IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, a Lawful Permanent Resident of the U.S.; MIRNA S., a Lawful Permanent Resident of the U.S.; and VICENTA S., a U.S. Citizen, Plaintiffs, v. DONALD J. TRUMP, President of the United States of America, et al., Defendants.	Civil Action No. 1:20-cv-01419

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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Plaintiffs respectfully move this Court to enter an immediate temporary restraining order preventing Defendants from enforcing Proclamation No. 10014, *Suspension of Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, 85 Fed. Reg. 23,441 (Apr. 22, 2020) (the "Proclamation") against visa applicants sponsored by Plaintiffs and other similarly situated United States citizen and lawful permanent resident parents, which applicants will turn 21 years old during the Proclamation's effective period. These minor children are currently eligible for visas, and have visas immediately available to them, but the Proclamation (as enforced by Defendants) forbids issuance of those visas. If these minor children do not receive visas and enter the United States before turning 21, they will "age out" of their current visa eligibility—meaning that they will lose the opportunity to immigrate for the foreseeable future, and that Plaintiffs and similarly situated individuals will lose the opportunity to reunite with their families—potentially for their lifetimes.

Plaintiff Domingo Arreguin Gomez's beneficiary Alondra, the eldest of the named Plaintiffs' beneficiaries, will turn 21 and age out on Monday, June 15, 2020. She must receive her visa and enter the country before that date to avoid aging out. Plaintiffs accordingly respectfully request that the Court issue its ruling on this motion as expeditiously as possible, but **not later than June 10, 2020**, in order to allow time for a visa to issue by June 12 (the last business day before Alondra's birthday). Plaintiffs respectfully propose the following briefing schedule, with a telephonic hearing to be held at the Court's convenience:

Defendants' Opposition: June 5, 2020

Plaintiffs' Reply: June 8, 2020[1]

[1] Pursuant to Local Civil Rule 7(m), Plaintiffs' counsel have conferred with counsel for Defendants. Defendants oppose the motion.

INTRODUCTION

Defendants' enforcement of the Proclamation is an affront to the foundational principles of our country's family-focused immigration system. To prevent irreparable harm, Plaintiffs respectfully request a temporary restraining order ("TRO") enjoining Defendants' enforcement of the Proclamation as it applies to visa applicants with approved visa petitions who are in danger of aging out while the Proclamation is in effect. Plaintiffs satisfy the threshold requirement of standing and are likely to succeed in proving that Defendants' implementation of the Proclamation violates the Administrative Procedure Act ("APA"): There is no evidence that Defendants undertook anything approaching the required level of consideration before reversing longstanding policy and determining to apply the Proclamation in a manner that will cause many 20-year-olds, including Plaintiffs' family members, to age out of their current visa eligibility. Had they done so, it is improbable that Defendants could rationally have concluded that excluding a finite number of young people from the country—potentially for decades, or even permanently—would have sufficient benefits to justify the immense suffering their policy imposes on a few individuals. The Proclamation, moreover, runs counter both to Congressional policy and to the State Department's Foreign Affairs Manual—which *requires* prompt decision of age-outs' visa applications.

In the absence of a TRO, Plaintiffs will suffer immense and irreparable harm as a result of Defendants' arbitrary and capricious determination to compel their families to remain separated, potentially for life, even though Plaintiffs' family members are otherwise eligible and eminently qualified to immediately receive immigrant visas and to enter the country as permanent residents. And the balance of equities tilts heavily in favor of relief: Neither Defendants nor the public has any valid interest in keeping Plaintiffs' beneficiaries out of the country for the sole and arbitrary reason that they happened to turn 21 at the wrong time. To avert that outcome, and to preserve the status quo as of April 22, Defendants' enforcement of the Proclamation should be swiftly enjoined.

BACKGROUND

A. The Immigrant Visa System

This case concerns the Executive Branch's unlawful administration of the visa-issuance system established through statute and regulation. Broadly speaking, and as relevant here, that system is designed to operate as follows. When a U.S. citizen or lawful permanent resident wishes to "sponsor" for entry into the country a foreign national living abroad (the "beneficiary"), the sponsor will generally file an appropriate visa petition with U.S. Citizenship and Immigration Services ("USCIS"). 8 U.S.C. § 1154(a). The sponsor may also petition for visas for certain relatives ("derivatives") of the principal beneficiary. *Id.* Provided that the petition is complete and meets all congressionally outlined eligibility criteria, USCIS will approve it. 8 U.S.C. § 1154(b). Once the petition is approved, USCIS will forward the visa petition for consular processing at the U.S. Department of State's National Visa Center ("NVC"). *Id.*; 22 C.F.R §§ 42.41-42.42; *see also* 9 FAM 504.1-2.[2] Because the number of immigrant visas authorized per year is limited, the NVC maintains queues for the various forms of visas; new applicants start at the back of the relevant line. 8 U.S.C. § 1153(e); 22 C.F.R. §§ 42.51(a), 42.52(a)-(c); 9 FAM 504.1-2(c)-(d). The NVC will not complete its processing of an application until the applicant completes the application process, *see* 22 C.F.R. §§ 42.61-68, 9 FAM 504.1-3(a), and a visa becomes available ("current") for the applicant through the appropriate queue. 22 C.F.R. § 42.54(a); 9 FAM 504.1-2(d). If and when a visa becomes available, the NVC notifies the appropriate consulate, which schedules an interview to confirm that the beneficiary is eligible and merits issuance of an immigrant visa. 22 C.F.R. § 42.73; 9 FAM 504.1-2(d); 9 FAM 504.1-3.

Within this broad framework, the Immigration and Naturalization Act ("INA") establishes

[2] "FAM" is the State Department's Foreign Affairs Manual, available at https://fam.state.gov/.

a complex system for determining the availability of immigrant visas to various classes of foreign nationals. In constructing this system, Congress's paramount goals included reunifying families, admitting immigrants with skills that are useful to the economy, protecting humanitarian interests, and promoting diversity. *See, e.g.*, *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005); *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980). Congress has sought to promote family unity by (among other things) authorizing 88,000 "family-sponsored" visas to be issued annually to spouses and minor children of lawful permanent residents ("F2A" visas), *see* 8 U.S.C. § 1153(a)(2)(A), and a minimum of 23,400 visas to married children of U.S. citizens ("F3" visas), *see id.* § 1153(a)(3). A principal visa applicant may seek visas for derivative spouses and unmarried minor children, so that they may immigrate together and preserve the unity of their family. *Id.* § 1153(d). Such derivative applicants receive the same immigration preferences as the principal. *See id.*; 9 FAM 502.2-3(C)(a).

Congress has further authorized annual issuance of up to 10,000 "U" nonimmigrant visas, for victims of crimes who aid law enforcement officials in investigating or prosecuting criminal conduct. *See id.* §§ 1101(a)(15)(U), 1184(p)(2)(A). Once a U visa has issued, its recipient (and any qualifying derivative family members who are already in the United States) may "adjust" his or her immigration status to that of a lawful permanent resident (*i.e.*, obtain a "Green Card"). *See id.* § 1255(m). After adjusting status and becoming a lawful permanent resident, a U-visa recipient may sponsor for an "SU" immigrant visa a qualifying derivative minor family member who remains outside of the United States. *See id.* § 1184(p)(7)(A); 9 FAM 402.6-6(K)(a). There is no limit to the number of SU visas that may be granted in any year. *See* 8 U.S.C. § 1101(a)(15)(U)(ii); 8 C.F.R. §§ 214.14(c)(5)(i), 214.14(d), 214.14(f)(6).

A great deal turns on whether a person seeking a visa is a "child," a term that the INA

generally defines to mean an unmarried person under the age of 21. *See* 8 U.S.C. § 1101(b)(1). For example, while the total number of visas that can issue to nationals of any given country is generally capped at 7 percent of the total number of visas issued in any given year, *id.* § 1152, minor children seeking F2A visas are generally not subject to the cap, *see id.* § 1152(a)(4)(A)(i). As a result, an F2A visa generally becomes available in less time than those in the "F2B" visa category for which unmarried *adult* children of lawful permanent residents are eligible.[3] Similarly, while there is no cap on the number of SU visas that may issue each year, the applicant must both receive the visa and enter the country before his or her 21st birthday, *see* 8 U.S.C. § 1184(p)(7); 9 FAM 402.6-6(K)(d)-(f); if she fails to do so, her eligibility expires and a new application under a different immigration rubric is required (if one is available). The same is true with respect to a minor child seeking a visa as a derivative of a parent's F3 visa: upon turning 21 he loses his eligibility and will have to seek a visa on another basis (if one exists). *See* 8 U.S.C. § 1153(h)(3).

A child who "ages out" of preferential visa eligibility may seek a visa through another avenue. But in even the best-case scenario, such an applicant is likely to face years of delays before a visa may issue. For example, a prospective F2A immigrant who ages out might be able to pursue an F2B visa instead (if he or she remains unmarried)—but the latter category authorizes only around 26,000 visas annually (one-third the number of F2A visas), *see* 8 U.S.C. § 1152(a)(4)(C); Wheeler Decl. ¶ 6, and is also subject to the 7 percent per-country cap of § 1152 (which does not apply to F2A visas). These restrictions combine to create a queue for prospective F2B immigrants that is at least several years long. *See* 8 U.S.C. § 1153(a)(3); Wheeler Decl. ¶¶ 6-9. Prospective F2B immigrants hailing from oversubscribed countries (such as Mexico, China,

[3] *See* U.S. Dep't of State, *June 2020 Visa bulletin* (Visa Bulletin), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_june2020.pdf.

