UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAMED SUFYAN OTHMAN ALMAQRAMI, *et al.*, Plaintiffs, v. REX W. TILLERSON, in his official capacity as Secretary of State, *et al.*, Defendants.	Civil Action No. 1:17-cv-01533-TSC

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

EREZ REUVENI
Assistant Director

By: */s/ Joshua S. Press*
JOSHUA S. PRESS
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-0106
Facsimile: (202) 305-7000
e-Mail: joshua.press@usdoj.gov

STEVEN A. PLATT
Trial Attorney

Attorneys for Defendants

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INTRODUCTION

Plaintiffs would like to present their case as one where their selection in the diversity visa lottery entitles them to diversity visas "without regard to the fiscal year deadline." (ECF No. 54, at 1) (hereinafter, Pls.' Br.). But this ignores the statutory scheme and deadline governing the diversity visa program. Simply put, Plaintiffs' selection in the diversity-visa lottery entitled them to *apply* for a diversity visa, but they were not issued diversity visas before the end of the fiscal year, after which time Defendants are prohibited by statute from issuing diversity visas. And Congress expressly barred the issuance of visas after the end of the fiscal year. Although Plaintiffs may be understandably disappointed, they are in good company as there were almost 34,000 lottery "winners" in fiscal year 2017 who, for various reasons, did not receive a diversity visa before the end of the fiscal year, including some "winners" who could not even apply for a diversity visa as a result of country limits already being reached under 8 U.S.C. § 1153(c)(1)(E)(v). Because Plaintiffs are no longer possibly eligible for a diversity visa from fiscal year 2017 (the year that they were selected in the diversity-visa lottery) under 8 U.S.C. § 1154(c) ("Section 1154") and 22 C.F.R. § 42.33(a)(1), this case is moot. Plaintiffs resist this straightforward conclusion by (1) appealing to the Court's equitable powers while ignoring Congress' statutory constraints and State Department regulations and (2) expansively reading two out-of-circuit decisions while ignoring the careful circumscriptions those courts drew around their holdings. Both arguments lack merit.

As numerous federal courts have held, challenges to denials of diversity visas become moot at the end of the fiscal year, *even if* the diversity visa applications are allegedly denied improperly—a circumstance which Defendants deny. *Keli v. Rice*, 571 F. Supp. 2d 127, 137 (D.D.C. 2008) ("Nevertheless, even the most egregious of circumstances do not permit this

Court to opine on the merits of claims for which no remedy is available.”). Congress has spoken clearly here, and this Court’s equitable powers cannot override that plain statutory language; instead plaintiffs complain of an issue only Congress can address, not the courts. *See, e.g.*, *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006); *Coraggioso v. Ashcroft*, 355 F.3d 730, 731–32 (3d Cir. 2004). Defendants therefore ask the Court to grant their motion to dismiss. (ECF No. 53).

ARGUMENT

I. This Case Is Moot Because There Is No Longer Any Remedy Available To Plaintiffs.

This case begins and ends with 8 U.S.C. § 1154: “Aliens who qualify, through random selection, for a [diversity] visa ... shall remain eligible to receive such visa *only through the end of the specific fiscal year for which they were selected*.” 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added). In accordance with the constraint imposed by Section 1154, State Department regulations state: “The eligibility for a visa under INA 203(c) [8 U.S.C. § 1153(c)] ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility.” 22 C.F.R. § 42.33(a)(1). Plaintiffs did not receive a diversity visa by September 30, 2017. Their claims therefore became moot once that time passed. *See, e.g.*, *Mwasaru v. Napolitano*, 619 F.3d 545, 553 (6th Cir. 2010); *Nyaga v. Ashcroft*, 323 F.3d 906, 909, 915 (11th Cir. 2003) (per curiam).

Plaintiffs and this Court have cited *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999), and *Przhebelskaya v. U.S. Bureau of Citizenship & Immigration Services*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004), for the proposition that judicial intervention prior to the end of a fiscal year may allow for a different remedial outcome. Order (ECF No. 49) at 11–12. But this is a vast

expansion of what those decisions stand for. In both cases, the courts had already ordered the governmental defendants *to complete adjudication of the applications prior to the close of the fiscal year*. When the governmental defendants did not comply, the courts found that they had inherent authority to enforce their own orders. The courts held that the expiration of the fiscal year was no longer an obstacle to the statutory deadline.

