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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. *Hinojosa*

In February 2019, the United States filed a brief in opposition to the petition for certiorari in the Supreme Court of the United States in *Hinojosa et al. v. Horn*, No. 18-461. In 2018, after consolidating the *Hinojosa* and *Villafranca* cases for review, the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal of challenges to separate decisions denying or revoking petitioners' U.S. passports (based on lack of evidence of U.S. citizenship). *Hinojosa v. Horn*, 896 F.3d 305 (5th Cir. 2018); see also *Digest 2018* at 1-5; *Digest 2017* at 4-7. The Court of Appeals held that petitioners were not entitled to review under the Administrative Procedure Act ("APA") because they had an adequate alternative remedy which they had failed to pursue. Excerpts follow (with citations to the record omitted) from the U.S. brief opposing certiorari. The Supreme Court denied the petition for certiorari on March 18, 2019.

* * * *

Petitioners contend that the district court erred by dismissing their APA claims seeking review of the Department of State's action regarding their passports on the ground that 8 U.S.C. 1503 provides an adequate alternative remedy that petitioners have not exhausted. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The APA provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. 704. ...

a. Petitioners’ APA claims seek review of the Department of State’s action denying or revoking their passports based on the Department’s determinations that petitioners had not adequately established that they are natural-born U.S. citizens. ... Petitioners contend ... that those determinations of noncitizenship were erroneous because each petitioner was born in Texas rather than in Mexico.

Section 1503 of Title 8, United States Code, entitled “Denial or rights and privileges as national,” establishes a detailed procedure for individuals who claim they have been denied a right or privilege as a U.S. national to obtain review of that alleged denial. 8 U.S.C. 1503. The process differs depending on whether such an individual is present in the United States or is abroad. For a “person who is within the United States” who “claims a right or privilege as a national of the United States,” and who “is denied such right or privilege by any” federal agency or official “upon the ground that he is not a national of the United States,” Section 1503(a) provides that the person may seek judicial review by filing an action under the Declaratory Judgment Act, 28 U.S.C. 2201, against the agency or official for a judgment “declaring him to be a national of the United States.” 8 U.S.C. 1503(a). Such an action must be brought “within five years after the final administrative denial of such right or privilege.” *Ibid.* Section 1503(a) contains an exception prohibiting such declaratory relief where the question of a person’s status as a U.S. national “arose by reason of, or in connection with,” or is “in issue in,” a removal proceeding. *Ibid.*

For a “person who is not within the United States” but was “physically present in the United States” at some previous point in time (or is under the age of 16 and was born abroad to U.S.-citizen parents), and who claims the denial of “a right or privilege as a national of the United States,” Section 1503(b) and (c) prescribe a different mechanism for challenging that denial. 8 U.S.C. 1503(b). Section 1503(b) provides that such a person may “make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission.” *Ibid.* If the person presents “proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis,” the officer “shall issue to such person a certificate of identity.” *Ibid.* If the certificate of identity is granted, Section 1503(c) provides that the person may then “apply for admission to the United States at any port of entry.” 8 U.S.C. 1503(c). Upon admission to the United States, the person would then be eligible to seek a declaratory judgment under 8 U.S.C. 1503(a) that he is a citizen.

As the court of appeals observed, if a person outside the United States is unsuccessful at either administrative phase of the process prescribed by Section 1503(b) and (c), judicial review is available at that time. ...

Petitioners each “concede[d] that [the] § 1503 procedures apply to them.” ... And they do not appear to dispute that, if they had pursued those procedures, whatever the outcome at the various stages of the administrative process, judicial review would be available. Yet neither petitioner alleges that she began, let alone exhausted, the statutorily prescribed process in Section 1503(b) and (c) before bringing her APA suit. The court of appeals therefore correctly determined that the APA does not authorize judicial review in these cases because petitioners have, but declined to pursue, an alternative “adequate remedy.” 5 U.S.C. 704.

b. Petitioners principally contend ... that this Court's decision in *Rusk v. Cort*, 369 U.S. 367 (1962), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977), compels a contrary conclusion. The court of appeals correctly rejected that contention. ... As the court explained, the question this Court addressed in *Cort* must be understood in the context of the circumstances of that case. See *id.* at 14-15.

Cort involved a person who was a natural-born U.S. citizen at birth, but whose citizenship was revoked on the ground that he had evaded the draft and whose passport application from abroad was denied on that basis. ...

Cort sought judicial review of his passport denial from abroad under the APA. *Cort*, 369 U.S. at 369-370. In particular, he sought to challenge the constitutionality of the INA provision that stripped native-born U.S. citizens of their citizenship for draft evasion, *id.* at 370—a provision that the Court later held was unconstitutional, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-184 (1963). The district court denied the government's motion to dismiss *Cort*'s APA claim on the ground that Section 1503(b) and (c) provided the exclusive means for challenging the Department of State's citizenship determination, *Cort*, 369 U.S. at 369-370, and this Court affirmed over a dissent, see *id.* at 371-380; see also *id.* at 383-399 (Harlan, J., joined by Frankfurter and Clark, JJ., dissenting).

In reaching that decision, the Court framed the question presented narrowly and consistent with the specific circumstances of the case, explaining that,

precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States.

Cort, 369 U.S. at 375. The Court answered that case-specific question in the negative. See *id.* at 375-380. In doing so, the Court reasoned that “the purpose of [Section 1503(b) and (c)] was to cut off the opportunity which aliens had abused under” prior law “to gain fraudulent entry to the United States by prosecuting spurious citizenship claims.” *Id.* at 379. The Court concluded that the circumstances of *Cort*'s case—in which *Cort* sought to challenge the constitutionality of the statutory provision by which his natural-born citizenship had been revoked, and where returning to the United States to do so would subject him to arrest and likely criminal penalties in light of pending charges—did not implicate that congressional purpose. See *ibid.* As the court of appeals here explained, the Court held that, “[i]n light of the extreme burden the § 1503 procedures would have placed on [*Cort*], whose claim and circumstance § 1503 was not specifically intended to address, the plaintiff could proceed under the APA.” ...

The court of appeals correctly determined that *Cort*'s reasoning and result do not compel a similar conclusion here in light of the significant differences in the circumstances between that case and this one. ... Unlike *Cort*, petitioners have a “clear path to judicial review,” *id.* at 15, and pursuing that path would not require them to be subject to inevitable arrest and criminal prosecution on already-pending criminal charges, *id.* at 14. In addition, whereas *Cort*'s original entitlement to U.S. citizenship was never questioned, and his suit sought to challenge the revocation of his birthright citizenship on the ground that the applicable statute was unconstitutional, here it is precisely the factual determinations by the Department of State concerning petitioners' claimed citizenship of which they seek review. In contrast to *Cort*, petitioners thus “are precisely the sort of persons that Congress, according to [*Cort*], was

concerned to regulate under §§ 1503(b)-(c),” and “[t]hese cases present the exact facts that [*Cort*] held would implicate the jurisdictional restrictions.” *Id.* at 15 (emphasis omitted).

* * * *

2. *Chacoty*

In *Chacoty v. Pompeo*, 392 F. Supp. 3d 1 (D.D.C. 2019), a federal district court in the District of Columbia held (contrary to the Fifth Circuit’s holding in *Hinojosa*) that 8 U.S.C. § 1503 did not provide an adequate remedy and permitted claims under the APA to proceed. After reaching that holding, however, the court granted the U.S. cross-motion for summary judgment on the merits of plaintiffs’ claims to citizenship regarding the interpretation of “residence” under the applicable statute. The July 17, 2019 opinion in *Chacoty* is excerpted below.

* * * *

Plaintiffs contend that they are U.S. citizens by birth pursuant to 8 U.S.C. § 1401(c). That provision confers birthright citizenship on a person born abroad, as Plaintiffs were, if both her parents are U.S. citizens and one of her parents “has had a residence in the United States” prior to her birth. 8 U.S.C. § 1401(c). Each of the Plaintiffs applied to the State Department for proof of citizenship in the form of a Consular Report of Birth Abroad (“CRBA”). The State Department either denied their CRBA applications or, in the case of two of the Plaintiffs, revoked their previously-issued CRBAs. The Department concluded that Plaintiffs are not U.S. citizens because none of their parents satisfied the residency requirement of § 1401(c). Plaintiffs challenge those decisions under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, and the Due Process Clause of the Fifth Amendment. The Court previously concluded that it has jurisdiction to consider Plaintiffs’ claims. The parties’ cross-motions for summary judgment on the merits with respect to two representative plaintiffs are now before the Court.

... The Department, in its opposition and cross-motion, argues that the two representative plaintiffs may not challenge the cancellation of their CRBAs under the APA because the APA cause of action is available only to plaintiffs who have “no other adequate remedy in a court,” 5 U.S.C. § 704, and because 8 U.S.C. § 1503(b) provides an alternative means for a person who is not in the United States to seek a determination of her citizenship. But, even if the APA provides an avenue for challenging the denial or cancellation of a CRBA, the Department continues, the representative plaintiffs’ claims fail on the merits because § 1401(c)’s “residence” requirement demands more than fleeting physical presence in the United States.

As explained below, the Court agrees with Plaintiffs that § 1503 does not provide an adequate remedy sufficient to supplant Plaintiffs’ APA causes of action (and does not even arguably supplant their stand-alone due process claims) but agrees with the Department that Plaintiffs’ claims fail on the merits. The Court, accordingly, will **DENY** Plaintiffs’ motion for summary judgment and will **GRANT** the Department’s cross-motion.

* * * *

1. *Is the Department's Current Reading of 8 U.S.C. § 1401 Permissible?*

Under 8 U.S.C. § 1401(c), U.S. citizenship is conferred at birth on “a person born outside of the United States ... of parents both of whom are citizens of the United States and one of whom has had a residence in the United States ... prior to the birth of such person.” The INA defines “residence” as “the place of general abode” and, in turn, defines “the place of general abode of a person” as “his principal, actual dwelling place in fact, without regard to intent.” 8 U.S.C. § 1101(a)(33). Here, Plaintiffs contend that Kayla and Chana Sitzman’s mother, Masha Bodenheimer Sitzman, satisfied § 1401(c)’s “residence” requirement before their birth because she was present in the United States prior to their birth on three occasions: from July 31, 1974 to September 11, 1974; from April 4, 1982 to May 3, 1982; and “for approximately 10 days” in February 1990. AR CIV000263. During these visits, Marsha “stayed with relatives on both sides of [her] family and participated in family activities and chores as a member of each [of these] household[s],” although her immediate family “did not contribute to household finances.” *Id.* During the 1974 stay, moreover, Marsha’s family “stopped their mail in Israel” but did not “look[] for employment or schooling opportunities” in the United States.” *Id.*

* * * *

b. The Department’s Reading of “Residence” Under Plaintiffs’ construction of the INA, an individual can satisfy the “residence” requirement so long as she can demonstrate “any physical presence short of a brief, hours-long transit through the United States.” ... The Deputy Assistant Secretary disagreed, and in her final determination she concluded that residence requires more than “physical presence” and requires consideration of “the nature and quality of the person’s connection to the place.” ... Even without granting any deference to the Deputy Assistant Secretary, the Department has the better reading of the statute.

The Court “begin[s], as usual, with the statutory text.” *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017). The INA defines “residence” as an individual’s “place of general abode,” which means his or her “principal, actual dwelling place in fact, without regard to intent.” 8 U.S.C. § 1101(a)(33). This statutory definition is at odds with Plaintiffs’ contention that “almost anyone ... would seem to satisfy the [INA’s] definition,” short of “a person who is merely transiting the United States on his way to another country.” ... Most notably, Plaintiffs’ interpretation would read the words “place of *general* abode” and “*principal*, actual dwelling place” out of the statute. 8 U.S.C. § 1101(a)(33) (emphasis added). The statute does not simply require that the putative citizen’s parent have “dwelled” or been present in the United States for a limited time; it requires that the parent’s abode in the United States eclipse any other residence the parent had at the time. The statutory definition of “residence,” in other words, requires a degree of primacy over other places of residence. ...