India, and the Philippines) face a wait of several decades because demand for visas from these countries has far exceeded supply. *See* 8 U.S.C. § 1152(e); June 2020 Visa bulletin (https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_june2020.pdf).[4] Current estimates are that the wait time for an F2B immigrant from Mexico is now ***sixty-seven years***. Wheeler Decl. ¶ 9 (attached as Exhibit A). Recall that an F2B visa may be issued only to the *adult* child (21 or over) of a still-living lawful permanent resident. *See* 8 U.S.C. §§ 1153(a)(2); 1154(a)(1)(B); 1154(l).

Recognizing the inequity created by the "age-out" phenomenon, Congress enacted the Child Status Protection Act ("CSPA") in 2002. Under the CSPA, the child of a U.S. citizen cannot age out of any immigration category, provided that the citizen parent sponsored the child for an immigrant visa before the child turned 21. 8 U.S.C. §§ 1151(f)(1), (f)(4). The CSPA also provides a limited measure of protection to some children of lawful permanent residents and to some minor-child derivative applicants, who may in some circumstances be treated as under 21 for age-out purposes even after passing their 21st birthdays. *See* 8 U.S.C. § 1153(h).

The Executive Branch has also long recognized the problem of desirable and otherwise-qualified immigrants aging out of visa eligibility, and has for that reason prioritized children whose applications are "current" (*i.e.*, a visa is immediately available through the appropriate queue) but who are about to age out of immediate eligibility by turning 21. For example, consular officials are instructed they "***must*** process [SU visa] cases ***as quickly as possible*** when they are close to aging out," 9 FAM 402.6-6(K)(d) (emphases added), and that in the event of a crisis requiring

[4] Additionally, while an aged-out F2A applicant at least retains his or her "priority date" for purposes of placement in the F2B queue, an aged out SU or F3-derivative applicant must find another basis to immigrate and must begin an entirely new application process—putting him or her at the very back of the F2B line. *See* 8 U.S.C. § 1153(h)(3); 9 FAM 402.6-6(d)-(f).

limitations on immigrant visa services, consulates should "[m]ake provisions for age-out cases, expiring preferences, etc.," 7 FAM 1812.4-2.b(4); *see also* 9 FAM 502.2-3(C)(c)(1) (directing consular officers to pay "[c]areful attention … to cases where a derivative beneficiary's immigration status is likely to change" as the result of an age-out). Further, the State Department's settled practice (as explained in separate litigation by the Division Chief of the Office of Field Operations of the Bureau of Consular Affairs' Visa Office[5]) is to schedule visa interviews on an emergency basis when the beneficiary is approaching age 21, so that approved visas may issue before the applicant ages out. *See* Manning Decl. (attached as Exhibit B), Ex. B (submitted in *Doe v. Trump*, No. 3:19-cv-1743-SB (D. Or.)). Preventing age-outs has been viewed as so important that emergency interviews have remained available even during the COVID-19 pandemic. *See id*.[6] Thus, if a soon-to-be-21-year-old child is otherwise eligible for a visa, emergency consular processing normally enables the child to receive her visa and to enter the United States before he or she turns 21 and ages out.

B. The Proclamation and Its Implementation

On April 22, 2020, the President announced the Proclamation. Manning Decl., Ex. A. Citing the recent rise in unemployment due to the COVID-19 pandemic and strains on the health care system and consular resources, the Proclamation directs the suspension of virtually all

[5] Officers of the Bureau of Consular affairs are charged by statute with "powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. § 1104(a).

[6] *See also, e.g.*, U.S. Embassy and Consulates in Mexico, *Status of U.S. Consular Operations in Mexico in Light of COVID-19* (Apr. 13, 2020) ("Immigrant visa emergency appointment requests will be considered only when the applicant will age out of his or her case, or in case of emergencies."), https://mx.usembassy.gov/status-of-u-s-consular-operations-in-mexico-in-light-of-covid-19/.

immigration into the United States. *Id.* Preamble & § 1. The Proclamation became effective at 11:59 p.m. on April 23, 2020 (*id.* § 5), approximately 30 hours after the President signed it.

Although the Proclamation is initially scheduled to "expire 60 days from its effective date" (on June 22, 2020), it "may be continued as necessary" (*id.* § 4). Credible news reports reflect that the President "is expected to extend and expand" the Proclamation before its scheduled expiration.[7]

The Proclamation excepts from its general ban on immigration several discrete categories of potential immigrants, including persons already admitted as lawful permanent residents (Proclamation § 2(b)(i)), certain healthcare professionals (*id.* § 2(b)(ii)), and spouses and minor children of U.S. citizens (*id.* §§ 2(b)(iii), 2(b)(iv)). It also contains a vague, discretionary exception for immigrants "whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees" (*id.* § 2(b)(ix)), but provides no definition of "national interest" nor any guidance regarding what a prospective immigrant should show in order to satisfy this exception. The Proclamation makes no provision for individuals who are at risk of aging out of their current visa eligibility either during the Proclamation's initial effective period or during its expected extension.

The Proclamation does not purport to be self-executing. Instead, it directs other parts of the Executive Branch regarding administration of the programs under their respective auspices:

> Sec. 3. Implementation and Enforcement. (a) The consular officer shall determine, in his or her discretion, whether an immigrant has established his or her eligibility for an exception in section 2(b) of this proclamation.
>
> The Secretary of State shall implement this proclamation as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish in the Secretary of State's discretion.

[7] *E.g.*, Anita Kumar, *Trump expected to broaden foreign worker bans*, Politico (May 25, 2020), https://www.politico.com/news/2020/05/25/trump-broaden-foreign-worker-bans-276510.

> The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of aliens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish in the Secretary of Homeland Security's discretion.

Id. § 3 (paragraph breaks added). These delegations are consistent with the INA, which provides that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA], except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers." 8 U.S.C. § 1103(a)(1).

Although the Proclamation directs that the Secretaries of State and of Homeland Security "shall implement" its provisions pursuant to "procedures" to be issued under the Secretaries' delegated authority, neither Secretary has publicly announced any formal procedures. The closest they have come is posting to the State Department's website an announcement referring readers back to the Proclamation.[8] The announcement was last updated on April 23, 2020 (presumably before the Proclamation took effect at 11:59 p.m. that evening). The announcement noted that "[r]outine visa[] services have been suspended at U.S. posts worldwide," pursuant to a prior announcement issued on March 20, 2020.[9] But the April 23 announcement advised that, "as resources allow, embassies and consulates will continue to provide emergency and mission critical visa services for applicants"—making clear, however, that such services are limited to applicants

[8] U.S. Department of State—Bureau of Consular Affairs, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak* (last updated Apr. 23, 2020), https://travel.state.gov/content/travel/en/News/visas-news/Proclamation-Suspending-Entry-of-Immigrants-Who-Present-Risk-to-the-US-labor-market.html.

[9] U.S. Department of State—Bureau of Consular Affairs, *Suspension of Routine Visa Services* (last updated March 20, 2020), https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html.

"who may be eligible for an exception under this presidential proclamation," even if the applicant otherwise qualifies for immediate issuance of a visa.

Outside of the State Department's internet announcement, officials have made clear that the Executive Branch's settled policy is to prohibit the issuance of visas to otherwise-qualified applicants unless they are found to satisfy one of the Proclamation's discrete exceptions—and that this sweeping prohibition applies fully to children who will age out of their respective visa eligibility categories within the Proclamation's effective period. For example, after the plaintiffs in separate litigation pending in the U.S. District Court for the District of Oregon sought to enjoin the Proclamation as applied to such children, the Division Chief of the Office of Field Operations of the Bureau of Consular Affairs' Visa Office took the position in a sworn declaration that such a child may still request an emergency interview, but that a visa will not issue unless the child satisfies the interviewing consular officer that one of the Proclamation's narrow exceptions applies. *See* Manning Decl., ¶¶ 5-7; *id.*, Ex. B ¶ 4. Counsel for the government said the same thing at a telephonic hearing (*id.* Ex. C (4/29/2020 Hearing Tr.) at 8:4-6), and further affirmed that the Administration would not adopt a "categorical exception" for children at risk of aging out—reiterating that prospective age-outs are required to demonstrate eligibility for one of the Proclamation's exceptions "during the interview on a case-by-case basis" (*id*. at 31:3-9).[10]

While it is thus clear that the government has adopted a policy not to generally exempt potential age-outs from the Proclamation at issue here, that is not for lack of authority to do so. For example, on May 22, 2020, the Acting Secretary of Homeland Security (Defendant Wolf)

[10] The Oregon district court ultimately declined to issue an injunction on procedural grounds, without reaching the merits. Specifically, the court found an insufficient connection between the Proclamation and the claims underlying the suit, such that the Proclamation would not so "interfere with the Court's jurisdiction" as required to invoke the All Writs Act. *See Doe v. Trump*, 2020 WL 2061775 (D. Or. Apr. 29, 2020).

issued a directive granting a blanket exemption from four other COVID-related immigration Proclamations to "aliens who compete in professional sporting events…, including their professional staff, team and league leadership, spouses, and dependents." Manning Decl., Ex. E at 1. The Secretary based his directive on a "determin[ation] that it is in the national interest to except" professional athletes and other associated aliens from the proclamations at issue, which (like the Proclamation here) suspend the entry of foreign nationals and contain exceptions for individuals whose admission "would be in the national interest." *See id.* The Secretary cited a determination that "[p]rofessional sporting events provide powerful first- and second-order benefits to the national economy" and "also provide intangible benefits to the national interest, including civic pride and national unity." *Id.*

The government has not released any justification for the Proclamation at issue in this case, or the largely unannounced procedures through which it is being implemented, other than what is contained in the text of the Proclamation itself. In particular, there is no public evidence that the government considered the effect of applying the Proclamation to prospective immigrants who will age out of visa eligibility while the Proclamation is in effect.

