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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FATEHY ABDO ALI MOHAMED,

Plaintiff,

v.

JOSEPH BIDEN,[1] in his official capaacity as President of the United States, *et al.*,

Defendants.

Case No. 3:19-cv-05558-JCS

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Judge: Hon. Joseph C. Spero
Date: February 12, 2025
Time: 9:30 A.M.
Location: San Francisco U.S. Courthouse – Zoom Videoconference

[1] The current President of the United States is automatically substituted as a defendant in place of the former President of the United States, Donald Trump. *See* Fed. R. Civ. P. 25(d).

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I. INTRODUCTION

Defendants' motion to dismiss fails to grapple with the basic facts alleged in the Complaint, namely, Defendants' continued and unlawful refusal to deliver visas that were undisputedly approved by consular officials not once, but twice: in September 2015 and again in July 2017. Due to Defendants' failure to issue these approved visas, Plaintiff's family members have been stuck in a war zone, unable to reunite with Plaintiff and their other family members in the United States. Rather than address this failure, Defendants argue that this Court does not have authority to review Plaintiff's claims pursuant to the doctrine of consular non-reviewability because the visas were allegedly revoked pursuant to a Presidential directive in January 2018, invoking the doctrine of consular non-reviewability even though it clearly does not apply. Contrary to Defendants' arguments, however, none of Plaintiff's causes of action challenge discretionary decisions by consular officers that are beyond the reach of judicial review. Consular officers did not revoke Plaintiff's family members' visas on the merits, but instead misapplied a Presidential directive that was issued by then-President Trump. Defendants then implemented the Proclamation by ordering consular officials to unlawfully revoke visas that had already been approved, in violation of the clear terms of the Presidential directive. The doctrine of consular non-reviewability thus does not shield Defendants from this Court's review of their actions, which resulted in consular officers' refusing to issue visas that consular officers had twice approved, even though they had a mandatory duty to do so. Nor can Defendants selectively moot Plaintiff's third cause of action by relying on a one-sided and untested factual proffer about Defendants' most recent refusal to issue the visas that were approved in 2015 and 2017, the validity of which acts are inextricably tied to the merits of the case. Because Defendants' arguments rely on an inapposite doctrine, facts that are not properly before this Court, and misstatements of applicable law, this Court should deny Defendants' motion to dismiss.

Defendants first argue that the doctrine of consular non-reviewability prevents this Court from

reviewing Plaintiff's claims under the Administrative Procedures Act ("APA") and the Due Process Clause of the Fifth Amendment to the United States Constitution. Not so. The doctrine of consular non-reviewability applies only to a *consular officer's discretionary decision* pursuant to a Congressional or Presidential grant of discretionary authority. *Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018). The only discretionary consular decisions alleged in the Complaint are the 2015 and 2017 approvals of Plaintiff's family members' visas. As Defendants admit, Plaintiff's Complaint does not challenge the merits of these decisions to approve Plaintiff's family members' visas at all. Rather, Plaintiff's claims stem from Defendants' failure to carry out their ministerial, nondiscretionary, and statutorily mandated duty to deliver Plaintiff's family members' visas in accordance with those approvals. 22 C.F.R. § 42.81; 9 FAM 504.1-3(i)(1).

Nor does the doctrine of consular non-reviewability deprive this Court of its authority to review Defendants' later attempt to revoke the visas. Defendants' attempted revocations were not the result of a consular officer's discretionary decision on an individual's admissibility to the United States under the immigration laws; as described in the Complaint, the revocations were part of the *en masse* unlawful application of a Presidential directive that consular officers had no discretion to interpret or decline to apply. Defendants' argument, if accepted, would lead to grave separation of powers concerns by shielding the erroneous implementation of a Presidential directive from review and precluding judicial oversight of Defendants' unambiguous statutory duty to issue Plaintiff's family members' approved visas.

In an attempt to further obfuscate their failures to carry out their nondiscretionary duties, Defendants argue that this Court should consider untested factual assertions that allegedly moot Plaintiffs' third cause of action under the Mandamus Act. Specifically, Defendants "rely on several record declarations," including a declaration and the printout of an online record that states Plaintiff's visa applications were "refused" nearly ten years after they were first approved. ECF No. 98, Defendants' Motion to Dismiss, at 7 n.4, 9. These records cannot support Defendants' motion to dismiss because they

are inextricably bound up with the merits of Plaintiff's mandamus action. Dismissing Plaintiff's mandamus claims based on those records would require this Court not only to accept Defendants' untested proffer of contested facts as true prior to any discovery, but also to accept that this Court has no authority to redress the harms caused by Defendants' nearly decade-long delay in issuing the visas. The Court has jurisdiction to test the merits of these critical issues and should not accept Defendants' invitation to abandon judicial oversight of Defendants' acts.

Finally, Defendants' motion to dismiss this case for improper venue is meritless. Venue is proper because two of the original plaintiffs in this action resided in the Northern District of California.

II. ISSUES TO BE DECIDED

1. Whether Defendants have a nondiscretionary duty to issue Plaintiff's family members the visas that consular officials approved in 2017.
2. Whether the revocation of Plaintiff's family members' visa applications under the facially inapplicable Presidential Proclamation 9645 involved the type of discretionary decision-making authority that implicates the doctrine of consular non-reviewability where (1) the Presidential Proclamation was issued by then-President Donald Trump, in consultation with the U.S. Department of Homeland Security and the Attorney General—and *not* the U.S. Department of State—and (2) consular officials had no discretion to interpret or decline to apply the Presidential Proclamation.
3. Whether the untested fact of the putative denial of Plaintiff's visa applications in August 2024 is so inextricably bound up with the merits of the case that it is not properly before the Court at this stage.
4. Whether venue is proper in the Northern District of California when two of the original plaintiffs in this action resided within the district at the time the Complaint was filed.