The Department’s interpretation ... sets forth criteria for determining whether a location is, in fact, an individual’s “*principal*, actual dwelling place.” 8 U.S.C. § 1101(a)(33) (emphasis added). ... Applying this definition to the Sitzmans, the Deputy Assistant Secretary examined “the fact that Mrs. [Bodenheimer Sitzman] visited [the United States] on three occasions and that for one of the trips her parents temporarily stopped mail delivery in Israel while they visited the United States does not support the claim that Mrs. [Bodenheimer Sitzman] had a residence here.” The Deputy Assistant Secretary concluded there was “no evidence that these visits to the U.S. were anything other than vacation visits to see family and attend family events.” *Id.*

* * * *

The INA's legislative history makes the distinction between objective place of residence and physical presence even clearer. According to a 1952 Senate Judiciary Committee Report, the statute's definition of "residence" is meant to be "a codification of judicial constructions of the term 'residence' as expressed by the Supreme Court of the United States in *Savorgnan v. United States*, 338 U.S. 491, 505 (1950)." S. Rep. No. 82-1137, at 4-5 (1952); *see also United States v. Arango*, 670 F.3d 988, 997 (9th Cir. 2012). In *Savorgnan*, the Supreme Court held that a United States citizen who obtained Italian citizenship and lived in Italy from 1941 to 1945 relinquished her American citizenship. *Savorgnan*, 338 U.S. at 496. The petitioner argued that, even though she swore allegiance to Italy and lived there, she had not actually expatriated. *Id.* at 499. Noting that expatriation occurred when an individual naturalized as a foreign citizen and then "resided" abroad, she argued that she had no "intention of establishing a permanent residence abroad or abandoning her residence in the United States, or of divesting herself of her American citizenship." *Id.* at 496. The Supreme Court disagreed. It concluded that "[w]hatever may have been her reasons, wishes or intent, her principal dwelling place was in fact with her husband in Rome where he was serving in his Foreign Ministry. Her intent as to her 'domicile' or as to her 'permanent residence,' as distinguished from her actual 'residence,' 'principal dwelling place,' and 'place of abode,' is not material." *Id.* at 506. Thus, when the INA specifies that an individual's residence is determined "without regard to intent," that simply means that the inquiry is objective, not subjective. It does not, as Plaintiffs contend, convert "residence" into "physical presence."

Because the Department's reading better comports with the plain meaning, structure, and legislative history of the INA, the Court concludes that Plaintiffs' challenge to the Department's interpretation fails.

2. Was the Department's Revocation of the CRBAs Permissible?

That conclusion, however, does not fully resolve the Sitzmans' claims. In addition to challenging the Department's current construction of "residence," Plaintiffs challenge the Department's authority to revoke the Sitzmans' previously-issued CRBAs. ... Given the level of generality of these statements, it is difficult to discern the basis for Plaintiffs' contention that the revocations were unlawful. ...

First, Plaintiffs argue that "until roughly 2007, Defendants interpreted and applied the term 'residence' in [§] 1401(c) to mean any physical presence short of a brief, hours-long transit through the United States." ...

* * * *

There are two problems, however, with Plaintiffs' argument. As an initial matter, although the Jerusalem consulate previously announced a practice in accord with Plaintiffs' view of the statute, Plaintiffs have not shown that *the Department* has changed position at all. To the contrary, as the Department explains in its briefs, the "State Department's interpretation has *consistently* been that temporary visits to the United States do not establish 'residence.'" ... The Jerusalem consulate (and other consulates), accordingly, appears to have implemented its own, erroneous interpretation of the INA separate from—and at odds with—the Department's guidance. ...

Moreover, even if the Jerusalem consulate's fact sheet could be attributed to the Department as a whole, the Department rejected that interpretation because it is inconsistent with the meaning of the statute. ...

Second, Plaintiffs adopt the hearing officer's contention that "[a]ny change in the interpretation and application of the law should be applied only prospectively, if at all." As explained above, Plaintiffs have not shown that the Department actually changed any Department-wide policy. But even putting that problem aside, this contention also fails. ... The Department ... did nothing more than Congress authorized and, in doing so, it enforced the law as Congress enacted it.

To be sure, had the Department revoked the Sitzmans' U.S. citizenship, that would have raised grave equitable considerations, and, indeed, would have required a "federal judicial order." *Xia*, 865 F.3d at 650. As the Supreme Court has explained, "[i]t would be difficult to exaggerate [citizenship's] value and importance," *Schneiderman*, 320 U.S. at 122, and its revocation "may result in 'loss of both property and life; or of all that makes life worth living,'" *United States v. Minker*, 350 U.S. 179, 187 (1956) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). But that is not what the Department did. Rather, it revoked a document *evidencing* the Sitzmans' citizenship. As in *Xia*, "the statutory authority on which the government relied is quite explicit that it authorizes only revocation of certain evidence of citizenship, *not* the citizenship status itself, ... administrative actions alone are inadequate to extinguish any United States citizenship plaintiffs may have." 865 F.3d at 655 (emphasis in original). Although undoubtedly a serious step, revocation of a CRBA is far less serious than revoking citizenship from someone who was—and then, as a result, no longer—a U.S. citizen, and Plaintiffs have failed to identify any legal or factual basis to question the Department's authority to correct its prior, erroneous issuance of the CRBAs.

* * * *

3. **Zzyym: Indication of Sex on U.S. Passports**

As discussed in *Digest 2018* at 5-12, Dana Zzyym ("Zzyym") is an intersex individual who filed suit after the State Department denied Zzyym's request for a passport with an "X" in the sex field, contrary to its policy of requiring either "M" or "F." Zzyym's complaint alleged violations of the APA and equal protection under the Fifth Amendment. On September 19, 2018, the U.S. District Court for the District of Colorado decided that the State Department's policy and denial of the requested passport violate the APA and enjoined the Department from relying on the policy to deny the requested passport.

The Department of State has unsuccessfully sought stays of the district court injunction in both district court and the U.S. Court of Appeals for the Tenth Circuit. The Court of Appeals denied the motion for stay on April 3, 2019, reasoning that the Department was not required to do anything under the district court's order if there was no pending renewed application for a passport from Zzyym. *Zzyym v. Pompeo*, No. 18-1453 (10th Cir.). Oral argument on the merits of the case on appeal is scheduled for 2020. The U.S. briefs filed in support of motions for stay in 2019 in the district court and the Court of Appeals are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

4. Citizenship Claims in Cases of Assisted Reproductive Technology (“ART”)

On October 11, 2019, the United States filed its brief on appeal in the U.S. Court of Appeals for the Ninth Circuit in *E.J. D.-B. v. Pompeo*, No. 19-55517 (9th Cir.). The case concerns a minor, E.J. Dvash-Banks, conceived using a surrogate and sperm from one of his fathers, Elad Dvash-Banks, who is not a U.S. citizen. Elad and his husband, Andrew Dvash-Banks—who is a U.S. citizen—were recognized in Canada as E.J.’s legal parents. However, the U.S. consulate in Ontario, Canada determined that E.J. did not acquire citizenship at birth because Elad is not a U.S. citizen and E.J. has no biological relationship with Andrew. The family brought suit after they moved to the United States, seeking (among other things) a judicial declaration of E.J.’s citizenship. The lower court held that E.J. is a citizen. The lower court construed 8 U.S.C. § 1401(g), which confers citizenship at birth on “a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States,” as applicable based on Ninth Circuit precedents. *Dvash-Banks v. Pompeo*, No. 18-cv-00523 (C.D. Cal. Feb. 21, 2019). The U.S. brief appealing the lower court’s decision is excerpted below (with record citations omitted) and available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

This Court has previously held that a child born overseas may acquire citizenship at birth under 8 U.S.C. § 1401(g) even if he is not biologically related to his U.S. citizen mother or father. *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). Unless this case is heard initially en banc, the district court’s judgment that E.J. is a U.S. citizen must be affirmed, but the government respectfully submits that initial en banc consideration may be warranted because this Court’s precedents are incorrect for the reasons discussed below.

Section 1401(g)’s text supports the Department’s interpretation that a child born overseas cannot acquire citizenship at birth under that provision unless he is biologically related to a U.S. citizen parent. The statute confers citizenship on individuals “born ... of parents” who meet the statutory requirements, and “[t]here can be little doubt that the ‘born of’ concept generally refers to a blood relationship.” *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009).

That textual interpretation is bolstered by § 1401(g)’s context: the conferral of *jus sanguinis* citizenship. *Jus sanguinis* literally means the “right of blood.” Consistent with that historical meaning, the Supreme Court has repeatedly emphasized the importance of the government’s interest in “assuring that a biological ... relationship exists” between a child and a parent through whom the child claims citizenship. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62 (2001).

A related provision, 8 U.S.C. § 1409(a), explicitly requires a biological relationship for a child to claim citizenship through his father when the child’s parents were unmarried at the time of his birth. But that is no reason to construe § 1401(g) as lacking a biological-relationship

requirement. Section 1409(a) simply reflects the fact that, when a child is born outside a marriage, the identity of the child’s father must be “established”—rather than presumed—for the purpose of applying § 1401(g) to the child.

The district court based its conclusion partly on the view that § 1401(g) incorporates the common-law “presumption of legitimacy that applies when a child is born to married parents.” That is incorrect. Presumptions of legitimacy are legal fictions that render biological parentage irrelevant for certain purposes. But in this context, Congress has made clear that a child’s legal parent—whose identity is properly determined not by federal common law but by the law of the relevant state or foreign jurisdiction—must also be his biological parent for § 1401(g) to apply.

To the extent § 1401(g) remains ambiguous, the Court should defer to the State Department’s interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That interpretation is reasonable, consistent, and longstanding, and it reflects the Department’s extensive experience adjudicating citizenship applications. A biological-relationship requirement is a powerful tool in the government’s efforts to prevent fraud. Without such a requirement, citizenship claims could be supported merely by documents purporting to show legal relationships between parents and children, and it can be quite difficult (especially in certain countries) to verify that such documents are genuine and accurate.

The district court opined that the Department’s interpretation of § 1401(g) is not “consistent with the legislative history of the INA” because it undermines Congress’s goal “of keeping families of United States citizens and immigrants united.” But the law affords alternative paths to citizenship for children in E.J.’s circumstances. For example, E.J. could become a lawful permanent resident of the United States by virtue of his relationship to Andrew, and Elad could become a U.S. citizen by virtue of his marriage to Andrew; at that point, E.J. could acquire U.S. citizenship through Elad.

* * * *

5. U.S. Passports Invalid for Travel to North Korea

As discussed in *Digest 2017* at 7, and *Digest 2018* at 12, U.S. passports were declared invalid for travel to the Democratic People’s Republic of Korea (“DPRK”), pursuant to 22 CFR § 51.63(a)(3), beginning September 1, 2017 and extending until August 31, 2019. On August 14, 2019, the Secretary of State extended the restriction until August 31, 2020 unless extended or revoked. 84 Fed. Reg. 43,259 (Aug. 20, 2019).

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. Hussain v. Beecroft

On March 4, 2019, the United States filed its brief on appeal in *Hussain v. Beecroft*, No. 18-2110 (6th Cir.), in the U.S. Court of Appeals for the Sixth Circuit. Mr. Hussein appealed the district court’s dismissal of his APA and due process claims relating to the State Department’s refusal and return of an immigrant visa application he filed on behalf of his purported wife, Ms. Abdulrab, a citizen of Yemen. The consular officer in Cairo, Egypt

refused the application pursuant to INA § 221(g), noting suspicions about their marriage. The court found that the doctrine of consular nonreviewability barred review of the refusal and that plaintiffs' claims against the Department were moot upon the return of the underlying petition to USCIS for review. Excerpts follow from the U.S. brief on appeal. The brief is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. The Court of Appeals subsequently affirmed.

* * * *

The district court properly dismissed Plaintiffs-Appellants' mandamus petition because it lacked subject matter jurisdiction over Plaintiffs-Appellants' claims. Inasmuch as Ms. Abdulrab sought review of the consular officer's determination to refuse her visa application, the doctrine of consular nonreviewability as laid out in *Kerry v. Din*, 135 S. Ct. 2128 (2015), "precluded the court all of the putative claims and arguments by the plaintiffs that invite[d] the Court to look beyond the facial basis for the refusal ... since the consular decision denying the application is not open to substantive review by the Court." ... Defendants-Appellees provided Plaintiffs-Appellants with a facially legitimate and bona fide reason for refusal of Ms. Abdulrab's visa application: Plaintiffs-Appellants "failed to meet the burden of establishing the bona fides of the marital relationship upon which the petition approval was based—a prerequisite for the immigrant visa." ...

Further, unlike what appears to be the case in the instant filing before this Court, Plaintiffs-Appellants did not dispute before the district court that the I-130 petition had been sent to the [National Visa Center or] NVC for return to [U.S. Citizenship and Immigration Services or] USCIS for reconsideration and possible revocation. ... As shown here, Plaintiffs-Appellants are even inconsistent on their position of return of the petition within the same filing, their Opening Brief. However, the record reflects that the I-130 petition was sent to the NVC in November 2017 to return to USCIS with a memo to USCIS explaining the reason for the return. ... Thus, even assuming, arguendo, the district court had found the refusal of the visa application and the doctrine of consular nonreviewability insufficient to strip it of subject matter jurisdiction, the district court correctly determined Plaintiffs-Appellants' claims were moot "because the consular role in the process of reviewing the application fully was performed upon the return" of the petition to the NVC to return to USCIS. ... Consequently, this court should affirm the district court's grant of dismissal of the mandamus petition.

