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Dated: April 20, 2016

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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AARON SKALKA and EMMA SKALKA, *et al.*,

Plaintiffs,

v.

JEH JOHNSON, Secretary, U.S. Department  
of Homeland Security, *et al.*,

Defendants.

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Case No.: 1:16-cv-107-RJL

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO DISMISS**

This case involves the joint decision of U.S. Citizenship and Immigration Services (“USCIS”) and the Department of State (“Defendants”) to suspend adjudication of immediate relative visa petitions filed on behalf of children from Nepal who allegedly qualify as “orphans” because they were found abandoned (“the Suspension”). Such petitions are filed on USCIS Form I-600, Petition to Classify Orphan as an Immediate Relative (“I-600 petition”). Plaintiffs Aaron and Emma Skalka, Evan and Jennifer Lee, Ryan and Jessica Scheel, Robert and Heather Ayers, and Frank Adoption Center (“Plaintiffs”) are four couples who allege that they seek to adopt abandoned children from Nepal and an organization that facilitates “American families through the Nepalese adoption process.” First Amended Complaint (“FAC”), ECF No. 11 ¶ 2. Plaintiffs ask this Court to enter an order declaring the Suspension “legally invalid,” and ordering Defendants to resume processing their I-600 petitions. *See id.* ¶¶ 82-82. This Court should reject Plaintiffs’ claims and dismiss the FAC for four reasons.

First, most of Plaintiffs should be dismissed for lack of standing. Indeed, as alleged in the FAC, only two of the Plaintiff couples have even filed the petition they maintain is improperly being delayed.

Second, Plaintiffs' claim that the Suspension is itself unlawful fails as a matter of law. The Suspension falls within the respective authorities of the Secretary of Homeland Security and the Secretary of State under 8 U.S.C. §§ 1103 and 1104, and is not prohibited by nor does it conflict with any other provision of law.

Third, to the extent Plaintiffs challenge the propriety and prudence of Defendants' determination that the Suspension was the appropriate response to the systemic problems that existed within the Nepali adoption system, such claim presents a non-justiciable political question. Defendants' decision was based in significant part on foreign policy considerations, which are not a proper subject for judicial review.

Finally, the mandamus claim should be dismissed because Plaintiffs have not shown, and cannot show, that Defendants have a ministerial duty to complete the processing of I-600 petitions premised on abandonment claims while the Suspension is in place. Moreover, given the nature of the issues in this case, this Court also should decline to exercise mandamus relief as a matter of its discretion. Thus, as explained more fully below, this Court should dismiss the FAC under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).<sup>1</sup>

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<sup>1</sup> Because Defendants believe the Court should dismiss Plaintiffs' complaint at this early stage for the reasons set forth in this memorandum—none of which rely upon any portion of the administrative record not attached to Plaintiffs' complaint—Defendants respectfully request that their obligation to file a certified list of the contents of the administrative record under Local Civil Rule 7(n)(1) be tolled pending resolution of the Government's motion. *See* Comments to LCvR 7(n) (noting that the purpose of Rule 7(n) is “to assist the Court in cases involving a voluminous record . . . by providing the Court with copies of relevant *portions of the record relied upon in any dispositive motion.*”) (emphasis added).

## **BACKGROUND**

### **I. Adoption and Immigration of Eligible Orphans**

Shortly after the Second World War, Congress gave the Department of State authority to issue visas for children who qualify as alien “orphans.” Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2, 62 Stat. 1009 (1948). Although the Displaced Persons Act and the accompanying regulations, did not make the child’s adoption by a citizen essential to the child’s admission, *see id.*; 13 FR 5821 (1948); the Act of September 11, 1957, limited the admission of orphans to those who had been or would be adopted by a U.S. citizen and the citizen’s spouse. *See* Pub. L. No. 85-316, § 4, 71 Stat. 639, 639 (1957). This provision gave the Attorney General temporary authority to receive and adjudicate immigrant visa petitions filed on behalf of orphans by their adoptive or prospective adoptive parents.<sup>2</sup> *Id.* Congress reaffirmed this grant of authority by making the “orphan” provision a permanent part of the Immigration and Nationality Act (“INA”) in 1961. Act of September 26, 1961, Pub. L. No. 87-301, § 1, 75 Stat 650, 650 (1961). The definition of an eligible “orphan” now appears in 8 U.S.C. § 1101(b)(1)(F).<sup>3</sup>

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<sup>2</sup> Congress transferred the authority to adjudicate immigrant visa petitions to the Secretary of Homeland Security, effective March 1, 2003. Homeland Security Act of 2002 Pub. L. No. 107-296, §§ 102(a)(3), 451(b), and 1101, 116 Stat. 2135, 2143, 2196, 2272 (2002).

<sup>3</sup> Section 1101(b)(1)(F) is not the only way an adopted child can immigrate as the adoptive parent’s child. First, if the child is adopted before the child’s sixteenth birthday (or the child’s eighteenth birthday, if the child is the birth sibling of another child adopted by the same parents), the child is considered the adoptive parent’s “child” for purposes of immigration once the parent has had legal custody of and resided with the child for at least two years. 8 U.S.C. § 1101(b)(1)(E). Second, if the child is from a country that is a party to the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded at The Hague on May 29, 1993, then classification as an orphan under § 1101(b)(1)(F) is not available. Instead, the adoptive parent must apply under 8 U.S.C. § 1101(b)(1)(G) and the regulations at 8 CFR § 204.300 *et seq.*

There are four elements to classification as an orphan under § 1101(b)(1)(F). First, the child must be under the age of 16 when the adoptive parent files the visa petition for the child, unless an exception applies. 8 U.S.C. § 1101(b)(1)(F)(i). Second, the child must be an orphan, as defined by the statute. *Id.* A child is an orphan if: (a) the child has no parents because each parent has either died or disappeared, or has abandoned, deserted, been separated from, or lost to the child; or (b) the child has a sole or surviving parent who is not able properly to care for the child and who has irrevocably released the child for emigration and adoption. *Id.* Particularly relevant to the case at hand, a child is abandoned, with respect to a birth parent, if the birth parent has:

willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s).