III. FACTS AND PROCEDURAL HISTORY

A. The Visa Application Process

The visa process relevant to this case begins with filing an I-130 Petition for Alien Relative with the U.S. Citizenship and Immigration Services ("USCIS") in which the petitioner must establish that the beneficiaries have qualifying family relationships. *See* 8 U.S.C. § 1151(b)(2)(A)(i); 8 U.S.C. § 1153(a)(2). After USCIS approves the petition(s), the National Visa Center—a sub-agency of Defendant the U.S. Department of State—schedules interviews of the beneficiaries in overseas consulates and embassies. *See* 9 FAM 504.5–6. Once an interview is scheduled, the consular officer has a nondiscretionary duty to issue the visas or refuse them: "[t]here are no exceptions to the rule that once a visa application has been properly completed and executed before a consular officer, a visa must be either issued or refused." 9 FAM 504.1-3(i)(1); *see also* 22 C.F.R. § 42.81. In accordance with these regulations, at the time this action was filed, the State Department's website reflected that the consular interview was the last step in the immigration visa adjudication process; it informed beneficiaries that "[a]t the end of your immigrant visa interview at the U.S. Embassy or Consulate, the consular officer will always inform you whether your visa application is approved or denied." Compl. ¶ 29.

B. Defendants' Approval of Visas for Plaintiff's Beneficiaries

The Mohamed family's quest to obtain visas to enter the United States began in July 2001, when Abdo Ali Mohamed filed an I-130 petition seeking visas for his son (Mohamed Abdo Ali Mohamed) and his family, who are citizens of Yemen. Compl. ¶¶ 2, 151–52. USCIS approved Abdo Ali Mohamed's petition nine years later, in May 2010, and the family had to wait an additional five years before they were first scheduled for consular interviews in 2015. *Id.* ¶¶ 151, 153.

During their fourteen-year wait to be scheduled for interviews, Yemen fell into a devastating civil war, forcing the Mohamed family to travel to Malaysia for their consular interview. *Id.* ¶ 153. The journey to attend their interview was long and difficult, but the family succeeded in making the trip by land, sea, and air through Saudi Arabia and Djibouti before ultimately reaching Malaysia. *Id.* ¶ 154.

Consular officers at the United States Embassy in Malaysia conducted the interview of the Mohamed family as scheduled in September 2015 and approved their visas. *Id.* ¶ 155. However, the Mohamed family was later told that a discrepancy in records required correction, which took an additional

nine months—a delay that forced the Mohamed family to return to Yemen, as their Malaysian visas had expired. *Id.* ¶¶ 155–59.

In July 2017, the Mohamed family was scheduled for a new interview at the United States Embassy in Djibouti. *Id.* ¶ 159. The family undertook the lengthy and expensive trip, through war zones, to attend the interview, and their visas were again approved by a consular officer, who provided the family with a printed notice confirming the visa approvals and stating: "Your visa is approved. We cannot guarantee how long it will take to print it and have your passport ready for pickup." *Id.* Ex. 19. Consular officials took the Mohamed family's passports so that officials could complete the ministerial step of issuing their approved visas by placing visa stamps in their passports. *Id.* ¶ 161.

C. The Travel Ban Proclamation and Its Unlawful Application to Plaintiff's Beneficiaries by Defendants

While the Mohamed family was waiting for Embassy officials to complete this final ministerial step of printing the physical visas and affixing them to the family members' passports, on September 24, 2017, then-President Donald Trump issued Presidential Proclamation 9645 (the "Proclamation"), which has been commonly referred to as the "Muslim Ban" or "Travel Ban." *Id.* ¶¶ 9–10. The Proclamation barred nationals of certain countries, including Yemen, from entering the United States. *Id.* ¶ 10. However, by its terms, the ban did not apply to individuals who had already been issued visas and provided that no visa "shall be revoked pursuant to this Proclamation." *Id.* ¶ 43.

After an injunction preventing enforcement of the Proclamation was stayed by the Supreme Court of the United States, the State Department—not any consular official—announced that the Proclamation would be enforced beginning on December 8, 2017. *Id.* ¶ 11. However, beginning in mid-December 2017, the United States Embassy in Djibouti began systematically issuing visa denials—and, despite the clear terms of the Proclamation, revoking visas that had already been approved. *Id.* The Plaintiffs who originally filed this case—including the Mohamed family—all had their approved visas erroneously revoked in violation of the plain terms of the Proclamation. *Id.* ¶ 12.

The Mohamed family's passports were returned to the family in January 2018, along with a letter stating that they would not be issued visas "under Section 212(f) of the Immigration and Nationality Act,

pursuant to Presidential Proclamation 9645." *Id.* ¶¶ 13, 163.[2] Prior to receiving this letter, the Mohamed family did not receive any further interview before a consular official. Rather, as alleged in the Complaint, the Embassy refused to issue Plaintiffs' approved visas, allegedly on orders from the President, Secretary of State, and/or Secretary of Homeland Security, who are named Defendants in this case.

Defendants' instruction to Embassy officials was unlawful: it was contrary to the plain terms of the Proclamation and contrary to contemporaneous public statements by the State Department, which said that "***No visas will be revoked*** pursuant to [Presidential Proclamation] 9645. Individuals subject to [Presidential Proclamation] 9645 who possess a valid visa or valid travel document generally will be permitted to travel to the United States, irrespective of when the visa was issued." *Id.* ¶ 15 (emphasis added).

