ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5156

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAMED SUFYAN OTHMAN ALMAQRAMI; ALIAKBAR NOWZARI GOLSEFID; MASOUMEH FOTOHI; BEHNAM NOZARI GOLSEFID; FARZAD ABDOLLAHI ZADEH; ZHREH BABADI; SZ; RZ; AIMAN ALSAKKAF,
Plaintiffs-Appellants

v.

MICHAEL R. POMPEO, in his official capacity as Secretary of State; JOHN DOES, #1-#50, in their official capacity as the consular officials responsible for issuing diversity visas,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Columbia,
No. 1:17-cv-1533 (TSC)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) *Parties.* The parties before the District Court were Plaintiffs P.K. (terminated Sept. 5, 2017), N.H. (terminated Sept. 5, 2017), M.K. (terminated Aug. 3, 2017), M.K.1 (terminated Sept. 5, 2017), M.K.2 (terminated Sept. 5, 2017), Afshan Asadi Sorkhab (terminated Sept. 14, 2017), Neda Heidari Dehkordi (terminated Sept. 14, 2017), Y.S.1 (terminated Sept. 14, 2017), Y.S.2 (terminated Sept. 14, 2017), Y.S.3 (terminated Sept. 14, 2017), Hamed Sufyan Othman Almaqrami, Radad Fauiz Furooz (terminated Aug. 28, 2017), Aliakbar Nowzari Golsefid, Masoumeh Fotohi, Behnam Nozari Golsefid, Farzad Abdollahi Zadeh, Zhreh Babadi, SZ, RZ, and Aiman Alsakkaf; and Defendants Rex W. Tillerson and John Does #1-#50.

The parties before this Court are Plaintiffs-Appellants Hamed Sufyan Othman Almaqrami, Aliakbar Nowzari Golsefid, Masoumeh Fotohi, Behnam Nozari Golsefid, Farzad Abdollahi Zadeh, Zhreh Babadi, SZ, RZ, and Aiman Alsakkaf; and Defendants-Appellees Michael Pompeo and John Does #1-#50.

(B) *Rulings Under Review.* The ruling under review is the district court order and accompanying memorandum opinion dismissing the case below with prejudice. Judge Tanya S. Chutkan issued both on March 27, 2018. The order is entry 66 on the district court docket and is reprinted at J.A. 154. The opinion is published at 304 F. Supp. 3d 1 (D.D.C. 2018) and is reprinted at J.A. 141-153.

(C) *Related Cases.* Plaintiffs-Appellants are unaware of any related cases.

Dated: September 4, 2018

/s/ Matthew E. Price
Matthew E. Price

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GLOSSARY

DV ..... Diversity Visa

EO-2 ..... Executive Order 13,780, 82 Fed. Reg. 13,209 (2017)

EO-3 .....Presidential Proclamation No. 9645, 82 Fed. Reg. 45,161 (2017)

INA.....Immigration and Nationality Act

INTRODUCTION

Under the "diversity visa" program, 50,000 immigrant visas are reserved each year for applicants from countries that send few immigrants to this country through other channels. Millions of people around the world enter the annual lottery for these prized visas. A lucky few are selected to finalize their visa applications and, if legally eligible, immigrate to the United States. Time is of the essence in this process, because a lottery-winner's visa eligibility generally expires at the end of the fiscal year in which she was selected.

Plaintiffs, Yemeni and Iranian nationals, won the diversity lottery for Fiscal Year 2017. But Defendants, the Secretary of State and consular officials, refused to process Plaintiffs' visa applications. Specifically, Defendants decided that there was no need to process Plaintiffs' *visa* applications because, by executive order, the President had temporarily suspended *entry* by Yemenis and Iranians, among others, pending review. *See* Exec. Order 13,780, § 2(c), 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2").

Because their visa eligibility would ordinarily lapse at the end of September 2017, Plaintiffs brought suit in August of that year. Plaintiffs did not challenge the legality of the President's entry suspension, and they conceded that they would not be able to enter the United States while it remained in effect. Nonetheless, they

wanted their *visa* applications processed in order to preserve their chance of immigrating later if and when entry restrictions are lifted. Under the controlling statute and regulations, Plaintiffs explained, a president's suspension of *entry* provides no legal warrant for refusing to process and issue diversity *visas*.

On the eve of the September 30, 2017, deadline for issuing diversity visas, the district court intervened and enjoined the government to hold "visa numbers"—essentially, placeholders for future visa processing—available for Plaintiffs. The court opted not to resolve the merits of Plaintiffs' legal theory at that time, however, because it preferred to await the Supreme Court's resolution of two pending cases involving challenges to the entry suspension. A few weeks later, the Supreme Court disposed of those cases without addressing the merits, explaining that the Executive Order's expiration had rendered the appeals moot. The Supreme Court therefore provided none of the guidance the district court had hoped for.

At that point, the merits of Plaintiffs' claims were squarely presented in the district court, and the district court should have decided whether Defendants' continuing refusal to process Plaintiffs' visa applications was (and is) lawful. Instead, however, the district court granted Defendants' motion to dismiss the case as moot. The court reasoned that because the Executive Order had expired, there could no longer be any live controversy about how Defendants had applied that Executive

Order in deciding not to process Plaintiffs' visa applications. The court also appeared to construe its earlier injunctive order as holding potential visas available for Plaintiffs' use *only* if the Supreme Court found the Executive Order unlawful. Because the Supreme Court had not resolved that question either way, the court said, there was no live dispute between the parties.

