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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JANAN VARGHESE JACOB, et al., Plaintiffs, v. JOSEPH R. BIDEN, et al., Defendants.	Case No. 3:21-cv-00261-EMC **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AS MOOT** Honorable Edward M. Chen

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I. Introduction

Defendants President Joe Biden, Secretary of State Anthony Blinken, and Secretary of Homeland Security Alejandro Mayorkas have moved to dismiss this action as moot. Defendants' misguided motion fails to acknowledge the ongoing controversy surrounding Proclamation 10014's implementing policies and the **intentional and lingering harm** caused by PP 10014. Plaintiffs, 2,193 Diversity Visa 2021 (DV-2021) selectees and family-based visa applicants, request that this Court deny their motion.

This case is far from moot. While Proclamation 10014 has been revoked by the President, the policies, procedures, and practices implemented pursuant to the proclamation remain a live controversy. First, the proclamations implementing policies, such as "mission critical/emergency" designation requirements and the diplomacy strong framework, are illegal. These policies continue to cause unlawful impediments to the mandatory, nondiscretionary adjudication of Plaintiffs' visa applications. Second, the unlawful proclamation and its implementing policies continue to cause lingering injuries. The yearlong suspension of processing and issuance of Plaintiffs' immigrant visa applications have unreasonably delayed the adjudication of those applications. Because of those unreasonable delays, immigrants and their families now face indefinite delays in the reunification of their families and DV-2021 selectees face the harrowing prospect of losing their opportunity to immigrate to the United States altogether.

In addition, the revocation of PP 10014 constitutes a voluntary cessation of the unlawful activity. The challenged proclamations and policies are capable of repetition. In addition, the harm caused by Defendants' unlawful activities has not been completely eradicated by the revocation. It is well established that the voluntary cessation of unlawful conduct does not deprive a court of the power to hear and determine a case. *Friends of the Earth, Inc.*, 528 U.S. at 189. Defendants cannot meet their substantial burden of demonstrating that the challenged conduct cannot be expected to begin again because those policies and interpretations remain in place. *See* ECF 45-3 at ¶ 9. In fact, Defendants continue to unlawfully use the authority delegated

to the President pursuant to 8 U.S.C. § 1182(f) to categorically suspend the processing and issuance of immigrant visa applications pursuant to bans implemented by Defendant Biden. See *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019*, 86 FR 7467 (Jan. 28, 2021); *see also* Ex. A, State Department Tweets. This unequivocally demonstrates that not only is the challenged injury capable of repeating again, but that it is repeating itself.

Contrary to the Defendants averments, a ruling in this case would not be purely advisory. Defendants categorical and uniform suspension of processing and issuance of Plaintiffs' immigrant visa applications and the resulting delays caused by the Proclamation and the implementing policies, which remain in place, can be remedied by this Court. To effectuate justice, a court may "mold its decree to meet the exigencies of the particular case," (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, at 115 (3d ed. 2013)), and may "address each element contributing to the violation" *Hutto v. Finney*, 437 U.S. 678, 687 (1978). This court should issue the bold and imaginative relief that the egregious conduct warrants. Without it, our country's immigration system will be forever damaged.

For these reasons, this Court should find that this case is not moot and deny Defendants' motion to dismiss.

II. Statement of Facts

A. Presidential Proclamation 10014

On April 22, 2020, President Trump signed Presidential Proclamation 10014, which suspended the "entry into the United States" of certain classes of immigrants who did not already have a valid immigrant visa or travel document as of April 23, 2020, the effective date of the Proclamation. 85 Fed. Reg. at 23, 442-43 §§1, 2(a), 5. The Proclamation cited various reasons rooted in the fallacy that immigrants cause economic harm to American workers to justify the suspension of entry. *See* 85 Fed. Reg. at 23, 441–42. For these alleged reasons, then President Trump suspended all immigration to the United States but for nine narrow exceptions for a 60-day period starting April 23, 2020 — effectively ending diversity and family-based immigration to the United States for all but two visa categories. *Id*. at 23,443 §§4–5.

On June 22, 2020, President Trump issued a follow-up proclamation, which extended the Proclamation through December 31, 2020. *See Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak* (June 22, 2020), 85 Fed. Reg. at 38,263 ("PP 10052"). On December 31, 2020, President Trump again extended the duration of PP 10014 citing "a risk of displacing and disadvantaging United States workers." *Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak* (December 31, 2020), 86 Fed. Reg. at 417.