D. Plaintiff's Claims for Relief

In the face of Defendants' unlawful conduct, and after spending more than $100,000 on travel and accommodations to obtain their visas, the Mohamed family was forced to return to Yemen and its ongoing civil war. *Id.* ¶¶ 164–66. Along with twelve other plaintiffs, Abdo Ali Mohamed[3] filed the instant suit in September 2019.[4] *Id.* ¶ 19. At the time, the lead plaintiff in this action, Hanna Dobashi, as well as plaintiff

[2] Because Plaintiff's Beneficiaries' visas were putatively revoked under Immigration and Nationality Act ("INA") Section 212(f) (codified as 8 U.S.C. § 1182(f)), this case does not fall within the Supreme Court's recent decision addressing judicial review of revocations under a separate statutory provision, 8 U.S.C. § 1155. *Bouarfa v. Mayorkas*, No. 23-583, 2024 WL 5048700 (S. Ct. Dec. 10, 2024). The Court in *Bouarfa* held that 8 U.S.C. § 1252(a)(2)(B)(ii) barred judicial review of revocations issued under 8 U.S.C. § 1155 because of the broad discretion that statute vests in the Secretary of Homeland Security—discretion that is not available to Defendants here. *Id.* at *6 (noting § 1155 states the Secretary "may" revoke visas whenever he "deems" there to be "good and sufficient cause"). Plaintiff alleges that the Proclamation, by its plain terms, did not grant the Secretary any discretion to revoke Plaintiff's visas and, thus, their revocation does not concern decisions under any statute that the Supreme Court considered in *Bouarfa*. Indeed, as the *Bouarfa* Court noted, there is a general presumption of judicial review of agency action that applies absent clear statutory language investing discretion in the executive. *See id.* at *7.

[3] During the pendency of this litigation, Plaintiff Abdo Ali Mohamed passed away. The parties subsequently stipulated to substitute Fatehy Abdo Ali Mohamed, who is the current petitioner of record on the relevant I-130 petition, as Plaintiff in place of Abdo Ali Mohamed. ECF No. 96, Joint Stipulation at 1 n.2.

[4] By this time, the United Nations Office for the Coordination of Humanitarian Affairs had described the situation in Yemen as one of the largest humanitarian crises in the world. Compl. ¶ 4. It was estimated that over 24 million civilians required some form of humanitarian aid, over 20 million were food

Hajer Taleb, were domiciled in Oakland, California, within the Northern District of California. *Id.* ¶¶ 48, 58. Plaintiffs allege that Defendants have improperly and unlawfully ordered Embassy officials not to take the nondiscretionary step of issuing their beneficiaries' approved visas, in violation of the Proclamation, the Administrative Procedure Act (the "APA"), and the Due Process Clause of the Fifth Amendment. *See generally id.* ¶ 223–244.

After this lawsuit was filed, and after the revocation of Presidential Proclamation No. 9645 by Presidential Proclamation No. 10141,[5] Mohamed Abdo Ali Mohamed, along with three of his family members, were issued their approved visas, entered the United States, and have been dismissed from this case. However, three of Mohamed's family members, Mayada, Lamia, and Emad (the "Remaining Beneficiaries"), have not yet been issued the visas that were approved over seven years ago.

On October 28, 2024, Defendants moved to dismiss the Complaint, attaching a declaration and citing an online record that Defendants assert shows that the Remaining Beneficiaries' visas were denied—seven years after they were approved by a consular official—on the basis that the applicants were *currently* ineligible for visas because they have married. ECF 98.

IV. LEGAL STANDARD

Dismissal under Fed. R. Civ. P. 12(b)(6) is "appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must "accept factual allegations in the complaint as true and construe pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 591 F.3d 1025, 1031 (9th Cir. 2008).

insecure, 7.4 million were malnourished, and less than 55% of the population had access to clean drinking water. *Id.*

[5] 86 Fed. Reg. 7005 (Jan. 20, 2021). Judicial notice can be taken of documents that are public records, like Presidential Proclamations, whose accuracy could not reasonably be questioned. Fed. R. Evid. 201(b)(2).

V. DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S APA AND DUE PROCESS CLAIMS SHOULD BE DENIED.

A. None of the Defendants Are Consular Officers, and the Doctrine of Consular Non-Reviewability Does Not Bar This Court's Review of Their Conduct.

Defendants' motion to dismiss relies on the doctrine of consular non-reviewability to shield Defendants' conduct from the claim in the Complaint, but that doctrine does not apply in this case. Defendants—none of whom are consular officers—unlawfully ordered Embassy officials to refuse to issue the Remaining Beneficiaries' approved visas and to record those visas as having been revoked. In the face of those orders, Embassy officials had no discretion to act, and their refusal to complete the ministerial step of issuing the Remaining Beneficiaries' approved visas is accordingly not shielded by the doctrine of consular non-reviewability.

The doctrine of consular non-reviewability protects only the "*discretionary* visa-processing [] authority [of] a consular officer" from judicial review. *Allen*, 896 F.3d at 1005 (emphasis added) (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). As the Supreme Court and the Ninth Circuit have explained, "Congress may delegate to executive officials the *discretionary authority* to admit noncitizens immune from judicial inquiry or interference." *Dep't of State v. Muñoz*, 602 U.S. 899, 907 (2024) (emphasis added) (internal quotation marks omitted); *see also Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970–71 (9th Cir. 1986) ("[I]t 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.") (emphasis added).

As is obvious from the Complaint, this case does not involve a challenge to the discretionary decision of a consular official. The only discretionary acts of consular officials mentioned in the Complaint occurred in 2015 and 2017 when a consular officer *approved* Plaintiff's family members' visas, including the visas of the Remaining Beneficiaries. Plaintiff's Complaint does not challenge those approvals, it challenges Defendants' unlawful instructions to Embassy officials to erroneously apply the Proclamation and revoke those approved visas, in violation of the plain terms of the Proclamation. Compl. ¶¶ 16–18. The relief sought by Plaintiff is (1) a finding by this Court that Defendants' instructions were unlawful, and (2) an order directing Embassy officials to take the ministerial, nondiscretionary step of issuing the Remaining Beneficiaries' approved visas.