While Defendants take issue with the holdings in those cases, their viability is irrelevant here because this Court never issued an order requiring Defendants to complete adjudication of Plaintiffs' applications before the end of the fiscal year. Furthermore, in this case Plaintiffs' visa applications had all already been adjudicated and refused under 8 U.S.C. § 1201(g). Therefore, *Paunescu* and *Przhebelskaya* do not help plaintiffs.

Plaintiffs try to enlarge those cases' scope by deeming themselves lottery selectees "who secured a judicial order compelling adjudication *or freezing the status quo* before the end of the Fiscal Year." Pls.' Br. 12 (emphasis added). But that is not what those cases held—in fact no case has held that *any* judicial order beyond compelling adjudication is enough to circumvent Section 1154's plain language. The Court should decline to create such an exception here. This Court's September 29 order did not—and could not have—exempted Plaintiffs from Section 1154's deadline.

In any event, the status quo was only frozen by this Court in the event the Supreme Court invalidated the Executive Order, an event that did not come to pass. That is, the limited relief that Plaintiffs did receive by this Court's order was expressly predicated upon the Supreme Court reaching a decision in *Trump v. International Refugee Assistance Project* ("*IRAP*"). Order at 15 ("Accordingly, the court orders the State Department to report, by October 15, the number of visa numbers returned unused for FY 2017, and to hold those visa numbers to process Plaintiffs'

visa applications *in the event the Supreme Court finds the Executive Order to be unlawful*." (emphasis added)). But that condition did not occur—the Supreme Court did not find any executive order to be unlawful. Moreover, the Court disposed of the consolidated *IRAP* cases by vacating their respective lower court judgments as moot. — S. Ct. —, 2017 WL 4518553 (Oct. 10, 2017); — S. Ct. —, 2017 WL 4782860 (Oct. 24, 2017). Therefore, because the Supreme Court did not find the executive order unlawful, under the terms of this Court's order of September 29, the visa numbers Defendants had been reserving no longer exist and there is no status quo—pursuant to which adjudication would be required under an order of this Court—for this Court to vindicate. Thus, the fiscal year has now ended without an order from this Court akin to those issued in *Paunescu* or *Przhebelskaya.*[1]

This case must therefore be dismissed under Federal Rule of Civil Procedure 12(b)(1).

A. Section 1154 Deprives The Court Of Jurisdiction Because The Relief Plaintiffs Have Sought From This Court Would Do Plaintiffs No Good.

Plaintiffs offer two primary counterarguments. First, Plaintiffs argue that Section 1154 goes to the merits, not mootness. As part of their argument, Plaintiffs claim, "Defendants are not claiming that the relief Plaintiffs have sought from this Court would do Plaintiffs no good—nor could they claim that." *Id.*

But that is precisely the situation here. *See* Defs.' Mot. to Dismiss at 10 (ECF No. 53-1) ("[T]here is no 'likelihood' that Plaintiffs' alleged injury can be 'redressed by a favorable decision'[.]"). At midnight on September 30, based on the plain terms of the enactment that

[1] Plaintiffs complain, "Defendants do not even attempt to explain why the non-merits resolution of the *[IRAP]* cases should foreclose Plaintiffs' cases from being heard, with or (as it turns out) without guidance from the Supreme Court." Pls.' Br. 17. This is incorrect because, as Defendants did argue, this Court's preliminary injunction order expressly predicated relief on the resolution of *IRAP* (with no limitation on the type of resolution).

permits diversity visas in the first place, Defendants lost the legal authority to issue any more diversity visas for fiscal year 2017 applicants.

Plaintiffs cite case law holding that a case is not moot if a favorable judicial decision would benefit them, regardless of the court's legal authority to issue such an order. Pls.' Br. at 8 (citing, *e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 174 (2013) (rejecting a claim that the court's lack of legal authority to issue an order mooted the case, because the relief could be physically granted)). However, in cases like *Chafin*, the court had at least *arguable* legal authority to issue an order. In contrast, the statute is categorical when it prohibits Defendants from issuing diversity visas for a given fiscal year after the fiscal year ends. *Cf. id.* at 168–70 (finding no mootness where the relevant statute was not categorical).

