IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-01419
MOHAMMED ABDULAZIZ ABDUL MOHAMMED, et al., Plaintiffs, v. MICHAEL R. POMPEO, et al., Defendants.	Civil Action No. 1:20-cv-01856
AFSIN AKER, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-01926
CLAUDINE NGUM FONJONG, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-02128
MORAA ASNATH KENNEDY, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-02639

***GOMEZ* PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

In granting preliminary equitable relief, this Court ruled that "Plaintiffs are highly likely to succeed on the merits," *Gomez v. Trump*, 2020 WL 5367010, *34 (D.D.C. Sept. 4, 2020) (ECF 123) (*Gomez I*), because (among other things) Defendants "have not identified any statutory authority that would permit the suspension of th[e] ordinary process" of visa adjudication and issuance, *id.* at *29, and in fact "effectively abrogat[ed] Congress's policy for months through their unlawful and arbitrary actions," *Gomez v. Trump*, 2020 WL 5861101, *5 (D.D.C. Sept. 30, 2020) (ECF 151) (*Gomez II*). Defendants hardly acknowledge those decisions. Certainly Defendants offer no good reason to depart from the course that the Court has charted in *Gomez I* and *Gomez II*. And that course leads to summary judgment for Plaintiffs and the class they represent.

At the threshold, Defendants' sweeping "nonreviewability" argument has zero support. No case holds that *any* Executive decision having *anything* to do with visas is *ipso facto* insulated from judicial review. The rule instead is the one that this Court enunciated in *Gomez I*: Courts cannot second-guess a consular officer's exercise of discretion in denying a *particular* applicant's visa, but courts *can* direct the State Department "to provide a decision in the manner provided by Congress." 2020 WL 5367010, at *15 (collecting cases). This case falls in the latter category.

Defendants' merits arguments fare no better. Their defense of the No-Visa Policy runs headlong into *Gomez I*. As this Court explained, nothing in the INA (or anywhere else) permits the State Department to implement a Proclamation suspending ***entry*** under 8 U.S.C. § 1182(f) by ceasing to take the discrete antecedent step of processing ***visa*** applications. And particularly when applied to 2020 Diversity Visa Lottery (DV-2020) applicants, the No-Visa Policy is inarguably arbitrary and capricious—it gives no heed to the imminent expiration of these applicants' visa eligibility. Defendants would have this Court allow the Executive to arbitrarily turn a purportedly *temporary* entry suspension into a *permanent* revocation of diversity lottery winners' eligibility to

immigrate—effectively eliminating the annual diversity-visa program. Congress has given the Executive no such power.

Similar considerations doom the State Department's COVID-19 Guidance and Defendants implementation of the "national interest" exception to the Proclamations at issue. Defendants cannot overcome the APA's "strong presumption" of judicial review, *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 824 (D.C. Cir. 2020), nor can they identify anything in the administrative record suggesting that they even tried to account for the important and time-sensitive interests of the thousands of DV-2020 selectees who faced imminent expiration of their chance to immigrate. That is textbook arbitrary-and-capricious agency action.

This Court should carry through with the analysis set forth in *Gomez I* and *Gomez II*, and (given the absence of material factual disputes) should enter summary judgment for all Plaintiffs and the certified DV-2020 class. The Court should set aside Defendants' unlawful policies under the APA, so that the ordinary process of visa adjudication and issuance may resume. And specifically with respect to the DV-2020 class, the Court should invoke 5 U.S.C. § 706(1) to compel the State Department promptly to adjudicate DV-2020 applications and to issue visas to class members and their beneficiaries until all of the 9,095 reserved visas have been issued.

STATEMENT OF FACTS

A. Statutory And Regulatory Background

"Broadly speaking, a foreign national wishing to enter the United States must first obtain a visa from the State Department." *Gomez I*, 2020 WL 5367010, at *2. A foreign national may not obtain a visa if he or she "is ineligible to receive a visa under … section 1182." 8 U.S.C. § 1201(g). Persons who are "ineligible to receive visas" are principally described in § 1182**(a)**.

A visa-holder ordinarily may use the visa to seek admission ("lawful entry") into the United States. *See* 8 U.S.C. §§ 1101(a)(13)(A), 1181(a), 1225(a)(1). But § 1182**(f)** provides the President

power in some circumstances to suspend or to restrict ***entry*** into the country (emphases added):

> Whenever the President finds that the ***entry*** of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the ***entry*** of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the ***entry*** of aliens any restrictions he may deem to be appropriate.

In addition, § 1185(a)(1) allows the President to "prescribe" "reasonable rules, regulations, and orders" governing who may "***enter*** … the United States" (emphasis added). Neither § 1182(f) nor § 1185(a)(1) mentions ***visas*** or provides that any person is "ineligible" for a visa.

Three categories of visas are at issue here. *See Gomez I*, 2020 WL 5367010, at *2-3.

Diversity Immigrant Visas. Congress has reserved 55,000 "diversity" immigrant visas (visas allowing admission as a lawful permanent resident, 8 U.S.C. § 1101(a)(20)) each year to randomly selected individuals from countries with historically low levels of immigration. *See id.* §§ 1151(e), 1153(c)(1)(A). Eligible applicants enter a lottery held once each fiscal year. 8 U.S.C. § 1153(c); 22 C.F.R. § 42.33. Far more than 55,000 entries are received every year; more than 14.7 million applications were filed for the 2020 lottery.[1] A lottery winner (or "selectee") must complete a visa application and a medical examination, and must attend a consular interview. "[I]f he meets the criteria," the consulate will issue the visa. *Almaqrami v. Pompeo*, 933 F.3d 774, 777 (D.C. Cir. 2019); *see* 8 U.S.C. §§ 1153(c)(1), 1153(e)(2); 9 FAM 502.6-4. A selectee's spouse and unmarried minor children may immigrate as derivatives. 8 U.S.C. §§ 1151(e), 1153(d). A selectee "shall remain eligible" to receive a diversity visa only through the end of the federal government's fiscal year (September 30). *Id.* § 1154(a)(1)(I)(ii)(II).

A diversity visa (like other immigrant visas) "shall be valid for such period, not exceeding six months, as shall be by regulations prescribed." 8 U.S.C. § 1201(c)(1); *see* 22 C.F.R. § 42.72(a).

[1] *See* U.S. Dep't of State, Diversity Visa Program, DV 2019-2021: *Number of Entries During Each Online Registration Period by Region and Country of Chargeability*, https://bit.ly/3r7DtSP.

The State Department directs consular officers to "make sure to limit the validity of the visa to the validity of the [immigrant's] medical examination." 9 FAM 302.2-3(C).b. Medical examinations are valid for either three or six months, as determined by the Centers for Disease Control and Prevention based on particular medical conditions. *See id.* 302.2-3(C).a.

Family-Based Immigrant Visas. A U.S. citizen or lawful permanent resident (LPR) may "sponsor" a foreign-national relative (the "beneficiary") for an immigrant visa. 8 U.S.C. §§ 1151(a)-(c), 1153(a), 1154(a). But because demand for visas outstrips supply, most applicants must wait in a queue, which can take years or decades to clear. *See Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 48 (2014); 8 U.S.C. § 1153(e); 22 C.F.R. §§ 42.51(a), 42.52(a)-(c); 9 FAM 504.1-2(c)-(d). When the applicant reaches the front of the queue, he or she completes the visa application and attends an interview with a consular officer, who issues the visa upon finding that the beneficiary merits the visa. 8 U.S.C. § 1201; 22 C.F.R. § 42.73; 9 FAM 504.1-2(d), 504.1-3.

Nonimmigrant Visas. Nonimmigrant visas authorize individuals to enter the country on a temporary basis for work, study, and residence. Plaintiffs sponsoring H-1B "specialty occupation" visas (8 U.S.C. § 1101(a)(15)(H)) and J exchange visas (*id.* § 1101(a)(15)(J)) remain at issue.

B. The No-Visa Policy

On April 22, 2020, President Trump announced Presidential Proclamation 10014, *Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 23,441 (2020). Citing §§ 1182(f) and 1185(a), the Proclamation suspended for 60 days the "entry into the United States" of most intending immigrants abroad who did not have a valid visa as of April 23, 2020. *Id.* §§ 1, 2(a), 5. The Proclamation provided limited exceptions, including one for "any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees." *Id.* § 2(b)(ix).

In Proclamation 10052, President Trump amended Proclamation 10014 to extend its termination date to December 31, 2020. 85 Fed. Reg. 38,263 (2020), § 1. Proclamation 10052 also extended the entry suspension to cover many individuals seeking to enter on nonimmigrant visas. *Id.* § 2. This suspension was also subject to a "national interest" exception. *Id.* § 3.

Proclamation 10131, announced on December 31, 2020, extended both prior proclamations' termination date to March 31, 2021. 86 Fed. Reg. 417 (2020), §§ 1-2.

Although the Proclamations did not suspend the issuance of visas (the INA does not grant the President such power), the State Department implemented the Proclamations by adopting what the Court has termed the "No-Visa Policy," forbidding consular posts from issuing most immigrant and nonimmigrant visas. *See* CAR 24 (consular officers "may not issue any [visas] that are not … excepted under the [Proclamation]"); CAR 32 (similar); CAR 36 (similar); *Gomez I*, 2020 WL 5367010 at *5-6; SAC ¶¶ 109-112 & Exs. H, I, N. The State Department instructed that before granting a visa under the Proclamations' "national interest" exception, consular officers are required to obtain case-by-case approval from the Secretary of State or his designee. CAR 19-20. While the guidance supplied detailed criteria regarding "national interest" exceptions for *nonimmigrant* visas (CAR 169-74), it identified only a single category of *immigrants* who were eligible for such an exception: "Applicants who are subject to aging out of their current immigrant visa classification before P.P. 10014 expires or within two weeks thereafter." CAR 174. This exception was mandated by Proclamation 10052, *see* 85 Fed. Reg. at 38,265, and was designed for minors who are immediately eligible for visas as derivative beneficiaries, but who would lose their immediate eligibility upon turning 21. *See generally* ECF 1.[2]

[2] Despite indications that it intended to rescind the Proclamations, *e.g.*, Camilo Montoya-Galvez, *Biden to rescind Trump's pandemic-era limits on immigrant and work visas, top adviser says*, CBS News (Jan. 28, 2021), https://cbsn.ws/3t9cUyG, the new Administration has not yet done so.

C. The COVID-19 Guidance

On March 20, 2020, the State Department temporarily suspended "routine … visa services" at consular posts abroad due to COVID-19, but continued to require posts to provide "mission critical and emergency visa services." *See* CAR 12-14. Until July 15, 2020, "[p]osts [did] not have the authority to resume normal visa operations even if the host country ha[d] lifted most restrictions." CAR 23, 35. Under a directive entitled "Diplomacy Strong," the State Department permitted posts to "begin a phased approach to the resumption of routine visa services" beginning July 15, "based on local health and safety conditions." CAR 35-36.

The State Department designated age-out "cases in which an applicant … is at risk of losing eligibility for a visa in his or her current category" as "mission critical" cases that were eligible for emergency treatment. Marwaha Decl., ECF 94-1, ¶ 2. But the State Department did not consider DV-2020 selectees to be "mission critical" cases, even as they approached the statutory September 30 deadline. *See Gomez I*, 2020 5367010, at *32 (citing 8/7/2020 Status Hr'g Tr. 19; CAR 26). Even when consulates began to reopen, DV-2020 applicants were assigned the lowest priority for processing and adjudication. CAR 38. As a result, the State Department ceased processing DV-2020 applications as of March 20, 2020. *See* Luster Decl., ECF 94-3, ¶ 5.

