UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORAA ASNATH KENNEDY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, President of the United States of America, *et al.*, Defendants.	Civil Action No. 20-2639 (APM)

DEFENDANTS' RESPONSE TO COURT ORDER REGARDING ADDITIONAL EQUITABLE RELIEF

Pursuant to the Court's September 24, 2020, Minute Order, Defendants respectfully submit this brief explaining why additional equitable relief for the *Kennedy* Plaintiffs is unnecessary and unwarranted.[1] Defendants also join and incorporate by reference herein the government's brief submitted concurrently in *Gomez v. Trump*, Civ. A. No. 20-1419 (APM) (D.D.C.). *See* Ex.

As the Court has recognized, the *Kennedy* Plaintiffs, who allege they are 2020 diversity visa selectees, are already beneficiaries of the Court's preliminary injunction in *Gomez*. Consistent with the Court's September 4, 2020, Order in *Gomez*, the U.S. Department of State has been processing diversity visa applicants, including the *Kennedy* Plaintiffs, in the order of priority set forth by the Court. *See* Decl. Morgan D. Miles; Decl. Neal R. Vermillion and accompanying exhibits. On this basis alone, awarding the *Kennedy* Plaintiffs any separate relief is inappropriate.

[1] Defendants' response only addresses the propriety of additional equitable relief as it may relate to these *Kennedy* Plaintiffs. Accordingly, Defendants do not concede any issues raised in the pending motions for temporary restraining order and preliminary injunction.

Nor should the *Kennedy* Plaintiffs be afforded additional relief beyond that from which they are already benefitting under the *Gomez* injunction. The *Kennedy* Plaintiffs concede that they "*do not seek to be prioritized* at the expense of other DV-2020 winners" and instead ask for "a proper adjudication of their visas." ECF No. 3-1 at 13 (emphasis added). They are, by virtue of the *Gomez* injunction, receiving a proper adjudication of their visas in accordance with the Court's order of priority and in compliance with the statutory scheme defined by Congress. *See* 8 U.S.C. § 1153(e)(2) (providing that diversity visas "shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved"); *see also* U.S. Dep't of State, Instructions for the 2020 Diversity Immigrant Visa Program (DV-2020)[2] at 13 ("Being randomly chosen as a selectee does not guarantee that you will receive a visa. Selection merely means that you are eligible to apply for a Diversity Visa. If your rank number becomes eligible for final processing, you potentially may be issued a Diversity Visa."). Case law in the D.C. Circuit likewise counsels against granting the *Kennedy* Plaintiffs any relief in addition to that which they have already received. *See, e.g.*, *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003) (recognizing that courts deny relief "where 'a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain'" in circumstances where there "was no evidence the agency had treated the petitioner differently from anyone else" (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (cleaned up))).

Case law and basic fairness principles, coupled with the *Kennedy* Plaintiffs' own representation, weigh against any further equitable relief that would advance these individuals

[2] https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2020-Instructions-Translations/DV-2020-Instructions-English.pdf (last visited Sept. 25, 2020).

ahead of other diversity lottery selectees with a higher rank order simply because the *Kennedy* Plaintiffs elected, at the eleventh hour, to file a lawsuit. This is especially true where this lawsuit was filed *two weeks* after the *Gomez* Court issued its injunction on September 4, 2020.

Dated: September 25, 2020

Respectfully submitted,

MICHAEL R. SHERWIN
Acting United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: /s/ Robert A. Caplen
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Counsel for Defendants

DECLARATION OF MORGAN D. MILES

I, Morgan D. Miles, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am employed by the U.S. Department of State as the Acting Director of the Kentucky Consular Center (KCC), which is part of the Visa Services Directorate within the Bureau of Consular Affairs. In my capacity as Acting Director, I am authorized to search the electronic Consular Consolidated Database and the Diversity Visa Information System (DVIS) system of the U.S. Department of State, Bureau of Consular Affairs, for visa records and the records of the KCC. One of the four units I oversee at KCC is responsible for processing cases under the Diversity Visa Program, which includes document processing, scheduling appointments for interview and transferring documentarily-qualified cases to posts around the world, responding to public inquiries, and all other DV-related tasks for KCC. It is comprised of 28 contract staff members at this time, including supervisors.

2. In that capacity, I have knowledge regarding the Department's actions to implement the U.S. District Court's Memorandum Opinion and Order dated September 4, 2020, and the Amended Order dated September 14, 2020, (collectively, the "PI Order") in *Gomez v. Trump*, Case No. 20-cv-1419 (APM). The following declaration is based on information acquired in my official capacity and in the performance of my official functions.

KCC's Scheduling

3. As further explained in my declaration dated September 21, 2020, KCC has made an absolute priority of conducting document review and scheduling cases for the Fiscal Year 2020 Diversity Visa Program (DV 2020) since becoming aware of the PI Order on September 5, in accordance with the prioritization schedule outlined in the PI Order. To that end, KCC has prioritized processing and scheduling of named Plaintiffs in *Gomez*, *Aker*, *Mohammed*, and *Fonjong* and their derivatives in accordance with the PI Order and scheduled as many other DV 2020 cases as possible.

4. I have been in daily contact with Visa Office management to obtain the latest information on the availability of interview slots at posts worldwide that are able to process diversity visa applications. As of September 25, we continue to schedule DV 2020 cases for interviews.

5. KCC has managed to schedule and transfer to posts 423 of the 425, or over 99 percent, of the diversity visa cases associated with the named Plaintiffs. During the period including September 4 through September 24, KCC has scheduled a total of 1,132 DV 2020 cases, representing at least 2,407 individual applicants. This figure includes both Plaintiffs and non-plaintiffs and represents our diligent efforts to help process as many cases as possible.

KCC's Correspondence with DV Selectees

6. In my role as Acting KCC Director, I am responsible for approving cleared written text used by our correspondence unit in responding to public inquiries. The following is the

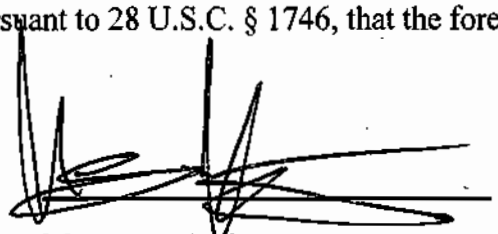
verbatim text of the message that KCC has been sending out in response to email inquiries regarding the diversity visas since the PI Order was issued:

> Thank you for your email regarding the scheduling of a Diversity Immigrant Visa interview appointment.
>
> Consistent with the court order in Gomez v. Trump, the Department of State is making a good-faith effort to adjudicate as many Diversity Visa applications as possible notwithstanding Presidential Proclamation 10014. Please note, however, the DV-2020 Program expires on September 30, 2020 and, in accordance with law, diversity visas may no longer be issued after that date. The Department expects that, due to resource constraints, limitations due to the COVID-19 pandemic, and country conditions, we will not be able to adjudicate applications for all Diversity Visa selectees by that expiration date.
>
> As ordered by the court, we are prioritizing individual named plaintiffs in the court case Gomez v. Trump and its companion cases who are applying for Diversity Visas. Beyond that, we have established priorities based on statutory standards and categories of cases most likely to result in timely issuances for eligible applicants. Accordingly, we are prioritizing applicants who have already been interviewed and who either have been determined eligible for a visa or may be determined eligible for a visa with additional information. We will also prioritize applicants with appointments that were cancelled in March, April, or May due to the COVID-19 pandemic and worldwide suspension of routine processing. Diversity Visa Selectees who have heard from the Kentucky Consular Center (KCC) that they are documentarily qualified, but awaiting an interview date, will be scheduled in accordance with their rank order and post's capacity, consistent with our standard processes. For more details, see https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html."
>
> Kind regards,
> The Kentucky Consular Center

7. I have provided additional supervision and instruction when needed to the KCC contract staff who answer telephone calls related to the Diversity Visa Program to ensure consistent messaging that accurately reflected the Department's good faith efforts to comply with the PI Order. When I learned of any concerns that our messaging regarding scheduling for diversity visa applicants had been misunderstood by the public, I reminded staff that we are actively scheduling appointments for all DV 2020 cases at posts with capacity to process them, and not just the Plaintiffs' cases.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

September 25, 2020



Morgan D. Miles

Acting Director

Kentucky Consular Center

DECLARATION OF NEAL R. VERMILLION

I, Neal R. Vermillion, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am employed by the U.S. Department of State as a Division Chief in the Outreach and Inquiries Division, Office of Field Operations of the Visa Office, Bureau of Consular Affairs. The Field Operations Office supports and monitors visa operations at embassies and consulates around the world (commonly referred to as "posts"), provides updated guidance to our posts regarding changes in visa policy, and oversees the Visa Office's web unit, which maintains visa-related content on CA's public-facing website, travel.state.gov.