But this case cannot possibly be moot. Plaintiffs still want their visa applications processed, and Defendants still refuse to do that. To be sure, Plaintiffs' ultimate entitlement to relief depends on a number of unresolved merits issues. All that matters for mootness purposes, however, is that *if* the district court sides with Plaintiffs on those issues, it *can* grant them effectual relief: namely, it can order Defendants to process Plaintiffs' visa applications on the merits, and to grant Plaintiffs their visas if they are legally entitled to them. That means there is still a live controversy for the district court to resolve. Nothing in the Supreme Court's disposition of the challenges to the entry suspension casts any doubt on that commonsense conclusion. This Court should therefore reverse and remand for the district court to resolve the merits of Plaintiffs' claims.

JURISDICTIONAL STATEMENT

Plaintiffs appeal from a final judgment of the U.S. District Court for the District of Columbia, entered on March 27, 2018, dismissing their suit against Defendants for injunctive, declaratory, and mandamus relief. J.A. 141-153. The

district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under federal law. The court also had jurisdiction of Plaintiffs' mandamus claim under 28 U.S.C. § 1361. Plaintiffs filed their timely notice of appeal on May 24, 2018. J.A. 155. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issue presented in this appeal is whether the expiration of an executive order temporarily barring entry to the United States mooted Plaintiffs' challenge to Defendants' ongoing refusal to process Plaintiffs' visa applications.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in the addendum to this brief at pages 1a-6a.

STATEMENT OF THE CASE

A. The Diversity Visa Program.

Congress created the diversity visa program in 1990 to promote immigration from countries with low rates of immigration to the United States. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 131, 104 Stat. 4978, 5000 (codified as amended at 8 U.S.C. § 1153(c)). The statute sets a target of 50,000 diversity immigrants per fiscal year. *See* 8 U.S.C. § 1151(e).[1] To implement the program, the Secretary of

[1] Although the statute sets the worldwide target at 55,000, 5,000 of that number are set aside for another purpose. *See* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193, 2199 (1997) (codified at 8 U.S.C. § 1151 note).

Homeland Security first identifies countries and regions with low rates of immigration and applies a statutory formula to allocate available visas among those places. *See* 8 U.S.C. § 1153(c)(1)(E); 22 C.F.R. § 42.33(a). The State Department then conducts a lottery to select a small number of individuals from each place who will be allowed to submit applications for the available visas. *See* 22 C.F.R. § 42.33(c). The sheer number of lottery-entrants makes the process intensely competitive. For Fiscal Year 2017, more than 19 million people entered the lottery, and 83,910 of them were selected to apply for a visa—a success rate of one-half of one percent.[2]

Once selected, lottery winners must finalize their applications, be interviewed by a consular official, and complete other procedural steps. *See* 8 U.S.C. § 1202(b); 22 C.F.R. §§ 42.33(g), 42.61-67. By statute and regulation, the government must then issue visas to applicants who satisfy the relevant statutory criteria. *See* 8 U.S.C. § 1153(c)(1); 22 C.F.R § 42.81(a) ("When a visa application has been properly completed and executed . . . , the consular officer must either issue or refuse the visa[.]"); *id.* § 40.6 ("A visa can be refused only upon a ground specifically set out in the law or implementing regulations."). Eligible lottery winners whose cases are processed by the end of the fiscal year (September 30) thus receive visas that allow them to immigrate and become lawful permanent residents. *See* 8 U.S.C.

[2] U.S. Dep't of State, *Visa Bulletin for July 2016* (June 9, 2016), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2016/visa-bulletin-for-july-2016.html.

§ 1154(a)(1)(I)(ii)(II) (specifying that lottery-winners are "eligible to receive" diversity visas "only through the end of the specific fiscal year for which they were selected"); 22 C.F.R. § 42.33(a)(1). Once a visa is issued, it is generally valid for six months. *See* 8 U.S.C. § 1201(c)(1).

During the period between the lottery drawing and the end of the fiscal year, the State Department closely manages the worldwide application process in order to ensure that approximately 50,000 actual diversity visas are issued. *See* Oppenheimer Decl. ¶¶ 4-7 (J.A. 92-93). The Department uses "visa numbers"—abstract placeholders for potential visas—for this purpose. *Id.* ¶¶ 4-5; *see* 22 C.F.R. § 42.33(f). Each of these "numbers" represents, in effect, a license for a consular post to go forward with processing one application. Defendants issue many more than 50,000 visa numbers per year, because they expect a significant fraction to go unused for a variety of reasons. But by monitoring and regulating the distribution of visa numbers to consular posts, Defendants ensure that any deviation from the 50,000 target is relatively slight. *See* J.A. 45 (setting out government statistics for recent years, which reflect that as few as 46,000 and as many as 54,000 diversity immigrants are sometimes allowed).

B. The Entry Suspension.

On March 6, 2017, President Trump issued Executive Order 13,780, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (hereinafter

"EO-2"). 82 Fed. Reg. 13,209 (Mar. 9, 2017). Relying on his authority to "suspend the entry of … any class of aliens," 8 U.S.C. § 1182(f), the President suspended "entry into the United States" by nationals of six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—while the government undertook a ninety-day review. EO-2, § 2(c), 82 Fed. Reg. at 13,213. In keeping with the President's statutory authority under § 1182(f), the order did not purport to impose any limit on the processing or issuance of visas.