D. The Plaintiffs And The Diversity-Visa Class

DV-2020 Plaintiffs. Plaintiffs Fatma Bushati, Jodi Lynn Karpes, Shyam Sundar Koirala, Aja Tamamu Mariama Kinteh, Iwundu épouse Kouadio Ijeoma Golden, and Aya Nakamura represent a certified class of DV-2020 winners:

> Individuals who have been selected to receive an immigrant visa through the U.S. Department of State's FY2020 Diversity Visa Lottery and who had not received their immigrant visa on or before April 23, 2020, when the Presidential Proclamation 10014, later extended by Presidential Proclamation 10052, took effect.

Gomez II, 2020 WL 5861101, at *9-11. The named Plaintiffs won the DV-2020 lottery and were

immediately eligible for visas when Proclamation 10014 went into effect, and they were ready to complete the final steps in the process (the medical examination and the consular interview).[3] But because each of these Plaintiffs was subject to the No-Visa Policy and the COVID-19 Guidance, Defendants cancelled or refused to schedule their consular interviews.[4]

Defendants' policies caused significant harm to the DV-2020 Plaintiffs. Each had won the lottery—a rare opportunity to immigrate to the United States.[5] And each had made concrete plans to complete his or her immigration process—in some cases by selling property or forgoing investments, business opportunities, and career advancement.[6] But the No-Visa Policy and the COVID-19 Guidance threatened to strip that opportunity away by preventing their visas from being issued before the statutory deadline on September 30, 2020. The DV-2020 Plaintiffs suffered considerable emotional distress and anxiety as a result.[7]

Family-Based Immigrant Visa Plaintiffs. Plaintiffs Nancy Abarca, Nazif Alam, Claudio Alejandro Sarniguet Jiménez, Juan Carlos Rosario Lebron, Daniel Chibundu Nwankwo, Loida Phelps, Carmen Ligia Pimentel, and Angela Sinon submitted family-based visa petitions on behalf of their spouses, children, and parents. Each petition is approved, and each beneficiary has reached the front of his or her queue. None of these Plaintiffs is aware of any ground of inadmissibility or other lawful reason that a visa would be denied to any beneficiary.

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[3] Bushati Decl. ¶¶ 13, 15-16; Iwundu Decl. ¶¶ 4-5; Karpes Decl. ¶ 7; Kinteh Decl. ¶ 4; Koirala Decl. ¶ 3; Nakamura Decl. ¶ 9. Citations to Plaintiffs' declarations refer to those filed herewith.

[4] Bushati Decl. ¶ 21; Iwundu Decl. ¶ 6, 11; Karpes Decl ¶¶ 7, 12; Kinteh Decl. ¶ 10; Koirala Decl. ¶ 7; Nakamura Decl. ¶¶ 14-18.

[5] Bushati Decl. ¶¶ 11-12; Iwundu Decl. ¶ 4; Karpes Decl. ¶ 4; Kinteh Decl. ¶ 3; Koirala Decl. ¶ 3; Nakamura Decl. ¶ 3.

[6] *E.g.*, Iwundu Decl. ¶ 10; Karpes Decl. ¶ 20; Koirala Decl. ¶ 5; Nakamura Decl. ¶¶ 13-19.

[7] *See* Bushati Decl. ¶¶ 2, 28; Iwundu Decl. ¶ 10; Karpes Decl. ¶¶ 17-21; Kinteh Decl. ¶¶ 9, 13; Koirala ¶¶ 6-7; Nakamura Decl. ¶¶ 13, 23-25.

Nonimmigrant Visa Plaintiffs. Plaintiff 3Q Digital is seeking an H-1B visa to bring a vital employee to the United States from Singapore. Rodnitzky Decl. ¶ 3. The petition is approved, but the beneficiary has not been granted a visa appointment. *Id.* ¶¶ 18-20.

ASSE International and EurAuPair International sponsor J visa foreign-exchange and au pair programs, respectively. Gustafson Decl. ¶¶ 2-4, 6-15, 22-23.

E. Relevant Procedural History

1. The Complaint

The operative Second Amended Complaint (ECF 111) asserts challenges to the No-Visa Policy, the State Department's implementation of the "national interest" exception, and the COVID-19 Guidance as applied to members of the certified DV-2020 class (First, Second, Fifth, Eighth and Ninth Causes of Action); a claim that the State Department unreasonably delayed and unlawfully withheld adjudication of DV-2020 applications (Tenth Cause of Action); and a mandamus claim seeking an order requiring the State Department to adjudicate DV-2020 applications (Eleventh Cause of Action). Plaintiffs sought declarations that the challenged policies are unlawful and are set aside under the APA; an order requiring the State Department to adjudicate DV-2020 applications; and an order invoking the Court's equitable authority to require the State Department to reserve diversity visa numbers, so that visas may be granted after September 30, 2020 upon a final judgment invalidating the challenged policies. *See* SAC, Prayer for Relief.

2. The Preliminary Injunction

Plaintiffs moved for a preliminary injunction and for certification of the class described above. *See* ECF 52, 53, 66. This Court granted the preliminary injunction in part on September 4, 2020. *Gomez I*, 2020 WL 5367010. The Court ruled that Ms. Nakamura had established standing, *id.* at *10-13, and rejected as "wrong" the Government's invocation of "the doctrine of consular nonreviewability," *id.* at *15-16.

On the merits, the Court observed that the Proclamations "[a]nd the statutory authorities cited" therein "address only entry, not visa issuance," such that the Proclamations "do not dictate Defendants' No-Visa Policy"—meaning that the adoption of that policy constitutes final agency action reviewable under the APA. *Id.* at *26, *28. The Court rejected Defendants' argument that "the No-Visa Policy is an automatic consequence" of the Proclamation, explaining that a "suspension of entry under § 1182(f) … has no bearing on whether the person is 'inadmissible' under § 1182(a) or ineligible to receive a visa under § 1201(g)." *Id.* at *27. "Because Defendants have not identified any statutory authority that would permit the suspension of th[e] ordinary process [of visa adjudication and issuance], the [C]ourt conclude[d] that Plaintiffs are likely to succeed on the merits of their claim that Defendants' No-Visa Policy is 'not in accordance with law' and 'in excess of statutory … authority.'" *Id.* at *29 (quoting 5 U.S.C. § 706(2)).

The Court also ruled that "Plaintiffs are … likely to succeed on their argument that [the] No-Visa Policy is arbitrary and capricious," both because "[t]he Administrative Record reveals no justification for [the] policy except the incorrect assumption that it is compelled by the Proclamations," and because Defendants "offered no rational explanation" and failed to "account for the serious consequences the policy would impose on DV-2020 selectees." *Id.*

The Court reached similar conclusions with respect to the COVID-19 Guidance—ruling that the Guidance "is final agency action" and that its application to DV-2020 applicants likely is arbitrary and capricious because "Defendants failed to consider an important aspect of the problem"—the administrative record contains neither an "explanation … for the exclusion of DV-2020 selectees from mission critical services" nor "any reasoned consideration of the detrimental effects that will be wrought on diversity visa selectees if they do not receive visas." *Id.* at *33.

The Court further ruled that Defendants "unreasonably delayed processing … DV-2020 selectees' visa applications." *Id.* at *30. Analyzing the factors outlined in *Telecommunications*

Research & Action Center v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984) (*TRAC*), the Court noted the "absolute" September 30 deadline for visa issuance, which "manifests Congress's intent that the State Department undertake good-faith efforts to ensure that diversity visas are processed and issued before" that date. 2020 WL 5367010, at *30. And in view of the "dire" consequences of delay beyond the deadline, Defendants' "complete refusal to process diversity visa applications" could not be considered "reasonable." *Id.* at *31. Although the Court found it unnecessary to fully analyze Plaintiffs' unlawful-withholding claim, it noted that "agencies are … required to 'proceed to conclude a matter presented to [them]' 'within a reasonable time,'" and that the INA "require[s] that all immigrant … visa applications 'shall be reviewed and adjudicated by a consular officer.'" *Id.* at *32 n.23 (quoting 5 U.S.C. § 555(b) and 8 U.S.C. § 1202(b)).

Having found that "Plaintiffs are highly likely to succeed on the merits," *id.* at *34, the Court turned to the remaining preliminary-injunction factors. Deeming Defendants' determination not to contest the DV-2020 Plaintiffs' irreparable-injury showing a "smart choice," the Court ruled that those Plaintiffs "met their burden" on that issue. *Id.* And the Court found no harm to the public interest from adjudicating diversity visa applications. *Id.* at *34-35.

Based on the foregoing, the Court granted a preliminary injunction with respect to the DV-2020 Plaintiffs. *Id.* at *38. The Court directed that "Defendants shall undertake good-faith efforts … to expeditiously process and adjudicate DV-2020 diversity visa … applications and issue or reissue diversity … visas to eligible applicants by September 30, 2020." *Id.*[8]

The Court declined to issue a preliminary injunction with respect to the Non-DV Plaintiffs,

[8] Subsequent decisions have followed this Court's reasoning and have enjoined the State Department's suspension of visa processing with respect to other visa categories. *See Tate v. Pompeo*, 2021 WL 148394, at *7-9 (D.D.C. Jan. 16, 2021) (Howell, C.J.) (O-1 and O-3 visas); *Milligan v. Pompeo*, 2020 WL 6799156, at *5-7 (D.D.C. Nov. 19, 2020) (Boasberg, J.) (fiancé(e) visas); *Young v. Trump*, 2020 WL 7319434, at *16 (N.D. Cal. Dec. 11, 2020) (family-based visas).

"even though they are substantially likely to succeed on their challenges to Defendants' No-Visa Policy." *Gomez I*, 2020 WL 5367010, at *35. The Court ruled that without a hard deadline for visa issuance or an immediate prospect of entering the country, these Plaintiffs had not shown that a preliminary injunction on the APA claims was warranted. *Id.*

Defendants processed and granted the six named DV-2020 Plaintiffs' visas before September 30.[9] Defendants granted a total of 3,208 diversity visas in that period. *See* Grewe Decl., ECF 143-2, ¶ 5; *Gomez II*, 2020 WL 5861101, at *2. Each of the DV-2020 Plaintiffs' visas is valid for six months; they will expire in March 2021.[10]

The Court did not enjoin the Proclamations, leaving in place the entry suspensions. Consequently, none of the remaining Plaintiffs, their beneficiaries, or (to Plaintiffs' knowledge) any of the DV-2020 class members have been able to enter the United States.[11]

3. The Visa-Reservation And Class-Certification Order

As of September 30, 2020, tens of thousands of DV-2020 visas remained unissued. Finding that this failure was in large part a result of the unlawful policies that the Court had enjoined on September 4, the Court granted supplemental equitable relief. *Gomez II*, 2020 WL 5861101.

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[9] Bushati Decl. ¶ 27; Iwundu Decl. ¶ 12; Karpes Decl. ¶ 18; Kinteh Decl. ¶ 11; Koirala Decl. ¶ 8; Nakamura Decl. ¶ 22.

[10] *See* Bushati Decl. ¶ 27; Iwundu Decl. ¶ 12; Karpes Decl. ¶ 18; Kinteh Decl. ¶ 11; Koirala Decl. ¶ 8; Nakamura Decl. ¶ 23.

Other DV-2020 selectees have received medical examinations (and thus immigrant visas) that expire in less than six months (*see supra* p. 4); diversity visas issued to such selectees in September 2020 have already expired.

