IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

***GOMEZ* PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

When he revoked Proclamation 10014, President Biden expressly found that eliminating the DV-2020 program "does not advance the interests of the United States," because it "harms individuals who were selected to receive the opportunity to apply for" diversity visas, causing "delay and possible forfeiture of their opportunity to receive Fiscal Year 2020 diversity visas and to realize their dreams in the United States." Proclamation 10149, Revoking Proclamation 10014, 86 Fed. Reg. 11,847 (Feb. 24, 2021). The President further found that the ban on employment-based immigration is contrary to U.S. interests because it "harms industries in the United States that utilize talent from around the world." *Id.* But Defendants have nevertheless refused to voluntarily ensure that DV-2020 selectees receive the visas that Congress intended them to receive and that this Court reserved in *Gomez II*, or to restart the adjudication of employment-based nonimmigrant visas. Regrettably, therefore, this Court's intervention is necessary. Defendants have no compelling arguments against such relief. Plaintiffs' motion should be granted, and this Court should enter final judgment vacating the No-Visa Policy and directing Defendants to process and to issue the 9,095 DV-2020 visas that this Court reserved in *Gomez II*.

At the threshold, this case is justiciable. Both the nonimmigrant visa Plaintiffs and the members of the DV-2020 class retain live interests in this controversy. And no "nonreviewability" doctrine applies to claims (like those here) that do not challenge any particular visa determination.

The heart of this case is the plain language of 8 U.S.C. § 1182(f), which does not allow for limitations on visa processing. Defendants have no way around that plain language. Indeed, Defendants do not even try to identify any ambiguity in the statutory text—and without textual ambiguity, all of Defendants' other arguments about § 1182(f) fail. Defendants' position is contrary to the INA, and the No-Visa Policy violates the APA.

Defendants also offer no viable defense of their refusal to process DV-2020 visas based on

policies regarding "mission critical" status under the COVID-19 Guidance and the Proclamations' "national interest" exceptions. The presumption favoring judicial review applies, and Defendants identify no reason to conclude that Congress meant to override that presumption here. Because the administrative record discloses no valid basis for Defendants' actions, they violate the APA.

Defendants' substantive violations compel the conclusion that they also violated the APA's procedural prohibitions on unreasonable delay and unlawful withholding of agency action, when they failed to process Plaintiffs' and class members' DV-2020 applications in a timely manner.

Regarding the remedy for the DV-2020 class, Defendants have no response to *Gomez II*. An order requiring processing and issuance of the DV-2020 visas that this Court reserved would vindicate the orders in *Gomez I* and *Gomez II*, as well as the congressional policy embedded in the INA. Such an order would also help to remedy the immense harms that Defendants' actions have caused. Conversely, denying relief would pull the rug out from under thousands of immigrants hoping to "realize their dreams in the United States." 86 Fed. Reg. at 11,847.

Plaintiffs respectfully submit that urgent relief is necessary. Even with this Court's orders in place, and despite Plaintiffs' requests that Defendants provide class members clear guidance on the status of the DV-2020 program, Defendants have persisted in advising the public that "diversity visa applicants for DV-2020 who were not issued visas before September 30, 2020 for any reason including P.P. 10014 will **not** be interviewed, scheduled, or reconsidered for visas." U.S. Dep't of State, Diversity Visa Instructions (visited March 29, 2021), https://bit.ly/31kmrGe. This representation is misleading—it does not account for *Gomez II*. And the State Department's tendentious legalism is causing great confusion among class members, who may abandon investments in immigrating to the United States as a result. A final judgment is necessary to compel the State Department to rectify its actions. Plaintiffs therefore respectfully request that the Court schedule a hearing and issue a final judgment at the earliest practicable date.

ARGUMENT

I. PLAINTIFFS SATISFY THE REQUIREMENTS OF ARTICLE III

Defendants' argument that the named DV-2020 Plaintiffs lost standing when they received their diversity visas (ECF 224, at 4-7) confuses standing with mootness. "[S]tanding is assessed at the time of filing," *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012), whereas mootness concerns "'circumstances that destroy the justiciability of a suit previously suitable for determination,'" *Loughlin v. United States*, 393 F.3d 155, 169 (D.C. Cir. 2004) (citation omitted)); *accord Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 188-89 (2000); *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (both cited in ECF 224, at 5-6).

As this Court previously found, *Gomez v. Trump*, 485 F. Supp. 3d 145, 170-73 (D.D.C. 2020) (*Gomez I*), at least Ms. Nakamura had "[t]he requisite personal interest … at the commencement of the litigation," *Laidlaw*, 528 U.S. at 170. Defendants do not challenge that ruling, which is compelled by the record evidence. *See* ECF 195-1, at 16 n.14. "Dismissal for lack of standing [would be] erroneous." *Wheaton*, 703 F.3d at 552.

Even if recast in mootness terms, Defendants' argument fails. Defendants bear the "heavy burden" to establish mootness with respect to *every* party seeking relief, *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561 (D.C. Cir. 2016), yet they ignore the indisputably live claims of the certified class, *see Gomez v. Trump*, 2020 WL 5861101, at *12 (D.D.C. Sept. 30, 2020) (*Gomez II*). That class holds a "legal status separate from the interest asserted" by the named Plaintiffs, *Sosna v. Iowa*, 419 U.S. 393, 399 (1975), and "the mootness of individual claims does not affect the ability of representatives to litigate a controversy between the defendants and absent class members," *J.D. v. Azar*, 925 F.3d 1291, 1308 (D.C. Cir. 2019). The named Plaintiffs' receipt of visas pursuant to *Gomez I* "does not moot the claims of the unnamed members of the class," whose visas have yet to be adjudicated, and does not deprive this Court of jurisdiction. *Cty. of Riverside v. McLaughlin*,

500 U.S. 44, 51-52 (1991); *see, e.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755-56 (1976) (live controversy where unnamed class members were entitled to relief already afforded to class representative); *Afghan & Iraqi Allies Under Serious Threat v. Pompeo*, 334 F.R.D. 449, 463 (D.D.C. 2020) (similar in case concerning visa processing); ECF 195-1, at 16 n.14.[1]

II. "PRINCIPLES OF NONREVIEWABILITY" STILL DO NOT APPLY

Plaintiffs have explained (*e.g.*, ECF 195-1, at 13-16), and this Court has ruled, *Gomez I*, 485 F. Supp. 3d at 175-76, that the claims at issue are subject to judicial review. As Judge Edwards put it, Defendants are "wasting time" in arguing the contrary. *See* ECF 195-1, at 13 n.13.

