UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP KINSLEY, et al. Plaintiffs, v. ANTONY J. BLINKEN, et al. Defendants.	Civil Action No. 1:21-cv-00962-JEB **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR SUMMARY JUDGMENT IN THE ALTERNATIVE**

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR SUMMARY JUDGMENT IN THE ALTERNATIVE

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiffs respectfully move the Court for a preliminary injunction, or in the alternative, pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7, summary judgment to enjoin Defendants from continuing a "no visa policy" in specific consulates as a means to implement suspensions on *entry* to the United States under Presidential Proclamations issued under 8 U.S.C. § 1182(f), Immigration and Nationality Act ("INA") § 212(f). The parties conferred and submitted a joint scheduling order consistent with the procedural approach for an expedited resolution of this matter. *See* ECF No. 14. The filing of this motion complies with the agreed upon schedule, though undersigned counsel understands the Court has yet to grant the parties' motion. *Id*.

Dated: June 11, 2021

Respectfully Submitted,
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UNITED STATES DISTRICT COURT
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PHILIP KINSLEY, et al. Plaintiffs, v. ANTONY J. BLINKEN, et al. Defendants.	Civil Action No. 1:21-cv-00962-JEB **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR SUMMARY JUDGMENT IN THE ALTERNATIVE**

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I. INTRODUCTION

Multiple judges, including your honor, have ordered Defendants to cease their unlawful agency action of refusing to issue visas to individuals subject to suspensions on *entry* under Section 212(f) of the Immigration and Nationality Act ("INA") , 8 U.S.C. § 1182(f). The same result is warranted here for those subject to the so-called "regional bans" issued via multiple Presidential Proclamations in response to the COVID-19 pandemic; while INA § 212(f) allows the President to temporarily suspend the entry of noncitizens, the statute does not allow the Department of State to adopt a "no visa" policy as a means to implement a Presidential suspension of entry. Defendants stubborn refusal to acknowledge this principle has caused massive delays and irreparable harms to U.S. citizens, U.S. employers, and noncitizens suffering from the inability to receive what they paid for and what they are eligible for: a visa that will allow them to enter the United States at a future time.

There are no material facts in dispute – Defendants have a policy of refusing to adjudicate visas in countries subject to these entry restrictions without an affirmative showing that such persons qualify for a national interest exception. There are no immigration laws that permit the State Department to pursue these actions. The law at 8 U.S.C. § 1182(f) plainly permits the President to "suspend the *entry* of all aliens or any class of aliens as immigrants or nonimmigrants, or *impose on the entry of aliens* any restrictions he deems appropriate." *Id*. (emphasis added). The law does not allow the President or Executive agencies to suspend visa adjudication or impose additional eligibility requirements prior to having a visa adjudicated. Although several Courts have struck down Defendants' "no visa" policy as a means to implement suspensions on entry, they continue to move forward where, as here, suspensions of entry have not yet been enjoined.

Defendants' unlawful practice has harmed plaintiffs and millions of nonimmigrants, immigrants, U.S. citizens, and American businesses impacted under the "no visa" policy.

A history of the cases striking Defendants' action demonstrates the validity of the plaintiffs' claims here. In a suspension on the entry for most immigrants issued by former President Trump, Judge Mehta in *Gomez v. Trump*, 485 F.Supp.3d 145, 194, 2020 WL 5367010, *29 (D.D.C. Sept. 4, 2020), concluded that the Defendants "have not identified any statutory authority that would permit the suspension of th[e] ordinary process" of visa adjudication and visa issuance, and further stated that Defendants had in fact "effectively abrogat[ed] Congress's policy for months through their unlawful and arbitrary actions." *Id*. . While Defendants issued visas for the class of immigrants covered in *Gomez*, Defendants maintained the "no visa" policy for all other classes of noncitizens.

In *Milligan v. Pompeo*, 502 F.Supp.3d 302, ---, 2020 WL 6799156 at *6-7, 12 (D.D.C. Nov. 19, 2020), this Court entered an injunction against Defendants' unlawful conduct in the context of K-1 fiancé(e) visas, stating that "a person who falls within a Presidential Proclamation issued pursuant to section 1182(f) is merely ineligible to enter [the United States]," and not ineligible to receive a visa. Defendants were undaunted for all other classes of noncitizens whose entry was suspended by the President.

Across the country, in *Young v. Trump*, 2020 WL 7319434, *22 (N.D. Cal. Dec. 22, 2020), Judge Chen issued yet another injunction against Defendants, with a clear explanation of what the law is: "Plaintiffs in the case at bar are merely prohibited from *entering* the United States by the Proclamations. They have not been deemed ineligible to *receive a visa*. That determination is made by a consular officer based on, *inter alia*, the grounds described in [8 U.S.C.] § 1182(a).

Nothing in § 1182(a) makes the plaintiffs categorically barred from receiving a visa." *Id*. at *22 (emphasis in original). Yet again, Defendants remained undeterred.

As recently as January 2021, in *Tate v. Pompeo,* --- F.Supp.3d ----, 2021 WL 148394, *9 (D.D.C. Jan. 16, 2021), Judge Howell again enjoined Defendants' unlawful "no visa" policy as it applied to O-1 "extraordinary ability" visas, ruling that the policy was "contrary to the text and structure of 8 U.S.C. § 1182." *Id.* . Despite numerous challenges to this policy, however, and the several Court Orders holding it unlawful, as Judge Howell stated, "Defendants have identified no applicable statutory authority permitting the State Department to suspend visa processing on the basis of entry restrictions provided by the Presidential Proclamations." *Id*. at .

Defendants keep making the same flawed arguments in each case; they have identified no applicable authority because there is none, and yet rely on the fact that the orders entered against them apply only to the Plaintiffs or class members named in the respective cases. Defendants have continued to implement its unlawful policy against millions of individuals seeking visas in countries subject to Presidential Proclamations restricting direct entry to the United States, including the plaintiffs here. Plaintiffs have no other option but to respectfully request the Court to enjoin Defendants from continuing to implement its "no visa" policy as a means to implement the President's choice to suspend entry to the United States under 8 U.S.C. § 1182(f).