8 C.F.R. § 204.3(b) (first prong of definition of abandonment). Third, an eligible U.S. citizen must either have adopted the child abroad or have arranged lawfully to bring the child to the United States for adoption. 8 U.S.C. § 1101(b)(1)(F)(i). Fourth, the Secretary of Homeland Security must be satisfied that the adoptive parent(s) will provide proper care to the child if the child is admitted to the United States. *Id.* To assist the Secretary in making this determination, each case must include a favorable home study among other requirements to assess overall suitability to be adoptive parent(s) of a child. *Id.* § 1154(d).

## **II. The Suspension of Abandonment-Based I-600 Petitions from Nepal**

On August 6, 2010, Defendants jointly suspended the processing of new I-600 petitions involving children from Nepal reported as having been found abandoned. *See* ECF No. 11-6 at 2. Consistent with the findings of other foreign governments that had likewise suspended the processing of adoption cases from Nepal around 2010, Defendants imposed the Suspension

because they concluded that they could “no longer reasonably determine whether a child documented as abandoned qualifies as an orphan.” *Id.*

In the Joint Statement announcing the Suspension, Defendants noted that the Suspension was based on the unreliability of documents presented to describe and “prove” the abandonment of the child (including documents, such as birth certificates, that “often include[d] data that has been changed or fabricated”), the fact that “[i]nvestigations of children reported to be found abandoned [were] routinely hindered by the unavailability of officials named in reports of abandonment,” and the frequent refusal of police and orphanage officials “to cooperate with consular officers’ efforts to confirm information by comparing it with official police and orphanage records.” *Id.* In at least one documented case, Nepali “birth parents were actively searching for a child who had been matched with an American family for adoption.” *Id.*

Thus, “due to a lack of confidence that children presented as orphans are actually eligible for intercountry adoption,” Defendants imposed the Suspension and suspended the processing of new I-600 petitions and related visa issuance for children reported to have been found abandoned in Nepal. *Id.* Similar measures were also taken during the same period by all other countries that previously processed adoption cases from Nepal. *Id.* (noting that “all other countries . . . have stopped accepting new cases due to a lack of confidence that children presented as orphans are actually eligible for intercountry adoption”). The United States’ Suspension applies only to I-600 petitions for children reported as having been abandoned in Nepal, and does not restrict processing of petitions based upon the adoption of Nepali children who were relinquished by known parents whose identity and relationship to the children could be confirmed. *See* ECF No. 11-5 (“Who May File”).

On January 5, 2011, the Nepali government itself acknowledged the systemic problems that existed with its adoption system when it announced that it, too, was suspending adoptions of children found by the police and considered abandoned, and that such children would not be available for intercountry adoption until further notice. *See* ECF No. 11-3 at 2; ECF No. 11-4 at 3, 4. Although similar in most respects, the Nepali ban does not apply to children reported to have been abandoned in a hospital, while the United States' Suspension does. *See* ECF No. 11-3 at 6; ECF No. 11-4 at 3.

In November 2014, a joint USCIS and Department of State delegation traveled to Nepal to review the country's child welfare system and adoption procedures. *See* ECF No. 11-3 at 4. Although the delegation's visit "was an important step in identifying potential actions that could be taken to address the concerns that led to the [S]uspension," it did not resolve the U.S. Government's concerns about the unreliability of claims of abandonment and the "lack of necessary infrastructure to provide adequate protections in an intercountry adoption process in Nepal." *Id.* Thus, the Suspension remains in place, and "USCIS and the U.S. Department of State continue to strongly recommend that prospective adoptive parents refrain from adopting children from Nepal due to serious concerns about the reliability of Nepal's adoption system." *Id.*

### **III. The Current Process for Adopting a Child from Nepal**

A U.S. citizen seeking to immigrate a child who the citizen claims is an "orphan" whom the citizen has adopted or will adopt must follow the process specified in 8 C.F.R. § 204.3. A U.S. citizen seeking to adopt a child from Nepal must first file a Form I-600A, Application for Advance Processing of an Orphan Petition ("I-600A application"), with USCIS. *See generally* 8 C.F.R. § 204.3. In adjudicating the I-600A application, USCIS determines whether the applicant



is eligible to adopt and can show that proper parental care will be provided for the child. *See* ECF No. 11-4 at 6; 8 C.F.R. § 204.3(h)(2). Approval of the I-600A application “does not guarantee that the orphan petition will be approved.” 8 C.F.R. § 204.3(i).

Prospective parents must also submit an application to the Nepali Ministry of Women, Children and Social Welfare (“MWCSW”), which makes its own determination under Nepali law of eligibility to adopt and, if the applicant is approved, will match the U.S. citizen applicant(s) with a Nepali child by issuance of a referral letter. ECF No. 11-4 at 6. The child’s eligibility for adoption under Nepali law does not establish that the child is an “orphan” as defined in 8 U.S.C. § 1101(b)(1)(F).

Once a U.S. citizen applicant has an approved I-600A application and has been matched by MWCSW with a child for adoption, the U.S. citizen may petition for the child by submitting an I-600 petition with the U.S. Embassy in Kathmandu, Nepal.<sup>4</sup> ECF No. 11-4 at 6-7; *see also* 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. § 204.3(d). The I-600 petition addresses, among other things, whether a specific child qualifies as an orphan under U.S. immigration law. If the I-600 petition is approved, then the child, as the beneficiary of the petition, may apply for an immigrant visa to facilitate his or her immigration to the United States. 8 U.S.C. § 1154(b).