C. The Challenged Policy.

On June 28, 2017, shortly before the entry suspension became effective, the Secretary of State issued a cable to all consular posts announcing the policy challenged here. J.A. 13-20. The cable purported to be "implementing" EO-2. J.A. 15. In fact, however, it converted EO-2's suspension of *entry* into a ban on issuing *visas*—casting aside "the basic distinction between admissibility determinations and visa issuance that runs throughout the [Immigration and Nationality Act (INA)]." *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018) ("*Hawaii II*"); *see id.* at 2414 n.4 (noting that the "concepts of entry and admission . . . are used interchangeably in the INA," but that "issuance of a visa" is distinct).

Specifically, with respect to diversity visas, the cable instructs as follows:

> For Diversity Visa (DV) applicants already scheduled for interviews falling after the [EO-2] implementation date of 8:00

> p.m. EDT June 29, 2017, post should interview the applicants. Posts should interview applicants following these procedures:
>
> a.) Officers should first determine whether the applicant is eligible for the DV, without regard to the E.O. If the applicant is not eligible, the application should be refused according to standard procedures.
>
> b.) If an applicant is found otherwise eligible, the consular officer will need to determine during the interview whether the applicant is exempt from the E.O.'s suspension of entry provision (see paragraphs 10-13), and if not, whether the applicant qualifies for a waiver (paragraphs 14 and 15).
>
> c.) *DV applicants who are not exempt from the E.O.'s suspension of entry provision and who do not qualify for a waiver should be refused 221(g)* and the consular officer should request an advisory opinion … following current guidance in 9 FAM [Foreign Affairs Manual] 304.3-1.
>
> Based on the Department's experience with the DV program, we anticipate that very few DV applicants are likely to be exempt from the E.O.'s suspension of entry or to qualify for a waiver. [Consular Affairs] will notify DV applicants from the affected nationalities with scheduled interviews of the additional criteria to allow the potential applicants to determine whether they wish to pursue their application. …
>
> The Kentucky Consular Center (KCC) will continue to schedule additional DV-2017 appointments for cases in which the principal applicant is from one of these six nationalities.

J.A. 16-17 (emphasis added). Defendants thus established a special procedure governing diversity visa applications by lottery winners whose countries of origin were subject to entry suspension under EO-2. Under that procedure, Defendants would first determine whether such a diversity-visa applicant is "otherwise eligible," apart

from EO-2. *Id.* But even if the applicant *was* otherwise eligible, she was then "refused" a visa unless and until she established that EO-2 did not bar her entry. *Id.*[3] Thus, anyone who was subject to EO-2's entry ban was categorically barred from obtaining a visa under the Secretary of State's visa procedures.

D. Plaintiffs' Lawsuit And The Preliminary Injunction.

Plaintiffs are four nationals of Iran and Yemen who won the diversity-visa lottery for Fiscal Year 2017 (as well as their immediate family members). All promptly submitted their visa applications and completed their consular interviews. *See* J.A. 99. But, pursuant to the policy described above, each was treated as ineligible for a visa—without respect to the merits of their applications or the statutory and regulatory criteria. Fearing that their applications would not be processed on the merits before the end of the fiscal year, when their eligibility would ordinarily expire, Plaintiffs brought suit on August 3, 2017.[4]

As Plaintiffs underscored in their complaint, "[t]his case does not challenge the President's power to issue the Executive Order," but rather concerns only "the

[3] The cable's instruction that applicants should be "refused 221(g)" is a reference to section 221(g) of the INA, which bars the granting of a visa when the consular official has reason to believe the applicant is "ineligible to receive a visa." 8 U.S.C. § 1201(g).

[4] Mr. Almaqrami was an original plaintiff, alongside others who have since voluntarily dismissed their claims. The other three plaintiff families joined the suit on September 22, 2017. *See* J.A. 99 & n.5.

government's illegal decision to refuse to issue *visas* to individuals covered by the Executive Order's prohibition on *entry*." Am. Compl. ¶¶ 5, 7 (J.A. 59) (emphasis added).[5] Plaintiffs challenged that refusal under the Administrative Procedure Act and sought declaratory, injunctive, and mandamus relief. *Id.* ¶¶ 53-67 & A-E (J.A. 72-75). The operative complaint thus asks the district court to, among other things, (1) issue a writ of mandamus compelling Defendants to process Plaintiffs' visa applications notwithstanding the challenged policy, (2) enjoin Defendants from implementing that policy, and (3) enjoin Defendants to issue visas that would have been issued but for that policy. *Id.* Plaintiffs also moved for class certification, seeking to represent all winners of the Fiscal Year 2017 diversity lottery whose applications were refused for processing because their home countries were subject to EO-2. *See* Mot. for Class Cert. at 5, Dkt. 3-1.[6]

Plaintiffs immediately sought a preliminary injunction or emergency mandamus relief compelling Defendants to process their visa applications before the end

[5] *See also id*. ¶ 10 (J.A. 60) ("Although other cases are currently pending that challenge the Executive Order's suspension of *entry*, Plaintiffs do not challenge that suspension of entry here. Instead, Plaintiffs are simply asking that their visa applications be processed consistent with the statute and regulations, so that they can, if eligible, be issued visas before the September 30 deadline, or pursuant to a court order after the September 30 deadline. Plaintiffs do not seek an order permitting them to immediately *enter* the United States or striking down the Executive Order.").