In the same manner, this Court should find denial of Plaintiffs-Appellants' motion to amend their mandamus petition proper, as amendment is futile. As the district court found, "the amended petition could not withstand a motion to dismiss." ... Plaintiffs-Appellants move to amend to add claims that will not change the outcome that the district court lacks jurisdiction over claims against the existing Department of State defendants. ... Further, Plaintiffs-Appellants' request to add new parties and new claims against USCIS and the DHS was—and remains—futile because Plaintiffs-Appellants have pointed to no statute or regulation that requires that USCIS move them to the front of the line of petition returns, or that USCIS must act on a returned petition in any specified period of time. Therefore, this Court should also find that Plaintiffs-Appellants' motion to amend was rightfully denied.

* * * *

II. LAW REGARDING VISA REFUSALS AND RETURNS TO USCIS

a. Visa Application Refusal for Failure to Establish Eligibility

The INA allows certain relatives of U.S. citizens to apply for immigrant visas based on certain family relationships. *See* 8 U.S.C. § 1151(a)(1). A United States citizen may file an I-130 Petition on behalf of an “immediate” alien relative. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a). If the petition is approved, the alien may apply for an immigrant visa. *See* 22 C.F.R. § 42.42. An immigrant visa application is executed at the interview before the consular officer. *See* 22 C.F.R. § 42.67. At the conclusion of the interview, a consular officer *must either issue or refuse* the visa. *See* 22 C.F.R. § 42.81 (emphasis added). The burden of proof is upon the applicant to establish eligibility to receive the visa. 8 U.S.C. § 1361. If the applicant fails to establish to the satisfaction of the consular officer that he or she is eligible for the visa, the consular officer *must* refuse the visa. *See* 8 U.S.C. §§ 1201(g), 1361 (emphasis added).

b. Petition Returns

The Department of State should “suspend [an] action in a petition case and return the petition, with a report of the facts, for reconsideration by DHS ... if the [consular] officer knows or has reason to believe that ... the beneficiary is not entitled, for some ... reason, to the status approved.” *See* 22 C.F.R. § 42.43(a). Upon return, USCIS “may revoke the approval of [a] petition upon notice to the petitioner on any ground other than those specified in § 205 when the necessity for the revocation comes to the attention of this Service.” *See* 8 C.F.R. § 205.2(a). “Revocation of the approval of a petition ... under paragraph (a) of this section will be made only on notice to the petitioner The petitioner ... must be given the opportunity to offer evidence in support of the petition ... and in opposition to the grounds alleged for revocation of the approval.” *Id.* at § 205.2(b).

* * * *

Following briefing and two hearings, the district court found: (1) Defendants-Appellees provided Plaintiffs-Appellants with a facially-legitimate and bona fide justification for refusal of the visa application, ...; (2) “the consular role in the process of reviewing the application fully was performed upon the return of the [petition] to the National Visa Center,” ...; and (3) “the consular decision denying the application is not open to substantive review by the Court” due to the well-established doctrine of consular nonreviewability. ... On appeal, Plaintiffs-Appellants have failed to demonstrate clear error in the district court’s factual findings. *See Whitbeck*, 382 F.3d at 636 (6th Cir. 2004). Consequently, this Court should affirm the district court’s dismissal of Plaintiffs-Appellants’ mandamus petition.

b. Denial of Plaintiffs-Appellants’ Motion to Amend was Proper Because Amendment Will be Futile

Plaintiffs-Appellants also sought amendment of their mandamus petition to “add Defendants: (1) USCIS; (2) Director USCIS, [L. Francis] Cissna; (3) United States Department of Homeland Security [], and; (4) Secretary of DHS, Kirstjen Nielsen as parties.” ... However, as explained *supra*, ... Plaintiffs-Appellants’ claims regarding the refusal of Ms. Abdulrab’s immigrant visa application and return of the I-130 petition have been properly dismissed for lack of subject matter jurisdiction as Defendants-Appellees provided a facially legitimate and bona fide reason for refusal, and have returned the petition to USCIS. ...

What is truly at issue before this Court regarding the requested amendment is Plaintiffs-Appellants’ claim of unreasonable delay of USCIS’s adjudication of Ms. Abdulrab’s returned petition. However, as the district court concluded, this Court should find denial of Plaintiffs-

Appellants' request to amend proper, and deny Plaintiffs-Appellants' request for remand, as their proposed amended petition cannot withstand a motion to dismiss.

* * * *

b. Aboutalebi v. Department of State

On December 18, 2019, the U.S. District Court for the District of Columbia issued its decision in *Aboutalebi v. Department of State*, No. 19-cv-2605 (D.D.C.). Ms. Aboutalebi challenged the failure to adjudicate her visa application but also alleged that denial of the application would violate the APA. After the litigation began, the U.S. Embassy in London notified Aboutalebi that she had been found ineligible for a visa under Section 212(f) of the INA, pursuant to Presidential Proclamation 9932. See discussion of Proclamation 9932 in section 4.c., *infra*. The court accordingly determined that her claims regarding failure to adjudicate were moot. As to the APA claim, the court found it lacked subject matter jurisdiction under the doctrine of consular nonreviewability. Excerpts follow from the court's decision, which is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

Under the doctrine of consular nonreviewability, federal courts lack subject matter jurisdiction over a consular official's decision to issue or withhold a visa. As the D.C. Circuit has explained, "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159. The doctrine operates out of respect for "the political nature of visa determinations," *id.*, and acknowledges that "[c]onsular officers have complete discretion over issuance and revocation of visas," *id.* at 1158 n.2. It "predates passage of the APA," and therefore "represents one of the 'limitations on judicial review' unaffected by [5 U.S.C.] § 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action." *Id.* at 1160. The doctrine sweeps wide and deep. It precludes judicial review "even where it is alleged that the consular officer failed to follow regulations, where the applicant challenges the validity of the regulations on which the decision was based, or where the decision is alleged to have been based on a factual error." *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 4 (D.D.C. 2009) (quoting *Chun v. Powell*, 223 F. Supp. 2d 204, 206 (D.D.C. 2002)). And if Aboutalebi's "claims are barred by the doctrine of consular non-reviewability," then "the Court has no subject-matter jurisdiction to hear the case." *Jathoul v. Clinton*, 880 F. Supp. 2d 168, 172 (D.D.C. 2012); *see also Singh v. Tillerson*, 271 F. Supp. 3d 64, 72 (D.D.C. 2017).

Aboutalebi preemptively alleges in her complaint that any later denial of her visa application would violate the APA. Compl. 97–100. In part of count three and count four, she asks the Court to declare that she is, in fact, entitled to a visa. *Id.* 94, 102. But under the doctrine of consular nonreviewability, the Court lacks subject-matter jurisdiction to review Defendants' decision to deny her application, and these claims must be dismissed.

Aboutalebi makes several attempts to sidestep this doctrine. First, she appears to question its force by arguing that the Supreme Court has neither endorsed the doctrine nor applied it to dismiss a case for lack of jurisdiction. *See* Supp. Br. at 2. She also points to *Trump v. Hawaii*, *id.*, in which the Supreme Court “assume[d] without deciding that plaintiffs’ statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue,” 138 S. Ct. 2392, 2407 (2018). But the Court may not so gingerly leapfrog controlling precedent. “[D]istrict judges, like panels of [the D.C. Circuit], are obligated to follow controlling circuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule it.” *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). And an intervening Supreme Court decision “effectively overrules” controlling precedent only if it “eviscerates” the prior precedent such that the two cases are “incompatible.” *Perry v. Merit Sys. Prot. Bd.*, 829 F.3d 760, 764 (D.C. Cir. 2016) (quoting *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999)), *rev’d on other grounds*, 137 S. Ct. 1975 (2017). Whatever may be said of the above language in *Trump v. Hawaii*, it does not “eviscerate” *Saavedra Bruno*, which continues to be applied by other courts in this District. *See, e.g., Rohrbaugh v. Pompeo*, 394 F. Supp. 3d 128, 131 (D.D.C. 2019).

Aboutalebi’s other arguments fare no better. She spends considerable time explaining why Defendants’ denial is unlawful. For example, she argues that Proclamation 9932 is not a valid basis to deny her visa application because it concerns “suspension of entry,” which she argues is separate from a finding of ineligibility for a visa. *See* Supp. Br. at 3–5; Supp. Reply at 2–4. The proclamation, she argues, “temporarily pauses the physical entry of a class of aliens,” but it does not render them “ineligible for a visa.” *See* Supp. Br. at 4. But that distinction, even if accurate, makes no difference here, because Aboutalebi’s claims challenge the reason for the denial of her specific visa application, which is prohibited by the doctrine. *Saavedra Bruno*, 197 F.3d at 1160.

Aboutalebi also argues that a consular officer did not make the decision in her case, and as a result, it is not covered by the doctrine. *See* Supp. Br. at 10. But Defendants represent that her “visa application was finally adjudicated by a consular officer in the Nonimmigrant Visa Unit of the U.S. Embassy in London,” Supp. Opp’n at 7, and there appears no reason to question their representation. Indeed, by law consular officers are the only persons empowered to issue or deny J-1 visas. *See* 8 U.S.C. §§ 1101(a)(9), 1103(a)(1), 1104(a), 1201(a)(1); 22 C.F.R. § 41.111; *see also Garcia v. Baker*, 765 F. Supp. 426, 428 (N.D. Ill. 1990) (“Neither the Attorney General nor the Secretary of State can require consular officers to grant or deny visa applications, and they are without power to issue visas.”); *Shen v. U.S. Consulate Gen. at Shanghai*, 866 F. Supp. 779, 780 (S.D.N.Y. 1994). Aboutalebi pivots in her Supplemental Reply to argue that a consular officer could not have adjudicated her application because the proclamation instructs that “the Secretary of State, or the Secretary’s designee” must identify persons covered by the proclamation. Supp. Reply at 5. But there is no reason why the Secretary could not have designated a consular officer to do so. And even if the Secretary or some other official identified persons covered by the proclamation, there remains no reason to doubt, as Defendants represent, that a consular officer made the subsequent decision regarding Aboutalebi’s specific visa application. Thus, the Court lacks the power to review it. *Saavedra Bruno*, 197 F.3d at 1160.

Aboutalebi also argues that her case is distinguishable from *Saavedra Bruno* because, unlike in that case, “the alleged basis of ineligibility is not a statutory basis for ineligibility at all.” Supp. Br. at 10. But, as Defendants point out, the reasoning supporting the doctrine is not so cabined. *See* Supp. Opp’n at 7–8. The doctrine is grounded in deference to the political branches’

power to determine who may enter the country. *Saavedra Bruno*, 197 F.3d at 1158–59. As the *Saavedra Bruno* court instructed, it is “not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” *Saavedra Bruno*, 197 F.3d at 1159 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). Aboutalebi has not pointed to any law that would permit this Court to review her visa denial.

Finally, Aboutalebi argues that her father is not a “senior official of the Government or Iran” under Iranian law and that she is not his “immediate family member” as properly understood under U.S. law. *See* Supp. Br. at 5–8, 10–11. For that reason, she argues, the proclamation does not apply to her. *Id.* at 11. But again, Aboutalebi asks the Court to do what it cannot: review a consular officer’s adjudication, whatever its underlying merits. *Chun*, 223 F. Supp. 2d at 206.

* * * *

2. Diversity Visa Lottery

On November 4, 2019, the U.S. District Court for the District of Colombia issued its decision on a motion for preliminary injunction in *E.B. v. Department of State*, No. 19-cv-02856 (D.D.C.), a challenge to the rule requiring that any individual who seeks to participate in the annual diversity visa lottery must possess a valid passport from her home country when she registers for the lottery. The Diversity Visa Program (Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997 *et seq.* (1990) (codified at 8 U.S.C. § 1153(c))) allows the State Department to issue up to 50,000 diversity visas annually to individuals from countries and regions that are historically underrepresented in immigration to the United States. *See* 8 U.S.C. § 1151(e). The process uses a “lottery” to select potential visa applicants from among the approximately 14 million individuals who register each year. 84 Fed. Reg. 25,989 (June 5, 2019) (codified at 22 C.F.R. § 42.33). The court first found that the plaintiffs were likely to succeed in demonstrating standing to sue under the APA. Then the court considered whether plaintiffs could meet the requirement of showing a likelihood of irreparable harm in order to obtain a preliminary injunction. The court’s consideration of irreparable harm, excerpted below (with record citations omitted), concludes with the court denying the motion for a preliminary injunction due to the failure to show a likelihood of irreparable harm from the rule. The full opinion is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law>.

* * * *

Applicant Plaintiffs argue that the “cost and time of obtaining a passport” will effectively preclude them from applying for this year’s lottery. They argue that “losing the opportunity to apply for a diversity visa in this year’s lottery” would constitute irreparable harm that “cannot be subsequently redressed.” Thus, the harm they allege is the loss of the *chance* to apply for an immigrant visa, not the loss of the visa itself. ... Family Plaintiffs, for their part, argue that their

irreparable harm flows from that same loss of a chance. They contend that “the denial of the conditional benefit of family unification through this year’s Diversity Visa Program would also comprise an irreparable injury that cannot be remedied once the lottery has taken place.”