2. In that capacity, I have knowledge regarding the State Department's actions to implement the U.S. District Court's Memorandum Opinion and Order dated September 4, 2020 and the Amended Order dated September 14, 2020 (collectively, the "PI Order") in *Gomez v. Trump*, Case No. 20-cv-1419 (APM).

Consular Sections' Adjudication of Diversity Visa Cases

3. Further to the declaration of Laura Chamberlin dated September 21, 2020, consular sections continue to schedule and process as many diversity visa ("DV") applications as possible in accordance with the PI Order. Consular sections are prioritizing the adjudication of the named Plaintiffs in *Gomez*, *Aker*, *Mohammed*, and *Fonjong* and their derivatives in accordance with the PI Order and adjudicating as many other DV 2020 cases as possible.

4. The amount of cases consular sections can process at this time varies due to many factors, including but not limited to local border closures, local quarantine requirements, COVID-19 outbreaks, security issues, staffing issues, panel physician limitations, and social distancing requirements to prevent transmission of COVID-19 in our waiting rooms. Some posts no longer have capacity to schedule and process more DV applicants before the September 30 fiscal year deadline and have communicated that in response to inquiries from diversity visa applicants. Below are some examples of verbatim text responses provided by U.S. consular sections to diversity visa applicants.

5. The U.S. Embassy in Djibouti, Djibouti, received an inquiry from the attorney for named plaintiff Nabeel Alamawyi in the lawsuit *Kennedy v. Trump* in which the attorney wrote that "a federal court ordered the immediate adjudication of Mr. Nabeel Alamawyi's immigrant visa application." The consular section responded as follows:

> Consistent with the court order in *Gomez v. Trump*, the Department of State is making a good-faith effort to adjudicate as many Diversity Visa applications as possible notwithstanding Presidential Proclamation 10014. Please note, however, the DV-2020 Program expires on September 30, 2020 and, in accordance with law, diversity visas may no longer be issued after that date. The Department expects that, due to resource constraints, limitations due to the COVID-19 pandemic, and country conditions, we will not be able to adjudicate applications for all Diversity Visa selectees by that expiration date.

> As ordered by the court, we are prioritizing individual named plaintiffs in the court case *Gomez v. Trump* and its companion cases who are applying for Diversity Visas. Beyond that, we have established priorities based on statutory standards and categories of cases most likely to result in timely issuances for eligible applicants. Accordingly, we are prioritizing applicants who have already been interviewed and who either have been determined eligible for a visa or may be determined eligible for a visa with additional information. We will also prioritize applicants with appointments that were cancelled in March, April, or May due to the COVID-19 pandemic and worldwide suspension of routine processing. Diversity Visa Selectees who have heard from the Kentucky Consular Center (KCC) that they are documentarily qualified, but awaiting an interview date, will be scheduled in accordance with their rank order and post's capacity, consistent with our standard processes. For more details, see https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html.
>
> Finally, please note that the U.S. Embassy in Djibouti does not have the capacity to schedule additional visa appointments next week. However, if any cancellations occur post will attempt to fill those slots with Diversity Visa appointments.

See Exhibit A.

6. The U.S Embassy in Cairo, Egypt, responded to an inquiry regarding DV processing by stating that the consular section had reached capacity for DV processing due to local health conditions and resource constraints except for named plaintiffs. The email states the following:

> Unless you have heard from us already, at this time, Cairo is unable to process your case due to local health conditions and resource constraints. You may request a transfer of your case to another post. **Applicants can request a transfer by contacting the desired post directly; we will not be able to accommodate all transfer requests.**
>
> However, if you were a named plaintiff in Gomez v. Trump and its companion cases and have not been informed of an appointment time, please send another e-mail and include your case number and "NAMED PLAINTIFF" in the subject line, as well as include a copy of the lawsuit indicating the exact page number of your name in that document. We will review the information you send and if we confirm you are a named plaintiff, make every attempt to schedule an appointment.

See Exhibit B (emphasis in original).

7. The U.S. Embassy in Chisinau, Moldova responded to an inquiry regarding DV processing as follows:

> We cannot assist you with scheduling an appointment in Chisinau, Moldova, as all our appointment times in the month of September are already filled.

> Consistent with the court order in *Gomez v. Trump*, the Department of State is making a good-faith effort to adjudicate as many Diversity Visa applications as possible notwithstanding Presidential Proclamation 10014. Please note, however, the DV-2020 Program expires on September 30, 2020 and, in accordance with law, diversity visas may no longer be issued after that date. The Department expects that, due to resource constraints, limitations due to the COVID-19 pandemic, and country conditions, we will not be able to adjudicate applications for all Diversity Visa selectees by that expiration date.
>
> As ordered by the court, we are prioritizing individual named plaintiffs in the court case *Gomez v. Trump* and its companion cases who are applying for Diversity Visas. Beyond that, we have established priorities based on statutory standards and categories of cases most likely to result in timely issuances for eligible applicants. Accordingly, we are prioritizing applicants who have already been interviewed and who either have been determined eligible for a visa or may be determined eligible for a visa with additional information. We will also prioritize applicants with appointments that were cancelled in March, April, or May due to the COVID-19 pandemic and worldwide suspension of routine processing. Diversity Visa Selectees who have heard from the Kentucky Consular Center (KCC) that they are documentarily qualified, but awaiting an interview date, will be scheduled in accordance with their rank order and post's capacity, consistent with our standard processes. For more details, see https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html. You can inquire with other embassies to see if they have additional interview capacity this month, but unfortunately Embassy Chisinau does not.

See Exhibit C.

8. The U.S. Embassy in Warsaw, Poland, responded to an inquiry from a named plaintiff in *Kennedy v. Trump* by stating the following:

> We are sorry we are unable to schedule your case for an interview. You are a plaintiff in the Kennedy vs. Trump case that is still pending judicial process, while the State Department was authorized to process only beneficiaries of Gomez vs. Trump case.
>
> Unfortunately, given current space and capacity constraints, we are not able to schedule appointments for any Diversity Visa applicants (program year 2020) who did not have an appointment cancelled in March, April or May. We are required to follow the prioritization guidance from the Department of State.

See Exhibit D.

9. The U.S. Embassy in Warsaw, Poland, responded to another inquiry regarding DV processing by stating the following:

> We are sorry but we cannot ask the KCC for any new transfers of DV-2020 cases. We understand that you are a plaintiff in the new case that was just filed on September 18th. You have to wait for the judge's decision in your case.
>
> Unfortunately, given current space and capacity constraints, we are not able to schedule appointments for any Diversity Visa applicants (program year 2020) who did not have an appointment cancelled in March, April or May. We are required to follow the prioritization guidance from the Department of State.

See Exhibit E.

