UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

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INTRODUCTION

Defendants submit this memorandum in support of their Motion to Dismiss Plaintiffs' Amended Complaint (ECF No. 46) because Plaintiffs' claims are nonjusticiable and fail on the merits. This case is moot for two separate reasons: (1) this Court cannot order the relief Plaintiffs seek because the statutory deadline for the State Department to issue Fiscal Year 2017 diversity visas has passed, and (2) Section 2(c) of Executive Order No. 13,780 (the ultimate basis for Plaintiffs' Amended Complaint) expired on September 24, 2017, meaning both that the Plaintiffs are ultimately challenging something that no longer exists and that this Court's condition for potentially granting the relief Plaintiffs seek—that the Supreme Court finds Section 2(c) is unlawful—has not been met. *See Trump v. Int'l Refugee Assistance Project* ("*IRAP*"), — S. Ct. —, 2017 WL 4518553, at *1 (Oct. 10, 2017) (dismissing appeal as moot because Section 2(c) "expired by its own terms").

As even Plaintiffs have acknowledged, diversity-visa applicants are not eligible to receive such a visa after the end of the specific fiscal year for which they were selected. *See, e.g.*, Pls.' Am. Compl. at ¶ 58; *accord* 8 U.S.C. § 1154(a)(1)(I)(ii)(II) ("Aliens who qualify, through random selection, for a visa under section 1153(c) of this title shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected."); 22 C.F.R. §§ 42.33(a)(1) ("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 visa eligibility."), (f). "The statutory language and implementing regulations of the diversity visa program make clear that there are *no circumstances* under which [an alien can] receive a visa through the diversity visa program after his eligibility expired at midnight on September 30[.]" *Mogu v. Chertoff*, 550 F. Supp. 2d 107, 109 (D.D.C. 2009) (emphasis added). "Though

unforgiving, this strict interpretation of the diversity visa statute has been adopted by every Circuit Court to have addressed the issue." *Id.* Because Fiscal Year 2017—the fiscal year for which Plaintiffs were selected—has ended, "[u]nder no circumstances," 22 C.F.R. § 42.33(a)(1), may Defendants issue plaintiffs diversity visas. Thus, their alleged injuries are no longer redressable.

Even if this case were not moot, Defendants' decision to deny Plaintiffs' visa applications would still be nonjusticiable under the longstanding doctrine of consular nonreviewability. *See, e.g.*, *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929). This doctrine preceded the Administrative Procedure Act ("APA") and is an exception to the presumption of judicial review. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160–62 (D.C. Cir. 1999).

Indeed, even if this Court were to reach the merits, it would still need to dismiss this case. For the Plaintiffs whose applications were refused under 8 U.S.C. § 1201(g) for administrative processing, they have failed to state a claim because Defendants' pacing of further adjudicating diversity visas is a discretionary State Department decision not subject to judicial review. *See Beshir v. Holder*, 10 F. Supp. 3d 165, 176–77 (D.D.C. 2014) (holding that unless Congress explicitly legislates otherwise, a court cannot review the pace at which an agency adjudicates applications). And to the extent other Plaintiffs' applications were refused by the State Department under Section 2(c) and did not qualify for a waiver, they were properly denied an immigrant visa because they admittedly had no connection to the United States and were therefore within the ambit the Supreme Court ruled was permissible for the Government to enforce. *See IRAP*, 137 S. Ct. 2080, 2088 (2017) (per curiam) (holding that Section 2(c) "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship

with a person or entity in the United States" but that "[a]ll other foreign nationals are subject to the provisions of EO-2," the executive order in this case).

STATUTORY AND REGULATORY BACKGROUND

Defendants incorporate by reference the "Statutory And Regulatory Background" section in their Response to Plaintiffs' Request for a Preliminary Injunction And Mandamus Relief. *See* ECF No. 24 at 2–11.

FACTUAL BACKGROUND

Plaintiffs are four foreign nationals who were selected in May or July 2016 to apply for a diversity visa. *See* Am. Compl. at ¶ 36. Plaintiffs Almaqrami and Alsakkaf are Yemeni nationals, and Plaintiffs Golsefid and Zadeh are Iranian nationals. *Id*. at ¶¶ 12–19. Both Yemen and Iran were countries covered by the now-expired Section 2(c) of Executive Order No. 13,780, which suspended the admission of nationals from several countries. None of the four Plaintiffs allege in the Amended Complaint a credible claim of a *bona fide* relationship with a person or entity in the United States that would exempt them from Section 2(c). *Id.*

The Amended Complaint does not challenge Executive Order No. 13,780 itself, but solely the State Department's alleged policy of denying diversity visas to aliens who are otherwise eligible to receive a diversity visa on the ground that they are subject to the Executive Order's Section 2(c). *See, e.g.*, *id.* at ¶¶ 10, 59. Plaintiffs contend that such a policy would be arbitrary and capricious in violation of the APA. *Id.* at ¶¶ 54–59. They further allege that if they were statutorily eligible for a diversity visa, the State Department had a nondiscretionary duty to process and issue them a diversity visa prior to September 30, 2017—the end of Fiscal Year 2017. *Id.* at ¶¶ 61–67. Plaintiffs seek mandamus and injunctive relief requiring the State Department to process and issue them diversity visas before that deadline. *Id.* at 18.

PROCEDURAL BACKGROUND

Plaintiff Almaqrami originally brought this lawsuit on August 3, 2017 along with three other families of aliens selected in the Fiscal Year 2017 diversity visa lottery. All Plaintiffs allege that they were being deprived of a diversity visa because of Section 2(c). *See generally* Plaintiffs' Initial Complaint (ECF No. 1.) Those Plaintiffs moved for a preliminary injunction (ECF No. 2). While the motion for a preliminary injunction was still pending, the other three aliens and their families each received diversity visas, mooting their cases. *See* ECF Nos. 32, 39, and 42 (former-plaintiffs' voluntary dismissals).