[11] Plaintiff Mohamed Saleh's ten-year-old granddaughter, stranded alone in Egypt, initially was denied the opportunity to seek a "national interest" exception, but ultimately was granted an exception after this lawsuit was filed. *See* ECF 112. SEIU Healthcare's and Powertrunk, Inc.'s beneficiaries were granted exceptions based on the nature of their work. *See* ECF 164. Superior Scape and Shipco were able to obtain visas for their beneficiaries pursuant to the injunction in *Nat'l Ass'n of Mfrs. v. DHS*, 2020 WL 5847503 (N.D. Cal. Oct. 1, 2020). *See* ECF 176, 185.

Relying on (*inter alia*) *P.K. v. Tillerson*, 302 F. Supp. 3d 1 (D.D.C. 2017), *Przhebelskaya v. U.S.C.I.S.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004), and *Paunescu v. I.N.S.*, 76 F. Supp. 2d 896 (N.D. Ill. 1999), the Court ruled that it "plainly ha[d] the equitable authority and discretion to order Defendants to reserve visas for future processing [upon] a final resolution of the merits." *Gomez II*, 2020 WL 5861101, at *5. The Court specifically rejected Defendants' argument that "such an order would … run afoul of Congress's intent," explaining that "Defendants violated Congress's design when they nearly extinguished the FY 2020 diversity visa program through their No-Visa Policy." *Id.* The Court "agree[d]" with Plaintiffs' position that the approximately 3,208 visas issued in September 2020 were not "sufficient to remedy th[e] harm" that Defendants caused, *id.* at *6, and the Court concluded that "[a]dditional relief [was] needed to provide an adequate remedy to the DV-2020 Selectees who are not Named Plaintiffs." *Id.* at *7.

After analyzing visa-issuance data and the "operational disruptions" caused by the pandemic, the Court found that but for the State Department's unlawful policies, the agency "reasonably and realistically could have issued" 9,095 additional diversity visas between March 20, 2020 and the end of fiscal year 2020. *Id.* at *7-8. The Court certified the class of DV-2020 selectees described above, *id.* at *9-11, and "order[ed] the State Department to reserve 9,095 diversity visa numbers after September 30, 2020, for the future processing of the Named Plaintiffs' and class-members' diversity visa applications [upon] final adjudication of this matter." *Id.* at *12.

LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material fact and … the movant is entitled to a judgment as matter of law." *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 31-32 (D.D.C. 2010) (citing Fed. R. Civ. P. 56(c)). But on "review of a final agency action under the Administrative Procedure Act, … the Court's role is limited to reviewing the administrative record." *Id.* at 32 (citation omitted). In such a case,

summary judgment is "the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Cottage Health Sys. v. Sebelius*, 631 F. Supp. 2d 80, 90 (D.D.C. 2009) (citation omitted).

ARGUMENT

I. "PRINCIPLES OF NONREVIEWABILITY" DO NOT APPLY

At the preliminary-injunction stage, this Court ruled that consular nonreviewability does not bar Plaintiffs' claims—explaining that a challenge to "the State Department's refusal to review and adjudicate their pending visa applications" does not trigger the doctrine. *Gomez I*, 2020 WL 5367010, at *15-16. Defendants do not engage with or even acknowledge this Court's analysis, nor do they address the many cases reaching the same conclusion.[12] Instead, Defendants advance a sweeping theory (ECF 189-1, at 13-16) that *any* executive action that bears on visa processing is *inherently* unreviewable. This theory is, again, "wrong." *Gomez I*, 2020 WL 5367010, at *15.[13]

At the outset, Defendants disregard controlling precedent holding that limitations on judicial review in the immigration sphere "ha[ve] no application" where the plaintiff "do[es] not challenge a particular determination in a particular case of matters which Congress has left to executive discretion." *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985). Plaintiffs here have not challenged any particular visa determination.

Defendants rely on *Fiallo v. Bell*, 430 U.S. 787 (1977), but that case did not concern the

[12] *See, e.g.*, *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997); *Tate*, 2021 WL 148394 at *5; *Milligan*, 2020 WL 6799156 at *8; *Vulupala v. Barr*, 438 F. Supp. 3d 93, 98 (D.D.C. 2020); *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 113-15 (D.D.C. 2020); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1019 (N.D. Cal. 2019); *P.K.*, 302 F. Supp. 3d at 11.

[13] When Defendants' counsel tried to advance an identical, expansive nonreviewability theory at oral argument before the D.C. Circuit, the three judges on the panel cut him off; Judge Edwards admonished counsel to stop "wasting time." Oral Arg. 20:47-21:14, *Gomez v. Trump*, No. 20-5292 (D.C. Cir. Jan. 14, 2021), https://bit.ly/3iETufW.

administration of visa processing. It held that the courts generally may not second-guess *Congress's* "immigration *legislation.*" *Id.* at 793-94 (emphasis added). Likewise in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court rejected a claim that a *statute* was so "unreasonabl[e]" as to violate due process. *Id.* at 588-89. In contrast, Plaintiffs here are not seeking to overturn a statute or the "conditions" that Congress has set for immigrant entry (*contra* ECF 189-1, at 14). Rather, Plaintiffs are suing to compel the Executive Branch to *comply* with Congress's legislation. Defendants cite no case suggesting that this kind of suit is foreclosed.

Defendants also cite (ECF 189-1, at 14-16) *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999). But those cases hold that courts will not entertain *post hoc* challenges to immigration officers' exercise in particular cases of "the discretion entrusted to [them] by Congress." *Knauff*, 338 U.S. at 543-44 (emphases added); *see Kleindienst*, 408 U.S. at 770; *see also Saavedra Bruno*, 197 F.3d at 1158 & n.2; *Bricklayers*, 761 F.2d at 801. Again, Plaintiffs do not raise any such challenge—there is no contention here that a consular officer wrongly denied a visa. Plaintiffs' claims go to Defendants' programmatic policy of *refusing to adjudicate* diversity visa applications in accordance with the INA, and the APA (*see Gomez I*, 2020 WL 5367010, at *32 n.23). Such a challenge is reviewable. *Id.* at *15-16.

Defendants are wrong in suggesting (ECF 189-1, at 14-15) that 8 U.S.C. § 1252 and 6 U.S.C. § 236(f) somehow foreclose judicial review. Section 1252's scheme governing judicial review of *removal orders* does not "preclude judicial review" in this separate context, 5 U.S.C. § 701(a)(1), nor does it otherwise displace the APA's "basic presumption of judicial review," *see DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). And § 236(f) states only that § 236's *other* subsections do not "create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."

The statute thus acknowledges the doctrine of consular nonreviewability as this Court and many others have construed it: Courts cannot review an individual decision "to grant or deny a visa." But once again, that rule has no application here.

Defendants have no authority for their contention (ECF 189-1, at 15) that Plaintiffs cannot bring APA challenges to the State Department's directives dictating "how to prioritize consular services." And Defendants' premises are incorrect. Defendants assert (*id.*) that there is no "review of the Secretary's decision not to prioritize the processing of visa applications made by aliens whose entry into the United States is suspended under 8 U.S.C. § 1182(f) and who are therefore ineligible for a visa"—but a critical question here is *whether* Plaintiffs and class members were "ineligible for a visa." This Court has already ruled that Plaintiffs and class members were *not* "ineligible" under the INA's plain terms. *Gomez I*, 2020 WL 5367010, at *26-29.

Defendants also assert (ECF 189-1, at 15) that Plaintiffs improperly "seek judicial review of the Executive Branch's exercise of power clearly provided to it by Congress"—but the gist of Plaintiffs' claims is precisely that Congress did *not* provide the Executive Branch with the power that it is asserting here. In particular, this Court has explained that the State Department *has no authority* to "extinguish the diversity program … by simply sitting on its hands and letting all diversity visa applications time out," *Gomez I*, 2020 WL 5367010, at *30, and that by attempting to do so, "Defendants *violated* Congress's design," *Gomez II*, 2020 WL 5861101, at *5 (emphasis added). This Court has authority to review and to remedy such violations of law.

Most broadly, Defendants' position is contrary to well-established precedent holding that "[e]xecutive action under legislatively delegated authority … is *always* subject to check by the terms of the legislation … and if that authority is exceeded it is open to judicial review," *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); and that because "Congress intends the executive to obey its statutory commands, … it expects the courts to grant relief when an executive agency violates

such a command," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). Defendants' actions violate the INA and the APA. This Court can and should grant relief.[14]

II. PLAINTIFFS AND THE DV-2020 CLASS ARE ENTITLED TO SUMMARY JUDGMENT ON THE MERITS

A. The No-Visa Policy Violates The APA

This Court has ruled that the State Department's No-Visa Policy likely constitutes APA-reviewable "final agency action," 5 U.S.C. § 704, that the policy is likely "not in accordance with law" and "in excess of statutory authority," *id.* §§ 706(2)(A), (C), and that the policy is likely "arbitrary" and "capricious," *id.* § 706(2)(A). *See Gomez I*, 2020 WL 5367010, at *26-29. Defendants no longer dispute the first point, and their remaining arguments hinge on the assertion that "proclamations under section 1182(f) *require* visa refusals." ECF 189-1, at 16 (emphasis added). But the Court has rejected that position, and Defendants supply no basis to depart from the statutory analysis that compelled this Court's decision to grant a preliminary injunction. There are no facts in dispute, and Plaintiffs (not Defendants) are correct on the law. The Court should grant summary judgment to all Plaintiffs and the DV-2020 class on the First Cause of Action.

1. The INA Does Not Authorize Defendants' No-Visa Policy

The No-Visa Policy violates the APA. *Gomez I*, 2020 WL 5367010, at *26-29. The policy is contrary to the INA's mandate that all immigrant and nonimmigrant "visa applications ***shall*** be

[14] Defendants do not object to the Court's ruling that at least Ms. Nakamura has standing. *Gomez I*, 2020 WL 5367010, at *10-13; *see* Nakamura Dec. ¶¶ 1-2, 4, 5, 8-10, 13, 15-18, 23-25; *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) ("the court need only find one plaintiff who has standing"); *see also, e.g.*, Bushati Decl. ¶¶ 22, 28, 31; Iwundu Decl. ¶ 10; Karpes Decl ¶ 20; Kinteh Decl. ¶ 8; Koirala ¶¶ 5-6, 10; Phelps Decl. ¶¶ 8-10; Abarca Decl. ¶¶ 8-11; Jimenez Decl. ¶¶ 13-15, 18; Lebron Decl. ¶¶ 24-25; Alam Decl. ¶¶ 9-11; Sinon Decl. ¶¶ 16-20; Nwanko Decl. ¶¶ 7-9; Pimentel Decl. ¶¶ 12, 15, 19-20; Rodnitzky Decl. ¶¶ 21-22, 25; Gustafson Decl. ¶¶ 15-21, 31-33.

While the named DV-2020 Plaintiffs received their visas as a result of the *Gomez I* injunction, that fact "does not moot the claims of the unnamed members of the class." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *J.D. v. Azar*, 925 F.3d 1291, 1307-11 (D.C. Cir. 2019).

reviewed and adjudicated by a consular officer." 8 U.S.C. § 1202(b), (d) (emphasis added); *Gomez I*, 2020 WL 5367010, at *29; *see Sierra Club v. E.P.A.*, 705 F.3d 458, 467 (D.C. Cir. 2013) ("the word 'shall' … evidences a clear legislative mandate"); *N.R.D.C. v. E.P.A.*, 755 F.3d 1010, 1019 (D.C. Cir. 2014) ("shall" "makes the directive … mandatory"). The No-Visa Policy also conflicts with the INA's provisions that "a consular officer may issue" visas to individuals who have "made proper application therefor," 8 U.S.C. § 1201(a)(1) (emphasis added), and that the Secretary of State may not exercise "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas," *id.* § 1104(a); *see Gomez I*, 2020 WL 5367010, at *29; *Encuentro Del Canto Popular v. Christopher*, 930 F. Supp. 1360, 1369 (N.D. Cal. 1996) (State Department cannot "interfere[e] with the decision of a consular official to grant or refuse a visa"). And, further, the No-Visa Policy violates the statutory mandate that DV-2020 selectees "***shall*** remain eligible" to receive a visa through the end of the fiscal year, 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added)—the policy's effect was to declare otherwise-qualified DV-2020 selectees to be ***in***eligible for visas before the fiscal year's close.