II. CERTIFICATION OF CONFERRAL WITH OPPOSING COUNSEL

Pursuant to Local Rule 7(m), Plaintiffs' and Defendants' counsel conferred on the present motion on June 9, 2021 in a good faith effort to determine whether there is any opposition and to narrow the areas of disagreement. Defendants oppose the present Motion for a Preliminary Injunction or Summary Judgment in the Alternative, but have agreed to the proposed briefing schedule submitted to the Court on June 10, 2021.

III. STATEMENT OF FACTS

A. COVID-19 Travel Bans and the "No-Visa" Policy

Since January 2020, Presidents Trump and Biden have issued seven COVID-related geographical proclamations that suspend the entry of individuals to the U.S. from certain countries. All of these entry suspensions currently remain in effect.

On January 31, 2020, former President Trump issued Proclamation 9984, restricting the *entry* of all immigrants or nonimmigrants who were physically present within China during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 6709.

On February 29, 2020, former President Trump issued Proclamation 9992, restricting the *entry* of all immigrants or nonimmigrants who were physically present within Iran during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 12855.

On March 11, 2020, former President Trump issued Proclamation 9993, restricting the *entry* of all immigrants or nonimmigrants who were physically present within Schengen Area during the 14-day period preceding their entry or attempted entry into the U.S. The Schengen Area includes Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. 85 Fed. Reg. 15045.

On March 14, 2020, former President Trump issued Proclamation 9996, restricting the *entry* of all immigrants or nonimmigrants who were physically present within the United Kingdom and the Republic of Ireland during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 15341.

On May 24, 2020, former President Trump issued Proclamation 10041, restricting the *entry* of all immigrants or nonimmigrants who were physically present within Brazil during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 31933.

On January 18, 2021, former President Trump issued Proclamation 10138, that rescinded the regional restriction imposed by for Schengen area countries, the United Kingdom, the Republic of Ireland, and Brazil as of January 26, 2021. 86 Fed. Reg. 6799. However, on January 25, 2021, President Biden issued Proclamation 10143, which negated Proclamation 10138 and restored the restrictions on the *entry* of all immigrants and nonimmigrants who were physically present in the preceding 14-day period in the Schengen Area, the United Kingdom, the Republic of Ireland, and Brazil. President Biden also expanded the suspension on *entry* to include South Africa. 86 Fed. Reg. 7467.

On April 30, 2021, President Biden issued Proclamation 10199, restricting the *entry* of all nonimmigrants who were physically present within India during the 14-day period preceding their entry or attempted entry into the U.S. 86 Fed. Reg. 24297. Defendants have implemented the latest ban on entry as a ban on the issuance of visas in the absence of a National Interest Exception ("NIE").

The Department of State, however, as recently as April 6, 2021 has explicitly stated its interpretation of the suspension on "entry or attempted entry" as a suspension on visa issuance, declaring that "[t]hese proclamations, with certain exceptions, place restrictions on visa issuance and entry into to the United States for individuals physically present in China, Iran, Brazil, UK, Ireland, South Africa, and the 26 countries in the Schengen area." *Visa Services Operating Status Update*, U.S. DEPARTMENT OF STATE (April 6, 2021),

https://travel.state.gov/content/travel/en/News/visas-news/visa-services-operating-status-update.html (visited June 7, 2021).

Importantly, the Presidential Proclamations do not bar the entry of individuals from these countries entirely. Indeed, it is only where individuals have been physically present in these countries in the preceding 14 days that they are barred from entering the U.S. This means that those who already possess valid visas, or those who are able to forgo the visa process to obtain a special visitor permit through Customs and Border Protection called the "Electronic System for Travel Authorization" or "ESTA" are able to quarantine in a country not subject to a regional entry ban for 14 days before being allowed to enter the United States. In a March 1, 2021 "Briefing with Consular Affairs Acting Deputy Assistant Secretary for Visa Services Julie M. Stufft on the Current Status of Immigrant Visa Processing at Embassies and Consulates," the following exchange took place:

> **QUESTION:** Hi, everyone. Thanks for doing this. I'm just wondering if you can address – you mentioned that you will continue not to process immigrant visas for people subject to the COVID ban (inaudible) Schengen ban.
> I'm wondering if you can address why, because those bans are structured not as sort of bans on nationals of countries, but of – if they've been present there in the previous 14 days. And I know some folks with non-immigrant visas that are not – that are – that were not subject to other bans were able to go to places like Turkey or Mexico for two weeks before entering the United States lawfully.
>
> **MS STUFFT:** There certainly is the opportunity – **because you're right, those are based on presence, not citizenship. So if there is capacities in other posts, the situation that you lay out is possible**. We definitely advise people to check with other embassies and the consulates to find out if there is capacity in those places. Of course, in the – in both the NIV and the IV context, they would have to get into the line that exists at that post for processing, but yes, it's possible. Thanks.[1]

[1] *Briefing with Consular Affairs Acting Deputy Assistant Secretary for Visa Services Julie M. Stufft on the Current Status of Immigrant Visa Processing at Embassies and Consulates*, U.S. DEPARTMENT OF STATE (Mar. 1, 2021), available at https://www.state.gov/briefing-with-consular-affairs-acting-deputy-assistant-secretary-for-visa-services-julie-m-stufft-on-the-current-status-of-immigrant-visa-processing-at-embassies-and-consulates/ (last accessed June 7, 2021) (emphasis added).