10. When the Visa Office received notice of any consular sections sending automatic messages after the Amended Order dated September 14, 2020 that stated that DV applicants were subject to the regional COVID 19 proclamations (9984, 9992, 9993, 9996, and 10041), we immediately followed up with those consular sections to ensure that their messaging was accurate and that they were applying the Amended Order dated September 14. For example, we reached out to the U.S. Embassy in London, England, and the U.S. Consulate General in Frankfurt, Germany, after receiving notice about their automatic messages regarding the regional COVID 19 proclamations. On September 17, the Visa Office provided updated instruction to all consular officers worldwide that posts should schedule and process DV-2020 applicants (principals and derivatives) regardless of their current, future, or past physical presence in areas covered by regional COVID Proclamations and that posts should also review recent DV-2020 refusals, particularly those that were adjudicated between September 4-15, that were refused solely due to regional COVID PPs and re-adjudicate consistent with the revised guidance. We have verified that since the Amended Order dated September 14, no DV applicant in London or Frankfurt has been prevented from applying and no applicant who was interviewed after September 4 is denied under one of the regional COVID 19 proclamations.

Posts' Good Faith Efforts

11. Notwithstanding all of the resource constraints and limitations due to the COVID-19 pandemic, consular sections have gone above and beyond the good faith requirements in the PI Order to adjudicate as many cases as possible. For example, after two locally employed staff members in the consular section at the U.S. Embassy in Beirut, Lebanon, tested positive for COVID-19 on September 22 and on September 24, all employees in the visa unit except for one were ordered to quarantine until October 8. In order to finish adjudicating DV 2020 cases, the Consul General requested and received permission for him and a locally employed staff member to work September 24 and 27 so that they can process DV 2020 cases.

12. In addition, the U.S. Embassy in Yerevan, Armenia, accepted a transfer request from the U.S. Embassy in Ankara, Turkey, and scheduled plaintiff Mahdi Moadab and his family members for an interview on September 25. After the consular section in Yerevan received a request to reschedule the September 25 interview, the consular section responded as follows: "Please note that our schedule is full. If the applicant [sic] can't make the appointment we will not be able to reschedule him." *See* Exhibit F. The consular section did not tell the plaintiff that his application was rejected as asserted by Plaintiffs' counsel. *See* Exhibit G ("Yerevan has told this

Fonjong plaintiff that if he doesn't attend his interview tomorrow, his application is rejected."). After interview slots in Yerevan opened up because of cancellations, the consular section rescheduled Mahdi Moadab, his wife, and two children for September 29.

13. Posts throughout the world are working within the confines of their resources and local circumstances to process as many DV cases as possible, prioritizing the named plaintiffs in accordance with the court's order. Notable examples include the Embassies in Manama, Stockholm, and Yaounde. These comparatively small consular sections found that they had conditions favorable enough and staff sufficient to take on cases outside their districts. Consular staff in Sweden adjudicated 23 diversity visa applicants compared to 11 cases over the same time period in 2019. The consular section in Yaounde, which is operating with limited staff, has adjudicated 96 cases in three weeks. The staff in Manama adjudicated all plaintiffs in their district and offered ten interview slots to neighboring countries. The Consulate General in Frankfurt, a much larger section, but one restricted by local government quarantine and entry rules, has also been working to process anyone who can get to the Consulate. To date, they have processed 27 diversity visa applicants versus 17 in the same time period last year.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

September 25, 2020

Neal R. Vermillion, Division Chief
Outreach and Inquiries Division
Office of Field Operations, Visa Office
Bureau of Consular Affairs
United States Department of State

[redacted]

From: Djibouti, Attorney Consular
Sent: Thursday, September 24, 2020 10:58 AM
To: DV processing; Djibouti, Attorney Consular
Subject: RE: NAMED PLAINTIFF- 2020AS00028689; ALAMAWYI, Nabeel-URGENT SCHEDULING REQUEST

Dear Mr. Urena,

Thank you for your email regarding the scheduling of a Diversity Immigrant Visa interview appointment.

Consistent with the court order in *Gomez v. Trump*, the Department of State is making a good-faith effort to adjudicate as many Diversity Visa applications as possible notwithstanding Presidential Proclamation 10014. Please note, however, the DV-2020 Program expires on September 30, 2020 and, in accordance with law, diversity visas may no longer be issued after that date. The Department expects that, due to resource constraints, limitations due to the COVID-19 pandemic, and country conditions, we will not be able to adjudicate applications for all Diversity Visa selectees by that expiration date.

As ordered by the court, we are prioritizing individual named plaintiffs in the court case *Gomez v. Trump* and its companion cases who are applying for Diversity Visas. Beyond that, we have established priorities based on statutory standards and categories of cases most likely to result in timely issuances for eligible applicants. Accordingly, we are prioritizing applicants who have already been interviewed and who either have been determined eligible for a visa or may be determined eligible for a visa with additional information. We will also prioritize applicants with appointments that were cancelled in March, April, or May due to the COVID-19 pandemic and worldwide suspension of routine processing. Diversity Visa Selectees who have heard from the Kentucky Consular Center (KCC) that they are documentarily qualified, but awaiting an interview date, will be scheduled in accordance with their rank order and post's capacity, consistent with our standard processes. For more details, see https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html.

Finally, please note that the U.S. Embassy in Djibouti does not have the capacity to schedule additional visa appointments next week. However, if any cancellations occur post will attempt to fill those slots with Diversity Visa appointments.

Kind regards,

Consular Section
U.S. Embassy Djibouti

SBU -PRIVACY OR PII

From: DV processing <dv@curtismorrisonlaw.com>
Sent: Thursday, September 24, 2020 7:39 AM
To: Djibouti, Attorney Consular <DjiboutiAttorneyConsular@state.gov>; KCC DV <KCCDV@state.gov>
Subject: NAMED PLAINTIFF- 2020AS00028689; ALAMAWYI, Nabeel-URGENT SCHEDULING REQUEST

Applicant Name: ALAMAWYI, Nabeel

Vermillion Decl. Ex. A

Case Number: 2020AS00028689

Date of Birth: [redacted]

Dear sir or madam:

We are attorneys for **Nabeel Alamawyi**, in connection with his immigrant visa application. A properly executed G-28 is attached.

On September 4, 2020, a federal court ordered the immediate adjudication of Mr. **Nabeel Alamawyi's** immigrant visa application. As a named plaintiff in the suit, (*please see attached* **COMPLAINT** pg 127 and 941) **Nabeel Alamawyi MUST be given priority scheduling.** (*please see attached* **ORDER**). **We are *less than 7 days* away from the deadline and this is the SECOND request.**

We respectfully request that Nabeel Alamawyi's case be sent to the U.S. Embassy Djibouti and he be immediately scheduled for an interview, as the September 30 deadline is rapidly approaching.

We thank you in advance for your prompt attention to this matter.

Best regards,

Rafael Urena, Esq.

Vermillion Decl. Ex. A

From: **HANA KAMEL ZAKY** hanakamelzaky@gmail.com
Subject: HANA KAMEL ZAKY MIKHAIEL
Date: September 23, 2020 at 7:43 PM
To: evidence@curtismorrisonlaw.com

Good Afternoon,

Thank you for your inquiry.

On September 4, 2020, the U.S. District Court in the District of Columbia ruled in Gomez v. Trump that the Department must make good-faith efforts to process expeditiously and adjudicate Diversity Visa 2020 (DV-2020) applications by September 30, 2020 notwithstanding Presidential Proclamation 10014.

Therefore, embassies and consulates have been directed to prioritize the processing of DV-2020 applicants, where local health conditions and post resources allow.

Unless you have heard from us already, at this time, Cairo is unable to process your case due to local health conditions and resource constraints. You may request a transfer of your case to another post. **Applicants can request a transfer by contacting the desired post directly; we will not be able to accommodate all transfer requests.**

However, if you were a named plaintiff in Gomez v. Trump and its companion cases and have not been informed of an appointment time, please send another e-mail and include your case number and "NAMED PLAINTIFF" in the subject line, as well as include a copy of the lawsuit indicating the exact page number of your name in that document. We will review the information you send and if we confirm you are a named plaintiff, make every attempt to schedule an appointment.

Thank you for your patience.

Best,

Immigrant Visa Section

U.S. Embassy Cairo

From: **lilia gorgos** 33lili@mail.ru
Subject: OLEG DIDENCO
Date: September 12, 2020 at 4:24 AM
To: evidence evidence@curtismorrisonlaw.com

Тема: RE: Green Card

Thank you for your email regarding the scheduling of a Diversity Immigrant Visa interview appointment.