Where an I-600 petition is filed for an orphan relinquished by known parents, and whose petition therefore is not subject to the Suspension, a consular officer at the U.S. Embassy will complete an investigation (commonly referred to as an “orphan determination”) utilizing Form I-604, Determination on Child for Adoption, and inform the prospective adoptive parents of the

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<sup>4</sup> Statutory authority to adjudicate I-600 petitions rests solely with the Secretary of Homeland Security. The Secretary of Homeland Security has delegated authority to act on an I-600 petition to the U.S. Department of State for some types of cases. In particular, authority relating to an I-600 petition filed for a child from Nepal has been delegated to the U.S. Embassy in Kathmandu. *See* 8 U.S.C. § 1154(a)(1)(A)(i) and (b); *supra* note 1.

results.<sup>5</sup> 8 C.F.R. § 204.3(k)(1). By regulation, a consular officer must complete this investigation (hereinafter “I-604 orphan determination”) “in every orphan case” before the I-600 petition is adjudicated. *Id.* The scope of the I-604 orphan determination depends on the circumstances of the particular case. For example, if the documents offered to establish that the child qualifies as an orphan are questionable, the case may require an extensive investigation to establish the child’s actual age, identity, and parentage, including “document checks, telephonic checks, interview(s) with the natural parent(s), and/or a field investigation.” *Id.*

After completion of the I-604 orphan determination, if a consular officer determines that the I-600 petition is clearly approvable, the U.S. Embassy in Kathmandu will notify the prospective adoptive parents and advise them they may travel to Nepal to proceed with the adoption.<sup>6</sup> 8 C.F.R. § 204.3(k)(2); ECF No. 11-3 at 7. Then, if and when the adoptive parents submit a valid adoption order to the U.S. Embassy, it will approve the I-600 petition on behalf of USCIS. 8 C.F.R. § 204.3(k)(2); ECF No. 11-3 at 7. If, however, the consular officer determines that the I-600 petition is “not clearly approvable,” the I-600 petition is forwarded to the USCIS

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<sup>5</sup> To provide greater clarity regarding the nature of this “investigation,” a blank Form I-604 is attached hereto as Exhibit B. In light of the nature of the inquiry, this brief refers to the investigation and completion of Form I-604 collectively as the “I-604 orphan determination.”

<sup>6</sup> Often in intercountry adoptions, the prospective parents will travel to the foreign country and complete the adoption or obtain legal custody of the child to complete the adoption in the United States before filing an I-600 petition on behalf of the adopted child. *See* ECF No. 11-4 at 6-7. As a legal matter, a U.S. citizen seeking the immigration of a child from Nepal could do that. Because of its concerns about the unreliability of documentation on purported orphan children in Nepal, however, the U.S. Government has encouraged prospective adoptive parents to file their I-600 petitions with the U.S. Embassy in Kathmandu first, and to travel to Nepal to finalize the adoption only after a favorable I-604 orphan determination has been made. Only after the adoptive parents submit a valid adoption order may the Embassy approve the I-600 petition. *See* ECF No. 11-5 at 2. Submitting the I-600 petition before finalization of the adoption helps to “protect the interests of the prospective adoptive parents and the child to be adopted by placing the U.S. Government’s determination of the child’s likely eligibility to immigrate to the United States BEFORE the completion of Nepal’s adoption process.” *Id.* at 3.

office abroad with jurisdiction over that location for adjudication. 8 C.F.R. § 204.3(k)(2); ECF No. 11-3 at 7.

Relevant to the case at hand, if the U.S. embassy in Kathmandu determines the record reflects that the proposed adoption involves a child from Nepal who has been reported to have been found abandoned and thus appears to fall within the Suspension, the I-600 is “not clearly approvable.” Accordingly, the embassy forwards the case to USCIS with all supporting documents and the I-604 orphan determination indicating that the case is “not clearly approvable.” When a case is forwarded to USCIS as “not clearly approvable,” USCIS reviews the I-600 petition, the I-604 orphan determination, and any supporting reports and documentation, and then decides whether to approve the petition, deny the petition, or take appropriate additional steps.<sup>7</sup> *See* 8 C.F.R. § 204.3(k)(1). If USCIS determines the case falls within the Suspension, USCIS then notifies the petitioners that their case will be administratively closed. *See* ECF No. 11-2 at 2-3 (“No further action will be taken on your case until the USG lifts the [S]uspension . . . USCIS and State are continuously monitoring the situation in Nepal, and if the suspension is lifted, USCIS will notify you and reopen your case for processing.”).

#### **IV. The Plaintiffs**

According to the FAC, each of the Plaintiff couples has an approved I-600A application. FAC ¶¶ 51, 57-59. The Skalkas are the furthest along in the adoption process: they have been matched by MWCSW with a child who was purportedly abandoned at a hospital in Nepal, and on June 23, 2015, they filed an I-600 petition with the U.S. Embassy in Kathmandu. *Id.* ¶¶ 51-52. The consular officer at the Embassy in Kathmandu determined that the adoption was covered by the Suspension, and that the petition therefore was not clearly approvable, and

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<sup>7</sup> Before denying an I-600 petition on the basis of the I-604 orphan determination, USCIS will provide the petitioner with notice and an opportunity to address any adverse evidence. 8 C.F.R. § 103.2(b)(16).

forwarded the petition to the USCIS field office in New Delhi. *See* ECF No. 11-1. Because the child the Skalkas seek to adopt is reported as having been found abandoned, their I-600 petition is subject to the Suspension. Therefore, USCIS administratively closed the Skalkas' I-600 petition but informed them that "if the [S]uspension is lifted, USCIS will notify [them] and reopen [their] case for processing." *See* ECF No. 11-2 at 4.

The remaining three couples were not as far along when the FAC was filed. The Lees allege that they have been matched by MWCSW with a child and filed an I-600 petition on March 11, 2016, but had not yet received an indication whether it would be administratively closed.<sup>8</sup> FAC ¶ 57.

The Ayers and Scheels are even less far along in the process. The Ayers allege that they have been matched with a child by MWCSW, but "have elected not to file an I-600 Petition at this time." *Id.* ¶ 59. The Scheels have neither been matched with a child nor filed an I-600 petition. *Id.* ¶ 58.

As noted, Frank Adoption Center is authorized to provide adoption services. *Id.* ¶ 17. It does not, however, allege that it has any authority to represent the Plaintiff couples, or any other prospective adoptive parents, in proceedings related to an I-600A application or I-600 petition.<sup>9</sup> *See generally id.*

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<sup>8</sup> Defendants aver that on April 6, 2016, the USCIS Field Office in New Delhi issued a Notice of Administrative Closure of Form I-600, Petition to Classify Orphan, administratively closing the Lees' I-600 petition. The USCIS Field Office in New Delhi attempted to serve a copy of the notice to the Lees at their current address of record on multiple occasions without success. Attorney Kelly Dempsey subsequently submitted a Form G-28, Notice of Entry of Appearance on behalf of the Lees, which authorizes USCIS to effect service by sending her a copy of the Notice. While USCIS continues in its efforts to effect formal service, both Ms. Dempsey and Plaintiffs' counsel have been provided with a courtesy copy of the April 6, 2016 Notice.