As the parties' additional status reports have previously explained, the State Department anticipated by September 8 that it would reach the 50,000 statutory cap for fiscal year 2017 and therefore stopped allocating new visa numbers soon thereafter. (ECF No. 47 at 4–5.) As a result, the State Department could no longer allocate any more such numbers to the Plaintiffs' relevant posts, and the posts were out of numbers to issue plaintiffs a visa—even if they were otherwise eligible. *Id.* This is because the relevant statute, 8 U.S.C. § 1153(g), and regulation, 8 C.F.R. § 42.33(c), only permit the State Department to issue diversity visas so long as they estimate that the total will not exceed 50,000. If their projection meets or exceeds that statutory limit, the State Department is statutorily barred from issuing further visa numbers. *See, e.g.*, *Basova v. Ashcroft*, 383 F. Supp. 2d 390, 392 (E.D.N.Y. 2005).

Plaintiff Almaqrami filed an amended complaint on September 22 that joined three new aliens who sought to receive diversity visas for themselves and their families. The Amended Complaint was also brought on behalf of a putative class. *Id.* These three new Plaintiffs never filed a new preliminary injunction motion.

On September 29, the Court granted in part and denied in part the preliminary injunction motion, and directed Defendants to "(1) reserve any unused visa numbers for FY 2017 for processing following the Supreme Court's decision (should the Court rule in Plaintiffs' favor); and (2) report any unused visa numbers to the court by October 15." ECF No. 49 at 13.

Less than two weeks later, on October 10, after Section 2(c) of the Executive Order expired, the Supreme Court in *IRAP* vacated the Fourth Circuit's judgment below, which enjoined the suspension of admission of aliens from six specific countries. 2017 WL 4518553, at *1. The Supreme Court instructed the Fourth Circuit to dismiss the case as moot. *Id.*

On October 15, per this Court's order, Defendants advised the Court that 27,241 diversity-visa numbers for Fiscal Year 2017 were returned unused, and that 49,976 diversity visas were actually issued. ECF No. 52.

STANDARDS OF REVIEW

I. Dismissal Under Federal Rule of Civil Procedure 12(b)(1).

A motion to dismiss under Rule 12(b)(1) tests whether the court has subject-matter jurisdiction over an action. A court has subject-matter jurisdiction only when the plaintiffs establishes that he has standing to maintain the suit. *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). To make that showing, plaintiffs must show: "(1) an 'injury in fact' that is 'concrete and particularized' as well as 'actual or imminent'; (2) a 'causal connection' between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, 'that the injury will be redressed by a favorable decision.'" *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)).

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the court need not accept factual inferences drawn by plaintiffs if those inferences are

not supported by facts alleged in the complaint, nor must the [c]ourt accept plaintiff's legal conclusions." *Disner v. United States*, 888 F. Supp. 2d 83, 87 (D.D.C. 2012) (quoting *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006)).

II. Dismissal Under Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim on which relief can be granted, the Court accepts as true all well-pleaded facts and allegations in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the court may take judicial notice. *See Hassan v. Holder*, 793 F. Supp. 2d 440, 445 (D.D.C. 2011). The court need not, however, accept a plaintiff's legal conclusions. *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id*. at 679 (citing *Twombly*, 550 U.S. at 556). The facts alleged must allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *See Rollins v. Wackenhut Servs., Inc*., 703 F.3d 122, 129–30 (D.C. Cir. 2012).

III. Review Of Agency Action

Because the entire case on review under the APA is a question of law, there is no inherent barrier to reaching under a 12(b)(6) motion to dismiss the merits of a plaintiff's claim that the agency acted contrary to law. *See Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Under the APA, the court may review a challenge to a final agency action by an aggrieved party, *see* 5 U.S.C. §§ 702, 704, but the court may set aside a final agency

action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). This is a "deferential" standard, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007), that "presume[s] the validity of agency action," *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999), and precludes the Court from substituting its judgment for that of the agency, *see Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009).

IV. Review Under The Mandamus Act

The extraordinary writ of mandamus is available "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The writ of mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotations and citation omitted); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Mandamus relief is available only if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005) (citations omitted). Thus, "the standards for obtaining relief [through mandamus and through the APA] are essentially the same." *Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir. 2010) (citing *In re Core Commc'ns Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)).

ARGUMENT

The Court should dismiss the Amended Complaint under Rule 12(b)(1) because the end of the fiscal year and the expiration of Section 2(c) have mooted this case—depriving Plaintiffs of standing. This case is also nonjusticiable because the doctrine of consular nonreviewability precludes courts from adjudicating visa denials, especially where there is no mandatory timeline

and if U.S. entities' rights are involved. Alternatively, the Court should dismiss the Amended Complaint without leave to amend under Rule 12(b)(6) because, on the merits, Plaintiffs have failed to state a claim.

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

A. The Plaintiffs' Claims Became Moot On October 1, 2017.

Defendants cannot issue diversity visas after the end of the fiscal year. Section 1154 clearly states that "[a]liens who qualify, through random selection, for a [diversity] visa under section 1153(c) … 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); *see also* 22 C.F.R. § 42.33(a)(1). Plaintiffs' claims for diversity visas, therefore, became moot on the day Fiscal Year 2017 ended: September 30, 2017. *See Nyaga v. Ashcroft*, 323 F.3d 906, 909, 915 (11th Cir. 2003) (per curiam) (citing 22 C.F.R. §§ 42.33(a)(1), (e), & (g)) (holding that consistent with Congress's "inten[t] to place an ultimate deadline on visa eligibility in order to bring closure to each fiscal year's diversity visa program," "[t]he State Department has promulgated regulatory provisions that automatically revoke diversity visa petitions and prevent the issuance of [diversity] visas … after midnight of the final day of the relevant fiscal year").

The Eleventh Circuit made this clear in *Nyaga*. Much like these Plaintiffs, the *Nyaga* plaintiffs sought an order to compel government officials to adjudicate their diversity visa applications after the end of the relevant fiscal year. *Id.* at 915–16. Although the district court granted that relief, *Nyaga v. Ashcroft*, 186 F. Supp. 2d 1244, 1256–57 (N.D. Ga. 2002) (requiring agency to adjudicate the plaintiffs' "diversity visa application … on the merits as if [the relevant] fiscal year … had not yet expired"), the Eleventh Circuit vacated the district court's order and remanded it with instructions to dismiss the action as moot, 323 F.3d 906.

