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' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

This Court should deny Plaintiffs' partial summary judgment motions, ECF Nos. 195-1, 196-1, and instead grant summary judgment to the government.[1] At the threshold, because the President has revoked Proclamation 10014, and because the State Department has granted National Interest Exception ("NIE") waivers to diversity visa ("DV") Plaintiffs with diversity visas issued during fiscal year ("FY") 2020 who are subject to Proclamations 9984, 9992 and 10143 (the "COVID-19 regional proclamations"), Plaintiffs' claims suffer from two justiciability defects. First, the named DV Plaintiffs issued diversity visas during FY 2020 lack Article III standing to proceed because they no longer suffer from any injury in fact. Proclamation 10014 and the COVID-19 regional proclamations no longer bar named DV Plaintiffs holding expired or unexpired FY 2020 diversity visas from immediately seeking admission into the United States. And, all of the DV Plaintiffs in *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* lack standing (regardless of visa issuance) because none has provided any specific facts necessary to establish standing at the summary judgement stage of this litigation. Second, revocation of Proclamation 10014 and the State Department's granting of NIEs to certain individuals has rendered moot many of the Plaintiffs' claims in this case.

Justiciability defects aside, there are six reasons why Plaintiffs' arguments in response to the government's summary judgment motion fail as a matter of law. First, principles of nonreviewability bar Plaintiffs' claims. Second, the State Department's longstanding

[1] The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs filed their consolidated summary judgment briefing on February 3, 2021. ECF 194. On February 8, 2021, without leave of Court, this group of Plaintiffs filed an amended summary judgment memorandum as an exhibit to a "Notice of Errata," stating that a footnote was added to note that the *Aker* Plaintiffs objected to the argument that the *Kennedy* Plaintiffs should receive prioritized consideration if Plaintiffs prevail. ECF 196, 196-1. The government's immediate brief cites to Plaintiffs' February 8 memorandum. ECF 196-1.

interpretation of 8 U.S.C. § 1182(f) to preclude issuing visas for travel to the United States to persons whose entry into the country is suspended by proclamation is lawful under the Administrative Procedure Act ("APA") and entitled to deference. Third, the State Department's processing methods under its COVID-19 prioritization guidance, and its designation of who may qualify for NIE waivers are discretionary determinations and not subject to judicial review, and even if they were reviewable, are not arbitrary or capricious. Fourth, Plaintiffs' different procedural claims under the APA and mandamus have no basis in law. Fifth, any challenge by Plaintiffs to Proclamations 9645 and 9983 (the "travel ban" proclamations) is moot because the President has revoked those proclamations. Finally, Plaintiffs are wrong that the Court has the authority to require the State Department to issue the 9,095 FY 2020 diversity visas that the Court "reserved" to class members at the conclusion of this litigation. Congress, through the Immigration and Nationality Act ("INA"), has foreclosed the issuance of diversity visas after the end of the fiscal year (September 30, 2020), and the Court cannot order the State Department to take administrative action contrary to law.

On these grounds, the Court should grant summary judgment to the government, and deny the Plaintiffs' summary judgment motions.

RECENT EXECUTIVE AND ADMINISTRATIVE ACTIONS

Since the parties filed their cross partial summary judgment briefs, *see* ECF 189-1, 195-1, 196-1, there has been significant executive and administrative action that directly affects this consolidated case:

Presidential Proclamation 10141. On January 20, 2021, the President issued Proclamation 10141. *See* Proclamation on Ending Discriminatory Bans on Entry to The United States, 86 Fed. Reg. 7,005 (Jan. 25, 2021). Proclamation 10141 revoked "Executive Order 13780 of March 6,

2017 (Protecting the Nation From Foreign Terrorist Entry Into the United States), Proclamation 9645 of September 24, 2017 (Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), Proclamation 9723 of April 10, 2018 (Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), and Proclamation 9983 of January 31, 2020 (Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats)." *Id*. (collectively the "travel ban proclamations").

National Interest Exceptions for Diversity Visas Expiring Between February 17 and February 28, 2021. On February 19, 2021, the Government notified the Court that, with the exception of one individual who was present in the United States on a non-immigrant visa, the State Department issued national interest exceptions to all individuals subject to Proclamation 10014 with valid diversity visas that were expiring between February 17 and February 28. *See* Notice, ECF No. 208.

Presidential Proclamation 10149. On February 24, 2021, the President issued Proclamation 10149, which revoked Proclamation 10014, along with section 1 of Proclamation 10052, and section 1 of Proclamation 10131. *See* A Proclamation on Revoking Proclamation 10014, 86 Fed. Reg. 11,847 (Mar. 1, 2021). Section 2 of Proclamation 10149 further provides that the applicable agencies "shall review any regulations, orders, guidance documents, policies, and other similar agency actions developed pursuant to Proclamation 10014 and, as appropriate, issue revised guidance consistent with the policy set forth in" the proclamation. *Id*.

National Interest Exceptions to COVID-19 Regional Proclamations. On February 24, 2021, the Secretary of State granted national interest exceptions under Section 2 of Presidential

Proclamations 9984, 9992 and 10143 (the "COVID-19 regional proclamations") to individuals holding a valid diversity visa issued during fiscal year 2020. *See* Rescission of Presidential Proclamation 10014, https://travel.state.gov/content/travel/en/News/visas-news/rescission-of-presidential-proclamation-10014.html (last visited Mar. 15, 2021). The COVID-19 regional proclamations bar certain foreign nationals from attempting admission, or being admitted, into the United States if they have been physically present in certain countries within the preceding 14 days, due to COVID-19 pandemic conditions in those countries. Under Section 2 of each of the COVID-19 regional proclamations, however, the Secretary of State determined that persons holding valid FY 2020 diversity visas issued prior to September 30, 2020, and who are subject to the COVID-19 regional proclamations, should be granted national interest exceptions. *Id*. ("The Secretary of State has granted a national interest exception for Diversity Visa (DV) applicants for the 2020 fiscal year (DV-2020) who hold a valid immigrant visa and are subject to the geographic COVID-19 Presidential Proclamations.").

ARGUMENT

A. The named DV Plaintiffs who possess FY 2020 diversity visas, and the named Plaintiffs from the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* cases lack Article III standing.

The Court should dismiss the named DV Plaintiffs who possess FY 2020 diversity visas and all the remaining named Plaintiffs from the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* cases for lack of Article III standing because the named DV Plaintiffs suffer from no injury in fact, and the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs failed to provide any specific facts necessary to establish standing at the summary judgement stage of this litigation.

1. The named DV Plaintiffs who have been issued FY 2020 diversity visas no longer suffer from any injury in fact.

The 4,180 named DV Plaintiffs in this consolidated case filed their lawsuits in July 2020 challenging the President's authority to suspend their entry into the United States under Proclamation 10014, and the State Department's implementation of the proclamation.[2] *See Aker v. Biden*, 20-cv-1926, ECF No. 3, ¶ 4 (149 DV plaintiffs); *Fonjong v. Biden*, No. 20-cv-2128, ECF No. 165 ¶ 1 (243 DV plaintiffs); *Gomez v. Biden*, No. 20-cv-1419, ECF No. 111 ¶ 24-29 (7 DV plaintiffs); *Kennedy v. Biden*, No. 20-cv-2639, ECF No. 13 ¶ 1 (3,288 DV plaintiffs); *Mohammed v. Blinken*, No. 20-cv-1856, ECF No. 170 ¶ 1 (493 DV plaintiffs). However, any named DV Plaintiff from this group who has been issued a FY 2020 diversity visa, whether it is facially-expired or not, no longer suffers from any injury in fact. Proclamation 10014, the COVID-19 regional proclamations, and the travel ban proclamations no longer impede these persons' ability to immediately seek admission into the United States. The Court should therefore dismiss these named DV Plaintiffs from this consolidated action for lack of standing.

Standing is a core component of the Article III cases or controversies requirement. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *City of L.A. v. Lyons,* 461 U.S. 95, 101 (1983) ("It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy."). Standing is the "personal interest that must exist at the commencement of the litigation[,]" and must continue throughout the existence of the litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.,* 528 U.S. 167, 189 (2000); *cf. Arizonans for Official English v.*

[2] The non-immigrant plaintiffs in this consolidated case challenged the President's authority to suspend entry under Proclamation 10052, and the State Department's implementation of that proclamation as well.

Arizona, 520 U.S. 43, 68 n.22 (1996) ("The requisite personal interest that must exist at the commencement of the litigation … must continue throughout its existence.") (quotation marks and citation omitted). The personal interest that constitutes standing consists of three elements: (1) an injury in fact, *i.e.,* an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) that is fairly traceable to the challenged act of the defendant; and (3) that is likely to be redressed by a favorable decision by the court. *Navegar, Inc. v. United States,* 103 F.3d 994, 998 (D.C. Cir. 1997).

Here, any named DV Plaintiff who possesses a FY 2020 diversity visa, whether it is facially-expired or not, no longer has the requisite personal interest needed to maintain standing in this litigation because Proclamation 10014, the COVID-19 regional proclamations, and the travel ban proclamations no longer bar these named Plaintiffs from immediately seeking admission into the United States. The President revoked the travel ban proclamations on January 20, 2021, *see* Proclamation 10141, 86 Fed. Reg. 7,005, revoked Proclamation 10014, along with section 1 of Proclamation 10052, and section 1 of Proclamation 10131, on February 24, 2021, *see* Proclamation 10149, 86 Fed. Reg. 11,847, and the State Department started granting NIE waivers to DV Plaintiffs with FY 2020 diversity visas who are subject to the COVID-19 regional proclamations on February 24, 2021. *See Rescission of Presidential Proclamation 10014*, https://travel.state.gov/content/ travel/en/News/visas-news/rescission-of-presidential-proclamation-10014.html (last visited Mar. 15, 2021). Moreover, the State Department has issued public guidance that indicates that "individuals who received diversity visas in 2020 as a result of orders in the court case *Gomez v. Trump* may travel to the United States on an expired visa as the court ordered the government to treat these visas as though they were issued on the date P.P. 10014 was rescinded." *Id*. Accordingly, any named DV Plaintiff with a FY 2020 diversity visa issued

during September 2020, or whose visas are facially valid, can immediately seek admission into the United States and cannot plausibly argue that they still suffer from the "invasion of a legally protected interest," *Navegar, Inc.,* 103 F.3d at 998, regarding Proclamation 10014, the COVID-19 regional proclamations or the travel ban proclamations impeding their inability to seek admission into the country as a FY 2020 diversity visa holder.