Defendants rely principally on 8 U.S.C. § 1201(g), which says that a visa may not issue if the applicant "is ineligible to receive a visa … under section 1182…, or any other provision of law." Defendants then assert that a § 1182(f) suspension of *entry* renders an applicant "ineligible to receive a visa." ECF 189-1, at 17-18. But this Court has explained that this argument "ignores 'the basic distinction between admissibility determinations,' *i.e.*, entry determinations, and 'visa issuance that runs throughout the INA.'" *Gomez I*, 2020 5367010, at *27 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 & n.3 (2018); footnote omitted). Just as important, Defendants' "reading is contrary to the text and structure of § 1182." *Tate*, 2021 WL148394, at *7. "Subsection 1201(g) precludes the issuance of visas only as to persons who are 'ineligible to *receive a visa*'…, not to persons who are only ineligible to *enter*," and "[t]he categories of persons deemed ineligible to

receive a visa pursuant to § 1201(g) appear in § 1182(a), not § 1182(f)." *Gomez I*, 2020 5367010, at *27 (second emphasis added). The latter provision addresses only *entry*, and not visa eligibility.

Defendants assert that "[t]he fact that section 1182(f) does not specifically use the word 'visas' is irrelevant" (ECF 189-1, at 17)—but "it is through the 'dint of … phrasing' that Congress speaks, and where [Congress] uses different language in different provisions of the same statute, we must give effect to those differences." *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) (citation omitted). Congress could have written the word "visa" into § 1182(f), or it could have referenced "suspensions of entry" in § 1201(g), but it did neither. The Executive Branch is obliged to respect Congress's choice. Judges Howell and Boasberg have adopted this Court's "persuasive" analysis on this point. *See Milligan*, 2020 WL 6799156, at *6; *Tate*, 2021 WL 148394, at *7; *see also Young*, 2020 WL 7319434, at *15-16 (similar). This Court should adhere to that analysis.

"Losing the textual battle, Defendants [again] invoke the Supreme Court's decision in *Trump v. Hawaii*." *Gomez I*, 2020 5367010, at *27; *see* ECF 189-1, at 18. But Defendants offer no reason for this Court to depart from its correct conclusion that *Hawaii* "never held that the President's suspension of entry under § 1182(f) renders a person ineligible to receive a visa." *Gomez I*, 2020 5367010, at *27; *see Tate*, 2021 WL 148394, at *8 (similar). The passage that Defendants block-quote does not so hold—it refers generally to "Section 1182," *Hawaii*, 138 S. Ct. at 2414, and only *part* of that section bears on which foreign nationals are eligible to receive visas. *Sub*section 1182(f) does *not* affect visas: the Supreme Court "specifically cited § 1182(f) as a screen on *entry* into the United States"—*not* as a screen on *visa eligibility*. *Gomez I*, 2020 5367010, at *27 (citing *Hawaii*, 138 S. Ct. at 2414). Moreover, "the [Supreme] Court repeatedly stressed the distinction between entry and visa issuance, a distinction which Defendants' position elides." *Id.* (citation omitted).

Defendants next cite § 1185(a)(1), "which renders it unlawful for an alien to enter or to

attempt to enter the United States in violation of a Proclamation" (ECF 189-1, at 18). But to the extent Defendants argue that a § 1185(a)(1) order suspends visa eligibility, they again lose the textual battle: § 1185(a)(1) does not refer to visa eligibility, but only to "enter[ing] or attempt[ing] to … enter the United States." It therefore does not trigger § 1201(g)'s prohibition on visa issuance. Here too, Judges Howell and Boasburg have correctly rejected Defendants' § 1185(a)(1) argument. *Milligan*, 2020 WL6799156, at *7; *Tate*, 2021 WL 148394, at *7-8.

Defendants argue in the alternative that it "invites confusion" to interpret the INA to "require[] consular officers to grant visas … to individuals who are not permitted to attempt to enter the United States under section 1185(a)(1)." ECF 189-1, at 19. This Court has already rejected this argument. *Gomez I*, 2020 5367010, at *29. And Defendants point to no evidence of *actual* confusion, despite the issuance of more than 3,200 diversity visas in September 2020 to individuals who were subject to the Proclamations. *See* Grewe Decl., ECF 143-2, ¶ 5. Such confusion is unlikely; State Department and DHS officials understand the "basic distinction between admissibility determinations and visa issuance." *Hawaii*, 138 S. Ct. at 2414 & n.3. For example, officials advised DV-2020 Plaintiffs that they are not permitted to attempt entry while the Proclamation are in effect, and made notations to that effect on their visas.[15]

Defendants next assert that § 1201(g) "must be read in light of the INA as a whole," and that "the INA creates a significant legal infrastructure for ensuring that visas are not issued to individuals who are not eligible to enter." ECF 189-1, at 19. But the latter claim is another that Defendants fail to support. This Court, moreover, has explained that there are "sound reasons" for allowing visas to issue to at least some individuals who are subject to § 1182(f) entry suspensions

[15] *See, e.g.*, Bushati Decl. ¶ 27; Iwundu Decl. ¶¶ 12-14 & Ex. A; Karpes Decl. ¶ 18; Kinteh Decl., ¶¶ 11-12 & Ex. A; Koirala Decl. ¶¶ 8-9 & Ex. A; Nakamura Decl. ¶ 23.

(*Gomez I*, 2020 5367010, at *28): A § 1182(f) *suspension* is by its nature a *temporary* "defer[ral] till later" of the opportunity to enter the county, *Hawaii*, 138 S. Ct. at 2409-10 (citation omitted), and a visa issued while such a temporary suspension is in effect may remain valid *after* the suspension expires. Under Defendants' erroneous construction, the DV-2020 Plaintiffs' visas would not have issued before the statutory deadline, and as a consequence the President's *temporary* entry suspension would have erected a *permanent* barrier to their immigration—something that Congress has not authorized.

Defendants strain to find support in §§ 1101(a)(16) and (26), which define "immigrant visa" as a visa "properly issued … to an eligible immigrant" and "nonimmigrant visa" as "a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this Act." Defendants contend (ECF 189-1, at 20) that "eligible immigrant" and "eligible nonimmigrant" must refer to persons who are *immediately* eligible to enter the country. But the INA defines "immigrant" to mean "*every* alien"—whether or not he or she is eligible for admission—other than those foreign nationals who fall within the specific categories of foreign nationals who are eligible for nonimmigrant visas. 8 U.S.C. § 1101(a)(15) (emphasis added). Given that definition, the phrase "eligible immigrant" in § 1101(a)(16) naturally refers to a foreign national who is "eligible" *for an immigrant visa*, and to whom such a visa may "properly" be issued. Likewise, an "eligible nonimmigrant" under § 1101(a)(26) is a foreign national who is "eligible" *for a nonimmigrant visa*, and to whom such a visa may "properly" be issued. Nothing in § 1101(a) suggests that the recipient of either visa must be immediately eligible to take the separate step of gaining *admission* into the United States. Defendants' construction impermissibly requires "add[ing] words to the law," *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015), and to do so in disregard of the "basic distinction between admissibility determinations and visa issuance," *Hawaii*, 138 S. Ct. at 2414 & n.3.

Defendants also cite (ECF 189-1, at 20) 22 C.F.R. § 40.6, but that provision refutes their position. It states: "A visa can be refused only upon a ground *specifically set out* in the law or implementing regulations" (emphasis added). Defendants cite no statute or implementing regulation that "*specifically* set[s] out" a § 1182(f) entry suspension as a permissible ground for refusing a visa. And the language from § 40.6 on which Defendants rely speaks only to the applicant's "burden of proof … to establish eligibility to receive a visa"—the regulation does not suggest that the recipient must also prove that he or she is immediately eligible for *admission* at the time the visa is issued.

The visa lookout system (*see* ECF 189-1, at 22) also does not justify Defendants' position—as Chief Judge Howell correctly concluded in *Tate*, 2021 WL 148394, at *8. For one thing, the administrative record does not reflect that the State Department considered the lookout system when it adopted the No-Visa Policy—and "[i]t is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents*, 140 S. Ct. at 1907. In any event, § 1201(g) is unambiguous for all the reasons set forth above and in *Gomez I*. The lookout system cannot alter that statute's plain meaning, and so it cannot justify the No-Visa Policy. *See, e.g.*, *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 340 (D.C. Cir. 2020) ("When the words of a statute are unambiguous…, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).[16]

[16] Rather, the lookout-system statute directs that in issuing a visa, the consular officer must "check" the system and "certify" that "there is no basis under such system for the exclusion of such alien." 8 U.S.C. § 1182 (note), § (1)(A). The statute does not dictate that individuals covered by a temporary § 1182(f) proclamation must be "included in the … system." Even if there were such a requirement, § (1)(B) plainly contemplates that visas may issue to individuals who are in the system: It does *not* prohibit issuance of such visas, but calls for certain professional consequences for officers who commit procedural mistakes. *Id.* § (1)(B). This provision is not "inconsistent, or even in tension, with plaintiffs' interpretation of § 1182(f)." *Tate*, 2021 WL 148394, at *8.

Finally, Defendants are wrong to suggest that 8 U.S.C. §§ 1182(e) and 1182(f) (cited in ECF 189-1, at 22) eliminate the "basic distinction" between visa issuance and entry, *Hawaii*, 138 S. Ct. at 2414 & n.3. Because a visa is a prerequisite to admission, *see* 8 U.S.C. §§ 1181, 1184, the provisions in §§ 1182(e) and 1182(f) barring visa issuance also serve their stated purposes of denying lawful entry. The situation in this case is the converse: Defendants are (unlawfully) relying on a temporary prohibition on entry as a reason to refuse visa issuance. But whereas visa issuance is a prerequisite to admission, the reverse is not true. An immigrant or nonimmigrant can receive a visa without being eligible to enter the country immediately. The DV-2020 Plaintiffs here bear this out. And Congress would have anticipated this result when it provided for immigrant visas to be valid for up to six months, 8 U.S.C. § 1201(c)(1), and when it chose *not* to specify a maximum duration for nonimmigrant visas, *see id.* § 1201(c)(2).

"Defendants have identified no applicable statutory authority permitting the State Department to suspend visa processing on the basis of the entry restrictions provided by the Presidential Proclamations." *Tate*, 2021 WL 148394, at *9; *see Young*, 2020 WL 7319434, at *16 (similar). Thus, as this Court has concluded, the "No-Visa Policy is 'not in accordance with law' and 'in excess of statutory authority.'" *Gomez I*, 2020 5367010, at *29 (quoting 5 U.S.C. § 706(2)).