B. Implementation of PP 10014

The Secretaries of State and Homeland Security were tasked with implementing the PP 10014. *Id*. at 23,443 §3. On April 25, 2020, the State Department began its implementation. The State Department thereby suspended immigrant visa processing and adjudications for family-based and diversity immigrant visa applicants at the National Visa Center (NVC), the Kentucky Consular Center (KCC), and embassies and consulates abroad. CAR 000019, 000022. The Department of State's policies also implemented additional requirements for adjudication of an immigrant visa application — requiring consular officers to find an application was "mission critical", an "emergency", and an exception to COVID-19 related Proclamations before completing a visa adjudication. *Id*. at 22 and 34. The Department of State then irrationally determined which immigrant visa categories would receive the "mission critical" designation. CAR 000031.

On July 8, 2020, the State Department began to resume "routine visa services" and implemented "Diplomacy Strong" guidelines for the resumption of services. CAR at 000037. "Diplomacy Strong" sets forth a four-tier approach to resuming the adjudication of immigrant visas. Under all tiers, including tier four which is resumption of all routine services, immigrant visa categories remain suspended, and only adjudicated to prevent "complete stagnation." CAR at 000039–40. These policies remain in place and have not been rescinded by the revocation of PP 10014.

C. Revocation of PP 10014

On February 24, 2021, President Biden issued Presidential Proclamation 10149. The proclamation revoked PP 10014, section 1 of Proclamation 10052 and section 1 of Proclamation 10131. Proclamation 10149, *A Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. at 11,847. However, Section 2 of PP 10149, specifically states that "[t]he Secretary of State, the Secretary of Labor, and the Secretary of Homeland Security ***shall review*** any regulations, orders, guidance documents, policies, and any other similar agency actions developed pursuant to [PP] 10014 and, as appropriate, issue revised guidance consistent with the policy set forth in this proclamation." *Id* at § 2. Defendants' policies and guidelines implemented pursuant to PP 10014 are still in effect and Defendants have not indicated any intention on rescinding those policies. These policies include "Diplomacy Strong," "Mission Critical," and "Emergency Designation Requirements." *See generally* CAR.

D. Lingering Injury Caused by PP 10014 and Its Categorical Suspension of Processing

PP 10014 did exactly what then-President Donald J. Trump and his anti-immigrant advisor Stephen Miller intended it to do -- end family-based and diversity immigration to the United States. ECF 14 at 5, 6. Since the implementation of PP 10014, the NVC's backlog of documentarily qualified immigrant visa applications for family-based categories has grown to over 334,000. ECF 59-1 at 5. Over 50,000 more family-based visa applications languish in backlogs at consular posts abroad. *See* Young v. Trump, 3:20-cv-07183-EMC (CAND Nov. 4, 2020) ECF 23-5 at 3. Over a 120,000 family preference immigrant visas were diverted to other categories causing further delays to families attempting to reunite in the United States. *Visa Bulletin for October 2020*, Number 46, Volume X (Washington, D.C). More than 35,000 diversity immigrants permanently lost their opportunity to immigrate to the United States in the fiscal year 2020. *Gomez v. Trump*, No. 20-cv-01419 (APM) (D.D.C. Sep. 30, 2020). Behind those unadjudicated and lost visas are individuals with vanquished dreams and families that are facing indefinite delays in reunification of their families -- over 200,000 of which are spouses,

minor children, or parents of U.S. citizens and legal permanent residents. ECF 59-1 at 5. The damage to our immigration is heartbreaking and un-American.

In Defendants' March 11, 2021 Report, Defendants gloat about scheduling 380 parents of United States citizens for April interviews. ECF 59-3 at § 7. At that pace of adjudication, it would take over 16 years to adjudicate the backlog of IR-5 visas at the NVC. It is also unsurprising that Defendants make no mention whatsoever of their efforts to schedule family preference categories. This is because the adjudication of family preference category visas are still impeded and prevented by the unlawful "mission critical/emergency" designation requirements and Diplomacy Strong framework.

Defendants also avoided the Court's directive to determine the potential delay in the adjudication of Plaintiffs' visa application. *See* ECF 59 at 3. As the IR-5 delay demonstrates those predictions are frightening, particularly for minor children waiting to be reunited with their parents. The delays will be a stain on our immigration system and felt for years, possibly decades, without judicial intervention. For Plaintiffs in the family-based visa categories, this delay is cruel and inhumane. Plaintiffs have already been separated for years from their families, the prospect of further delays means missing the entirety of their children and grandchildren's' infancy, delaying the starting of families with their spouses, and indefinitely postpone the reunifications with adult children and siblings after decade long wait times. For DV-2021 visa applicants the lingering injury is irreparable. Tens of thousands of diversity visa selectees will lose their opportunity to immigrate to the United States. At this moment, not one DV-2021 selectee has received a full adjudication of their visa application. With six months of the fiscal year left, tens of thousands of the 50,000 diversity visas allocated by Congress stand to go unused and our country will be worse off because of it.