We cannot assist you with scheduling an appointment in Chisinau, Moldova, as all our appointment times in the month of September are already filled.

Consistent with the court order in *Gomez v. Trump*, the Department of State is making a good-faith effort to adjudicate as many Diversity Visa applications as possible notwithstanding Presidential Proclamation 10014. Please note, however, the DV-2020 Program expires on September 30, 2020 and, in accordance with law, diversity visas may no longer be issued after that date. The Department expects that, due to resource constraints, limitations due to the COVID-19 pandemic, and country conditions, we will not be able to adjudicate applications for all Diversity Visa selectees by that expiration date.

As ordered by the court, we are prioritizing individual named plaintiffs in the court case *Gomez v. Trump* and its companion cases who are applying for Diversity Visas. Beyond that, we have established priorities based on statutory standards and categories of cases most likely to result in timely issuances for eligible applicants. Accordingly, we are prioritizing applicants who have already been interviewed and who either have been determined eligible for a visa or may be determined eligible for a visa with additional information. We will also prioritize applicants with appointments that were cancelled in March, April, or May due to the COVID-19 pandemic and worldwide suspension of routine processing. Diversity Visa Selectees who have heard from the Kentucky Consular Center (KCC) that they are documentarily qualified, but awaiting an interview date, will be scheduled in accordance with their rank order and post's capacity, consistent with our standard processes. For more details, see https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html.

You can inquire with other embassies to see if they have additional interview capacity this month, but unfortunately Embassy Chisinau does not.

Kind regards,

Consular Section Staff

Embassy of the United States of America

Chisinau, Moldova

https://md.usembassy.gov/

http://www.facebook.com/U.S.EmbassyMoldova

From: didenco oleg <didenco.oleg@bk.ru>
Sent: Monday, September 7, 2020 9:53 AM
To: Chisinau, Visas <ChisinauVisas@state.gov>
Subject: Green Card

Buna ziua , ma numesc DIDENCO OLEG , sunt cistigator DV . Nu a fost stabilit interviu pentru case-ul meu , apoi a aparut proclamatia lui Trump , apoi decizia in ceea ce priveste cele 5 procese intentate pentru intreruperea procesului de acordare a vizelor pentru diferite tipuri de imigrare, inclusiv de castigatorii loteriei DV-2020 , care sunt urmatoarele etape , ca sa am stabilit data interviului ?

Multumesc

case 2020EU00041799

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didenco oleg

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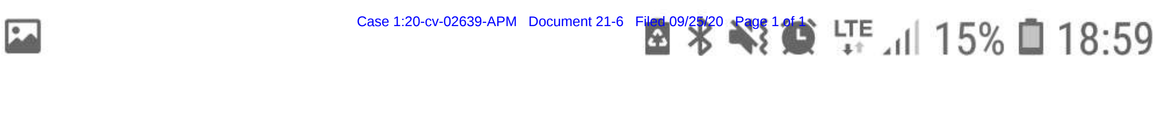

Immigrant Visas Warsaw 18:07

do mnie, Public

Dear Sir,

Thank you for the inquiry.

We are sorry, but we cannot ask the KCC for any new transfers of DV-2020 cases. We understand that you are a plaintiff in this new case that was just filed on September 18th. You have to wait for the judge's decision in your case.

Unfortunately, given current space and capacity constraints, we are not able to schedule appointments for any Diversity Visa applicants (program year 2020) who did not have an appointment cancelled in March, April or May. We are required to follow the prioritization guidance from the Department of State. You can find more information here: https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html

Sincerely,

Vermillion Decl. Ex. D

[redacted]

From: Immigrant Visas Warsaw
Sent: Wednesday, September 23, 2020 11:17 AM
To: maximaddress@gmail.com
Cc: Public Warsaw, Poland
Subject: Re: Diversity Visa Interview scheduling for a plaintiff of 1:20-cv-2639 case

Dear Sir,

Thank you for your inquiry.

We are sorry we are unable to schedule your case for an interview. You are a plaintiff in the Kennedy vs. Trump case that is still pending judicial process, while the State Department was authorized to process only beneficiaries of Gomez vs. Trump case.

Unfortunately, given current space and capacity constraints, we are not able to schedule appointments for any Diversity Visa applicants (program year 2020) who did not have an appointment cancelled in March, April or May. We are required to follow the prioritization guidance from the Department of State.
You can find more information here: https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html

> Diversity Visa (DV-2020) Update - travel.state.gov
>
> On September 4, 2020, the U.S. District Court in the District of Columbia ruled in Gomez v.Trump that the Department must make good-faith efforts to expeditiously process and adjudicate DV-2020 diversity visa applications by September 30, 2020. Therefore, DV-2020 applicants may be processed in embassies and consulates where local health conditions and post resources allow.
>
> travel.state.gov

We are very sorry we cannot schedule you for an appointment.
Regards,

Immigrant Visa Unit
Consular Section
U.S. Embassy Warsaw
/ep

From: MAXIM 7250169951052564596 <maximaddress@gmail.com>
Sent: Tuesday, September 22, 2020 1:20 PM
To: Public Warsaw, Poland <PublicWaw@state.gov>
Subject: Diversity Visa Interview scheduling for a plaintiff of 1:20-cv-2639 case

Dear Sir/Madam,

My case number: 2020EU00035450
My complete name: Maksim Sadyka

Vermillion Decl. Ex. E

My date of birth: [redacted]

Hi, I'm a plaintiff on 1:20-cv-2639 case(https://drive.google.com/file/d/17Q6gkiCIFqK88Vi7fxpxCB1fvfWBwCD3/view) on page 14(Maksim Sardyka).

I want to schedule a Diversity Visa interview in an "emergency" or "mission critical" order in your embassy in accordance with Judge Mehta's order(**https://drive.google.com/file/d/1xpq6LmZ_XvG5XOlnAKJjbNeE16wZOgOt/view**) and accompanying Department of State guidelines published at https://travel.state.gov.

It is important to point out that the visa cannot be issued later than 30 of September 2020.

Will it be possible to do so at your embassy?

Look forward to your reply.
Yours faithfully,
Maksim Sadyka
maximaddress@gmail.com

From: Yerevan, Iran IV
Sent: Friday, September 25, 2020 11:21 AM
To: DV processing <dv@curtismorrisonlaw.com>
Cc: moadab.co@gmail.com <moadab.co@gmail.com>; FARZAD.VAHABI@GMAIL.COM <FARZAD.VAHABI@GMAIL.COM>
Subject: RE: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 new date is 29 September, 2020 at 09:30

Dear Kristina Ghazaryan,

Thank you for your follow up email. Please be advised that Mahdi Moadab's appointment is rescheduled to **29 September, 2020 at 09:30**.

ATTENTION: UNDER NO CIRCUMSTANCES CAN A VISA BE ISSUED OR AN ADJUSTMENT OF STATUS OCCUR IN YOUR CASE AFTER SEPTEMBER 30, 2020.

Sincerely,
Consular Section
Immigrant Visa Unit
U.S. Embassy Yerevan
American Ave, Yerevan 0082, Armenia

SBU -PRIVACY OR PII

From: DV processing <dv@curtismorrisonlaw.com>
Sent: Friday, September 25, 2020 12:28 AM
To: Yerevan, Iran IV <IranIVYerevan@state.gov>
Cc: moadab.co@gmail.com
Subject: Re: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)

Hello there,

Thank you for your response and we realize and appreciate the situation you are currently in with the volume of requests coming in.

Vermillion Decl. Ex. F

My mutual plaintiff:
Applicant Name: **VAHABIDEHKORDI, FARZAD**
Case Number: 2020AS00005558
Date of Birth: [redacted]
Has an interview scheduled for: 29 September 2020 at 15:00 that I canceled in a previous email as they cannot make it.
We would like to respectfully ask if you would please consider giving this spot to Mr. Moadab and his family. Please be advised he has spent nearly a two year salary on his tickets and would love an opportunity to at least have an interview.
We realize this is not a normal request and you must have hundreds of people waiting for that spot but would really, really appreciate it if you would consider it.
I thank you in advance for your time and consideration.
Best,
Kristina Ghazaryan, Esq.