Defendants now emphasize (ECF 224, at 12-13) *Kleindienst v. Mandel*, 408 U.S. 753 (1972), but that case is still inapposite (*see* ECF 195-1, at 14). The plaintiffs there did not seek adjudication of a visa application, but sought reversal of a visa *denial*. 408 U.S. at 762, 769. The Supreme Court thus did not address a claim (like the claims here) challenging the failure to *adjudicate* a visa application. *Mandel* does not contradict this Court's ruling that "when the suit challenges inaction, as opposed to a decision taken within the consul's discretion, there is jurisdiction." *Gomez I*, 485 F. Supp. 3d at 176 (internal quotation marks omitted).

Defendants assert (ECF 224, at 12-13) that this case involves "affirmative determinations" that are immune from judicial review. Not so. "Plaintiffs challenge the State Department's refusal to review and adjudicate their [and the class members'] pending visa applications," not "an affirmative visa 'determination'" that would be nonreviewable. *Gomez I*, 485 F. Supp. 3d at 176. Such a refusal of review and adjudication is not (*contra* ECF 224, at 13) an exercise of "the

[1] Defendants do not dispute Plaintiffs' showing (*see* ECF 195-1, at 16 n.14) that the nonimmigrant visa Plaintiffs' claims are justiciable. Those Plaintiffs' visa beneficiaries still do not have visas, and their entry into the country continues to be unlawfully suspended by Proclamation 10052 (as extended). Whether those claims "may become moot" if Proclamation 10052 expires on March 31, 2021 (ECF 224, at 11 n.4) is immaterial at this juncture.

political branches' 'prerogative to regulate the entry of foreign nationals,'" but rather a *failure* to exercise that prerogative. *Gomez I*, 485 F. Supp. 3d at 176; *see, e.g.*, *P.K. v. Tillerson*, 302 F. Supp. 3d 1, 12 (D.D.C. 2017) (similar).

Defendants' arguments are in any event foreclosed by *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), which Defendants fail to distinguish (ECF 224, at 13). *Bricklayers* holds that where plaintiffs challenge a general policy and not a "particular determination," nonreviewability (and *Mandel* in particular) "ha[ve] no application." *Id.* at 801. Indeed, *Bricklayers* specifically permitted review of claims for "injunctive relief prohibiting continued application of [the challenged policy] by … the State Department," on grounds that the policy was contrary to the INA. *Id.* at 799. Plaintiffs here seek just such relief. Nonreviewability is inapplicable. *See, e.g.*, *Tate v. Pompeo*, 2021 WL 148394, at *5 (D.D.C. Jan 16, 2021) (applying *Bricklayers* to reject nonreviewability argument in similar case).

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PLAINTIFFS

A. The No-Visa Policy Violates The APA

1. Sections 1182(f) And 1201(g) Do Not Authorize The No-Visa Policy

a. This Court has ruled that Defendants' No-Visa Policy is likely not in accordance with law, and that it therefore violates the APA as applied to both immigrant and nonimmigrant visa applicants. *Gomez I*, 485 F. Supp. 3d at 190-94; *see* ECF 195-1, at 16-22. The INA does not authorize—let alone *require*—the State Department to halt visa processing simply because the applicants are subject to a temporary suspension of *entry* under § 1182(f). Defendants' position "is contrary to the text and structure of § 1182." *Tate*, 2021 WL 148394, at *7.

Defendants assert (ECF 224, at 14) that "Plaintiffs fail to address *Castaneda-Gonzalez* [*v. INS*, 564 F.2d 417 (D.C. Cir. 1977)]"—but it is Defendants who disregard the D.C. Circuit's explanation that 8 U.S.C. § 1201(g) "delegates the authority to issue visas to consular offices and

directs them not to issue visas to any alien who falls within one of the excludable classes ***described in section 212(a)***"—that is, § 1182**(a)**. 564 F.2d at 426 (emphasis added). This Court relied on that very holding when explaining that "[t]he categories of persons deemed ineligible to receive a visa pursuant to § 1201(g) appear in § 1182(a), not § 1182(f)." *Gomez I*, 485 F. Supp. 3d at 191.

b. Besides lacking any affirmative basis in either § 1201(g) or § 1182(f), Defendants' No-Visa Policy is contrary to multiple other provisions of the INA. *See* ECF 195-1, at 16-17.

First, with respect to the directive that DV-2020 selectees "shall remain eligible" to receive a visa until the end of the fiscal year, 8 U.S.C. § 1154(a)(1)(I)(ii)(II), Plaintiffs do not contend (*contra* ECF 224, at 15) that the statute "requires that all selectees remain eligible for the full year" even if changed circumstances legitimately affect their eligibility.[2] The point is that a § 1182(f) proclamation cannot affect anyone's visa eligibility. Thus, Defendants cannot implement such a proclamation by effectively revoking a diversity visa selectee's eligibility. ECF 195-1, at 17.[3]

Second, § 1182(f) does not allow Defendants to override the INA's mandate that "***[a]ll***" "visa applications ***shall*** be reviewed and adjudicated by a consular officer." 8 U.S.C. § 1202(b), (d) (emphases added). These provisions do not "merely place limitations on who may issue a visa" (*contra* ECF 224, at 14-15 n.5). If Congress wanted to allow the State Department to halt visa processing, it would have used the permissive "may," not the mandatory "shall." This language "flatly contradict[s]" Defendants' position. *Gomez I*, 485 F. Supp. 3d at 198 n.23.

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[2] If an applicant were convicted of a specified crime, for example, he would become ineligible *to receive a visa* under § 1182**(a)**(2) (and, thus, under § 1201(g)). Such *specific* grounds of visa ineligibility, where applicable, would control § 1154(a)(1)(I)(ii)(II)'s *general* eligibility provision. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

[3] Defendants suggest (ECF 224, at 15 n.5) that the word "only" in § 1154(a)(1)(I)(ii)(II) has some special significance, but they do not say what that significance is. Defendants agree with Plaintiffs that § 1154(a)(1)(I)(ii)(II) defines the period "when an applicant is eligible to receive a diversity visa" (*id.*), and they identify no statute allowing for premature termination of such eligibility on the basis of a § 1182(f) entry suspension.