III. Standard

"Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, at 90. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'"

Id. at 91. A case becomes moot "only when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013)(*emphasis added*). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

Courts in this Circuit have long recognized voluntary cessation exception to mootness. "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000). Voluntary cessation can only yield mootness if a "stringent" standard is met: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (*citing Friends of the Earth*, 528 U.S. at 189.)

"It is well-established that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case unless it can be said with assurance that there is no reasonable expectation . . .that the alleged violation will recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)(*internal quotations omitted*); *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). This doctrine is grounded on the recognition that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways." *Jacobus v. Alaska*, 338 F.3d 1095, 1102 (9th Cir. 2003); *See also Fikre*, 904 at 1037 ("Though there is no bright-line rule for application of the voluntary cessation doctrine, this much is apparent: a claim is not moot if the government remains practically and legally 'free to return to [its] old ways' despite abandoning them in the ongoing litigation.)(citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953));

Finally, a party asserting mootness has "the 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (quoting *Friends of the Earth, Inc.*, 528 U.S. at 189 (2000)). "We presume that a government entity is acting in good faith when it changes its policy…but when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Rosebrock*, 745 F.3d at 971.

III. Argument

A. This Case is Not Moot as Plaintiffs Continue to Enforce Policies Implemented Pursuant to PP 10014

Defendants' motion to dismiss fails at its outset. Plaintiffs challenge not only PP 10014 itself, but also the policies, practices, and procedures implemented pursuant to the proclamation, such as: "Diplomacy Strong," "Mission Critical/Emergency Designation Requirements," and "National Interest Exceptions." Am. Compl., ECF 14 at 15, 16, 22-23, 25. Therefore, Plaintiffs' claims are still a live controversy and Plaintiffs still have a "legally cognizable interest in the outcome." *See Already, LLC*, 568 U.S at 90.

A case becomes moot "only when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013)(*emphasis added*). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Defendants bear a "heavy burden to establish that there is no effective relief remaining for a court to provide.'" *In re Palmdale Hills Property, LLC*, 654 F.3d 868, 874 (9th Cir. 2011).

1. The Revocation of PP 10014 Did Not Rescind the Policies Implemented Pursuant to PP 10014

On February 24, 2021, President Biden issued Presidential Proclamation 10149. 86 Fed. Reg. at 11,847 (PP 10149). PP 10149 rescinded: PP 10014, section 1 of Proclamation 10052, and section 1 of Proclamation 10131. *Id.* However, Section 2 of PP 10014, states "[t]he Secretary of State, the Secretary of Labor, and the Secretary of Homeland Security ***shall review*** any

regulations, orders, guidance documents, policies, and any other similar agency actions developed pursuant to Proclamation 10014 and, as appropriate, issue revised guidance consistent with the policy set forth in this proclamation." *Id*. at 11,847 (emphasis added). These policies, practices, and procedures implemented pursuant to the PP 10014, challenged throughout Plaintiffs' Amended Complaint and the basis for Plaintiffs Motion for Preliminary Injunction, continue to cause Plaintiffs' injuries. Am. Compl., ECF 14 at 15, 16, 22-23, 25; Pl. Mot. for Prel. Inj., ECF 31-1 at 17-18. These policies include "Diplomacy Strong," "Mission Critical/Emergency Designation Requirements," and "National Interest Exceptions."

Therefore, Defendants' assertion that their resumption of processing and adjudication of visa applications without regard to the PP 10014 is incorrect and belies the record before this Court. *See* ECF No. 60 at 1. Whatever visas, if any, Defendants have resumed adjudicating, continue to be processed pursuant to the challenged policies implemented by PP 10014. As a result, a live case and controversy continues to exist.

2. Plaintiffs Continue to Suffer Ongoing Injury from the Policies, Practices, and Procedures Implemented by Defendants Pursuant to the Proclamation.

Plaintiffs continue to suffer injury from the policies implemented pursuant to PP 10014. These policies, such as "Diplomacy Strong" and "Mission Critical/Emergency Designation Requirements", continue to unlawfully impede and preclude the adjudication of Plaintiffs' immigrant visa applications. *See* ECF No. 14 at 15, 16, 22-23, 25. Through these policies, Defendants continue to implement a moratorium on visa processing in the categories previously banned under PP 10014. See Ex. B, *E-mail from the US Embassy in Montreal*. In fact, Defendants foresaw Diplomacy Strong's categorical and indefinite suspension of processing of family preference and diversity visa applications and informed consular posts to schedule those categories ***only*** to prevent a "**complete stagnation**." CAR 000038 (20 STATE 65080); CAR 000257 (Flowchart for IV Scheduling)(emphasis added).