2. The No-Visa Policy Is Not Entitled To Deference

Defendants fall back to an assertion that "[e]ven if the Court disagrees that visa refusal is *compelled* under section 1182(f), the State Department's long-held understanding that the INA

Defendants' extra-record declarant should be disregarded. *See Regents*, 140 S. Ct. at 1907. Even if considered, his declaration cannot alter the INA's plain language, and in any event it states only that an officer "who issues a visa to an applicant subject to a [§ 1182(f)] restriction without following the procedures set out in the FAM ***could***," hypothetically, "be found to have violated VLA requirements and be subject to the penalty provided for in that law." Ramotowski Decl. ¶ 8 (ECF 189-2) (emphasis added).

authorizes [the No-Visa Policy] is reasonable and consistent with law." ECF 189-1, at 23 (emphases added). But this Court has *rejected* the contention that the INA even *authorizes* the No-Visa Policy, and Defendants still "have not identified any statutory authority that would permit the suspension of th[e] ordinary process" of reviewing and adjudicating visa applications. *Gomez I*, 2020 WL 5367010, at *29 (citing 8 U.S.C. §§ 1202(b), 1201(a)(1), 1104(a)).

Defendants' reliance on the State Department's alleged historical practice (ECF 189-1, at 23-26) is mistaken. That the State Department has been laboring under a misapprehension of the INA's "basic distinction" (*Hawaii*, 138 S. Ct. at 2414) "since at least 1995" (ECF 189-1, at 23) is not a valid defense of its continued adherence to that misapprehension. Nor do the FAM provisions on which Defendants rely (*id.* at 23-25) provide such a defense. Defendants acknowledge (*see* ECF 189-1, at 26-27) that the FAM is not a regulation carrying the force of law,[17] and their suggestion that a § 1182(f) *entry* suspension also *requires* a blanket suspension of *visa processing* is contrary to the INA's plain text. "No matter how firmly entrenched, … past practice cannot provide a justification for agency action clearly contrary to statute." *Tate*, 2021 WL 148394, at *8; *see Milligan*, 2020 WL 6799156, at *7 ("Given the clarity of section 1182(f), … th[e] Court finds no basis to defer to State's practice, however well established it may be.").

The prior Presidential actions that Defendants cite (ECF 189-1, at 24) also do not support their position. Consistent with § 1182(f)'s plain language, *none* of those actions—undertaken by three different Presidents—invokes that statute to direct a suspension of visa processing.[18]

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[17] *See also Christensen v. Harris Cty.*, 529 U.S. 578, 587 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines … lack the force of law."); *Farrell v. Tillerson*, 315 F. Supp. 3d 47, 67 (D.D.C. 2018) (same specifically with respect to the FAM).

[18] *See* Executive Order 13780, 82 Fed. Reg. 13,209, 13,213 (2017) (President Trump) ("I … direct that the ***entry*** into the United States of nationals of [the affected] countries be suspended for 90 days…."); Presidential Proclamation 8697, 76 Fed. Reg. 49,277, 49,277 (2011) (President Obama)

The cases in Defendants' string citation (ECF 189-1, at 25) did not address the issue presented in this case. Those cases challenged the State Department's failure to adjudicate their *waiver* requests under Proclamation 9645 (the "Muslim Ban"), rather than its failure to adjudicate *visa* applications as required by 8 U.S.C. § 1202(b) and (d).[19] And the plaintiffs in those cases also were not in a position like the DV-2020 Plaintiffs and class members here—who required the issuance of their visas *before* Proclamation 10014 expired so that they could then immigrate *after* its expiration. Thus, none of Defendants' cases addressed the question whether a § 1182(f) entry suspension triggers § 1201(g). And where plaintiffs in other cases *have* raised claims like the one here, the courts have found them meritorious, and have rejected the same arguments that Defendants now raise. *See, e.g.*, *Tate*, 2021 WL 148394, at *7-9; *Milligan*, 2020 WL 6799156, at *5-7; *Young*, 2020 WL 7319434, at *16.

For these reasons, the Court should reject Defendants' proposal (ECF 189, at 26-28) that their interpretation should be granted *Skidmore* deference. In the face of unambiguous statutory language, the Defendants' interpretation has no persuasive value. *See, e.g.*, *Fox v. Clinton*, 684 F.3d 67, 78-80 (D.C. Cir. 2012) ("the [State] Department can claim no [*Skidmore*] deference" where the statute is unambiguous and State's interpretation "is unpersuasive").

("The ***entry*** into the United States … of the following persons is hereby suspended…."); Presidential Proclamation 8342, 74 Fed. Reg. 4,093, 4093 (2009) (President Bush) ("The ***entry*** into the United States … of the following aliens is hereby suspended….") (emphases added).

[19] *See Kangarloo v. Pompeo*, 2020 WL 4569341, *1 (D.D.C. Aug. 7, 2020); *Moghaddam*, 424 F. Supp. 3d at 110; *Didban v. Pompeo*, 435 F. Supp. 3d 168, 170 (D.D.C. 2020); *Thomas v. Pompeo*, 438 F. Supp. 3d 35, *39-40 (D.D.C. 2020); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 91 (D.D.C. 2020); *Ghadami v. DHS*, 2020 WL 1308376, at *1 (D.D.C. Mar. 19, 2020); *Jafari v. Pompeo*, 459 F. Supp. 3d 69, 73 (D.D.C. 2020); *Sarlak v. Pompeo*, 2020 WL 3082018, at *1-2 (D.D.C. Jun. 10, 2020).

The cited passages pertain to consular nonreviewability, and they further support Plaintiffs' explanation (*supra* Point I) that the doctrine is not triggered on facts like those here.

3. The No-Visa Policy Is Also Arbitrary And Capricious As Applied To The DV-2020 Plaintiffs And The DV-2020 Class

Even assuming that the State Department had authority to adopt a policy generally to suspend visa processing for individuals affected by a § 1182(f) entry suspension, that would not save the No-Visa Policy as applied to DV-2020 applicants. At the time the State Department adopted the No-Visa Policy, the following facts were known: DV-2020 selectees were eligible for visas only until September 30, 2020, *see* 8 U.S.C. § 1154(a)(1)(I)(ii)(II), and visas issued (or reissued) in the weeks preceding the September 30 deadline would retain validity after the Proclamations' scheduled expiration, *see id.* § 1201(c)(1); 22 C.F.R. § 42.72(a); CAR 6. But the administrative record does not suggest that the State Department considered DV-2020 selectees' interests, nor that it "account[ed] for the severe consequences the policy would impose on DV-2020 selectees" by depriving them of the opportunity to immigrate after the Proclamations' expiration. *Gomez I*, 2020 WL 5367010, at *29. The State Department thus gave no "rational explanation for the policy," and "'fail[ed] to consider [an] important aspect[] of the problem'"—from which it follows that its action was arbitrary and capricious. *Id.* at *29, *33 (quoting *Regents*, 140 S. Ct. at 1913); *see* 5 U.S.C. § 706(2)(A).

Defendants do not seriously dispute these points, or this Court's conclusion in *Gomez I*. Their cursory assertion that "the administrative record demonstrates that the State Department's non-processing of cases where entry would be barred by one of the Proclamations was based on a rational explanation" (ECF 189-1, at 26) is baseless. (Defendants refer to CAR 17, but that page contains only a summary of the policy—not a rational explanation for it.) The *post hoc* rationalizations offered in Defendants' brief cannot support the No-Visa Policy, because "[i]t is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents*, 140 S. Ct. at 1907. In

any case, Defendants' current extra-record rationalizations (preserving government resources and avoiding confusion, *see* ECF 189-1, at 26) fail, because they are not supported by contemporaneous evidence and still do not show that the State Department ever considered the "important … problem," *Regents*, 140 S. Ct. at 1913, of how to protect DV-2020 selectees' opportunity to immigrate after the Proclamations' expiration.

* * *

For all the reasons set forth above, this Court should grant summary judgment to Plaintiffs on their APA challenge to the No-Visa Policy.

B. The COVID-19 Guidance Violates The APA As Applied To The DV-2020 Plaintiffs And The DV-2020 Class

The State Department's treatment of DV-2020 selectees under the COVID-19 Guidance—both their exclusion from "mission critical" visa services and their relegation to the lowest priority for visa processing at reopened consular posts—is arbitrary, capricious, and unlawful under the APA. *See Gomez I*, 2020 WL 5367010, at *32-33.[20] The Court should also grant summary judgment to the DV-2020 Plaintiffs and the class on their Eighth Cause of Action.

1. The Omission Of DV-2020 Applicants From "Mission-Critical" Visa Services Is Not Committed To Agency Discretion

Defendants' threshold argument on this claim is curious. They contend (ECF 189-1, at 30) that it is "impossible to evaluate" Plaintiffs' challenge, *see Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997)—but they disregard that such an evaluation obviously *is* possible, because *this Court has*

[20] Defendants fail to articulate any argument in support of their purported "dispute[]" (ECF 189-1, at 30) with the Court's conclusion that the COVID-19 Guidance constitutes final agency action, *Gomez I*, 2020 WL 5367010, at *33. Such "perfunctory and undeveloped arguments, … unsupported by pertinent authority, are deemed waived," *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013), and this Court's prior ruling is in any event correct.

already undertaken one. *Gomez I*, 2020 WL 5367010, at *33.

The problem with Defendants' position is fundamental. The APA embodies a "strong presumption that Congress intends judicial review of administrative action," *Am. Hosp. Ass'n*, 967 F.3d at 824 (citation omitted), which applies fully "to immigration statutes," *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). This presumption may be overcome only by "clear and convincing evidence that Congress intended" to foreclose review. *Am. Hosp. Ass'n*, 967 F.3d at 824 (citation omitted); *see, e.g.*, *Ramirez v. U.S. Imm. & Customs Enf't*, 338 F. Supp. 3d 1, 37-39 (D.D.C. 2018). In view of this presumption, the courts "have read the [5 U.S.C.] § 701(a)(2) exception for action committed to agency discretion '*quite narrowly*, restricting it to those *rare circumstances* where … a court would have ***no*** meaningful standard against which to judge the agency's exercise of discretion.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (emphases added; citation and internal quotation marks omitted).

Under these principles, the D.C. Circuit has construed 5 U.S.C. § 701(a)(2) to "impose[] two related, but distinct, barriers to judicial review." *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020):

First, § 701(a)(2) bars review of a few "categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). Examples include "a decision not to institute enforcement proceedings," "allocation of funds from a lump-sum appropriation," and "an agency's decision to reach a settlement." *Id.* (citations omitted).

Second, § 701(a)(2) precludes review "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)) (citation and internal quotation marks omitted). This "threshold bar" applies only "where 'the courts have no legal norms pursuant to

which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion.'" *Id.* at 642-43 (quoting *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)). Conversely, "judicial review is available where there are 'meaningful standards to cabin the agency's otherwise plenary discretion.'" *Id.* at 643 (quoting *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002)). To determine whether an agency action falls within this narrow exception to judicial review, "courts consider 'both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action.'" *Moghaddam*, 424 F. Supp. 3d at 116 (quoting *Twentymile*, 456 F.3d at 156). The relevant standards "may be found in formal and informal policy statements and regulations as well as in statutes." *Physicians for Soc. Resp.*, 956 F.3d at 643.

Although Defendants do not clearly distinguish between these two theories of nonreviewability, their argument fails under either one.

First, Defendants cite no authority for the proposition that the State Department's determinations regarding prioritization in visa processing is categorically immune from judicial review. That would be a surprising result, and not only because the presumption of review applies fully in the immigration context. *See Guerrero-Lasprilla*, 140 S. Ct. at 1069. Defendants' position would mean, for example, that the State Department "could effectively extinguish the diversity program … by simply sitting on its hands and letting all pending diversity visa applications time out," *contra Gomez I*, 2020 WL 5367010, at *30—and that there could be no judicial review.