The court of appeals held that because the fiscal year had already ended, the plaintiffs were no longer able to obtain a diversity visa due to the program's temporal limitation, which rendered moot the ultimate relief sought. *Id.* at 914. Because the statutory framework made it impossible for the State Department to provide the plaintiffs with diversity visas for the relevant fiscal year, the lower court could no longer provide meaningful relief and there was no live "case or controversy" left to decide. *Id.* at 916. Courts across the country have embraced that reasoning. *See, e.g.*, *Mwasaru v. Napolitano*, 619 F.3d 545, 550–51 (6th Cir. 2010) (agreeing with *Nyaga* and noting that "[a]ll circuits that have addressed this issue have read the plain language of 8 U.S.C. § 1154(a)(1)(I)(ii)(II) in the same way even in the wake of what may seem to be harsh results"); *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006) ("The federal courts … do not have the authority to hear these claims because, under the structure established by the applicable statutes, they are now moot."); *Coraggioso v. Ashcroft*, 355 F.3d 730, 734 (3d Cir. 2004) ("If Congress had used different language, our analysis may be different. We are compelled, however, to interpret the statute as written."); *Carillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003) ("Carrillo-Gonzalez's eligibility for a visa under the D[iversity]V[isa] Lottery Program expired on September 30, 1997, long before the I[mmigration]J[udge] issued his decision. The I[mmigration]J[udge] was without authority to grant the adjustment."); *Keli v. Rice*, 571 F. Supp. 2d 127, 132 (D.D.C. 2008) ("The plain language of the statute makes clear that 'eligibility for a [diversity visa] ... ceases at the end of the fiscal year' and that '[u]nder 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.'" (quoting 22 C.F.R. § 42.33(a)(1))); *Mogu*, 550 F. Supp. 2d at 109 (dismissing complaint as moot because "[t]he diversity visa program is a limited-time offer").

These principles establish that Plaintiffs' case is moot. Regardless of whether the number of diversity visas issued in the fiscal year fell below the statutory cap, Defendants may not issue diversity visas after midnight on September 30. Because there is no "likelihood" that Plaintiffs' alleged injury can be "redressed by a favorable decision," *Ark Initiative*, 749 F.3d at 1075, this case is moot and must be dismissed.

B. Principles Of Equity Cannot Overcome The Statutory Deadline.

Plaintiffs try to circumvent the unambiguous language of Section 1154 that moots their case by appealing to the Court's equitable powers. Principles of equity do not override Section 1154's plain language and cannot breathe life into this moot case. Contrary to the Plaintiffs' misapprehension, equity courts do not dispense "'equity [which] varies like the Chancellor's foot.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Gee v. Pritchard*, 36 Eng. Rep. 670, 674 (1818)). Instead, they must adhere to the established principles that govern their authority. 1 J. Story, *Equity Jurisprudence* 20 (Lyon ed. 1918). One fundamental principle of modern equity jurisprudence is that "[e]quity follows the law." G. McDowell, *Equity and the Constitution* 5 (1982). This means that equity courts are bound by statutory constraints no less than are law courts. *See Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873) ("A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law."); *accord Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017) (noting that "if the necessary means [a]re unlawful, [a] Court could not have mandated them" because "equity courts, like any other, may not order parties to break the law"). As Justice Story once put it, equity is "compelled to stop where the letter of the law stops." *See* Story, *supra* at 16. The letter of the law now precludes the result Plaintiffs seek.

Applying these venerable principles, the Supreme Court has instructed lower courts to not use equity to alter statutory provisions. *See INS v. Pangilinan*, 486 U.S. 875, 883–85 (1988); *INS v. Hibi*, 414 U.S. 5, 7–8 (1973). The Supreme Court affirmed this rule in *INS v. Pangilinan*. In *Pangilinan,* sixteen Filipino nationals sought from the district court a declaration of citizenship under a statute that established a five-year period, ending December 31, 1946, in which aliens serving honorably in the United States Armed Forces during World War II could apply for naturalization. 486 U.S. at 877–80. The plaintiffs did not comply with this deadline, but contended that because no immigration official was present in the Philippines to act upon naturalization petitions from October 1945 to August 1946, they were entitled to file for citizenship after the deadline had passed. The Ninth Circuit agreed, finding the Attorney General's failure to make immigration officials available in the Philippines for a nine-month period to have been in violation of the statute. *Pangilinan v. INS*, 796 F.2d 1091 (9th Cir. 1986). The Supreme Court reversed, applying the well-established principles that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law," and 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[.]" 486 U.S. at 883 (citing *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893); *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874)). In dismissing the claims of all sixteen aliens, the Court stated that the 1946 deadline defined a congressionally-established policy decision that courts could not override, either "by application of the doctrine of estoppel, [or] by invocation of equitable powers, [or] by any other means." *Id.* at 884.

That reasoning forecloses Plaintiffs appeal to equity here. Congress plainly stated that aliens who are randomly selected for further consideration under the diversity visa program

"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); *see also* 22 C.F.R. § 42.33(a) (1), (d), (f). Equity does not permit a court to override such a clear statutory mandate. *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").

Thus, even if there are unused, available diversity visas for Fiscal Year 2017, this Court cannot use its equitable powers to order Defendants to issue diversity visas after the end of the fiscal year, in violation of the statutory deadline set by Congress. The Ninth Circuit affirmed this very same conclusion in the diversity-visa context, explaining that *Pangilinan* means "that the doctrine of equitable tolling has no application in cases involving the Congressionally-mandated, one-year deadline of the D[iversity]V[isa] Lottery Program." *Carillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003). Many other courts have ruled to the same effect. *See, e.g.*, *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002); *Ahmed v. DHS*, 328 F.3d 383, 388 (7th Cir. 2003); *Ticheva v. Ashcroft*, 241 F. Supp. 2d 1115, 118–19 (D. Nev. 2002); *Zapata v. INS*, 93 F. Supp. 2d 355, 358 (S.D.N.Y. 2000) (Mukasey, J.).