C. The Plaintiffs and Their Families

Mirna S. is a U.S. lawful permanent resident of Mexican origin who resides in the Bronx. Mirna S. Decl. ¶ 1 (attached as Exhibit C). Mirna S.'s daughter M.T.S. is a 20-year-old Mexican national who will turn 21 on June 23, 2020. *Id.* ¶¶ 6, 10.[11] M.T.S. is a lifelong resident of Mexico,

[11] Because M.T.S.'s birthday is the day after the Proclamation is set to expire without an extension, her last day of eligibility for an SU visa (the last day she is less than 21 years old) is also the Proclamation's last effective day. There will be no point in time at which she will be eligible for her SU visa under the Proclamation as currently enforced.

but she and her mother have wanted to reunite in the United States ever since Mirna S. came to this country in 2006 to earn money to support M.T.S. and the rest of her family. *See id.* ¶¶ 2, 9.

Mirna S. was the victim of severe domestic violence in the United States, and assisted U.S. law enforcement with investigating and prosecuting her abuser. *Id.* ¶¶ 4-5. Based on her suffering and the aid she provided to law enforcement, Mirna S. obtained a U visa in 2013. *Id.* ¶ 5. Although Mirna S. filed a derivative visa application on behalf of M.T.S. in connection with her own U visa application, that effort failed through no fault of her own: Mirna S. was unable to locate M.T.S.'s father in Mexico in order to obtain his consent for M.T.S. to be issued a passport or to obtain sole custody, as would have been necessary given M.T.S.'s age at the time. *Id.* ¶ 7.

Mirna S. applied for a Green Card in July 2017, and received it in September 2018. *Id.* ¶ 8. Shortly thereafter, Mirna S. filed an I-929 petition to sponsor M.T.S. for an SU immigrant visa. *Id.* ¶ 10. USCIS approved the petition on June 27, 2019, allowing Mirna S. and M.T.S. to prepare and submit a visa application to the NVC. *Id.* ¶ 10. The NVC notified Mirna S. on December 13, 2019 that M.T.S. was ready to be scheduled for a visa interview at the U.S. consulate in Ciudad Juarez, Mexico. *Id.* ¶ 11.

However, it took months of prodding (including repeated efforts by the office of Mirna S.'s U.S. Senator, Kirsten Gillibrand) to persuade the consulate to schedule an appointment. Eatroff Decl. ¶¶ 4-11 (attached as Exhibit D). The consulate did not do so until May 13, 2020—after the Proclamation had been in effect for nearly three weeks. *Id.* ¶ 12. In scheduling the interview, the consulate advised Mirna S. that "approval of [M.T.S's] visa classification is currently suspended under" the Proclamation, such that "visa approval for this case will require a national interest exception." *Id.* ¶ 13. The consulate explained that "[t]here [was] no guarantee that this exception [would] be granted, even if the visa is otherwise issuable at the time of interview." *Id.*

M.T.S.'s visa interview took place on May 29, 2020. M.T.S. Decl. ¶ 17 (attached as Exhibit E). It lasted eight minutes. *Id.* Only M.T.S. herself was allowed to attend the interview, even though Mirna S. had traveled from the Bronx to Ciudad Juarez to support her daughter. *See id.* ¶ 16. The consular officer asked M.T.S. only a few personal questions: does she have a spouse or children (no); has she ever been to the United States (no). *See id.* ¶ 19. Although Mirna S.'s immigration attorney had submitted to the consulate a three-page document explaining why it would be in the national interest to admit M.T.S., and although M.T.S. provided the consular officer with a copy of the Complaint in this action, the officer did not ask any questions directed to the "national interest" exception, did not give M.T.S. an opportunity to explain why she might qualify, and did not explain what she could have done (or could yet do) to satisfy the exception. *See id.* ¶ 20; *id.*, Ex. A. At the conclusion of the eight-minute interview, the consular officer confirmed to M.T.S. that she met all of the requirements for issuance of an SU visa and had submitted all of the required documentation. *Id.* ¶ 21.

The officer nevertheless stated that the Proclamation alone foreclosed issuance of the visa, and that the officer did not know when the Proclamation would no longer be in effect such that a visa could issue. *Id.* ¶ 17. The officer provided M.T.S. with a notice that she had been found ineligible at this time to receive a visa under INA § 221(g), 8 U.S.C. § 1201(g). M.T.S. Decl. ¶ 21; *id.*, Ex. B. The notice states that her case is undergoing an unspecified administrative process, and that the consulate will send her a written notification via DHL when that process has concluded. *Id.* The officer told M.T.S. that the consulate will call her in one to two months if circumstances change (*id.* ¶ 21)—perhaps forgetting that M.T.S. will age out of SU visa eligibility in less than one month.

If M.T.S. ages out of her SU visa eligibility, immigrating to the United States would require her to pursue an F2B visa as a lawful permanent resident's adult daughter. *See supra,* pp. 5-6. Because of the limited number of visas available to immigrants from Mexico who fall in this category (and the huge backlog of applications that has built up as a result), she is likely never to become eligible for such a visa: Mirna S. is almost 45 years old and unlikely to survive the nearly seven-decade waitlist (*see* Wheeler Decl. ¶ 9), and if Mirna S. dies, M.T.S. will again lose her visa eligibility, *see* 8 U.S.C. § 1154(l); 8 C.F.R. § 205.1(a). Even in a best-case scenario in which the F2B queue moves much more rapidly than anticipated, it will be many years before M.T.S. could possibly join her mother in the United States. *See* Wheeler Decl. ¶¶ 9, 13. And maintaining F2B eligibility would require M.T.S. to refrain from getting married in the meantime. *See* 8 U.S.C. § 1153(a)(2)(B).

Mirna S. and M.T.S. have already been separated for 14 years. It would be an extreme burden on both of them for M.T.S. suddenly to lose her opportunity to immigrate for at least the foreseeable future. *See* Mirna S. Decl. ¶ 14; M.T.S. Decl. ¶ 23-24. Mirna S. has been desperate to have M.T.S. join her and her older daughter in the U.S. in part because of their fear that M.T.S. will be victimized by Mirna S.'s ex-husband, who verbally and physically abused both her and her children. Mirna S. Decl. 9; M.T.S. Decl. 4-7. M.T.S. lives in fear of Mirna S.'s ex-husband to this day. M.T.S. Decl. ¶¶ 3-4, 7-9, 11-12. The burden would only be exacerbated by the knowledge that the consulate conceded her visa eligibility, but denied relief essentially because the consulate failed to schedule an interview in the more than four months between the date her application was complete and the date the Proclamation went into effect.

Domingo Arreguin Gomez, like Mirna S., is a U.S. lawful permanent resident of Mexican origin. Gomez Decl. ¶ 1 (attached as Exhibit F). He resides in Romeo, Michigan. *Id.* Mr. Gomez

met his wife while visiting Mexico in 2010, and married her in April 2016. *Id.* ¶ 3. Mr. Gomez's wife, daughter, and four stepchildren are Mexican citizens. *Id.* ¶¶ 3-5.

Mr. Gomez filed a petition to sponsor his wife for an F2A immigrant visa on October 21, 2016. *Id.* ¶ 4. His daughter and four stepchildren were named as derivative beneficiaries of the petition. *Id.* ¶ 4. USCIS granted the petition on December 27, 2017 (*id.* ¶ 4), but at that time Mr. Gomez's family was only able to identify enough financial sponsors to complete the required Affidavit of Support for his wife, daughter, and two of his stepchildren (*id.* ¶ 5). Mr. Gomez therefore had to omit his then-18-year-old stepdaughter Alondra (his wife's daughter) from the visa application that he submitted to the NVC. *Id.* ¶ 5.[12] Therefore, although the visa application was granted in January 2020, Alondra had to remain in Mexico. *Id.* ¶¶ 5-6.

Alondra will turn 21 on June 15, 2020. *Id.* ¶ 7. She has a four-year-old son who is a U.S. citizen, and who is thus eligible to enter this country with her. *See id.* ¶ 7. But when Alondra turns 21, she will no longer be eligible for an F2A derivative visa. *See* 8 U.S.C. § 1153(h); Wheeler Decl. ¶ 16 . If she has not received a visa by then, her still-pending F2A derivative visa application will convert to an F2B application. 8 U.S.C. § 1153(h)(3); Wheeler Decl. ¶ 16. Although her converted F2B application would keep the same "priority date" as her original F2A application (*i.e.*, the date it was filed, October 21, 2016), *see id.*, she would still have to contend with the 60-plus-year F2B queue running from that priority date. *See* Wheeler Decl. ¶ 9.

The Gomez family was eventually able to locate a sponsor for Alondra and thus to gather the documentation necessary to finalize her application. *See* Gomez Decl. ¶ 8. On April 16, 2020, two months before Alondra's 21st birthday, Mr. Gomez's wife contacted the U.S. consulate in

[12] Mr. Gomez's fourth stepchild aged out of his F2A derivative visa eligibility before visas became available. Gomez Decl. ¶ 5.

Ciudad Juarez to schedule an emergency visa interview for Alondra. *Id.* ¶ 9. Unfortunately, the consulate refused to schedule an interview at that time because Alondra's Mexican passport had expired. *Id.* ¶ 9. The family took immediate steps to renew Alondra's passport, but faced delays (including a passport appointment cancelled by the Mexican government) caused by the COVID-19 pandemic. *Id.* ¶ 9.

Alondra was finally able to renew her Mexican passport on May 13, 2020. *Id.* ¶ 11. On that same day, she called the consulate seeking to schedule an emergency consular interview, but she was told to wait five business days for a response. *Id.* ¶ 12. Despite multiple attempts to follow up with the consulate, Alondra did not receive a response until May 22, 2020, at which time the consulate instructed her to file paperwork and pay the immigrant visa fee through the State Department's Consular Electronic Application Center ("CEAC"). *Id.* Alondra has since then attempted repeatedly to complete those steps, but her access to CEAC has been blocked. *Id.* Alondra and Mr. Gomez's attorney have contacted the NVC and the U.S. consulate in Mexico on an almost-daily basis since that time, but they have received no response. *See id.* ¶ 13; Belej Decl. ¶ 6 (attached as Exhibit G).