<sup>9</sup> Indeed, Frank Adoption Center could not reasonably allege such authorization. *See* 8 C.F.R. § 103.2(a)(3) (providing that only an attorney or the accredited representative of a not-for-profit

### **STANDARDS OF REVIEW**

Federal courts have limited jurisdiction, and they may exercise that jurisdiction only where it is specifically authorized by federal statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure tests the existence of such jurisdiction. Fed. R. Civ. P. 12(b)(1). “[T]he district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction, [but] must still accept all of the factual allegations in the complaint as true.” *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005) (internal quotations, citations, and alteration omitted). If a court determines that jurisdiction is lacking, the court cannot proceed at all, and its sole remaining duty is to state that it lacks jurisdiction and dismiss the case. *See Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 94 (1998). A court must presume the lack of jurisdiction until the party asserting jurisdiction proves otherwise. *Kokkonen*, 511 U.S. at 377.

A court should also dismiss a complaint that fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Dismissal may be based on the lack of a cognizable legal theory or on a plaintiff’s failure to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007). When assessing a Rule 12(b)(6) motion, a court must take as true allegations of material fact and must construe them in the light most favorable to the non-moving party. *Browning*, 292 F.3d at 242; *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004). A

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entity recognized by the Board of Immigration Appeals is authorized to represent a party in a proceeding before USCIS).

court need not accept as true pleadings that are no more than legal conclusions or the “formulaic recitation of the elements” of a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

### **ARGUMENT**

The Court should dismiss this case under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for the following reasons explained further below. First, most of the Plaintiffs lack standing and thus their claims should be dismissed. Second, Plaintiffs’ claim that the Suspension is itself unlawful fails as a matter of law because it is within Defendants’ statutory grant of authority and is neither prohibited by nor conflicts with any other provision of law. Third, Plaintiffs’ challenge to prudence and propriety of Defendants’ decision to impose the Suspension poses a nonjusticiable political question. Finally, Plaintiffs’ mandamus claim should be dismissed both because they cannot show that Defendants owe them a clear, nondiscretionary duty, and as a matter of the Court’s discretion.

#### **I. Plaintiffs should be dismissed for lack of Article III standing.**

##### **A. Legal Standard**

Article III of the Constitution limits the power of federal courts to the resolution of actual “Cases” and “Controversies.” U.S. Const., art. III, § 2; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). “[A]n essential and unchanging part of the case-or-controversy requirement of Article III” is “the requirement that a litigant have standing to invoke the authority of a federal court.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). The irreducible minimum of constitutional standing consists of three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs, as the party seeking to establish jurisdiction, bear the burden of demonstrating the existence of standing, *Lujan*, 504 U.S. at 561, and must have standing at the time of the filing of the complaint, *id.* at 571 n.5. If a plaintiff

cannot meet all three prongs of the standing test, the Court should dismiss the suit. *LPA Inc. v. Chao*, 211 F. Supp. 2d 160, 163 (D.D.C. 2002).

B. The Scheels and Ayers lack standing because they did not have an injury-in-fact when the FAC was filed.

Based on the allegations in the FAC, two of the four plaintiff couples lack standing because they have not satisfied the injury-in-fact element. In order to show injury-in-fact, a plaintiff must allege an injury that is concrete and particularized and actual or imminent, not conjectural, hypothetical, or speculative. *See Lujan*, 504 U.S. at 560-61; *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). “[S]ome day’ intentions – without any description of any specification of when the some day will be – do not support a finding of the ‘actual or imminent’ injury our cases require.” *Lujan*, 504 U.S. at 564.

Here, the Scheels and Ayers admit that they have not filed an I-600 petition. FAC ¶¶ 58-59. Moreover, they have not alleged any facts showing when they intend to file I-600 petitions, and have suggested that they have no intention to do so at this time. *See id.* ¶ 59 (“The Ayers have elected not to file an I-600 Petition at this time...”). To the extent they do intend to file I-600 petitions, their “some day intentions” do not establish an injury-in-fact as a consequence of the Suspension sufficient to support standing. *Lujan*, 504 U.S. at 564.

Additionally, the Scheels and Ayers lack standing because they have failed to allege facts showing that the children they intend or hope to adopt are subject to the Suspension at all. *See* FAC ¶¶ 58-59. As fellow Plaintiff Frank Adoption Center recognizes on its website, “[t]here are currently children in Nepal who are eligible for international adoption,” and such children—those who have been relinquished by known parents—“are not included in the suspension of adoptions and the US government has stated that these children can be issued visas.” *See* Homepage, Frank Adoption Center, *available at* [www.frankadopt.org/index.html](http://www.frankadopt.org/index.html) (last visited

April 19, 2016) (printout attached as Exhibit A); ECF No. 11-3 at 2 (“The U.S. government is currently adjudicating intercountry adoption petitions filed on behalf of Nepalese children who have been relinquished by a known birth parent or parents whose identity and relationship can be confirmed.”). The Scheels concede that they have not even been matched with a child, FAC ¶ 58, thus, they cannot know, and do not allege, that they will be matched with an abandoned—rather than a relinquished—child, and can only speculate that they will ever be subject to the Suspension. Similarly, although the Ayers allege that they have been matched with “a child,” they have not alleged that the children with whom they have been matched were abandoned and thus that they fall within the Suspension at all. *Id.* ¶ 59.

Because the Scheels and Ayers do not allege whether and when they intend to file an I-600 petition, they have failed to satisfy the injury-in-fact requirement to establish Article III standing. Furthermore, they have likewise failed to satisfy the injury-in-fact requirement because they have failed to allege facts sufficient to show that that they would be subject to the Suspension even if they did file I-600 petitions. Their claims should therefore be dismissed for lack of standing.