The two cases Plaintiffs have relied upon may appear to provide an exception to this rule, but those courts issued their orders to adjudicate visas *prior* to the expiration of the statutory time frame with the reasonable expectation that they would be executed. In other words, "Congress provides the Court with jurisdiction to order [the Government] to adjudicate the Plaintiffs' status *while* [the agency] still maintains the statutory authority to issue the visas." *Perejoan–Palau v. USCIS*, 684 F. Supp. 2d 225, 229 (D.P.R. 2010) (emphasis added) (citing

Iddir, 301 F.3d at 501 n.2). The plain language of Section 1154 therefore precludes Plaintiffs from receiving any redress for their alleged injuries, and this case is moot.

C. The Cases Upon Which Plaintiffs Rely Are Inapposite.

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 Servs.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004), for the proposition that judicial intervention prior to the end of Fiscal Year 2017 may allow for a different remedial outcome. *E.g.*, ECF No. 49 at 11–12. But those cases relied on the court's inherent authority to vindicate its orders—not equity overriding the plain language of a statute—and therefore provide no help to Plaintiffs here.

In *Paunescu*, the plaintiff was selected as a winner for the 1998 diversity-visa lottery program. 76 F. Supp. 2d at 898. The plaintiff submitted his paperwork for adjustment of status to then Immigration and Nationality Service on time and was told to wait for the agency to adjudicate his application. *Id.* After complying with three separate requests to supply his fingerprints, the plaintiff filed an action on September 23, 1998 seeking a preliminary injunction and the court ordered the defendants two days later to "immediately complete adjudication of the applications for adjustment status … without delay and by no later than September 30, 1998." *Id.* (internal quotations and citations omitted). When the defendants failed to do so, the court cited the violation of its prior order to "immediately complete adjudication of the applications" that as authority to order defendants to act, even though it was after September 30th. *Id.*; *see also Keli*, 571 F. Supp. 2d at 135 (noting that although "[i]t is … conceivable that a district court could maintain jurisdiction and reject a mootness challenge," this could only be done "if it took some affirmative action to *compel adjudication* of a D[iversity-]V[isa] application *within the fiscal year during which the aggrieved applicant was eligible*" (emphases added)).

The same situation played out in *Przhebelskaya*, where the plaintiffs came into court shortly before the expiration of the fiscal year and sought to compel the United States Citizenship and Immigration Services to adjust their status. On September 24, 2003, the court issued an order compelling the agency to process plaintiffs' applications. 338 F. Supp. 2d at 400. After the defendants failed to process all of the plaintiffs' applications in a timely manner, the court compelled the government to adjust the status of certain plaintiffs whose applications had still not been processed—similarly relying upon the court's authority to enforce its order to adjudicate the applications before the end of the fiscal year: "The existence of a prior order to compel [adjudication] is the dispositive factor in a case such as this one." *Id.* at 404 n.6. *Przhebelskaya* does not help Plaintiffs because in that case "the plaintiffs had filed the complaint prior to September 30 *and* a court had granted an order compelling defendants to adjudicate their applications before September 30." *Mwasaru*, 619 F.3d at 552.

The takeaway from *Paunescu* and *Przhebelskaya* therefore is not that equity overcomes statutory limitations on relief, but rather that courts have inherent power to enforce their prior orders. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). "The [*Paunescu* and *Przhebelskaya* plaintiffs] had each convinced the district court[s] to issue … writ[s] of mandamus *while the Government still had time to review their application and issue a diversity visa*." *Gebre v. Rice*, 462 F. Supp. 2d 186, 190 (D. Mass. 2006) (emphasis added). Here, by contrast, there is no comparable order to readjudicate or issue visas. This Court cannot direct the Executive to set aside a diversity visa number and now issue a visa.

II. The Amended Complaint Is Also Moot Because The Operative Provision Of The Executive Order That Plaintiffs' Amended Complaint Challenges Has Expired By Its Own Terms.

Even if the Court does not find this case moot based on Section 1154's September 30 deadline, this case is moot for the independent reason that the basis for Defendants' alleged unlawful action no longer exists. Standing must exist throughout the entirety of a litigation. *K.B. v. District of Columbia*, No. 13-cv-0649, 2015 WL 5191330, at *7 (D.D.C. Sept. 4, 2015) ("But even if standing once existed, courts must take additional pains to ensure that jurisdiction continues to exist throughout all stages of the litigation." (citing *Davis v. FEC*, 554 U.S. 724, 732–33 (2008))).

Plaintiffs' Amended Complaint indirectly challenges Section 2(c) of Executive Order No. 13,780 by alleging that Defendants violated the law by applying Section 2(c) to Plaintiffs' diversity-visa applications. *See* Pls.' Am. Compl. at ¶¶ 28, 39. But that provision expired on September 24, 2017 and was no longer operative at the time this Court entered its Order on September 29, 2017. Thus, even if Plaintiffs' purported chain of causation caused them injuries when they filed the Amended Complaint, the allegedly unlawful policy mooted out after September 24th. As the D.C. Circuit recently explained, "[i]f the challenged conduct is at best an indirect or contributing cause of the plaintiff's injury—*i.e.,* if the injury may or may not follow from the conduct, based on a 'chain of contingencies,'—the plaintiff faces an uphill climb in pleading[.]" *West v. Lynch*, 845 F.3d 1228, 1236 (D.C. Cir. 2017) (internal citations omitted). That uphill climb has not been met in this case because the policies Plaintiffs challenge expired in late September.

Plaintiffs claim that this case is not moot because the President issued the *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into*

the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). (*See* ECF No. 48.) But far from continuing the validity of Plaintiffs' Amended Complaint, that Proclamation confirms that their claims are actually moot. This is because when a challenged government regulation is replaced by one that is not substantially similar, any judicial decision regarding the prior policy is improper. *E.g.*, *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (finding a challenge to a Pennsylvania statute to be moot because the state had since enacted a new statute and courts are "apply the law as it is now, not as it stood below").