Family-based and diversity visa applicants are categorically not "mission critical." (CAR at p. 000026). The Diplomacy Strong framework makes clear that even if a consular post has no backlog, "mission critical" or "emergency" designation requirements would forbid a consular

officer from scheduling or adjudicating a visa application from an applicant in a family preference or diversity visa category. CAR 000037-38. While the possibility of backlogs is mentioned in the resumption of services, even if those were backlogs are completely resolved, consular officers can still be **prohibited** from adjudicating banned visa categories under the Diplomacy Strong policy. CAR 000037. These policies unlawfully impede and preclude the adjudication of Plaintiffs' immigrant visa applications. Plaintiffs' challenge these unlawful policies, which, despite the mandatory, nondiscretionary duty to adjudicate an immigrant visa application, completely withhold adjudication of banned family-based visa categories without any rational basis. While the Court need not reach the merits of Plaintiffs' challenge to these policies to resolve Defendants misguided motion to dismiss this action as moot, the relevant portion of the CAR for "mission critical" and "emergency" designation requirements and the Diplomacy Strong policies makes no attempt to rationalize the indefinite suspension of adjudication of family preference and diversity visa categories visa categories. CAR 000035-41. For these reasons, there exists a live controversy and Defendants' motion should be denied.

3. Plaintiffs Continue to Suffer Ongoing Injury from PP 10014 and Defendants' Categorical Suspension in Adjudicating Visas

Despite Defendants' averments, the uniform delays in the adjudication of Plaintiffs' immigrant visa applications have not been remedied by the rescission of PP 10014. The rescission in no way places Plaintiffs in the same position as before PP 10014. Conversely, the Plaintiffs are in a far worse position due the compounding delays caused by PP 10014 and its implementing policies. These injuries, explained in detail above, render this matter a live controversy and Defendants' motion should be denied. *See Supra* Sec. II, D.

As a result, Plaintiffs continue to hold a legally cognizable, concrete interest in the outcome of the case and Defendants can not meet their heavy burden to establish that there is no effective relief remaining for a court to provide.

4. *Kavoosian* Does Not Say What Defendants Wish It Said

For support of their suggestion that "this case is now moot," Defendants point to *Kavoosian et al. v. Blinken et al.*, Case No. 20-55395 (9th Cir. Feb. 9, 2021), Dkt. No. 60, at 9.

However, *Kavoosian* and the present case are very different. *Kavoosian* never challenged unreasonable delays in the adjudication of visa applications, but rather, "[*Kavoosian*] Plaintiffs allege[d] that the Government, through unreasonable delays, []…denied them timely adjudication of their case-by-case waivers under Presidential Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other [*2] Public-Safety Threats," which President Trump signed on September 24, 2017. 82 Fed. Reg. 45161 (2017) ("PP 9645")." *Kavoosian v. Pompeo*, No. SACV 19-1417 JVS (DFMx), 2020 U.S. Dist. LEXIS 97963, at *1 (C.D. Cal. Mar. 18, 2020). In fact, the unreasonable delay issue presented to the Ninth Circuit in the *Kavoosian* appeal was "Did the district court err in prematurely finding that Respondents-Appellees have not withheld and/or unreasonably delayed ***the adjudication of PP 9645 waivers*** for Petitioners-Appellants?" ECF 54-1, *Kavoosian* Opening Brief Excerpt (emphasis added).

Defendants' past conduct demonstrates they well-know that unreasonable delay challenges for PP 9645 waiver adjudication and for visa adjudications are distinguished. Because challenging unreasonable delays for PP 9645 waiver adjudication was a different cause of action, challenging a different immigration barrier, than challenging unreasonable delays in visa adjudication, five *Kavoosian* plaintiffs happen to have also been plaintiffs in *Young v. Biden*. Yet, when President Biden cancelled PP 9645, Defendants did not seek dismissal of these plaintiffs' unreasonable delay claims for visa adjudication in *Young*. That's because a challenge to an unreasonable delay for a waiver of a suspension of entry pursuant to 8 U.S.C. § 1182(f) is not the same thing as a challenge to visa application adjudication, and thus, *Kavoosian* is clearly distinguished from this case.