[6] Citations to "Dkt. __" are to the docket in the district court, No. 1:17-cv-1533 (D.D.C.).

of the fiscal year. At the time of Plaintiffs' motion in August 2017, the Supreme Court had granted certiorari in two cases involving challenges to the legality of EO-2 itself. *See Trump v. IRAP*, 137 S. Ct. 2080 (2017) ("*IRAP I*"). The Court had also stayed, with respect to foreign nationals without a bona fide relationship to a U.S. person or entity, the lower courts' injunctions against enforcement of EO-2. *See id*. After the district court expressed concern that it might be improper to adjudicate Plaintiffs' claims on the merits while those cases were pending in the Supreme Court (and while the injunctions against EO-2 were stayed), Plaintiffs added an alternative request for relief:

> While Plaintiffs believe that the pending litigation in the Supreme Court is irrelevant to this case, if the Court disagrees, it could also reserve any unused visa numbers until after that case is resolved. … Reserving unused visa numbers would permit this Court to maintain the status quo in advance of the decision of the Supreme Court.

J.A. 46.

On September 29, 2017, the day before the September 30 deadline, the district court granted Plaintiffs' motion in part and denied it in part. J.A. 95-112. First, the court agreed that "Plaintiffs have a right to have their visa applications processed in accordance with the INA" and that "State Department consular officers have a clear duty to do so." J.A. 106. Second, however, the court declined to "alter the status quo and grant [Plaintiffs'] specific requests for injunctive and mandamus relief while the legality of [EO-2] is currently before the Supreme Court." J.A. 102. Instead, the

court "grant[ed] the alternative relief Plaintiffs request[ed] and order[ed] the State Department to reserve any unused visa numbers until after the Supreme Court's ultimate decision in *Trump*." *Id.*; *see also* J.A. 109 (directing Defendants to "hold those visa numbers to process Plaintiffs' visa applications in the event the Supreme Court finds the Executive Order to be unlawful"). This remedy, the district court explained, would "address[] the potential irreparable harm that Plaintiffs face." J.A. 107. Specifically, it would do so by ensuring that if Plaintiffs' legal claims were later vindicated, neither the end of the fiscal year, nor an argument that available visa numbers have been exhausted, would prevent them from immigrating to this country. J.A. 107-109.

The district court modeled this relief on two analogous cases in which courts had ordered the processing of diversity-visa applications, notwithstanding the passage of the statutory deadline, because plaintiffs sought emergency relief before the deadline had passed. *See Przhebelskaya v. U.S. Bureau of Citizenship & Immigration Servs.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999). As the district court later explained, Defendants "fail[ed] to specifically argue that the courts in *Paunescu* and *Przhebelskaya* improperly ordered the adjudication of visa applications after the statutory deadline," and Defendants had thereby "conced[ed] that under certain circumstances, equity permits a court to order the processing of visas after September 30." J.A. 148 n.1. Defendants did not

appeal the preliminary injunction ordering them to hold visa numbers for processing after the deadline.

As part of the same injunctive order, the district court also directed Defendants to report, after the end of the fiscal year, the number of visa numbers that were issued but went unused. J.A. 112. Defendants responded that 27,241 visa numbers had been returned unused, and that they had approved only 49,976 diversity immigrants for Fiscal Year 2017. J.A. 118. Defendants thereby confirmed that, by any measure, an adequate number of visas remain available for Plaintiffs to obtain visas in the Fiscal Year 2017 program.

E. The Decision Below.

In October 2017, just weeks after the district court ordered Defendants to hold visa numbers for Plaintiffs, the Supreme Court disposed of the challenges to EO-2 without reaching the merits. *See Trump v. Hawaii*, 138 S. Ct. 377 (2017) ("*Hawaii I*"); *Trump v. IRAP*, 138 S. Ct. 353 (2017) ("*IRAP II*"). Because the relevant provisions of EO-2 had "expired by [their] own terms," *Hawaii I*, 138 S. Ct. at 377, the Court vacated the courts of appeals' judgments upholding injunctions against enforcement of those provisions and remanded for those courts to dismiss the appeals as moot.

Defendants then moved to dismiss this case for lack of subject-matter jurisdiction based on mootness.[7] They first argued that the September 30 statutory deadline barred them from issuing visas to Plaintiffs—notwithstanding the district court's preliminary injunction—and that the passage of time had therefore mooted the case. Defendants also argued that Plaintiffs' suit was, like the *Hawaii* and *IRAP* appeals before the Supreme Court, mooted by the expiration of EO-2. Finally, Defendants argued that the district court's preliminary injunction had conditioned any further relief for Plaintiffs on a decision by the Supreme Court invalidating EO-2; because the Supreme Court had not done that, Defendants said, this case was moot.