In fact, Section 2(c)'s expiration was enough for the Supreme Court to dismiss the *IRAP* case as no longer presenting a "live case or controversy." *IRAP*, 2017 WL 4518553, at *1. Notably, the *IRAP* Court's decision relied upon its previous decision in *Burke v. Barnes*, 479 U.S. 361, 363 (1987), which is telling and should guide this Court's disposition here. *Burke* involved a challenge to President Reagan's "pocket veto" of a bill "conditioning the continuance of United States military aid to El Salvador upon the President's semiannual certification of El Salvador's progress in protecting human rights." 479 U.S. at 361–62. However, at the end of Fiscal Year 1984, a few weeks after the D.C. Circuit entered its judgment, the "bill in question expired by its own terms." *Id.* at 363. The Court explained, "it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Id.* This reasoning applies with equal force here. Plaintiffs no longer have standing to challenge Section 2(c) of Executive Order 13,780, and their claims must be dismissed.

Finally, Plaintiffs' case is not saved from mootness by the Court's preliminary-injunction order of September 29, which instructed Defendants to reserve diversity-visa numbers for Plaintiffs in the event the Supreme Court found Section 2(c) of the Executive Order to be

unlawful. (ECF No. 50.) First, as discussed above, even if Defendants had unused, available visa numbers at the end of the fiscal year, Defendants cannot issue diversity visas for Fiscal Year 2017 after September 30, 2017. Second, this Court, prior to September 30, did not order Defendants to readjudicate the Plaintiffs' diversity-visa applications before the end of the fiscal year. *P.K. v. Tillerson*, — F. Supp. 3d —, 2017 WL 4355929, at *6 (D.D.C. Sept. 29, 2017) (recognizing the distinction between the original relief sought by the Plaintiffs (the processing of their diversity-visa applications) and their request for the alternative relief (the reserving of unused visa numbers)); *cf. Paunescu*, 76 F. Supp. 2d at 898 (enforcing an order of September 25 for defendant agency to complete the adjudication of plaintiff's adjustment of status); *Przhebelskaya*, 338 F. Supp. 2d at 400 (enforcing an order of September 24 to compel the defendant agency to process plaintiffs' applications).

And most importantly, the Supreme Court never fulfilled the condition laid out regarding whether "the Supreme Court finds … Executive Order [No. 13,780] to be unlawful," ECF No. 50. *Cf. In re Guantanamo Bay Detainee Litig.*, 706 F Supp. 2d 120, 123 (D.D.C. 2010) ("As mentioned in the February 4 Order, however, the Court need not rely on Rule 62(c) to dissolve the injunction because it was set to *dissolve by its own terms*."). The Supreme Court declined to make that finding. This ultimately leaves only the plain language of the diversity-visa statute, which prevents Defendants from issuing the diversity visas Plaintiffs seek. *See Nyaga*, 323 F.3d at 914; *Iddir*, 301 F.3d at 502 (Flaum, J., concurring); *Ticheva*, 241 F. Supp. 2d at 1118; *Zapata*, 93 F. Supp. 2d at 358. Therefore, this case is still moot, notwithstanding the Court's prior order.

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

This case is also nonjusticiable based on the doctrine of consular nonreviewability. Although this Court's prior order disagreed, *P.K.*, 2017 WL 4355929, at *8–9, Defendants

respectfully ask the Court to revisit that analysis. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Trans World Airlines*, 655 F.2d 155, 159 (8th Cir. 1981) (R. Arnold, J.) ("[F]indings [and] observations as to the governing law made in this [preliminary injunction] opinion[] are tentative and provisional, in the sense that different findings or conclusions might be warranted after a trial on the merits."). In particular, Defendants believe the binding circuit precedent, prior decisions of this district court, and case law dictate a contrary conclusion regarding Plaintiffs, who admittedly have no connection to the United States.

The denial or revocation of a visa for an alien abroad "is not subject to judicial review ... unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159–60 & n.9 (discussing the history of the doctrine). Indeed, the Supreme Court "ha[s] long recognized the power to … exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As Justice Harlan explained: "The power … to exclude aliens altogether from the United States or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced *exclusively through executive officers without judicial intervention*, is settled by our previous adjudications." *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (emphasis added); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *Mansur v. Albright*, 130 F. Supp. 2d 59, 62 (D.D.C. 2001) (describing this doctrine as comporting with "ancient principle of international law that the 'power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government'" (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972))). Acting on this power, Congress has affirmatively declined to provide for

judicial review of decisions to exclude aliens abroad. *See, e.g.*, 6 U.S.C. § 236(f); *see id*. §§ 236(b)(1), (c)(1).

Courts have referred to that rule as "the doctrine of consular nonreviewability," *id*., but the principle is not limited to consular officers refusing visa applications. Instead, it applies regardless of the manner in which the executive branch denies admission to an alien abroad. *See, e.g.*, *Mandel*, 408 U.S. at 766 (in the seminal modern application of this case, analyzing the decisionmaking of officials at the Department of Justice, not consular officers); *see also Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998) (R. Arnold, J.) (applying the doctrine to a non-consular officer's decision who was the "functional equivalent … because he [wa]s an Executive Branch official … deciding questions of admissibility brought before him by aliens who are also located outside the United States").

Plaintiffs' Amended Complaint rests on the view that in the APA, Congress has authorized judicial review of their visa applications. But the APA does not apply "to the extent that ... statutes preclude judicial review," 5 U.S.C. § 701(a)(1), which "is determined not only from [a statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved," *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Moreover, the APA itself contains a "qualifying clause" that preserves "other limitations on judicial review" that predated the APA. *Saavedra Bruno*, 197 F.3d at 1158 (quoting 5 U.S.C. § 702(1)). Here, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of []consular visa decisions." *Id*. at 1160. At a minimum, the general rule of "nonreviewability ... represents one of the 'limitations on judicial review' unaffected by Section 702's opening clause[.]" *Id*.