When Alondra is able to complete her application and to schedule a visa interview, she would (absent a TRO) still be subject to the Proclamation, and would thus be unable to obtain a visa unless she is able to satisfy the interviewer that she falls within one of the Proclamation's exceptions. *See, e.g.* M.T.S. Decl. ¶¶ 20-21. Apart from the Proclamation, Mr. Gomez's attorney is unaware of any reason why Alondra would be refused a visa. *See* Belej Decl. ¶ 7.

Mr. Gomez and his wife have a close relationship with Alondra, and she depends on them for support. *See* Gomez Decl. ¶ 14. Alondra is very busy working and attending school, and it is difficult for her to work, go to school, and provide care for her son. *Id.* ¶ 14. Before Mr. Gomez

and his wife returned to the United States earlier this year, Alondra relied on them for child care. *See id.* ¶ 14. Although Mr. Gomez and his wife speak to Alondra daily, they are no longer able to provide child care or to spend time with their daughter and grandson. *See id.* ¶ 14. They are anxious for Alondra and their grandson to join them in the United States, and they are devastated that they cannot be together even after obtaining visa approval and finding a sponsor. *Id.* ¶¶ 15-16.

Vicenta S. is a U.S. citizen of Salvadoran origin who resides in Council Bluffs, Iowa. Vicenta S. Decl. ¶ 1 (attached as Exhibit H). She filed an F3 visa petition as sponsor for her son on July 15, 2004; her grandson, W.Z.A., is one of several derivative beneficiaries of that petition. *See id.* ¶¶ 7, 14. USCIS approved the petition on February 10, 2006 (*see id.* ¶¶ 7, 17), but the family was unable to reach the front of the F3 queue and complete their visa applications until March 10, 2020 (*see id.* ¶ 17).

W.Z.A. is 20 years old, and will age out of his eligibility for an F3 derivative visa when he turns 21 on June 30, 2020. *Id.* ¶ 17. Vicenta S.'s attorney alerted the NVC and the U.S. Embassy in San Salvador to that fact, and in March (shortly after the family submitted their visa applications) the U.S. consulate contacted them to schedule their consular interview for April 30, 2020. *Id.* ¶ 17. But on April 1, 2020, the consulate cancelled the appointment on account of the COVID-19 pandemic. *Id.* ¶ 18. Vicenta S.'s attorney contacted the NVC and the Embassy multiple times between April 1 and April 20 to attempt to reschedule the interview, but the consulate never responded. *Id.* ¶ 20; Blackford Decl. ¶ 6 (attached as Exhibit I). When those efforts failed, Vicenta S.'s attorney contacted her Congressperson, Rep. Cindy Axne, on April 20. Vicenta S. Decl. ¶ 20; Blackford Decl. ¶ 7. Rep. Axne's office said it would look into Vicenta S.'s case the next day, April 21 (*id.* ¶ 7), but the President announced the Proclamation the day after

that. Vicenta S. has not been able to make contact with anyone at the consulate to reschedule the interview. *Id.* ¶ 9.

If W.Z.A. is unable to obtain a visa interview before his 21st birthday on July 30, he will age out of his F3 eligibility. *See* 8 U.S.C. §§ 1153(a)(3), 1153(d). The same will be true if his interview is scheduled while the Proclamation continues in effect, particularly if (as expected) it is extended: W.Z.A. will be ineligible for a visa unless he is able to persuade the interviewer that he falls within one of the Proclamation's exceptions. Neither Vicenta S. nor her immigration attorney is aware of any reason other than the Proclamation that the visa would fail to issue. *See* Blackford Decl. ¶ 10.

If the visa does not issue in time, W.Z.A. would be required to pursue a new F2B visa as the adult son of a lawful permanent resident—putting him at the back of the long F2B queue and subject to a waiting period of at least five years. While this expected waiting period is less substantial than the one facing prospective immigrants from Mexico (El Salvador is relatively less oversubscribed than Mexico for F2B visas), the additional delay of at least five years would still cause significant harm to Vicenta S. and her family. Vicenta S. is in poor health, and fears that she may not survive until her grandson is able to obtain another visa. *See* Vicenta S. Decl. ¶ 21.

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Plaintiffs' individual experiences highlight two glaring practical problems with the Proclamation and its implementation. *First*, the short window between the Proclamation's announcement and its effective date (approximately 30 hours) left visa applicants with no meaningful opportunity to seek and obtain expedited assistance before the border was closed to them. Most consular services had already been suspended due to the COVID-19 pandemic, and Plaintiffs' experiences show that scheduling even an "emergency" interview required months of effort (if it could be done at all). None of the Plaintiffs (nor any other prospective immigrant)

could possibly have secured and attended a visa interview on the single business day after the Proclamation was announced but before it went into effect.

Second, the only way for visa applicants like Plaintiffs' beneficiaries to get around the Proclamation's immigration ban (apart from obtaining judicial relief) apparently is to seek a "national interest" exception from the consulate—but Plaintiffs' experiences demonstrate that standard's utter indiscernibility. Every one of the Plaintiffs' prospective-immigrant relatives satisfies the requisites to obtain an immigrant visa under a category designated and created by Congress, and none of them has any red flags that would prevent a visa from issuing. The consulate even told M.T.S. as much. But despite M.T.S.'s seemingly sterling credentials, her perfunctory visa interview did not even touch on the "national interest" exception. And despite their similar records and emergency status, Alondra and W.Z.A. have been unable even to secure interviews—perhaps as a result of the State Department's determination only to afford "emergency … [visa] services for applicants who may be eligible for an exception under this presidential proclamation." *See supra* note 5. Plaintiffs' beneficiaries have been left completely without guidance regarding what the undefined "national interest" standard would require them to show, or even a genuine opportunity to make a showing—let alone an opportunity to develop, acquire, or document whatever traits, skills, experience, references, or other qualifications may be necessary.

LEGAL STANDARD

A motion for a TRO is governed by the same standards as a motion for a preliminary injunction. *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 81 (D.D.C. 2018); *Sterling Commercial Credit-Mich., LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d. 8, 12 (D.D.C. 2011). The Court should consider four factors: (1) the movant's likelihood of success on the merits; (2) irreparable harm to the movant; (3) the balance of equities; and (4) the

public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004).

ARGUMENT

Each of the relevant factors weighs strongly in favor of immediate injunctive relief in favor of the named Plaintiffs (and the proposed class), prohibiting Defendants from enforcing the Proclamation so as to deny visas to prospective immigrants with immediately available visas (*i.e.*, with "current" priority dates) who would age out of their current visa eligibility while the Proclamation is in effect. Plaintiffs' challenge to such enforcement of the Proclamation against Plaintiffs and others like them is likely to succeed under the APA, because (among other things) Defendants have arbitrarily and capriciously failed to consider important aspects of the problem or to offer any defense of their decision. Defendants' enforcement of the Proclamation against Plaintiffs and other similarly situated individuals will cause immense and irreparable harm if not enjoined: Should they age out, Plaintiffs will forever lose their present opportunity to obtain visas and rejoin their families, and will be left to face many years or even decades before they may again have the chance to immigrate. On the other side of the scale, there is no cognizable public interest in preventing a finite number of 20-year-olds with already-approved visas from entering the country to join their families. The balance of equities tilts decisively in favor of immediate relief.

I. PLAINTIFFS HAVE STANDING TO SUE

In a prior challenge to the Proclamation, this Court denied a TRO on grounds that the plaintiffs had failed adequately to demonstrate standing to sue. *See Nguyen v. U.S. Dep't of Homeland Security*, 2020 WL 2527210 (D.D.C. May 18, 2020). As the Court explained, "[t]o establish standing, a party must demonstrate: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by

a favorable decision." *Id.* at *3 (quoting *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 76 (D.C. Cir. 2020); internal quotation marks omitted). Only "one plaintiff must have standing to seek each form of relief requested in the complaint," *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); it is not necessary for *all* plaintiffs to have standing for a case to proceed. Unlike in *Nguyen*, each of the standing requirements is satisfied on the record here.

First, Plaintiffs here have identified "concrete," "particularized," and "imminent" injuries: Each of them has sponsored a visa beneficiary who will age out of his or her eligibility in the coming weeks rather than receive the visa for which he or she is qualified (and which is already approved). This impending loss of eligibility to receive an immediate visa, and Plaintiffs' consequent loss of opportunity to reunite with their family members in the United States, satisfy the injury requirement for Article III standing. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) ("a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact"); *infra* Point III (discussing injuries in detail).

Second, unlike the plaintiffs in *Nguyen*, Plaintiffs here have "adduced … evidence that their injuries are attributable to the Proclamation [and] its implementation and enforcement." 2020 WL 2527210 at *5. Specifically, Mirna S.'s daughter M.T.S. has attested that the consular officer at her visa interview told her directly that while she satisfied all of the ordinary requirements for an SU visa, her visa would not be granted solely on account of the Proclamation (and the State Department's implementation thereof). M.T.S. Decl. ¶ 21. Such facts leave it beyond dispute that Mirna S.'s foundational injury (the refusal to issue her daughter's visa leading to a threat that she will age out of eligibility) is directly traceable to Defendants' enforcement of the Proclamation.