Moreover, the most recent of those cases explicitly cautioned that a claim for relief cannot turn a mootness argument into a merits argument if it is "so implausible that it is insufficient to preserve jurisdiction." *Id.* (citing *Steel Co. v. Citizens for Better Envt.*, 523 U.S. 83, 89 (1998)).[2] Both the plain language of Section 1154 and the unanimity of the case law on this issue demonstrate that Defendants may no longer issue diversity visas for fiscal year 2017. Plaintiffs' argument, which ignores the Section 1154's categorical imperative, is thus "so implausible" that it fails to vest jurisdiction in this Court.

Therefore, as several courts (including this district court and the Second, Sixth, and Eleventh Circuits) have ruled, the expiration of a fiscal year moots a claim that an alien may receive a diversity visa in that fiscal year. *See, e.g.*, *Keli v. Rice*, 571 F. Supp. 2d at 137; *Mogu v.*

[2] Even if the Court disagrees, and holds that Section 1154 poses a merits problem for Plaintiffs rather than a subject-matter jurisdiction defect, the fact that the requested relief is unauthorized is sufficient basis to dismiss the case without reaching the underlying merits argument.

Chertoff, 550 F. Supp. 2d 107, 109–10 (D.D.C. 2008); *Mwasaru*, 619 F.3d at 547; *Nyaga*, 323 F.3d at 913; *Mohamed*, 436 F.3d at 81; *accord Zapata v. INS*, 93 F. Supp. 2d 355 (S.D.N.Y. 2000) (Mukasey, J.). The Court should follow their lead—and the plain language of Section 1154—here.[3]

B. The Rules Of Equity Preclude The Court From Issuing An Order Inconsistent With Section 1154.

Second, Plaintiffs try to avoid mootness by rehashing their equitable arguments and adding a new equitable plea for *nunc pro tunc* relief. A federal court's inherent authority is limited to matters that are "*governed not by rule or statute* but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (emphasis added); *see Antone v. Block*, 661 F.2d 230, 235 (D.C. Cir. 1981) (holding that a district court's remedial powers "are necessarily limited by a clear and valid legislative command counseling against the contemplated judicial action"). Here, a statute dictates the result, which forbids Defendants from issuing diversity visas after a fiscal year has closed. 8 U.S.C. § 1154(a)(1)(I)(i)(II). Plaintiffs do not explain how the Court can circumvent this statutory limitation. Instead, they merely argue what they believe the Court *should* do. *See* Pls.' Br. 11–13, 18–19. The only authority they cite is the general proposition that a preliminary injunction preserves the status quo until a trial on the merits can be held. *Id.* at 10. While that is true, it does not mean that Section 1154 ceases to

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[3] Plaintiffs also argue at length that the case is not moot given the President's more recent Proclamation. But the fact remains that Plaintiffs' Amended Complaint (ECF No. 46) never once mentions the Proclamation or makes any allegation of illegal action pursuant to that Proclamation. Nor, for that matter, is the Proclamation addressed in Plaintiffs' Motion for a Preliminary Injunction (ECF No. 2). As Defendants explained, "when a challenged government regulation is replaced by one that is not substantially similar, any judicial decision regarding the

"govern[]" the Court's equitable authority. *Dietz*, 136 S. Ct. at 1891. And the status quo—now that fiscal year 2017 has ended and this Court's injunctive order has been satisfied—is that Plaintiffs are no longer eligible for diversity visas under Congress's plain terms. Because federal courts are subject to that clear statutory command, the Court is prevented from granting Plaintiffs the equitable relief they seek. *See INS v. Pangilinan*, 486 U.S. 875 (1988) (explaining that courts are powerless to override congressionally established policy through equity, without limitation to the naturalization context); *cf. also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 902 (10th Cir. 2017) (dismissing claims and refusing to "'engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide'" (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985))).[4]

II. The State Department's Decisions Regarding Plaintiffs' Visas Are Not Reviewable.

Alternatively, the Court should dismiss under the doctrine of consular nonreviewability. As Defendants pointed out in their motion, a court can revisit a legal determination made in an order granting a preliminary injunction motion. Defs.' Mot. 18; *accord, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the

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prior policy is improper." (citing *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977)). Defs.' Mot. at 15–16.