Plaintiffs have not shown that missing the lottery this year will subject them to irreparable harm under the law of this Circuit. First, the loss of such a small chance is not sufficiently “great” to warrant a preliminary injunction. As discussed above, to warrant preliminary relief, the alleged injury must not only be “certain” but also “great.” *Wisc. Gas Co.*, 758 F.2d at 674. Even the certain loss of a tiny—about 0.8%—chance of a desired benefit cannot suffice under this exacting standard. While “there is some appeal to the proposition that any damage, however slight, which cannot be made whole at a later time, should justify injunctive relief,” the Court cannot ignore that “some concept of magnitude of injury is implicit in the [preliminary injunction] standards.” *Gulf Oil Corp. v. Dep’t of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981). Plaintiffs have cited no case in which a court found that the loss of such a small chance at a benefit met the irreparable harm standard, even a benefit as potentially significant as a diversity visa.

Second, the “greatness” of Plaintiffs’ injury is also undermined by the lottery’s annual repetition. By statute, the State Department must issue diversity visas every year, 8 U.S.C. § 1153(c)(1), and must do so randomly, 8 U.S.C. § 1153(e)(2). Plaintiffs thus are not losing their *only* chance at a diversity visa if they do not participate in the lottery this year. That the lottery is held annually further underscores why the alleged injury is insufficiently “great” to be irreparable. *Cf. Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 226 (D.C. Cir. 1981) (“The uncertainty of future opportunities emphasizes the irreparable character of the injury class members would sustain if discriminatory selection were permitted.”).

Third, at least on this record, the lack of a direct connection between the alleged injury and the Passport Rule further weakens Plaintiffs’ case for irreparable harm. An irreparable injury must “directly result from the action which the movant seeks to enjoin.” *Wisc. Gas Co.*, 758 F.2d at 674. Applicant Plaintiffs allege that they cannot obtain a passport in time to enter the lottery because they either lack the money to do so or learned about the new requirement too late. But these obstacles, to the extent that they exist, do not “directly result” from the Passport Rule for irreparable harm purposes.

* * * *

...[T]he Passport Rule was published in the Federal Register on June 5, 2019. *See* Passport Rule. And while the Court understands that Applicant Plaintiffs likely do not regularly check the *Federal Register*, the rule’s publication there serves to provide them notice as a matter of law. 44 U.S.C. § 1507; *see also Nat’l Ass’n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 953 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (“The Federal Register Act further provides that the filing of a document required to be published in the Federal Register constitutes constructive notice to anyone subject to or affected by it.”). None of the Applicant Plaintiffs’ representations suggest that, had they started the process of obtaining passports when they had constructive notice of the rule in June, they would not have been able to secure them five months later, by November 5, 2019. This amounts to another reason why the Applicant Plaintiffs’ harm from missing the lottery this year does not “directly result” from the Passport Rule itself.

Another court in this District recently found an insufficient causal connection between government action and alleged irreparable harm in the visa context in *Feng Wang v. Pompeo*, 354 F. Supp. 3d 13 (D.D.C. 2018). That case concerned the EB-5 visa program, which allows foreign immigrant investors, their spouses, and their young unmarried children to be admitted to the United States as permanent residents. *Id.* at 17. The annual number of EB-5 visas is limited and, because the demand for EB-5 visas outpaces the supply, prospective EB-5 immigrant investors from China must wait years for a visa. *Id.* at 16–19. Immigrant investor plaintiffs challenged the State Department’s policy of counting family members towards the annual limit—which they alleged caused the long wait—as unlawful. *Id.* at 19. They argued that without an injunction, their children would be too old to join them by the time they obtained visas. *Id.* at 25–26. And as a result, they asserted, they would be irreparably harmed because their families would be separated. *Id.* In denying their motion for a preliminary injunction, the court found that the causal link between the government’s policy and the potential separation of the plaintiffs’ families was not direct enough to show irreparable harm. *Id.* at 25–26, 28. The Court reasoned that “State’s counting policy does not, in and of itself, cause family separation. Rather, the causal connection is between the counting policy and the choice investors face if their children age out by the time EB-5 visas become available.” *Id.* at 26.

In support of their irreparable harm claim, Plaintiffs cite cases that present a few distinct scenarios, but none are akin to the unusual circumstances here. They point to several cases from outside this Circuit in which courts have held that the loss of a chance to bid on a contract can constitute irreparable harm. ...[U]nlike the plaintiffs in those cases, Applicant Plaintiffs are not losing out on a unique opportunity because the lottery is held annually.

Plaintiffs also refer to cases in which courts have held that the loss of a chance to take the bar exam can constitute irreparable harm. *See, e.g., Enyart v. Nat’l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011). Again, the harm in those cases was “greater” than that faced by Plaintiffs here because in all likelihood those plaintiffs had far higher chances of passing the bar exam than Applicant Plaintiffs have of winning the lottery. Moreover, in those cases, courts found that the plaintiffs’ loss of a chance to take the exam would harm them in specific ways beyond mere delay.

* * * *

3. Visa Waiver Program

The agreement between the United States and Poland on cooperation on border security and immigration was signed at Washington on August 16, 2019 and entered into force November 14, 2019. The full text of the agreement is available at <https://www.state.gov/poland-19-1114>.

On March 7, 2019, U.S. Ambassador-at-Large and Coordinator for Counterterrorism Nathan A. Sales delivered remarks at the Heritage Foundation on the role of the Visa Waiver Program (“VWP”) in strengthening U.S. security. Ambassador Sales’s remarks are excerpted below and available at <https://www.state.gov/the-visa-waiver-programs-role-in-strengthening-our-security/>.

* * * *

[T]he Visa Waiver Program is the gold standard for international security cooperation. The VWP helps us push our borders out: It enables us to identify terrorists attempting to travel here and stop them long before they reach our shores.

That's because visa-free travel doesn't mean *vetting*-free travel. As a condition of membership, our partners share valuable information that strengthens our national security, like terrorist watchlists and criminals' fingerprints. They invest in sophisticated border security technology. They upgrade their passport security programs. And they amend their counterterrorism laws to address the new threat landscape.

* * * *

The VWP's Security Requirements

The Visa Waiver Program's economic benefits are well known. In 2017, the United States welcomed more than 22.6 million visitors under the program. While they were here, they collectively spent more than \$94 billion in our country. On average, VWP travelers spend 44 percent more during a trip to the United States than other visitors.

* * * *

The criteria for membership are fairly straightforward. By law, member countries must have a nonimmigrant visa refusal rate lower than three percent. ... Members also have to implement a number of tough security measures to combat terrorist travel.

DHS is responsible for ensuring that countries meet the VWP's strict security criteria. The State Department's Counterterrorism Bureau, which I lead, plays a key role in ensuring the VWP is helping to secure our homeland and keep our citizens safe.

Let me say a few words about five key security requirements in the program.

First, there's the Electronic System for Travel Authorization, or ESTA. Citizens of VWP countries apply online before boarding their plane or ship to the U.S. DHS then screens their data to determine if they might pose a threat. If their ESTA is denied, they must apply for a visa at a U.S. embassy or consulate.

This vetting works because of a second VWP requirement—it gives us unprecedented access to other countries' terrorism-related data.

One of the lessons we learned on 9/11 was the need to tear down the walls that kept officials within and among governments from talking to one another. We can't allow ourselves to forget that vital lesson.

Under the VWP, member states must provide us with their watchlists of known and suspected terrorists. They also have to share information about serious criminals, including their fingerprints and other biometrics.

In addition, since 2017, VWP members have been required to screen travelers arriving in their countries against U.S. watchlists, and notify us about any encounters with potential terrorists. This dramatically expands our awareness of global terrorist travel and makes it harder for terrorists to cross borders anywhere. Think of it as a global neighborhood watch where everyone's looking out for emerging terrorist threats.

Third, we've leveraged INTERPOL's capabilities to enhance the security of the VWP.

VWP partners are required to report lost or stolen passports within 24 hours, either to INTERPOL or directly to the U.S. This helps us spot terrorists trying to travel on forged documents. In fact, VWP countries are responsible for over 70 percent of the 84.5 million records in INTERPOL's database of stolen and lost travel documents.

We also recently began requiring member countries to report foreign terrorist fighter identities to organizations like INTERPOL and Europol. ...

Fourth, the VWP helps us spot unknown terrorists—the ones hiding in plain sight.

The VWP's intensive information sharing requirements enable us to stop travelers who've been watchlisted. But we need to do more if we're going to stop terrorists who've managed to escape notice. To help flag these previously unidentified threats, we've called on our VWP partners to analyze Passenger Name Record data, or PNR.

PNR is the information you give an airline when you book a ticket. ...

The United States began using PNR in 1992, and in 2002 collection became mandatory for all flights to and from our country. We made it a requirement for VWP members in 2015.

PNR is one of the most valuable weapons in our counterterrorism arsenal, because it draws connections between known terrorists and their unknown associates. The technique is called "link analysis." If a traveler has booked a ticket with the same phone number as, say, the underwear bomber, he probably deserves a closer look than a typical airline passenger.

In fact, if investigators had applied simple link analysis techniques to PNR and related data, they could have uncovered the ties among all 19 of the 9/11 hijackers.

We can also use PNR to spot potential terrorists based on their travel patterns. We can tell if a traveler flies with a companion who's on a watchlist. We can tell if a passenger's current travel varies from previous routes. We can tell if a traveler is taking odd routings to get from point A to point B.

Fifth, the VWP isn't just about sharing threat information or screening travelers. It also enables DHS to evaluate partners' border security and passport facilities ...

DHS experts regularly visit VWP countries to inspect airport security, see how border officials screen travelers, visit refugee-processing facilities, and check that government offices are issuing passports to genuine applicants. ...

Why are member states willing to live up to these strict security requirements? Part of the answer is that, like the U.S., they take seriously the threat of international terrorism.

But partly it's because the benefits of visa-free travel are worth it to them. In short, the VWP is a carrot with which we can induce member states to live up to the very highest security standards. It buys us data and cooperation we otherwise wouldn't get. Because of the VWP, we have more watchlists, more fingerprints, and more leverage. And more security.

* * * *

In December 2017, the UN Security Council unanimously adopted a tough, landmark resolution on terrorist travel. Resolution 2396 requires all UN members to use tools like watchlists and PNR. [Resolution] 2396 internationalizes American policies and practices. ...

Similarly, the European Union is now setting up its own ESTA-like system. ...

Going forward, we'll continue using the VWP as a lever to induce other countries to embrace state-of-the-art border security.

For that reason, we're also open to welcoming new members that meet the program's strict criteria. ...

* * * *

4. Visa Regulations and Restrictions

a. *Proclamation 9645*

(1) *Congressional communications regarding waiver provision*

As discussed in *Digest 2017* at 17-28, and *Digest 2018* at 21-37, the U.S. Supreme Court upheld Presidential Proclamation (“P.P.”) 9645 as a lawful exercise of executive discretion to suspend the entry of aliens into the United States. On February 22, 2019, the State Department responded to a letter from several members of both chambers of Congress regarding the waiver provision in P.P. 9645. The February 22, 2019 response is excerpted below (without the referenced enclosures, which include sensitive, non-public information). The State Department has also submitted regular reports to the appropriate congressional committees on the implementation of P.P. 9645, as mandated by Public Law 116-6, the Consolidated Appropriations Act of 2019. Those reports are available at <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/presidential-proclamation9645.html>.

* * * *

Thank you for your letter of October 12, 2018 regarding Presidential Proclamation 9645—Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (the Proclamation or PP 9645). ...

Your letter requested the Department’s guidance regarding the processing of waivers to foreign nationals affected by the Proclamation and specific statistical data on such waivers. In addition to the information provided in this letter, the Department also makes a broad range of visa statistics publicly available at <https://travel.state.gov/content/travel/en/us-visas.html>.

The Department works closely with U.S. embassies and consulates to ensure visa applicants who are subject to PP 9645 and otherwise eligible for visas are considered for exceptions and waivers under the Proclamation. An applicant whose situation fits into one of the exceptions set forth in the Proclamation, and who is otherwise eligible for a visa, may be issued a visa without going through the waiver process.

If an applicant does not fall into an exception category, but is otherwise eligible for a visa, a consular officer will *automatically* consider the applicant for a waiver based upon the three-part test set forth in PP 9645. The applicant need not prepare any separate application for a waiver. Consular officers adjudicate waivers as part of the visa application process based on information provided in the standard visa application and an in-person interview of the applicant. Aliens who are subject to the Proclamation’s entry restrictions may present evidence regarding their eligibility for a waiver pursuant to the regulations applicable to immigrant and nonimmigrant visa applicants. *See e.g.* 22 C.F.R. §§ 41.105(a), 41.121(b)(1), 42.65, 42.81(b).