Importantly, Plaintiff's Complaint does not challenge the discretionary decision to issue and enforce the Proclamation itself, which set "the conditions of entry" for Plaintiff and other visa applicants. *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (internal quotation marks omitted); *see Trump v. Hawaii*, 585 U.S. 667, 703–04 (2018) (explaining that the Executive possesses broad authority over the admission of noncitizens to the United States). Plaintiff does not need to challenge the terms of the Proclamation, because on its face the Proclamation did not apply to the Remaining Beneficiaries' approved visas. Pursuant to Section 6(c), while the Proclamation barred "[t]he entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants," it only applied *prospectively* from its "applicable effective date." Proclamation No. 9645, 82 Fed. Reg 45161 §§ 2(g)(ii), 6(c) (2017). Because Plaintiff's Beneficiaries' visas were approved prior to the "applicable effective date of the proclamation," Compl. ¶ 43, "the Proclamation had no legal force as applicable to Plaintiffs' Beneficiaries," Compl. ¶ 47, and the consular officer "had no authority . . . to revoke the visas." *See Wong v. Dep't of State*, 789 F.2d 1380, 1386 (9th Cir. 1986) (reviewing and finding that a consular officer failed to follow the permitted reasons for revoking a visa and ordering the district court to vacate the order revoking the visas at issue); *Li Hing of Hong Kong, Inc.*, 800 F.2d at 971 (explaining that review is permitted where "[t]he decision granting the visas was not at issue [and] the consular official's basis for revocation was not one of the permissible grounds enunciated by the applicable regulations"); *Saavedra Bruno v. Albright*, 20 F. Supp. 2d 51, 53 (D.D.C. 1998), *aff'd*, 197 F.3d 1153 (D.C. Cir. 1999) ("[T]here is a difference between visa decisions made outside a consular officer's authority . . . and consular decisions made within the officer's discretionary power.") (citing *Mandel*, 408 U.S. at 766 n.6). In other words, Section 6(c) removed any discretion from the consular officer's decision-making in applying the Proclamation to Plaintiff's family members' applications that might otherwise be accorded protection under the consular non-reviewability doctrine. *See Gill v. Mayorkas*, No. C20-939 MJP, 2021 WL 3367246, at *8 (W.D. Wash. Aug. 3, 2021) ("'[W]here Congress entrusts discretionary visa-processing and ineligibility-waiver authority in a consular officer . . ., the courts cannot substitute their judgments . . . .' It follows that, where congress has not entrusted an official with discretionary authority over the issuance or revocation of visas, the doctrine of nonreviewability does not apply." (quoting *Allen*, 896 F.3d at 1102)).

It would be inconsistent with the purpose of the doctrine of consular non-reviewability to shield this facially illegitimate application of the Proclamation from judicial review. The purpose of the doctrine has been to accord due deference to the careful and individualized deliberative processes conducted by consular officials in embassies throughout the world. *Tamjidi v. Blinken*, No. 8:24-CV-00403 HDV JDE, 2024 WL 4328813, *4 (C.D. Cal. Aug. 27, 2024) (concluding that the doctrine of consular non-reviewability does not apply to a claim regarding unreasonable delay in visa adjudication and denying motion to dismiss because "Plaintiffs do not seek to 'look behind' the consular officer's discretion. They merely ask that such final discretion be exercised."). Similarly to *Tamjidi*, Plaintiff does not request that this Court look behind any consular officer's deliberative process in this case, but rather asks this Court to give effect to the decision of consular officials to *approve* the Remaining Beneficiaries' visas in 2015 and 2017.

As alleged in the Complaint, Defendants' decision to *revoke* those issued visas, in clear contradiction of the Proclamation's plain terms, did not involve any individualized deliberative process of consular officials. Neither the President's issuance of the Proclamation, nor the Department of State's implementation of the President's directive through *en masse* revocations of approved visas (including those of the Remaining Beneficiaries), involved the deliberative and discretionary decision-making of consular officers. This is precisely the kind of executive action this Court is competent to review without implicating any of the concerns behind the doctrine of consular non-reviewability. Indeed, judicial review in this case is consistent with the original intent behind the separation of powers. "Judges have always been expected to apply their 'judgment' *independent* of the political branches when interpreting the laws those branches enact. . . . And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (internal citation omitted) (emphasis in original). To fail to review Defendants' acts in this case would work a great injustice on the Remaining Beneficiaries' years of waiting for Defendants to adhere to their statutorily mandated obligations.

B. The Complaint States a Valid Claim Under the APA.

Plaintiff has pleaded facts demonstrating that Defendants failed to complete their mandatory, nondiscretionary duty to print and place the approved visas in his family members' passports. The Ninth

Circuit has held plainly that consular officers' failure to follow a "nondiscretionary, ministerial duty" is subject to review under § 706(2)(A). *Rivas v. Napolitano*, 714 F.3d 1108, 1111–13 (9th Cir. 2013) (finding that Plaintiff had stated a valid APA claim where the agency failed to follow "a nondiscretionary, ministerial duty" required of consular officers); *see also Jane Doe 1 v. Nielsen*, 357 F. Supp. 3d 972, 1004 (N.D. Cal. 2018) (finding that the APA applies to "an agency's non-compliance with a mandatory duty," and collecting visa-related cases). The APA provides a cause of action for review of precisely this kind of "final agency action," and there is a broad presumption in favor of judicial review of such actions, including in the immigration context. 5 U.S.C. §§ 554, 706(2)(A); *Emami v. Nielsen*, 465 F. Supp. 3d 991, 995 (N.D. Cal. 2020) ("[O]ur circuit has construed the APA to provide for broad judicial review of agency action. . . . Agency action is not immunized from review just because it might be linked to a Presidential Proclamation.") (internal citations omitted).