2. The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs failed to provide any specific facts necessary to establish standing at the summary judgment stage of this litigation.

There are 4,173 named plaintiffs in the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* cases, and with their summary judgment motion, ECF No. 196-1, not one of them has asserted anything more than general factual allegations of injury. No plaintiff supported their allegations with evidence of specific facts of harm. This is insufficient to establish standing at the summary judgment stage in litigation. The Court should therefore dismiss these plaintiffs from this action for failure to establish standing to proceed.

To establish standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). In *Lujan v. Defenders of Wildlife*, the Supreme Court explained that "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. 555, 561 (1992). At the pleading stage, the complaint must merely "'state a plausible claim' that each element of standing is satisfied." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)). But on summary judgment, "the plaintiff can no longer rest on such mere allegations." *Lujan*, 504 U.S. at 561

(quotation marks omitted); *see also Scenic Am., Inc. v. DOT*, 836 F.3d 42, 49 n.3 (D.C. Cir. 2016) ("[T]he plaintiff has the burden to establish the evidentiary basis for its standing at the summary judgment stage."). Plaintiffs must therefore support factual assertions by "citing to particular parts of materials in the record," Fed. R. Civ. P. 56(c)(1)(A), and "must set forth by affidavit or other evidence specific facts" that prove their standing, *Lujan*, 504 U.S. at 561 (quotation marks omitted).

Here, the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs come nowhere close to meeting this burden. In their summary judgment motion, ECF No. 196-1, no plaintiff from these cases supports their factual assertions by citing to particular parts of materials in the record, and no plaintiff has "set forth by affidavit or other evidence" any specific facts that establish their standing to proceed. *Lujan*, 504 U.S. at 561 (quotation marks omitted). Rather, these plaintiffs rely on "mere allegations" of injury, which is not enough. *Id.* (quotation marks omitted). Thus, the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs have failed to meet their burden to establish standing at the summary judgment stage in this litigation. *Humane Soc'y of the United States v. Perdue*, 935 F.3d 598, 604 (D.C. Cir. 2019); *see also Nguyen v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 27, 33–34 (D.D.C. 2020) (indicating that "allegations, unsupported by record evidence, are insufficient to establish standing under the 'heightened standard for evaluating a motion for summary judgment.'") (quoting *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017)). Significantly, due to that failure, the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs have forfeited any claim to standing. *Humane Soc'y*, 935 F.3d at 604; *Scenic Am., Inc.*, 836 F.3d at 49 n.4 ("Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction.").

B. Revocation of Proclamation 10014 has rendered moot the Immigrant Visa Plaintiffs' claims.

Recent executive and administrative actions have rendered moot the immigrant visa Plaintiffs' claims (DV, family-based and employment-based immigrant visa beneficiaries).

Plaintiffs initiated this action challenging two Presidential Proclamations that this Court determined were lawfully issued: Proclamation 10014, *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*, 85 Fed. Reg. 23,441 (Apr. 22, 2020), which dealt with certain categories of immigrant visas, and Proclamation 10052, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 38,263 (June 22, 2020), which temporally extended Proclamation 10014's effectiveness and expanded its application to certain categories of nonimmigrant visas. On January 20, 2021, Defendants filed their motion for partial summary judgment, seeking the dismissal of Plaintiffs' challenges to the implementation of these Proclamations by the Department of State and the Department of Homeland Security ("DHS"). ECF 189-1.[3] On February 3, 2021, in accordance with the Court's scheduling order, Plaintiffs file two cross-summary judgment motions: one on behalf of the *Gomez* Plaintiffs (ECF 195) and one on behalf of the named Plaintiffs in the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed*

[3] Defendants' motion for summary judgment did not address Plaintiffs' challenges to the Proclamations themselves because the Court's scheduling order directed that briefing shall "be limited to issues raised by Plaintiffs' Administrative Procedure Act, mandamus, and related claims concerning visa adjudication and issuance." ECF 184 at 3. Accordingly, the Government reserves its right to seek summary judgment on all other remaining claims. The Plaintiffs in the *Gomez* case appealed from this Court's Order upholding those Proclamations (No. 20-5292), and on March 5, 2021, both the Government and the Plaintiffs filed supplemental briefing with the D.C. Circuit advising, among other things, that Plaintiffs' challenge to Proclamation 10014 is now moot following the President's February 24, 2021 revocation of that proclamation discussed herein.

cases (ECF 196). But time marches on and further events have since changed the scope of this litigation.

"The rule against deciding moot cases forbids federal courts from rendering advisory opinions or 'deciding questions that cannot affect the rights of litigants in the case before them.'" *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (citations omitted). In *Hall*, the D.C. Circuit dismissed as moot Hall's challenge to the agency's denial of his FOIA fee waiver request after the agency decided to release records to Hall without seeking payment from him. *Id.* Because Hall "already ha[d] 'obtained everything that [he] could recover ... by a judgment of this court in [his] favor,'" there was no case or controversy before the Court. *Id*. at 99 (citation omitted). The Court also held that "Hall fail[ed] to undermine the government's mootness claim with his argument that the media status claim is capable of repetition, yet evading review." *Id.* So too here.

On February 24, the President issued Proclamation 10149, revoking Proclamation 10014, along with section 1 of Proclamation 10052, and section 1 of Proclamation 10131. 86 Fed. Reg. 11,847. Proclamation 10149 further provides that the applicable agencies "shall review any regulations, orders, guidance documents, policies, and other similar agency actions developed pursuant to Proclamation 10014 and, as appropriate, issue revised guidance consistent with the policy set forth in" the Proclamation. *Id.* at 11,847. That same day, the Secretary of State announced that DV-2020 holders would be exempt from other regional Proclamations requiring a quarantining period before traveling to the United States. *See* ECF 216. This, combined with prior national interest exceptions granted by the Secretary of State, ECF 208, means there is no longer any suspension of entry into the United States for Plaintiffs holding valid immigrant visas.

As there is now no impediment from the Proclamations, or their implementation, for those persons seeking non-DV 2020 immigrant visas, those Plaintiffs' claims are now moot and the

Court should dismiss them from this case.[4] *See Davis v. FEC*, 554 U.S. 724, 732–33 (2008) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (citation and quotation marks omitted); *Schmidt v. United States*, 749 F.3d 1064, 1068–70 (D.C. Cir. 2014) (case moot when alleged procedural flaw in prior decision was rectified on remand). And this is especially true where, as here, the appropriate relief available under the APA is remand to the agencies. *See Nakai v. Zinke*, 279 F. Supp. 3d 38, 43 (D.D.C. 2017) ("Because the [agency]'s denial of Plaintiff's application for Indian preference was based only on its interpretation of the Lumbee Act, and that interpretation subsequently changed, there remains nothing for this court to review in light of the agency remand. The only relief this court could order would be a remand requiring the agency to consider Plaintiff's application based on her Indian heritage pursuant to section 5.1(c); that is exactly the outcome of the agency's own [actions].").

Turning back to the doctrine's exception for harms that are capable of repetition, yet evading review, there is no indication whatsoever that this case is capable of repetition for the Plaintiffs given that Proclamation 10149 directs the undoing of the complained of policies implementing Proclamation 10014 and once they enter the United States as new immigrants, even similar policies would not apply to them. *See Krislov v. Yarbrough*, — F.3d —, 2021 WL 672106, at *2 (7th Cir. Feb. 22, 2021) (Easterbrook, J.) ("He says that this dispute is capable of repetition because hundreds of candidates need to gather signatures in every election cycle, and some of those signature-gathering efforts are sure to fall just short. But the question is not whether the issue will matter to *someone*, but whether it will matter *to him*, *in particular*." (emphasis in original)

[4] As Proclamation 10052 is set to expire in 16 days on March 31, 2021, the claims by those Plaintiffs seeking nonimmigrant visas, whose entry is temporarily suspended under Proclamation 10052, may become moot at that time.

(citing *Weinstein v. Bradford*, 423 U.S. 147 (1975)). Second, even "[a]ssuming … that the matter is capable of repetition," like the question before the *Hall* Court, it is impossible "to see how the issue has any tendency to evade review" because policies regarding visa "[d]enials … do not seem inherently of such short duration that they cannot ordinarily be fully litigated[.]" *Krislov*, 2021 WL 672106, at *2.

C. Principles of nonreviewability bar Plaintiffs' claims.

Principles of nonreviewability bar judicial review under the APA of Plaintiffs' claims that are not moot. ECF 189-1 at 16 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)); *id*. at 13-16. Plaintiffs disagree, arguing that these principles have no application to the claims before the Court. ECF 196-1 at 4-5; ECF 195-1 at 13-16. Specifically, Plaintiffs contend that principles of nonreviewabilty are limited to a particular visa determination by a consular officer. *See* ECF 196-1 at 4 (none of the Plaintiffs challenge "an affirmative 'visa determination'"); ECF 195-1 at 14 (arguing that these principles are limited to challenges to immigration officers' exercise of discretion "in particular cases"). But Plaintiffs are wrong because *Mandel* precludes their arguments. *See* 408 U.S. at 759, 769–70 (holding that principles of nonreviewability extend to bar judicial review of the decision by the Attorney General to deny a waiver of inadmissibility).