C. Frank Adoption Center lacks organizational standing because it has failed to establish an injury-in-fact that is fairly traceable to Defendants.

Like the individual Plaintiffs, the claims of organizational Plaintiff Frank Adoption Center should also be dismissed for lack of standing. As an organization, Frank Adoption Center “can assert standing on its own behalf, on behalf of its members or both.” *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Based on the allegations in the FAC, Frank Adoption Center only asserts standing on its own behalf. *See* FAC ¶¶ 17, 60-61.

When asserting standing on its own behalf, an organization must meet the standing requirements applied to individuals. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir.



1990). Thus, to establish standing, an organization “must demonstrate that it has suffered injury in fact, including such concrete and demonstrable injury to the organization’s activities—with a consequent drain on the organization’s resources—constituting more than simply a setback to the organization’s abstract social interests.” *Nat’l Ass’n of Home Builders v. E.P.A.*, 667 F.3d 6, 11 (D.C. Cir. 2011) (internal quotes and alterations omitted). Where the objectives of an organization are merely “frustrated,” the concerns are too abstract and standing is not imparted. *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

In the FAC, Frank Adoption Center asserts that it is “a non-profit organization dedicated exclusively to facilitating . . . American families through the Nepalese adoption process.” FAC ¶ 2. It asserts that its mission is to provide “lasting, permanent homes to orphaned and abandoned children worldwide and to do so in a manner that is timely, cost effective and transparent for all parties involved.” *Id.* ¶¶ 17, 60. The organization asserts that it “has been, and will continue to be, unable to fulfill this mission since the Blanket Suspension halted all adoptions by U.S. citizens of abandoned Nepalese children in August 2011” and will remain unable to do so “unless and until the Blanket Suspension is lifted.” *Id.* ¶ 61.

Frank Adoption Center’s allegations fail to establish that it has suffered an injury-in-fact for two reasons. First, Frank Adoption Center does not provide any specific allegations detailing how it has been harmed by the Suspension. *See generally* FAC. Rather, it asserts generally that its “has been, and will continue to be, unable to fulfill [its] mission” because of the Suspension. *Id.* ¶ 61. This is precisely “the type of abstract concern that does not impart standing.” *Nat’l Taxpayers Union*, 68 F.3d at 1433 (“allegation that [statute] has ‘frustrated’ NTU’s objectives” insufficient basis for standing). Indeed, Frank Adoption Center has failed to allege the “concrete and demonstrable injury to the organization’s activities—with a consequent drain on the

organization's resources" that is requiresit for standing. *Nat'l Ass'n of Home Builders*, 667 F.3d at 11 (internal quotes and alterations omitted).<sup>10</sup>

Second, any impact on Frank Adoption Center's resources is not "fairly traceable" to Defendants because it has been "self-inflicted." *See Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (holding that an injury that is self-inflicted "is not really a harm at all" and is not fairly traceable to the government). Frank Adoption Center did not handle any Nepali intercountry adoption cases until 2013, when it "re-opened its doors as an entirely new agency, working in Nepal and employing a new staff, as well as a new Board of Directors." *See* Exhibit A (noting that prior to 2013 the organization "worked . . . to place children from Eastern Europe with families living in the US and abroad," until such adoptions "ceased in 2012").<sup>11</sup> As it acknowledges in the FAC and on its website homepage, the Suspension went into effect in 2010. *Id.*; FAC ¶ 3. Thus, at the time it began working on Nepali adoptions, Frank Adoption Center knew of the very limitation it now claims has rendered it "unable to fulfill [its] mission." FAC ¶ 61; *see* Exhibit A (claiming that "Frank Adoption Center is now the only US agency authorized to work in Nepal" because all other organizations stopped handling such adoptions following the Suspension in 2010).

To the extent Frank Adoption Center is "unable to fulfill [its] mission," therefore, it is solely because it defined its "mission" as facilitating the very adoptions prohibited by the

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<sup>10</sup> To be clear, Frank Adoption Center may not itself file an I-600 petition on behalf of any child; only a natural person who is a United States citizen may do so. 8 U.S.C. § 1154(a)(1)(A)(i). Because Frank Adoption Center is never a party to any I-600 petition proceeding, it has no legally cognizable interest in the adjudication of any specific I-600 petition nor in the immigration of any particular alien child.

<sup>11</sup> The Court may properly consider such evidence because Defendants seek dismissal for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Jerome Stevens Pharm., Inc.*, 402 F.3d at 1253-54.

Suspension is seeks to challenge. This kind of “self-inflicted” injury does not establish standing for an organizational plaintiff. *See Fair Employment Council*, 28 F.3d at 1276-77. In *Fair Employment Council*, the court found an organizational plaintiff could not establish standing based on “the mere expense of testing” a legal question, and claimed harm which “result[ed] not from any actions taken by [the government actor], but rather from the [plaintiff’s] own budgetary choices.” *Id.*; *see also Equal Rights Ctr.*, 633 F.3d at 1140 (noting that an organizational plaintiff can establish injury-in-fact if it expended resources to “counteract the effects” of challenged actions, rather than “in anticipation of litigation”). The court noted that “independent of its efforts to increase legal pressure on possible open housing violators, [the organizational plaintiff] and its programs would have been totally unaffected.” *See Fair Employment Council*, 28 F.3d at 1276-77. The court ultimately found that the organization plaintiff had not shown “injury” “merely because [it had] decided that its money would be better spent by testing . . . than by counseling or researching.” *Id.*

Similarly, to the extent Frank Adoption Center has suffered any harm, it is due to “the mere expense of testing” the legal sufficiency of the Suspension, and has resulted not from any actions taken by Defendants, but rather from the Frank Adoption Center’s “efforts to increase legal pressure” on the government to lift the Suspension. *See Fair Employment Council*, 28 F.3d at 1276. Accordingly, Plaintiff Frank Adoption Center’s cannot establish that it has suffered an injury-in-fact sufficient for Article III standing, and its claims should be dismissed for lack of subject matter jurisdiction.