Third, Defendants fail to show that § 1182(f) "permit[s] the suspension of th[e] ordinary process" of visa adjudication as provided in the INA. *Id.* at 194. In fact, the INA *prohibits* Defendants from interfering with "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. § 1104(a); *see* ECF 195-1, at 17.

c. "Losing the textual battle," *Gomez I*, 485 F. Supp. 3d at 192, Defendants again retreat to *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018). But as this Court explained, the Supreme Court did not (*contra* ECF 224, at 15) "recognize[] … a unified standard for both admissibility and visa-eligibility determinations"—rather, the Court "repeatedly stressed the distinction between entry and visa issuance," and "never held that the President's suspension of entry under § 1182(f) renders a person ineligible to receive a visa." *Gomez I*, 485 F. Supp. 3d at 192 (citation omitted).[4]

In suggesting that *Hawaii*'s reference to "Section 1182" means that *every* subsection of § 1182 affects visa eligibility (ECF 224, at 15-16), Defendants ignore that only some (not *all*) of those subsections provide "limitations on eligibility for visas"—including §§ 1182(a), (e), (s), and (t)(1). *Gomez I*, 485 F. Supp. 3d at 191 n.19. The Supreme Court's general citation to § 1182 was meant to sweep in those other subsections governing visa ineligibility—not to rewrite § 1182(f).

d. Abandoning many of the arguments advanced in their principal brief,[5] Defendants place

[4] Moreover, the Supreme Court drew that distinction in its discussion of a nondiscrimination provision (8 U.S.C. § 1152(a)(1)) that refers only to visa issuance. *Hawaii*, 138 S. Ct. at 2413-14. Had the Court "recognized … a unified standard," as Defendants contend, it would have applied that same standard in both contexts. The Court did not do so, but instead hewed closely to § 1152(a)(1)'s language—holding that the nondiscrimination provision applied *only* to the visa-issuance process referenced in the statutory text. *Id.*

[5] Defendants no longer dispute Plaintiffs' showings that **(i)** Congress's omission of the word "visas" from § 1182(f) is not "irrelevant"; **(ii)** the No-Visa Policy cannot be justified under § 1185(a)(1), which does not mention visas; **(iii)** purported confusion among DHS officials is factually unsubstantiated and legally irrelevant; **(iv)** the INA does *not* "create a significant legal infrastructure for ensuring that visas are not issued" to noncitizens affected by § 1182(f) entry suspensions; and **(v)** 22 C.F.R. § 40.6 actually *prohibits* Defendants' No-Visa Policy, because § 1182(f) does *not* "specifically set out" a ground for refusing a visa. *See* ECF 195-1, at 18-21.

great weight (ECF 224, at 16-19) on the visa lookout system. But Defendants' failure to identify any ambiguity in either § 1201(g) or § 1182(f) is dispositive: "th[e] first canon is also the last," and the words in the statute mean exactly what they say—irrespective of another, later-enacted provision. *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 340 (D.C. Cir. 2020); *see Beverly Enters., Inc. v. Herman*, 119 F. Supp. 2d 1, 8 (D.D.C. 2000) ("The rule that statutes *in pari materia* should be construed together … applies only when the statute to be construed is ambiguous.").

Defendants' argument is, moreover, implausible on its face. The basic structure of § 1201(g) and § 1182(f) has been in place since 1952, when Congress first enacted the INA—including provisions that were materially identical to current law. 66 Stat. 163, 188, 192, §§ 212(e), 221(g) (1952). Defendants would have the Court conclude that Congress meant to upend this text and structure *sub silentio* forty-two years later, through an obscure, uncodified rider buried in a two-year State Department appropriations bill (the "Foreign Relations Authorization Act, Years 1994 and 1995"). That rider did not eliminate the INA's "basic distinction between admissibility determinations and visa issuance." *Hawaii*, 138 S. Ct. at 2414 & n.3.

Defendants' remaining arguments fail. Defendants do not dispute that "[t]he statute does not dictate" the inclusion of temporary § 1182(f) proclamations in the lookout system (ECF 195-1, at 21 n.16).[6] Instead, they pivot to evidentiary declarations and FAM provisions (*see* ECF 224, at 17-18)—but none of that is relevant to the legal question whether the No-Visa Policy is lawful. Congress has never prohibited the issuance of visas to noncitizens subject to a § 1182(f) entry suspension, and the lookout-system statute does not amend either § 1182(a) or § 1201(g). It is not even clear that a § 1182(f) suspension renders a noncitizen "excludable" as the lookout-system

[6] To the extent that Defendants have a genuine concern about professional consequences for consular officers who issue visas like those issued to the DV-2020 Plaintiffs, the State Department presumably could amend its internal guidance to address the issue.

statute uses the term. *See Tate*, 2021 WL 148394, at *8. At bottom, the statute simply is not "inconsistent, or even in tension, with plaintiffs' interpretation of § 1182(f)." *Id.*

e. In response to Plaintiffs' showing (ECF 195-1, at 20) that Defendants' misinterpretation of §§ 1182(a) and 1201(g) is not "grounded" in §§ 1101(a)(16) and (26) (*contra* ECF 189-1, at 20), Defendants try a different tack—accusing Plaintiffs of "improperly divorc[ing] admissibility from visa eligibility" (ECF 224, at 19-20). But Congress, not Plaintiffs, "divorced" those concepts almost 70 years ago. *See Hawaii*, 138 S. Ct. at 2414 & nn.3-4.

Quoting *Kerry v. Din*, 576 U.S. 86, 89 (2015), Defendants assert that "'[b]efore issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA[,]' including section 1182(f)." ECF 224, at 20. But the reference to § 1182 does not appear in *Din*. Moreover, Defendants' quotation is from background *dicta* (not a holding) in a three-Justice plurality opinion. And the quotation relies on 8 U.S.C. § 1361, which is an "example[]" of a provision that *distinguishes* admissibility from visa eligibility. *Hawaii*, 138 S. Ct. at 2414 n.3.[7]

f. Defendants are still wrong in arguing (ECF 224, at 20-21) that 8 U.S.C. §§ 1182e and 1182f[8] somehow amend the text of §§ 1182(f) and 1182(g). Unlike § 1182(f), Defendants' statutes both *expressly* forbid the issuance of visas to covered individuals. 8 U.S.C. §§ 1182e(a), 1182f(a). Sections 1182e and 1182f confirm that when Congress intends to prohibit visa issuance, it writes a statute that prohibits visa issuance. Such a prohibition has the knock-on effect of prohibiting lawful entry (because lawful entry requires a visa). But because visa issuance and entry remain

[7] Section 1361 reconfirms the distinction between visas and entry. Its use of the disjunctive "or," and its concluding phrase "as the case may be," make clear that when a person "makes application for a visa," his burden is "to establish that he is eligible to receive such visa." Separately, the applicant must show that he "is not inadmissible" when he later "makes application for admission."