[4] Plaintiffs claim that *Pangilinan*'s holding that "[a] Court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law," is inconsistent with *Paunescu and Przhebelskaya*. 486 U.S. at 883. If the Court agrees, then Defendants' position is that those aspects of *Paunescu* and *Przhebelskaya* were wrongly decided,

merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the ... conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." (citations omitted)). This is because a preliminary injunction, as Plaintiffs acknowledge, is designed to quickly preserve the status quo. As "there has been no 'trial on the merits' here," Pls.' Br. 26, and the only other exploration of this nor any other full exploration of the legal issues of consular nonreviewability until now, the Court is free to, and should, reconsider its earlier decision on this issue.

As Defendants have pointed out, the denial or revocation of a visa for an alien abroad "is not subject to judicial review ... unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159–60 & n.9 (D.C. Cir. 1999) (discussing the history of the doctrine). Consistent with *Saavedra Bruno* and the other Supreme Court and D.C. Circuit cases Defendants cited their motion, Defs.' Mot. at 17–22. Defendants respectfully ask the Court to rule consistent with binding precedent from the D.C. Circuit and grant their motion to dismiss.

III. Plaintiffs Have Failed To State A Claim Under The Administrative Procedure Act Because Plaintiffs Were Not Eligible For A Visa.

The Amended Complaint further fails to state a claim. Plaintiffs' Administrative Procedure Act ("APA") claim was brought under 5 U.S.C. § 706(1). That subsection directs a "reviewing court [to] (1) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706. This is the crux of the Amended Complaint: that Defendants unlawfully withheld the issuance of diversity visas. As Defendants explained, Defs.' Mot. at 23, a Section 706(1) claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004);

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and they ask the Court to follow a binding Supreme Court decision over the nonbinding district

accord Kaufman v. Mukasey, 524 F.3d 1334, 1338 (D.C. Cir. 2008). Because the diversity-visa statute does not mandate that the State Department adjudicate all diversity-visa applications by September 30—only that it *stop* adjudicating visa applications on that date—Defendants did not have a clear, nondiscretionary duty to readjudicate Plaintiffs' visa applications before their statutory eligibility expired on that date. The Court should dismiss Plaintiffs' APA claim on this basis.

Plaintiffs respond that their claim is brought not under § 706(1) but under 5 U.S.C. § 706(2)(A), which prohibits arbitrary and capricious agency action.[5] Even if Plaintiffs properly alleged a claim of arbitrary and capricious agency action under 5 U.S.C. § 706(2)(A), their claim fails for two reasons. First, Section 706(2) claims require a decision that is "final" within the context of the APA. Here, there was no final decision under the executive order. Rather, Defendants offered Plaintiffs the opportunity to demonstrate that they had a bona fide relationship with a qualifying U.S. entity and thus were not subject to the executive order. Indeed, the former plaintiffs in this case (P.K., Furooz, and Sorkhab) were able to make that showing to Defendants and otherwise establish eligibility to receive a visa. Because Defendants had not determined that Plaintiffs' were eligible to receive diversity visas prior to the end of the fiscal year and their cases remained refused under 8 U.S.C. § 1201(g), If anything, Plaintiffs' APA claim is one of unlawful withholding under 5 U.S.C. § 706(1).

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court decisions.

[5] Plaintiffs claim that they did bring an action under 5 U.S.C. § 706(2) because they specifically cited that subsection in their Amended Complaint and because they alleged that the action was "final agency action." Pls.' Br. at 30–32. Those contentions are, like all legal conclusions, not entitled to any deference on a Rule 12(b)(6) motion. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Second, even if Plaintiffs properly invoked Section 706(2)(A), they nonetheless failed to identify any arbitrary or capricious action taken by Defendants. The Amended Complaint claims that Defendants violated the APA by impermissibly using 8 U.S.C. § 1182(f) to refuse Plaintiffs a visa. But the statutory language easily neutralizes that argument: Defendants are statutorily barred from issuing visas to aliens who are ineligible to receive them "under section 1182 of this title [*i.e.*, Title 8], or any other provision of law." 8 U.S.C. § 1201(g).[6] Section 1182 lists many such grounds for ineligibility, including aliens who are ineligible for admission because they are subject to a suspension of entry under Section 1182(f)—including aliens like Plaintiffs who were subject to Subject 2(c) of the executive order.[7]

Although Section 1182(f) does not explicitly equate ineligibility for admission with ineligibility for a visa, that is the most natural reading of Sections 1201(g) and 1182(f). It would make little sense to issue a visa to an alien whom the consular officer knows is barred from admission into the country, only for the alien to actually be denied admission upon arrival. A visa entitles the alien to travel to the United States, but does not entitle the alien to be admitted if, upon arrival, "he is found to be inadmissible." *Id.* § 1201(h). Applying the executive order—or its successor, the Presidential Proclamation—at that time would result in administrative confusion, in spite of Plaintiffs' assurances that they will forgo travel until the Presidential

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[6] More fully, this subsection states:

> No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law[.]