B. This Court Can Still Grant Meaningful Relief as The Actions Taken by Defendants to Implement the Proclamation Remain in Effect

A case becomes moot "only when it is impossible for a court to grant *any* effectual relief whatsoever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (emphasis added). "'The question is not whether the precise relief sought at the time the case was filed is still available, but whether there can be ***any*** effective relief.'" *Bayer v. Neiman Marcus*

Grp., Inc., 861 F.3d 853, 862 (9th Cir. 2017)(citation omitted)(emphasis added). Defendants have not me their "heavy burden to establish that there is no effective relief remaining for a court to provide.'" *In re Palmdale Hills Property, LLC*, 654 F.3d 868, 874 (9th Cir. 2011). "As long as the parties have a concrete interest, however small, in the outcome of the litigation the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). In addition, a cause of action is not moot simply because the "primary and principal relief sought" is no longer available. *Powell v. McCormack*, 395 U.S. 486, 499 (1969).

As explained above, the obscene harm caused by PP 10014 and its implementing policies are ongoing. Defendants' unlawful implementation of PP 10014 has created a backlog of hundreds of thousands of documentarily qualified immigrant visa applications. *See Supra* Sec. II, D. By Defendants' own admission, "Defendants are not able to specifically address the pace of case processing since the recession of PP 10014". ECF No. 59 at 3. But when the pace of adjudication is addressed, the effects mean years long, if not decades long delays in the adjudication of immigrant visa applications. Strangely, Defendants have offered no plan whatsoever to address this backlog or remedy the harm caused by Defendants unlawful actions. *See generally* ECF 59.

Defendants argue that because the Defendants have now rescinded PP 10014 "there is no longer a need for the requested injunction, nor is there a need to mandate the adjudication of Plaintiffs' immigrant visa applications, as they are being processed and adjudicated without regard to the now-revoked Proclamation." ECF No. 60 at 7. However, Defendants' argument cruelly ignores the years long separation that will occur to Plaintiffs' families and the loss of the opportunity to immigrate to the United States for DV-2021 selectees without an immediate remedy. However, should this Court find that Plaintiffs' relief sought is no longer available due to the rescission of PP 10014, that alone does not render this case moot. The question here is whether there can be "any effective relief." See *Bayer*, 61 F.3d at 862.

C. This Court Has Broad Powers to Shape Relief That Befits the Egregious Harm Caused by PP 10014 and Its Implementing Policies

A request for injunctive relief remains "so long as there is some present harm left to enjoin." *Bayer*, 61 F.3d at 862. A federal court also has broad authority to grant injunctive relief to prevent future misconduct where the "defendant's past and present misconduct indicates a strong likelihood of future violations." *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549, 564 (9th Cir. 1990); *Long v. U.S. I.R.S.*, 693 F.2d 907, 909 (9th Cir. 1982). "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Gomez v. Trump*, 486 F. Supp. 3d 445 (D.D.C. 2020)(citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The court may "mold its decree to meet the exigencies of the particular case," *id*. (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, at 115 (3d ed. 2013)), and may "go beyond earlier orders . . . to address each element contributing to the violation," and "insure against the risk of inadequate compliance," *Hutto v. Finney*, 437 U.S. 678, 687, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). Thus, "where the district court finds a probability that alleged illegal conduct will recur in the future, an injunction may be framed to bar future violations that are likely to occur." *Id.*; *See S.E.C. v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978) ("An inference arises from illegal past conduct that future violations may occur. The fact that illegal conduct has ceased does not foreclose injunctive relief.")

Here, this Court should use the broad powers to remedy the egregious action of Defendants. This Court does have the tools to remedy gross unlawful conduct on such a scale as this. For example, this Court could order the appointment of a special master to ensure that the relief ordered by this Court to remedy the injuries to Plaintiff is governed and oversaw in an equitable manner. Without broad requiring the expeditious adjudication of Plaintiffs' immigrant visa applications, restorative justice will not be received, our immigration system will be forever broken, DV-2021 Plaintiffs will lose the opportunity to immigrate to the United States forever, and family-based Plaintiffs will lose out on the most cherished moments of their lives with their families.

D. Plaintiffs Still Have Standing to Seek Meaningful Relief as They Continue to Suffer Injury by Defendants

In order to have standing, Plaintiffs need to show they have (1) suffered an "actual or imminent, not conjectural or hypothetical" injury as a result of the allegedly illegal conduct; (2) a causal link between their injury and the challenged action; and (3) that the injury must likely be "redressed by a favorable decision" of a federal court. *McCormack*, 788 F.3d at 1017 (internal citations and quotations omitted). "[A]n actual controversy must exist at all stages of federal court proceedings," meaning that "at all stages of the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant [that is] likely to be redressed by a favorable judicial decision.'" *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014).