[8] Due to an editing error, Plaintiffs inadvertently added parentheses to the citations to §§ 1182e and 1182f in the opening brief (ECF 195-1, at 22).

distinct concepts, Congress need not limit visa issuance in order to limit entry. Congress can just address entry directly, without touching the visa system—as in § 1182(f). This Court should refuse Defendants' proposal "to add words to the law to produce what is thought [by Defendants] to be a desirable result." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).[9]

For all these reasons, the "No-Visa Policy is 'not in accordance with law' and 'in excess of statutory authority.'" *Gomez I*, 485 F. Supp. 3d at 194 (quoting 5 U.S.C. § 706(2)).

2. Defendants' Position Is Not Entitled To *Skidmore* Deference

Under *Skidmore*, "agency action … is entitled to respect only to the extent it has the power to persuade." *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (collecting cases; internal quotation marks omitted). Defendants' interpretation of §§ 1182(f) and 1201(g) is owed no such respect, because it has no persuasive power. As this Court and others have found, there simply is no "statutory authority that would permit the suspension of th[e] ordinary process" of visa adjudication. *Gomez I*, 485 F. Supp. 3d at 194; *see, e.g.*, *Young v. Trump*, 2020 WL 7319434, *16 (N.D. Cal. Dec. 11, 2020).

Defendants urge that purported historical practice supports *Skidmore* deference (ECF 224, at 22), but they admit that "prior [§ 1182(f)] proclamations did not expressly direct the suspension of visa processing" (*id.*; *see* ECF 195-1, at 23 & n.18). Defendants' argument thus hinges on alleged "informal guidance … directing the suspension of visa processing" in response to prior proclamations. ECF 224, at 22. But the record contains no such "informal guidance," and Defendants cannot rely on factual matter outside of the record to obtain summary judgment. Fed.

[9] Defendants tack on a citation to 6 U.S.C. § 236 (ECF 224, at 21), but any argument based on that provision is waived. Defendants made no such argument in their opening brief, *see, e.g.*, *Bloche v. Dep't of Defense*, 414 F. Supp. 3d 6, 23 n.5 (D.D.C. 2019), and even now they do not develop the point, *see, e.g.*, *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013). In any event, nothing in § 236 alters the plain and unambiguous meaning of §§ 1182(f) and 1201(g).

R. Civ. P. 56(c)(1)(A). In any event, the guidance would make no difference: "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 v. Pompeo*, 2020 WL 6799156, *7 (D.D.C. Nov. 19, 2020) (similar).

Defendants also admit (ECF 224, at 22) that none of their authority "addressed the lawfulness of the State Department's understanding" of §§ 1182(f) and 1201(g)—which is to say that all of their cases are off-point and unpersuasive. Passing references to § 1182(f) in cases like *Kangarloo v. Pompeo*, 480 F. Supp. 3d 134, 138 (D.D.C. 2020), cannot overcome the plain statutory language and the conclusions of every court to analyze the provisions at issue. *See Gomez I*, 485 F. Supp. 3d at 194; *Tate*, 2021 WL 148394, at *7-9; *Milligan*, 2020 WL 6799156, at *5-7; *Young*, 2020 WL 7319434, at *16. While Defendants assert (ECF 224, at 23) that "none [of these cases] addressed the State Department's entitlement to *Skidmore* deference," that misses the point completely. *Skidmore* deference applies only if an agency's position is persuasive *on the merits*. Plaintiffs' cases, and this Court's analysis in *Gomez I*, make clear that Defendants' position has no merit and is entitled to no deference. *See, e.g.*, *Fox*, 684 F.3d at 78-80.

3. Defendants Fail To Overcome This Court's Ruling That The No-Visa Policy Is Arbitrary And Capricious As Applied To The DV-2020 Class

Assuming that some statute *authorized* the State Department to suspend visa processing for individuals affected by a § 1182(f) entry suspension, the No-Visa Policy is still arbitrary and capricious as applied to DV-2020 applicants. ECF 195-1, at 25-26. Defendants do not deny that the State Department failed to "account for the serious consequences the policy would impose on DV-2020 selectees, whose opportunity to receive visas w[ould] expire by the end of th[e] fiscal year." *Gomez I*, 485 F. Supp. 3d at 194. Defendants thus violated the APA by "'fail[ing] to consider [an] important aspect of the problem.'" *Id.* at 199 (citation omitted). Even if the State

Department relied "on its understanding of the INA's requirements" (ECF 224, at 23), that does not help Defendants because the INA does not require the No-Visa Policy. Because the policy "stands on a faulty legal premise and lacks adequate rationale," it is arbitrary and capricious. *Gomez I*, 485 F. Supp 3d at 194 (citation and brackets omitted).[10]

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

It is unclear how, in Defendants' view, the "[r]evocation of Proclamation 10014 has rendered moot Plaintiffs' challenge" to the COVID-19 Guidance (ECF 224, at 24). Plaintiffs' and the class's claim is that thousands more DV-2020 visas should have been processed and issued before the end of the fiscal year, that the COVID-19 Guidance unlawfully contributed to that shortfall, and that the Court should provide a remedy by directing the adjudication and issuance of DV-2020 visas after the deadline. That claim is not moot. And Defendants' merits arguments fail.

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

Even though this Court has already reviewed the COVID-19 Guidance and concluded that it was likely arbitrary and capricious, *Gomez I*, 485 F. Supp. 3d at 198-99, Defendants insist (ECF 224, at 27) that such review is impossible. Defendants are wrong. Indeed, Defendants no longer rely on the principal cases cited in their opening brief (*e.g.*, *Massachusetts v. EPA* and *In re Barr Laboratories*, *see* ECF 195-1, at 28-29).[11]

On the substance, Plaintiffs never argued (*contra* ECF 224, at 25) that "§ 701(a)(2) is limited to agency actions involving military policy or analogous policies." Rather, Plaintiffs distinguished "two related, but distinct, barriers to judicial review": one applies to a few

[10] Defendants have dropped the contention that preserving resources or avoiding confusion supports their application of the No-Visa Policy to DV-2020 selectees. *See* ECF 195-1, at 26.

[11] While Defendants cite *Tate* in passing (ECF 224, at 25), they do not rebut Plaintiffs' explanation (ECF 195-1, at 32 n.21) that the discussion in *Tate* (a case about O visas) is inapposite here.

"traditionally" unreviewable agency actions such as military policy; and the second applies outside those traditional categories, in "*rare instances*" where there exist "*no* meaningful standard against which to judge the agency's exercise of discretion" and "*no* legal norms pursuant to which to evaluate the challenged action." *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020) (emphases added; citations omitted). Neither barrier applies here. ECF 195-1, at 27-32.