Indeed, when the Supreme Court held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the APA, *see Brownell v. Tom We Shung*, 352 U.S. 180, 184–86 (1956), Congress responded by abrogating that decision. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653; *Saavedra Bruno*, 197 F.3d at 1157–62 (recounting history); *El-Hadad v. United States*, 377 F. Supp. 2d 42, 47–48 n.5 (D.D.C. 2005). The House Report accompanying the abrogating statute explained that APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess., at 33 (1961). Because an alien present in the United States cannot invoke the APA to obtain review—as Congress prescribed in 1961—it would does not follow that aliens abroad—in contravention of the doctrine of consular nonreviewability, no less—could do so. *See Chinese Am. Civic Council v. Att'y Gen.*, 396 F. Supp. 1250, 1251 (D.D.C. 1975) (reflecting a policy "against affording a Federal forum for a person anywhere in the world challenging denial of entry or immigration status"), *aff'd*, 566 F.2d 321, 324 (D.C. Cir. 1977).

Plaintiffs and the Court's prior Order state that the non-reviewability doctrine does not apply to challenges against a governmental policy, *P.K.*, 2017 WL 4355929, at *9. That is incorrect because "courts have repeatedly rejected 'recasting' of complaints by plaintiffs to 'circumvent this well-established doctrine of consular nonreviewability by claiming that they are not seeking a review of a consular officer's decision,' and have applied the doctrine of consular non-reviewability in suits against the Secretary of State and consulates alike." *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 4 (D.D.C. 2009) (quoting *Chun v. Powell*, 223 F. Supp. 2d 204, 206–07 (D.D.C. 2002)) (internal citations omitted). Indeed, this argument falters at the start

because "courts lack subject matter jurisdiction to review the visa-issuing process" itself. *Zhang v. USCIS*, No. 05-cv-4086, 2005 WL 3046440, at *6 (S.D.N.Y. Nov. 8, 2005); *accord Saleh v. Holder*, 84 F. Supp. 3d 135, 139 (E.D.N.Y. 2014). Indeed, any reliance on the distinction between the "Plaintiffs challenge [to] the State Department's policy, not the discretion of a specific consular officer," *P.K.*, 2017 WL 4355929, at *9, turns the doctrine on its head. *See Mansur*, 130 F. Supp. 2d at 63 (applying the doctrine to conclude "that the Secretary of State, if acting as Secretary, not as a consular officer, in exercise of the Constitutional and inherit authority of the sovereign in the field of foreign affairs, is immune … from judicial review by Constitutional separation of powers principles, at least until Congress says otherwise"). The doctrine does not exist solely because of a consular officer's expertise—it is rooted in plenary power and deference to the political branches' exercise of sovereignty.

Judge Huvelle's opinion in *Chun* and its discussion of *Garcia v. Baker*, 765 F. Supp. 426 (N.D. Ill. 1990) is instructive here. *See Chun*, 223 F. Supp. 2d at 206–07. *Garcia* involved a challenge to the State Department's binding legal opinion upon its consular officers. *Garcia*, 765 F. Supp. at 428. Ultimately, the *Garcia* court rejected "Plaintiffs['] attempt to avoid the consular nonreviewability doctrine by maintaining that they [we]re not seeking review of the consular officer's decision" but that they were instead merely "challenging the State Department's [allegedly unlawful] legal opinion[.]" *Id.* This limit on the Court's power applies even where the denial was incorrect as a matter of law. Put another way, consular nonreviewability applies to bar judicial review of a decision of a consular officer to grant or deny a visa even where the consular officer's decision is 'erroneous, arbitrary, or contrary to agency regulations." *Aquino v. ICE*, No. 09-cv-0912, 2009 WL 1406625, at *2 (E.D.N.Y. May 18, 2009); *Ngassam v. Chertoff*, 590 F. Supp. 2d 461, 466–67 (S.D.N.Y. 2008).

Simply put, these decisions, along with past decisions of this district court, stand for the principle that "the decision to exclude aliens from the United States or to prescribe the terms and conditions that govern their entry is *exclusively an executive decision*." *El-Hadad*, 377 F. Supp. 2d at 48 (citing *Chun*, 223 F. Supp. 2d at 206). "Such attempts to manufacture subject matter jurisdiction by recasting a complaint have consistently been rejected by the courts." *Chun*, 223 F. Supp. 2d at 206. "More to the point in this case, the doctrine also applies where a plaintiff attempts to circumvent the doctrine by claiming the he is not seeking a review of the consular officer's decision, but is challenging some other, related aspect of the decision." *Malyutin v. Rice*, 677 F. Supp. 2d 43, 46–47 (D.D.C. 2009). Therefore, Plaintiffs' challenge to Defendants' visa-issuing practices are nonjusticiable.

IV. The Plaintiffs Claims Against The Pacing Of Further Adjudication Of Their Applications Must Fail.

Turning to the merits, Plaintiffs' claims against the pacing of further adjudication of their visa applications fail. The action that the Plaintiffs seek to compel is not just administrative processing of their diversity visa applications; they essentially argue that Defendants did not further adjudicate their diversity visa applications fast enough after their initial refusal. But before Plaintiffs are entitled to relief under either the APA or the Mandamus Act, they must point to a plainly defined duty of the State Department to readjudicate their visa applications by the end of the fiscal year. Plaintiffs have failed to do so. Indeed, the State Department has been clear with Plaintiffs that their selection in the diversity visa lottery gave them only a chance to apply for a visa—not a right to visa issuance. And the diversity visa system does not specify any maximum length of time for the State Department to act following an initial refusal of a visa application under 8 U.S.C. § 1201(g).

The APA does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The Supreme Court has clarified that "the only agency action that can be compelled under the APA is action legally *required*.... Thus, a[n APA] 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); *accord Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008). Nor is mandamus appropriate in the administrative context that Plaintiffs have presented, because "the common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear non-discretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616–17 (1984) (citations omitted); *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 403 (1976).