Causation is also sufficiently established for all three Plaintiffs' beneficiaries by the facts that (i) the State Department "includes as 'mission critical or emergency services' the processing

of immigrant visa application cases where the applicant would soon turn 21 and age out of his or her immigrant visa classification" (Manning Decl., Ex. B ¶ 2; *see id.* ¶ 4 (that definition "has not changed")); (ii) the State Department has announced a policy to grant "emergency" consular services but only to applicants "who may be eligible for an exception under this presidential proclamation" (*see supra* note 4; Manning Decl., Ex. B ¶¶ 3-4); and (iii) Plaintiffs' beneficiaries' requests for emergency interviews have gone unfulfilled despite the fact that they are approaching their 21st birthdays (Gomez Decl. ¶¶ 12-13; Vicenta S. Decl. ¶ 20). Taken together, these facts establish a "substantial likelihood," *see Nguyen*, 2020 WL 252720, at *3, that the reason those beneficiaries have yet to receive "emergency" interview appointments, despite falling within the definition of applicants warranting "emergency" services, is the State Department's current policy of refusing even "emergency" visa services to applicants covered by the Proclamation. That is, the evidence in this case shows at least a substantial likelihood that Defendants' manner of enforcing the Proclamation is what is preventing Plaintiffs' beneficiaries from securing emergency interviews and thus their visas before they age out of their visa eligibility. That is enough to demonstrate standing at this stage.

Third, Plaintiffs' injuries would likely be redressed by a favorable decision in this case (provided that it is issued in time). Whereas the plaintiffs in *Nguyen* failed to establish redressability because they had not shown that they could obtain an interview (and because some of them had not completed their applications), *see* 2020 WL 2527210 at *6, Plaintiffs' beneficiaries here are differently situated. M.T.S. has already secured an interview at which she was told that a visa would have issued if not for the Proclamation, so there is every reason to believe that an injunction against further such enforcement of the Proclamation would lead to a visa issuing for her. And for reasons just stated, injunctive relief against Defendants' enforcement

of the Proclamation would redress all three Plaintiffs' injuries by removing the only apparent barrier to their beneficiaries being treated as "emergency" cases who would receive expedited interviews and processing in advance of their 21st birthdays. And because there is no other basis on the record to believe that any of Plaintiffs' beneficiaries would be denied a visa on the merits, the end result in each case would likely be issuance of a visa allowing the beneficiary to immigrate to the United States and thus to redress each Plaintiff's injury.

Plaintiffs have sufficiently established standing to sue on the facts of this case.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APA CLAIM

A. Defendants' Implementation and Enforcement of the Proclamation Is Arbitrary, Capricious, and Not in Accordance with Law

Plaintiffs are likely to succeed in showing that Defendants' implementation of the Proclamation is arbitrary and capricious, contrary to law, and in violation of the APA. It follows that this Court likely "shall" hold Defendants' actions "unlawful" and set them aside under the APA, 5 U.S.C. § 706. And for that reason, immediate relief in the form of a TRO is appropriate and necessary to protect Plaintiffs' interests. *See id.* § 705 ("the reviewing court … may issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings"); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (affirming preliminary injunction based in part on APA challenge to agency implementation of presidential immigration proclamation); *Doe v. Trump*, 288 F. Supp. 3d 1045 (W.D. Wash. 2017) (granting preliminary injunction based on APA challenge to agency implementation of executive order on immigration).

Specifically, Defendants have violated the APA in implementing the Proclamation by categorically applying it to 20-year-old visa applicants who are otherwise eligible for visas, and for whom visas are immediately available, but who will age out of their eligibility before the

Proclamation expires. Instead of implementing the Proclamation against such individuals—the result of which will be to arbitrarily strip many prospective immigrants of the opportunity to obtain a visa for the foreseeable future, if not forever—Defendants could have (just as an example) determined to invoke the Proclamation's "national interest" exception in order to save age-outs from this dire consequence, and to further Congressional policy to preserve the unity of families with minor children. But Defendants have done the opposite of that. Their refusal to issue visas and to permit entry to otherwise-approved applicants who will lose their eligibility during the pendency of the Proclamation is irrational and unlawful. The Court is likely to so find, and accordingly it should enjoin Defendants' enforcement of the Proclamation against Plaintiffs and class members.

First, Defendants' actions are "arbitrary" and "capricious," 5 U.S.C. § 706(2)(A), because Defendants have not justified the sudden change in their "longstanding earlier position," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). The Executive Branch's settled practice has long been to further Congress's goals (expressed in the INA and the CSPA) of promoting family unity by facilitating emergency visa processing to prevent individuals like the beneficiaries of Plaintiffs and other class members from aging out of eligibility for visas that are otherwise available. *See* Manning Decl., Ex. B ¶¶ 2, 4. But in late April, with hardly a day's notice, Defendants suddenly reversed course, deciding not just to delay but effectively to *prohibit* issuance of an entire class of visas *that are already approved and immediately available*.

Such a sharp change in position requires an agency to provide adequate reasons for its reversal. Indeed, "'[a] full and rational explanation' becomes 'especially important' when, as here, an agency elects to 'shift [its] policy' or 'depart[ ] from its typical manner of' administering a program." *Sw. Airlines Co. v. Fed. Energy Regulatory Comm'n*, 926 F. 3d 851, 855-56 (D.C. Cir.

2019) (quoting *Great Lakes Gas Transmission Ltd. Partnership v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993)). The agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Casa de Maryland v. U.S. Dep't of Homeland Security*, 924 F.3d 684, 703 (4th Cir. 2019); *accord Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 89 (D.C. Cir. 2020) (same principle); *Cigar Ass'n of Am. v. FDA*, 2020 WL 532392, at *9 (D.C. Cir. Feb. 3, 2020) (noting the "basic procedural requirement[] … that an agency must give adequate reasons for its decisions") (quoting *Encino Motorcars*, 136 S. Ct. at 2125). "***At a minimum***, an agency must 'display awareness that it is changing position and show that there are good reasons for the new policy.'" *Casa de Maryland*, 924 F.3d at 703-04 (quoting *Encino Motorcars*, 136 S. Ct. at 2126) (emphasis added); *accord Sw. Airlines*, 926 F.3d at 855-56 (agency changing position "must at least 'acknowledge' its seemingly inconsistent precedents and either offer a reason 'to distinguish them' or 'explain its apparent rejection of their approach'") (quoting *Tenn. Gas Pipeline Co. v. FERC*, 867 F.2d 688, 692 (D.C. Cir. 1989)).

To justify a change in position, the agency must address the "facts and circumstances that underlay or were engendered by the prior policy," ***including any "serious reliance interests."*** *Encino Motorcars*, 136 S. Ct. at 2126 (emphasis added). An "unexplained inconsistency" is reason enough to hold a change in policy to be arbitrary and capricious, and thus unlawful. *Id.* So is a "fail[ure] to consider an important aspect of the problem." *HIAS, Inc. v. Trump*, 415 F. Supp. 3d 669, 683 (D. Md. 2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, the court must undo its action." *Cigar Ass'n*, 2020 WL 532392, at *9.

Here, Defendants have failed to provide the requisite justification for their actions. Indeed, they have "said almost nothing" to justify their insistence on enforcing the Proclamation against visa applicants facing the prospect of aging out of eligibility. *Encino Motorcars*, 1366 S. Ct. at 2127. Neither the Proclamation itself nor the State Department's public guidance even mentions this issue, and nothing that the government has said in prior litigation or in connection with Plaintiffs' visa applications provides a justification either. Defendants have not even satisfied their "minimum" duty to "display awareness that [they are] changing position," and so cannot possibly have "show[n] that there are good reasons for the new policy." *Casa de Maryland*, 924 F.3d at 703-04.

Nor is there any evidence that Defendants considered the "facts and circumstances that underlay or were engendered by the prior policy" of granting visas to immigrants facing age-outs, *see Encino Motorcars*, 136 S. Ct. at 2126. Defendants appear from the barren public record to have entirely disregarded the "serious reliance interests" of individuals like Plaintiffs and their families, *see id.*: Each of the Plaintiffs has spent *years* diligently working through the visa system—in wholly justified reliance on the premises that the only relevant age-out deadline would be when their beneficiaries actually hit age 21, and that visa applicants approaching age 21 would be afforded an opportunity to complete an interview on an emergency basis. But despite having reached the culmination of that process, Plaintiffs and their visa-eligible relatives would under the Proclamation see their years of patient effort voided for no good reason. Defendants have shown no regard for Plaintiffs' reliance interests. Indeed, their utter lack of concern is highlighted by the speed with which the Proclamation went into effect—had Plaintiffs and other similarly situated individuals been given fair notice of the Proclamation, they could have made redoubled efforts to obtain emergency consular interviews and immediate review of their applications. But lacking

such notice, they reasonably relied on the longstanding practice of granting emergency interviews—only to have Defendants rip the rug out from under them at the last moment. Defendants' failure to give any consideration to these "serious reliance interests" is more than enough to void their decisions. *Id*.

Defendants' actions are also arbitrary and capricious for the related reason that their implementation of the Proclamation "fail[s] to account for … a matter of importance under the statute" (namely, the INA as amended by the CSPA). *Gresham v. Azar*, 950 F.3d 93, 102 (D.C. Cir. 2020) (deeming such a failure to be "[a] critical issue" and setting aside agency's action). Congress has made perfectly clear that it is "importan[t] under the [INA]," *id.*, to promote family unification. *See, e.g.*, *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (one of Congress's reasons for enacting INA's visa preference provisions was family unification); *Kaho v. Ilchert*, 765 F.2d 877, 879 n.1 (9th Cir.1985) (one of INA's basic objectives is to reunite families); *Kaliski v. Dist. Dir. Of INS*, 620 F.2d 214, 217 (9th Cir. 1980) ("the humane purpose of the [INA is] to reunite families"); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir.1977) (similar); *Mufti v. Gonzales*, 174 F. App'x 303, 306 (6th Cir. 2006) ("Congress's intent is clear: family unification is one of the highest goals of our immigration law"). The underlying purpose of all of the visa provisions at issue here is to further this goal, by allowing children to join their parents and grandparents in the United States. But again, Defendants have given no indication that they accounted for this crucial congressional goal when they determined to implement the Proclamation as they have done.