Indeed, Defendants have abandoned their prior argument (*see* ECF 189-1, at 31-33) that the COVID-19 Guidance falls within some "traditionally" unreviewable category of agency. They now argue instead (ECF 224, at 26-27) that this is one of the "rare" situations where neither a "meaningful standard" nor a "legal norm" constrains the State Department's discretion.

But Defendants' cases (*id.* at 25-26) only illustrate the narrowness of this exception to the APA's "strong presumption" of judicial review, *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 824 (D.C. Cir. 2020). In *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020), a statute placed the decision in question within "the sole and unreviewable discretion of the [DHS Secretary]." *Id.* at 632 (quoting 8 U.S.C. § 1225(b)(1)(A)(iii)(I)). "There could hardly be a more definitive expression of congressional intent" to foreclose judicial review. *Id.* Similarly in *Drake v. FAA*, 291 F.3d 59 (D.C. Cir. 2002), the statute authorized the FAA Administrator to dismiss a complaint whenever she "is of the opinion" that dismissal is warranted, leaving "the Administrator's own beliefs" as "[t]he only statutory reference point." *Id.* at 71-72. And in *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 104 F.3d 1349 (D.C. Cir. 1997), the statute provided that visa applications "shall" be made "in such form and manner and at such place as shall be by regulations prescribed," and thus left determinations about where applications were to be made "entirely to the discretion of the Secretary of State"—leaving "no law to apply" and thus foreclosing review. *Id.* at 1353.

In each case, the statute made clear that no judicial review was available, *and* the court

found no other meaningful standard or legal norm under which to judge the agency's action. Here, in contrast, there is no statute conferring unreviewable discretion, and there are ample standards against which to judge Defendants' action. ECF 195-1, at 30-32.

For example, the Court may (and did) fairly ask whether it was reasonable for Defendants to categorically exclude DV-2020 applicants from "mission critical" services when the result would upset Congress's statutory scheme by depriving tens of thousands of people of the opportunity to immigrate. *See Gomez I*, 485 F. Supp. 3d, at 198-99; 8 U.S.C. §§ 1151(e), 1154(a)(1)(I)(ii)(II), 1202(b). Defendants assert (ECF 224, at 26) that these provisions do not shed light on "what services the State Department should prioritize in the face of a worldwide health emergency," but that is incorrect: The structure of the diversity visa system, including its annual deadline, provides ample basis to assess whether it was arbitrary and capricious to put diversity-visa applicants at the very *bottom* of Defendants' prioritization list.

Similarly, the "reasonable time" requirement of 5 U.S.C. § 555(b) provides a meaningful standard against which to judge the agency's action (*contra* ECF 224, at 26): The court can assess whether it was arbitrary and capricious for the State Department to establish a policy under which *no* diversity visas would be processed within a "reasonable time" (*i.e.*, before the deadline).[12]

Defendants are also wrong in contending (ECF 224, at 27) that their actions cannot be meaningfully judged against the COVID-19 Guidance itself. The question is whether there exists a standard or norm against which to assess whether the State Department acted arbitrarily and capriciously in its treatment of DV-2020 selectees. The Court can look to the guidance's provisions for age-outs to decide whether Defendants breached the "fundamental norm" "to treat like cases alike." *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007).

[12] The Court can likewise consider whether Defendants acted arbitrarily by erasing the FAM's diversity-visa processing scheme. *See* ECF 195-1, at 31; *contra* ECF 224, at 27.

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

Defendants still fail to refute this Court's conclusion that excluding DV-2020 applicants from "mission-critical" visa services lacked a rational explanation and was arbitrary and capricious. *Gomez I*, 485 F. Supp. 3d at 198-99. Defendants cannot save that exclusion by relying (ECF 224, at 28) on the erroneous premise that the No-Visa Policy was lawful. *See supra* Point III.A; *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (agency action "cannot be sustained [when] it is based … on an erroneous view of the law.").[13]

Defendants fail to justify their noncompliance with "[the] fundamental norm" of "treat[ing] like cases alike." *Westar*, 473 F.3d at 1241; *see* ECF 195-1, at 34. Defendants assert that "it was rational … to prioritize" age-outs over DV-2020 selectees (ECF 224, at 28), but the record does not reveal the basis for such a calculation, or show that anyone at the State Department relied on it. The COVID-19 Guidance cannot be upheld on a basis that the agency itself did not invoke when it took the action. *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020). What is more, the record shows that the State Department did not merely put DV-2020 selectees below age-outs on a prioritization list: Selectees were *excluded* from consideration as "mission critical" (CAR 26), and assigned the *lowest* priority for processing—*even if* they qualified for a "national interest" exception to Proclamation 10014 (CAR 38, 257). Defendants do not claim that the record contains a rational justification for *that* choice.

Nor do Defendants identify anything in the record to suggest that the State Department relied on the number of DV-2020 selectees as a reason to exclude them from "mission critical" treatment and to put them at the bottom of the priority list (*see* ECF 224, at 28 n.11). Again, the

[13] Defendants no longer advance their arguments about "minimiz[ing] face-to-face interactions" or the purported burdens of weighing "the pros and cons" of various visa classifications; as Defendants admitted (ECF 189-1, at 35), such arguments are not supported by the record.

agency's action cannot be upheld on this ground. *See Regents*, 140 S. Ct. at 1907. In any event, the number of selectees is not "a relevant distinction," *Westar*, 473 F.3d at 1241, that could justify treating DV-2020 selectees different from age-outs, or shutting them out *en masse*. Plaintiffs do not contend that Defendants were required to adjudicate *every* DV-2020 application before the deadline. Rather, the State Department could and should have treated DV-2020 applicants (who faced a visa-issuance deadline) as "mission critical" in order to issue as many DV-2020 visas as practicable before the deadline. Defendants offer no good justification for their failure to do so.

C. Defendants' Implementation Of The Proclamation's "National Interest" Exception Violates The APA As To The DV-2020 Class

The Court should also grant summary judgment for Plaintiffs on their challenge to Defendants' implementation of the "national interest" exception. *See* ECF 195-1, at 34-38.

1. The rescission of Proclamation 10014 did not moot this claim (*contra* ECF 224, at 29). The DV-2020 Plaintiffs and class members challenge Defendants' *past* policy: The claim is that "national interest" exceptions should have been made generally available to DV-2020 selectees *before* the period for obtaining visas expired, such that it is appropriate to direct the processing of DV-2020 applications after the statutory deadline. That claim is not moot.