From: Yerevan, Iran IV <IranIVYerevan@state.gov>
Sent: Wednesday, September 23, 2020 11:02 PM
To: DV processing <dv@curtismorrisonlaw.com>
Cc: moadab.co@gmail.com <moadab.co@gmail.com>
Subject: Re: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)

Dear Kristina Ghazaryan,
Thank you for your email. Please note that our schedule is full. If the appliccant can't make the appointment we will not be able to reschedule him.
ATTENTION: UNDER NO CIRCUMSTANCES CAN A VISA BE ISSUED OR AN ADJUSTMENT OF STATUS OCCUR IN YOUR CASE AFTER SEPTEMBER 30, 2020.
Sincerely,
Consular Section
Immigrant Visa Unit
U.S. Embassy Yerevan
American Ave, Yerevan 0082, Armenia

From: DV processing <dv@curtismorrisonlaw.com>
Sent: Wednesday, September 23, 2020 7:02 PM
To: Yerevan, Iran IV <IranIVYerevan@state.gov>
Cc: moadab.co@gmail.com <moadab.co@gmail.com>
Subject: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)

Applicant Name: **MOADAB / MAHDI**
Case Number: 2020AS11830
Date of Birth: [redacted]
Dear sir or madam:
We are attorneys for MAHDI MOADAB, cc'd on this email, in connection with his immigrant visa application. A properly executed G-28 is attached.
First and foremost, we would like to extend our sincere appreciation for accepting our named plaintiffs transfer request and granting him an interview in such short notice for the 25th of September at 15:00.
Unfortunately due to Covid , the airlines have much fewer flights from Tehran to Yerevan and as you are aware the land border is closed also.
Mr, MOADAB **has purchased** the first ticket available for the evening of September 25(attached to this email) but unfortunately it will not get him there in time for his originally scheduled interview as he has to take the Covid test and wait 24 hours for the results. We respectfully ask that you consider giving him an appointment on the 28/29/30 please.

Vermillion Decl. Ex. F

I thank you in advance for your time and consideration.
Best regards,
Kristina Ghazaryan, Esq.

[redacted]

From: Curtis Morrison <curtis@curtismorrisonlaw.com>
Sent: Thursday, September 24, 2020 12:39 PM
To: Wen, James J. (CIV)
Cc: Rafael Urena
Subject: Fwd: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)

Hi James,

Yerevan has told this Fonjong plaintiff that if he doesn't attend his interview tomorrow, his application is rejected. The first flight he could find was for tomorrow, which he will be on.

Could ask your client if they could fit him in Monday, Tuesday, or Wednesday?

Thanks.

--
Curtis Morrison
714-661-3446

From: DV processing <dv@curtismorrisonlaw.com>
Sent: Thursday, September 24, 2020 10:19 AM
To: Amir Naderi <amir@curtismorrisonlaw.com>
Subject: Fwd: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)

Get Outlook for iOS

From: Yerevan, Iran IV <IranIVYerevan@state.gov>
Sent: Wednesday, September 23, 2020 11:02:07 PM
To: DV processing <dv@curtismorrisonlaw.com>
Cc: moadab.co@gmail.com <moadab.co@gmail.com>
Subject: Re: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)
Dear Kristina Ghazaryan,

Thank you for your email. Please note that our schedule is full. If the appliccant can't make the appointment we will not be able to reschedule him.
ATTENTION: UNDER NO CIRCUMSTANCES CAN A VISA BE ISSUED OR AN ADJUSTMENT OF STATUS OCCUR IN YOUR CASE AFTER SEPTEMBER 30, 2020.
Sincerely,
Consular Section
Immigrant Visa Unit
U.S. Embassy Yerevan
American Ave, Yerevan 0082, Armenia

Vermillion Decl. Ex. G

From: DV processing <dv@curtismorrisonlaw.com>
Sent: Wednesday, September 23, 2020 7:02 PM
To: Yerevan, Iran IV <IranIVYerevan@state.gov>
Cc: moadab.co@gmail.com <moadab.co@gmail.com>
Subject: URGENT--Interview date change request--- MOADAB / MAHDI --2020AS11830 (Currently scheduled for Sep 25 @ 15:00)

Applicant Name: **MOADAB / MAHDI**
Case Number: 2020AS11830
Date of Birth: [redacted]

Dear sir or madam:

We are attorneys for MAHDI MOADAB, cc'd on this email, in connection with his immigrant visa application. A properly executed G-28 is attached.

First and foremost, we would like to extend our sincere appreciation for accepting our named plaintiffs transfer request and granting him an interview in such short notice for the 25th of September at 15:00.

Unfortunately due to Covid , the airlines have much fewer flights from Tehran to Yerevan and as you are aware the land border is closed also.

Mr, MOADAB **has purchased** the first ticket available for the evening of September 25(attached to this email) but unfortunately it will not get him there in time for his originally scheduled interview as he has to take the Covid test and wait 24 hours for the results. We respectfully ask that you consider giving him an appointment on the 28/29/30 please.

I thank you in advance for your time and consideration.

Best regards,

Kristina Ghazaryan, Esq.

Vermillion Decl. Ex. G

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al., **Plaintiffs,** **v.** **DONALD J. TRUMP, et al.,** **Defendants.**	Case No. 20-cv-01419 (APM)
MOHAMMED ABDULAZIZ ABDUL MOHAMMED, et al., **Plaintiffs,** **v.** **MICHAEL R. POMPEO, et al.,** **Defendants.**	Case No. 20-cv-01856 (APM)
AFSIN AKER, et al., **Plaintiffs,** **v.** **DONALD J. TRUMP, et al.,** **Defendants.**	Case No. 20-CV-01926 (APM)

CLAUDINE NGUM FONJONG, et al., **Plaintiffs,** **v.** **DONALD J. TRUMP, et al.,** **Defendants.**	)	Case No. 20-cv-02128 (APM)
CHANDAN PANDA, et al., **Plaintiffs,** **v.** **CHAD F. WOLF, et al.,** **Defendants.**	)	Case No. 20-cv-01907 (APM)

DEFENDANTS' SUPPLEMENTAL BRIEF

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ARGUMENT

Defendants file this memorandum in response to the Court's request for supplemental briefing regarding the Plaintiffs' requests for equitable relief for diversity visa ("DV") applicants beyond the end of Fiscal Year 2020 on September 30, 2020.

Congress, through the Immigration and Nationality Act ("INA"), has mandated that that individuals selected in the DV lottery are not eligible to receive a diversity visa after the end of the fiscal year, 8 U.S.C. § 1154, and that the Executive Branch is expressly barred from issuing visas to ineligible applicants. *Id.* § 1153(e)(2). Because clear statutory authority bars the issuance of diversity visas after the close of the fiscal year, this Court lacks discretion to issue the equitable relief the Plaintiffs request. *U.S. v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483, 496 (2001); *I.N.S. v. Pangilinan*, 486 U.S. 875, 883–84 (1988).

I. The Court Lacks Jurisdiction to Grant Plaintiffs' Requested Relief.

Plaintiffs request that the Court order that visa numbers be held for beneficiaries of the Fiscal Year 2020 DV lottery beyond the close of the fiscal year. But, the Court lacks jurisdiction to grant this equitable relief. The Supreme Court has made clear that even "when district courts are properly acting as courts of equity, they have discretion *unless a statute clearly provides otherwise*." *Oakland Cannabis Buyers' Co-Op*, 532 U.S. at 496 (emphasis added). Indeed, "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Id.* at 497 (quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978). Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. *Id.*, at 194–95.

Here, numerous statutes proscribe this Court's discretion to fashion any equitable remedy to either "hold" numbers for FY2020 DV applicants beyond or direct that any FY2020 DV applicant be issued a visa under that program after September 30, 2020.