In short, Defendants have wholly failed, either in public or in private, to "give adequate reasons for [their] decision[]" to enforce the Proclamation against Plaintiffs and other class members. *Cigar Ass'n*, 2020 WL 532392, at *9. Based in part on a similar litany of agency "fail[ures] to adequately consider a number of critical factors," the District of Maryland recently

granted preliminary injunctive relief under the APA against several agencies' implementation of another immigration-related executive order. *HIAS*, 415 F. Supp. 3d at 683-64. The same result should obtain here.

Second, and related, Defendants also have not "articulated a satisfactory explanation for [their] action" inasmuch as there is no evident "rational connection between the facts found and the choices made." *Baystate*, 950 F.3d at 89 (citations omitted); *Casa de Maryland*, 924 F.3d at 703-04. Establishing such a connection appears impossible for the fundamental reason that there is no evidence that Defendants have "found" any "facts" relevant to the question whether the Proclamation should be applied to visa applicants like those at issue here. Nor is it likely that any *rational* connection could ever be made between the Proclamation's stated goals and Defendants' insistence on applying it to a finite number of 20-year-olds whose visas *Defendants themselves* have *already approved* and who will suffer irreparable harm if visas do not promptly issue:

- The Proclamation principally relies on the purported "impact of foreign workers on the United States labor market," but there is no basis to conclude that admission of finite number of individuals in Plaintiffs' circumstances will have any negative impact (let alone a *material* negative impact) on the labor market in a country of 330 million people. Certainly there is no *rational* basis for Defendants to have concluded that the hypothetical impacts on the economy are so substantial as to justify likely-permanent vitiation of Plaintiffs' interests in being reunited with their families, and the prospective immigrants' interests in living safely and securely in this country.[13]

[13] This is particularly true with respect to family-based visas (such as the F2A visa sought by Alondra and the F3 derivative visa sought by W.Z.A.), each recipient of which must prove that he

- The Proclamation also cites an asserted need to "conserve critical State Department resources," namely those of "consular officers," but there is no plausible basis to conclude that allowing potential age-outs to obtain emergency interviews will unduly burden consulates abroad. The State Department virtually concedes as much in stating that "embassies and consulates will continue to provide emergency … visa services" to applicants eligible for an exception to the Proclamation. Consulates could still offer "emergency" interviews to potential age-outs, just as they did before the Proclamation. Indeed, they have already granted an interview to M.T.S. And M.T.S.'s interview shows that cases like Plaintiffs' could be resolved with minimal expenditure of consular resources: it took only eight minutes for the consular officer to complete the interview and determine that the visa would have issued but for the Proclamation. M.T.S. Decl. ¶ 21.
- Finally, the Proclamation cites purported "strain on the finite limits of our healthcare system" created by immigrants, but there is again no evidence that admitting a finite number of presumably healthy 20-year-olds would materially contribute to any such "strain." The Administration has enacted a rule requiring most immigrants to demonstrate their ability to pay for medical insurance and foreseeable medical costs. *See* 9 FAM 302.8-2(B)(2).c. And of course there are many restrictions on the entry of foreign nationals who could strain the health care system by spreading COVID-19.[14]

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or she is not likely to become a "public charge" after admission—including by providing affidavits of financial support from one or more sponsors. *See* 8 U.S.C. § 1182(a)(4).

[14] *See* U.S. Dep't of State—Bureau of Consular Affairs, *Presidential Proclamations on Novel Coronavirus* (last updated May 26, 2020) (summarizing COVID-19-related travel restrictions),

The wholly disproportionate mismatch between Defendants' draconian enforcement "choices" and any set of facts they could plausibly have "found" to support them provides an additional compelling basis to conclude that their actions violate the APA. *See Baystate*, 950 F.3d at 89.

Third, the State Department's implementation of the Proclamation also violates the APA because it is in conflict with the Department's Foreign Affairs Manual. The FAM directs that consular officials "*must* process [SU visa] cases *as quickly as possible* when they are close to aging out," 9 FAM 402.6-6(K)(d) (emphases added), and that in the event of a crisis requiring limitations on immigrant-visa services, they should "[m]ake provisions for age-out cases, expiring preferences, etc.," 7 FAM 1812.4-2.b(4). Those requirements have not changed in the wake of the COVID-19 pandemic. The State Department's implementation of the Proclamation, however, directs that consular officers *cannot* process age-out visas *at all*, and so necessarily *cannot* "make provisions" to decide them "as quickly as possible." The Department's policy is thus contrary to its own guidelines.

Where, as here, a new agency action conflicts with a preexisting and unamended internal guideline, the new action is invalid under the APA. "[A]dministrative agencies are bound to follow their rules and guidelines[,] … however they might be denominated," and therefore "an agency can be sued [under the APA] for failing to abide by the rules and procedures it formulates to perform its duties." *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1020 (N.D. Cal. 2019). This includes, for example, "internal operating procedures" and "operations instructions." *Id.* (citing *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985)). The FAM plainly falls within this category,

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https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-coronavirus.html.

as it supplies procedures formulated by the State Department to guide consular officers in the performance of their duties. *See id.* Indeed, "'in the immigration context,'" the requirement that an agency adhere to its rules "'is not limited to rules attaining the status of formal regulation,'" but is properly "applied to internal agency guidance." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.D.C. 2018) (quoting *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991)); *accord Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 120-21 (D.D.C. 2020) (permitting APA claim based on State Department's failure to adhere to its own guidance and pronouncements); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations"); *Mayor & City Council of Balt. v. Trump*, 416 F. Supp. 3d 452, 503-09 (D. Md. 2019) (FAM supplies legislative rules subject to notice-and-comment rulemaking provisions). Because the FAM runs contrary to the State Department's current visa policy, the latter must give way under the APA.

Finally, Defendants' implementation of the Proclamation is also arbitrary and capricious because the lone escape hatch apparently available to individuals like Plaintiffs' beneficiaries—the "national interest" exception—is impermissibly vague. A vague rule "denies due process" (and thus necessarily violates the APA) "by imposing standards of conduct so indeterminate that it is impossible to ascertain" what the rule requires. *Hastings v. Judicial Conference of the U.S.*, 829 F.2d 91, 105 (D.C. Cir. 1987); *see Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993) (invalidating SEC rule because key terms were "subject to seemingly open-ended interpretation"). Defendants have provided zero public guidance as to the meaning of "national interest," what an applicant must show in order to qualify for the "national interest" exception, or how consular

officers are to evaluate "national interest" claims. The term has no common meaning in this context, so in the absence of some articulation of the relevant criteria, visa applicants like Plaintiffs have no meaningful opportunity to establish that they qualify for the exception. And under such a broad and undefined standard, the outcome of any case in which it may arise (*i.e.*, *every* case in which the Proclamation leaves an otherwise-approved visa applicant with no other route to relief) is doomed to be arbitrary. An unconstitutionally vague rule that will inevitably lead to arbitrary results cannot comport with the APA.

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For each and all of the reasons set forth above, Plaintiffs respectfully submit that the Court is likely to conclude that Defendants' implementation of the Proclamation is arbitrary, capricious, and not in accordance with law. Their action is therefore likely to be set aside. Defendants' current application of the Proclamation should accordingly be enjoined.

B. Defendants' Likely Counterarguments Fail

Defendants are likely to raise a number of arguments against subjecting their implementation of the Proclamation to APA review. None of them will succeed.

First, Defendants may argue that Presidential action is not reviewable under the APA. That is irrelevant, because the Proclamation is not self-executing: it delegates implementation authority to the Secretaries of State and of Homeland Security (§ 3), and it is *those* officials' conduct (and that of the agencies they direct) that Plaintiffs challenge under the APA. Agency action implementing an otherwise unreviewable presidential action is itself reviewable. *See, e.g.*, *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 120 (D.D.C. 2020) (collecting cases so holding); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) ("[T]hat the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into

question."). As the Ninth Circuit has "persuasively decided" in the context of a challenge to another immigration proclamation, *Moghaddam*, 424 F. Supp. 3d at 120, "officer suits against executive branch officials charged with carrying out the instructions contained in [a] Proclamation" are permissible under the APA. *Yavari v. Pompeo*, 2019 WL 6720995, at *6 (C.D. Cal. Oct. 10, 2019) (citing *Hawaii v. Trump*, 878 F.3d 662, 681 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 2392 (2018)).

Second, Defendants may argue that there is no "final agency action" subject to APA review, 5 U.S.C. § 704, because they have not published any rules implementing the Proclamation. But they would again be wrong. A formal rule is unnecessary to constitute "final agency action," for it is long settled that a "guideline or guidance may constitute final agency action" within the APA's "flexible and pragmatic" language. *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000). Even a letter suffices. *Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 437-38 & n.9 (D.C. Cir. 1986); *see also, e.g., Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 58-59 (D.D.C. 2019) (similar). Defendants may not insulate their actions from review by failing to disclose them to the public; their determination regarding how they will enforce the Proclamation is fully subject to judicial review under the APA. All that is needed is conduct demonstrating that Defendants have reached "the consummation of the … decisionmaking process" and have "determined" the "rights" of a class of visa applicants by establishing a rule or policy "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 156, 178 (1997) (citations and internal quotation marks omitted); *see Hawaii*, 878 F.3d at 681 (agency implementation of Presidential Proclamation relating to immigration was reviewable under APA).