2. Defendants' implementation of the exception was "final agency action." Defendants do not dispute that legal consequences flowed from their actions (*see* ECF 195-1, at 35-36), but contend (ECF 224, at 29) that the "national interest" guidance is "in flux" because the State Department issued new guidance in the weeks after Plaintiffs' filed their principal brief. But again, the DV-2020 Plaintiffs and class members challenge Defendants' *past* policy. Defendants do not deny that their policy was final in the pre-September 30 period.

3. Defendants suggest (ECF 224, at 29) that Plaintiffs are urging this Court "to determine what is in the national interest with respect to the admission of foreign nationals," and that judicial

review is not available because such decisions are "committed to agency discretion." There is no dispute that such determinations are for the Executive Branch. But the Executive Branch is bound by the APA, and the courts may assess whether an agency complied with the statute.

Defendants assert that the statutory and FAM provisions on which Plaintiffs rely do not provide "any meaningful standard for review" (ECF 224, at 29; *see* 8 U.S.C. §§ 1151(e), 1154(a)(1)(I)(ii)(II), 1202(b); 9 FAM 502.6-4.c-d). But these provisions supply standards against which to assess whether Defendants' policy was arbitrary and capricious: The Court can assess (for example) whether Defendants had good reasons to exclude DV-2020 selectees from the groups who were expressly entitled to "national interest" exceptions, when the effect was to deny visas to all such selectees and thus to upset the statutory scheme. *See supra* Point III.B.1.[14]

Plaintiffs also do not argue that the Court should just "look at the NIE guidance" and determine what is in the "national interest" without any legal standard (*contra* ECF 224, at 30). Because Defendants must "treat like cases alike," *Westar*, 473 F.3d at 1241, their provision for "national interest" exceptions to be granted in age-out cases supplies a norm against which to evaluate their treatment of the similarly situated DV-2020 selectees. *See* ECF 195-1, at 36.

4. On the substance, Defendants do not even try to defend the State Department's failure to explain its exclusion of DV-2020 selectees from the "national interest" guidance, or to consider the severe harms that selectees would face upon being deprived of the opportunity to immigrate.

[14] Defendants cite (ECF 224, at 30) *Zhu v. Gonzales*, 411 F.3d 292, 295-96 (D.C. Cir. 2005), and *Poursina v. USCIS*, 936 F.3d 868, 870-72 (9th Cir. 2019), but those were not APA cases. And they involved a statutory provision allowing for the issuance of visas to noncitizens "of exceptional ability," 8 U.S.C. § 1153(b)(2), not a time-limited program like the diversity visa system. Nor did those cases involve a situation where the Government had adopted a policy to issue visas to one group of prospective immigrants, but categorically refused to offer the same treatment to another, similarly situated group. Defendants' reliance on *Make the Road* is again misplaced, for the reasons already discussed. *See supra*, at 13.

See ECF 195-1, at 37-38; ECF 201-1, at 7. Plaintiffs should prevail on this ground alone.

While Defendants assert that "[t]he State Department has the authority to issue guidance with respect to national interest exceptions" (ECF 224, at 30), they cite no actual statutory or regulatory authority in support of that proposition. The very concept of a "national interest exception" stems from President Trump's Proclamations—which under § 1182(f) pertain only to *entry* (not to visas). No statute authorizes the President or the State Department to prescribe extra-statutory "national interest" criteria for visa processing. *See* ECF 195-1, at 37.

Plaintiffs' challenge to the absence of an intelligible decisional standard for "national interest" exceptions (ECF 195-1, at 37) is not a mere "disagreement with the NIE guidance" (*contra* ECF 224, at 31). The problem is that the guidance had no substantive content regarding how to obtain an exception. Such empty "guidance" is arbitrary and capricious.

Plaintiffs' challenge to Defendants' failure to "treat like cases alike" (ECF 195-1, at 37; *Westar*, 473 F.3d at 1241) also is not a mere "disagreement" with the guidance (*contra* ECF 224, at 31). As discussed in connection with the COVID-19 Guidance (*supra*, at 15-16), nothing in the record negated Defendants' obligation to make available to DV-2020 selectees the same exception that was available to similarly situated age-outs.

Defendants are incorrect in asserting (ECF 224, at 31) that "the NIE guidance did not … exclude DV applicants." "[D]iversity visas [were] not listed as among the categories of visas eligible for the exception," which meant that "the average DV-2020 selectee … d[id] not appear to be eligible." *Gomez I*, 485 F. Supp. 3d at 164 (citations omitted). And the State Department summarily denied the named DV-2020 Plaintiffs' requests for exceptions.[15]

[15] *See, e.g.*, ECF 195-6, ¶ 11 (Iwundu: "Each time I requested an emergency interview to try to explain why I should be granted a 'national interest' exception to the Proclamations, I was summarily denied"); ECF 195-9, ¶ 10 (Kinteh: "[E]ach time I requested an emergency interview

Defendants cite no evidence that DV-2020 applicants could actually obtain an exception.

Finally, Defendants' observation that "recently, the State Department granted NIE waivers to FY2020 DV holders" (*id.*) again misses the point. The DV-2020 Plaintiffs are challenging Defendants' *past* practice, which prevented Plaintiffs and class members from securing their diversity visas *before* the deadline. While the new Administration publicly recognized the harm to the DV-2020 class and allowed a few DV-2020 visa holders to enter the country before their visas expired, that hardly vindicates the prior Administration's senseless, blanket refusal to allow DV-2020 selectees to obtain their visas in the first place. Quite the contrary: The new Administration's change in position highlights the irrational cruelty of the policies under review.

D. The State Department Acted Ultra Vires As To The DV-2020 Class

Defendants acted without authority by establishing policies that had the effect of overriding the INA's express mandate that DV-2020 selectees "***shall*** remain eligible to receive [a] visa" until the end of the fiscal year. 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added); *see* ECF 195-1, at 38. Defendants do not directly address this claim, but suggest (ECF 224, at 14-15 n.5) that their actions were lawful because the statute's *only* purpose is to impose an end-date on visa eligibility. That is wrong; the statute has *two* effects. It puts in place a deadline for visa issuance, and it mandates that selectees "shall remain eligible" until that date. Defendants identify no authority that would allow them to nullify a selectee's eligibility prematurely.

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

Defendants again fail to defend many of their arguments against Plaintiffs' unreasonable-delay, unlawful-withholding, and mandamus claims on behalf of the DV-2020 Class. And

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to explain why I deserved an exception to the Proclamations, the Embassy denied my request in a cursory fashion"); ECF 195-10, ¶ 7 (Koirala: "Each time [I contacted the U.S. Embassy in Kathmandu], the Embassy responded to my requests with a standard form rejection.").

Defendants' remaining arguments also fail.