Defendants suggest that courts cannot review agencies' "decisions on allocating scarce resources" (ECF 189-1, at 31), but Defendants' authorities *refute* their position. *Massachusetts v. EPA*, 549 U.S. 497 (2007), reached the merits—and famously held that the EPA could not refuse to regulate greenhouse gases (*i.e.*, could not refuse to make such regulation a priority) without "provid[ing] some reasonable explanation" for its choice. *Id.* at 533. And while the D.C. Circuit

denied mandamus in *In re Barr Laboratories, Inc.*, 930 F. 2d 72 (D.C. Cir. 1991), it did so on the merits—it did not rule that agency priorities are immune from review. *See id.* at 74-75. Moreover, Defendants' rule would impermissibly expand a "quite narrow[]" exception well beyond the "traditional[]" categories to which it applies. *Dep't of Commerce*, 139 S. Ct. at 2568. And Defendants' rule would also conflict with the APA's authorization of an action to "compel agency action … unreasonably delayed," 5 U.S.C. § 706(1)—such an action *necessarily* asserts that the agency's priorities are unreasonably out of order.

Defendants assert (ECF 189-1, at 31) that "agency determinations dealing with national interest and foreign policy issues are not proper subjects of judicial intervention." But the cases they cite involved questions specifically relating to "*military* policy." *Nat'l Fed. of Federal Emps. v. United States* (*NFFE*), 905 F.2d 400, 406 (D.C. Cir. 1990) (emphasis added); *see Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 41-42 (D.C. Cir. 2000) (similar). Review was unavailable because "the *subject matter* of th[e] [statutory] criteria is not 'judicially manageable'" in that the "judiciary is ill equipped to conduct review of the nation's *military* policy." *NFFE*, 905 F.2d at 405-06 (emphases added). Military policy falls within those "categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Physicians for Soc. Resp.*, 956 F.3d at 642. The same cannot be said of the subject matter of the current dispute. *See, e.g.*, *Ramirez*, 338 F. Supp. 3d at 38 (treatment of children in DHS custody "does not fall into the 'categories of administrative decisions' that the Supreme Court and the D.C. Circuit have held are unreviewable") (citation omitted). And Defendants' proposal to adopt a categorical exception to the APA's presumption of judicial review for anything "dealing with national interest" would swallow the rule.

Second, to the extent that Defendants deny the existence of any reviewable standards, their approach is mistaken. They suggest (ECF 189-1, at 31-33) that the Court should limit its search

for reviewable standards to a single statute, 22 U.S.C. § 2651a—but that provision, captioned "Organization of Department of State," is only a general "vesting and delegation statute[]," of a type that is "found throughout the Executive Branch." *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 31 & n.11 (D.D.C. 2020). Its function is not to specify substantive legal standards, but to designate who may exercise the State Department's powers. And the statute makes clear that the State Department "shall be administered[] *in accordance with this Act and other provisions of law*." 22 U.S.C. § 2651a(a)(1) (emphasis added). Thus, any powers and discretion that § 2651a confers are defined and cabined by "other provisions of law."

As relevant here, those "other provisions of law" include the INA provisions governing the processing and issuance of immigrant visas. So, for example, the agency's exercise of discretion must account for Congress's directive that "[t]he worldwide level of diversity immigrants is equal to 55,000 for each fiscal year," 8 U.S.C. § 1151(e), the provision that lottery winners "shall remain eligible" until "the end of the … fiscal year" (and must receive their visas by that deadline), *id.* § 1154(a)(1)(I)(ii)(II), and the directive that all "visa applications *shall* be reviewed and adjudicated by a consular officer," *id.* § 1202(b), (d) (emphasis added). The agency is also bound by, among other things, the APA provision requiring each agency "to conclude a matter presented to it" "within a reasonable time." 5 U.S.C. § 555(b). While the Secretary may exercise discretion in administering the visa-processing system, the INA and the APA provide "meaningful standards" and "legal norms" under which the courts may fairly evaluate the Secretary's exercise of that discretion. *Physicians for Soc. Responsibility*, 956 F.3d at 642-43. A court may ask, for instance, whether a directive takes into rational consideration its impact on Congress's policy of increasing diversity in the immigrant population, as well as the serious harms that would be inflicted on diversity visa selectees who are deprived of the opportunity to immigrate. And as Judge Kollar-Kotelly explained in a related context, both "the general APA reasonableness standard" and the

agency's obligation to timely decide matters presented to it also provide manageable standards sufficient to allow judicial review. *Moghaddam*, 424 F. Supp. 3d at 116; *see Ashtari v. Pompeo*, 2020 WL 6262093 (D.D.C. Oct. 23, 2020) (similar)

Beyond the statutes, the State Department's "formal and informal policy statements" also provide guidance for judicial review. *See Physicians for Soc. Responsibility*, 956 F.3d at 643; *see also Moghaddam*, 424 F. Supp. 3d at 117-21 (relying on policy statements and ruling that determination of when to act was not unreviewably "committed to agency discretion"). The FAM sets out a complex scheme for processing diversity visa applications, which is designed so that visas are issued each month at a rate sufficient to allow the total number of visas issued annually to come as close as possible to Congress's 55,000-visa cap. *See* 9 FAM 502.6-4.c-d. Courts may assess whether a processing directive accords with that statement of Department policy.

The COVID-19 Guidance itself—also a statement of State Department policy—provides yet another measuring stick: It directs that "[a]ge-out IV cases" are to be treated as "mission-critical" (CAR 12; *see* CAR 24, 26), in recognition of Congress's policy favoring family unification (*e.g.*, 136 Cong. Rec. H8629-02 (1990)) and the harsh consequences that result when an otherwise-qualified prospective immigrant loses his or her visa eligibility (*see generally* ECF 21, at 4-7; ECF 43, at 5-6). Because Diversity Visa selectees are in a similar situation—their visas are both a congressional priority and the subject of a strict deadline—courts are well-positioned to assess whether the State Department must afford them similar treatment under the "fundamental norm of administrative procedure requires an agency to treat like cases alike." *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *see, e.g.*, *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 42 (D.D.C. 2020) (relying on terms of Presidential proclamation to conclude

that agency implementation of that proclamation was not "committed to agency discretion").[21]

Defendants have not supplied "clear and convincing evidence" that judicial review is unavailable, *Am. Hosp. Ass'n*, 967 F.3d at 824, and so have "fallen well short of rebutting the presumption" of review, *Ramirez*, 338 F. Supp. 3d at *37. To the extent that the State Department enjoys deference vis-à-vis its exercise of discretion, that deference manifests in the *conduct* of arbitrary-and-capricious review, *see, e.g.*, *Fox*, 684 F.3d at 75—not in abdicating review.

2. The Omission Of DV-2020 Applicants From "Mission-Critical" Visa Services Is Arbitrary And Capricious

On the substance, this Court has already concluded that the State Department acted arbitrarily and capriciously by excluding DV-2020 applicants from the scope of "mission-critical" visa services under the COVID-19 Guidance. As the Court explained, "in issuing and implementing the Guidance, Defendants failed to consider an important aspect of the problem in violation of § 706(2) of the APA," because "[t]he record reveals no explanation whatsoever for the exclusion of DV-2020 selectees from mission critical services, nor does it reflect any reasoned consideration of the detrimental effects that will be wrought on diversity visa selectees if they do not receive visas." *Gomez I*, 2020 WL 5367010, at *33. Defendants "did not attempt to defend the rationality of their COVID-19 Guidance" at the preliminary-injunction stage, *id.*, and their present, belated attempt at a defense does not solve the problem that the Court identified.

First, Defendants note (ECF 189-1, at 35) that "[d]iversity visa applicants do not meet th[e] criteria" that the State Department established for granting exceptions to the suspension of visa

[21] Chief Judge Howell's discussion of this topic in *Tate*, 2021 WL 148394, at *10 n.8, does not control this case. The plaintiffs there "suggest[ed] no standard to employ," and the court did not consider the statutes and guidance discussed above. *See id.* Many of those considerations would not even have applied to the O-visa plaintiffs in that case, *see id.* at *1, who (unlike the class members here) faced no statutory visa-issuance deadline.

services. But that is just a description of the action that Plaintiffs are challenging: The "mission critical" criteria are arbitrary and capricious.

Second, Defendants assert (*id.*) that "because diversity visa applicants … could not be issued visas under section 1182(f), it would have been a waste of scarce resources" to process their applications on a "mission critical" basis. But as discussed (*supra* Point II.A), the premise that DV-2020 selectees "could not be issued visas under section 1182(f)" is wrong as a matter of law. And "[a]n agency action, however permissible as an exercise of discretion, cannot be sustained where it is based … on an erroneous view of the law." *Sea-Land Serv., Inc. v. Dept of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (citations and internal quotation marks omitted).

Third, Defendants contend (ECF 189-1, at 35) that "inviting diversity visa applicants for interviews would have undermined the Department's efforts to minimize face-to-face interactions in light of the COVID-19 pandemic." But as Defendants acknowledge (*id.*), the administrative record "does not provide an analysis" of whether or to what extent it is possible for consular posts to operate safely while protecting DV-2020 selectees' time-sensitive and exceptionally weighty interests. Defendants thus all but admit that the State Department acted arbitrarily and capriciously in that it "failed to consider [an] important aspect of the problem," *Regents*, 140 S. Ct. at 1913; *Gomez I*, 2020 WL 5367010, at *33, and "fail[ed] to account for … a matter of importance under the statute," *Gresham v. Azar*, 950 F.3d 93, 102 (D.C. Cir. 2020), namely Congress's desire to increase diversity by admitting 55,000 diversity immigrants each year.

Defendants insinuate (ECF 189-1, at 35) that it would have been overly burdensome to consider "the pros and cons for each of the 110 classifications of immigrant and non-immigrant visas," but they disregard that DV-2020 selectees were in a uniquely vulnerable position. Even supposing that it was unnecessary to weigh "pros and cons" for *other* classifications (perhaps some of them would not be considered "important aspect[s] of the problem"), that would not free the

State Department from its obligation to consider its policy's effects on DV-2020 selectees.

Finally, Defendants have no answer to Plaintiffs' explanation (*e.g.*, ECF 66, at 4-7; ECF 108, at 22; ECF 111 ¶ 297) that the COVID-19 Guidance violates "[the] fundamental norm of administrative procedure" under which the agency must "treat like cases alike," *Westar*, 473 F.3d at 1241, in that it does not grant DV-2020 selectees the same "mission critical" status that is afforded to age-outs. Defendants have never "point[ed] to a relevant distinction between the two cases, and so they are required "make an exception in [these] similar case[s]." *Id.*

Plaintiffs recognize that the pandemic disrupted consular operations, and do not contend that Defendants were required to adjudicate *every* DV-2020 application before the September 30 deadline (contrary to Defendants' intimation, ECF 189-1, at 43). But even though the events of September 2020 make clear that the State Department was capable of processing a substantial number of diversity-visa applications even as the pandemic was ongoing, the administrative record does not evidence either any effort to minimize the number of DV-2020 selectees who would lose their chance to immigrate, or a valid basis for making that choice. For all these reasons, the Court should grant summary judgment setting aside the COVID-19 Guidance as arbitrary and capricious in its application to Plaintiffs and class members.

