to the United States, the individual becomes a LPR whose status cannot simply be "revoked" by the whims of the Secretary. While Plaintiffs dismiss the harm to American workers who bear the burden of immigration at a time of a glutted labor market as "no good reason" to deny entry to the beneficiaries (*see* TRO Mot. 26), an injunction of this Proclamation would allow these identified harms to endure. *Cf. Dallas Safari Club v. Bernhardt*, No. 19-CV-03696 (APM), 2020 WL

1809181, at *7 (D.D.C. Apr. 9, 2020) (Mehta, J.) (denying a motion for a preliminary injunction and explaining, in a different context, that "the court cannot ignore the current COVID-19 pandemic and the particular hardship a mandatory injunction would impose in the present situation").

D. There is no basis in law or equity for entry of a nationwide injunction.

If the Court determines that emergency injunctive relief is warranted, the Court should reject Plaintiffs' request for a nationwide injunction. *See* TRO Mot. 2. Such relief is inappropriate for three reasons.

First, Article III requires that a "remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Allowing a party to challenge policies "apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the face of Article III's injury-in-fact requirement." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). Likewise, injunctions that go beyond Plaintiffs' own injuries exceed the power of a court sitting in equity, which must limit injunctions to "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). "[T]he purpose of" preliminary equitable relief "is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Courts thus "need not grant the total relief sought by the applicant but may mold [their] decree to meet the exigencies of the particular case." *Id.*; *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 106 F. Supp. 3d 126, 129 (D.D.C. 2015), *aff'd sub nom. U.S. Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131 (D.C. Cir. 2017) ("the Court has not finally determined that the [action] is unlawful," so "the need for narrow tailoring ... is particularly important," and any "injunction should be limited in

scope to protect only" parties). That is especially true here, where Vicenta S. is the only plaintiff left with a case that has not been mooted out. Her case does not warrant relief such that it would encumber the government's response to the extreme economic disruption caused by a national emergency. A nationwide injunction would be disproportionate and unwarranted given the fact that this Court can provide Vicenta S. with full interim relief with an injunction as applied to her narrow circumstances.

Second, the APA does not authorize relief beyond the parties before the Court. It provides only that a court may "hold unlawful and set aside agency action." 5 U.S.C. § 706(2). In this case, of course, as mentioned above, Plaintiffs challenge not "agency action" but a lack thereof—so there is plainly no APA-grounded basis for broad relief. In any event, nothing in section 706(2)'s text specifies whether challenged agency action, if found invalid, should be set aside on its face or as applied to the individuals. In the absence of a clear statement in the APA that it displaces traditional rules of equity, the Court should adopt the narrower reading. *See Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) ("Nothing in the language of the APA . . . requires us to exercise such far-reaching power."). Indeed, the APA further provides that in the absence of a special statutory review provision, the proper "form of proceeding" under the APA is a traditional suit for declaratory or injunctive relief. *See* 5 U.S.C. § 703. But declaratory and injunctive remedies are equitable in nature, and, as discussed, equitable relief traditionally has been limited to determining the rights of the parties before the court.

It is true that *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998), holds that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual [plaintiffs] is proscribed." But that case involved a *final judgment* on the merits, and it

did not purport to establish a categorical rule for final judgments, let alone preliminary injunctions. And Plaintiffs here do not identify any regulation that they wish to challenge. Moreover, the APA's very reference to actions for "declaratory judgments" makes clear that no injunction—much less a nationwide injunction—is in any sense compelled by the APA when agency action is held unlawful. *See* H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946).

Finally, a nationwide injunction cannot be justified by the fact that Plaintiffs have included class claims in their complaint. Such a standard disregards key protections provided by Fed. R. Civ. P. 23 and "would justify nationwide injunctions in every putative class action, contrary to law." *Doe #1*, 944 F.3d at 1229 (Bress, J., dissenting). It also "shortcircuits the procedures for class certification by giving thousands of persons not before the court the relief that the class certification process is designed to evaluate." *Id.* at 1228–29. This is why the traditional rule is that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). And in this Circuit, "injunction[s] must be narrowly tailored to remedy the specific harm shown." *Aviation Consumer Action Project v. Washburn*, 535 F. 2d 1010, 108 (D.C. Cir. 1976); *see also Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842–43 (D.C. Cir. 1985) (injunction overbroad where it prohibited disclosure not only of plan in question but also of all "substantially similar" documents). Here, nationwide relief is not required to remedy the claims of the plaintiffs in this case, and providing them with nationwide relief at this stage is inappropriate. *See, e.g.*, *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 205 n.4 (D.D.C. 2018) (collecting cases and noting that "it is not clear that [a c]ourt can or should issue class-wide injunctive relief without a certified class").

Thus, if this Court grants Plaintiffs any relief, it should be limited to the named Plaintiffs.

CONCLUSION

The Court should deny Plaintiffs' motion because they cannot satisfy any of the requirements necessary for the extraordinary relief of a TRO. At most, the Court should grant only limited relief.

Dated: June 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2020, 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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