Just as Dr. Mandel could not challenge the Attorney General's exercise of discretion in denying a waiver of inadmissibility, here, the *Gomez* Plaintiffs cannot challenge how the State Department exercises its discretion in crafting national interest exceptions that waived grounds of inadmissibility for certain foreign nationals. For the same reason, these principles bar review of Plaintiffs' APA challenges to the State Department's purported "No-Visa Policy," its decisions on prioritizing certain consular services over other services, and the Department's implementation of presidential proclamations under 8 U.S.C. § 1182(f) in general. These types of affirmative

determinations go to the core functions of the State Department and the political branches' "prerogative to regulate the entry of foreign nationals." *Gomez, et al. v. Trump, et al. (Gomez I)*, No. 20-CV-01419 (APM), 485 F. Supp. 3d 145, 176 (D.D.C. Sept. 4, 2020) (recognizing the purpose of the nonreviewability doctrine); *see also,* ECF No. 189-1 at 14 ("The Supreme Court has long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

The *Gomez* Plaintiffs' reliance on *Int'l Union of Bricklayers & Allied Craftsmen v. Meese* is misplaced. ECF No. 195-1 at 13 (citing 761 F.2d 798, 801 (D.C. Cir. 1985)). In that case, the D.C. Circuit held that it had jurisdiction over a claim brought by a labor union challenging the internal operating procedures used by the former Immigration and Naturalization Service (the precursor to USCIS). *Int'l Union of Bricklayers*, 761 F.2d at 801. However, because *Int'l Union of Bricklayers*, 761 F.2d 798, did not involve a challenge to the State Department's processing of visas or any decision by the State Department with respect to a waiver of inadmissibility, it is inapposite to the questions before this Court.

In sum, nonreviewability principles bar judicial review of the Plaintiffs' APA claims in this case. *See Mandel*, 408 U.S. at 759, 769–70.

D. The State Department's decision to not process DV-2020 visa applications while the beneficiaries were subject to entry suspension under Proclamation 10014 was lawful.

Plaintiffs contend that the State Department violated the APA by deciding not to process visa applications for DV-2020 selectees who were subject to entry suspension under Proclamation 10014 (referring to this as the "No-Visa Policy"). *See* ECF 196-1 at 8-14, ECF 195-1 at 16-26. Plaintiffs are wrong. As the government has argued, under 8 U.S.C. § 1182(f), consular officers

are not permitted to issue visas to foreign nationals whose entry is suspended by presidential proclamations, and State Department's longstanding interpretation of 8 U.S.C. § 1182(f) is reasonable. ECF No. 189-1 at 16-29. The government is thus entitled to summary judgment on this claim.

1. The refusal of applicants subject to entry restrictions is required by 8 U.S.C. §§ 1182(f) and 1201(g).

Section 1201(g) dictates, "[n]o visa ... shall be issued to an alien if ... it appears to the consular officer ... that such alien is ineligible to receive a visa or other such documentation under section 1182." Section 1182(f) delegates to the President the authority to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," based on a finding that such entry would be "detrimental to the interests of the United States." In other words, foreign nationals who are barred from entry under a Presidential proclamation cannot be admitted to the United States, rendering them "excludable" or "inadmissible." *See* ECF 189-1 at 17 ("The D.C. Circuit has explained that 'as an absolute precondition to admission, an alien must submit his proof that he is not excludable to a preliminary screening by a consular officer.'") (emphasis omitted) (quoting *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 426 (D.C. Cir. 1977)).

Plaintiffs fail to address *Castaneda-Gonzalez*, 564 F.2d 417, in their summary judgment briefs, and fail to identify any exception in the INA that would lawfully permit a consular officer to issue a visa to an applicant who was determined to be inadmissible under 8 U.S.C. § 1182.[5]

[5] The *Gomez* Plaintiffs point to requirements that "visa applications shall be reviewed and adjudicated by a consular officer," 8 U.S.C. § 1202(b), (d); that "a consular officer may issue" visas to individuals who have "made proper application therefore," *id*. § 1201(a)(1); that "[t]he Secretary of State shall be charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties,

Instead, Plaintiffs argue that "the policy's effect was to declare otherwise-qualified DV-2020 selectees to be *in*eligible for visas before the fiscal year's close." ECF 195-1 at 17 (emphasis in original). But this argument suggests that 8 U.S.C. § 1154(a)(1)(I)(ii)(II) requires that all selectees remain eligible for the full year. Rather, that provision only sets a maximum period of eligibility for DV applicants; it does not mandate that an applicant remain eligible during this period, which would require nullifying other provisions of the INA that would render a DV applicant ineligible based on changing circumstances (*e.g.*, the expiration of an applicant's certified medical examination, changes to criminal history, or discovery of previously undisclosed exclusionary information).

Plaintiffs also argue that the so-called "No-Visa Policy" "ignores 'the basic distinction between admissibility determinations,' *i.e.*, entry determinations, and 'visa issuance that runs throughout the INA.'" ECF 195-1 at 17 (quoting *Gomez I*, 485 F. Supp. 3d at 191); *accord* ECF 196-1 at 8-9, 11. But the Supreme Court recognized that there is a unified standard for both admissibility and visa-eligibility determinations when it noted that, "[s]ection 1182 defines the universe of aliens who are admissible into the United States and therefore eligible to receive a visa." *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018). It is true that the determination of eligibility for entry and for visa issuance are two separate processes, but the Supreme Court did not hold that admissibility has no bearing on visa eligibility. *Id.* Plaintiffs claim that the Supreme Court meant

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and functions conferred upon the consular officers relating to the granting or refusal of visas," *id.* § 1104(a); and that DV-2020 selectees "shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected," *id.* § 1154(a)(1)(I)(ii)(II); ECF 195-1 at 16-17. *See* ECF 196-1 at 13-14. But those provisions merely place limitations on who may issue a visa ("a consular officer"); who may be issued a visa (applicants who "have made proper application therefore"); and when an applicant is eligible to receive a diversity visa ("only through the end of the specific fiscal year."). Tellingly, each time the *Gomez* Plaintiffs quote this provision in their brief, they exclude the word "only."

something different than what it said—that it meant "1182(a)" when it said "1182." ECF 195-1 at 18. But the Supreme Court is familiar with that distinction and clearly chose to reference all of section 1182.

Plaintiffs also fail to overcome the government's argument, ECF 189-1 at 19-23, that 8 U.S.C. §§ 1182(f) and 1201(g) must be read in light of the INA, as well as other provisions of immigration law, as a whole. *See* ECF 195-1 at 21.[6] Specifically, in 1994, Congress passed legislation requiring consular officers to confirm that a noncitizen is not "excludable" to the United States prior to visa issuance. *See* Foreign Relations Authorization Act, Years 1994 and 1995, Pub. L. No. 103-236, § 140(c)(1)(B) (8 U.S.C. § 1182 note). Under that legislation, "whenever a United States consular officer issues a visa for admission to the United States, that official shall certify, in writing, that a check of the Automated Visa Lookout System, or any other system or list which maintains information about the excludability of aliens under the [INA] [8 U.S.C. § 1101 et seq.], has been made and that there is no basis under such system for the exclusion of such alien." *Id.* (emphasis added). A determination that an individual is subject to a section 1182(f) proclamation will result in that individual's name being included in the Automated Visa Lookout System. *See* ECF 195-1 at 22 (citing Ramotowski Decl., ¶ 8). As a result, a consular officer who issues a visa to an applicant subject to a 8 U.S.C. § 1182(f) restriction could be found to have violated Visa Lookout Accountability requirements. *See* Pub. L. No. 103-236, § 140(c)(1)(B); Ramotowski Decl., ¶¶ 7-8.

Plaintiffs' argument that these legal requirements are irrelevant is unavailing for three reasons. *See* ECF 196-1 at 5-6; 195-1 at 21.

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[6] The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs do not meaningfully address the Automated Visa Lookout System's impact, beyond referencing it as "obscure." ECF 196-1 at 5-6.

First, Plaintiffs assert that there is no requirement that 8 U.S.C. § 1182(f) restrictions "must" be included in the Automated Visa Lookout System. ECF 195-1 at 21, n.16. But the State Department's declaration plainly states otherwise. Ramotowski Decl., ¶ 8, which is consistent with various provisions of the Foreign Affairs Manual ("FAM"). *See*, *e.g.*, 9 FAM 301.4-1(a) ("The basis on which applicants must be denied visas are established by law, as part of the [INA]…. Other grounds for refusal are found INA 212 (INA 212(a), INA 212(e), and *INA 212(f)*" (emphasis added); 302.14-3(B) (list "Suspension of Entry by President – INA 212(F)" under section titled, "Ineligibility [to receive a visa] Based on Sanctioned Activities –… INA 212(F).").

Second, Plaintiffs argue that "[section] (1)(B) plainly contemplates that visas may be issued to individuals who are in the system: It does *not* prohibit issuance of such visas, but calls for certain professional consequences for officers who commit procedural mistakes." ECF 195-1 at 21 n.16 (emphasis in original); *see* ECF 196-1 at 5-6. But this is unpersuasive. Congress required that consular officers confirm that a noncitizen is not "excludable" to the United States prior to visa issuance, providing for professional consequences for officers who fail to do so. *See* Pub. L. No. 103-236, § 140(c)(1)(B) ("the consular officer's failure shall be made a matter of record and shall be considered as a serious negative factor in the officer's annual performance evaluation"); *see also, id*. § 140(c)(2) (if a foreign national "to whom a visa was issued as a result of a failure described in paragraph (1)(B) is admitted to the United States and there is thereafter probable cause to believe that the alien was a participant in a terrorist act causing serious loss of life or property in the United States, the Secretary of State shall convene an Accountability Review Board"). These measures evidence a clear congressional intent that consular officers not issue visas to excludable individuals.