The burden of proof is on the alien to establish that they are eligible for a visa and a waiver to the satisfaction of the consular officer. *See e.g.* 8 U.S.C. § 1361; 22 C.F.R. § 40.6. The text of the Proclamation and these regulations and other helpful information, including frequently asked questions regarding the Proclamation and the total number of waivers approved (updated biweekly) for applicants subject to PP 9645 travel restrictions, are available on the Department’s public website, travel.state.gov. Certain information has also been made publicly available on the Department’s Freedom of Information Act website, foia.state.gov, as discussed in the attachment.

The Department noted in its responses to your prior two letters from 2018 that, although two cases had been cleared for waivers as of January 8, 2018 (which was only one month after the Department began processing cases under the Proclamation), that number was expected to grow as time elapsed. The attached data reflect[] that approximately 5.9 percent of applicants hav[e] been found to qualify for waivers as of October 31, 2018. In addition, more than 11,000 applicants have been determined to meet the first two requirements for a waiver and are now under review to determine whether they meet the remaining national security and public safety criterion. Due to the time required to fully evaluate an applicant’s eligibility for a waiver, the Department is providing statistics using October 31 as a cut-off date, which is likely to give a more accurate indication of the portion of applicants covered by the Proclamation who qualified for waivers. Many applicants who applied between October 31 and the present are still being considered for a waiver. Furthermore, as discussed in the attachment and in the appendix, once a consular officer determines that an applicant meets all three criteria for a waiver, the timing of visa issuance often depends on how quickly the applicant provides documents required for visa issuance to the consular officer. This includes documents such as medical exam results, police certificates, passports, and other documents required under the ... INA or implementing regulations.

As requested, please find enclosed answers to the questions enumerated in your letter. The responses include statistics for the period between December 8, 2017 and October 31, 2018.
...

* * * *

(2) *Litigation regarding waiver provision*

There were several lawsuits filed in 2019 challenging the Trump administration’s application of the waiver provision in P.P. 9645. On December 5, 2019, in *Najafi v. Pompeo*, No. 19-cv-05782 (N.D. Cal.), the U.S. District Court for the Northern District of California denied plaintiffs’ motion for a preliminary injunction requiring completion of waiver adjudication within fifteen days. Excerpts follow from the section of the court’s order considering the “likelihood of success” requirement for a preliminary injunction. The court’s order is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law>.

* * * *

To the extent that Plaintiffs are arguing that their APA claim regarding timing is subject to APA review, however, the Court finds that Plaintiffs have not established reviewability. Plaintiffs point to no objective standard in PP 9645 that can be applied to determine what is a reasonable time. While Plaintiffs point to *Nine Iraqi Allies v. Kerry*, this case is distinguishable because there, the relevant statutes required that the government process applications within nine months. 168 F. Supp. 3d 268, 293 (D.D.C. 2016). Thus, when determining what was a reasonable time, the district court was able to find that the statutes “provide[d] just such a timetable or other indication of speed.” *Id.* (internal quotation omitted). No such timing obligation exists in PP 9645, however, and thus the Court has no manageable standards to assess Defendants’ compliance. See *Darchini* Ord. Denying Prelim. Inj. at 6 (distinguishing *Nine Iraqi Allies* “because there is no similar statutory directive here”).

Accordingly, the Court finds that Plaintiffs’ claim as to whether consular officers’ discretion and authority to make individual waiver decisions is being unlawfully usurped is reviewable under the APA. The Court finds, however, that Plaintiffs have not established that their claim regarding the reasonable timing of such decisions is reviewable under the APA.

b. Consular Nonreviewability

Defendants argue that Plaintiffs are attempting to “short-circuit consular nonreviewability” via the APA... “It has been consistently held that the consular official’s decision to issue or withhold a visa is not subject either to administrative or judicial review.” *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008). Here, consular nonreviewability does not apply because Plaintiffs are not challenging the consular officer’s decision, but the lack thereof, as well as the procedures by which PP 9645 is being implemented. ... Further, as Beneficiary Plaintiffs are still *waiting* for a decision by the consular officer, there is no decision to review and thus consular nonreviewability is not at issue.

* * * *

c. Unreasonable Delay

On the merits, the Court finds that Plaintiffs have failed to show a likelihood of success on the merits as to whether the waiver decisions have been unreasonably delayed. Again, as discussed above, the Court finds that Plaintiffs have not shown that they can bring an APA claim based solely on the timing. Rather, Plaintiffs have established reviewability as to an APA claim based on the alleged policy depriving consular officers of the discretion and authority to issue waivers. Even if Plaintiffs succeed on this violation, however, Plaintiffs fail to connect this policy with any unreasonable delay. At most, Plaintiffs point to the e-mail by Mr. Nantais stating that “the goal of this effort is not to create timely processing of waivers for any applicant who is ineligible under the proclamation.” (Pls.’ Mot. for Prelim. Inj., Exh. 95 at 6.) This e-mail, however, is not proof of intentional delay, as the e-mail goes on to state: “The goal is to as thoroughly and effectively screen and vet every affected applicant prior to waking [sic] a waiver determination.” Thus, at most the e-mail states that the priority is on vetting rather than timeliness. Nor is it clear that Mr. Nantais’s e-mail is representative of a government policy...

Even if the Court was to find that the challenged policy causes delay, Plaintiffs fail to establish that such delay is unreasonable. Plaintiffs urge the Court to apply the factors set out in *Telecommunications Research and Action Center v. FCC* (“TRAC factors”) for determining unreasonable delay...

The first TRAC factor requires the application of a “rule of reason.” ... Here, the Court cannot say that the time taken by Defendants thus far is unreasonable. Indeed, courts in this

district have recognized that “[t]errorist-related determinations involving immigration applicants are not made lightly and may be time-consuming.” *Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1071 (N.D. Cal. 2014). Additionally, in finding that PP 9645 was lawful, the Supreme Court accepted (and this Court is bound by its ruling) PP 9645’s “extensive findings describing how deficiencies in the practices of select foreign governments . . . deprive the Government of ‘sufficient information to assess the risks those countries’ nationals pose to the United States.” *Trump v. Hawaii*, 138 S. Ct. at 2408 (quoting PP 9645 § 1(h)(i)). Thus, as Defendants explain, “[t]he vetting process may be more difficult and time consuming for the [Beneficiary Plaintiffs] because, as the Presidential Proclamation explains, Iran does not adequately provide public-safety and terrorism-related information.” (Defs.’ Opp’n at 19; *see also Darchini* Ord. Denying Prelim. Inj. at 8 (“The Court is persuaded by the Government’s argument that this vetting process is more difficult and time consuming for Iranian nationals because, [as] the Presidential Proclamation explains, Iran does not adequately provide public-safety and terrorism-related information”) (internal quotation omitted).)

In arguing that Defendants are able to complete the waiver determinations within fifteen days, Plaintiff argues that “Defendants have stated that waiver considerations can be completed in ‘one business day.’” (Pls.’ Mot. for Prelim. Inj. at 21.) The relevant e-mail is an automatic reply from the “Countries-of-concern-inquiries” e-mail, and states: “In urgent cases, a response from the Visa Office can be provided within one business day, provided that the Visa Office has all the information needed.” (Pls.’ Mot. for Prelim. Inj., Exh. 74 at 1.) The e-mail does not suggest that waiver considerations can in fact be completed in one business day; it only states that responses can be provided in one business day in urgent cases. It is not clear, however, that this e-mail address is used for waiver considerations only; notably, the State Department’s Operating Q&As states that this e-mail is to be used “[i]f the applicant does not fit under one of the undue hardship and national interest waiver examples . . . but the interviewing consular officer and consular manager believe that the applicant meets the undue hardship and national interest requirements for the waiver for other reasons . . .” (Pls.’ Mot. for Prelim. Inj., Exh. 75 at 6.) The auto-reply also refers to “general inquiries,” which suggests this e-mail address is used for many different functions, some of which may be capable of responses within one business day.

Plaintiffs also point to the Defendants’ implementation of the enhanced, automated front-end screening for security checks, which greatly reduces the time necessary for adjudication. (Pls.’ Mot. for Prelim. Inj. at 21-22.) While this appears to be true, it does not show that the delay in adjudication up to this point is unreasonable. The automated system was not implemented until July 2019, at which point there was already a backlog of approximately 17,000 waiver applications. It is not clear that the implementation of automated screening necessarily means Defendants can now complete the waiver determinations within fifteen days for Plaintiffs. Thus, the Court finds this factor weighs in favor of Defendants.

The second *TRAC* factor considers where there is a mandated timetable. No timetable exists in PP 9645. While Plaintiffs argue that the President “promised to create a ‘robust’ waiver program,” and points again to the “one business day” e-mail, the Court finds that the plain language of PP 9645 creates no timing requirement. Thus, this factor is neutral.

Courts typically consider the third and fifth *TRAC* factors together, namely the dangers to human health and welfare as well as the nature of the interests prejudiced by the delay. *See Islam*, 32 F. Supp. 3d at 1073; *Beyene*, 2012 WL 2911838, at *7. Plaintiffs point to the hardships

that they are suffering due to family separation. Defendants do not appear to dispute these factors, and the Court finds they weigh in favor of Plaintiffs.

The fourth *TRAC* factor considers the effect of expediting adjudication “on agency action of a higher or competing priority.” *TRAC*, 750 F.2d at 80. Plaintiffs argue that “the agency’s competing priorities are a difficult metric to analyze because Defendants have abandoned all pretense of competing priorities, by prioritizing only a blanket preclusion of entry” (Pls.’ Mot. for Prelim. Inj. at 24.) The Court does not find this conclusory argument persuasive, particularly when waivers have in fact been granted to Plaintiffs in this case since its filing. (Defs.’ Opp’n, Exh. B at 13, 40, 45 (visas issued to Plaintiffs Aryana, Shafeian, Rayatidamavandi, and Beykli.) As Defendants point out, there are also competing priorities including the need for national security vetting and the thousands of other waiver applicants in line. (Defs.’ Opp’n at 22.) In particular, “national security concerns constitute the stated purpose for the proclamation, and given that this purpose has been expressly approved by the Supreme Court, we must weigh this factor decisively in favor of Defendants.” *Yavari v. Pompeo*, 2:19-cv-2524-SVW-JC, Dkt. No. 27 at 13 (citing *Trump v. Hawaii*, 138 S. Ct. at 2420).

The final *TRAC* factor concerns bad faith. Plaintiffs state that at this juncture, they are not alleging any impropriety. (Pls.’ Mot. for Prelim. Inj. at 24.) A court “need not find that an agency acted in bad faith to conclude unreasonable delay.” *Qureshi*, 2012 WL 2503828, at *7 (citing *Indep. Mining Co.*, 105 F.3d at 510). Thus, this factor weighs slightly in favor of Defendants.

Considering the factors together, the Court finds that Plaintiffs have not established a likelihood of success that Defendants have subjected them to unreasonable delay. In particular, the rule of reason and competing agency priorities weigh strongly against such a finding. *See Darchini* Ord. Denying Prelim. Inj. at 7-9 (finding that *TRAC* factors weigh against finding unreasonable delay based on identical facts); *Jamal* Ord. Denying Prelim. Inj. at 7-9 (same).

* * * *

In *Darchini v. Pompeo*, No. 19-cv-01417 (C.D. Cal.) (referenced by the *Najafi* court’s order), the U.S. District Court for the Central District of California denied the plaintiffs’ motion for a preliminary injunction on September 24, 2019 and granted the U.S. government’s motion to dismiss on December 3, 2019. Excerpts follow from the section of the court’s order dismissing the APA claims, without prejudice. The court also dismissed the Fifth Amendment (due process) and mandamus claims without prejudice. The court’s order is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law>.

* * * *

First, the Government argues that Plaintiffs have failed to allege unreasonable delay under the APA, 5 U.S.C. §§ 555(b) and 706(1). Mot. at 13. To succeed on such a claim, a plaintiff must establish that the agency has a “discrete” duty to act and that the agency unreasonably delayed acting on that duty. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-65 (2004). “[F]or a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place.” *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). Accordingly, “there can be

no unreasonable delay” where “the governing statute does not require action by a certain date.” *Id.* at 885-86.

In their Complaint, Plaintiffs allege that the Government has failed to act within a reasonable time because it has “failed to adjudicate Beneficiary Plaintiffs visa waivers within 90 days,” although Plaintiffs offer no explanation for this particular deadline. Complaint 166. But in their Opposition, Plaintiffs do not address the Government’s arguments regarding the lack of a statutory requirement. The Court finds that Plaintiffs have not adequately alleged that the Government has unreasonably delayed agency action it is required to take. Therefore, the Court dismisses Plaintiffs’ first cause of action under §§ 555(b) and 706(1), without prejudice.

Next, the Government argues that Plaintiffs fail to state a claim under § 706(2)(A) and (D). Mot. at 17-18.

The APA bars federal agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or is conducted “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) and (D). Plaintiffs claim that the Government’s alleged requirement that visa and consular section chiefs concur with consular officers’ determinations regarding waivers is unlawful under PP 9645. See Complaint 174-181.