8 U.S.C. § 1201(g).

Proclamation admission restriction is lifted. Proclamation 9645, 82 Fed. Reg. 45,161; *see Hawai'i v. Trump*, No. 17-17168, Doc. 39 (9th Cir. Nov. 13, 2017) (permitting the government to enforce the proclamation against qualifying foreign nationals who lack a credible claim of a bona fide relationship with a person or entity in the United States). Therefore, if an alien is ineligible for admission under any part of Section 1182, he is ineligible to receive a visa. Thus, Plaintiffs, who are ineligible for admission under Section 1182(f), are ineligible for a visa per Section 1201(g). Defendants properly refused the visas under Section 1201(g) and 42 C.F.R. § 42.81(a).[8]

Instead of arguing why Section 1201(g) would not apply, Plaintiffs focus on Section 1182(a). Section 1182(a) ties visa eligibility to admissibility: "Except as otherwise provided in this chapter, *aliens who are inadmissible under the following paragraphs are ineligible to receive visas* and ineligible to be admitted to the United States[.]" 8 U.S.C. § 1182(a) (emphasis added). Plaintiffs argue that "the plain language of § 1182(a) and § 1182(f) make clear that they address different subject matter," because "§ 1182(f) does not mention visas or visa eligibility at all; it speaks only to 'entry.'" Pls.' Br. at 38–39.

In making this argument, Plaintiffs ignore the plain language of Section 1182(a), which ties admissibility (addressed in the paragraphs following Section 1182(a)) together with visa eligibility (addressed in Section 1201(g)). Similarly, Plaintiffs rely on what they term "divergent" structures between Sections 1182(a) and (f). Pls.' Br. at 40. Plaintiffs are essentially

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[7] Plaintiffs do not dispute that the President properly invoked Section 1182(f).

[8] To be clear, admission and visa issuance *are* distinct subject matters. A statute that addresses visas does not necessarily address entry, *e.g.*, 8 U.S.C. § 1202(b) (documentation required to be presented for a visa), and vice versa, *e.g.*, *id.* § 1225(b)(1) (permitting certain applicants for admission to apply for asylum). Here, however, the issues are related by virtue of Section 1201(g).

making a legislative intent argument, but the best expression of legislative intent is the language of the statutes that Congress passed. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987) (applying the assumption "that the legislative purpose is expressed by the ordinary meaning of the words used"). The text of these statutes is stark: Section 1182(a) is clear that an alien who is not permitted to be admitted under a "following paragraph[],"is not eligible to receive a visa. Applied here, when the President suspended the admission of aliens under Section 1182(f), that rendered Plaintiffs inadmissible under Section 1182(a), and so Defendants were required to deny Plaintiffs visas, which they did pursuant to Section 1201(g). There was nothing unlawful about those refusals.[9]

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[9] Plaintiffs dispute that Section 1182(f) is a "following paragraph[]" of Section 1182(a). They argue that "paragraph" is a legal term of art that refers only to numbered statutory subdivisions. Under their reasoning, "following paragraphs" refers to Section 1182(a)(1), Section 1182(a)(2), and so forth, but not Section 1182(f). This argument is as ridiculous as it sounds.

In the context of this case, the "following paragraph[]" language would encompass Section 1182(f). "Following" means "being next in order or time," and "listed or shown next." *Merriam-Webster's Collegiate Dictionary* 486 (11th ed. 2014). "Paragraph" refers to "a subdivision of a written composition that consists of one or more sentences." *Id.* at 898. Neither word appears to have a precise, specialized meaning in the INA. Therefore, Section 1182(f), a statutory subdivision that is shown after Section 1182(a), is a "following paragraph[]" that provides a ground for refusing a visa. Additionally, this reading is consistent with Section 1201(g), which refers to all of Section 1182, and reading the provisions to be consistent makes far more sense than Plaintiffs' cramped reading.