Here, Plaintiffs have standing as they are still suffering harm from the ongoing effects of PP 10014. As explained above, their injury would be redressed by a favorable decision of this Court. In their Amended Complaint, Plaintiffs allege that "Defendants' actions are causing and will continue to cause Plaintiffs imminent, concrete, and irreparable injuries-in-fact, as detailed herein, by preventing the individual Plaintiffs from obtaining visas and entering the country, despite the fact that these individuals would be granted those benefits if not for the PP 10014, its extensions, and the suspension of adjudication of their visa applications." ECF 14 at 3. Plaintiffs continue to suffer harm from Defendants' actions which are causing Plaintiffs imminent, concrete, and irreparable injuries-in-fact, by continuing to implement policies implemented pursuant to PP 10014. Therefore, an actual controversy still exists, even after the revocation of 10014.

E. The Revocation of the Proclamation Does Not Render This Case Moot As It Constitutes A Voluntary Cessation of Unlawful Behavior

The revocation of PP 10014 does not in and of itself render this case moot because the revocation of PP 10014 has not negated Plaintiffs' legally cognizable interest in the outcome of this case. Moreover, even if this Court does find that the revocation has mooted some of Plaintiffs' claims regarding the proclamation itself, this Court should apply the voluntary cessation exception to mootness.

"Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC*, 568 U.S. at 90. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 91. It is well-established that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case" unless "it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017).

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189, (2000). Voluntary cessation can only yield mootness if a "stringent" standard is met. *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (*citing Friends of the Earth*, 528 U.S. at 189.) "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* This doctrine is grounded on the recognition that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways." *Jacobus v. Alaska*, 338 F.3d 1095, 1102 (9th Cir. 2003) (citation omitted).

"Though there is no bright-line rule for application of the voluntary cessation doctrine, this much is apparent: a claim is not moot if the government remains practically and legally 'free to return to [its] old ways' despite abandoning them in the ongoing litigation. *Firke* at 1039 (*Citing United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953); *see also City of Mesquite*, 455 U.S. at 289. A party asserting mootness has "the 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (quoting *Friends of the*

Earth, Inc. 528 U.S. at 189). "We presume that a government entity is acting in good faith when it changes its policy…but when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Rosebrock* at 971. Voluntary cessation of illegal conduct does not render a challenge to that conduct moot unless "(1) there is no reasonable expectation that the wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Californians v. United States EPA,* 2018 U.S. Dist. LEXIS 56105, *51 (N.D. Cal. March 30, 2018) (citing *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992)(internal citation omitted). Defendants have failed to meet this burden.

1. Defendants Have Not Met Their "Formidable Burden" of Showing That it is "Absolutely Clear" That Defendants' Wrongful Behavior Will Not Be Repeated

The mere cessation of illegal activity does not render a case moot, unless the party alleging the mootness can show the "allegedly wrong behavior could not reasonably be expected to reoccur". *Friends of the Earth, Inc.*, 528 U.S. at 189. To obtain the dismissal of an action based on mootness, the defendant "bears the *formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. at 190 (*emphasis* added); *see also Trinity Lutheran Church*, 137 S. Ct. at 2019 n.1 (holding that although the state had "beg[u]n allowing religious organizations to compete for and receive [government] grants on the same terms as secular organizations," it did not meet the requisite "'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations")(quoting *Friends of the Earth, Inc.*, 528 U.S. at 189)).

Here, Defendants voluntarily revoked PP 10014, which purportedly ended Defendants' illegal conduct of the challenged "No Visa Policy." However, this voluntary cessation of illegal conduct does not automatically deprive this Court of the power to hear and determine this case. *See Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018). It cannot be said with any assurance that there is no reasonable expectation "that the alleged violation would [recur]." *Id.* Courts in this jurisdiction have found "that a voluntary change in official stance or behavior moots an action only when it is 'absolutely clear' to the court, considering the 'procedural safeguards' insulating

the new state of affairs from arbitrary reversal and the government's rationale for its changed practice(s), that the activity complained of will not reoccur." *Fikre*, 904 F.3d at 1039; *McCormack*, 788 F.3d at 1025; *Rosebrock*, 745 F.3d at 974.

Defendants cannot meet this heavy of showing that it is clear that the allegedly wrongful behavior could not reasonably be expected to recur because they continue to implement suspensions of adjudication and issuance of visas pursuant to 8 U.S.C. § 1182(f). See ECF 31-1 at 10-11, Ex. A, *State Department Tweets*. There are no procedural safeguards in place to prevent this unlawful activity from harming Plaintiffs. Defendants' averments that the revocation constitutes a change in policy is a lie intended to mislead the Court to avoid judicial review of that policy and circumvent the remedy to the gross injuries caused by their blatantly unlawful actions. In fact, Defendant' declarant, Edward J. Ramotowski, who is currently employed by Defendant State Department as the Deputy Assistant Secretary for Visa Service, Bureau of Consular Affairs, now has the audacity to misrepresent this Trump-era invention as "the Department's long-standing practice.". ECF 45-3 at ¶ 9.