The Government argues that Plaintiffs “point to no source of law prohibiting consular-officer consultation with supervisors or other State Department components or federal agencies in making the national-security and public safety assessment,” and that the Proclamation “does not define ‘consular officer.’” Mot. at 17. The Government further suggest that PP 9645 contemplates agency involvement beyond that of rank-and-file consular officers, because it provides for the Secretary of State and the Secretary of Homeland Security to promulgate “standards, policies, and procedures for: ... determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States,” as Plaintiffs note. See Complaint 7; Mot. at 18. The Government contends that individual consular officers could not have access to all of the intelligence and national-security information they need to make the waiver adjudications, and so the participation of other officials in the process is appropriate. *Id.*

Plaintiffs’ response is that the Government cannot “make up a new meaning” for the phrase, “consular officer.” Opp’n at 14. To this argument, the Government notes that the definition of “consular officer” in federal law “easily encompasses consular officers who are managers and supervisors beyond the one, single, regional, rank-and-file officer before whom an individual Plaintiff visa applicant executed their visa application.” Reply at 7; ... The Court agrees with the Government that Plaintiffs’ allegations regarding the propriety of officials other than rank-and-file consular officers participating in the waiver adjudication process do not plausibly support their substantive APA claim.

Plaintiffs do not otherwise provide any legal support for their contention that the waiver adjudication process is unlawful. The Court finds that their Complaint fails to plausibly state a claim under §§ 706(2)(A) and (D) and dismisses this cause of action, without prejudice.

* * * *

(3) International Refugee Assistance Project (“IRAP”) v. Trump

In the *IRAP* case, multiple plaintiffs—including organizations (such as IRAP) and U.S. citizens and residents seeking visas for their relatives from Iran, Syria, Yemen, and

Somalia—challenged Presidential Proclamation 9645 as unconstitutional. The district court denied the U.S. government’s motion to dismiss, notwithstanding the Supreme Court’s decision in *Trump v. Hawaii*, holding that the Proclamation survives rational basis review because of its national security justification. See *Digest 2018* at 21-37. Excerpts follow from the U.S. brief filed October 22, 2019 in the U.S. Court of Appeals for the Fourth Circuit. *International Refugee Assistance Project v. Trump*, No. 19-1990 (4th Cir.). The brief is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

I. In *Hawaii*, the Supreme Court unequivocally held that the Proclamation survives rational-basis review. That decision is controlling here. The district court committed a variety of fundamental errors in concluding to the contrary.

The district court erred in relying upon, and crediting, precisely the same arguments that the Supreme Court rejected in *Hawaii*. The district court believed plaintiffs’ rational-basis challenge was viable under three cases—*Moreno*, *Cleburne*, and *Romer*—even though *Hawaii* held that the Proclamation did not fit the pattern of those cases. The district court also stated that the Proclamation’s national-security rationale was undermined by statements from the President, supposed deviations from the Proclamation’s baseline criteria, the rate at which waivers are granted, and the statutory scheme. But *Hawaii* considered and rejected the exact same arguments.

The district court’s effort to distinguish *Hawaii* is without merit. Although the Court reviewed a preliminary injunction under the likelihood-of-success standard, *Hawaii*’s holding turned on a binding legal conclusion that the Proclamation survives rational-basis scrutiny, not a tentative merits analysis or balancing of harms that would be relevant to a discretionary assessment of equitable relief. Also unavailing is the district court’s reliance on the possibility of new evidence—specifically, concerning the approval of waivers. But this purported new evidence is legally irrelevant, because *Hawaii* already rejected the argument that the rate at which waivers are granted affects the Proclamation’s rational basis. And it is also factually immaterial, in light of the thousands of waivers approved under the Proclamation since the restrictions were first imposed. Accordingly, the district court offered no persuasive rationale for disregarding the Supreme Court’s holding in *Hawaii*, which is binding here and forecloses plaintiffs’ constitutional claims.

The district court also fundamentally misunderstood the legal standard for applying rational-basis review at the motion to dismiss stage. The court’s call for a “more fulsome” record on these issues is simply incompatible with the rational-basis standard, which is not subject to courtroom fact-finding. Likewise, the court’s examination of what “motivated” the Proclamation cannot be squared with rational-basis review, in which actual motivations are entirely irrelevant. The court’s questioning of the Proclamation’s national-security efficacy is also improper, because the Proclamation survives review so long as its rationales are arguable, even if they were erroneous.

The district court also erred in its view that, on a motion to dismiss, plaintiffs’ rational-basis challenges may succeed based on nothing more “plausible” attacks on the Proclamation. Although the court must accept all plausibly pled factual allegations as true on a motion to

dismiss, the district court was wrong to apply that principle to legal conclusions, including the question whether the Proclamation is supported by a rational basis. Moreover, rational-basis review asks whether there are plausible reasons supporting the law, not whether there are plausible bases for attacking it.

Finally, even if the district court were somehow able to evade the Supreme Court's application of rational-basis review, the Proclamation must still be upheld. The district court focused exclusively on arguments it believed undermined the Proclamation's national-security rationale; but those arguments do not question the Proclamation's other, independent rationale—to encourage foreign governments to improve their practices, thus facilitating the government's vetting process overall—and the Proclamation can be sustained on that basis alone. Furthermore, while *Hawaii* did not reach this question, the Supreme Court strongly suggested that the Proclamation should more properly be analyzed under *Mandel* rather than rational-basis review, and there is no doubt that the Proclamation survives that more deferential standard.

II. Wholly apart from the threshold flaw that *Hawaii* forecloses this suit, plaintiffs' claims also must be dismissed for additional, alternative reasons. First, plaintiffs' Due Process claim fails on the merits because plaintiffs have no cognizable liberty interest in the issuance of a visa to a foreign national relative. And at a minimum, they have received all the process they are due. Second, plaintiffs' Equal Protection and Establishment Clause claims fail on the merits because those claims are not predicated on any violation of plaintiffs' own constitutional rights. The Proclamation does not apply to plaintiffs at all; it applies only to aliens abroad. Accordingly, plaintiffs' challenges must be predicated only on derivative claims based on the rights of foreign nationals who themselves have no constitutional rights. But it is a long-established rule that a party must assert his own rights based on being himself subject to the challenged government policy. Plaintiffs cannot satisfy that requirement, and so their claims fail on the merits.

Contrary to the district court's suggestion, the Supreme Court in *Hawaii* expressly declined to address this alternative basis for rejecting these claims.

* * * *

On December 17, 2019, the United States government filed a further reply brief in support of its appellate brief, excerpted above. Excerpts follow from the reply brief in *IRAP v. Trump*, which is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

The Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), held that “the Government has set forth a sufficient national security justification [for Presidential Proclamation 9645] to survive rational basis review.” That binding holding forecloses plaintiffs' rational-basis challenges to the Proclamation.

Though decided in a preliminary-injunction posture, the Supreme Court's legal conclusion is fully binding here. The Court's decision did not turn on the balancing of harms or the equities involved; its comprehensive opinion did not express any tentativeness or eschew any definitive judgment; and the parties fully argued all the merits issues.

The motion-to-dismiss standard does not permit plaintiffs to open discovery on claims that the Supreme Court has already held fail as a matter of law. Whether the Proclamation rests on a rational basis is a question of law. And the pertinent legal question under rational-basis review is whether there are plausible grounds supporting the Proclamation, not whether plaintiffs have alleged plausible grounds for attacking it. If there are plausible grounds supporting the Proclamation—and *Hawaii* held that there are—then rational-basis review is at an end.

Plaintiffs merely recycle the same legal arguments that the Supreme Court already considered and rejected; they have not made any new allegations that would suffice to negate the rational basis identified and affirmed by the Supreme Court. The Court rejected the argument that the Proclamation could be explained only by anti-Muslim bias, and held instead that the Proclamation was rationally grounded in legitimate national-security concerns and foreign-policy objectives.

Plaintiffs’ arguments fare no better regarding the Government’s alternative grounds for dismissal. The Proclamation’s purpose of encouraging other countries to improve their information-sharing practices is plainly legitimate, as the Supreme Court recognized. The Proclamation is not irrational merely because it does not single-mindedly pursue that purpose to the exclusion of all other interests and considerations. The Government has not waived any argument about information-sharing objective; the Proclamation expressly identifies its information-sharing purpose, which was asserted at every stage of this litigation. That legitimate, rational objective is sufficient to uphold the Proclamation even if is related to the Proclamation’s national-security purpose. In all events, plaintiffs fail to refute that they cannot prevail under the more deferential standard of *Kleindienst v. Mandel*, 408 U.S. 753 (1972). *Hawaii* rejected plaintiffs’ argument that the Proclamation can be explained only by animus, and unequivocally stated that applying *Mandel* would put an end to its review.

Finally, plaintiffs also fail to demonstrate any cognizable violations of their own rights. The Supreme Court has squarely held that Equal Protection and Establishment Clause claims cannot proceed unless the plaintiff is personally denied equal treatment by the challenged provision, regardless of any allegedly “stigmatic” message that may be conveyed by the provision’s treatment of third parties. Plaintiffs do not dispute that the Proclamation does not even apply to them. As for plaintiffs’ Due Process claims, those claims fail because plaintiffs have received all the process they may be due, a point they do not rebut. Regardless, they also provide no persuasive response to the plurality in *Kerry v. Din*, 135 S. Ct. 2128 (2015), which refutes their claimed constitutional liberty interest in the grant of a visa to a foreign national relative. Nor can they rely on a liberty interest supposedly created by statute, because their only interest is in petitioning on behalf of a foreign national, and does not extend to determining whether the foreign national is actually eligible for a visa.

* * * *

b. Proclamation 9931: Suspension of Entry related to Venezuela

Proclamation 9931 of September 25, 2019 is entitled “Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies or Actions That Threaten Venezuela’s Democratic Institutions.” 84 Fed. Reg. 51,931 (Sep. 30, 2019). The President issued Proclamation 9931 based on the determination that “the unrestricted immigrant and nonimmigrant entry into the United States of persons described in

section 1 of this proclamation would, except as provided for in section 4 of this proclamation, be detrimental to the interests of the United States.” *Id.* Section 1 identifies those subject to the restrictions:

- (a) Members of the regime of Nicolas Maduro at the level of Vice Minister, or equivalent, and above;
- (b) All officers of the Venezuelan military, police, or National Guard at the rank of Colonel, or equivalent, and above;
- (c) All members of the organization known as the National Constituent Assembly of Venezuela;
- (d) All other aliens who act on behalf of or in support of the Maduro regime’s efforts to undermine or injure Venezuela’s democratic institutions or impede the restoration of constitutional government to Venezuela;
- (e) Aliens who derive significant financial benefit from transactions or business dealings with persons described in subsections (a) through (d) of this section; and
- (f) The immediate family members of persons described in subsections (a) through (e) of this section.

Id.

c. *Proclamation 9932: Suspension of Entry of Senior Officials of the Government of Iran*

Proclamation 9932 of September 25, 2019, entitled “Suspension of Entry as Immigrants and Nonimmigrants of Senior Officials of the Government of Iran,” suspends the entry into the United States, as immigrants or nonimmigrants, of senior officials of the Government of Iran and their family members. 84 Fed. Reg. 51,935 (Sep. 30, 2019). The President based the proclamation on his finding that the unrestricted entry of these officials and their family into the United States would, with certain exceptions, be detrimental to the interests of the United States. See discussion in section 1.b., *supra*, of the D.C. district court decision in *Aboutalebi v. Department of State*, a case challenging the denial of a visa based on application of P.P. 9932.

d. *Denial of Visas to PLO and Palestinian Authority Officials*

On April 12, 2019, the State Department determined pursuant to section 604 of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228) (the “Act”), that the noncompliance by the Palestine Liberation Organization (PLO) or the Palestinian Authority with certain commitments warranted the imposition under the Act of visa sanctions. However, the Deputy Secretary also determined that it is in the national security interest of the United States to waive this sanction, pursuant to section 604(c) of the Act. 84 Fed. Reg. 22,222 (May 16, 2019).

e. *Proclamation 9945: Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System*

On October 4, 2019, the President issued Presidential Proclamation 9945 (“P.P. 9945”) on the “Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System.” 84 Fed. Reg. 53,991 (Oct. 9, 2019). A nationwide temporary restraining order has been issued by the U.S. District Court for the District of Oregon, halting implementation of P.P. 9945. See *Doe v. Trump*, 418 F.Supp.3d 573 (D. Or. 2019).

f. *Visa Ineligibility on Public Charge Grounds*

Effective October 15, 2019, the State Department issued an interim final rule regarding determinations of ineligibility for a visa for aliens likely to become a public charge. The summary of the rule published in the Federal Register follows. 84 Fed. Reg. 54,996 (Oct. 11, 2019). The effective date of the corresponding DHS rule regarding public charge grounds for inadmissibility was delayed due to preliminary injunctions issued by courts hearing challenges to the regulations.*

* * * *

This final rule amends Department of State (“Department”) regulations by prescribing how consular officers will determine whether an alien is ineligible for a visa under the Immigration and Nationality Act (“INA”), because he or she is likely at any time to become a public charge. Aliens who seek a visa, application for admission, or adjustment of status must establish that they are not likely at any time to become a public charge, unless Congress has expressly exempted them from this ground of ineligibility or if the alien obtained a waiver. This interim final rule adds certain definitions, including definitions of public charge, public benefit, alien’s household, and receipt of public benefit. This interim final rule reflects the Department’s interpretation of the pertinent section of the INA as it applies to visa applicants. This rulemaking is also intended to align the Department’s standards with those of the Department of Homeland Security, to avoid situations where a consular officer will evaluate an alien’s circumstances and conclude that the alien is not likely at any time to become a public charge, only for the Department of Homeland Security to evaluate the same alien when he seeks admission to the United States on the visa issued by the Department of State and finds the alien inadmissible on public charge grounds under the same facts. The Department is also removing the reference to fee collection for review and assistance with submitting an affidavit of support at consular posts as consular posts do not collect this fee, and an obsolete process related to bonds.