When a "visa application has been properly completed and executed . . . the consular officer *must* issue the visa[.]" 22 C.F.R. § 42.81(a) (emphasis added). The Ninth Circuit has recognized this to be a mandatory, nondiscretionary duty to review and "issue the visa." *Id.*; *see Patel v. Reno*, 134 F.3d 929, 932 (9th Cir. 1997) ("[A] consular officer is required by law to act on visa applications [u]nder 22 C.F.R. § 42.81"). A plaintiff therefore states a valid claim under the APA by showing that a consular officer failed to follow the mandatory, nondiscretionary requirements of 42 C.F.R. § 42.81. *See, e.g.*, *Atiffi v. Kerry*, No. CIV. S-12-3001 LKK, 2013 WL 5954818, at *8 (E.D. Cal. Nov. 6, 2013) (allegation that the government failed to follow statutory requirements in denying a visa application was sufficient to state a claim under the APA); *Gill*, 2021 WL 3367246, at *9 (denying the government's motion to dismiss where Plaintiff sought an order correcting Defendants' allegedly arbitrary and capricious decision to cancel Plaintiff's visa). Once Plaintiff's Beneficiaries' visas were approved, as alleged in the Complaint, Defendants had a mandatory, nondiscretionary duty to print the visas and place them into the Remaining Beneficiaries' passports. Their failure to do so was arbitrary and capricious, in violation of the APA. See 5 U.S.C. § 706(2)(A); *Hernandez Castro v. Mayorkas*, No. 2:21-CV-00315-SAB, 2022 WL 1085682, at *7–8 (E.D. Wash. Apr. 11, 2022) (finding that Plaintiff sufficiently stated a claim alleging that the Department of Homeland Security's failure to follow a nondiscretionary process was arbitrary and

capricious).[6] In other words, Plaintiff raises a valid claim under the APA because he is "simply requesting that Defendants follow their own processes" and Defendants' attempt to recharacterize this claim as an impermissible challenge of a consular decision is unavailing. *Hernandez Castro*, 2022 WL 1085682, at *9 (distinguishing *Capistrano v. Dep't of State*, 267 F. App'x 593 (9th Cir. 2008)).

C. The Complaint States a Valid Fifth Amendment Due Process Claim.

Defendants' failure to print and place Plaintiff's Beneficiaries' approved visas in their passports, and Defendants' subsequent unlawful and erroneous decision to revoke the visas, in violation of the Proclamation's plain terms, deprived Plaintiff of a property interest without the protections of due process. To state a procedural due process claim, Plaintiff must plead facts showing "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *United States v. 101 Houseco, LLC*, 22 F.4th 843 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 209 (2022). The Complaint's factual allegations are sufficient to meet this standard.

Defendants argue that Plaintiff's Due Process claim is foreclosed by the Supreme Court's decision in *Department of State v. Muñoz*, but that decision is entirely distinguishable from this case. 602 U.S. 899; *see* MTD at 16–17. In *Muñoz*, the Supreme Court held only that there is no liberty interest in family reunification inherent in the Due Process Clause. The visa petitioner in *Muñoz* challenged a consular officer's discretionary denial of a visa. 602 U.S. at 918. Here, however Plaintiff is challenging Defendants' erroneous *revocation* of a visa that a consular officer had previously *approved*. Because a consular officer had already acted and approved the visas at issue, as explained below, Plaintiff had an existing property interest that renders *Muñoz* inapplicable.

Plaintiff's claim is more akin to the claim brought in *Ching v. Mayorkas*, 725 F.3d 1149 (9th Cir. 2013). In *Ching*, the Ninth Circuit recognized that the grant of an I-130 petition is a "protected interest [] entitled to the protections of due process." *Id.* at 1156. As the Ninth Circuit observed, "[w]here a

[6] To the extent Defendants argue that the revocation of the Proclamation resolved any harm Plaintiff experienced, this Court recently rejected that argument. *See Emami v. Mayorkas*, No. 18-CV-01587-JD, 2022 WL 3031213, at *1–*2 (N.D. Cal. Aug. 1, 2022) (finding that "a genuine dispute remains for the Court to resolve" and that the "waiver implementation" of the now-revoked Executive Order was "arbitrary and capricious" under the APA). Plaintiff continues to be harmed by Defendants' arbitrary and captious decision to refuse to issue the approved visas—a failure to follow a mandatory, nondiscretionary duty that is capable of review under the APA.

petitioner . . . meets the requirements for the approval of an I-130, he is entitled, as a matter of right, to the approval of his petition." *Id.* at 1155. Just as the approval of an I-130 petition is a "matter of right," once a consular official approved the Remaining Beneficiaries' visas, Defendants had a mandatory, nondiscretionary duty to print the approved visas and place them in Plaintiff's Beneficiaries' passports, and Plaintiff had a "protected interest" in the mandatory issuance of the approved visas. As this Court recently observed, "[g]iven the different procedural postures of *Ching* and *Muñoz*, the Court cannot say that the reasoning of *Ching* is clearly irreconcilable with *Muñoz*. Plaintiff may have a property interest in the approval of an I-130 while lacking a liberty interest in residing in the United States together." *Hanan v. U.S. Citizenship and Immig. Servs.*, No. 23-CV-02414-HSG, 2024 WL 4293917, at *12 (N.D. Cal. Sept. 25, 2024).

Once Plaintiff obtained this property interest, Defendants could not deprive him of it without due process of law. Such rights require courts to balance: (1) "the private interest that will be affected by the official action[;]" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[;]" and (3) "the Government's interest." *Ching*, 725 F.3d at 1157 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). When Defendants unlawfully implemented the Proclamation and revoked the Remaining Beneficiaries' approved visas, Plaintiff was deprived of this protected interest without any procedural protections. Defendants simply informed the Remaining Beneficiaries that their approved visas had been revoked based on the unlawful and erroneous application of the now-defunct Proclamation. While the holding in *Muñoz* may mean that Plaintiff's interest is "limited," *Hanan*, 2024 WL 4293917, at *12, that does not mean the interest is nonexistent, as Defendants argue. Plaintiff was afforded no procedural protections, and the "risk of erroneous deprivation" was evidently high as the application of the Proclamation was itself erroneous. As such, *Muñoz* poses no bar to Plaintiff's claim under the Due Process Clause.