Here, it is plain that Defendants have consummated their decision-making process regarding implementation of the Proclamation as to prospective immigrants who are approaching

their 21st birthdays. The State Department has stated publicly that only "applicants who may be eligible for an exception under this presidential proclamation" will receive visa services while the Proclamation is effective. *See supra* note 5. The Division Chief of the Office of Field Operations of the Bureau of Consular Affairs' Visa Office has stated in a sworn declaration that consular officers are conducting interviews only "where a post determines [that a visa] applicant may qualify for an exception under the Presidential Proclamation." Manning Decl., Ex. B. And M.T.S.'s individual experience bears out that the Proclamation is being applied to refuse visas to otherwise-eligible applicants who are facing the imminent prospect of aging out: the Consulate told her before the interview that on account of the Proclamation "[v]isa approval for this case will require a national interest exception … even if the visa is otherwise issuable at the time of interview" (Eatroff Decl. ¶ 13), and then the consular officer advised her that her visa could not be issued for the sole reason that the Proclamation precluded it (M.T.S. Decl. ¶ 21). The record could not be clearer that Defendants have decided to implement the Proclamation as a prohibition on immigration that extends even to individuals who qualify now for visas but who will age out before the Proclamation expires. That is a "final agency action" reviewable under the APA.[15]

Third, Defendants may argue that suit under the APA is barred under the doctrine of consular nonreviewability, which generally prohibits courts from reviewing an individual consular officer's final decision whether to grant or deny a visa. *See, e.g.*, *Saavedra Bruno v. Albright*, 197

[15] To the extent Defendants are construed to have engaged in *inaction* by declining to announce a general exception to the Proclamation's effect for intending immigrants faced with an age-out problem, the result is no different: Refusal to grant an exception to a facially applicable presidential directive would still represent reviewable "final agency action," because it "ha[s] the same impact as agency action." *Alliance to Save Mattaponi v. U.S. Army Corps. Of Eng'rs*, 515 F. Supp. 2d 1, 9 (D.D.C. 2007). Under these circumstances, the Court "can undertake review as though [Defendants] had denied the requested relief and can order [Defendants] to either act or provide a reasoned explanation for its failure to act." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987).

F.3d 1153, 1158-59 (D.C. Cir. 1999). But "the doctrine of consular non-reviewability does not apply where the government has not made a *final* visa decision." *P.K. v. Tillerson*, 302 F. Supp. 3d 1, 11 (D.D.C. 2017) (emphasis added) (citing *Nine Iraqi Allies Under Serious Threat v. Kerry*, 168 F. Supp.3d 268, 291-92 (D.D.C. 2016) and collecting other cases); *accord Vulupala v. Barr*, 2020 WL 601887, at *5 (D.D.C. Feb. 7, 2020) (same rule). While the doctrine may prevent courts from second-guessing "the merits of a 'decision to issue or withhold'" a visa, *Vulupala*, 2020 WL 601887, at *5 (quoting *Saavedra Bruno*, 197 F.3d at 1159), it does not preclude them from deciding legal questions otherwise within their jurisdiction before the merits of a given visa have been decided. *See id.* In particular, where a visa application "remains in administrative processing" under INA § 221(g) (8 U.S.C. § 1201(g)), there is no final decision that could theoretically be "reviewed," and the doctrine of consular nonreviewability does not foreclose consideration of antecedent steps taken by actors outside the consulate. *Vulupala*, 2020 WL 601887, at *5; *P.K.*, 302 F. Supp. 3d at 11; *Nine Iraqi Allies*, 168 F. Supp.3d at 291-92.

No final decision has been rendered in any of Plaintiffs' cases, and so the consular nonreviewability doctrine does not apply. This is plainly true as to Mr. Gomez and Vicenta S., whose beneficiaries have neither appeared at a consular interview nor received any documentation suggesting that their visa applications have been finally declined. And it is also true of Mirna S.: While M.T.S. attended an interview and was told that her visa had not been granted, the notice she received under INA § 221(g) did not purport to be a final denial. M.T.S. Decl. ¶ 21; *id.*, Ex. B. The notice stated instead that her case remains in "administrative processing," just as in *Vulupala*, 2020 WL 601887, at *5. The consular officer confirmed that her case had not been finally resolved, advising M.T.S. that the consulate would contact her within one to two months if circumstances had changed such that she regains visa eligibility. M.T.S. Decl. ¶ 21. And,

moreover, the Proclamation does not purport to require the *denial* of any visa applications, but instead only directs the temporary *suspension* of the admission of certain aliens. Manning Decl., Ex. A. While in the absence of an injunction the suspension's ultimate effect will be to foreclose visa issuance for age-outs, that foreclosure will occur by operation of law through the mechanical application of statutory age limits. It will not result from any merits decision by any consular officer. Consular nonreviewability accordingly has no application, even to M.T.S.'s application.

Moreover, Plaintiffs do not challenge any individual consular decision. Rather, Plaintiffs are challenging the *policy* by which Defendants are implementing the Proclamation. Consular nonreviewability does not bar such a challenge. *See Hawaii*, 878 F.3d at 680-82 (finding presidential proclamation issued under 8 U.S.C. § 1182(f) and agency action implementing the proclamation reviewable); *see also Trump*, 138 S. Ct. at 2407 (assuming without deciding that statutory claims challenging presidential proclamation are reviewable); *Emami*, 365 F. Supp. 3d at 1019 (holding that claims challenging agency implementation of presidential proclamation issued under 8 U.S.C. § 1182(f) "do not require review of an individual consular officer's decision" and are thus reviewable); *Doe*, 288 F. Supp. 3d at 1068-69 (finding presidential proclamation issued under 8 U.S.C. § 1182(f) and agency action implementing the proclamation reviewable).

***

For all these reasons, Plaintiffs are likely to succeed in their challenge to Defendants' ill-considered and irrational insistence on applying the Proclamation in a manner that will deprive Plaintiffs' child beneficiaries of their visa eligibility.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT IMMEDIATE INJUNCTIVE RELIEF

In addition to being unlawful, application of the Proclamation to Plaintiffs and other members of the class will undoubtedly cause irreparable harm in the absence of an immediate

injunction. To justify injunctive relief, a threatened injury must be "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm," *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (citations and internal quotation marks omitted), and it must be one "for which legal remedies are inadequate," *Jackson v. Dist. of Columbia*, 692 F. Supp. 2d 5, 7 (D.D.C. 2010) (citing *FERC*, 758 F.2d at 674). These requirements are amply satisfied here by the certainty that absent relief, Plaintiffs' loved ones will be denied visas for which they are eligible, and as a result will be prevented from joining Plaintiffs and their families for a prolonged and indefinite period that in many cases will be permanent.

As an initial matter, the threatened harm to Plaintiffs is plainly imminent: Alondra will age out of her visa eligibility upon turning 21 on June 15; the same will happen to M.T.S. on June 23; and the same will happen to W.Z.A. on June 30. There is nothing any of them can do to forestall their upcoming birthdays, which will trigger immediate legal consequences absent an injunction allowing them to obtain their visas before they hit their respective age-out deadlines.

As to the nature of the harm Plaintiffs face, it is well accepted that separation from one's family constitutes irreparable harm. No legal remedy (*viz.*, damages) can possibly compensate for the loss of the opportunity to spend time with one's daughter or grandson. *See*, *e.g.*, *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 62 (D.D.C. 2019) ("This Court has no doubt that there is no adequate legal remedy to make those who are forced to leave, or those who are left behind, completely whole in the wake of a forcible ejection without warning…."). And, because "[p]rolonged and indefinite separation of parents, children, siblings, and partners create not only temporary feelings of anxiety but also lasting strains on the most basic human relationships," courts routinely recognize that separation from one's family is an irreparable harm sufficient to support injunctive relief. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 320 (4th Cir.

2018), *vacated on other grounds*, 138 S. Ct. 2710 (2018); *see, e.g.*, *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) ("separation from family members … constitutes irreparable harm[]"); *Sanchez v. McAleenan*, 2020 WL 607032, at *7 (D. Md. Feb. 7, 2020) ("emotional harm of being separated" from family constituted irreparable harm); *Ragbir v. United States*, 2018 WL 1446407, at *18 (D.N.J. Mar. 23, 2018) (party's "separat[ion] from his wife, daughter, family, and community" if deported, contributed to a finding of irreparable harm); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) ("The right to live with and not be separated from one's immediate family is 'a right that ranks high among the interests of the individual'") (quoting *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982)).

The record here confirms that Plaintiffs will suffer severe hardship absent injunctive relief. At the outset, the family separation Plaintiffs face would be "[p]rolonged and indefinite," *Int'l Refugee Assistance Project*, 883 F.3d at 320, and perhaps even permanent: If they lose their current visa eligibility, M.T.S. and Alondra would have to contend with a delay estimated to be some ***67 years*** before they may again become eligible (Wheeler Decl. ¶ 9), and in the meantime Plaintiffs may well pass away. Even as to W.Z.A., the estimated five-year wait for Salvadoran immigrants (Wheeler Decl. ¶ 17) is both a "[p]rolonged" period of separation and in no way a guaranteed maximum. Moreover, W.Z.A.'s sponsor is his grandmother Vicenta S., who is aging and in poor health (Vicenta S. Decl. ¶ 8)—so she may not still be around even if W.Z.A.'s renewed visa application does become current in five years.