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

By statute, eligibility for a diversity visa lasts only through the end of the specific fiscal year[1] for which an alien was selected: Aliens selected in the DV lottery "shall remain eligible to receive such visa only through *the end of the specific fiscal year for which they were selected*." 8 U.S.C. § 1154 (a)(1)(I)(II) (emphasis added); Diversity visas "shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State *for the fiscal year involved*." 8 U.S.C. § 1153(e)(2) (emphasis added); "Under no circumstances may a consular officer issue a visa or other documentation to an alien *after the end of the fiscal year during which an alien possesses diversity visa eligibility*." 22 C.F.R. § 42.33(a)(1) (emphasis added). *See also,* 22 C.F.R. § 42.33(f) ("[D]iversity immigrant visa numbers ... will be allotted only during the fiscal year for which a petition to accord diversity immigrant status was submitted and approved. *Under no circumstances will immigrant visa numbers be allotted after midnight of the last day of the fiscal year for which the petition was submitted and approved*.") (emphasis added).

In short, the INA's plain text imposes a limitation on DV eligibility based on the close of the fiscal year. In addition to the plain text of the statute, Congressional intent behind limiting the issuance of DVs to the fiscal year for which the applicant is selected is demonstrated by comparing provisions in the INA that account for the rolling-over of unused numbers in other immigrant visa categories but not immigrant visas issued under the DV program. *See* 8 U.S.C. § 1151(c)–(e).

[1] The Federal Government's fiscal year begins on October 1 of each year and ends on September 30 of the following year. *See* 31 U.S.C. § 1102.

Specifically, section 1151(c) provides the total annual number for family preference cases, which includes the unused number of employment-based visa numbers from the previous fiscal year. Section 1151(d) sets the total number of employment preference immigrants for a fiscal year, which will include the unused number of family preference visas from the previous fiscal year. But, Congress provided no rollover for DVs. *Id*. § 1151(e). Clearly, Congress knew how to provide for roll-over eligibility beyond the fiscal year, and it unequivocally declined to do so for DVs. *Compare id*. §§ 1151(c), (d) *with* § 1151(e). This unambiguous provision clearly provides "the judgment of Congress, deliberately expressed in legislation." *Oakland Cannabis*, 532 U.S. at 497.

Congress's intent behind the September 30th issuance deadline for diversity visas is reinforced by its history of providing relief via legislation to individuals who lost their DV opportunity due to the fiscal year deadline because of unique circumstances. *E.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. Law No. 104-208, § 637, Div. C, Title VI-C, 110 Stat. 3009-546, 3009-704 (Sept. 30, 1996) (DV applicants affected by administrative errors); Pub. Law 105-360, § 1, 112 Stat. 3276 (Nov. 10, 1998) (DV applicants affected by embassy bombings); PATRIOT Act of 2001, Pub. Law 107-56, § 422(c), 115 Stat. 272 (Oct. 26, 2001) (DV applicants affected by 9/11 attacks).

* * *

In addition to the plain text and structure of the relevant INA provisions, these examples confirm that even when there are exigent circumstances attributable not to the applicant but instead to government error or actions of third parties, there is unfortunately no remedy for an otherwise qualified DV applicant who could not receive a visa number during the fiscal year to potentially obtain a DV after the fiscal year has ended. This is, however, consistent with Congress's mandate

in the INA that diversity visas not be issued beyond the end of the fiscal year and an exercise of Congress's judgment. *Oakland Cannabis*, 532 U.S. at 497.

B. The Court lacks jurisdiction to issue equitable relief contrary to the INA.

Even assuming that the Court's equitable jurisdiction is properly invoked, its authority to craft equitable relief ends where Congress has already spoken. *Id*. at 496. Congress has spoken here, and numerous courts have recognized this statutory barrier in the visa eligibility context. Indeed, the Supreme Court has explained that:

> [T]he power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers. "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."

I.N.S. v. Pangilinan, 486 U.S. 875, 883–84 (1988) (quoting *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893), *Rees v. Watertown*, 86 U.S. [19 Wall.] 107, 122 (1874), and *United States v. Ginsberg*, 243 U.S. 472, 474, (1917)); citing *Thompson v. Allen County*, 115 U.S. 550, 555 (1885); 1 J. Story, Equity Jurisprudence § 19 (W. Lyon ed. 1918); 28 U.S.C. § 1361; and 28 U.S.C. § 1651.

As Judge Wilkins explained in *Am. Hosp. Assoc. v. Price*, "just as a court may not require an agency to break the law, a court may not require an agency to render performance that is impossible." 867 F.3d 160, 167 (D.C. Cir. 2018) (citing *Ala. Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979); *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974)). "The reasoning is simple and intuitive: it is not appropriate for a court—contemplating the equities—to order a party to jump higher, run faster, or lift more than she is physically capable." *Id.*; *see also United States ex rel. Newman v. City & Suburban Ry. of Wash.*, 42 App. D.C. 417, 420–21 (D.C. Cir. 1914) ("In the absence of such express authority, the writ here sought, if issued, would be a nullity. *It is of no*

concern that delay may be imputed to the railway company, since the duty sought to be imposed has been made by act of Congress impossible of performance. *The writ of mandamus will not issue to compel the performance of that which cannot be legally accomplished*." (emphases added)). What was true more than a century ago is still true today: "A Court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law[.]" *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (citing *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893); *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874)).

Even though the State Department is precluded by statute from issuing FY 2020 diversity visas past September 30, 2020, the Plaintiffs would have this Court direct the Department to treat their past applications "as if" they were still in the same temporal window. But after September 30, 2020, that temporal window will have come and gone. *See, e.g.*, *Zixiang Li v. Kerry*, 710 F.3d 995, 1002 (9th Cir. 2013) ("It does not matter whether administrative delays and errors are to blame …. Any other interpretation of the statute would allow statutory limits on levels of immigration in a particular fiscal year to be exceeded[.]" (footnotes omitted)). And the D.C. Circuit's case law instructs that courts may not craft an equitable remedy where a legislative temporal window has already closed. *See Antone v. Block*, 661 F.2d 230, 235 (D.C. Cir. 1981) (holding that a district court's remedial powers "are necessarily limited by a clear and valid legislative command counseling against the contemplated judicial action").

A court may not order any equitable relief that would require the issuance of diversity visas after the end of the applicable fiscal year for plaintiffs outside of the United States. "[C]ourts have consistently recognized that they are not necessarily empowered to relieve would-be immigrants from the profound frustration and disappointment that the [diversity visa] process can create...." *Smirnov v. Clinton*, 806 F. Supp. 2d 1, 24 (D.D.C. 2011), *aff'd*, 487 F. App'x 582 (D.C. Cir. 2012).

"[W]hen midnight strikes at the end of the fiscal year, those [diversity visa] applicants without visas are out of luck. Although this deadline may appear 'unforgiving, this strict interpretation of the diversity visa statute has been adopted by every circuit court to have addressed the issue.' ... Plainly stated, the mandamus and declaratory relief sought by [the plaintiff]—the *nunc pro tunc* processing of his Diversity Visa application after the relevant fiscal year—is statutorily barred." *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276, 282–83 (D.D.C. 2018), *aff'd sub nom. Yung-Kai Lu v. Pompeo*, No. 18-5066, 2018 WL 5919254 (D.C. Cir. Oct. 19, 2018) (quoting *Mogu v. Chertoff*, 550 F.Supp.2d 107, 109 (D.D.C. 2008); citing *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006); *Coraggioso v. Ashcroft*, 355 F.3d 730, 734 (3d Cir. 2004); *Carrillo–Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003); *Nyaga v. Ashcroft*, 323 F.3d 906, 914 (11th Cir. 2003); and *Iddir v. INS*, 301 F.3d 492, 501 (7th Cir. 2002)).