VI. DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR MANDAMUS RELIEF SHOULD BE DENIED.

A. This Court Has Jurisdiction Over Plaintiff's Claim for Relief Under the Mandamus Act.

Defendants' continuing refusal to issue the Remaining Beneficiaries' approved visas means this case is not moot, and this Court has subject-matter jurisdiction over Plaintiff's Mandamus Act claim. The

burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Plaintiff has met this burden and Defendants' attempt to rely on untested, disputed facts that are inextricably tied to the merits of this case only demonstrates why discovery is necessary before this Court can resolve the merits of Plaintiff's claims.

Whether Defendants properly and lawfully refused the Remaining Beneficiaries' visas in 2024, as Defendants now claim, is not properly before this Court at this stage. Defendants rely on external evidence to argue that this case is moot, asking this Court to take judicial notice of an online record that it argues shows that Plaintiff's Beneficiaries were denied visas in 2024. But the impact of that evidence is factually and legally contested, and accordingly should not be relied upon at this stage of the litigation to deprive this Court of jurisdiction. The Ninth Circuit has consistently held that dismissal pursuant to a Rule 12(b)(1) motion is inappropriate where, as here, the parties dispute facts pertaining to both the Court's jurisdiction and the claim's merits. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039–40 (9th Cir. 2004) (concluding dismissal is inappropriate where jurisdictional and substantive issues are "so intertwined" that a court cannot resolve disputed facts pertaining to one without resolving the other); *Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134, 1144 (9th Cir. 2024) (applying the same standard to factual attacks on standing, as a matter of first impression); *see also Morrison v. Amway Corp.*, 323 F.3d 920, 925, 930 (11th Cir. 2003) (holding improper Rule 12(b)(1) dismissal where jurisdictional facts implicate the merits); *Williamson v. Tucker*, 645 F.2d 404, 415–17 (5th Cir. 1981) (rejecting an attempt to couch a merits argument in jurisdictional terms at the Rule 12(b)(1) stage).

Defendants' mootness argument relies entirely on disputed factual assertions concerning actions taken with respect to Plaintiff's family's visa applications years after their initial, undisputed approval in 2017, as well as incorrect legal conclusions about this Court's power to review such actions. *See* MTD at 17–18. Defendants' subsequent actions and inaction constitute a significant basis for Plaintiff's claims, so the purported jurisdictional question is inextricably bound up with the merits. Plaintiff's claims could only be considered moot if this Court accepted Defendants' untested argument to the contrary. Indeed, to grant Defendants' motion to dismiss, this Court would not only have to accept as true that consular officials ultimately refused the Remaining Beneficiaries' visa applications, but also accept either that doing so after initially approving them—but failing to issue the visas, as required—was a proper exercise

of discretionary authority, or, if doing so were improper, that this Court can do nothing to redress the harms that followed. As such, resolving Defendants' arguments about mootness indisputably depends on resolving the merits of Plaintiff's claims, so dismissal on a Rule 12(b)(1) motion is impermissible.

Rather than improperly dismissing Plaintiff's mandamus claim under Rule 12(b)(1), this Court should continue to exercise its jurisdiction. At this early stage, dismissal for want of jurisdiction would be contrary to binding precedent. As the Ninth Circuit has held:

> [W]here the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial. . . . [T]he moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.

Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). Thus, this Court must retain jurisdiction and allow the parties to resolve critical factual disputes going to the merits—including whether, when, and why the Remaining Beneficiaries' visas were refused—at a later stage.

B. The Complaint States a Valid Claim for Mandamus Relief.

Plaintiff is entitled to mandamus relief in this case because "(1) [his] claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel*, 134 F.3d at 931. Mandamus from this Court is the only means available to Plaintiff to vindicate his clear and unambiguous right to Defendants' nondiscretionary, ministerial act of issuing the Remaining Beneficiaries' approved visas.

Federal law requires Defendants to act on visa applications, including by timely issuing approved visas. Under 22 C.F.R. § 42.81, once a visa applicant has completed the steps necessary to apply for a visa, "the consular officer *must* issue the visa, refuse the visa under INA 212(a) or 221(g) or other applicable law or, pursuant to an outstanding order under INA 243(d), discontinue granting the visa." (emphasis added). The law is clear, and the Ninth Circuit has repeatedly held that 22 C.F.R. § 42.81 imposes nondiscretionary duties. *See Patel*, 134 F.3d at 932 ("A consular officer is required by law to act on visa applications."); *Golkar v. Kerry*, 570 F. App'x 657, 659 (9th Cir. 2014) (concluding § 42.81 requires "mandatory action"). In this case, a consular officer approved Plaintiff's Beneficiaries' visa applications after an interview on July 5, 2017, but failed to take the required step of printing and affixing

the visas to their passports due to Defendants' improper application of the Proclamation six months later, in January 2018. Under § 42.81, Defendants' continuing delay was and remains improper.