Koons Buick, relied upon by Plaintiffs, Pls.' Br. at 39, did not hold that the term "paragraph" will always, as a matter of law, refer to statutory subdivisions identified by Arabic numbers. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–64 (2004). Rather, it resorted to this approach as part of a multifaceted, "holistic" analysis of an unclear statute that included a detailed study of legislative history. *Id.*; *see also id.* at 66–67 (Kennedy, J., concurring) (noting that the majority opinion avoided the question of whether the term "subparagraph," on its own, could resolve the case, because it was ambiguous). And as the Court noted, Congress has passed statutes that do not apparently adhere to this scheme, like 15 U.S.C. § 1637a(a)(6)(C), *see Koons Buick*, 543 U.S. at 61 n.5. This Court should apply the provision in light of Section 1201(g), and to avoid the unusual anomaly that would result under Plaintiffs' theory, whereby visas must be issued to individuals who may not lawfully be admitted into the United States.

IV. Defendants' Application Of The Executive Order Is Not Impermissible Nationality Discrimination.

Plaintiffs also contend that Defendants' refusal of Plaintiffs' visas constituted nationality discrimination in violation of 8 U.S.C. § 1152(a)(1)(A). Defendants have already responded to these arguments in past briefing. *See, e.g.*, Defs.' Opp. to Pls.' Motion for a Preliminary Injunction at 20–23 (ECF No. 24); Defs.' Mot. to Dismiss at 26–30. Regardless, Plaintiffs' briefing on this point is cursory.

As Defendants have previously explained, there is no conflict between the statute and the application of the executive order here. Section 1152(a) provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's ... nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). That provision operates within the class of persons who are eligible to receive a visa, but it does not limit other provisions of the INA, such as Section 1182(f), that determine which aliens are eligible to receive visas in the first place. Moreover, to hold that Section 1152(a) disallows for nationality based distinctions would make little sense in a case involving the diversity visa program—which explicitly conditions eligibility for the program in part based on nationality. *See id.* § 1152(c). The Court should dismiss Plaintiffs' nationality-discrimination claim.

V. Defendants Need Not Respond To Plaintiffs' Moot Class Certification Motion.

In Plaintiffs' "Response to the Government's October 15, 2017 Status Report" (ECF No. 55), Plaintiffs claim that the Court should treat their class certification motion as conceded "[i]n light of the Government's prolonged and unexplained failure to respond" and "the Government's efforts to stonewall class certification issues." *Id.* at 3.

To the contrary, the Government has not responded to the motion for class certification because the Court effectively stayed briefing on that motion. Hearing Tr. at 59:17–18 (ECF No. 36) ("THE COURT: All right. All right. I will address the motion for class certification in writing[.]"). Similarly, Plaintiffs' counsel expressed at the first preliminary-injunction hearing a desire to "schedule"—not "argue" or "brief"—that motion. *Id.* at 58:9–12 ("[PLAINTIFFS' COUNSEL]: I just wanted to raise ... the motion for class certification. Obviously, we believe this is appropriate for class-wide relief and would hope *to schedule that* quickly." (emphasis added)). The Court has never issued an order as to when Defendants must respond to the class certification motion, and given this Court's statements at past hearings, the Defendants have been appropriately awaiting further guidance.

This was a reasonable decision by the Court because it avoids the need to decide class issues if the Court grants Defendants' motion to dismiss. It also accords with the Local Rules, which permit the Court to order that a ruling on a class certification motion be postponed pending "appropriate preliminary proceedings," such as resolution of a motion to dismiss. LCvR 23.1(b). A decision to postpone also makes sense from this case's current posture, as the Amended Complaint proposes new subclasses not discussed or briefed in the Plaintiffs' previously filed motion for class certification. The Court should therefore ignore Plaintiffs' informal request to act on the class certification motion.[10]

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant their motion and dismiss this case.

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[10] In the alternative, should the Court deem that motion live, Defendants respectfully ask the Court to explicitly hold the motion in abeyance pending ruling on the motion to dismiss, and

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

EREZ REUVENI
Assistant Director

By: */s/ Joshua S. Press*

JOSHUA S. PRESS
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-0106
joshua.press@usdoj.gov

STEVEN A. PLATT
Trial Attorney

Dated: November 13, 2017

Attorneys for Defendants

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if the motion be denied, to set a date certain for Defendants to file a brief in opposition.

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record:

DATED: November 13, 2017

By: */s/ Joshua S. Press*

JOSHUA S. PRESS
Trial Attorney
United States Department of Justice
Civil Division