* * * *

* Editor’s note: On January 27, 2020, the U.S. Supreme Court issued an order staying the preliminary injunctions. The new rule (both from the State Department and DHS) took effect February 24, 2020.

5. Visa Ineligibility Due to Unlawful Presence

On July 24, 2019, the U.S. District Court for the District of New Jersey issued its opinion in *Matulewsky v. Pompeo*, 18-cv-03370 (D.N.J.), a case challenging the State Department’s guidance in the Foreign Affairs Manual (“FAM”) (based on INA § 212(a)(9)(B)(i)(II)) that makes anyone who has been unlawfully present in the United States inadmissible for 10 years after departure even if the departure was pursuant to removal proceedings. Plaintiffs did not allege that the FAM had ever been applied to them through any decision on any visa application. The court agreed with the Department’s main argument in its motion to dismiss that the challenge failed to identify any final agency action that could give rise to an APA claim. Excerpts follow from the court’s opinion (with record citations omitted). The opinion is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

The plaintiffs are six individuals who are United States citizens and who bring a putative class action complaint on behalf of themselves, their non-citizen family relatives, and “all others who are similarly situated.” ... In essence, the Amended Complaint “challenges Defendants’ rule ... on unlawful presence departure” under “the Due Process Clause of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act (‘APA’), 5 U.S.C. § 706.” More specifically, “Plaintiffs challenge the rule set forth in [9 FAM 302.11-2 (‘the rule’)],” which, they claim, “misconstru[es] and appl[ies] ... INA § 212(a)(9)(B)(i)(II), to any and all departures made by aliens unlawfully in the United States.” Hence the rule, Plaintiffs conclude, “incorrectly fails to exempt departures pursuant to removal proceeding orders,” “violates the statute[’]s clear meaning;” and is ultra vires. Plaintiffs assert that the rule itself is a “final agency action” and thus “is reviewable.”

With respect to purported injuries, Plaintiffs apparently allege that the consequences of their own anticipated litigation strategies would be “unnecessary” or “expensive.” Plaintiffs also claim that Defendants’ anticipated enforcement of the rule would “deprive[] them of an ‘opportunity’ for an ‘immediate relative’ permanent residence benefit or relief” or “will cause them to be . . . separated from their families for ten years.”

Defendants, in response, submit that the Amended Complaint should be dismissed for lack of subject-matter jurisdiction. Among other arguments, Defendants contend that the rule itself is not a “final agency action” and “because there is no final agency decision by a consular officer on Plaintiffs’ hypothetical visa application[s], the Court lacks subject matter jurisdiction under the APA.” The Court agrees.

* * * *

6. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security (“DHS”) in effecting the removal of aliens subject to final orders of removal. It is the

belief of the United States that every country has an international legal obligation to accept the return of its nationals whom another state seeks to expel, remove, or deport. Countries that are recalcitrant in accepting the return of their nationals subject to removal may be subject to “discontinuance” of visa issuance as a penalty under Section 243(d) of the INA.

On January 31, 2019, DHS announced Section 243(d) sanctions on Ghana. See DHS press release, available at <https://www.dhs.gov/news/2019/01/31/dhs-announces-implementation-visa-sanctions-ghana>. Beginning on February 4, 2019, the U.S. Embassy in Ghana discontinued issuing all non-immigrant visas (NIV) to domestic employees (A3 and G5) of Ghanaian diplomats posted in the United States, and began limiting the validity period and number of entries on new tourist and business visas (B1, B2, and B1/B2) for all Ghanaian executive and legislative branch employees, their spouses, and their children under 21 to one-month, single-entry visas.**

7. Agreements for the Sharing of Visa Information

On March 14, 2019 the United States-Argentina agreement for the exchange of visa information entered into force. The agreement is available at <https://www.state.gov/argentina-19-314>.

C. ASYLUM, REFUGEE, AND MIGRANT ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act (“INA” or “Act”), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status (“TPS”) after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; *Digest 2004* at 31–33; *Digest 2010* at 10–11;

** Editor’s note: On January 17, 2020, INA 243(d) sanctions were lifted for Ghana, and visa processing returned to the normal procedures. See U.S. Embassy in Ghana press release, available at <https://gh.usembassy.gov/statement-on-the-end-of-u-s-non-immigrant-visa-restrictions-in-ghana/>.

Digest 2011 at 6-9; *Digest 2012* at 8-14; *Digest 2013* at 23-24; *Digest 2014* at 54-57; *Digest 2015* at 21-24; *Digest 2016* at 36-40; *Digest 2017* at 33-37; and *Digest 2018* at 38-44. In 2019, the United States extended TPS designations for South Sudan and Syria.

a. South Sudan

On April 5, 2019, the Department of Homeland Security (“DHS”) provided notice of an 18-month extension of the designation of South Sudan for TPS, through November 2, 2020. 84 Fed. Reg. 13,688 (Apr. 5, 2019). The determination to extend TPS for South Sudan followed a review of conditions, which showed that the ongoing armed conflict and extraordinary and temporary conditions supporting South Sudan’s TPS designation remain. *Id.*

b. Syria

On September 23, 2019, DHS announced the extension of the designation of Syria for TPS for 18 months, through March 31, 2021. 84 Fed. Reg. 49,751 (Sep. 23, 2019). The extension is based on the determination that the ongoing armed conflict and extraordinary and temporary conditions supporting Syria’s TPS designation remain. *Id.*

c. Ramos v. Nielsen and other litigation

As discussed in *Digest 2018* at 40-44, several courts have enjoined enforcement of the termination of TPS for Sudan, Nicaragua, Haiti, and El Salvador after denying motions to dismiss litigation against the U.S. government. On May 10, 2019, DHS published a notice in the Federal Register announcing its compliance with an injunction against termination of TPS for Honduras and Nepal in *Bhattarai v. Nielsen*, No. 19-cv-00731 (N.D. Cal. Mar. 12, 2019). 84 Fed. Reg. 20,647 (May 10, 2019). In November, DHS published notice of continued compliance with preliminary injunctions in *Ramos, et al. v. Nielsen, et al.*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018), *Saget, et al., v. Trump, et al.*, No. 18-cv-1599 (E.D.N.Y. Apr. 11, 2019), and *Bhattarai v. Nielsen*, No. 19-cv-00731 (N.D. Cal. Mar. 12, 2019) (“*Bhattarai*”). 84 Fed. Reg. 59,403 (Nov. 4, 2019). As such, beneficiaries under the TPS designations for El Salvador, Honduras, Nepal, Nicaragua, and Sudan retain their TPS while the preliminary injunction in *Ramos* remains in effect, provided that an alien’s TPS is not withdrawn because of individual ineligibility. *Id.*

2. Deferred Enhanced Departure

On March 28, 2019, the President issued the “Memorandum on Extension of Deferred Enforced Departure for Liberians,” extending the wind-down period for Liberian Deferred Enforced Departure (“DED”) beneficiaries by an additional 12 months, through March 30, 2020. 84 Fed. Reg. 13,064 (Apr. 3, 2019). The President acted “pursuant to

my constitutional authority to conduct the foreign relations of the United States.” *Id.* Excerpts below from the Memorandum explain the reasoning for the extension.

The overall situation in West Africa remains concerning, and Liberia is an important regional partner for the United States. The reintegration of DED beneficiaries into Liberian civil and political life will be a complex task, and an unsuccessful transition could strain United States-Liberian relations and undermine Liberia's post-civil war strides toward democracy and political stability. Further, I understand that there are efforts underway by Members of Congress to provide relief for the small population of Liberian DED beneficiaries who remain in the United States. Extending the wind-down period will preserve the status quo while the Congress considers remedial legislation.

The relationship between the United States and Liberia is unique. Former African-American slaves were among those who founded the modern state of Liberia in 1847. Since that time, the United States has sought to honor, through a strong bilateral diplomatic partnership, the sacrifices of individuals who were determined to build a modern democracy in Africa with representative political institutions similar to those of the United States.

As mentioned by the President in the Memorandum, Congress acted on Liberian DED beneficiaries in 2019. On December 20, 2019, Congress enacted Section 7611 of the 2020 National Defense Authorization Act, Pub. L. 116-92, providing Liberian nationals who had been in the United States since November 20, 2014 an opportunity to apply for permanent status. <https://www.congress.gov/bill/116th-congress/senate-bill/1790>.

3. Refugee Admissions

On September 26, 2019 the U.S. Departments of State, Homeland Security, and Health and Human Services, submitted the President’s annual Report to Congress on Proposed Refugee Admissions for Fiscal Year 2020. See September 26, 2019 State Department media note, available at <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fy-2020/>. On November 2, 2019, President Trump signed the Determination on Refugee Admissions for Fiscal Year 2020, providing for resettlement of up to 18,000 refugees. 84 Fed. Reg. 65,903 (Nov. 29, 2019). The November 2, 2019 State Department press statement on the determination, available at <https://www.state.gov/presidential-determination-on-refugee-admissions-for-fiscal-year-2020/>, also includes the following:

Refugee resettlement is only one aspect of U.S. humanitarian-based immigration efforts. Since 1980, America has welcomed almost 3.8 million refugees and asylees, and our country hosts hundreds of thousands of people under other humanitarian immigration categories. This year’s refugee resettlement program continues that legacy, with specific allocations for people who have suffered or

fear persecution on the basis of religion; for Iraqis whose assistance to the United States has put them in danger; and for legitimate refugees from El Salvador, Guatemala, and Honduras.

Also on September 26, 2019, the President issued Executive Order 13888, “Enhancing State and Local Involvement in Refugee Resettlement.” 84 Fed. Reg. 52,355 (Oct. 1, 2019). The order creates a process for seeking consent from state and local governments to refugee resettlement in their localities. Sections 2(a) and 2(b) of E.O. 13888 follow.

Sec. 2. *Consent of States and Localities to the Placement of Refugees.* (a) Within 90 days of the date of this order, the Secretary of State and the Secretary of Health and Human Services shall develop and implement a process to determine whether the State and locality both consent, in writing, to the resettlement of refugees within the State and locality, before refugees are resettled within that State and locality under the Program. The Secretary of State shall publicly release any written consents of States and localities to resettlement of refugees.

(b) Within 90 days of the date of this order, the Secretary of State and the Secretary of Health and Human Services shall develop and implement a process by which, consistent with [8 U.S.C. 1522\(a\)\(2\)\(D\)](#), the State and the locality's consent to the resettlement of refugees under the Program is taken into account to the maximum extent consistent with law. In particular, that process shall provide that, if either a State or locality has not provided consent to receive refugees under the Program, then refugees should not be resettled within that State or locality unless the Secretary of State concludes, following consultation with the Secretary of Health and Human Services and the Secretary of Homeland Security, that failing to resettle refugees within that State or locality would be inconsistent with the policies and strategies established under [8 U.S.C. 1522\(a\)\(2\)\(B\) and \(C\)](#) or other applicable law. If the Secretary of State intends to provide for the resettlement of refugees in a State or locality that has not provided consent, then the Secretary shall notify the President of such decision, along with the reasons for the decision, before proceeding.

The State Department implemented E.O.13888 through its solicitation of funding proposals from the domestic resettlement agencies. See November 6, 2019 notice of funding opportunity, available at <https://www.state.gov/fy-2020-notice-of-funding-opportunity-for-reception-and-placement-program/>. The Department also created a website where it published the consent letters from state and local governments.***

*** Editor's note: On January 15, 2020, a federal district court judge issued a decision in a lawsuit brought against the Department of State, enjoining the notice and funding opportunity. *HIAS, Inc. v. Trump*, 415 F.Supp.3d 669 (D. Md. 2020). The Department took down the website with the state and local consents. The case will be discussed in *Digest 2020*.