The district court granted Defendants' motion. J.A. 141-154. The court began by correctly rejecting the argument that the fiscal-year deadline barred the court from ordering the State Department to process Plaintiffs' visa applications and (if appropriate) issue their visas. Because Plaintiffs had sought and obtained relief prior to the statutory deadline, the court explained, it had the equitable power to order the State Department to process Plaintiffs' applications as the prior order contemplated and the law required. *See* J.A. 147-148. "[I]f the court deemed it appropriate," the court concluded, "it could order the State Department to process Plaintiffs' diversity

[7] Defendants also raised merits arguments, but the district court did not reach those issues.

visa applications, and the passing of the September 30 deadline did not moot Plaintiffs' claims." J.A. 150.

The court then ruled, however, that Plaintiffs' claims were mooted by the expiration of EO-2. J.A. 150-152. The court acknowledged that "Plaintiffs do not challenge the Executive Order directly." J.A. 151. Nonetheless, the court reasoned that because "section 2(c)'s expiration moots challenges to the Executive Order, it necessarily follows that challenges to a State Department's [sic] policy promulgated pursuant to that section of the Executive Order are moot as well." *Id*. In responding to Plaintiffs' contrary arguments, the court also suggested that its September order had predicated any future relief for Plaintiffs on the Supreme Court finding EO-2 unlawful. *See id.* "Given the Supreme Court's decision to moot the challenges to the Executive Order and its decision not to rule on the legality of the Executive Order," the court said, "there is no longer any meaningful relief this court can provide." J.A. 151-152. This appeal followed.[8]

SUMMARY OF ARGUMENT

Under bedrock Article III principles, this case is not moot. Mootness, like standing, does not concern whether the plaintiff is actually entitled to the requested

[8] The district court deferred ruling on Plaintiffs' class certification motion until after resolving Defendants' motion to dismiss. *See* Tr. of 12/21/17 Hr'g at 21, Dkt. 70. Accordingly, the class-certification motion will remain pending on remand if this Court reverses or vacates the dismissal.

relief, but merely whether the plaintiff would benefit "*if the requested relief were granted*." *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989); *see Chafin v. Chafin*, 568 U.S. 165, 174 (2013). In other words, a case cannot be moot if the complaint seeks relief that, if granted, would benefit the plaintiff. Here, Plaintiffs seek declaratory, injunctive, and mandamus relief that would result in the processing of their visa applications and—assuming the substantive adequacy of their applications—the ultimate issuance of their visas. That relief would plainly benefit them: It would keep alive their once-in-a-lifetime chance to become Americans. Accordingly, the case cannot be moot.

The district court believed matters were more complicated only because it mischaracterized this case as another challenge to EO-2. In reality, however, this case does not challenge, and has never challenged, the legality of that Executive Order. Plaintiffs' complaint *assumes* the validity of EO-2 and challenges only Defendants' "policy of refusing diversity *visas* to applicants from Iran, Syria, Sudan, Somalia, Yemen, and Libya, notwithstanding these applicants' statutory eligibility." J.A. 75 (emphasis added). As Plaintiffs have maintained from the outset, that policy was never supported by EO-2 at all. The expiration of EO-2 thus has no bearing on Plaintiffs' claims and in no way alleviates Plaintiffs' asserted injury. So long as Defendants continue to refuse to process Plaintiffs' visa applications on their merits,

Plaintiffs have a stake in the relief sought in their complaint, and the case cannot be moot.

Although the district court's opinion is not clear on this point, the court may also have made a separate determination that this case is moot on another ground—namely, that the court's prior injunctive order, issued in September 2017, contemplated that the Supreme Court would rule on the merits of EO-2. If the opinion below does encompass such an alternative holding, however, that reading of the court's prior order—as somehow making a merits ruling by the Supreme Court, in other pending cases, a condition precedent for adjudicating Plaintiffs' case at all—is erroneous and an abuse of discretion.

Indeed, this reading would render the court's earlier order inexplicable and arbitrary. As the September opinion and order make plain, the injunction's purpose was to hold potential visas in reserve for Plaintiffs so that they could obtain their visas if, when the district court later reached the question, it determined that Plaintiffs were legally entitled to have their applications processed on their merits. Answering that question might have been easy if the Supreme Court had invalidated EO-2, because EO-2 was the government's only asserted rationale for violating the clear commands of the statutory and regulatory scheme governing the diversity visa program. But the question of whether the State Department should have processed

the visa applications remains live even though the Supreme Court did not have occasion to decide EO-2's legality. Defendants' refusal to process Plaintiffs' visa applications contravened governing statutes and regulations, and still does today—regardless of whether EO-2 was lawful.

Finally, no alternative ground supports the judgment below. The district court correctly rejected the government's reliance on the fiscal-year deadline because, as courts have unanimously held, a district court has the power to require the State Department to process an application after that deadline if the plaintiff sought and obtained predicate judicial relief beforehand. In an abundance of caution, Plaintiffs also explain below why the latest iteration of the President's entry suspension—which is expressly temporary and sets forth an extensive waiver regime—does not divest Plaintiffs of their concrete stake in obtaining their visas.

In sum, the parties remain locked in a live dispute, and this Court should therefore reverse and remand for the district court to resolve that dispute on the merits.

ARGUMENT

I. Standard of Review.

This Court "reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction." *Munsell v. Dep't of Agric.*, 509 F.3d 572, 578 (D.C. Cir. 2007).