In effect, those with the resources to do so may be able to travel internationally to a non-restricted country, comply with the quarantine requirements of *that* country, pay for accommodations as they wait for the adjudication of their visa application, and then, if successful, obtain that visa after approximately ten *more* days, and if at any point the individual re-enters a proclamation-country they must then quarantine for a minimum of 14 days yet again before then entering the United States. Extra steps, extra expense, and extra travel that would not be necessary if Defendants processed these individuals' visas in their home countries. In addition to creating this disparate system for those with more financial resources and more connections internationally, by suspending all visa processing for countries subject to entry restrictions, Defendants have, in many ways, manufactured the crisis-level backlogs of visa petitions and increasing wait times for those seeking visa processing, even considering the impact COVID-19 has had on their operations.[2] It must be noted that while the "no visa" policy creates an indefinite suspension on visa issuance for affected individuals, this permissive 14 day quarantine demonstrates that the proclamations themselves are only truly concerned with the two week period preceding an individual's entry to the United States.

B. Statutory and Regulatory Background

1. Interpretation of 8 U.S.C. § 1182(f)

As an initial matter, an individual seeking entry into the United States generally must first obtain a visa for that entry that requires the payment of fees and documented proof of eligibility prior to being scheduled for an interview. A foreign national may not obtain a visa if he or she is

[2] As of May, 2021, the National Visa Center reported a backlog of 481,965 eligible immigrant visa applicants pending the scheduling of an interview, in comparison to an average of 60,866 in Calendar Year 2019. Ex. L.

"ineligible to receive a visa under . . . section 1182." 8 U.S.C. § 1201(g). Persons who are "ineligible to receive a visa" are principally described in § 1182**(a)**.

A visa holder ordinarily may use the visa to seek admission ("lawful entry") into the United States. *See* 8 U.S.C. §§ 1101(a)(13)(A), 1181(a), 1125(a)(1). But § 1182**(f)** provides the President the power, in some circumstances, to suspend or to restrict the ***entry*** of noncitizens into the country (emphasis added):

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

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

The INA was codified in 1952, and included an identical provision to § 1182(f), granting the President the power to restrict the ***entry*** of noncitizens where the President finds that the ***entry*** of those noncitizens would be detrimental to the interests of the United States. 8 U.S.C. § 1182(e) (1952). This power went unused for decades, until the Nixon administration, when the legal breadth and scope of this provision was first considered as a means to restrict the entry of classes of noncitizens the President found to be detrimental to the United States. As the Deputy Administrator for the Bureau of Security and Consular Affairs, in a February 4, 1970 hearing before the Subcommittee on Africa of the House Committee on Foreign Affairs, stated:

> There was a somewhat similar provision in the 1907 Act and so far as we have been able to ascertain it was used only once, in 1913, to keep certain Japanese and Korean laborers out of the United States. I know of no other instance in which it has been invoked. **I think probably it is intended to apply to situations where you want to keep out large numbers of people because there may be communicable diseases in their area, such as the smallpox epidemic.**

Ex. A (emphasis added).

Such an interpretation would make sense, and be consistent with the statutory schema of the INA , as there is a corresponding ground of inadmissibility and visa ineligibility under § 1182**(a)** for individuals who are determined, in accordance with regulations prescribed by the Secretary of Health and Human Services, to have a communicable disease of public health significance. 8 U.S.C. § 1182(a)(1)(A)(i).

Subsequently, starting in the Reagan administration, Presidential Proclamations explicitly restricting the ***entry*** of noncitizens became increasingly common, and for increasingly complex purposes. *See* Ex. B. The first such proclamation, PP 4865, issued in 1981, authorized the interdiction of vessels holding would-be migrants from Haiti, finding that the "ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States." 46 Fed. Reg. 48107 (1981). Each Presidential Proclamation restricting the entry of noncitizens under § 1182(f) has remained faithful to the statutory language and used nearly identical wording to suspend the ***entry*** of the targeted class of noncitizens to the United States. Ex. B.

Rather than the Proclamations themselves, it is the Department of State that has unlawfully expanded the statutory authority granted to the President to restrict the ***entry*** of noncitizens to the United States to the suspension on the adjudication and issuance of visas. In 1984, the State Department analyzed the "legal basis for utilizing INA §212(f) to exclude Cubans from the United States," and properly determined that "§212(f) of the INA provides clear statutory authority for the imposition, by Presidential Proclamation, of restrictions on the ***entry*** of Cuban persons or a class thereof." Ex. C (emphasis added). This analysis culminated in PP 5377 on October 4, 1985, which again, suspended the ***entry*** of certain classes of Cuban nationals. *Id*.

Since that time, the Department of State has maintained and expanded the unlawful delegation of authority to suspend visas where the President has suspended entry under § 1182(f). For example, in a October 24, 1985 memorandum the State Department interpreted PP 5377 as a license to "suspend the issuance of U.S. nonimmigrant visas to Cuban officials travelling on diplomatic or official passports, as well as to Cubans traveling on tourist passports who are 'considered by the Secretary of State of his designee' to be Cuban officials." Ex. D. Indeed, internal Department of State cables suggest that the Department of State itself has been deciding when it had the authority to suspend the adjudication of visas to those within the ambit of a Presidential Proclamation suspending entry. *Id*. ("The Department has decided to institute a policy of denying visas to Cuban government and communist party officials who represent institutions that refuse to meet with USINT staff.").

2. Distinctions between Entry, Admission, and Inadmissibility

The word "entry" was, for decades, a term of art Congress used in immigration laws to signify whether a noncitizen could enter or remain in the United States. Congress defined the term "entry" to mean, in relevant part, "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." INA § 101(a)(13); 8 U.S.C. § 1101(a)(13) (1952) (emphasis added).

In 1996 the U.S. Congress overhauled many longstanding provisions of the INA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRAIRA"). Congress replaced the term "excludable" – as someone who could not enter the country or should not be allowed to enter – with a new term, "inadmissible." The amendment was one of several since the Immigration and Nationality Act's enactment in 1952 that changed or expanded which noncitizens would be considered

"inadmissible," adding, for example, the category of "Aliens Previously Removed." Pub. L. No. 104-208, 110 Stat. 3009-576. Historically, as the need has arisen, Congress *has* expanded or removed grounds of inadmissibility to modernize the immigration law and to keep those it has deemed undesirable from being granted visas and entering the country. In no amendment has a ground of inadmissibility been added for those subject to a Presidential Proclamation restricting entry under § 1182(f).