4. Conclusion of Negotiations with Mexico on Migration

On June 7, 2019, the United States and Mexico concluded negotiations of a Joint Declaration and Supplementary Agreement aimed at stemming illegal migration across the U.S.-Mexico border. See June 7, 2019 State Department press statement, available at <https://www.state.gov/conclusion-of-negotiations-with-mexico/>. The U.S.-Mexico Joint Declaration of June 7, 2019 is excerpted below and available as a State Department media note at <https://www.state.gov/u-s-mexico-joint-declaration/>. The June 7, 2019 Joint Declaration and Supplementary Agreement on migration between the United States and Mexico is also available at <https://www.state.gov/mexico-19-607>. The Supplementary Agreement commits to discussions for a binding bilateral agreement on burden- and responsibility-sharing for processing migrants' claims for refugee status.

* * * *

The United States and Mexico met this week to address the shared challenges of irregular migration, to include the entry of migrants into the United States in violation of U.S. law. Given the dramatic increase in migrants moving from Central America through Mexico to the United States, both countries recognize the vital importance of rapidly resolving the humanitarian emergency and security situation. The Governments of the United States and Mexico will work together to immediately implement a durable solution.

As a result of these discussions, the United States and Mexico commit to:

Mexican Enforcement Surge

Mexico will take unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border. Mexico is also taking decisive action to dismantle human smuggling and trafficking organizations as well as their illicit financial and transportation networks.

Additionally, the United States and Mexico commit to strengthen bilateral cooperation, including information sharing and coordinated actions to better protect and secure our common border.

Migrant Protection Protocols

The United States will immediately expand the implementation of the existing Migrant Protection Protocols across its entire Southern Border. This means that those crossing the U.S. Southern Border to seek asylum will be rapidly returned to Mexico where they may await the adjudication of their asylum claims.

In response, Mexico will authorize the entrance of all of those individuals for humanitarian reasons, in compliance with its international obligations, while they await the adjudication of their asylum claims. Mexico will also offer jobs, healthcare and education according to its principles.

The United States commits to work to accelerate the adjudication of asylum claims and to conclude removal proceedings as expeditiously as possible.

Further Actions

Both parties also agree that, in the event the measures adopted do not have the expected results, they will take further actions. Therefore, the United States and Mexico will continue their

discussions on the terms of additional understandings to address irregular migrant flows and asylum issues, to be completed and announced within 90 days, if necessary.

Ongoing Regional Strategy

The United States and Mexico reiterate their previous statement of December 18, 2018, that both countries recognize the strong links between promoting development and economic growth in southern Mexico and the success of promoting prosperity, good governance and security in Central America. The United States and Mexico welcome the Comprehensive Development Plan launched by the Government of Mexico in concert with the Governments of El Salvador, Guatemala and Honduras to promote these goals. The United States and Mexico will lead in working with regional and international partners to build a more prosperous and secure Central America to address the underlying causes of migration, so that citizens of the region can build better lives for themselves and their families at home.

* * * *

5. Executive Actions on Migration through the Southern Border

As discussed in *Digest 2018* at 45-46, Presidential Proclamation 9822 of November 9, 2018, in conjunction with an interim final rule (“Rule”), would have precluded asylum in the United States for any alien “subject to a presidential proclamation ... suspending or limiting the entry of aliens” on the border. On February 7, 2019, Presidential Proclamation 9842 renewed for another 90 days the suspension and limitation on entry initiated on November 9, 2018. 84 Fed. Reg. 3665 (Feb. 12, 2019). Proclamation 9842 acknowledges that a court injunction prevents the implementation of the Rule rendering aliens ineligible for asylum. *Id.* On May 8, 2019, Presidential Proclamation 9880 renewed the suspension and limitation for a further 90 days, once again acknowledging the injunction. 84 Fed. Reg. 21,229 (May 13, 2019).

On February 15, 2019, the President issued Proclamation 9844 declaring a national emergency concerning the southern border of the United States. 84 Fed. Reg. 4949 (Feb. 20, 2019). Excerpts follow from Proclamation 9844.

* * * *

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*), hereby declare that a national emergency exists at the southern border of the United States, and that section 12302 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretaries of the military departments concerned, subject to the direction of the Secretary of Defense in the case of the Secretaries of the Army, Navy, and Air Force. To provide additional authority to the Department of Defense to support the Federal Government’s response to the emergency at the southern border, I hereby declare that this emergency requires use of the Armed Forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. 1631), that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its

terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments. I hereby direct as follows:

Section 1. The Secretary of Defense, or the Secretary of each relevant military department, as appropriate and consistent with applicable law, shall order as many units or members of the Ready Reserve to active duty as the Secretary concerned, in the Secretary's discretion, determines to be appropriate to assist and support the activities of the Secretary of Homeland Security at the southern border.

Sec. 2. The Secretary of Defense, the Secretary of the Interior, the Secretary of Homeland Security, and, subject to the discretion of the Secretary of Defense, the Secretaries of the military departments, shall take all appropriate actions, consistent with applicable law, to use or support the use of the authorities herein invoked, including, if necessary, the transfer and acceptance of jurisdiction over border lands.

* * * *

6. Migration Protection Protocols ("MPP")

As discussed in *Digest 2018* at 46-47, on December 20, 2018, the Trump Administration announced new Migration Protection Protocols ("MPP"), directing (with some exceptions) that individuals arriving in the United States from Mexico—illegally or without proper documentation—be returned to Mexico for the duration of their immigration proceedings. On January 25, 2019, the Secretary of Homeland Security issued "Policy Guidance for Implementation of the Migrant Protection Protocols." 84 Fed. Reg. 6811 (Feb. 28, 2019). The Department of Homeland Security also issued several other documents related to the Policy Guidance, all of which were made available on the Department's website. *Id.*

In April 2019, the district court in *Innovation Law Lab v. Nielsen*, 366 F.Supp.3d 1110 (N.D. Cal.), imposed a nationwide injunction preventing the MPP from taking effect. The U.S. Court of Appeals for the Ninth Circuit stayed the injunction, pending resolution of the appeal by the U.S. Government. On May 22, 2019, the U.S. Government filed its opening brief in the U.S. Court of Appeals for the Ninth Circuit, arguing that the district court's preliminary injunction should be vacated. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir.). Excerpts follow from the summary of the argument in the U.S. brief. **** The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/2019>.

* * * *

A. MPP is authorized by statute, as this Court recognized in staying the injunction. Stay Op. 11-14. The contiguous-territory-return authority in 8 U.S.C. § 1225(b)(2)(C) applies to all aliens

**** Editor's note: On February 28, 2020, a panel of the Ninth Circuit Court of Appeals affirmed the district court's preliminary injunction. *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir.).

arriving in the United States by land who are placed in full removal proceedings under 8 U.S.C. § 1225(b)(2)(A). It is undisputed that each of the individual Plaintiffs arrived by land from Mexico and was placed in full removal proceedings under section 1225(b)(2)(A). Section 1225(b)(2)(C) therefore authorized DHS to return the individual Plaintiffs to Mexico pending their immigration proceedings, as an alternative to subjecting them to the mandatory detention that section 1225(b)(2)(A) would otherwise require.

The district court concluded that MPP is not authorized by misreading 8 U.S.C. § 1225(b)(2)(B)(ii), which states that the requirements of 8 U.S.C. § 1225(b)(2)(A) “shall not apply to an alien” “to whom [8 U.S.C. § 1225(b)(1)] applies.” But section 1225(b)(2)(B)(ii) merely clarifies that, if an alien is placed in expedited removal, he is not entitled to the full removal proceeding that section 1225(b)(2)(A) would otherwise afford him. The Secretary undisputedly possesses, and has exercised, prosecutorial discretion not to place aliens covered by MPP in expedited removal, and has instead elected to apply section 1225(b)(2)(A) and afford to those aliens full, “regular” removal proceedings under section 1229a. Order 15. Given that discretion, the exception in section 1225(b)(2)(B)(ii) is inapposite to aliens covered by MPP, because the expedited removal procedures in section 1225(b)(1) are not being “applie[d]” to them, even though those procedures could have been applied. Instead, section 1225(b)(2)(A) “applies” to all aliens subject to MPP—that is the very INA provision that authorizes a full removal proceeding for applicants for admission.

B. The district court also erred in enjoining MPP on the ground that the government violated the APA in how it addresses the United States’ non-refoulement obligations. MPP satisfies all applicable non-refoulement requirements by providing that any alien who is “more likely than not” to “face persecution or torture in Mexico” will not be returned to Mexico. ER139. And as this Court concluded in granting a stay, MPP is a “general statement of policy” that the APA exempts from notice-and-comment procedures because “immigration officers designate applicants for return on a discretionary case-by-case basis.” Stay Op. 14.

* * * *

7. Eligibility for Asylum

On July 16, 2019, the Department of Justice and the Department of Homeland Security published an interim final rule, making ineligible for asylum in the United States any aliens who enter or attempt to enter the United States across the southern border without applying for protection in a third country outside their country of citizenship, nationality, or last lawful habitual residence through which they transited en route. 84 Fed. Reg. 33,829 (July 16, 2019). Excerpts below from the Federal Register notice explain how the U.S. framework for asylum, as amended by the rule, comports with international treaty obligations. *Id.* at 33,834-35.

* * * *

The framework described above is consistent with certain U.S. obligations under the 1967 Protocol relating to the Status of Refugees (“Refugee Protocol”), which incorporates Articles 2-

34 of the 1951 Convention relating to the Status of Refugees (“Refugee Convention”), as well as U.S. obligations under Article 3 of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or] CAT. Neither the Refugee Protocol nor the CAT is self-executing in the United States. *See Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (“[T]he [Refugee] Protocol is not self-executing.”); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (the CAT “was not self-executing”). These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation. For example, the United States has implemented the non-refoulement provisions of these treaties—*i.e.*, provisions prohibiting the return of an individual to a country where he or she would face persecution or torture—through the withholding of removal provisions at section 241(b)(3) of the INA and the CAT regulations, rather than through the asylum provisions at section 208 of the INA. *See Cardoza-Fonseca*, 480 U.S. at 440-41; Foreign Affairs Reform and Restructuring Act of 1998 at sec. 2242(b); 8 CFR 208.16(b)-(c), 208.17-208.18; 1208.16(b)-(c), 1208.17-1208.18. Limitations on the availability of asylum that do not affect the statutory withholding of removal or protection under the CAT regulations are consistent with these provisions. *See R-S-C*, 869 F.3d at 1188 & n. 11; *Cazun v. U.S. Att’y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016).

Courts have rejected arguments that the Refugee Convention, as implemented, requires that every qualified refugee receive asylum. For example, the Supreme Court has made clear that Article 34, which concerns the assimilation and naturalization of refugees, is precatory and not mandatory, and, accordingly, does not mandate that all refugees be granted asylum. *See Cardoza-Fonseca*, 480 U.S. at 441. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See id.*; *see also R-S-C*, 869 F.3d at 1188; *Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun*, 856 F.3d at 257 & n. 16; *Garcia*, 856 F.3d at 42; *Ramirez-Mejia*, 813 F.3d at 241. As noted above, Congress has also recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. For example, courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited “penalty” under Article 31(1) of the Refugee Convention. *Mejia*, 866 F.3d at 588; *Cazun*, 856 F.3d at 257 & n.16. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing the issuance of international travel documents for refugees “lawfully staying” in a country’s territory, mandates that every person who might qualify for statutory withholding must also be granted asylum. *R-S-C*, 869 F.3d at 1188; *Garcia*, 856 F.3d at 42.

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8. Asylum Cooperative Agreements

On October 16, 2019, the State Department notified Congress that it would resume foreign assistance for El Salvador, Guatemala, and Honduras after those countries took actions to reduce the flow of migrants coming to the U.S. border. *See* October 16, 2019

State Department press statement, available at <https://www.state.gov/united-states-resumes-targeted-u-s-foreign-assistance-for-el-salvador-guatemala-and-honduras/>. The three countries signed Asylum Cooperative Agreements (“ACAs”), among other actions. The resumed funding supports programs to mitigate illegal immigration to the United States. Under the ACAs, the United States may transfer to Guatemala, Honduras, or El Salvador persons requesting asylum or protection from torture after arriving at a U.S. port of entry, or crossing a U.S. border between ports of entry, on or after the date of entry into force of the ACAs. The recipient country is responsible for examining and adjudicating the transferred person’s protection request in accordance with its domestic protection determination system. The ACAs do not apply to protection claimants who are citizens or nationals of the recipient country, to stateless persons whose last habitual residence was the recipient country, to unaccompanied minors, to persons who arrived in the territory of the United States with a valid U.S.-issued admission document (other than for transit), or to persons not required to obtain a visa by the United States. In 2019, only the Guatemala ACA entered into force. The “Agreement on Cooperation Regarding the Examination of Protection Claims” with Guatemala is available at <https://www.state.gov/guatemala-19-1115>.

Cross References

Agreements on Preventing and Combating Serious Crime, **Ch. 3.A.5.**

Recognizing extended validity of Venezuelan passports, **Ch. 9.A.2.**