"Federal district courts do not have subject matter jurisdiction over moot cases." *Zapata v. I.N.S.*, 93 F. Supp. 2d 355, 358 (S.D.N.Y. 2000) (citing *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir.1999) and *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir.1993). Thus, in *Zapata*, the court found that it had no power to issue an injunction requiring issuance of diversity visas because the fiscal year had ended. *Id*. Similarly, the court also found that it had no power to order the State Department to reserve diversity visas from the next fiscal year for the plaintiffs because 8 U.S.C. § 1154 only makes aliens eligible to receive diversity visas through the end of the fiscal year for which they were selected. *Id*. The court explained that "[t]he plain meaning of § 1154 is that after the fiscal year has ended on September 30, no diversity visas may be issued *nunc pro tunc* based on the results of the previous fiscal year's visa lottery." *Id*.

The D.C. Circuit has acknowledged that "[c]ourts are often asked to intervene in disputes over diversity visas, and the end of the selection FY does often render those cases moot."

Almaqrami v. Pompeo, 933 F.3d 774, 780 (D.C. Cir. 2019). *Almaqrami* acknowledges that a diversity visa plaintiff who sues after the applicable fiscal year has ended does "not have a statutory right to the requested visa and the government does not have a duty to issue her one," nor does a plaintiff who "files suit before the selection FY ends but the court fails to act on that request until after September 30." *Id.*

Some district courts have, however, required agencies to adjust the status of diversity-visa lottery selectees who were already within the United States after the fiscal year ended. *See, e.g.*, *Przhebelskaya v. U.S. Bureau of Citizenship & Immigration Servs.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999). *Almaqrami* stated that in such cases, where before the end of the applicable fiscal year the "plaintiff files suit and the court grants some relief—but not the visa—before October 1" it was "not implausible" that a court "might lawfully take steps to compel the government to process the plaintiff's application and issue her a diversity visa anyway." *Almaqrami*, 933 F.3d at 780-781. The *Almaqrami* court did not definitively determine whether such equitable relief would be permissible, holding that it was a merits question to be remanded to the district court. *Id*. at 781, 784.

The equitable relief that Plaintiffs are seeking is precluded by statute and thus not permissible in this case. *Przhebelskaya* and *Paunescu* are not applicable because neither involved the issuance of visas to foreign nationals overseas by a State Department consular official, but instead involved courts exercising equitable authority with respect to individuals within the United States. As then-Judge Ruth Bader Ginsburg explained for the D.C. Circuit: "By ... authorizing the Attorney General (and, under his delegation, Immigration Service officers) to grant permanent resident status, Congress afforded aliens *present in this country* on nonimmigrant visas a marked

advantage over the alien who could receive an immigrant visa only from a consular officer abroad." *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988) (emphasis added).

Immigration law has always distinguished between applicants for permanent residence from within the country (like the *Przhebelskaya* and *Paunescu* plaintiffs), and those from without. Before 1935, neither statute nor administrative practice permitted foreign nationals to obtain an immigrant visa or status if they were already in the United States. Instead, to achieve reclassification from nonimmigrant (temporary) to immigrant (or lawful permanent resident ("LPR") status — commonly referred to as a "green card"), the applicant had to leave the country and, in the ordinary course, apply to a United States consular officer abroad for an immigrant visa. *See* 8 U.S.C. § 202(a) (1934). "To reduce the hardship and inconvenience of this 'depart and seek reentry' procedure, the Immigration Service devised a 'pre-examination plan' which made accessible to some aliens a less expensive process: after screening by immigration officials here, the alien could travel briefly to Canada and there acquire from a United States consular officer the sought-after immigrant visa." *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988) (citing S. Rep. 1515, 81st Cong., 2d Sess. 603 (1950); 8 C.F.R. § 142 (Supp. 1941)).

With the INA's enactment in 1952, "8 U.S.C. § 1255, enabled an alien, under specified conditions, to obtain an immigrant visa 'without the necessity of leaving the United States.'" *Id.* (citing H.R. Rep. 2096, 82d Cong., 2d Sess. 128 (1952); U.S.C. Cong. & Admin. News 1952, p. 1653). Specifically, Section 1255(a) provides that adjustment of status is available to foreign nationals who, among other requirements, have already been inspected and admitted or paroled into the United States. That was the scenario confronting USCIS and the INS in *Przhebelskaya* and *Paunescu*, respectively. Those cases thus did not involve the separation-of-powers and foreign affairs issues of a court reaching beyond this country's borders to provide a foreign national with

a visa to apply for entry to the United States. *Cf. Ruston v. U.S. Dep't of State*, 29 F. Supp. 2d 518, 523 (E.D. Ark. 1998) (courts lack power to compel the State Department to rescind revocation of a visa because such relief would, in effect, give a court power to issue visas, a power it does not have). As the Supreme Court explained,

> For more than a century, this court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' Because decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of *changing political and economic circumstances*,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'"

Trump v. Hawaii, 138 S. Ct. 2392, 2418–19 (2018) (emphasis added) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) and *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952).

Moreover, neither *Przhebelskaya* nor *Paunescu* are applicable because in both cases the application files were already substantially complete before the court ordered the government to take action, and the only reason the applications were not approved before the end of the fiscal year was because of administrative errors. In *Paunescu*, the diversity visa applicant had already been interviewed by the INS on February 23, 1998—more than seven months before the end of the fiscal year; the plaintiff alleged that he was told at his February interview that he needed to resubmit his fingerprints, but "that absent the fingerprint problem his application would have been approved." *Paunescu*, 76 F. Supp. 2d at 898. In *Przhebelskaya*, the alien submitted her diversity visa application (and for those of her husband and daughter) on April 14, 2003. USCIS denied her application on April 24, 2003 and denied her motion for reconsideration on May 8, 2003. On July 8, 2003, USCIS voluntarily reopened the case after the alien had filed an action for mandamus

relief in federal district court. On September 24, 2003 the alien's and her family members' applications were complete, except for a required FBI background check, and the district court issued an order compelling complete adjudication of the applications. The FBI completed its background check on September 26, 2003, making the applications complete and ready for approval. Because of an administrative mistake, however, the applications were not approved before the end of the fiscal year. *Przhebelskaya*, 338 F. Supp. 2d at 402.

Defendants are not aware of any case where a court has ordered the government to process DV applications after the end of the fiscal year for an applicant who was merely selected and remains at some non-final phase of the immigrant visa process overseas. Granting equitable remedies in this case would be an unprecedented and massive expansion of courts' involvement in the Congress's express provisions governing the executive branch's exercise of its constitutionally granted powers and its lawful exercise of judgment about the how to properly carry out those powers.

II. Reasonable Equitable Relief Should be Limited to Providing Additional Time for Applicants to Establish Eligibility for Applications Made By September 30, 2020.

As demonstrated, Supreme Court precedent curtails the Court from exercising equitable jurisdiction to craft remedies in violation of statute, and therefore the Court lacks discretion to reserve DV numbers beyond the close of the fiscal year. But, if the Court were able to exercise equitable discretion, it should be limited to providing additional time for applicants to establish eligibility for applications made by September 30, 2020, and *should not* take into account the impacts of the COVID-19 pandemic on visa processing at U.S. consular posts around the world during Fiscal Year 2020. Appropriate relief would provide a very brief period of additional time for applicants who have made an application to a consular officer by the end of Fiscal Year 2020

but require additional time to establish visa eligibility, for example by providing statutorily required medical examinations or documents,. During this brief extension, State would schedule no new DV-2020 cases and would focus resources to completing the adjudication process for those DV-2020 applicants who made applications to consular officers before the end of the fiscal year. Moreover, any equitable relief provided should not prioritize Plaintiffs ahead of other DV-2020 selectees pursuant to the statutory scheme defined by Congress. *See* 8 U.S.C. § 1153(e)(2) (providing that diversity visas "shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved").

III. Any Equitable Remedy Should Consider the Substantial Legal and Operational Justifications for State Department's Pre-Injunction Practice.