Third, Plaintiffs suggest that the professional consequences should be disregarded because Deputy Secretary of State Ramotowski stated that a consular officer who violated their duty "'*could*' hypothetically, 'be found to have violated VLA requirements and be subject to the penalty provided for in that law.'" ECF 195-1 at 22 (quoting Ramotowski Decl., ¶ 8) (emphasis added by Plaintiffs). Plaintiffs' insertion of the term "hypothetically" into the sentence seeks to change the meaning of the sentence and ignores the statute's dictate that "the consular officer's failure *shall* be made a matter of record," "*shall* be considered a serious negative factor," and that "the Secretary of State *shall* convene an Accountability Review Board" based on the actions of the recipient of an improperly-issued visa.

Notably, Plaintiffs do not attack the substance of the Government's supporting declarations but instead assert that the Ramotowski and Marwaha declarations (ECF 189-2, 189-3, respectively) constitute impermissible post-hoc rationalizations. *See* ECF 196-1 at 5, 15; ECF 195-1 at 22 n.16; 25-26. Plaintiffs are wrong. Indeed, Plaintiffs do not dispute in their summary-judgment papers that the Government may provide the declaration of an agency official in an APA case to "illuminate reasons obscured but implicit in the administrative record." *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996); *see also* ECF No. 189-1 at 13.[7] Moreover, contrary to Plaintiffs' contentions, the declarations do not constitute post-hoc rationalizations; they provide explanations that consist of information implicit in the administrative record by spelling out the rationale that was inherent in the State Department's actions. *See Univ. of Colorado Health at Mem'l Hosp. v.*

[7] Plaintiffs in *Fonjong*, *Kennedy*, and *Mohammed* (but not Plaintiffs in *Gomez* and *Aker*) separately moved to strike the declarations based on their allegation that the declarations constitute post hoc rationalizations, *see* ECF 192, and Defendants filed their response in opposition to that motion. *See* ECF 202. To the extent that the motion raised arguments that are not presented in their summary judgment briefing, the Court should regard such arguments as waived in evaluating the merits.

Burwell, 164 F. Supp. 3d 56, 65 (D.D.C. 2016). The declarations help to "illuminate [the State Department's] reasons," *Clifford*, 77 F.3d at 1418, for determining that entry restrictions under 8 U.S.C. § 1182(f) compel visa refusals by consular officers, and they provide further explanation of the "assumption" identified in the Court's preliminary injunction Order, *Gomez I*, 485 F. Supp. 3d at 194, by furnishing context "necessary to facilitate effective judicial review." *See Rhea Lana, Inc. v. U.S. Dep't of Labor*, 271 F. Supp. 3d 284, 291 (D.D.C. 2017).[8] The declarations, therefore, clarify material in the administrative record with information that long pre-dates the Plaintiffs' legal challenges and belies Plaintiffs' meritless assertion that the State Department's explanations exist for the purpose of litigation.[9]

The *Gomez* Plaintiffs also quibble with Defendants' discussion of the legal term "eligible immigrant." ECF 195-1 at 20. But their contention that "the phrase 'eligible immigrant' in § 1101(a)(16) naturally refers to a foreign national who is 'eligible' for an immigrant visa, and to whom such a visa may 'properly' be issued," *id*. (emphasis in original), improperly divorces admissibility from visa eligibility. *See* ECF 189-1, at 20. The INA requires the possession of a valid unexpired visa for admission. *See* 8 U.S.C. § 1181(a) ("no immigrant shall be admitted into

[8] The Ramotowski declaration explains the State Department's understanding that the INA requires the refusal of visas in connection to a proclamation under section 1182(f), chronicling the State Department's long historical practice, provisions of the FAM, examples of other presidential proclamations, and operational concerns if the State Department departed from its traditional practice. *See generally* ECF No. 189-2. Likewise, the Marwaha declaration explains that, based on the State Department's longstanding practice and statutory interpretation that section 1182(f) is a basis for visa refusals (as articulated in the Ramotowski declaration), it was a matter of common sense for the State Department to choose not to prioritize DV applicants. *See* ECF No. 189-3, ¶ 5.

[9] If this Court disagrees, the proper course would be for the Court to remand this matter back to the agency. *See Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("If the agency action, once explained by the proper agency official, is not sustainable on the record itself, the proper judicial approach has been to vacate the action and to remand the matter back to the agency for further consideration.").

the United States unless at the time of application for admission he…has a valid unexpired immigrant visa….”); The *Gomez* Plaintiffs' suggestion that consular officers and immigration officers at ports of entry should employ different standards for visa issuance and admission runs contrary to settled law and would frustrate the INA's administrative framework. *See Castaneda-Gonzalez*, 564 F.2d at 426–27 (“This ‘double check’ system ... requires an alien to demonstrate his admissibility before two different administrative officials with independent and coequal authority ... Congress ... has continued the statutory framework which requires consular officers and the Attorney General independently to address the same issues in different contexts.”). The D.C. Circuit has explained the historical development of this understanding:

> In [1918], while the country was at war, the President designated the Secretary of State as the official in charge of granting permission to aliens to enter. In implementing this system, American consuls in foreign countries simply advised aliens of the various exclusionary provisions of the immigration laws, leaving the determination of excludability to immigration officers at the port of entry. This resulted in large numbers of foreigners making the arduous trip to the United States only to be detained at the border and then excluded. To cure this problem, Congress passed the Act of 1924 (ch. 190, 43 Stat. 153), transferring the responsibility for determining the admissibility of aliens from the Secretary of State to consular officers.

Saavedra Bruno v. Albright, 197 F.3d 1153, 1156 (D.C. Cir. 1999) (citations omitted). Accordingly, “[b]efore issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA[,]” including section 1182(f). *See Kerry v. Din*, 576 U.S. 86, 89 (2015) (citing 8 U.S.C. 1361); *Doe #1 v. Trump*, 984 F.3d 848, 855 (9th Cir. 2020); *see also Doe #1 v. Trump*, 957 F.3d 1050, 1081 (9th Cir. 2020) (Bress, J., dissenting) (“There is nothing unusual about Proclamation No. 9945 creating an independent—and yes, dispositive—ground for inadmissibility, when that is the whole point of § 1182(f).”).

Moreover, Plaintiffs fail to rebut Defendants' citation to 8 U.S.C. §§ 1182e and 1182f, which contains language dictating that the “denial of entry” specifically entails barring the issuance

of visas. *See* ECF 189-1 at 22. The *Gomez* Plaintiffs assert merely that "[b]ecause a visa is a prerequisite to admission, the provisions in §§ [1182e] and [1182f] barring visa issuance also serve their stated purposes of denying lawful entry," ECF 195-1 at 22, which tellingly comports with the Government's position regarding 8 U.S.C. § 1182(f). In their attempt to distinguish sections 1182e and 1182f from section 1182(f), *see* ECF 195-1 at 22, Plaintiffs cite to no authority that supports their suggestion that whether an entry restriction is temporary or permanent is dispositive as to whether such restriction compels the refusal of visas. Plaintiffs in *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* similarly attempt to gloss over this statutory text as a "non-sequitur," ECF 196-1 at 10, ignoring that these statutes are *in pari materia* to the proper interpretation of 8 U.S.C. § 1182(f). Thus, Plaintiffs arguments on this point fail.

Finally, in section 428 of the Homeland Security Act of 2002, Pub. L. No. 107-296 (codified at 6 U.S.C. § 236), Congress expressly preserved the Secretary of State's long-standing authority and responsibility to implement section 1182(f). Congress emphasized that no provision of the Act was intended "to affect any delegation of authority to the Secretary of State by the President pursuant to any proclamation issued under section 212(f)." 6 U.S.C. § 236(d)(2). Congress further underscored that "[n]othing in [section 428 of the Homeland Security Act], consistent with the Secretary of Homeland Security's authority to refuse visas in accordance with law, shall be construed as affecting the authorities of the Secretary of State under ... Section 212(f) of the [INA] (8 U.S.C. 1182(f))." 6 U.S.C. § 236(c)(2)(H).

In sum, when sections 1201(g) and 1182(f) are properly read in the context of the INA as a whole, it is clear that consular officers are not permitted to issue visas to foreign nationals who are inadmissible because they are barred from entering the country.

2. The State Department's longstanding understanding is reasonable and entitled to *Skidmore* deference.

The *Gomez* Plaintiffs argue that the Presidential proclamation history does not support the so-called "No-Visa Policy" because prior proclamations did not expressly direct the suspension of visa processing, ECF 195-1 at 23-24. This contention ignores the fact that the State Department has issued informal guidance in response to each of those proclamations directing the suspension of visa processing for individuals meeting the entry-bar criteria. *See* ECF 189-1 at 24-25, 28. This decades-long practice illustrates the consistency of the State Department's pronouncements with the cooperation of the President, bolstering the justification for *Skidmore* deference.