II. This Case Is Not Moot.

A. Plaintiffs Have An Ongoing Interest In The Relief They Seek.

Because the "case-or-controversy requirement subsists through all stages of federal judicial proceedings," federal courts lack jurisdiction to decide disputes that have become moot. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). But the test for mootness is demanding: "[A] case 'becomes moot *only* when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party.'" *Chafin*, 568 U.S. at 172 (quoting *Knox v. SEIU*, 567 U.S. 298, 307-08 (2012)) (emphasis added). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. SEIU*, 567 U.S. 298, 307-08 (2012).

Furthermore, both the Supreme Court and this Court have warned against "confus[ing] mootness with the merits." *Chafin*, 568 U.S. at 174. To determine Article III jurisdiction, a court does not conduct "an inquiry into the scope of the court's power to grant relief," but rather "*assumes* that a decision on the merits would be favorable and that the requested relief would be granted; it then goes on to ask whether that relief would be likely to redress the party's injury." *Thornburgh*, 869 F.2d at 1511; *see Miller v. Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996), *aff'd sub nom. Miller v. Albright*, 523 U.S. 420 (1998). Doubts about "the legal availability of a certain kind of relief" and concerns that the district court "lacks the

authority" to award a requested remedy thus go to "the merits"; they say nothing about the court's subject-matter jurisdiction. *Chafin*, 568 U.S. at 174.

Here, Plaintiffs have a clear, continuing interest in obtaining the relief they seek in their complaint. *Cf. Anderson v. Carter*, 802 F.3d 4, 10 (D.C. Cir. 2015) (evaluating mootness by examining "[t]he prayer for relief in [the plaintiff's] complaint"). If Plaintiffs prevail in full, they will obtain a declaration that Defendants' policy of refusing to process their visa applications is unlawful; an injunction against enforcement of that policy; an injunction "directing the issuance of visas that would have been issued but for the State Department's" policy; and a writ of mandamus directing Defendants to adjudicate Plaintiffs' visa applications and issue their visas. Am. Compl. ¶¶ A-E (J.A. 74-75). Naturally, it matters a great deal to Plaintiffs whether they obtain that relief. As the district court acknowledged, they "faced and overcame" "enormous statistical odds" in the diversity lottery. J.A. 152. If this case concludes without the adjudication of their applications, most of them will lose forever that rare opportunity to become Americans, and their significant sacrifices in pursuit of that dream (including leaving jobs, selling homes, and leaving school in anticipation of coming to America) will be for naught. If their applications are processed according to the governing law and regulations, by contrast, their visas will issue and their hopes of immigrating to this country will remain very much alive. Thus, this case is not moot.

As explained below, none of the alleged mooting events undermines that straightforward conclusion. *First*, the expiration of EO-2 does not moot this case because it has not prompted Defendants to process Plaintiffs' visa applications. *See infra* § II.B. *Second*, the Supreme Court's failure to resolve challenges to EO-2 on their merits does not moot this case because it is simply irrelevant to Plaintiffs' interest in having their visa applications adjudicated. *See infra* § II.C. *Third*, the passage of the September 30, 2017 deadline does not moot this case, as the district court correctly held, because it has no bearing on the district court's jurisdiction—and, in any event, the deadline was properly suspended with respect to Plaintiffs by the court's September injunction. *See infra* § II.D. And *fourth*, although neither the government nor the district court has suggested that the latest iteration of the President's entry suspension deprives Plaintiffs of a concrete stake in obtaining their visas, Plaintiffs explain below why that circumstance does not moot this case either. *See infra* § II.E.

B. The Expiration Of EO-2 Does Not Moot This Case.

Instead of asking whether Plaintiffs have a continuing stake in the relief they have sought—the traditional measure of mootness—the district court simply pointed to the Supreme Court's decision to vacate, on mootness grounds, two court of appeals decisions upholding injunctions against enforcement of EO-2. *See* J.A. 150 (citing *IRAP*, 138 S. Ct. at 353, and *Hawaii*, 138 S. Ct. at 377). Because the Supreme

Court concluded that those appeals "no longer present[ ] a 'live case or controversy,'" the district court reasoned, this case must not present one either. *Id.* (quoting *IRAP*, 138 S. Ct. 353).

But that reasoning fails to account for fundamental differences between the relief sought in this case and the relief sought in the challenges to EO-2. The *Hawaii* and *IRAP* appeals were mooted by the expiration of EO-2 for a simple reason: The Executive Order's expiration made the relief sought and obtained in those cases meaningless. Specifically, in both cases, the government had appealed from district court orders enjoining the government "from enforcing Section 2(c) of Executive Order 13,780." Order at 2, *IRAP v. Trump*, No. 8:17-cv-361-TDC (D. Md. Mar. 16, 2017), Dkt. 150; *see* Order at 23, *Hawaii v. Trump*, No. 1:17-cv-50-DKW (D. Haw. Mar. 29, 2017), Dkt. 270 (similar). Likewise, the underlying complaints sought only declaratory and injunctive relief barring enforcement of "President Trump's Executive Order of March 6, 2017." Second Amended Complaint at 37, *Hawaii v. Trump*, No. 1:17-cv-50-DKW (D. Haw. Mar. 8, 2017), Dkt. 64; *see* First Amended Complaint at 52, *IRAP v. Trump*, No. 8:17-cv-361-TDC (D. Md. Mar. 10, 2017), Dkt. 93 (similar). Once EO-2 ceased to exist, the plaintiffs lost all stake in enjoining that order and the government lost all stake in overturning the decisions enjoining that order.