Defendants respectfully present to the Court the legal foundations justifying its pre-injunction practice with regard to visa applicants who are barred from entry subject to Presidential Proclamations issued pursuant to 8 U.S.C. §§ 182(f) and 1185(a)(1).[2]

Presidential Proclamations and Executive Orders pursuant to these authorities that have been applied by the Department of State as bars to visa issuance, in many cases, specifically delegate to the Secretary of State or consular officers the authority to determine or adjudicate waiver or exception requests.[3]

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[2] For a summary of Presidential Proclamations invoking Section 1182(f), *see* Ben Harrington, Theresa A. Reiss, Cong. Research Serv., LSB10458, Presidential Actions to Exclude Aliens under INA § 212(f) (2020).

[3] *See, e.g.*, Pres. Proc. 9645 (*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats*), Sept. 27, 2017 (the President acting pursuant to Section 1182(f) and granting a consular officer authority to grant a waiver that "will be effective both for the issuance of a visa and for any subsequent entry on that visa"); Pres. Proc. No. 8697 (*Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses*), August 4, 2011 (the President acting pursuant to Section 1182(f) and delegating to the Secretary of State primary responsibility for identifying persons subject to the proclamation, implementing the proclamation, and for determining national interest exceptions).

It is important to note that once an alien applies for a visa, the consular officer is required to either issue the visa or deny the application. *See* 22 C.F.R. §§ 41.121(a) (nonimmigrant visas) and 42.81 (immigrant visas). The officer does not have the authority to "hold" the application in abeyance pending a waiver determination. If the President has barred an alien from entry under Section 1182(f), but the consular officer lacks the legal authority under the INA to deny the application, the consular officer must issue the visa even though the alien will be denied entry to the United States. In that scenario, the consular officer would have to issue a visa with an annotation indicating that the alien is barred from entry – in essence, an annotation invalidating the visa until either a waiver is granted or until the relevant Presidential Proclamation or Executive Order expires.

This scenario exemplifies significant implications both legally and operationally because a visa may not be issued by the consular officer if the applicant "is ineligible to receive a visa . . . under section 1182." 8 U.S.C. § 1201(g). In fact, by statute, "whenever a United States consular officer issues a visa for admission to the United States, that official shall certify, in writing, that a check of the Automated Visa Lookout System, or any other system or list which maintains information about the *excludability* of aliens under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], has been made and that there is *no basis under such system for the exclusion of such alien*." (emphasis added). Thus, in imposing screening requirements on consular officers, Congress has essentially prohibited consular officers from issuing a visa to any alien who is "excludable" under the INA. This clearly shows that Congress does not distinguish between the concepts of visa eligibility and exclusion from entry. Indeed, consular officers can suffer serious personnel consequences as a result of issuing a visa to an alien for whom there is a "basis for exclusion." The Department of State's Foreign Affairs Manual (FAM) specifically requires consular officers

to comply with this statute through ongoing Visa Lookout Accountability (VLA) requirements. 9 FAM 307.3-1.

Furthermore, the presidential proclamations at issue here, like most proclamations, invoke as authority both 8 U.S.C. §§ 1182(f) and 1185(a). The most pertinent portion of 1185(a) is that "it shall be unlawful for any alien to ... *attempt* to … enter the United States except under such … orders … as the President may prescribe." (emphasis added). As the D.C. Circuit has noted, a visa gives an alien permission to arrive at a port of entry and to apply for lawful admission. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999) (citing 8 U.S.C. § 1201(h)). Thus, a visa confers the right to attempt to lawfully enter the United States. If restrictions imposed under section 1182(f) and 1185(a) cannot be used to deny a visa, aliens will be able to attempt entry despite the President's direct orders that they shall be prohibited from doing so.

Courts in this jurisdiction have consistently accepted the use of 8 U.S.C. § 1182(f) as a basis for visa denial. In a series of cases challenging visa refusals and waiver decisions under Presidential Proclamation 9645, courts repeatedly accepted the premise that an alien's visa application may properly be denied pursuant to Section 1182(f). For example, in *Kangarloo v. Pompeo*, ---F. Supp. 3d---, 2020 WL 4569341, at *3 (D.D.C. Aug. 7, 2020), the court stated that the plaintiff's visa refusal "was made under 8 U.S.C. § 1182(f), *which permits consular officers to refuse visas pursuant to presidential immigration restrictions*." (emphasis added). Other courts in this jurisdiction have reached a similar conclusion. *See, e.g.*, *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 114–15 (D.D.C. 2020); *Didban v. Pompeo*, 435 F. Supp. 3d 168, 173–74 (D.D.C. 2020); *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 41 (D.D.C. 2020); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 92–93 (D.D.C. 2020); *Ghadami v. DHS*, No. 19-cv-00397, 2020 WL 1308376, at *4–5 (D.D.C. Mar. 19, 2020); *Jafari v. Pompeo*, ---F. Supp. 3d---, 2020 WL 2112056, at *3 (D.D.C. May 3,

2020); *Sarlak v. Pompeo*, No. 20-35, 2020 WL 3082018, at *3–4 (D.D.C. Jun. 10, 2020).

Additionally, visas will expire before the alien can travel. In some cases, an alien might keep this annotated visa and be able to use it to travel before it expires (leaving open the question of how to nullify the annotation on the visa). But in many cases, the "annotated" visa is going to expire before the alien is authorized to enter the United States (that is, before the waiver is granted or the proclamation expires). The adjudication of waivers and/or national interest exceptions – a responsibility that the proclamations have delegated to consular officers is a time-consuming process which often lasts longer than the typical validity of a visa, and consular officers do not have discretion to lengthen a visa's validity to accommodate a waiver application. The INA specifically limits immigrant visa validity to six months.[4] *See* 8 U.S.C. § 1182(c), and the validity of nonimmigrant visas is based on principles of reciprocity (*i.e.*, reciprocal treatment that other countries accord U.S. nationals). *See* 22 C.F.R. § 41.112(b)(1). In many cases involving nationals from certain countries, reciprocity is limited to three months (*e.g.*, for nationals of Iran, Libya, Syria, Chad). If these visas expire before their waiver or exception request is adjudicated, the INA and agency regulations would require that the applicant re-apply for a visa, pay a new fee (usually ranging between $160 and $330 per person), and re-interview for the visa. As seen in litigation challenging the issuance of waivers under Proclamation 9645, the adjudication of such waiver requests takes time. *See, e.g.*, *Didban*, 442 F. Supp. 3d at 168 (two-year adjudication time was reasonable); *Bagherian*, 442 F. Supp. 3d at 92–93 (twenty-five-month adjudication time was

[4] On the related issue of the temporal length of the validity of medical examinations that has been raised before this Court, *see, e.g.*, ECF nos. 129, 131, medical examinations are generally valid for six months. *See* Centers for Disease Control and Prevention, "Medical Examination: Frequently Asked Questions (FAQs)" https://www.cdc.gov/immigrantrefugeehealth/exams/medical-examination-faqs.html#18. Medical examinations are valid for three months for individuals with "Class A TB with Waiver," Class B1 TB, Pulmonary," "Class B1 TB, Extrapulmonary," and "HIV infection." *See id*. Thus, the length of the validity of medical examinations is based on patient symptoms, not as the *Aker* plaintiffs assert, the country of origin. *See* 9/22/2020 Hr'g Tr. 25-26.

reasonable); *Sarlak*, 2020 WL 3082018, at *1 (twenty-six-month adjudication time was reasonable). In these cases, the applicants would certainly be required to apply for new visas after their "annotated" visas expired. That would cost them a new visa fee and they would have to demonstrate to the satisfaction of a consular office that they remain eligible.

* * *

In sum, Defendants respectfully request that the Court take into consideration the strong legal justification for its longstanding practice prior to the issuance of the preliminary injunction for this case in considering the scope of any equitable relief to be issued.

CONCLUSION

The Court lacks discretion to issue Plaintiffs' requested equitable relief because "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *Oakland Cannabis*, 532 U.S. at 497 (internal citations and quotation marks omitted). Even if such relief were legally authorized, appropriate relief would extend the time period to process applications received by the close of Fiscal Year 2020. Under those circumstances, the Court should nonetheless consider the substantial precedent and global operational considerations in issuing any such relief.

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September 25, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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