C. Defendants' Implementation Of The Proclamation's "National Interest" Exception Violates The APA

The Court should also grant summary judgment to Plaintiffs on their Second Cause of Action, which alleges that Defendants' implementation of the Proclamations' "national interest" exception (*e.g.*, CAR 19-20, 44-45, 167-74) is unlawful, arbitrary, and capricious. Rather than contest the merits of this claim, Defendants raise threshold disputes. Those arguments fail.

1. Defendants' Implementation Of The "National Interest" Exception Is Final Agency Action

Contrary to Defendants' contention (ECF 189-1, at 42-44), their implementation of the

"national interest" exception plainly constitutes final agency action. The term "agency action" "cover[s] comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). And to be "final," an action need only "mark the consummation of the agency's decisionmaking process" and "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up). As with the similar COVID-19 Guidance, *Gomez I*, 2020 WL 5367010, at *33, Defendants' implementation of the "national interest" exception satisfies both elements. This is "paradigmatic final agency action." *Id.*

First, "Defendants' decisionmaking process is not in flux." *Id.* at *28. Defendants published guidance specifying the scenarios in which a "national interest" exception to the Proclamations is available. *See* CAR 167-74; *Gomez I*, 2020 WL 5367010, at *5. Defendants do not contend that this guidance is subject to revision.

Second, legal consequences flowed from Defendants' implementation of the "national interest" exception. With no express exception available, none of the remaining Plaintiffs or their beneficiaries has secured a "national interest" exception (or the visa that would go with it), despite their efforts to seek such exceptions.[22] Plaintiffs, beneficiaries, and class members have been denied visas and entry precisely because there is no "national interest" exception available to them.

Defendants assert (ECF 189-1 at 44) that their guidance "does not cabin the agency's discretion," but that misses the point. As with the COVID-19 Guidance, Defendants could have (for example) included in their "national interest" guidance an *express* exception for DV-2020 selectees who were at risk of losing their visa eligibility. Or, at minimum, they could have set up

[22] *See, e.g.*, Bushati Decl. ¶ 21; Iwundu Decl. ¶ 11; Karpes Decl. ¶ 12; Kinteh Decl. ¶ 10; Koirala Decl. ¶ 7; Nakamura Decl. ¶¶ 14-18; Alam Decl. ¶¶ 17-18; Jimenez Decl. ¶¶ 11-12; Lebron Decl. ¶¶ 7, 13, 19; Pimentel Decl. ¶¶ 11, 13-14; Sinon Decl. ¶ 23.

a process allowing visa applicants a meaningful opportunity to seek a "national interest" exception under intelligible criteria. It is the *omission* of any such content from the "national interest" guidance that is at issue. In practice, that omission foreclosed Plaintiffs and their beneficiaries from even being considered for an exception. This is a "concrete consequence[]" that constitutes final agency action. *See Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019).

2. Defendants' Implementation Of The "National Interest" Exception Is Not Committed To Agency Discretion

Defendants are wrong to contend that their implementation of the "national interest" exception is "committed to agency discretion" (ECF 189-1, at 44-45). Again, given the strong presumption favoring judicial review, the exception that Defendants invoke is "quite narrow[]," and is reserved for "rare circumstances" where there is "***no*** meaningful standard" to apply. *Dep't of Commerce*, 139 S. Ct. at 2568 (emphasis added); *see, e.g.*, *Moghaddam*, 424 F. Supp. 3d at 115.

This is not a situation in which there is no law to apply. The INA plainly prohibits an Executive Branch scheme requiring consular officers to obtain approval before issuing a visa. *See* 8 U.S.C. §§ 1201(a)(1)(A), 1104(a); *Encuentro Del Canto Popular*, 930 F. Supp. at 1369. And as discussed in connection with the COVID-19 Guidance (*supra* Point II.B.1), the INA and the FAM provide meaningful standards for reviewing the "national interest" guidance's rationality (or lack thereof). *See* 8 U.S.C. §§ 1151(e), 1154(a)(1)(I)(ii)(II), 1202(b); 9 FAM 502.6-4.c-d. Additionally, Proclamation 10052 itself (85 Fed. Reg. at 38,265) and the agencies' implementing documents (CAR 44-45, 174) supply bases to judge whether Defendants have adhered to the "fundamental norm of administrative procedure requir[ing] an agency to treat like cases alike." *Westar*, 473 F.3d at 1241. There is abundant law to apply, and certainly Defendants have not supplied "clear and convincing evidence" that Congress meant to foreclose judicial review. *Am. Hosp. Ass'n*, 967 F.3d at 824; *see Ramirez*, 338 F. Supp. 3d at *37.

3. Defendants' Implementation Of The "National Interest" Exception Is Arbitrary, Capricious, And Contrary To Law

On the merits, the Court should grant summary judgment setting aside Defendants' implementation of the "national interest" exception under 5 U.S.C. § 706(2)(A).

First, the implementation is not in accordance with law. Defendants' policies *require* consular officers to obtain case-by-case approval from the Secretary of State or his designee before issuing any visa under a "national interest" exception (CAR 19-20), unlawfully "interfering with the decision[s] of … consular official[s] to grant or refuse … visa[s]." *Encuentro Del Canto Popular*, 930 F. Supp. at 1369; *see* 8 U.S.C. §§ 1201(a)(1)(A), 1104(a).

Second, Defendants' implementation is arbitrary and capricious because it fails to "adopt an intelligible decisional standard" under which "national interest" exceptions are to be granted to or (much more often) withheld from prospective immigrants. *See, e.g.*, *Checkosky v. S.E.C.*, 139 F.3d 221, 226 (D.C. Cir. 1998). Apart from the age-out cases specified in Proclamation 10052, Defendants have identified no criteria under which "national interest" hopefuls are evaluated, or even a process through which visa-seekers may apply for an exception.[23]

Third, by failing to treat DV-2020 selectees (for whom no exception is available) like age-outs (who are expressly excepted), or to "point to a relevant distinction," Defendants violated the "fundamental norm" requiring agencies to "treat like cases alike." *Westar*, 473 F.3d at 1241.

Fourth, by omitting DV-2020 selectees from the classes to whom "national interest"

[23] The only example (to Plaintiffs' knowledge) of an immigrant receiving a "national interest" exception outside the age-out context is so extreme as to provide no guidance: After this litigation was filed, Defendants granted an exception to a ten-year-old Yemeni girl stranded alone in Egypt while her visa application inexplicably remained in "administrative processing"; her family had been forced to abandon her and travel to the United States because their own visas were set to expire. *See* ECF 46, ¶¶ 179-86; ECF 112. If that is what it takes to be granted relief, the exception is all but entirely illusory.

exceptions are expressly available, Defendants committed the same errors that the Court has identified in connection with the COVID-19 Guidance: "The record reveals no explanation whatsoever for the exclusion of DV-2020 selectees from [the 'national interest' guidance], nor does it reflect any reasoned consideration of the detrimental effects that will be wrought on diversity visa selectees if they do not receive visas." *Gomez I*, 2020 WL 5367010, at *33.

D. Defendants' Application Of The Proclamations And The COVID-19 Guidance To The DV-2020 Plaintiffs And The DV-2020 Class Was Ultra Vires

The Court should also grant summary judgment to Plaintiffs on the Fifth and Ninth Causes of Action, which allege that by halting the processing and issuance of DV-2020 visas, Defendants' implementation of the Proclamations and the COVID-19 Guidance unlawfully "override particular provisions of the INA." *Hawaii*, 138 S. Ct. at 2411. Specifically, if not for this Court's intervention, Defendants' policies would have effectively abolished the fiscal year 2020 diversity visa program, in violation of the INA's express mandate that diversity visa selectees "***shall*** remain eligible to receive such visa" until the end of the fiscal year. 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added). Defendants' policies impermissibly override this "clear legislative mandate," *Sierra Club*, 705 F.3d at 467, and accordingly they are unlawful under *Hawaii* and "not in accordance with law" and "in excess of statutory jurisdiction" under 5 U.S.C. § 706(2).

E. Defendants Unreasonably Delayed And Unlawfully Withheld Adjudication Of The DV-2020 Plaintiffs' And Class Members' Visa Applications

Finally, the Court should grant summary judgment on the Tenth Cause of Action, which alleges that Defendants unreasonably delayed and unlawfully withheld adjudication of DV-2020 selectees' visa applications. *See* 5 U.S.C. § 706(1).

1. This Court has already ruled that under *TRAC*, 750 F.2d 70, "Defendants … unreasonably delayed processing … DV-2020 selectees' visa applications." *Gomez I*, 2020 WL 5367010, at *30; *see id*. at *30-32. Defendants offer no sound basis to depart from this conclusion.

First and Second TRAC Factors. As the Court explained, these factors favor Plaintiffs and class members because "the INA provides a clear 'indication of the speed with which it expects the agency to proceed in' processing diversity lottery selectees' visa applications"—it "sets an absolute, unyielding deadline by which selectees must receive their visas." *Gomez I*, 2020 WL 5367010, at *30 (quoting *TRAC*, 750 F.2d at 80, and citing 8 U.S.C. § 1154(a)(1)(I)(ii)(II)). "'The specificity and relative brevity' of the September 30 deadline manifests Congress's intent that the State Department undertake good-faith efforts to ensure that diversity visas are processed and issued before the deadline." *Id.* (quoting *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 836-37 (D.C. Cir. 2012)). Thus, the September 30 deadline "supplies content for the *TRAC* rule of reason." *Id.* And under that rule of reason, "the State Department [cannot] effectively extinguish the diversity program for a given year by simply sitting on its hands and letting all pending diversity visa applications time out," because "[d]oing so would 'plainly frustrate[] the congressional intent' to make available 55,000 diversity immigrant visas each year." *Id.* (quoting *Mojahedin*, 680 F.3d at 837, and collecting other authorities); *accord In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (agency's failure to meet statutory deadline was unreasonable as it "evis[c]erate[d] the very purpose of the regulation").

Defendants assert (ECF 189-1, at 37-38) that "there is no statute or regulation that sets a timetable" for adjudicating diversity-visa applications, because § 1154(a)(1)(I)(ii)(II) "does not require the agency to do *anything* prior to September 30th." But Defendants again "ignore that the second *TRAC* factor may be satisfied by an express timetable *or* any 'other indication of [] speed,'" and that the statutory deadline provides such an "indication" (and "content for the *TRAC* rule of reason") even if it does not specifically mandate issuance of every diversity visa by that date each year. *Gomez I*, 2020 WL 5367010, at *30 (quoting *TRAC*, 750 F.2d at 80). Defendants also disregard the statutes that *do* impose upon the State Department an affirmative duty to act:

"*All* immigrant visa applications *shall* be reviewed and adjudicated by a consular officer," 8 U.S.C. § 1202(b) (emphasis added), and the agency "*shall* proceed to conclude" that adjudication "within a reasonable time," 5 U.S.C. § 555(b) (emphasis added), or else it is subject to compulsory relief under § 706(1). *See Gomez I*, 2020 WL 5367010, at *32 n.23. Thus, agencies are "obligated *under the APA* to respond to" matters presented to them, and to do so "within a reasonable time." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418-19 (D.C. Cir. 2004).[24]

Defendants have no basis for their suggestion (ECF 189-1, at 37) that § 706(1) requires an express statutory "requirement to direct an agency to act within a time certain." The Supreme Court identified one *example* of a statutory timetable in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004), but it did not rule out § 706(1) relief based on "other indication[s] of the speed with which [Congress] expects the agency to proceed," *TRAC*, 750 F.2d at 80—a standard that the D.C. Circuit continues to employ (*e.g.*, *Mojahedin*, 680 F.3d at 836-37).[25]

Nor do Defendants' remaining cases favor their position. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D.C. Cir. 2003), stated that "the ultimate issue" in a § 706(1) case is whether the agency's inaction "satisfies the 'rule of reason,'" in view of considerations such as "the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Id.* at 1102. And Defendants elide much of Judge Boasberg's analysis in *Center for Science in the Public Interest v. FDA*, 74 F. Supp. 3d

[24] In addition, the FAM directs that diversity visa applications are to be processed on a regular monthly basis, to ensure that visas are issued throughout the fiscal year. 9 FAM 502.6-4.c-d.