In addition to changes to "inadmissibility," through IIRAIRA, Congress in *most* instances replaced the term "entry" with the term "admission," which it defined as follows:

> The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

INA § 101(a)(13); 8 U.S.C. § 1101(a)(13); *see also Sanchez v. Mayorkas*, --- U.S. ---, 2021 WL 2301964, *4 (2021) (discussing the difference between entry and admission to hold that the grant of Temporary Protected Status, standing alone, which is treated as the legal equivalent of a nonimmigrant status in most respects, does not equate to an admission).

Congress carefully left specific references to "entry" unchanged within the INA. Most notably:

- The definition of admission references a lawful *entry*, 8 U.S.C. § 1101(a)(13);
- The statutory source for the Presidential Proclamations permits the President to suspend the *entry* of any aliens or class of aliens whose *entry* would be detrimental to the interests of the United States, 8 U.S.C. § 1182(f);[3]
- The statutory source for restrictions and prohibitions on *entry* to the United States

[3] But note Section 308(f)(1)(E) of IIRAIRA replaced the word "entry" with the word "admission" in § 1182(h). The broad § 1182 was not insulated from Congress' amendments, and the retention of the word "entry" in § 1182(f) was no accident.

still makes reference to that entry, while expressly including a subsection stating that an inadmissibility determination can be made separately, 8 U.S.C. § 1185.

In effect, the term entry was generally subsumed by the term admission except for specific statutory provisions where Congress sought to keep the plain language of "entry" unchanged. These explicit drafting choices represent Congressional intent and legal significance. *See Keene Corp v. United States*, 508 U.S. 200, 208 (1993) ("where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposeful in the disparate inclusion or exclusion."); *see also Lindh v. Murphy*, 521 U.S. 320, 330 (1977) ("[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.").

IV. ARGUMENT

When considering a motion for a preliminary injunction, the Court considers four factors: 1) the movant's likelihood of success on the merits; 2) irreparable harm to the movant; 3) the balance of equities; and 4) the public interest. *Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 20 (2008); *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004).

Summary judgment is usually appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits [or declarations] show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as matter of law." *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 31-32 (D.D.C. 2010) (alteration in original) (citing Fed. R. Civ. P. 56(c)), aff'd, 663 F.3d 476 (D.C. Cir. 2011). In "a case involving review of a final agency action under the Administrative Procedure Act, 5 U.S.C. § 706, however, the Court's role

is limited to reviewing the administrative record, so the standard set forth in Rule 56(c) does not apply." *Id*. at 32 (citation omitted). In such cases, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Cottage Health Ss. v. Sebelius*, 631 F. Supp. 2d 80, 90 (D.D.C. 2009) (citation omitted).[4]

A. Plaintiffs are likely to succeed on the merits

This is not the first time that Defendants' "no-visa" policy has been examined by this Court, and despite numerous judges in multiple jurisdictions reviewing Defendants' policy, not a *single Court* has found that the Defendants "no-visa" policy is lawful. This is because there is simply no statutory basis for refusing to issue visas to individuals subject to a Presidential Proclamation restricting those individuals' ***entry*** to the United States. The statute speaks plainly to the entry of noncitizens, not the adjudication of visas and Congress has declined to expand inadmissibility grounds to include those subject to a § 1182(f) Proclamation. There can be no other conclusion drawn than that Defendants have, in an arbitrary, capricious, and *ultra vires* manner, created a new ground of inadmissibility not found or supported by statute. Plaintiffs call upon this Court to enjoin Defendants from imposing a "no visa" policy with regard to the regional bans on entry.

At the threshold, the State Department has undertaken "final agency action" subject to

[4] The Court may "convert a decision on a preliminary injunction into a final disposition of the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage," so long as the requirements of Rule 56 are satisfied. *Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990). Because a "party may file a motion for summary judgment at any time" (Fed. R. Civ. P. 56(b)), the Court may grant summary judgment prior to the filing of an answer. *See Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120 (10th Cir. 2006). And the court may reach a similar result by "advance[ing] the trial on the merits and consolidate[ing] it" with the preliminary injunction hearing (Fed. R. Civ. P. 65(a)(2)). The Court has the discretion to take this approach where, as here, the requirements of Rule 56 have been satisfied insofar as the facts are not in dispute and the record provides a sufficient basis for the Court to award relief under the APA.

APA review. *See* 5 U.S.C. § 704. The definition of that term "cover[s] comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001), and even informal action may rise to the level of being final and reviewable: The APA's "flexible and pragmatic" language is satisfied by a "guideline or guidance," *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000), or a press release, *CropLife Am. v. E.P.A.*, 329 F.3d 876, 883-84 (D.C. Cir. 2003). All that is needed is conduct demonstrating that an agency has reached "the consummation of the … decisionmaking process" and has "determined" visa applicants' "rights" by establishing a policy "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 156, 178 (1997) (citations and internal quotation marks omitted); *see Hawaii v. Trump*, 878 F.3d 662, 681 (9th Cir. 2017) (agency implementation of § 1182(f)) proclamation was reviewable under APA). This standard is amply met here.

As summarized above, and as detailed in Plaintiffs' declarations, the State Department has made clear in both public and private that it has decided to implement the Proclamations by refusing to adjudicate visas. This is the "consummation of the … decisionmaking process," for there is no suggestion that the State Department is still considering whether this is its policy. *See Bennett*, 520 U.S. at 156. And this policy "determine[s]" the "rights" of Plaintiffs and other similarly situated individuals, by resolving (in the negative) the question whether applicants may obtain their visas while the entry suspensions are in effect. *Id.* With the understanding that this policy is reviewable under the APA, it is abundantly clear that Plaintiffs are likely to succeed on the merits.

Congress has specifically provided that "the term 'application for admission' has reference to the application for admission into the United States and not to the application for the issuance

of an immigrant or nonimmigrant visa." 8 U.S.C. § 1101(a)(4). Generally, the terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A).