2. The Defendants Have Not Met Their Burden to Show the Revocation of PP 10014 Has Completely and Irrevocably Eradicated the Effects of PP 10014.

It is well settled that "a defendant's voluntary cessation of a challenged practice does not [automatically] deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc.*, 528 U.S. at 189 (citing *City of Mesquite*, 455 U.S. at 289). Defendants must satisfy the heavy burden of demonstrating that recission of PP 10014 has "completely and irrevocably eradicated the effects of the alleged violation" before this case can be found moot. *Fikre*, 904 F.3d at 1037.

Defendants argue that the revocation of PP 10014 "obviates the need for any judicial relief for Plaintiffs." ECF No. 60 at 7. However, here, the revocation has not "completely and irrevocably eradicated the effects" of the unlawful PP 10014. *See Fikre*, 904 F.3d at 1037.As previously explained, the revocation only rescinded PP 10014 itself, not the unlawful practices, policies and procedures implemented pursuant to the Proclamation nor has it remedied the injury. Therefore, the Revocation has not "completely and irrevocably" eradicated the effects of the

unlawful Proclamation. As a result, Plaintiffs suffer harm and will continue to suffer harm from the effects of the alleged violation.

3. The Revocation of PP 10014 Can Not Moot Plaintiffs' Claims As It Is An Executive Action That Is Not Governed By Any Clear Or Codified Procedures

"The form the governmental action takes is critical and, sometimes, dispositive." *Fikre*, 904 F.3d at 1038. "While a statutory change 'is usually enough to render a case moot', an executive action that is not governed by any clear or codified procedures **cannot** moot a claim." *McCormack*, 788 F.3d at 1025 (emphasis added)(internal citations omitted); see also *Bell v. City of Boise*, 709 F. 3d, 890 (holding that "the ease with which the [agency] could [revive the alleged conduct] counsels against a finding of mootness.").

Here, the revocation of the PP 10014 cannot moot Plaintiff's claim as it is an "executive action that is not governed by any clear or codified procedures". *See McCormack*, 788 F.3d at 1025. On February 24, 2021, President Biden issued a "Proclamation on Revoking Proclamation 10014", which revoked PP 10014, section 1 of Proclamation 10052 and section 1 of Proclamation 10131. *See* Proclamation 10149, *A Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. at 11,847. The revocation of PP 10014 did not outline any clear or codified procedures ensuring the challenged harm will not reoccur. In fact, the challenged policies implemented pursuant to the proclamation are still in effect, which demonstrates the ease with which Defendants can revive the harm to Plaintiffs. *See Bell*, 709 F. 3rd at 890.

Moreover, "even if the government is unlikely to reenact the provision, a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision." *Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991). "We presume that a government entity is acting in good faith when it changes its policy…but when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Rosebrock* at 971.

The Court in *Coral Contstr. Co.* declined to find the case as moot and reasoned that "not only could the County reenact its earlier ordinance, but it could do so without the spectre of a

prior finding of unconstitutionality. This factor weighs against mootness." 941 F.2d at 928. Here, just as in *Coral Contr. Co.*, there is also nothing stopping Defendants from resuming the unlawful action. Not only could the President sign another executive order with similar language to the Proclamation, but he can do so "without the spectre of a prior finding of unconstitutionality." *See Id.* Moreover, the government must still demonstrate that the change in its behavior is "entrenched" or "permanent." *Fikre* 904 F.3d at 1037 (quoting *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010); *McCormack*, 788 F.3d at 1025 (9th Cir. 2015); *see Rosebrock*, 745 F.3d at 971.

Defendants fail to meet this heavy burden that the challenged conduct cannot reasonably be expected to start up again, or that its supposed change in behavior is "entrenched" or "permanent" because Defendants continue to unlawfully suspend the processing and issuance of visas pursuant to a purported authority under 1182(f). As this unlawful behavior is still ongoing, it is more than reasonable to expect that the Defendants will again suspend the issuance of visas to Plaintiffs.