In this case, Plaintiffs cannot identify any non-discretionary duty held by Defendants to further Plaintiffs' visa applications after their initial refusals under 8 U.S.C. § 1201(g) at the rate they would have preferred, because the diversity-visa program does not specify any timeline or maximum length of time for administrative processing. The State Department lacks authority to issue diversity visas after the end of the fiscal year. It cannot, and is not required to, find all diversity visa applicants eligible and issue them visas before that date. Indeed, the State Department selects more aliens than the number of visas it may issue, in part because of the recognition that not all applicants will be able to establish eligibility and be issued visas by the end of the fiscal year. The diversity-visa statute clearly contemplates that not all aliens selected in the diversity visa lottery will be issued a diversity visa by the end of the fiscal year, because the statute discusses only the consequences for the *alien*, not the agency, if adjudication does not complete by then. 8 U.S.C. § 1154(a)(1)(I)(i)(II) ("Aliens who qualify [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."). This means that Defendants do not have any "clear, nondiscretionary duty" required for Plaintiffs to receive APA or mandamus relief.

Indeed, this district court has previously decided that "[i]n the absence of statutorily prescribed time limitations …, it is difficult to determine how the pace of processing an application could be anything other than discretionary." *Orlov v. Howard*, 523 F. Supp. 2d 30, 35 (D.D.C. 2007); *Beshir v. Holder*, 10 F. Supp. 3d 165, 176–77 (D.D.C. 2014) ("The absence of an applicable timeframe for the adjudication of adjustment applications supports the conclusion that the pace of adjudication is discretionary and that the Court lacks jurisdiction to hear Beshir's claim of unreasonable delay."); *see also Zhang v. Chertoff*, 491 F. Supp. 2d 590, 594, (W.D. Va. 2007) ("Congress … could have expressly offered a standard with which to measure the lapse of time[.]"). Because nothing binds the State Department to a timeframe for readjudicating visa applications denied under 8 U.S.C. § 1201(g) for administrative processing, "plaintiff[s] plainly cannot assert that [the agency] has failed to adjudicate [their] application[s] within a time period in which it was required[.]" *Orlov,* 523 F. Supp. 2d at 37. The same is true regarding the pacing of administrative processing challenged here and was a point of distinction relied upon by Plaintiffs' principal authority in their preliminary injunction motion regarding the State Department's discretion. *See* Pls.' Mot. at 12 (ECF No. 2); *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Kerry,* 168 F. Supp. 3d 268, 294 n.24 (D.D.C. 2016) ("The Government points to *Orlov v. Howard* in support of its argument that the speed of application adjudication is discretionary, but that case also relies on the *absence of a Congressionally-prescribed timeline*, and therefore is also inapplicable." (emphasis added)). The reasoning in *Nine Iraqi Allies* has no application here because Plaintiffs' case involves *no*

congressionally-prescribed timeline, meaning that this district court's past decisions in *Orlov* and *Beshir* should control.

As has been true for decades within the immigration context, "matters solely within the [agency]'s discretion ... are not reviewable under the Administrative Procedure Act or 28 U.S.C. § 1361.... [and] the judicial creation of such a duty would have the potential for mischievous interference with the functioning of already overburdened administrative agencies." *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1182 (2d Cir. 1978) (citations omitted). 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. This challenge therefore fails to remove Plaintiffs from the ambit of consular nonreviewability. In the alternative, it fails to state a claim on which relief can be granted, and must be dismissed under Rule 12(b)(6).

V. The Denials Of Plaintiffs' Applications Were In Accord With Both The Immigration And Nationality Act And The Supreme Court's Stay.

Finally, even if the Court were to assume jurisdiction and rule that the State Department had a nondiscretionary duty to adjudicate all diversity-visa applicants' applications before September 30 every fiscal year, the Plaintiffs claims must still fail as a matter of law. Plaintiffs contend that the State Department's policy of denying diversity visas to applicants they believe are eligible is contrary to law because (1) its denial of visas to nationals of Iran or Yemen pursuant to the State Department's carrying out of Section 2(c) of the former Executive Order violated the Immigration and Nationality Act's ("INA") bar on visa-issuance nationality discrimination; and (2) it must issue visas to otherwise qualified applicants. Each claim is untenable.

A. There Is No Conflict Between 8 U.S.C. § 1152(a)(1)(A) And The President's Suspension Authorities

Plaintiffs' argument on this point—that Section 1152(a)(1)(A) precludes the President from using any other provision of the INA to impose nationality-based restrictions—necessarily creates a conflict because nationality-based restrictions would otherwise fall naturally within the plain terms of Sections 1182(f) and 1185. Plaintiffs' argument is therefore contrary to the well-settled canon that "when two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (citation omitted). Here, there is an easy way to harmonize the statutory provisions because they operate in two different spheres: Sections 1182(f) and 1185(a)(1) limit the universe of individuals eligible to receive visas, and Section 1152(a)(1)(A) prohibits discrimination on the basis of nationality within that universe of eligible individuals.

The legislative history shows that Congress understood the INA to operate in this manner. The 1965 amendments (of which Section 1152(a)(1)(A) was integral) were designed to eliminate the country-quota system previously in effect—*not* to limit any of the pre-existing provisions like Sections 1182(f) or 1185(a)(1) addressing the admission of aliens or protecting national security. *See* H. Rep. No. 745, 89th Cong., 1st Sess., at 13 (1965) ("It should be emphasized that there has been no relaxing of the qualitative criteria for admissibility to the United States and that no relaxation of the mental, health, moral, economic, and security criteria is proposed. The bill is not a comprehensive overhaul of the immigration laws."); S. Rep. No. 748, 89th Cong., 1st Sess., at 11 (1965) (similar). The history expressly states that the new immigrant-selection system (now codified in Section 1152) was intended to operate only as to those *otherwise eligible for visas*. *See* H. Rep. No. 745, 89th Cong., 1st Sess., at 12 (1965) ("Under this [new] system, selection *from among those eligible to be immigrants* ... will be based

upon the existence of a close family relationship to U.S. citizens or permanent resident aliens and not on the existing basis of birthplace or ancestry." (emphasis added)); S. Rep. No. 748, 89th Cong., 1st Sess., at 13 (1965) (similar). There is thus no conflict on this point between the INA's separate provisions: Sections 1182(f) and 1185(a)(1) limit the universe of potentially eligible immigrants, and Section 1152(a)(1) prohibits discrimination within that universe of eligible immigrants.