Generally speaking, the process for obtaining a visa begins with a petition filed with U.S. Citizenship and Immigration Services, which, upon approval, transfers the approved petition to the National Visa Center. Upon consular request, the case moves onward to the consulate for the scheduling of an optional, in-person interview and final adjudication and issuance of the visa. An individual with an approved, unexpired visa may then seek admission to the United States at a port of entry.

Even with a visa in hand, however, that visa does not guarantee an individual's entry into the United States, but it is a necessary precedent condition to seeking such entry. Where the President acts under § 1182(f) to suspend a class of individuals from *entering* the United States, 8 U.S.C. § 1185(a)(1) specifically prohibits the individuals from attempting to enter the United States, but it does not prevent, an eligible applicant from issuance of a visa. The statute is careful to delineate between issuance of visa and seeking entry by providing that: "Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued [such as a visa] to enter the United States if, upon arrival in the United States, he is found to be inadmissible." 8 U.S.C. § 1185(a).

Defendants' legacy argument has rested on a longstanding misinterpretation of 8 U.S.C. § 1182 – an interpretation that it has intentionally and repeatedly perpetuated despite all Courts that have examined the interpretation finding it without merit. Defendants have asserted that, while § 1182(f) makes reference only to the President's power to restrict the ***entry*** of noncitizens, because of its placement in 8 U.S.C. § 1182, an entry restriction equates to a new ground of inadmissibility

or visa ineligibility under § 1182**(a)**, and therefore those subject to a § 1182(f) proclamation are ineligible for the visas for which they are applying.

An analysis of the statutory text demonstrates that this interpretation finds no support in the plain language of the text. The categories of persons deemed ineligible to receive a visa appear in § 1182(a), which discusses the grounds of inadmissibility and ineligibility for a visa, not § 1182(f), which discusses the President's ability to issue a Proclamation suspending the *entry* of classes of individuals. *See Castaneda-Gonzalez v. Immigr. & Naturalization Serv.*, 564 F.2d 417, 426 (D.C. Cir. 1977) (explaining that § 1201(g) "directs [consular officers] not to issue visas to any alien who falls within one of the excludable classes described in [8 U.S.C. § 1182(a)]"). Subsection 1182(a) provides that "aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States." Thus, a person who falls into one of the categories of inadmissible persons outlined in § 1182(a) is both ineligible to enter the country and ineligible to receive a visa pursuant to § 1201(g).

The reading of inadmissibility and ineligibility for visas ends there, as this statute is comprised of a *multitude* of wildly different, and inherently discreet, subsections. Indeed, in reviewing this exact line of argument, Judge Mehta in *Gomez v. Trump* came to the conclusion that § 1182(a)'s use of the phrase "the following paragraphs" does not include § 1182(f). *Gomez*, 485 F.Supp.3d. at 191.. "Section 1182 of the INA carefully distinguishes between *subsections*, which include §§ 1182(a) and 1182(f), and *paragraphs*, which are subunits of those subsections. *Id*.

And such an interpretation makes sense when reviewing § 1182 as a whole. Clearly one would not extend any inadmissibility analysis to section 1182(b), dealing with the format for denials, section 1182(j), describing the requirements for a foreign medical graduate, or § 1182(p)

instructing how "prevailing wage levels" must be computed for certain work visas. 8 U.S.C. § 1182 is broken down by discreet subsection, and internal references necessarily refer *only to their respective subsection*.

This distinction between the issuance of a visa and admissibility has been confirmed by the Supreme Court as well in the only major challenge to a § 1182(f) proclamation – *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). In *Trump v. Hawaii* the Supreme Court, in rejecting an argument related to protections against discrimination found in 8 U.S.C. § 1152(a)(1)(A), underscored the "basic distinction between admissibility determinations and visa issuance that runs throughout the INA." *Id*. at 2414. As the Court stated:

> The Act is rife with examples distinguishing between the two concepts. See, e.g., 8 U.S.C. § 1101(a)(4) ("The term 'application for admission' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa."); § 1182(a) ("ineligible to receive visas and ineligible to be admitted"); § 1182(a)(3)(D)(iii) ("establishes to the satisfaction of the consular officer when applying for a visa ... or to the satisfaction of the Attorney General when applying for admission"); § 1182(h)(1)(A)(i) ("alien's application for a visa, admission, or adjustment of status"); § 1187 (permitting entry without a visa); § 1361 (establishing burden of proof for when a person "makes application for a visa ..., or makes application for admission, or otherwise attempts to enter the United States").

Id. at n.3

Defendants' policy of refusing to issue visas, schedule interviews, or even *work on cases* for individuals subject to a § 1182(f) Proclamation remained unchallenged from its first usage in the 1980s until the COVID-19 pandemic in 2020. The first Court to review this "no-visa" policy succinctly summarizes Defendants' position, and equally succinctly summarizes why it is facially unlawful:

> A person is declared inadmissible to enter the United States under § 1182(f), the theory goes, is therefore ineligible to receive a visa under § 1201(g). . . . But that argument ignores "the basic distinction between admissibility determinations," i.e., entry determinations, and "visa issuance that runs throughout the INA." *Hawaii*, 138 S.Ct. at 2414 & n.3 . . . Subsection 1201(g) precludes the issuance of visas only as to persons who are "ineligible

> to receive a visa" under Section 1182, not to persons who are only ineligible to enter under that provision. 8 U.S.C. § 1201(g) (emphasis added).

Gomez v. Trump, Civ. A. No. 20-cv-01419, 2020 WL 5367010 (D.D.C. Sept. 4, 2020).

Since that time, Courts from the District of Columbia to California have reviewed the "no-visa" policy and come to the same conclusion – there is no legal basis for this policy. *Gomez v. Trump*, 486 F. Supp. 3d 445 (D.D.C. 2020); *Milligan v. Pompeo*, 502 F.Supp.3d 302, ---, 2020 WL 6799156 , (D.D.C. Nov. 19, 2020); *Young v. Trump*, 2020 WL 7319434 (N.D. Cal. Dec. 22, 2020); *Tate v. Pompeo*, --- F.Supp.3d ----, 2021 WL 148394 (D.D.C. Jan. 16, 2021). Defendants have argued the contrary in countless filings, and have yet to identify any statutory backing for this policy, because there is none.