The *Gomez* Plaintiffs also contend that "[t]he cases in Defendants' string citation (ECF 189-1 at 25) do not address the issue presented in this case," and that courts "have rejected the same arguments that Defendants now raise." ECF 195-1 at 24 (citing *Tate v. Pompeo*, No. CV 20-3249 (BAH), 2021 WL 148394, at *7–9 (D.D.C. Jan. 16, 2021); *Milligan v. Pompeo*, No. CV 20-2631 (JEB), 2020 WL 6799156, at *5–7 (D.D.C. Nov. 19, 2020); *Young v. Trump*, No. 20-CV-07183-EMC, 2020 WL 7319434, at *16 (N.D. Cal. Dec. 11, 2020)). Although none of the authorities cited in the government's brief addressed the lawfulness of the State Department's understanding, courts have repeatedly accepted the premise that a visa application may properly be denied pursuant to section 1182(f). *See, e.g.*, *Kangarloo v. Pompeo*, No. 1:20-CV-00354 (CJN), 2020 WL 4569341, at *3 (D.D.C. Aug. 7, 2020) (noting that the plaintiff's visa refusal "was made under 8 U.S.C section 1182(f), which permits consular officers to refuse visas pursuant to presidential immigration restrictions."); s*ee also, Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 114–15 (D.D.C. 2020); *Didban v. Pompeo*, 435 F. Supp. 3d 168, 173–74 (D.D.C. 2020); *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 41 (D.D.C. 2020); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 92–93 (D.D.C. 2020); *Ghadami v. DHS*, No. 19-cv-00397, 2020 WL 1308376, at *4–5 (D.D.C. Mar.

19, 2020); *Jafari v. Pompeo*, 459 F. Supp. 3d 69, 74–75 (D.D.C. 2020); *Sarlak v. Pompeo*, No. 20-35, 2020 WL 3082018, at *3–4 (D.D.C. Jun. 10, 2020). Moreover, none of the decisions cited by Plaintiffs "rejected the same arguments Defendants now raise" because none addressed the State Department's entitlement to *Skidmore* deference. *See Tate*, 2021 WL 148394, at *7–9; *Milligan*, 2020 WL 6799156, at *5–7; *Young*, 2020 WL 7319434, at *16.

3. Plaintiffs fail to show that the "No-Visa Policy" is arbitrary and capricious.

Plaintiffs contend that the State Department's understanding of the INA is arbitrary and capricious, asserting that the State Department "gave 'no rational explanation for the policy,' and 'fail[ed] to consider [an] important aspect[] of the problem'—from which it follows that its action was arbitrary and capricious." ECF 195-1 at 25 (quoting *Gomez I*, 485 F. Supp. 3d at 194, 199); *see* ECF 196-1 at 14. Respectfully, this Court should revisit those preliminary conclusions and reject Plaintiffs' arguments. Here, the administrative record demonstrates that the State Department reasonably suspended processing for visa applicants who were barred from entry under a Presidential proclamation based on its understanding of the INA's requirements. *E.g.*, CAR 17. Though the record may not have expressly laid out in detail the statutory underpinnings for the State Department's understanding that persons subject to an entry bar are inadmissible and ineligible to receive a visa, the contextualizing declarations establish that such an analysis was unnecessary because the State Department has long understood that its practice was required by statute. *See* Ramotowski Decl.

Accordingly, based on 8 U.S.C. § 1201(g), read in conjunction with the entire INA, the State Department provided a rational explanation for the so-called "No-Visa Policy."

* * *

In sum, what Plaintiffs refer to as the "No-Visa Policy" describes the State Department's lawful compliance and enforcement of the INA's restrictions on the Department's discretion to issue visas to foreign nationals who are legally barred from admission into the United States under a presidential proclamation issued under section 1182(f). This decades-long understanding is entitled to the Court's deference under *Skidmore* and was rationally applied to the facts of this case.

E. Plaintiffs' Challenge to the State Department's COVID-19 Prioritization Guidance for Consular Operations Lacks Merit.

Revocation of Proclamation 10014 has rendered moot Plaintiffs' challenge to the State Department's COVID-19 Prioritization Guidance for Consular Operations (the "COVID-19 Prioritization Guidance"). To the extent it is not moot, the government is entitled to summary judgment on this claim, brought only by the *Gomez* Plaintiffs, for two reasons. First, under 5 U.S.C. § 701(a)(2), there is no meaningful standard for reviewing the State Department's determination of which consular services it should prioritize in the face of a global health emergency. Second, in the alternative, the COVID-19 Prioritization Guidance was reasonable in light of the competing pressures that the State Department faced at the time.

1. The APA does not authorize judicial review of the State Department's COVID-19 Prioritization Guidance because, under 5 U.S.C. § 701(a)(2), there is no meaningful legal standard for reviewing this guidance.

The Government is entitled to summary judgment on Plaintiffs' APA challenge to the State Department's COVID-19 Prioritization Guidance, because the State Department's choices on its prioritization of the consular services it will provide in the face of an evolving, worldwide health crisis that take into account the safety of State Department employees, is committed to agency

discretion by law. *See* ECF 189-1 at 30 ("Under the APA, a court may not review… agency action if the action fails to provide a 'meaningful standard against which to judge the agency's exercise of discretion.'") (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)); *see id.* at 33 ("the determination and prioritization of 'mission critical' functions during a time of crisis and administrative triage lies squarely within the discretion of the Secretary of State, under 22 U.S.C. § 2651a, and is not subject to judicial review") (quoting *Tate*, 2021 WL 148394, at *10 n.8)); *id.* at 29-33. The *Gomez* Plaintiffs' arguments to the contrary are unavailing. *See* ECF 195-1 at 26-33.

First, the *Gomez* Plaintiffs argue that the Government fails to cite any authority to support the proposition that 5 U.S.C. § 701(a)(2) precludes judicial review of how the State Department prioritizes its consular services. ECF 195-1 at 28. That is incorrect. The government's summary judgment brief provides ample authority. *See, e.g.,* ECF 189-1 at 33 (citing *Tate*, 2021 WL 148394, at *10 n.8); *id.* at 29-33 (discussing other authorities applying 5 U.S.C. § 701(a)(2)).[10]

Second, Plaintiffs also argue that 5 U.S.C. § 701(a)(2) is limited to agency actions involving military policy or analogous policies. *See* ECF 195-1 at 29. This is also incorrect. *See* ECF 189-1 at 30 (citing *Heckler*, 470 U.S. at 830). And, the D.C. Circuit has held to the contrary. *See, e.g., Make the Road N.Y. v. Wolf*, 962 F.3d 612, 633–34 (D.C. Cir. 2020) (ruling, in the context

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[10] The *Gomez* Plaintiffs note that courts have sometimes used the phrase "clear and convincing" in connection with the presumption of reviewability under the APA. ECF 195-1 at 27-28. But the Supreme Court explained that it has "never applied the clear and convincing standard in the strict evidentiary sense ... [but rather] has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *See Block v. Community Nutrition Institute*, 467 U.S. 340, 350–51 (1984) (citations and quotation marks omitted). In this context, the clear and convincing standard "is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review ... is controlling." *Id.* at 351.

of expedited removal, 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"); *Drake v. F.A.A.*, 291 F.3d 59, 70 (D.C. Cir. 2002) (ruling, in the context of aviation safety, that "meaningful judicial review is impossible" because, under the applicable statute, there was no discernable judicially manageable standard); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affs.*, 104 F.3d 1349, 1352–53 (D.C. Cir. 1997) (ruling that plaintiffs' APA claims were "unreviewable because consular venue determinations are entrusted to the discretion of the State Department").

Third, Plaintiffs assert that general provisions of the INA regarding the DV program provide a meaningful standard for APA review. ECF 195-1 at 30 (citing 8 U.S.C. §§ 1151(e), 1154(a)(1)(I)(ii)(II), 1202(b), (d)). However, none of these provisions sheds any light on what consular services the State Department can designate as "mission critical," or what services the State Department should prioritize in the face of a worldwide health emergency. *See Make the Road*, 962 F.3d at 633–34. Thus, Plaintiffs' argument is unavailing.

Fourth, Plaintiffs argue that 5 U.S.C. § 555(b) provides a meaningful standard because it requires each agency to conclude a matter presented to it "within a reasonable time." ECF 195-1 at 30 (citing 5 U.S.C. § 555(b)). But this misses the point of the COVID-19 Prioritization Guidance. Given the developing nature of the COVID-19 pandemic, the State Department had to choose between competing priorities and determine which consular services were of such importance that they could be deemed "mission critical." *See* ECF 189-1 at 29-30. Section 555(b)'s requirement of reasonableness simply does not address these questions or provide a meaningful standard of review in this context.

Fifth, Plaintiffs argue that the "COVID-19 Guidance itself—also a statement of State Department policy—provides yet another measuring stick." ECF 195-1 at 30. This is a circular argument that amounts to nothing more than a disagreement with the State Department's choices as to which services it decided to prioritize in its phased reopening of services.

Sixth, Plaintiffs argue that the FAM sets forth a meaningful standard of review. ECF 195-1 at 33 ("The FAM sets out a complex scheme for processing diversity visa applications, which is designed so that visas are issued each month at a rate sufficient to allow the total number of visas issued annually to come as close as possible to Congress's 55,000-visa cap") (citing 9 FAM 502.6-4.c-d). But this argument fails as well because the FAM provision does not establish how consular services should be prioritized, or suggest that the processing of DV applications is "mission critical."

Finally, Plaintiffs argue that there is a meaningful standard against the State Department's COVID-19 Prioritization Guidance because this Court already found that there was such a standard. ECF 195-1 at 26-27. This is not true. *See Gomez I*, 485 F. Supp. 3d at 198–99. Rather this Court ordered summary judgment briefing on Plaintiffs' APA claims, including Plaintiffs' challenge to the State Department's COVID-19 Prioritization Guidance. ECF 184 at 3.

In sum, without any manageable standard, the APA does not provide a vehicle for reviewing the State Department's COVID-19 Prioritization Guidance. *See* 5 U.S.C. § 701(a)(2).