1. Defendants are wrong in asserting (ECF 224, at 31) that the revocation of Proclamation 10014 has mooted these claims. The claims go to Defendants' failure to *issue visas* to DV-2020 class members before the statutory deadline. And they seek to compel the State Department to take the very action that it unlawfully and unreasonably withheld. These claims are not moot.

Defendants are also wrong to contend (*id.*) that Plaintiffs' claims merely challenge an abstract failure to prioritize DV-2020 applicants. These claims arise in the context of the concrete statutory deadline for visa issuance, which "provides a clear 'indication of the speed with which [Congress] expects the agency to proceed in' processing diversity lottery selectees' visa applications." *Gomez I*, 485 F. Supp. 3d at 196 (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*), and citing 8 U.S.C. § 1154(a)(1)(I)(ii)(II)). Plaintiffs' claims also implicate the statutory mandates that "*[a]ll* immigrant visa applications *shall* be reviewed and adjudicated by a consular officer," 8 U.S.C. § 1202(b) (emphases added), and that "each agency shall proceed to conclude a matter presented to it" "within a reasonable time," 5 U.S.C. § 555(b); *see* ECF 195-1, at 43. Defendants' position is "flatly contradicted" by these governing statutes. *See Gomez I*, 485 F. Supp. 3d at 198 n.23.[16]

2. On the unreasonable-delay claim, Defendants do not defend their mistaken analysis of the *TRAC* factors, nor do they identify any error in this Court's or Plaintiffs' analysis. *See Gomez I*, 485 F. Supp. 3d at 196-98; ECF 195-1, at 38-42. Instead, Defendants assert that they were not required to prioritize DV-2020 applications. That is wrong: Separately and in combination, the

[16] Neither *Tate* nor *Milligan* (cited in ECF 224, at 32-33) involved a visa-issuance deadline, so neither case presented the congressionally mandated need for urgency that existed in this case. *See Tate*, 2021 WL 148394, at *10-11 ("plaintiffs do not argue that the *length* of the delay is necessarily unreasonable"); *Milligan*, 2020 WL 6799156, at *9 (noting that no "specific timeline" or "statutory deadline" applied to the visas at issue, and distinguishing *Gomez I* on this ground).

INA and the APA required Defendants to make good-faith efforts to process as many DV-2020 visas as was practicable before the deadline. *See Gomez I*, 485 F. Supp. 3d at 196, 198 n.23.

Contrary to Defendants' intimation (ECF 224, at 32), this Court did not "disregard[] … competing priorities" in *Gomez I*, 485 F. Supp. 3d at 196-97, and Plaintiffs do not propose that the Court should do so now (*see* ECF 195-1, at 41-42). Even considering competing priorities and "operational disruptions," this Court found that Defendants should reasonably have adjudicated thousands more diversity visas than they actually did before the deadline. *Gomez II*, 2020 WL 5861101, at *6-8; *see* ECF 195-1, at 42.[17] Defendants do not contest that factual finding, which supports the conclusion that their delay in issuing those visas was unreasonable.

3. Defendants ignore the unlawful-withholding claim. ECF 195-1, at 43. But as shown, Defendants owed a nondiscretionary duty to adjudicate DV-2020 applications under 8 U.S.C. § 1202(b) and 5 U.S.C. § 555(b). And Defendants' asserted basis for abdicating that duty was "plainly incorrect: qualified DV-2020 selectees ha[d] no legal impediment to receiving visas." *Gomez I*, 485 F. Supp. 3d at 197. Summary judgment is warranted.[18]

IV. THE COURT SHOULD GRANT FINAL EQUITABLE RELIEF

Beyond vacating Defendants' unlawful policies under the APA (including as they apply to nonimmigrant visas), the Court should grant the final relief that it contemplated in *Gomez II*.

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[17] Defendants suggest that their refusal to adjudicate diversity visas was reasonable because DV applicants were subject to Proclamation 10014 (ECF 224, at 32)—but at the relevant time, that Proclamation was set to expire by December 31, 2020. DV-2020 visas issued in September 2020 would "be valid for another three months after the Proclamations [were] set to expire, giving [their holders] three months to enter the country." *Gomez I*, 485 F. Supp. 3d at 193.

[18] Plaintiffs reiterate that if the Court concludes that relief is otherwise unavailable, it should invoke the Mandamus Act to compel Defendants to review and to adjudicate class members' visa applications. *See* ECF 195-1, at 44. Class members have "a clear and indisputable right to relief," and the State Department "is violating a clear duty to act." *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Defendants make no independent argument against granting summary judgment and awarding such relief. *See* ECF 224, at 31.

President Biden has found that eliminating the DV-2020 program "does not advance the interests of the United States" because of the harm that it inflicts on DV-2020 selectees. 86 Fed. Reg. at 11,847. Defendants thus do not deny that DV-2020 class members face irreparable harm, and do not argue that any valid public interest disfavors relief. Defendants instead argue (ECF 224, at 35-42) that this Court lacks authority to direct the State Department to adjudicate visa applications and to issue the 9,095 DV-2020 visas that it reserved pursuant to *Gomez II*, 2020 WL 5861101, at *12. But this Court has already rejected Defendants' argument, concluding that it "plainly has" all the authority it needs. *Id.* at *5 (citing *Almaqrami v. Pompeo*, 933 F.3d 774, 782 (D.C. Cir. 2019)). Given the principle that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again," this Court should not revisit this question in the absence of a demonstrated "clear error in the first order." *Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 253, 255 (D.D.C. 2017) (Mehta, J.) (citations omitted); *see, e.g.*, *E.M. v. Shady Grove Reprod. Sci. Ctr. P.C.*, 2020 WL 7264048, at *3 (D.D.C. Dec. 10, 2020) (collecting cases; declining to revisit preliminary injunction order).

Defendants dropped their appeal of *Gomez II*, and they have identified no clear error in that decision. They entirely disregard *Almaqrami*, in which the D.C. Circuit recognized that "where '[t]he plaintiff files suit and the court grants some relief—but not the visa—before October 1…, the court might lawfully take steps to compel the government to process the plaintiff's application and issue her a diversity visa' even 'after the fiscal year has ended,'" in order to "'give effect to the district court's prior directive, entered before the end of the selection FY.'" *Gomez II*, 2020 WL 5861101, at *5 (quoting *Almaqrami*, 933 F.3d at 781-82).