In short, the statute is clear, the statutory scheme confirms the plain reading of the statute, and the history of the Immigration and Nationality Act since its enactment is yet more confirmation of the plain reading of § 1182(f). The President may restrict the entry of certain noncitizens where the President finds that such noncitizens' ***entry*** into the United States would be detrimental to the interests of the United States. Such a proclamation does not create a new ground of inadmissibility and does not create a bar to visa issuance. Congress has, in multiple amendments, created new grounds of inadmissibility, and has declined to add such a ground for those subject to a Presidential Proclamation under § 1182(f). The "no visa policy" is created out of whole cloth by the Department of State, lacks any statutory basis, and is, as many Courts throughout the country have already found in preliminary injunctions – *ultra vires*.

B. <u>Plaintiffs will suffer irreparable harm</u>

Plaintiffs' declarations, submitted herein as Exhibits F through J, detail the irreparable harms that Plaintiffs are and will continue to suffer. Because these substantial injuries are

irreparable, a preliminary injunction – or summary judgment on the merits to alleviate the harm – is warranted.

1. Plaintiffs have and maintain standing

For standing purposes, a plaintiff must have suffered 1) an injury in fact, that is 2) fairly traceable to the challenged conduct, and that is 3) likely to be redressed by a favorable decision. *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "An association has standing to sue on behalf of its members when: (1) 'its members would otherwise have standing to sue in their own right;' (2) 'the interests it seeks to protect are germane to the organization's purpose;' and (3) 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit" *Center for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Here, as a result of Defendants' policy, Plaintiffs have had their cases significantly delayed, had their employees separated from them for an immense amount of time, and are finding their membership on the brink of financial ruin. They have, in no uncertain terms, suffered an "injury in fact," and as there is no adequate legal remedy and their effects cannot possibly be undone, the harms suffered by Plaintiffs are paradigmatic "irreparable harm." This injury is directly caused by the "no visa" policy, even with operational constraints caused by COVID. Where non-proclamation countries have been able to process visas, even at a reduced capacity, Plaintiffs have been repeatedly denied visa appointments, and Defendants have in fact refused to even *process* Plaintiffs cases to be interview-ready when and if interviews become available to Plaintiffs.

Although the COVID-19 Regional Proclamations remain in effect, Defendants may argue that immigrant and K-1 visa applicants' claims relating to these Proclamations are now moot due to the Secretary of State's National Interest Exception ("NIE") issuance for K-1 and immigrant

visa applicants. An analysis of justiciability here should be done under the doctrine of "voluntary cessation." Plaintiffs' claims withstand this analysis. The voluntary cessation analysis contains two prongs: "(1) it can be said with assurance that there is no reasonable expectation … that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

As Plaintiffs continue to wait for the final adjudication of their visas, there is a reasonable expectation that the violation will recur. The NIE by the Secretary of State acts as the only protection for immigrant and K-1 visa applicants, yet the public announcement regarding the NIE states "[a]s with all national interest exceptions for qualified travelers seeking to enter the United States under a Presidential Proclamation, *if circumstances warrant*, the Secretary of State *may review the national interest determination*"[5] (emphasis added).

Circumstances have not stagnated here; developments continue to occur nationally and internationally in the ongoing COVID-19 pandemic. On April 30, 2021, a surge of COVID-19 cases in India resulted in a new Presidential Proclamation adding those present there to the classes of noncitizens whose entry was suspended. In addition to the constantly shifting circumstances, the DOS has acted inconsistently in their treatment of immigrant and K visas. In a public briefing on March 9, 2021, Consular Affairs Acting Deputy Assistant Secretary Julie Stufft stated:

> [W]e've prioritized the processing of immigrant visas, full stop, at every post. As there is capacity, these will be *the first visas adjudicated*. Among those, we will continue to prioritize the processing of immigrant visas for spouses and children of U.S. citizens, *including fiancé(e) visas* not subject to regional restrictions."[6] (emphasis added).

[5] https://travel.state.gov/content/travel/en/News/visas-news/updates-to-national-interest-exceptions-for-regional-covid-proclamations.html (Last accessed May 19, 2021).
[6] "Update on U.S. Immigrant Visa Processing at Embassies and Consulates," U.S. Department of State, Mar. 9, 2021. Accessible at: https://www.state.gov/briefings-foreign-press-centers/update-on-u-s-immigrant-visa-processing-at-embassies-and-consulates/ (Last accessed May 25, 2021).

However, on April 30, 2021, DOS backtracked on this statement and has shifted fiancé(e) visas from the first visas to be adjudicated to tier two priority, following certain Special Immigrant Visas, age-out cases, and adoption visas.[7] Additionally, "the prioritization plan also instructs posts to schedule and adjudicate some cases in Tier Three and Tier Four each month."[8] Furthermore, consulates themselves do not appear to be following this tiered system for prioritization. For example, in April of 2021, after the blanket National Interest Exception was implemented, the Rio De Janeiro consulate issued only ***two*** K-1 visas, compared to 100 nonimmigrant visas in all categories and 358 immigrant visas in all categories. *See* Ex. M, N. In other words, K-1 visas in Rio De Janeiro represent 0.56% of the visas issued by the immigrant visa unit – hardly the equivalent priority given to other applicants in the Tier Two category.

DOS's explicit statement that national interest determinations may be reviewed as circumstances warrant, the ever-changing global landscape surrounding the COVID-19 pandemic, and the subsequent prioritization contradictions offer Plaintiffs no confidence that they will not find themselves in the same situation once again.