Second, Defendants owe visa applicants like the Remaining Beneficiaries a nondiscretionary, ministerial duty to administer and implement the INA and corresponding regulations, including by ensuring that consular officers timely issue approved visas. This Court and others have held that such duties extend to executive agencies and high-ranking officials. For example, in *Singh v. Holder*, this Court held that the USCIS "has a non-discretionary duty to act on I-130 petitions" and that a delay in doing so could give rise to a claim for relief. No. C-13-4958, 2014 WL 117397, at *7 (N.D. Cal. Jan. 10, 2014). In *Pars Equality Center v. Blinken*, this Court acknowledged a series of cases recognizing a "mandatory, non-discretionary duty to adjudicate [] visa applications within a reasonable time." No. 24-CV-00001, 2024 WL 4700636, at *12 (N.D. Cal. Nov. 5, 2024) (collecting cases, including *Durham v. Blinken*, No. CV 24-02868, 2024 WL 3811146, at *4 (C.D. Cal. Aug. 8, 2024) (holding that the Secretary of State owes visa applicants "a mandatory, non-discretionary duty that [a] visa application will be adjudicated by a consular officer within a reasonable time.")). And in *Maadarani v. Mayorkas*, the court concluded that, under the INA and APA, the Secretary of Homeland Security and others had "several nondiscretionary duties, any one of which would be sufficient to require further action on Plaintiff's spouse's visa application." No. 2:24-CV-1325, 2024 WL 4674703, at *8-*9 (E.D. Cal. Oct. 31, 2024). Thus, Defendants have clear, ministerial obligations to ensure approved visas are issued without delay.

Defendants' contention that they lack such a duty because they are not themselves consular officers misses the point. The law imposes mandatory obligations on Defendants and agencies they oversee to process visa applications and issue approved visas in a timely manner. By failing to ensure that the Remaining Beneficiaries' approved visas were issued as required by federal law, Defendants failed to act as the law required. By imposing and implementing the Proclamation and thereby exercising direct control over the actions of Embassy officials, Defendants undertook the very substantive actions they are now claiming not to have responsibility over. Defendants' attempt to rely on *Patel* to argue that they owed no duty because of their status as non-consular officers is therefore incorrect as a matter of law. *See* MTD at 18 (citing *Patel*, 134 F.3d at 933). While the *Patel* Court held that only consular officers have the power to make decisions regarding approval or refusal of a visa, it said nothing about Defendants' other

obligations concerning visas. 134 F.3d at 933. As explained above, however, after *Patel*, this Court and others have held that Defendants owe a ministerial duty to ensure that approved visas are issued without delay.

Third, no other remedy would accord Plaintiff and his beneficiaries adequate relief. Plaintiff's family's visa applications were approved in 2017. If Defendants had then fulfilled their obligations under the law, and ensured the consular officers they oversaw timely issued the approved visas, Plaintiff's family would not have had to complete new medical examinations; incur the costs of travel; or live in an active warzone, with children subjected to regular airstrikes and the fear of imminent military action. And Plaintiff would not have suffered prolonged episodes of depression and anxiety due to the uncertainty of when—or whether—his family's approved visas would finally arrive. *See* Compl. ¶ 167. No other remedy would put Plaintiff in the place he would have been in had Defendants fulfilled their duty to ensure that the visas issued promptly after their approval in 2017.

Since Defendants breached their clear duty to ensure that Plaintiff's family's approved visas were issued following their approval, Plaintiff is entitled to mandamus relief. As outlined above, under the APA, INA, and corresponding regulations, Defendants, their departments, and their subordinate consular officers owed Plaintiff and his beneficiaries not only timely resolution of their visa applications, but also timely issuance of the beneficiaries' approved visas by affixing them to their passports. Defendants breached these duties. Permitting them now to moot Plaintiff's claims, by failing to issue approved visas and leaving his beneficiaries in limbo for years—in violation of their clear, nondiscretionary duties—would be fundamentally unfair and against the interests of justice. Yet that is exactly what Defendants ask this Court to do. *See* MTD at 17–19. Instead, as Plaintiff has sufficiently pleaded the elements necessary for extraordinary relief, this Court should allow Plaintiff's mandamus claim to proceed.

Defendants should not now be permitted to argue that the 2024 denials absolve Defendants of their erroneous and unlawful decision to withhold Plaintiff's Beneficiaries' visas seven years earlier. Additionally, Defendants should not be permitted to insulate their unlawful conduct by utilizing the purported 2024 denials for a separate reason—the doctrine of equitable estoppel. Equitable estoppel is appropriate where: "(1) the party to be estopped knows the facts; (2) the party intends that his or her conduct will be acted on; (3) the claimant must be ignorant of the true facts; (4) and the claimant must

detrimentally rely on the other party's conduct." *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1166 (9th Cir. 2005). "The government in immigration cases may be subject to equitable estoppel if it has engaged in affirmative misconduct" and "estoppel against the government [] would not unduly damage the public interest." *Salgado-Diaz*, 395 F.3d at 1165–66.

Each of the prerequisites for estoppel is present here. Defendants knew the Proclamation did not apply to Plaintiff's Beneficiaries and, for years, led Plaintiff into believing that Defendants would correct this misapplication (which Defendants corrected for all of the other beneficiaries of the dismissed plaintiffs and all of Plaintiff's other beneficiaries). The Remaining Beneficiaries detrimentally relied upon the approval of their applications and Defendants' corrective actions by repeatedly traveling through war zones to obtain their approved visas. *See Chang v. United States*, 327 F.3d 911, 926 (9th Cir. 2003) (finding I-526 applicants "reasonably relied" on the approval of their applications when they moved to the United States and expended funds); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 30 (2020) (acknowledging Deferred Action for Childhood Arrivals ("DACA") recipients may have reliance interest where they "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children"). The government erroneously withheld Plaintiff's Beneficiaries' approved visas for years under the plainly inapplicable Proclamation, which is clear "affirmative misconduct." *See Villena v. INS*, 622 F.2d 1352, 1360–61 (9th Cir. 1980) (finding the "affirmative misconduct" requirement met where the government was under a duty to act and failed to do so "almost four years later"). Estoppel would also not "unduly damage the public interest" because "the public interest would not be burdened by allowing [Plaintiff] to have his claim[s] properly considered as if the events arising out of the government's actions had not occurred." *Salgado-Diaz*, 395 F.3d at 1166. Because "[Defendants'] duty was clear" and government officials, "by their affirmative inaction, deprived [Plaintiff's Beneficiaries]" of their already-approved visas, Defendants should be equitably estopped from relying on the subsequent 2024 denials—seven years after the visas were approved. *See Sun Il Yoo v. INS*, 534 F.2d 1325, 1329 (9th Cir. 1976); *see also Regents*, 591 U.S. at 31 (holding DHS violated the APA when it failed to consider DACA recipients' reliance interest, which may "radiate outwards" to affect recipients' families, employers, and schools).