2. Alternatively, the State Department's COVID-19 Prioritization Guidance was reasonable.

Alternatively, summary judgment in the government's favor is warranted because even if Plaintiffs' challenge to the COVID-19 Prioritization Guidance was reviewable under the APA, "the State Department's decisions on what services to prioritize was reasonable." ECF 1891-1 at

33; *see id*. at 33-36. Plaintiffs disagree, arguing that this guidance was arbitrary and capricious. ECF 196-1 at 14-15; ECF 195-1 at 32-34. Again, Plaintiffs' arguments are unavailing.

First, the Plaintiffs argue that the State Department's non-inclusion of DV-2020s as mission-critical was not rational because it was based on an improper understanding of the law. ECF 196-1 at 14-15, ECF 195-1 at 33. They are wrong because, for the reasons stated above, in addressing the purported "No-Visa Policy" the State Department's longstanding interpretation of sections 1182(f) and 1201(g) is correct and entitled to deference.

Second, the Plaintiffs argue that it is irrational to provide consular services to the children of U.S. citizens who might "age out" but not provide consular services to DV applicants who also faced a statutory deadline. ECF 195-1 at 34; *see also* ECF 196-1 at 14-15 (arguing that the State Department did not adequately consider the hardship its prioritization imposed on DV selectees). But as the government explained, it was rational for the State Department to prioritize the unification of minor children with their U.S. citizen parents over providing services to foreign nationals who potentially have no connection to the United States and who were barred from entering the country under Proclamation 10014. *See* ECF 189-1 at 35 ("it was sensible for the State Department to reserve its limited consular resources to [persons] who are eligible to enter rather than [persons] covered under the Proclamations who must be refused visas"); *id*. at 33-36; *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way").[11]

[11] Moreover, Plaintiffs overlook a significant difference between DV selectees and age-outs: the administrative record shows that between April 23 and July 13, the State Department processed 14 age out cases worldwide, and none were refused. CAR at 102. This reflects a significant numerical difference between age-outs and the thousands of DV selectees that Plaintiffs contend should be adjudicated under the State Department's Prioritization Guidance.

Third, the *Gomez* Plaintiffs argue that the Government conceded that the guidance was arbitrary and capricious. ECF 195-1 at 32. This is incorrect as the government's summary judgment brief provides several arguments why the guidance was rational. *See* ECF 189-1 at 33-36.

For these reasons, Plaintiffs' APA challenge to the COVID-19 Prioritization Guidance fails as a matter of law.

F. Plaintiffs' Challenge to the State Department's Guidance on Designating NIE Waivers Fails as a Matter of Law.

Revocation of Proclamation 10014 renders moot any challenge to the State Department's guidance on NIE waivers because FY 2020 DV holders can immediately seek admission to the United States. But even if this claim is not moot, the *Gomez* Plaintiffs fail to demonstrate that the guidance is subject to review. *See* ECF 195-1 at 34-38. The *Gomez* Plaintiffs' arguments are unavailing for three reasons.

First, the *Gomez* Plaintiffs argue the NIE guidance constitutes final agency action because it is not "in flux" or "subject to revision." ECF 195-1 at 35-36. This is incorrect because the State Department recently revised the guidance, which included issuing "national interest exceptions to what the Department believes is all individuals subject to Proclamation 10014 with valid diversity visas that were expiring between February 17 and February 28," ECF 208 at 3, and issuing NIE waivers to Plaintiffs with FY 2020 diversity visas who are subject to the COVID-19 regional proclamations. *See* ECF 216.

Second, the *Gomez* Plaintiffs argue that there is a meaningful standard for review, for purposes of 5 U.S.C. § 701(a)(2), because courts have the authority to determine what is in the national interest with respect to the admission of foreign nationals. *See* ECF 195-1 at 36 (citing 8 U.S.C. §§ 1151(e), 1154(a)(1)(I)(ii)(II), 1202(b); 9 FAM 502.6-4.c-d). However, none of this

statutory or administrative authority defines what constitutes the "national interest" or provides any meaningful standard for judicial review of the State Department's discretion to determine exceptions to a foreign person's entry suspension under a presidential proclamation. *Cf. Zhu v. Gonzales*, 411 F.3d 292, 295–96 (D.C. Cir. 2005) (holding that national-interest waivers under 8 U.S.C. § 1153(b)(2)(A) are "entirely discretionary"); *accord Poursina v. USCIS*, 936 F.3d 868, 870–72 (9th Cir. 2019) (same); *Make the Road*, 962 F.3d at 633–34 (recognizing that agency designation with respect to expedited removal was discretionary and not subject to review under the APA). Similarly, the *Gomez* Plaintiffs contention that this Court can simply look at the NIE guidance, on its face, and determine whether the State Department's determination is in fact in the national interest without consulting any identifiable legal standard fails as a matter of law. *See* ECF 195-1 at 36. In the absence of any "discernible standards" by which a court can evaluate an agency's judgment, the APA does not authorize judicial review. *See Make the Road*, 962 F.3d at 633–34.

Third, the *Gomez* Plaintiffs argue that the NIE guidance is arbitrary and capricious and contrary to law because it purportedly (i) interferes with the decision-making of consular officers, (ii) does not contain an "intelligible standard" for determining eligibility for a waiver, (iii) does not treat similarly situated individuals similarly, and (iv) fails to provide a rational basis for excluding 2020 DV selectees entirely. ECF 195-1 at 36-38. These arguments are without merit. The State Department has the authority to issue guidance with respect to national interest exceptions and neither 8 U.S.C. § 1104(a), nor 8 U.S.C. § 1201(a)(1)(A), or any other statutory provision grants authority to any consular officer to make his or her own *ad hoc* determinations as to what may qualify as being in the "national interest." Similarly, the *Gomez* Plaintiffs' contention that the NIE guidance purportedly lacks an "intelligible standard" and purportedly does not treat

similarly situated individuals similarly is nothing more than a disagreement with the NIE guidance and the State Department's distinctions within it. Lastly, the NIE guidance did not, and does not, exclude DV applicants. DV applicants have always had the ability to seek such an exception, and recently, the State Department granted NIE waivers to FY2020 DV holders. *See* ECF 208; ECF 216. For these reasons, the government is entitled to summary judgment on Plaintiffs' challenge to the NIE guidance.

G. Plaintiffs' procedural claims under the APA and mandamus fail as a matter of law.

Revocation of Proclamation 10014 has rendered moot Plaintiffs' procedural claims under the APA and mandamus because since February 24, 2021, the Plaintiffs who were issued DVs can immediately seek admission into the United States. Even if these procedural claims were not moot, they fail as a matter of law and the government is entitled to summary judgment on them. *See* ECF No. 189-1 at 36-40 (applying the *TRAC* factors and explaining why, as a matter of law, Plaintiffs' claims under 5 U.S.C. § 706(1) fail, and explaining why Plaintiffs' mandamus claims are duplicative of the APA procedural claims and fail for similar reasons).

Plaintiffs disagree, asserting that they make valid claims for unreasonable delay, the unlawful withholding of agency action, and for mandamus as it relates to the State Department's processing of FY 2020 DV applications. *See* ECF 196-1 at 15-20; 195-1 at 38-44.[12] But Plaintiffs' contentions are nothing more than their assertion that the State Department should have prioritized the processing of FY 2020 DV applicants over other categories of visa applicants. *See* ECF 196-1 at 18. As a result, as the government argued in its opening brief, ECF 189-1 at 36-40, Plaintiffs'

[12] To be clear, the *Gomez* Plaintiffs recognize that mandamus relief is not appropriate if they receive relief under 5 U.S.C. § 706(1). *See* ECF 195-1 at 44 ("Should the Court again conclude that another adequate remedy is available, Plaintiffs would not object to summary judgment for Defendants on this claim").

claims under 5 U.S.C. § 706(1) and mandamus fail as a matter of law. *Tate*, 2021 WL 148394, at *10 (rejecting a similar claim by O visa applicants who argued that their adjudications were "'deprioritized' relative to the issuance of other visa categories"); *see also Milligan v. Pompeo*, No. CV 20-2631 (JEB), 2020 WL 6799156, at *10 (D.D.C. Nov. 19, 2020) ("The Court sympathizes with the frustrating and often painful situations Plaintiffs are enduring, but it believes that the government's interests in balancing its own priorities, in ensuring careful vetting, and in navigating the varied challenges this global pandemic presents outweigh Plaintiffs' interests in an immediate adjudication of their visas") (citations and quotation marks omitted).

The State Department did not have any nondiscretionary duty to prioritize the adjudication of FY 2020 DV applications over the processing of other visa applications or providing mission critical consular services, especially because DV applicants were barred from entry into the United States under Proclamation 10014. *See generally*, *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1101 (D.C. Cir. 2003) ("We agree with the Secretary that the district court erred by disregarding the importance of there being competing priorities for limited resources") (quotation marks omitted); *In re Barr Lab'ys, Inc.*, 930 F.2d at 76 (explaining that an agency is in the best position to allocate its resources "in an optimal way").

Further, Plaintiffs' conclusory allegations that the State Department acted in bad faith, ECF 196-1 at 20, ECF 195-1 at 41-42, are wrong. And this Court has already disregarded this baseless assertion by the Plaintiffs. *See* Order, ECF No. 151 at 13 ("The court acknowledges and appreciates the hard work undertaken by many State Department employees to process the huge backlog of diversity visa applications[.]"). The State Department took steps necessary to ensure the safety of Department employees and acted properly in the face of the quickly developing pandemic. *See Milligan*, 2020 WL 6799156, at *9 ("Plaintiffs collectively target delays that began eight months

ago, in March, when U.S. Embassies and Consulates around the world shut down. This timeline alone provides no basis for judicial intervention"); *see also, Tate*, 2021 WL 148394, at *3 (recognizing that "[v]isa processing remain[ed] limited around the world due to COVID-19 restrictions, including limits on public gatherings, imposed by host governments … and limited post staffing because of COVID-19 illness and quarantine") (citation omitted). Moreover, the State Department developed and disseminated implementing guidance pursuant to the Court's Order on September 4, 2020, *see* ECF 123, to more than 200 consular posts worldwide, amid a worldwide health emergency, in five calendar days (which included a federal holiday). For these reasons, Plaintiffs' claims under 5 U.S.C. § 706(1) and mandamus fail as a matter of law.