In addition to the reasonable possibility of reinstatement, the harms suffered by Plaintiffs have not been resolved. "[T]he defendant has the burden of establishing that these criteria have been met, and that is a 'heavy burden.'" *True the Vote, Inc. v. Internal Revenue Service*, 831 F.3d 551, 561 (D.C. Cir. 2016) (quoting *Linchpins of Liberty v. United States*, 71 F. Supp. 3d 236, 245 (D.D.C. 2014), aff'd in part, rev'd in part and remanded sub nom. *True the Vote, Inc.* 831 F.3d.). Defendants cannot meet their burden as they cannot demonstrate that the effects on Plaintiffs have

[7] "Immigrant Visa Prioritization" U.S. Department of State—Bureau of Consular Affairs, Apr. 30, 2021. Accessible at https://travel.state.gov/content/travel/en/News/visas-news/immigrant-visa-prioritization.html (Last accessed May 25, 2021).
[8] *Id*.

been "*completely and irrevocably eradicated*." *Coal. of Airline Pilots Ass'ns*, 370 F.3d at 1189 (emphasis added). The proclamations have added months of delays to the processing of K-1 amd immigrant visas, an effect which has not been eradicated by the issuance of the NIE. Plaintiffs must continue to wait for their claims to be processed for an unknown amount of time. "The determination whether sufficient effects [of the alleged violation] remain to justify decision [sic] often will turn on the availability of meaningful relief." *Cierco v. Lew*, 190 F. Supp. 3d 16, 24 (D.C. Cir. 2016). Despite the Secretary of State's NIE issuance for all immigrant and K-visa applicants, Plaintiffs continue to await any progress in their cases, and continue to receive mixed messages from consulates as to when and if appointments can be scheduled. Therefore, immigrant visa and K-1 Plaintiffs' maintain standing to proceed with this litigation.

2. Plaintiffs are suffering and will continue suffering irreparable harm absent relief

"The basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). Indeed, the D.C. Circuit has made clear that "[t]he key word in this consideration is ***irreparable***. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006) (citation omitted).

However, in an APA case as here, where monetary damages or other forms of compensatory or corrective relief are not available and the economic harm unrecoverable, such injuries may satisfy the standard for irreparable harm . *See, e.g., Milligan*, 502 F.Supp.3d 302, --- 2020 WL 6799156, *11 ("Without K-1 visas, Plaintiffs explain that they have and will continue

to suffer not only the financial and emotional strains of their long-distance relationships and of navigating uncertainty regarding their visas and futures, . . . , but they have missed and will continue to miss significant life events, including birthdays, anniversaries, family funerals, and holidays."); *accord Tate*, 2021 WL 148394, *13 ("defendants present no serious reason to doubt the irreparable harms plaintiffs allege" from non-issuance of nonimmigrant visas); *See, also Nalco Co. v. United States Envtl. Prot. Agency*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011); *Hoffman-Laroche, Inc. v. Califano*, 453 F.Supp. 900, 903 (D.D.C. 1978) (economic loss for which there is no corrective relief available is irreparable); *Armor & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (loss of goodwill and loss of profits that could not be recaptured constituted irreparable harm sufficient for equitable relief).[9]

Plaintiffs here are family-based immigrant visa applicants and their sponsors (Ex. F), employment-based immigrant visa applicants and their sponsors (Exs. G, H), employment-based nonimmigrant visa applicants and their sponsors (Exs. I, J), and fiancée visa applicants and their sponsors (Ex. K). All have had suffered from the "no visa" policy of Defendants, including the unlawful additional eligibility requirement that applicants prove they qualify for a "national interest exception" before receiving the adjudication of their visa applications.

For example, Jeff Laband, the Co-President of the Association of Cultural Exchange Organizations (ACEO), an organization that represents J-1 sponsoring programs reports the following harms to members of the ACEO: "Tens of thousands of Summer Work and Travel Exchange visitors, most of whom are from countries subject to regional travel bans will not arrive

[9] Note that while Plaintiffs meet their burden in establishing the heightened standard of "irreparable harm" for injunctive relief, Plaintiffs also meet the lower standard necessary for summary judgment to be granted in their favor, which requires only that "the movant is entitled to judgment as a matter of law," (Fed. R. Civ. P. 56(a)), and the injury required is only that necessary for justiciability purposes.

causing host businesses to severely curtail operations, lose significant revenue and/or close . . . Thousands of J-1 Teachers will not arrive causing 100s of thousands of mostly already-underserved American children to either entirely forego certain classes, and/or endure overcrowded classrooms . . . Not only will the continuation of visa and visa appointment bans and unavailability continue to cause sponsors to suffer financial harm, but will lead to the extinction of many key sponsor organizations, as well as irreparably harm the reputation and reliability abroad of the Dept of State's exchange visitor program."[10] Ex. J at 1.

The nonimmigrants themselves report a myriad of irreparable harms they are experiencing, from medical hardships, to financial hardships, to psychological hardships. Ex. I. Emma Hart, for example, the recipient of an approved O-1 "extraordinary ability" petition for purposes of working at the University of Pennsylvania's McNeil Center for Early American Studies as the Center's Director and as a Professor of History reports that Defendants' conduct has impeded her ability to begin work in this prestigious and important position, that she and her family are undergoing psychological hardship as a result of the uncertainty, and that, if she is unable to travel to the United States by August, she simply cannot do the job for which she was petitioned and hired. *Id*. at 22.

Immigrants are faring no better. Christopher Gibson, General Manager of Quest Transport, LLC, attests that "[w]e are in a significant labor shortage in the transportation industry. We have a substantial number of unseated trucks and we have not been able to recruit US Citizens to fill the need. Without the necessary truck drivers we are sponsoring, we will not be able to fulfill customer needs and our company will continue to suffer huge financial consequences." Ex. G at 4. Those

[10] The irony of the Department of State's refusal to issue J visas, and the corresponding disruption of its own cultural exchange mission and mandate should not be lost on the Defendants or this Court.

who are being sponsored are similarly suffering irreparable harm. Fernando Raduan attests that he has "a medical research position with a prestigious university in the U.S. that starts in July. I will lose my fellowship in foot and ankle surgery job opportunity in the Massachusetts General Hospital, University of Harvard. This is an important medical position that will benefit the U.S. since I will be participating not only on researches but also working on Emergency Rooms and operating patients with different pathologies, also related to Covid-19 infections." Ex. H at 2.