Plaintiffs' declarations illustrate the severe hardship that each of them will face if his or her family member ages out of visa eligibility. To Mirna S., it is already "incredibly painful for us, all survivors of domestic violence, not to be together to heal as a family," and it would be "devastating" for M.T.S. to lose her visa eligibility and thus to prolong the pain indefinitely. Mirna

S. Decl. ¶ 14. It would also be painful for Mirna S. to "be separated from M.T.S. in her young adulthood and much of her life as she grows up, builds an independent life for herself, possibly gets married and starts a family, and experiences the joys and sorrows of life." *Id.* Phone calls and WhatsApp messages are "no substitute for actually holding your daughter and knowing that, after years of trauma and fear, she is safe with you." *Id.* Mr. Gomez and his wife are similarly "anxious for [Alondra] to come live with us in the United States," and would be "devastated to be separated from our daughter Alondra and grandson for years and possibly decades." Gomez Decl. ¶¶ 14, 16. For her part, Vicenta S. "long[s] for the days when … W.Z.A. … can spend time with [her]." Vicenta S. Decl. ¶ 13. Given her age and declining health, "time is running out." *Id.* "After so much hardship in [their] family and such a long wait [to become visa eligible], it is incredibly painful for us not to be together all of these years later." *Id.* ¶ 21. It also "pains [Vicenta S.] as the grandmother not to be with [her grandchildren] in [her] last years of life and to see [her] son suffer because he is not allowed to see his children grow up." *Id.* Phone calls are "no substitute for actually being with your grandchildren and seeing your son happy knowing that his children are safe and sound in the United States with him." *Id.*

These significant harms will be compounded by irreparable injuries that will be suffered by Plaintiffs' families. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (affirming that courts can consider "indirect hardship to [immigrants'] friends and family members" to grant injunctive relief). Most obviously, the beneficiaries themselves would suffer irreparable hardship both by being denied entry to the United States at the last minute and for no good reason, and by losing the opportunity to reunite with their families. And those hardships would extend to other family members as well. Mirna S.'s older daughter is already in the United States, and also faces the threat of never being reunited with M.T.S. *See* Mirna S. Decl. ¶ 14. If Alondra's visa is not

granted, she may never again be able to live together with her mother—and both Alondra's mother and her U.S.-citizen son would also be deprived of the benefits of a close grandparent-grandchild relationship. Before Mr. Gomez and his wife returned to the United States, that relationship included regular child care when Alondra was in school (Gomez Decl. ¶ 14)—a benefit that redounds to both Alondra and her son, but which will be irretrievably lost if Alondra is unable to come to the United States in the near future. And if W.Z.A. is unable to secure his visa, it will impact not only W.Z.A. and Vicenta S., but also W.Z.A.'s father (Vicenta S.'s son)—who has lived in the United States since W.Z.A. was born and who has "missed [his son's] entire li[fe] waiting for the visa to become available." Vicenta S. Decl. ¶ 12.

Defendants can hardly deny that the loss of an opportunity for family unity is a severe and irreparable harm. They may argue that these harms should be disregarded, but they are wrong.

First, Defendants may assert that the Proclamation merely imposes a temporary "delay" on obtaining a visa in response to the COVID-19 pandemic and the economic downturn, and does not prohibit Plaintiffs' beneficiaries from entering the country at a later date. But while the Proclamation itself is supposed to last only so long as the President deems it necessary, there is no reason to think that either the pandemic or its effects on the economy will abate anytime soon. Indeed, the President is already expected to extend the Proclamation while expanding its scope.[16] More to the point, the harmful delays at issue here will arise by operation of law when Plaintiffs' beneficiaries turn 21—and they will not be short holdups of mere months until the end of the present crises, but *indefinite* delays of *years* and even *decades*. Such "[i]ndefinite delay … can rise to the level of irreparable harm." *Hawaii*, 878 F.3d at 698-99 (citing *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers)); *see, e.g.*, *Doe v. Trump*, 418 F. Supp. 3d

[16] *See* Kumar, *supra* note 3.

573, 598 (D. Or. 2019) (rejecting government argument that delay in issuing visas was not irreparable harm where such delay could have resulted in plaintiff's wife "be[ing] unable to return to the United States and live with him and their son").

Second, Defendants may argue that Plaintiffs' and their families' interests in reunification do not support injunctive relief because they could instead reunite in Mexico or El Salvador. But that is not a real choice for any of the Plaintiffs. Mirna S. has been living in the United States for 14 years (Mirna S. Decl. ¶ 2), and has built a life in the Bronx with her elder daughter. Moreover, returning to Mexico would put Mirna S. (and her older daughter) at risk of abuse by her ex-husband—indeed, one of the reasons Mirna S. is desperate to have M.T.S. join her in the United States is because her ex-husband "sexually abused" her older daughter when M.T.S. was four years old (Mirna S. Decl. ¶ 9) and "verbally and physically mistreated [M.T.S.] and [her] siblings" (M.T.S. Decl. ¶ 10). M.T.S. lives in fear he will try to sexually abuse her like he did her older sister (*id*. ¶ 8), "remain[s] afraid of him because of all the horrible things he did to me and my family" (*id*. ¶ 10), and is "desperate to leave Mexico in order to be far away from [him]," *id*. at 12.

Mr. Gomez has been a lawful permanent resident since 1990 (Gomez Decl. ¶ 1), and has recently moved his wife, daughter, and stepchildren to Michigan after years of effort to obtain visas for them (*id.* ¶¶ 3-6). And Vicenta S. is an elderly and infirm U.S. citizen who relies on her lawful permanent resident son to care for her and her husband. Vicenta S. Decl. ¶¶ 8-11. These Plaintiffs cannot simply uproot their lives to move to Mexico and El Salvador, in the process giving up their hard-earned rights to live happily in the United States. Requiring them to do so in order to reunite with their daughters and grandson would be its own form of irreparable harm. *See, e.g.*, *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 657 (E.D. Pa. 2017) (where government

action would force a choice between acquiescing in an unlawful requirement and giving up a valuable benefit, "[t]he choice itself demonstrates irreparable harm").

Third, Defendants may argue that any harm is in some sense speculative because in principle Plaintiffs could still obtain visas through the Proclamation's "national interest" exception. But the State Department's conduct in M.T.S.'s case—an eight-minute interview at which the official asked no "national interest" questions and made no reference to M.T.S.'s written submission on the subject, *see supra* p.12—has shown that nominal exception to be illusory. That revelation is confirmed by the fact that the other two beneficiaries have not even been permitted interviews. And even if interviews were granted, there is no guidance as to what "national interest" means in this context or how the exception could be satisfied, let alone an opportunity to develop whatever unspecified evidence may be required. The "national interest" exception as it stands is a mirage, and at present provides no viable avenue for relief from the harms that Defendants' implementation of the Proclamation will cause.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST WEIGH HEAVILY IN FAVOR OF INJUNCTIVE RELIEF

Finally, Plaintiffs have established that "the balance of the equities tip in [their] favor and that an injunction is in the public interest." *See Winter*, 555 U.S. at 20. Because the government is the opposing party here, these factors merge. *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 156 (D.D.C. 2018) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). In determining whether to grant relief, the Court should weigh the "competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.

Here, as just discussed, enforcing the Proclamation against Plaintiffs and other class members will cause significant and irreparable harms, including the long-term separation of families. But those injuries are not counterbalanced by any public benefit. The public, for

example, has no interest in separating families. *See Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663, 673 (N.D. Ill. 2015) ("[T]he public interest is seriously disserved by the [Plaintiff] family's separation."). And as explained above (*supra*, p. 28), there is no basis to conclude that enforcing the Proclamation against Plaintiffs' beneficiaries and a finite number of others in their position would further the Proclamation's stated goals. Certainly there is no basis to conclude that the economy would suffer harm from a provisional order enjoining application of the Proclamation to the three Plaintiffs' beneficiaries while the Court considers whether to issue broader relief.

Moreover, any insubstantial, speculative, and *temporary* impact on the labor market that Defendants may cite in support of the Proclamation is vastly outweighed by the specific and *permanent* harm that Defendants will visit upon Plaintiffs and other class members absent a TRO: Unlike other classes of potential immigrants, who in principle face only a minor delay in entry until the Nation's health and economy have recovered, intending immigrants like Plaintiffs are likely to lose entirely their opportunity to enter the country and to join their families for the foreseeable future.[17]

In fact, the public interest would be best served by granting a TRO and maintaining the status quo for the Plaintiffs and their class members. "There is generally no public interest in the perpetuation of unlawful agency action," *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016), and Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice," *Open Cmtys. Alliance v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017) (citation omitted). Conversely, "[t]he public interest is served … by ensuring that government agencies

[17] Moreover, and in contrast to the specific and permanent harm that Plaintiffs and their families will suffer if their beneficiaries are unable to immigrate, any imagined harm to the public interest from their entry into the country is both speculative and reversible: In the event that admission of an immigrant turns out in fact not to be in the public interest, the government could exercise its power to revoke his or her visa. *See* 22 C.F.R. § 42.82.

conform to the requirements of the APA." *Gulf Coast Mar. Supply, Inc. v. United States*, 218 F.Supp.3d 92, 101 (D.D.C. 2016), *aff'd*, 867 F.3d 123 (D.C. Cir. 2017); *accord League of Women Voters*, 838 F.3d at 12 ("there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations") (citation and internal quotation marks omitted). Enforcing the APA favors granting relief.

The balance of the equities here is exceptionally one-sided. Allowing Defendants to enforce the Proclamation against Plaintiffs and similarly situated class members would impose substantial and irreparable harms on a narrow class of individuals *who have already been approved for admission as immigrants into the country*—while at the same time visiting significant harms on their U.S.-resident families. Those private harms are not counterbalanced by any cognizable governmental interest. On these extraordinary facts, the balance of the equities and the public interest overwhelmingly weigh in favor of issuing a TRO.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court immediately issue a TRO preventing Defendants from implementing or enforcing the Proclamation against Plaintiffs' sponsored family members and other similarly situated visa applicants.

June 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused a true and correct copy of the foregoing to be provided to a process server for service upon the following by hand delivery on June 3, 2020:

U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA
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The undersigned hereby certifies that he has delivered a true and correct copy of the foregoing via postage pre-paid U.S. Mail to the following:

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