Historical practice also confirms this interpretation. First, with respect to Section 1185(a), in 1979 President Carter directed the Secretary of State and the Attorney General to adopt "limitations and exceptions" regarding "entry" of "Iranians holding nonimmigrant visas." Executive Order No. 12,172, 44 Fed. Reg. 67947 (Nov. 26, 1979); *see also Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979). President Carter subsequently amended that directive to make it applicable to all Iranians. *See* Executive Order No. 12,206, 45 Fed. Reg. 24101 (Apr. 7, 1980). Although President Carter's Order itself did not deny or revoke visas to Iranian nationals by its terms, he simultaneously explained how the new measures would operate: the State Department would "invalidate all visas issued to Iranian citizens for future entry into the United States, effective today," and "w[ould] not reissue visas, nor w[ould] [it] issue new visas, except for compelling and prove humanitarian reasons or where the national interest of our own country requires." The American Presidency Project, Jimmy Carter, *Sanctions Against Iran: Remarks Announcing U.S. Actions* (Apr. 7, 1980), http://www.presidency.ucsb.edu/ws/?pid=33233 (last visited Oct. 20, 2017). And that is how the State Department implemented it. *See* 45 Fed. Reg. 24,436 (Apr. 9, 1980).

Similarly, President Reagan invoked Section 1182(f) to suspend immigrant the admission of "all Cuban nationals," subject to exceptions. Proclamation No. 5,517. He and other Presidents

also invoked it to suspend the admission of officials of particular foreign governments. *See, e.g.*, Proclamation No. 6,958 (Nov. 26, 1996) (Sudanese government officials); Proclamation No. 5887 (Oct. 26, 1988) (Nicaraguan government officials). And the Supreme Court in *Sale v. Haitian Centers Council, Inc.* deemed it "perfectly clear" that Section 1182(f) would authorize a "naval blockade" against illegal migrants from a particular country. 509 U.S. 155, 187 (1993). Thus, Presidents have invoked Sections 1182(f) and 1185(a)(1) to draw distinctions based in part on nationality.

Accordingly, neither historical practice nor traditional canons of statutory construction support reading Section 1152(a)(1)(A) as foreclosing the President from adopting nationality-based restrictions under Sections 1182(f) or 1185(a)(1). Section 1152(a)(1)(A) still has meaningful effect—to wit, preventing discrimination on the basis of nationality within the universe of otherwise eligible immigrants—but it does not limit the President's authority under Section 1182(f) or 1185(a)(1).

Even if Plaintiffs were correct that there is a conflict between Section 1152(a)(1)(A)'s non-discrimination provision and the suspension authorities in Sections 1182(f) and 1185, the suspension authorities would prevail. This is because even though 1152(a)(1)(A) was enacted after Section 1182(f), that is not true for Section 1185(a)(1), which was modified to its current form in 1978. *See* Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993 (1978).

Moreover, Sections 1182(f) and 1185(a)(1) are unique within the INA because they delegate authority to the President personally. Although Section 1152(a)(1)(A) addresses nationality-based discrimination specifically, that provision is a default rule governing the visa-issuance context more generally. In contrast, Sections 1182(f) and 1185(a)(1) confer special

power upon the President to suspend entry of "any class" of aliens. Viewed in the context of the overall statutory scheme, therefore, there is no reason to assume that the default non-discrimination rule governing visa issuance generally was intended to supersede the unique grant of authority to the President to suspend or restrict the admission of certain aliens as he deems necessary. The suspension authorities are thus more specific within the overall statutory scheme, and even in the event of a conflict, would supersede Section 1152(a)(1)(A)'s general rule governing visa issuance.

B. The State Department May Not Issue Visas To Persons Barred Under Section 1182

Given the ample authority and history previously discussed, Plaintiffs err in presuming that they were otherwise qualified—that is, qualified for admission under *all* sections of the INA. Under the INA, a visa may not be issued by the State Department if the applicant "is ineligible to receive a visa … under [S]ection 1182." 8 U.S.C. § 1201(g). Section 1182 lists many such grounds for ineligibility—among them health, criminal history, and terrorist affiliation. Whatever the relevant underlying ground in any individual case, the alien is denied a visa because he is "ineligible" to enter "under [S]ection 1182." *Id.* This is equally true of aliens who are ineligible to enter because they are subject to a suspension of admission under Section 1182(f)—one of the INA provisions authorizing Section 2(c) of the former Executive Order. Plaintiffs therefore attempt to get around this problem by claiming that all nationality discrimination is barred in the issuance of visas under 8 U.S.C. § 1152(a)(1)(A).

The D.C. Circuit has explained this "as an absolute precondition to admission, an alien must submit his proof *that he is not excludable* to a preliminary screening by a consular officer." *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 426 (D.C. Cir. 1977) (interpreting 8 U.S.C. § 1201(g) (emphasis added)); *see also* 8 U.S.C. § 1182(a). The conditions for being "excludable"—the

statutory forerunner to inadmissibility—are contained in 8 U.S.C. § 1182, and therefore encompass the President's Section 1182(f) authority to restrict the admission of certain foreign nationals. Section 1182(a) explains that "aliens who are inadmissible under the following paragraphs" (including Section 1182(f)) "*are ineligible to receive visas*." 8 U.S.C. § 1182(a) (emphasis added). In conjunction with this provision, Section 1201(g) provides that "[n]o visa ... shall be issued to an alien if ... it appears to the consular officer ... that such alien is ineligible to receive a visa ... under section 1182." 8 U.S.C. § 1201(g).

At the time Plaintiffs' applications were reviewed by the State Department, they fell under the ambit of Section 2(c)'s geographic scope. They were therefore inadmissible pursuant to that Order and the Supreme Court's explicit allowance for the Federal Government to apply Section 2(c). *IRAP*, 137 S. Ct. at 2088 ("All other foreign nationals are subject to the provisions of [Executive Order 13,780]."). This means that pursuant to Sections 1182(a) and 1201(g), no visa *could have been* issued to Plaintiffs. Moreover, it would have made little sense to issue a visa to an alien whom the consular officer knew was barred from entering the country, only for the alien to be denied admission upon arrival.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant their motion and dismiss the above-captioned action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically filed the foregoing 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: October 20, 2017

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