Defendants rely on *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002), and its progeny (*see* ECF 224, at 35-38), but that line of cases "recognize[s] that … where 'the district court order[s] the [Government] to adjudicate [diversity visa applications] while the [Government] maintain[s] the

statutory authority to issue the visas,'" the Government may also be directed to adjudicate the applications after the statutory deadline. *Gomez II*, 2020 WL 5861101, at *4 n.2 (quoting *Iddir*, 301 F.3d at 501 n.2, and collecting other cases). Defendants cite no case holding the contrary.[19] Here, Plaintiffs and the class sought and *obtained* relief from this Court *before* the deadline.

Defendants "believe[]" that the cases holding that post-deadline relief is permissible on these facts "were wrongly decided given the congressional command in the statute." ECF 224, at 40 (citing *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999) and *Przhebelzkaya v. USCIS*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004)).[20] But this Court has already explained that "an order instructing the State Department to process the[] reserved visas would not create any conflict with the INA because 'such an order would give effect to [this C]ourt's prior directive, entered before the end of the selection FY, to preserve an essential (and otherwise expiring) ingredient of relief." *Gomez II*, 2020 WL 5861101, at *5 (quoting *Almaqrami*, 933 F.3d at 782). Moreover, "Defendants violated Congress's design when they nearly extinguished the FY 2020 diversity visa program through their No-Visa Policy," and they "cannot credibly claim that, though they … effectively abrogated Congress's policy for months through their unlawful and arbitrary actions, it would be inconsistent with Congress's intent to grant a remedy for their wrongs." *Id.*

[19] The courts in *Coraggioso v. Ashcroft*, 355 F.3d 730, 734 n.8 (3d Cir. 2004), *Mwasaru v. Napolitano*, 619 F.3d 545, 552 (6th Cir. 2010), and *Keli v. Rice*, 571 F. Supp. 2d 127, 135 (D.D.C. 2008), recognized the rule that this Court adopted in *Gomez II*. The plaintiffs in the other cases also did not file their actions until after the relevant fiscal year had expired. *See Nyaga v. Ashcroft*, 323 F.3d 906, 910 (11th Cir. 2003) (per curiam); *Mohamed v. Gonzales*, 436 F.3d 79, 80 (2d Cir. 2006), *aff'g Nakamura v. Ashcroft*, 2004 WL 1646777 (E.D.N.Y. July 20, 2004); *Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003); *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276, 279 (D.D.C. 2018); *Perejoan-Palau v. USCIS*, 684 F. Supp. 2d 225, 228-28 (D.P.R. 2010); *Gebre v. Rice*, 462 F. Supp. 2d 186, 187 (D. Mass. 2006).

[20] This is an unexplained departure from the Trump Administration's "acknowledge[ment] that courts have th[e] power" "to take steps to compel the issuance of diversity visas, notwithstanding the end of [the relevant fiscal year]." *See Almaqrami*, 933 F.3d at 781.

Defendants ignore their own past unlawful actions in suggesting (ECF 224, at 38-39) that the INA now prohibits this Court from granting relief for those violations.

Defendants attempt to distinguish *Paunescu* and *Przhebelzkaya* (ECF 224, at 40-42), but disregard this Court's conclusion that those cases' rationale applies fully here. *Gomez II*, 2020 WL 5861101, at *4-5. While Defendants assert (ECF 224, at 42) that "the takeaway" from these cases is that "courts have inherent power to enforce their prior orders," they are wrong in contending that "there is no comparable order to adjudicate or issue visas in advance of the statutory deadline" in *this* case. This Court's order in *Gomez I* expressly mandated that "Defendants shall undertake good-faith efforts … to expeditiously process and adjudicate DV-2020 diversity visa and derivative beneficiary applications and issue or reissue diversity and derivative beneficiary visas to eligible applicants by September 30, 2020," and further indicated that the Court would consider, "closer to the deadline," whether to "order Defendants to reserve unprocessed DV-2020 visas past the September 30 deadline." 485 F. Supp. 3d at 205. And in *Gomez II*—also issued *before* the end of the fiscal year—the Court determined that an additional 9,095 visas was a "reasonable estimate" of the number of additional DV-2020 visas that Defendants should have issued to remedy the effects of their past unlawful policies. 2020 WL 5861101, at *7-8 & n.4. An order now to adjudicate and issue the visas that the Court ordered reserved in *Gomez II* thus would vindicate both the reservation order itself and the Court's injunction in *Gomez I*. Such an order falls squarely within *Paunescu* and *Przhebelzkaya*.

Defendants also disregard the case law "recogniz[ing] in the analogous context of congressional appropriations that courts may suspend the operation of a statutory expiration date on an appropriation so long as the plaintiff requests relief before that date, thereby effectively reserving a congressionally afforded benefit past a statutory deadline." *Gomez II*, 2020 WL 5861101, at *5 (collecting cases). In a case like this one, an order "giv[ing] the [class members]

the chance to apply" for diversity visas "would further, rather than contravene, Congress's will." *Defy Ventures, Inc. v. SBA*, 469 F. Supp. 3d 459, 479 (D. Md. 2020); *see, e.g.*, *City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994).

Lastly, the D.C. Circuit has long recognized that where (as here) a court sits to review final agency action, it has "inherent equitable power to maintain the status quo" to facilitate such review. *Wagner v. Taylor*, 836 F.2d 566, 571 (D.C. Cir. 1987). Similarly under the All Writs Act, 28 U.S.C. § 1651(a), this Court has authority to "issue those orders necessary to preserve the availability of meaningful judicial review," *AstraZeneca Pharms. LP v. Burwell*, 197 F. Supp. 3d 53, 56 (D.D.C. 2016), and to "effectuate and prevent the frustration of orders [the Court] has previously issued in its exercise of jurisdiction otherwise obtained," *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977); *see Gomez v. Biden*, 2021 WL 1037866, *2 (D.D.C. Feb. 19, 2021). This Court thus had both inherent and statutory authority in *Gomez II* to reserve diversity visas for later processing in order to ensure that it did not lose jurisdiction over Plaintiffs' class-action challenges to Defendants' unlawful policies. And this Court now has authority to ensure that its prior orders are not deprived of their force.

With respect to the form of relief, the *Gomez* Plaintiffs (on behalf of the certified class) agree with Defendants (ECF 224, at 44) that the 9,095 reserved diversity visas should "be issued … in [the] random order established by the Secretary of State for the fiscal year involved." 8 U.S.C. § 1153(e)(2). This approach would do the least violence to the statutory scheme, and would restore the *status quo ante* as nearly as possible in the circumstances. To ensure that the Court's order is carried out, Defendants should be directed to meet and confer with class counsel regarding a plan for adjudicating and distributing visas, and to file their plan with the Court for approval.

CONCLUSION

Plaintiffs' motion should be granted.

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Respectfully submitted,

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