Likewise, Plaintiffs' claims regarding any purported APA notice and comment rulemaking violation are moot, and if not, they fail as a matter of law. The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs claim that the State Department was required to engage in APA notice-and-comment rulemaking before it could suspend consular services due to the pandemic. *See* ECF 196-1 at 14. The government addressed this claim in its summary judgment brief, ECF 189-1 at 40-42, providing authority that the State Department's public guidance regarding the suspension of routine visa services due to the COVID-19 pandemic "merely provided information and did not establish any rules or requirements," and thus amounted to "informal communications between agencies and their regulated communities that are vital to the smooth operation of both government and business." *Id.* at 41 (quoting *Valero Energy Corp. v. EPA*, 927 F.3d 532, 538 (D.C. Cir. 2019)). The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs do not provide any meaningful response to the government's argument on this point, asserting without any elaboration that even if "there was authority to suspend visa adjudication, the Defendants have not met the requirements for any exception to the APA's requirement of Notice and Comment Rulemaking." ECF 196-1 at 14. This

is wrong because even if the guidance amounted to more than an informal communication, the State Department's decision on whether to suspend services concerns consular affairs and the operation of foreign posts squarely fit the formal rulemaking exception involving the "foreign affairs function of the United States" under 5 U.S.C. § 553(a)(1).

The government is thus entitled to summary judgment on the Plaintiffs' procedural claims.

H. The Court should dismiss Plaintiffs' challenge to Proclamations 9645 and 9983 as moot.

The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs "ask this Court to order Defendants to resume processing for DV-2020 selectees who were denied" based on the travel ban proclamations. ECF 196-1 at 23. On January 20, 2021, the President revoked the travel ban proclamations, rendering this claim moot. Proclamation No. 10141, 86 Fed. Reg. 7,005. There is no longer any live case or controversy on this claim and the Court should dismiss it as moot. *See* Exhibit A, Order, *Kavoosian v. Blinken*, No. 20-55325 (9th Cir. Feb. 9, 2021), ECF 30.

As this Court has explained, "[e]ven where a case, or a claim within a case, involves a live controversy when filed, the mootness doctrine requires federal courts to refrain from rendering a decision 'if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Wilson v. James*, 139 F. Supp. 3d 410, 423 (D.D.C. 2015) (Mehta, J.) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990)). This aspect of mootness is especially relevant where a challenged policy has been altered. *See, e.g.*, *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1432 n.27 (D.C. Cir. 1984) ("There is no question that a case can be mooted by promulgation of new regulations or by amendment or revocation of old regulations."); *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) ("The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed. A new system

is now in place. We therefore must vacate this aspect of the district court's decision as moot."). And "[a]lthough exceptions to the mootness doctrine exist, Plaintiff has not raised any of them here." *Wilson*, 139 F. Supp. 3d at 423 (citation omitted)(citing *Clarke v. United States*, 915 F.2d 699, 703 (D.C. Cir. 1990)). The same treatment is due here because the "Plaintiff[s] already ha[ve] received the relief [t]he[y] seek[,]" the elimination of an entry bar's applicability to visa adjudications. *Id.* at 423.

Here, because the President has revoked the travel ban proclamations, *see* Proclamation No. 10141, 86 Fed. Reg. 7,005, Proclamations 9645 and 9983 are no longer an impediment to DV Plaintiffs from the previously affected countries. The Court should therefore dismiss this claim as moot. *See Wilson*, 139 F. Supp. 3d at 423.

I. The State Department is Statutorily Barred from Providing FY 2020 Diversity Visas after September 30, 2020.

In its September 30, 2020 Order, this Court ordered the State Department to hold 9,095 DV-2020 visa numbers for class members pending the outcome of the parties' cross-partial summary judgment briefing. *Gomez v. Trump (Gomez II)*, No. 20-CV-01419 (APM), — F. Supp. 3d. —, 2020 WL 5861101, at *12 (D.D.C. Sept. 30, 2020). Plaintiffs request that the State Department now process DV-2020 selectees' applications until those "reserved" DV numbers are used up. *See* ECF 196-1 at 23; ECF 195-1 at 44. The INA, however, bars the State Department from issuing any FY 2020 diversity visas after the close of the fiscal year. *See* 8 U.S.C. § 1154(a)(1)(I)(ii)(II); *see also Iddir v. INS*, 301 F.3d 492, 500–01 (7th Cir. 2002). Thus, a court order requiring the State Department to issue any FY 2020 diversity visas after ruling on partial summary judgment would amount to a request that the State Department take action contrary to law. The Court cannot properly issue such an order.

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

Defendants cannot issue diversity visas after the end of the fiscal year. Section 1154 clearly states that "[a]liens who qualify, through random selection, for a [diversity] visa under section 1153(c) … 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)(II) (emphasis added); *see also* 22 C.F.R. § 42.33(a)(1) ("Under no circumstances may a consular officer issue a [diversity] 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(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)).

The Eleventh Circuit made this clear nearly two decades ago in *Nyaga v. Ashcroft*. *See* 323 F.3d 906, 909, 915 (11th Cir. 2003) (per curiam) (citing 22 C.F.R. §§ 42.33(a)(1), (e), & (g)) (holding that consistent with Congress's "inten[t] to place an ultimate deadline on visa eligibility in order to bring closure to each fiscal year's diversity visa program," "[t]he State Department has promulgated regulatory provisions that … prevent the issuance of [diversity] visas … after midnight of the final day of the relevant fiscal year"). Much like these Plaintiffs, the *Nyaga* plaintiffs sought an order to compel government officials to adjudicate their DV applications after the end of the relevant fiscal year. *Id.* at 915–16. And much like this case, the district court granted that relief. *See Nyaga v. Ashcroft*, 186 F. Supp. 2d 1244, 1256–57 (N.D. Ga. 2002). As Plaintiffs in this case seek, the *Nyaga* district court required the agency to adjudicate the applicant's "diversity visa application … on the merits as if [the relevant] fiscal year … had not yet expired."

Id. This was wrong and the district court was reversed because of the DV program's temporal limitation. *Nyaga*, 323 F.3d at 914. Courts across the country have embraced that reasoning. *See, e.g.*, *Mwasaru v. Napolitano*, 619 F.3d 545, 550–51 (6th Cir. 2010) (agreeing with *Nyaga* and noting that "[a]ll circuits that have addressed this issue have read the plain language of 8 U.S.C. § 1154(a)(1)(I)(ii)(II) in the same way even in the wake of what may seem to be harsh results"); *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006) (similar); *Carillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003) (similar); *Keli v. Rice*, 571 F. Supp. 2d 127, 132 (D.D.C. 2008) ("The plain language of the statute makes clear that 'eligibility for a [diversity visa] ... ceases at the end of the fiscal year'" (quoting 22 C.F.R. § 42.33(a)(1)).

Indeed, a similar result was issued a year prior to the *Nyaga* decision in *Iddir*, 301 F.3d at 500. Much like this case, the plaintiffs in *Iddir* sought a writ of mandamus to compel the former Immigration and Naturalization Service ("INS") to adjudicate their adjustment-of-status applications under the DV Program. *Id.* at 493–94. As described above, such applications must be completed and adjudicated before the end of the fiscal year. *Id.* Although the plaintiffs had completed their applications on time, the INS failed to adjudicate them within the one-year statutory window. *Id.* at 494–95. The INS thus argued on appeal that it "[could not] issue the visas regardless of the outcome of any adjudication" because it was past the relevant fiscal year. *Id.* at 500. The Seventh Circuit affirmed the dismissal of the plaintiffs' case because "the relief the[y] … s[ought wa]s illusory, because even if the INS adjudicated the applications today, visas could not be issued." *Id.* The Seventh Circuit justified this ruling by pointing to how "the statute *unequivocally* states that the applicants only remain eligible 'through the end of the specific fiscal year for which they were selected.'" *Id.* at 501 (emphasis added) (quoting 8 U.S.C. § 1154(a)(1)(I)(ii)). Based on this deadline, the court concluded that "the INS lacks the statutory

authority to award the relief sought by the plaintiffs." *Id*. The only other court of appeals to consider the INA's temporal deadline as a merits question turned out the same way. *See Coraggioso v. Ashcroft,* 355 F.3d 730, 734 (3d Cir. 2004) ("If Congress had used different language, our analysis may be different. We are compelled, however, to interpret the statute as written.").

2. Principles of Equity Cannot Override the INA's Temporal Constraints.

This case is now in a very similar posture to *Nyaga* and *Iddir* because the relief Plaintiffs seek from the State Department is statutorily forbidden in FY 2021. Although this case has a convoluted procedural history, that does not mean that the APA allows this Court to now go back in time to perform a "re-do" of the FY 2020 DV Program for these particular Plaintiffs. *See Zixiang Li v. Kerry*, 710 F.3d 995, 1002 (9th Cir. 2013) ("Since courts are not time machines, [they] are unable to order [the agency] to go back in time[.]"). And under D.C. Circuit precedent, courts may not award such relief where agency performance is statutorily impossible. *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2018). This is because Article III courts' powers in equity do not allow it to disregard statutory temporal limits or stop the passage of time.