[25] Section 706(1) was not even at issue in *Brock v. Pierce County*, 476 U.S. 253 (1986), *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), or *NRA of America, Inc. v. Reno*, 216 F.3d 122 (D.C. Cir. 2000)—so those cases cannot support Defendants' rule. Defendants also cite *Ghadami v. DHS*, 2020 WL 1308376 (D.D.C. Mar. 19, 2020), but they disregard this Court's explanation that *Ghadami* is "inapposite" because there was "no … time frame associated with" the plaintiff's waiver request. *Gomez I*, 2020 WL 5367010, at *30 n.21 (quotation mark omitted).

295 (D.D.C. 2014), which explains that the first two TRAC factors "get at whether the agency's response time complies with an existing specified schedule and whether it is governed by an identifiable rationale." *Id.* at 300. Here, the State Department's refusal to adjudicate DV-2020 applications disregarded the "specified schedule," and threatened to impose permanent and hugely significant consequences on the applicants. The Department's rationales for this inaction were unlawful, arbitrary, and capricious. *See supra* Points II.A-D. And while the State Department faced COVID-related operational disruptions, Defendants have not shown that adjudicating qualified DV-2020 applications was so onerous that the State Department could not through good-faith effort have adjudicated even a *single* diversity visa between March and mid-September.

In passing, Defendants cite the pandemic as the basis for their "decision to reduce consular processing" (ECF 189-1, at 37)—but as the Court has ruled, even the pandemic did not justify reducing DV-2020 processing *all the way to zero*. *See Gomez II*, 2020 WL 5861101, at *6. Defendants do not refute that conclusion. At a basic level, the "rule of reason" did not permit the State Department to "effectively extinguish" more than half the DV-2020 program by "sitting on its hands" for more than six months. *Gomez I*, 2020 WL 5367010, at *30. Nor was it allowed to *continue* sitting on its hands for five days—"nearly 20% of time that remained"—*after* this Court found the *prior* delay unreasonable. *Gomez II*, 2020 WL 5861101, at *6.

Third and Fifth TRAC Factors. Defendants "do not dispute" that these factors "favor a finding of unreasonable delay, and for good reason." *Gomez I*, 2020 WL 5367010, at *31. "The prejudice from delay [was] dire[,] … and such delay is 'less tolerable' in cases like this one, where 'human … welfare' is 'at stake.'" *Id.* (citation omitted).

Fourth TRAC Factor. The lone "competing priorit[y]" that Defendants identify (ECF 189-1, at 38-39) is the disruption of operations and strain on the State Department's resources caused by the pandemic. Plaintiffs, like the Court, are "not insensitive to these concerns,

but they do not render reasonable the agency's complete refusal to process diversity visa applications." *Gomez I*, 2020 WL 5367010, at *31. Defendants still have not "provided an adequate explanation for why [they did] not consider DV-2020 applications mission critical," nor have they justified the State Department's directive to treat such applications "as low priority" even at posts where visa processing resumed. *Id.* (citing CAR 35). Even if certain posts faced resource constraints, "that does not justify a blanket withholding of processing worldwide." *Id.*

Citing declarations that the Court already considered in granting a preliminary injunction, Defendants point out that the Court's visa-reservation order "recognized that '[t]he COVID-19 pandemic has caused worldwide operational disruptions of the State Department's consular and visa processing operations.'" ECF 189-1, at 38-39 (quoting *Gomez II*, 2020 WL 5861101, at *7)). But the visa-reservation order *reaffirmed* the Court's earlier conclusion regarding unreasonable delay, *see Gomez II*, 2020 WL 5861101 at *1, and reiterated that Defendants' actions were "unlawful and arbitrary," *id.* at *5. The Court considered "operational disruptions" when it limited the number of visas to be reserved, *see id.* at *7-8—but those disruptions do not disturb the Court's conclusion that if the State Department had acted reasonably, it would have adjudicated thousands more diversity visas than it actually did. *See id.* at *6.

Sixth TRAC Factor. The Court previously declined to find "impropriety lurking behind agency lassitude," *Gomez I*, 2020 WL 5367010, at *32, but Plaintiffs continue to maintain that this factor favors relief. Defendants' actions were "unlawful and arbitrary" at best, *Gomez II*, 2020 WL 5861101, at *5, and public evidence points to a conclusion that the prior Administration's policy choices were motivated by President Trump's "well documented" "hostility towards the diversity visa lottery program." *Gomez I*, 2020 WL 5367010, at *26.

Because each of the *TRAC* factors favors relief, the Court should grant summary judgment to the DV-2020 Plaintiffs and the class on their unreasonable-delay claim.

2. In addition to being unreasonably delayed, Plaintiffs' and class members' visa adjudications were "unlawfully withheld" by the State Department—providing another basis for compulsory relief under § 706(1). Relief is warranted under this branch of the statute where the defendant has refused "to take a *discrete* agency action that it is *required to take*." *Kirwa v. U.S. Dep't of Defense*, 285 F. Supp. 3d 21, 41 (D.D.C. 2017) (quoting *Norton*, 542 U.S. at 64). Here, the State Department has a nondiscretionary duty under the INA: "*All* immigrant visa applications *shall* be reviewed and adjudicated by a consular officer." 8 U.S.C. § 1202(b) (emphasis added); *see Gomez I*, 2020 WL 5367010, at *32 n.23; *Sierra Club*, 705 F.3d at 467 ("the word 'shall' … evidences a clear legislative mandate"). Such a mandate provides a proper basis for relief under § 706(1). *See, e.g.*, *Meina Xie v. Kerry*, 73 F.3d 405, 406-08 (D.C. Cir. 2015); *Sai v. DHS*, 149 F. Supp. 3d 99, 119-21 (D.D.C. 2015).[26]

Despite their statutory duty, Defendants *affirmatively refused* Plaintiffs' requests that their diversity visa applications be reviewed and adjudicated.[27] And they also barred review and adjudication of thousands of other DV-2020 applications—based on policies that are unlawful for the reasons set forth above (Points II.A-D) and in *Gomez I*, 2020 WL 5367010, at *26-29, *32-33.

Defendants do not address this claim in their motion, other than asserting (ECF 189-1, at 39) that "the State Department d[id] not have a nondiscretionary duty" to adjudicate Plaintiffs' and class members' diversity visa applications. But this Court has already rejected that contention as "flatly contradicted" by § 1202(b). *Gomez I*, 2020 WL 5367010, at *32 n.23. And while the Court found it unnecessary to separately address the unlawful-withholding claim at the

[26] Even if § 1202(b) did not provide a statutory mandate, that would be "beside the point" because agencies are "obligated *under the APA* to respond to" matters presented to them. *In re Am. Rivers*, 372 F.3d at 419 (citing 5 U.S.C. § 555(b)); *see Gomez I*, 2020 WL 5367010, at *32 n.23.

[27] *See* Bushati Decl. ¶ 21; Iwundu Decl. ¶ 11; Karpes Decl ¶ 12; Kinteh Decl. ¶ 10; Koirala Decl. ¶ 7; Nakamura Decl. ¶¶ 14-18.

preliminary-injunction stage, *id.* at *32, Plaintiffs now are entitled to summary judgment.

3. At the preliminary-injunction stage, the Court declined to grant mandamus (Plaintiffs' Eleventh Cause of Action) on the basis that 5 U.S.C. § 706(1) applied and that mandamus "is only warranted when 'there is no other adequate remedy available to the plaintiff.'" *Gomez I*, 2020 WL 5367010, at *32. Should the Court again conclude that another adequate remedy is available, Plaintiffs would not object to summary judgment for Defendants on this claim.

But if for any reason the Court concludes that it otherwise lacks authority to require the State Department to review and to adjudicate class members' DV-2020 applications, Plaintiffs respectfully request that mandamus be granted. For all the reasons set forth above, class members have "a clear and indisputable right to relief" from Defendants' unlawful policies, and conversely the State Department "is violating a clear duty to act" by refusing to review and to adjudicate class members' visa applications. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

III. THE COURT SHOULD GRANT FINAL EQUITABLE RELIEF

For all the reasons set forth above, the Court should grant summary judgment to Plaintiffs. And upon doing so, the Court should direct the State Department to adjudicate class members' visa applications and to issue DV-2020 visas until it has issued the 9,095 visas reserved pursuant to *Gomez II*, 2020 WL 5861101, at *12. Defendants no longer dispute the Court's authority to grant such relief, nor do they contest that it will be appropriate upon entry of final judgment.[28]

As the Court has concluded, *Gomez II*, 2020 WL 5861101 at *3-7, such relief is more than warranted on the facts here: Thousands of DV-2020 class members face irreparable harm if their

[28] *See, e.g.*, *Almaqrami v. Pompeo*, 933 F.3d 774, 781 (D.C. Cir. 2019) (recognizing possibility of equitable relief from fiscal-year deadline); *P.K.*, 302 F. Supp. 3d. at 10 (equitable relief warranted where "the State Department's implementation" of an executive action "violated the INA"); *Przhebelskaya*, 338 F. Supp. 2d at 402 (similar); *Paunescu*, 76 F. Supp. 2d at 903 (similar).

visa applications remain unadjudicated. *See Gomez I*, 2020 WL 5367010, at *34. And the named Plaintiffs' declarations only reconfirm this obvious truth.[29] Issuance of the 9,095 reserved visas is necessary to minimize the irreparable harm to members of the certified class.

Nor is there any public-interest argument against granting the relief contemplated by *Gomez II*. To the contrary, the national interest *favors* "promot[ing] diversity in [the] immigration system." *E.g.*, H.R. Rep. No. 101-723, pt. 1 at 48 (1990). And "[t]here is generally no public interest in the perpetuation of unlawful agency action," *League of Women Voters*, 838 F.3d at 12, so Defendants can claim no interest in refusing visas to individuals who ought to have been granted them. *See Gomez I*, 2020 WL 5367010, at *34.

As representatives of the certified class, Plaintiffs respectfully submit that the Court should endeavor to restore the *status quo ante*—as it existed prior to Defendants' adoption of their unlawful policies—to the greatest extent possible. The State Department should be directed to adjudicate DV-2020 visa applications in the order in which those applications would have been adjudicated in the absence of Defendants' unlawful actions (but without regard to the end-of-fiscal-year deadline), and to issue visas to qualified DV-2020 applicants (and their beneficiaries) until all of the 9,095 reserved visas have been issued. Plaintiffs and class counsel further respectfully request that the Court direct Defendants promptly to meet and confer with respect to their plan for adjudicating and distributing visas, and to file a proposed plan with the Court for approval.

CONCLUSION

The Court should enter summary judgment for Plaintiffs on the claims discussed herein. The Court should order Defendants to adjudicate DV-2020 visa applications and to issue 9,095 diversity visas to members of the DV-2020 class and their derivative beneficiaries.

[29] *See, e.g.*, Bushati Decl. ¶¶ 22, 32; Iwundu Decl. ¶ 10; Karpes Decl. ¶ 20; Kinteh Decl. ¶ 8; Koirala Decl. ¶ 5; Nakamura Decl. ¶ 25.

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Respectfully submitted,

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