**II. Plaintiffs’ claim that the Suspension is unlawful fails to state a claim on which relief may be granted.**

To the extent Plaintiffs challenge that the Suspension “is not in accordance with the law,” *see* FAC ¶ 68, such challenge must be dismissed for failure to state a claim. *See* Fed. R. Civ. P.

12(b)(6). The INA provides ample authority for Defendants to suspend adjudication of adoption-based immediate relative visa petitions from a particular country where the procedures and documents from that country are not sufficiently reliable to enable them to determine whether prospective adoptees from that country are “orphans” within the meaning of the law. Moreover, Defendants’ imposition of the Suspension was a legitimate exercise of Defendants’ authority, and is not prohibited by or in conflict with any other provision of law.

A. Defendants acted within their statutory authority in implementing the Suspension.

First, as a matter of law the Suspension falls within the respective authorities of the Secretary of Homeland Security and the Secretary of State under the INA. The Secretary of Homeland Security is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, except those laws explicitly delegated within the INA to another portion of the Executive Branch. 8 U.S.C. § 1103(a)(1). The Secretary of State is charged with the administration and enforcement of all “immigration and nationality laws relating to . . . the powers, duties, and functions of diplomatic and consular officers of the United States.” *Id.* § 1104(a)(1). Both Secretaries have the authority to “establish such regulations; . . . issue such instructions; and perform such other acts as [they] deem[] necessary for carrying out” their respective responsibilities. *Id.* §§ 1103(a)(3) and 1104(a).

Immigration to the United States on the basis of an intercountry adoption, including the adoption of abandoned children from Nepal, undoubtedly implicates the authorities of both the Secretary of Homeland Security and the Secretary of State. *See supra* Background. And both USCIS and the Department of State determined that the Suspension was necessary after concluding that the U.S. Government could “no longer reasonably determine whether a child documented as abandoned qualifies as an orphan” and “due to a lack of confidence that children

presented as orphans are actually eligible for intercountry adoption.” *See* ECF No. 11-6 at 2.

Thus, imposing the Suspension was a legitimate exercise of the authorities granted to the Secretaries by statute.

B. The requirement of an I-604 “investigation” does not conflict with or prohibit the Suspension.

Despite the foregoing statutory grants of authority, Plaintiffs allege that the Suspension is in violation of law because 8 U.S.C. § 1154(b) and 8 C.F.R. § 204.3(k) mandate that an “investigation” be conducted in every case. *See* FAC ¶ 38. Plaintiffs argue that Defendants are not carrying out this duty with respect to I-600 petitions subject to the Suspension. *See id.* ¶¶ 37, 64. Plaintiffs’ argument mischaracterizes the requirement of an “investigation” under § 1154(b) and the implementing regulation (which as noted above, Defendants will refer to as the “I-604 orphan determination”), and should be rejected.

As a threshold matter, Defendants are not contesting that § 1154(b) requires an “investigation” in *every* immigrant visa petition case. Notably, § 1154(b)’s requirement applies to all immediate relative cases under 8 U.S.C. § 1151(b)(2)(A)(i) and family-based cases under 8 U.S.C. § 1153(a). Importantly, however, § 1154(b) does not impose any specific timeframe within which the investigation must be completed—but rather indicates that no petition can be approved until after the investigation has been done and eligibility has been verified. *See* 8 U.S.C. § 1154(b) (“After an investigation of the facts in each case . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative . . . *approve the petition*”). Thus, the scope and depth of any given investigation can vary from case to case. In each case, the issue is the alien beneficiary’s eligibility for the immigration classification that is sought. *See id.* If a case is

well-supported by authentic documentary evidence, the investigation, legitimately, can be less intensive than a case with questionable evidence.

Accordingly, Plaintiffs' argument that § 1154(b) somehow prohibits the Suspension (and resulting administrative closure of their I-600 petitions) fails as a matter of law. *Cf.* Order (ECF No. 16), *Pietro v. BCIS*, No. 2:03-cv-702 at 3 (W.D. Wash. July 14, 2003) (rejecting adoption-related mandamus claim because "the Court concludes that Defendants owe no duty to Plaintiffs until it is determined that the suspension can properly end") (attached as Exhibit C).

Section 1154(b) also does not specifically require that the investigation in an orphan case must be the I-604 orphan determination provided for in 8 C.F.R. § 204.3(k)(3). The use of the I-604 orphan determination as the vehicle for the § 1154(b) process in orphan cases exists only by regulation. An important distinction exists, moreover, between *whether* an I-604 orphan determination must take place and *when* such determination must occur. This is particularly relevant in the case at hand, which involves a suspension of adjudication and not a requirement that all I-600 petitions be denied.

Like § 1154(b), the regulation does not impose any specific timeframe within which the I-604 orphan determination must be completed, but only that completion must occur "before a petition is adjudicated abroad." 8 C.F.R. § 204.3(k). Thus, both the regulation and § 1154(b) clearly link the duty to conduct I-604 orphan determination to the adjudication of the petition, not its filing.<sup>12</sup> Indeed, interpreting the regulation and § 1154(b) to require an I-604 orphan determination the moment an I-600 petition is submitted, would lead to absurd results. For

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<sup>12</sup> To the extent the regulation is ambiguous regarding the timeframe within which an I-604 orphan determination must be completed, the agency's interpretation is reasonable and entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See Sierra Club v. Johnson*, 436 F.3d 1269, 1282 (11th Cir. 2006) ("When an agency has interpreted one of its regulations in a consistent manner, that interpretation is controlling unless plainly erroneous or inconsistent with the regulation.") (internal quotations omitted).

example, under Plaintiffs' theory, USCIS or a consular officer arguably would be obligated to conduct an I-604 orphan determination even where the prospective adoptive parents have become ineligible to adopt since the filing of the I-600 petition.

Moreover, Plaintiffs' argument fails as a matter of law even if there were an obligation to conduct an I-604 orphan determination in cases subject to the Suspension. Indeed, the documents attached to Plaintiffs' FAC show that an I-604 orphan determination *is* occurring even in cases subject to the Suspension. *See* ECF No. 11-2 at 2 ("USCIS has reviewed your Form I-600, the Form I-604, *Determination on the Child*, and supporting documents . . .") (underlining added). This determination, albeit limited to determining whether the child identified in the petition was reported as abandoned and thus whether the Suspension applies, satisfies any "investigation" obligation that Defendants may have had under the applicable statute or regulation. *See* 8 U.S.C. § 1154(b); 8 C.F.R. § 204.3(k) (providing that the scope of the I-604 orphan determination "depend[s] on the circumstances" of the particular case).