The argument to the contrary hinges directly on how this Court's action prior to the close of FY 2020 somehow preserves the ability for the Plaintiffs to ignore the statutes enacted by Congress in order to obtain their requested relief. But as Judge Wilkins explained in *American Hospital Association*, "a court may not require an agency to break the law." 867 F.3d at 167 (citing *Ala. Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979); *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974)); *see also United States ex rel. Newman v. City & Suburban Ry. of Wash.*, 42 App. D.C. 417, 420–21 (D.C. Cir. 1914) ("In the absence of such express authority, the writ here sought, if issued, would be a nullity. *It is of no concern that delay may be imputed to the railway*

company, since the duty sought to be imposed has been made by act of Congress impossible of performance. *The writ of mandamus will not issue to compel the performance of that which cannot be legally accomplished*." (emphases added)). What was true more than a century ago is still true today: "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)). Moreover, "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Id.* (quoting *INS v. Pangilinan*, 486 U.S. 875, 883 (1988)). So too here.

In this case, the Plaintiffs would have the Court direct the State Department to treat their past applications "as if" they were still in the same temporal window. But that temporal window has now come and gone, and Congress made that dispositive in the plain statutory text. *See, e.g.*, *Zixiang Li*, 710 F.3d at 1002 ("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"). This principle applies even to diversity visas for plaintiffs outside of the United States. "[C]ourts have consistently recognized that they are not necessarily empowered to relieve would-be immigrants from the profound frustration and disappointment that the [DV] process can create[.]" *Smirnov v. Clinton*, 806 F. Supp. 2d 1, 24 (D.D.C. 2011), *aff'd*, 487 F. App'x 582 (D.C. Cir. 2012). "[W]hen midnight strikes at the end of the fiscal year, those [DV] applicants without visas are out of luck. Although

this deadline may appear unforgiving, this strict interpretation of the DV statute has been adopted by every circuit court to have addressed the issue.... Plainly stated, the mandamus and declaratory relief sought by [the plaintiff]—the *nunc pro tunc* processing of his Diversity Visa application after the relevant fiscal year—is statutorily barred." *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276, 282–83 (D.D.C. 2018), *aff'd sub nom.* 2018 WL 5919254 (D.C. Cir. Oct. 19, 2018) (citations and quotation marks omitted)).

The two cases Plaintiffs have relied upon may appear to provide an exception to this rule, but those courts issued their orders to adjudicate or process visas *prior* to the expiration of the statutory time frame with the reasonable expectation that they would be executed. In other words, "Congress provides the Court with jurisdiction to order [the government] to adjudicate the plaintiffs' status *while* [the agency] still maintains the statutory authority to issue the visas." *Perejoan–Palau v. USCIS*, 684 F. Supp. 2d 225, 230 (D.P.R. 2010) (emphasis added) (citing *Iddir*, 301 F.3d at 501 n.2). The plain language of Section 1154 therefore precludes Plaintiffs from receiving any redress for their alleged injuries.

Plaintiffs and this Court have cited *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999), and *Przhebelskaya v. U.S. Bureau of Citizenship & Immigration Servs.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004), for the proposition that judicial intervention prior to the end of a fiscal year may allow for a different remedial outcome. The government believes those cases were wrongly decided given the congressional command in the statute. In any event, those cases relied on the court's inherent authority to vindicate its orders—not equity overriding the plain language of a statute—and therefore provide no help to Plaintiffs here.

In *Paunescu*, the plaintiff was selected as a winner for the 1998 diversity-visa lottery program. 76 F. Supp. 2d at 898. The plaintiff submitted his paperwork on time and was told to

wait for the agency to adjudicate his application. *Id*. After complying with three separate requests to supply his fingerprints, the plaintiff filed an action on September 23, 1998 seeking a preliminary injunction and the court ordered the defendants two days later to "immediately complete adjudication of the applications for adjustment status … without delay and by no later than September 30, 1998." *Id*. (internal quotation marks and citations omitted). When the defendants failed to do so, the court cited the violation of its prior order to "immediately complete adjudication of the applications" as authority to order defendants to act, even though it was after September 30th. *Id.*; *see also Keli*, 571 F. Supp. 2d at 135 (noting that although "[i]t is … conceivable that a district court could maintain jurisdiction and reject a mootness challenge," this could only be done "if it took some affirmative action to *compel adjudication* of a DV application *within the fiscal year during which the aggrieved applicant was eligible*.") (emphases added)).

The same situation played out in *Przhebelskaya*, where the plaintiffs came into court shortly before the expiration of the fiscal year and sought to compel the agency to adjust their status. On September 24, 2003, the court issued an order compelling the agency to process plaintiffs' applications. 338 F. Supp. 2d at 400. After the defendants failed to process all of the plaintiffs' applications in a timely manner, the court compelled the government to adjust the status of certain plaintiffs whose applications had still not been processed—similarly relying upon the court's authority to enforce its order to adjudicate the applications before the end of the fiscal year: "The existence of a prior order to compel [adjudication] is the dispositive factor in a case such as this one." *Id*. at 404 n.6. *Przhebelskaya* does not help Plaintiffs because in that case "the plaintiffs had filed the complaint prior to September 30 *and* a court had granted an order compelling defendants to adjudicate their applications before September 30." *Mwasaru*, 619 F.3d at 552 (emphasis in original).

Even assuming those cases were correctly decided, the takeaway from *Paunescu* and *Przhebelskaya* is not that equity overcomes statutory limitations on relief, but rather that courts have inherent power to enforce their prior orders. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). "The [*Paunescu* and *Przhebelskaya* plaintiffs] had each convinced the district court[s] to issue … writ[s] of mandamus *while the Government still had time to review their application and issue a diversity visa*." *Gebre v. Rice*, 462 F. Supp. 2d 186, 190 (D. Mass. 2006) (emphasis added). Here, by contrast, there is no comparable order to adjudicate or issue visas in advance of the statutory deadline that could be enforced. Without such an order, this Court cannot direct the State Department to issue FY 2020 diversity visas when we are now well into FY 2021.

3. The Plaintiffs' Other Forms of Extraordinary Relief Should Likewise Be Rejected.

The *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs are equally wrong to argue that the Court should increase the number of reserved FY-2020 visa numbers "considering the bad faith of the Department of State." ECF 196-1 at 21. In support of their argument, Plaintiffs make numerous unsubstantiated allegations of bad faith without presenting any affirmative evidence in support. *Id*. at 21-23. But such allegations cannot suffice at summary judgment, especially where they are asking the Court to issue extraordinary relief based on sensational allegations. Absolutely no evidence of bad faith has been submitted. Moreover, expanding the number of visa numbers would run counter to the rationale for the Court's September 30 Order because it would increase visa numbers *after* the end of the fiscal year. Accordingly, the Court should disregard Plaintiffs' unsupported request for additional visa numbers.

Similarly, the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs request that the Court require the State Department to "reissue" diversity visas that expired before the Court's September 4, 2020 Order. ECF 196-1 at 24. But here again, they base this request on another unsupported

claim of Defendants' noncompliance with the Court's Order because the State Department has not issued replacement visas to DV-2020 holders whose visas expired after the close of the fiscal year. *Id*. But the Court never ordered that relief. Instead, in the September 4 Order, the Court ordered expired visas to be reissued through September 30, *Gomez I*, 485 F. Supp. 3d at 205, and the Court declined to issue further relief when requested do so in its September 30 Order. *See Gomez II*, 2020 WL 5861101, at *9. Moreover, the equitable relief that the Court ordered for the Plaintiffs under the All Writs Act, 28 U.S.C. § 1651(a) on February 19, 2021 largely makes this request irrelevant. *See* ECF 209.

To the extent Plaintiffs now request the Court "reissue" diversity visas issued during FY 2020 that expired before the February 19 Order would be inconsistent with the Court's determination that it lacked jurisdiction over any Plaintiff with an expired diversity visa because "those visa holders would lose standing to challenge the Proclamations." *Id*. at 5. And here again, relief that goes further would require the State Department to take action contrary to its statutory limits discussed above, as well as regulatory and administrative authorities limiting such visas to six months' validity. *See Panda v. Wolf*, No. 20-cv-1907, 2020 WL 5545554, at *4 n.3 (D.D.C. Sept. 16, 2020) (Mehta, J.) (noting the temporal limitations for nonimmigrant visas and citing 8 U.S.C. § 1201(c)(2)); *see also* 8 U.S.C. §§ 1153(e)(2), 1154 (a)(1)(I)(II); 22 C.F.R. § 42.74; 9 FAM 504.10-5.

Finally, the *Aker*, *Fonjong*, *Kennedy*, and *Mohammed* Plaintiffs request that if the Court orders processing of the reserved DV-2020 visa numbers, the named Plaintiffs in those cases should be given priority over the *Gomez* class members. ECF 196-1 at 25-26. The *Gomez* Plaintiffs oppose this relief, instead requesting that the State Department "adjudicate DV-2020 visa applications in the order in which those applications would have been adjudicated." ECF 195-1 at

45. The *Aker* Plaintiffs oppose the *Kennedy* Plaintiffs from being prioritized. ECF 196 at 2. The Court need not sort out how this prioritization could be worked out because the INA dictates that diversity visas "shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved." 8 U.S.C. § 1153(e)(2). Moreover, it is not clear how Plaintiffs would have the Court enforce this prioritization, particularly in light of Plaintiffs' failure to present any evidence of which or how many named Plaintiffs have standing at this stage.

Accordingly, the Court should disregard Plaintiffs' request, and if the Court orders that the 9,095 DV-2020 numbers be processed, the Court should enforce section 1153(e)(2)'s requirement that applications be processed in the random order established by the Secretary of State.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' partial summary judgment motions and instead grant summary judgment to the government.

Dated: March 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 15, 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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