The relief that Plaintiffs seek here is entirely different. As detailed above, Plaintiffs do not seek relief from the operation or enforcement of EO-2, but rather seek relief from the State Department's refusal to process their visa applications as part of the Fiscal Year 2017 diversity visa program—a refusal that continues to this day. *Supra*, at 20. Thus, the expiration of EO-2 in no way vitiates Plaintiffs' various specific demands for relief—including for an injunction against "implementing the policy of refusing diversity visas to applicants from Iran, Syria, Sudan, Somalia, Yemen, and Libya, notwithstanding these applicants' statutory eligibility"; an injunction "directing the issuance of visas that would have been issued but for the State Department's illegal implementation of the Executive Order"; and a writ of mandamus "directing … consular officials [to] adjudicate diversity immigrant visa applications and issue diversity immigrant visas to visa applicants from Iran, Syria, Sudan, Somalia, Yemen, and Libya." *Id.*

To be sure, Plaintiffs alleged that Defendants' *reason* for refusing to process their applications was Defendants' mistaken view that this refusal was warranted by EO-2. *See* Am. Compl. ¶¶ 6, 30-34 (J.A. 59, 64-66). But Plaintiffs simply want an order directing Defendants to process their visa applications under the ordinary, merits-based criteria, as part of the Fiscal Year 2017 program. *See id.* ¶¶ A-E (J.A. 74-75). Indeed, Defendants have never claimed that their firm stance against processing Plaintiffs' visa applications (or those of other Fiscal Year 2017 lottery-winners from

their countries) changed with the expiration of EO-2 at all. Thus, the expiration of EO-2 cannot moot this case.

C. The Supreme Court's Failure To Reach The Merits In *Hawaii* and *IRAP* Does Not Moot This Case.

The district court's mootness holding rested mainly on the expiration of EO-2, as just discussed. *See* J.A. 150-152; *see also* J.A. 150 ("Mootness Based on the Expiration of Section 2(c) of the Executive Order"). After laying out that rationale, however, the district court briefly responded to "Plaintiffs' argument that the Supreme Court's decision … 'clears the way for this litigation to proceed'"—i.e., Plaintiffs' argument that the non-merits disposition of the *Hawaii* and *IRAP* cases should free the district court of its prior hesitation to address Plaintiffs' claims while allegedly related issues were pending in the Supreme Court. J.A. 151. By way of answering that argument, the court said that its September injunction holding visa numbers for Plaintiffs had "expressly predicated a future order requiring the State Department to process Plaintiffs' visa applications on 'the Supreme Court find[ing] the Executive Order to be unlawful,'" thereby making a merits ruling in the *Hawaii* and *IRAP* cases "a condition precedent to the court granting Plaintiffs the ultimate relief they seek." *Id.* (quoting J.A. 112).

Because this analysis is both curt and interwoven with the district court's faulty analysis based on the expiration of EO-2, it should not be regarded as an independent alternative holding at all. Rather, if this Court agrees that the district

court's principal mootness theory is erroneous, *see supra* § II.B, it would be appropriate to vacate and remand so that the district court can reconsider its conclusion freed of the error that drove its analysis. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (vacating and remanding where "[t]he court's opinion leaves us uncertain as to whether … [there was] an impermissible taint" of one holding by another); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012) (similar); *Colorado v. Connelly*, 479 U.S. 157, 171 n.4 (1986) (similar).

If this Court does consider the district court's "condition precedent" reasoning as an alternative holding, however, it should reject it. There are two problems with this theory. First, the district court's narrow reading of its prior order, even if sound, has nothing to do with mootness. As the court acknowledged elsewhere in its opinion, "if the court deemed it appropriate, it could order the State Department to process Plaintiffs' diversity visa applications." J.A. 150. And Plaintiffs stand to benefit from such an order, irrespective of the terms of the district court's earlier injunction. *See supra* § II.A. That fact resolves the mootness question. The district court's contrary conclusion—that the court somehow divested itself of subject-matter jurisdiction by including particular language in its earlier order—does not make sense and lacks any apparent precedent.

Second, in any event, the district court's reading of its earlier order as establishing a rigid and unexplained "condition precedent" is simply untenable. As the

court explained in its preliminary injunction opinion, the point of preliminary relief is "to preserve the relative positions of the parties until a trial on the merits can be held." J.A. 102 (citation omitted). Here, the court did that by "grant[ing] the alternative relief Plaintiffs request[ed] and order[ing] the State Department to reserve any unused visa numbers until after the Supreme Court's ultimate decision in *Trump*." *Id.* That way, the court explained, it could resolve the merits of Plaintiffs' claims with the benefit of any Supreme Court guidance and without risking intruding on the interim status quo established by the Supreme Court's stay order—and yet could also avoid subjecting Plaintiffs to the ordinary consequences of the fiscal-year deadline on account of the court-imposed delay. *See* J.A. 107 (explaining that the order "address[ed] the potential irreparable harm that Plaintiffs face" through the imminent lapsing of their eligibility).