Thus, the Suspension does not prevent Defendants from complying with any duty they may have to investigate the circumstances of an I-600 petition. The Suspension (as the name implies) merely "suspend[s] adjudication of new adoption petitions and related visa issuance for children who are described as having been abandoned in Nepal"—it does not require the denial of such petitions. *See* ECF No. 11-6 at 2; *see also* ECF No. 11-2 at 4 ("[I]f the suspension is lifted, USCIS will notify you and reopen your case for processing."). Similarly, the Suspension does not eliminate the requirement that an I-604 orphan determination be completed in every case. Indeed, the U.S. Embassy in Kathmandu is still completing a Form I-604 in every case involving adoption of children from Nepal. But in cases where the alleged orphan child was reported as having been found abandoned, Defendants have determined that the systemic

problems in Nepal preclude processing an orphan petition to completion. *See* ECF No. 11-6 at 2 (“Without reliable documentation, it is not possible for the United States Government to process an orphan petition *to completion*.”). Thus, only an I-604 orphan determination limited in scope and nature may be completed for cases subject to the Suspension. If and when the Suspension is lifted Defendants will conduct another full I-604 orphan determination in each affected case, resulting in a complete adjudication of the I-600 petition.<sup>13</sup>

Because the Suspension is an exercise of Defendants’ duly authorized authority and is not prohibited by any law, Plaintiffs’ claim that the Suspension is not in accordance with law should be dismissed.

**III. Plaintiffs’ challenge to the prudence and propriety of the Suspension should be dismissed because it presents a political question beyond the Court’s jurisdiction.**

As an alternative argument, Plaintiffs contend that even if imposing the Suspension was within the Defendants’ legal authority, Defendants “abused [their] discretion” in determining that the circumstances in Nepal and the unreliability of documents related to Nepali children reported as having been found abandoned warranted the Suspension. *See, e.g.*, FAC ¶¶ 37-39. The decision to impose the Suspension, however, and the considerations relevant to whether and when the Suspension should be lifted, touch on sensitive matters of foreign relations that are committed to the prudence and discretion of the political branches, and are thus beyond the jurisdiction of this Court.

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<sup>13</sup> By way of example, Defendants note that a similar suspension was in place at one time related to intercountry adoptions from Vietnam, but that the Vietnamese suspension was lifted in part after the U.S. Government determined that Vietnam had taken sufficient steps to improve its intercountry adoption process. *See* Intercountry Adoption – Vietnam, Bureau of Consular Affairs, U.S. Department of State, <https://travel.state.gov/content/adoptionsabroad/en/country-information/alerts-and-notice/vietnam14-16-06.html> (last visited Apr. 19, 2016).



A. The political question doctrine.

Like standing, the “political question doctrine” is a justiciability doctrine that deprives a court of Article III jurisdiction.<sup>14</sup> *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (“The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review.”) (internal quotations omitted). The political question doctrine “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). The doctrine is “primarily a function of the separation of powers,” but it also rests on the relative capabilities of the judiciary and the political branches to make certain determinations. *See Baker v. Carr*, 369 U.S. 186, 210-11 (1962). Although the doctrine does not mean that “every case or controversy which touches foreign relations lies beyond judicial cognizance,” *id.* at 211, it applies to all claims that, “regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion,” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010). Ultimately, under the political question doctrine, courts “must decline to reconsider what are essentially policy choices because ‘[t]he Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.’” *Id.* at 843-44 (quoting *Japan Whaling*, 478 U.S. at 230).

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<sup>14</sup> Although there is a lack of clarity concerning the distinction between questions which a court lacks jurisdiction to consider and those that are nonjusticiable, the D.C. Circuit has “consistently dismissed claims raising political questions for want of subject matter jurisdiction” upon a finding of nonjusticiability. *See Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1233 n.3 (D.C. Cir. 2009), *vacated and remanded on other grounds*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

B. Plaintiffs’ challenge to the propriety of the Suspension is not subject to judicial inquiry or decision.

Plaintiffs challenge to the joint decision by USCIS and the Department of State to impose the Suspension presents a political question outside the jurisdiction of this Court. To be clear, regardless of how Plaintiffs have styled their claims, they ultimately challenge the propriety of Defendants’ decision that the Suspension was the most appropriate response to the troubling circumstances and problems posed in Nepal. *See* FAC ¶ 37 (arguing that “[t]he Blanket Suspension . . . is an abuse of agency discretion”). This is precisely the type of sensitive question of foreign relations that is committed exclusively to the prudence and discretion of the political branches. *See Japan Whaling*, 478 U.S. at 230; *El-Shifa*, 607 F.3d at 842 (noting that the political question doctrine bars judicial review of such claims “regardless of how they are styled”).

As the Supreme Court noted nearly a century ago, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—‘the political’—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *see also El-Shifa*, 607 F.3d at 843 (“[T]he strategic choices directing the nation’s foreign affairs are constitutionally committed to the political branches.”). The judiciary has a similarly limited role in the areas of immigration and naturalization policy. *Mathews v. Diaz*, 426 U.S. 67 (1976) (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”); *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003) (“Deciding and implementing immigration policy has been textually committed to the political branches, and there exists no judicially manageable standards

to decide how best to implement immigration laws.”). Indeed, “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)). “Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Id.*

Here, the policy Plaintiffs challenge—the Suspension—relates intimately to foreign affairs and its intersection with immigration and naturalization.<sup>15</sup> As discussed above, Defendants determined that the procedures and documents presented to describe and prove abandonment were not sufficiently reliable to permit the conclusion that supposed “orphans” were in fact abandoned. *See supra* Background, § II. Having made this determination, the Executive Branch then weighed the range of permissible means available to it to address these important concerns, and settled on a modest and appropriate response: suspension of processing immigrant visa petitions related to intercountry adoption of children reported to be abandoned in Nepal. Foreign relations, including consultation and coordination with other foreign governments and consideration of the actions taken by other foreign governments and of the potential impact of various options on diplomatic relations with Nepal, played a significant part in Defendants’ decision to implement the Suspension over other alternatives. Indeed, requiring Defendants to continue processing and adjudicating these cases, without sufficient confidence in the integrity of the underlying procedures and documentation, has the potential to engender unnecessary tensions with the government of Nepal and to impede coordination with other

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<sup>15</sup> Under the INA, “‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever,” 8 U.S.C. § 1101(a)(23), including acquisition of citizenship by a child adopted as an eligible “orphan.” *See* 8 U.S.C. § 1431(b).

foreign governments that are collectively working to improve the systemic issues affecting Nepal's adoption procedures, so that intercountry adoptions can reliably be resumed.