Families are also suffering immense and intangible harms as a result of Defendants' conduct. Victor Coco attests that his father "has missed out on my enlisted military promotions, college graduation, military commissioning ceremony, the beginning stages of my military aviation endeavors and most importantly my first child's birth. This was all mostly caused by the COVID delay. In fall of 2021, my child will complete one year of birth, I will be completing my military aviation training and earning my coveted Wings of Gold and I will have a vowel renewal celebrating 11 years of marriage. This is only the nontangible items, money and time were also invested into this process. Much of what I had to take out loans that I am still paying on. This has caused stress in my marriage as I went into great debt to help a family member that still cannot be physically present and makes that debt seem unnecessary and irresponsible. It is difficult to quantify and express the pain and suffering caused by COVID delays in the consulates abroad." Ex. F at 10.

In short, Plaintiffs present a cross-section of immigration at consulates abroad, and their harms are immediate, irreparable, and growing. For many, the regional travel restrictions have meant that they could not receive visas to see family for over a year, despite the option for quarantining in a non-Proclamation country for 14 days being available. For many businesses, their operations are irrevocably harmed each day they are missing critical workers. Entire

industries are on the brink of collapse with the inability to hire typical foreign workers. For some, medical hardships are growing while their cases remain in a legal limbo – approved for processing, and with a clear path to enter the United States after issuance, but unable to be scheduled due to the "no visa" policy. With an order from this Court invalidating the "no visa" policy, even with the operational constraints that COVID presents, the harms these Plaintiffs are suffering will be redressed.

C. <u>The balance of equities and public interest favor relief</u>

Finally, Plaintiffs have established that "the balance of equities tips in [their] favor and that an injunction is in the public interest." *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). Because the government is the opposing party here, these factors merge. *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 156 (D.D.C. 2018). The Court should weigh the "competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. While Plaintiffs and similarly situated intending immigrants and nonimmigrants, U.S. employers, and family member sponsors face real and irreparable injuries without relief (*see supra* Point B), there is no real harm or public interest weighing against an injunction.

The use of § 1182(f) to create a "no visa" policy did not exist until fairly recently – indeed the first Proclamation citing this statute was not created until the 1980s. It has only been in the last forty years that this policy has been in place – and been continually expanded. If Defendants assert a need for an entry restriction under § 1182(f) to be treated as the equivalent of a ground of inadmissibility and visa ineligibility under § 1182(a) they have had quite literally decades to discuss these concerns with Congress, and that Congress has declined to expand Defendants' authority through the several major substantive amendments to the Act since the 1980s, including

the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996), and indeed even during the creation of the Department of Homeland Security and the modern immigration system through the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002), speaks volumes. Congress has not authorized Defendants' creation of a "no visa" policy despite numerous opportunities to do so.

The public interest would, in fact, would be well-served by granting a preliminary injunction. The public has no other interest in keeping the affected individuals out of the country. Their visa petitions have already been approved. "[T]he public interest is seriously disserved by … family[] separation." *Pickett v. Hous. Auth. of Cook Cty*., 114 F. Supp. 3d 663, 673 (N.D. Ill. 2015). Congress has found that family unity is in the national interest. There is no basis to contest those judgments.

Furthermore, it is always in the public's interest to ensure that the federal government complies with the law. "There is generally no public interest in the perpetuation of unlawful agency action," *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016), and Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice," *Open Cmtys. Alliance v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017) (citation omitted). Conversely, "[t]he public interest is served … by ensuring that government agencies conform to the requirements of the APA." *Gulf Coast Mar. Supply, Inc. v. United States*, 218 F.Supp.3d 92, 101 (D.D.C. 2016), aff'd, 867 F.3d 123 (D.C. Cir. 2017); accord *League of Women Voters*, 838 F.3d at 12 ("there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations") (citation and internal quotation marks omitted). Enforcing the APA favors granting relief.

The balance of equities and the public interest overwhelmingly favor the granting of a preliminary injunction. There is no credible, substantial government interest while there are substantial and irreparable harms that will be suffered by the Plaintiffs and similarly situated individuals.

V. CONCLUSION

This is a straightforward and now familiar case of statutory interpretation of INA § 212(f). Plaintiffs represent a broad cross-section of the immigrant and nonimmigrant cases pending at consulates, and their harms continue to mount while Defendants refuse to process visas under their incorrect interpretation of 8 U.S.C. § 1182. Plaintiffs have met their burden for a preliminary injunction, or in the alternative immediate summary judgment, to be entered of Plaintiffs' behalf. For the foregoing reasons, Plaintiffs respectfully request this Court GRANT summary judgment for Plaintiffs and order the Department of State to resume processing visas in countries subject to regional travel restrictions stemming from Presidential Proclamations under 8 U.S.C. § 1182(f), or in the alternative grant a Preliminary Injunction ordering the same.

Respectfully submitted this the 11th day of June, 2021

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CERTIFICATE OF SERVICE

This is to certify that on this June 11, 2021, the foregoing **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR SUMMARY JUDGMENT IN THE ALTERNATIVE** was filed on the Court's CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP KINSLEY, *et al.*

Plaintiffs,

Civil Action No. 1:21-cv-00962-JEB

v.

ANTHONY BLINKEN, Secretary of the U.S. Department of State, *et al.*

Defendants.

PLAINTIFFS' PROPOSED ORDER ON MOTION FOR A PRELIMINARY INJUNCTION

After a reviewing the relevant pleadings, and after arguments in this matter, it is hereby ordered as follows:

Plaintiffs' motion for a preliminary injunction is GRANTED. Defendants are hereby ENJOINED from refusing to schedule, process, or adjudicate visa applications solely on the basis of the regional COVID-19 Presidential Proclamations restricting entry.

This__day of_, 2021

Hon. James Boasberg
District Court Judge.