4. **The Revocation of the Proclamation Does Not Render This Case Moot as It Is "Capable of Repetition Yet Evading Review"**

Another exception to mootness is an action which is "capable of repetition, yet evading review." *ProtectMarriage.com - Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014). "Under the 'capable of repetition, yet evading review' exception, we will decline to dismiss an otherwise moot action if we find that: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.*

For a controversy to be "too short to be fully litigated prior to cessation or expiration," it must be of "inherently limited duration." *Id.* "We recognize these types of controversies as 'inherently limited in duration,' because they will only ever present a live action until a particular date, after which the alleged injury will either cease or no longer be redressable. The limited duration of such controversies is clear at the action's inception." *Id.* The controversies of limited

duration fit within the exceptional situations in which the "capable of repetition, yet evading review" exception is used. *See Id.*

Here, the challenged PP 10014 and its extensions were in duration too short to be fully litigated prior to cessation or expiration. On April 22, 2020, President Trump signed Presidential Proclamation 10014, which suspended the "entry into the United States" of certain classes of immigrants who did not already have a valid immigrant visa or travel document as of April 23, 2020, the effective date of the Proclamation. 85 Fed. Reg. at 23, 442-43 §§1, 2(a), 5. President Trump suspended all immigration to the United States but for nine narrow exceptions for a *60-day period* starting April 23, 2020. *Id*. at 23,443 §§4–5. Then on June 22, 2020, President Trump issued a follow-up proclamation, which extended the Proclamation through December 31, 2020. *See Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak* (June 22, 2020), 85 Fed. Reg. at 38,263. On December 31, 2020, President Trump again extended the duration of PP 10014 to March 31, 2021. *Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak* (December 31, 2020), 86 Fed. Reg. at 417.

Therefore, PP 10014 and its extensions are "inherently limited in duration," because they were set in place until a particular date where they were set to expire. The limited duration of the harm of Proclamations is clear at their inception as the expiration date is explicitly stated in each proclamation and extension. The fact that the Proclamations were set to expire has no bearing on the constitutionality of the proclamations which Plaintiffs challenge. Plaintiffs suffered harm from unlawful conduct. Defendants now attempt to evade review of their illegal conduct. As explained above, the harm is not only capable of being repeated, but is currently being repeated. Therefore, there is a reasonable expectation that the same complaining party will be subject to the same action again.

As a result, this Court should find that Plaintiffs' case fits within the "capable of repetition, yet evading review" exception to mootness.

IV. Conclusion

For the reasons above, this Court should deny Defendants' Motion to Dismiss as Moot in its entirety.

Dated: March 25, 2021
New York, NY

/s/ Jonathan Aftalion
Jonathan Aftalion

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Venice, California 90294
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Email: jonathan@curtismorrisonlaw.com

CERTIFICATE OF SERVICE

On the below date, I electronically filed the PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AS MOOT, and all attached exhibits, with the Clerk of the United States District Court for the Northern District of California, using the CM/ECF System. The Courts CM/ECF System will send an electronically email all noticed parties to the action who are registered with the Court's CM/ECF System.

Dated: March 25, 2021
New York, NY

/s/ Jonathan Aftalion
Jonathan Aftalion

Ex. A

US Embassy Riga
@USEmbassyRiga

Replying to @GeorgeVdesign

Other immigrant visa applicants, including K fiancé visa applicants, remain subject to geographic COVID-19 related P.P.s 9984, 9992, and 10143, which suspend visa processing to persons who have been physically present in Schengen Area.

4:20 AM · Mar 24, 2021 · Twitter Web App

[redacted]

Ex. B

RE: DV-2021 Interviews

Montreal, IV <Montreal-IV-DV@state.gov>
Mon 3/22/2021 5:59 AM

To: [redacted]

Good Morning,

Thank you for contacting us.

The U.S. Consulate General in Montreal is processing immigrant visas and will prioritize Immediate Relative family members of U.S. citizens including intercountry adoptions, fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications, as well as other mission critical categories such as medical professionals. We have not yet resumed processing DV-2021 visa applications.

We will continue expanding our services following State Department guidance to safely return our workforce and the public to Department facilities. For more information on phased resumption of services please visit: https://travel.state.gov/content/travel/en/News/visas-news/phased-resumption-routine-visa-services.html

Thank you for your patience and cooperation,

Regards,

OP80
Correspondence Unit
U.S Consulate General in Montreal
1134 Saint-Catherine West, H3B 1H4

SENSITIVE BUT UNCLASSIFIED

From: [redacted]
Sent: Friday, March 12, 2021 9:49 AM
To: Montreal, IV <Montreal-IV-DV@state.gov>
Subject: DV-2021 Interviews

Dear Sir / Madam,

Could you please advise whether the U.S. Consulate General in Montreal has resumed scheduling interviews for qualified DV-2021 selectees?

Thank you.

Yours sincerely,

[redacted]