The prudence of Defendants' joint decision to impose the Suspension, which is a legitimate exercise of the authorities granted to the Secretaries by statute, *see supra* Argument, § II.A, implicates foreign policy and immigration and naturalization concerns, and is thus not subject to judicial review. *See Oetjen*, 246 U.S. at 302 (“[T]he propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”); *El-Shifa*, 607 F.3d at 843 (“[T]he strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches.”).

Finally, prudential considerations counsel against judicial intervention in this case. This Court's inquiry into the propriety of the Suspension would require review, analysis, and, potentially, criticism of Nepal's internal laws, policies, and practices, a function “for which the Judiciary has neither aptitude, facilities[,] nor responsibility.” *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). That is particularly the case where, as here, Plaintiffs seek judicial review exclusively on basis of the APA. The remedies available pursuant to the APA are discretionary and equitable. As such, they provide weak authority for judicial interjection into sensitive matters of foreign affairs, and the Court should exercise the discretion provided to it under the APA to decline Plaintiffs' invitation to opine on sensitive foreign policy decisions. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (“[W]here the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief.”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 42-43 (D.D.C. 2010) (same).

The U.S. Government, through its Embassy in Kathmandu and other officers in executive agencies, continues to evaluate whether the Suspension remains appropriate. *See* ECF No. 11-3 at 4 (discussing 2014 joint delegation to Nepal). USCIS and the Department of State have both the unique expertise and the constitutional responsibility to make that determination based on their assessment of the situation in Nepal, their consultations with other governments, and the political and foreign policy considerations implicated both by the Suspension and by any possible resolution. Accordingly, “[w]hether or not [the Suspension] is a matter so entirely committed to the care of the political branches as to preclude [the Court’s] considering the issue at all, . . . it at least requires the withholding of discretionary relief.” *Sanchez-Espinoza*, 770 F.2d at 208; *Al-Aulaqi*, 727 F. Supp. 2d at 42-43.

In light of the sensitive, political nature of the questions presented by Plaintiffs’ claim, and given the great deference given to the political branches in regards to both foreign policy and immigration issues, the Court should dismiss the claim as non-justiciable.

**IV. Plaintiffs’ mandamus claim should be dismissed for lack of jurisdiction and as a matter of discretion.**

“The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances.” *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (internal quotation marks omitted). To show entitlement to mandamus, a plaintiff must demonstrate: (1) a clear and indisputable right to relief; (2) that the government agency or official is violating a clear duty to act; and (3) that no adequate alternative remedy exists. *United States v. Monzel*, 641 F.3d 528, 532 (D.C. Cir. 2011). “These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Even where a plaintiff has satisfied the jurisdictional elements for

mandamus, “the central question in evaluating a claim of unreasonable delay is whether the agency’s delay is so egregious as to warrant mandamus.” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks omitted).

Here, Plaintiffs’ mandamus claim should be dismissed for lack of jurisdiction and as a matter of discretion. First, Plaintiffs have not shown that Defendants have a clear, nondiscretionary duty to adjudicate abandonment-based I-600 petitions *while the Suspension is in place*. Plaintiffs argue that Defendants owe them a duty to “adjudicate” their I-600 petition at this time, FAC ¶¶ 70-71, however, they fail to identify any statute, regulation, or case law that so provides. *See generally id.* Moreover, to the extent Defendants owe a “duty to act on [the Skalkas’] I-600 Petition,” *id.* ¶ 70, Defendants have done so by administratively closing the petition until the Suspension is lifted. Thus, Plaintiffs’ mandamus claim should be dismissed because they have failed to identify any duty on the part of Defendants’ to adjudicate their I-600 petition while the Suspension is in place. *See* Order (ECF No. 16), *Pietro v. BCIS*, No. 2:03-cv-702 at 4 (W.D. Wash. July 14, 2003) (rejecting adoption-related mandamus claim because “the Court concludes that Defendants owe no duty to Plaintiffs until it is determined that the suspension can properly end”) (attached as Exhibit C).

Second, even if the Skalkas could show that Defendants owe them a clear ministerial duty to adjudicate their I-600 petition, the remedy of mandamus should still be denied as a matter of discretion. *See In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (“[E]ven if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary.”). The Skalkas did not file their I-600 petition until June 23, 2015, approximately five years after the Suspension went into effect. FAC ¶ 52. Moreover, the Skalkas knew about the Suspension, because they had adopted a child from Nepal around the time of the Suspension. *See id.* ¶¶ 50,

54 (alleging that their private investigator “was as thorough as the 2010 investigation that supported the approval of their I-600 Petition for their first adopted child in 2010”). Thus, their decision to pursue adoption in Nepal without regard for the Suspension—which foreseeably would cause the exact delay Plaintiffs now challenge—cuts against any argument that Defendants’ actions warrant mandamus relief. *See* Exhibit C, Order at 4 (rejecting mandamus claim where “Plaintiffs were aware of the status of Cambodian adoptions, and still decided to proceed with a Cambodian adoption”). Accordingly, this Court should dismiss Plaintiffs’ mandamus claim for lack of jurisdiction and as a matter of discretion.

### **CONCLUSION**

For the foregoing reasons, Defendants ask this Court to dismiss Plaintiffs’ FAC under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Dated: April 20, 2016

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