VII. VENUE IS PROPER IN THE NORTHERN DISTRICT OF CALIFORNIA BECAUSE TWO PLAINTIFFS RESIDED IN THIS DISTRICT WHEN THE CASE WAS FILED.

Venue was proper in this District at the time the Complaint was filed, and Defendants' challenge to venue at this time accordingly fails. Venue is determined at the outset of litigation, and a change in parties does not alter the analysis. *See Stafford v. Briggs*, 444 U.S. 527, 536 (1980). Thus, when analyzing whether venue is proper, courts within the Ninth Circuit—including this Court—look to the parties and operative facts as of a suit's filing date and not some later date. *E.g.*, *Sutain v. Shapiro and Lieberman*, 678 F.2d 115, 117 (9th Cir. 1982) ("[S]ection 1391(e) venue is determined as to the date the suit is filed."); *Ray v. Cuccinelli*, No. 20-CV-06279, 2020 WL 7353697, at *6 (N.D. Cal. Dec. 15, 2020) (evaluating venue based on the date the suit, not the motion to dismiss, was filed); *Kim v. USCIS*, No. 2:21-CV-0615, 2021 WL 8893412, at *1 (C.D. Cal. Dec. 17, 2021) (evaluating venue based on plaintiff's residence at filing); *Boren v. Harrah's Entm't, Inc.*, No. CV07-07004, 2008 WL 11419050, at *3 (C.D. Cal. Feb. 13, 2008) ("[V]enue is determined as of the time the complaint was filed and is not affected by a subsequent change of parties.").

Venue is proper in the Northern District of California because two of the original plaintiffs in this litigation were domiciled in the district. Venue is proper when plaintiffs file suit in the judicial district where they reside. 28 U.S.C. § 1391(e)(1)(C). As relevant to the venue analysis, residence means a natural person's domicile. *Id.* § 1391(c)(1). When this action was filed, original plaintiffs Hanna Dobashi and Hajer Taleb were domiciled in Oakland, California, within the Northern District of California. Compl. ¶¶ 58, 67. As discussed above, the fact that Dobashi and Taleb are no longer parties to the litigation at the motion to dismiss stage has no bearing on the Court's venue analysis. *See Ray*, 2020 WL 7353697, at *7 (denying a motion to transfer because seven plaintiffs resided in the judicial district when the action was initiated).

Because venue is proper based on the original plaintiffs' domicile, Defendants' residences and the locus of the operative facts are irrelevant. Under § 1391(e), a plaintiff need only satisfy one basis for establishing proper venue: his domicile at the time of filing, a defendant's domicile at the time of filing, or the location of the operative facts. *Californians for Renewable Energy v. U.S. Env't Prot. Agency*, No. C 15-3292, 2018 WL 1586211, at *5 (N.D. Cal. Mar. 30, 2018) ("If the case falls within one of these three

categories, venue is proper."). The original plaintiffs' domicile within this judicial district is sufficient to establish proper venue.

None of the cases relied on by Defendants provides otherwise. Quoting footnotes in *Lamont v. Haig*, 590 F.2d 1124, 1128 n.19 (D.C. Cir. 1978), and *Kings Cnty. Econ. Cmty. Dev. Ass'n v. Hardin*, 333 F. Supp. 1302, 1304 n.1 (N.D. Cal. 1971), Defendants argue that a federal officer resides where she performs her official duties. MTD at 20. But § 1391 does not require both plaintiffs and defendants to reside within the judicial district for venue to be proper, so *Haig* and *Hardin* are inapposite here. Likewise, because venue is proper based on the original plaintiffs' domicile, it makes no difference under § 1391 whether Defendants adjudicated the at-issue visa applications within the Northern District of California. Thus, Defendants' citation to *Ramirez de Ochoa v. USCIS*, No. 05-CV-2068 BTM (JMA), 2006 WL 8455355, at *2-*3 (S.D. Cal. Aug. 11, 2006), is similarly irrelevant. MTD at 20. This Court need not look further than the original plaintiffs' domicile to hold that venue is proper.[7]

VIII. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied. In the alternative, if this Court were to determine that Defendants' motion should be granted in whole or in part, Plaintiff should be permitted an opportunity to replead.

Dated: December 12, 2024

Respectfully submitted,

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[7] The original plaintiffs established proper venue at the time of filing, so transferring or dismissing this action as Defendants request is impermissible. Defendants point to *Kantharia v. USCIS*, 672 F. Supp. 3d 1030, 1032 (C.D. Cal 2023) and *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992) to suggest that the Court should dismiss or transfer this action. See MTD at 11. In both of those cases, however, the court had first determined that venue was improper. Because venue in this case is unquestionably proper pursuant to § 1391(e)(1)(C), neither case applies here. Changing venue after it has been properly set would not only depart from courts' typical resolution of this question, but also permit the strategic mooting of Plaintiff's claims. This Court should not set such a novel precedent here.

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LOCAL RULE 7-4(b) CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff, certifies that the attached memorandum of points and authorities complies with Local Rule 7-4(b) 25-page limit.

Dated: December 12, 2024 */s/* Christopher S. Ford

CERTIFICATE OF SERVICE

I certify that on December 12, 2024, I electronically filed the forgoing Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss with the Clerk of Court by using the CM/ECF system, which will provide electronic notice pursuant to L.R. 5-1(h)(1) to all attorneys of record via the CM/ECF system.

Dated: December 12, 2024 */s/* Christopher S. Ford

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