It is true that the court's separate order, by its terms, directed Defendants to "hold [unused] visa numbers to process Plaintiffs' visa applications in the event the Supreme Court finds the Executive Order to be unlawful." J.A. 112; *accord* J.A. 107 ("Defendants are ordered to … reserve any unused visa numbers for FY 2017 for processing following the Supreme Court's decision (should the Court rule in Plaintiffs' favor)[.]"). But the court's references to a favorable outcome in the Supreme Court litigation simply reflected the recognition that, if the Supreme Court invalidated EO-2, Plaintiffs would prevail in this case *a fortiori*. That is because the

government offered no defense of its actions here other than the argument that the State Department's policy was authorized by EO-2. In the end, the Supreme Court did not make the district court's task that straightforward. But while the absence of a controlling decision by the Supreme Court may have complicated the task before the district court, it in no way undermines Plaintiffs' legal theory or entitlement to relief in this case. Indeed, neither the district court nor Defendants have even attempted to explain *why* the non-merits resolution of the *Hawaii* and *IRAP* cases should foreclose Plaintiffs' case from being heard, with or (as it turns out) without guidance on EO-2 from the Supreme Court.

The September injunction should not be interpreted in a fashion that renders it arbitrary and irrational, particularly when the actual purpose and scope of the injunction—to preserve the availability of relief—are so clear from the accompanying opinion (as well as the request for relief that it purported to grant). *See Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1178 (10th Cir. 2005) (discerning the "inten[t]" of a "district court's order" by "[v]iewing the order as a whole and in context"); *Gjertsen v. Bd. of Election Comm'rs of City of Chicago*, 751 F.2d 199, 201 (7th Cir. 1984) (determining the "proper characterization of [an] order" based on "the reasons the district judge gave for entering [it]"); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1480-81 (2017) (rejecting a proposed interpretation of an opinion because the opinion "nowhere attempts to explicate or justify the categorical rule

that the [party] claims to find there," and because "given the strangeness of that rule … we cannot think that the Court adopted it without any explanation"). Because the district court's construction of the September order is manifestly wrong (and would not go to mootness in any event, *see supra* at 25), it cannot independently support the court's judgment.

D. The End Of The Fiscal Year Does Not Moot This Case Or Bar Plaintiffs' Claims.

In the district court, Defendants argued that this case should be dismissed because the ordinary deadline for issuing diversity visas (September 30, 2017) has passed. *See* 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (specifying that lottery-winners are "eligible to receive" diversity visas "only through the end of the specific fiscal year for which they were selected"). The district court correctly rejected that argument, but Plaintiffs anticipate that Defendants may ask this Court to affirm on that alternative ground. Plaintiffs also recognize that, insofar as the deadline issue is cast as a matter of mootness (albeit wrongly, *see infra* § II.D.1), this Court has an independent obligation to determine subject-matter jurisdiction. Plaintiffs therefore address the issue briefly here.

1. The Fiscal-Year Deadline Does Not Moot This Case.

Initially, any suggestion that the fiscal-year deadline bears on mootness—an aspect of subject-matter jurisdiction—is misplaced. The Supreme Court's decision in *Chafin v. Chafin*, 568 U.S. 165 (2013), explains why. In *Chafin*, a father sought

a court order, pursuant to the Child Abduction Convention, "re-returning" his child to the United States (after she had been "returned" to her mother in Scotland). As the Court explained, the mother "argue[d] that th[e] case [was] moot because the District Court *lacks the authority* to issue a re-return order either under the Convention or pursuant to its inherent equitable powers." *Id.* at 174 (emphasis added). The Court continued: "But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits." *Id*. As long as an order in the father's favor could benefit him, and as long as the father's claim was not "so implausible that it is insufficient to preserve jurisdiction," the case was not moot. *Id.*[9]

The same analysis holds here. Whether the district court can properly order the relief Plaintiffs seek, in light of the statutory deadline, is a pure merits question concerning "equitable principles" and the "legal availability of a certain kind of relief" under the circumstances. *Chafin*, 568 U.S. at 174. It does not affect whether

[9] *Powell v. McCormack*, 395 U.S. 486 (1969), stands for the same proposition. *See Chafin*, 568 U.S. at 174. In *Powell*, the plaintiff's only surviving claim sought backpay, and the defendants argued that he had brought that claim in the wrong court—meaning that, according to the defendants, the court had no authority to grant him any relief. 395 U.S. at 500. But there, too, the Supreme Court rejected the defendants' claim that this state of affairs mooted the case, explaining that the defendants' argument "confuse[d] mootness with whether [the plaintiff] has established a right to recover." *Id*.

Plaintiffs would benefit from such an order, so it has no bearing on mootness or jurisdiction.[10]

2. The Fiscal-Year Deadline Also Does Not Warrant Dismissal On The Merits.

Because the fiscal-year deadline raises no mootness issue, this Court need go no further to reverse the district court's jurisdictional dismissal. Even if the Court elects to consider the significance of the deadline for the merits, however, the district court correctly determined that the statutory deadline is no bar to relief here.

At least three courts have now held that a court has equitable authority to compel the processing of visa applications, even after the September 30 deadline, if the court intervenes in the administrative process before the deadline has passed. *See* J.A. 147-150 (opinion below); *Przhebelskaya v. U.S. Bureau of Citizenship & Immigration Servs.*, 338 F. Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999); *see also Marcetic v. INS*, No. 97-C-7018, 1998 WL 173129, at *1 (N.D. Ill. Apr. 6, 1998) (similar based on immigration judge's order). And several other courts, addressing cases in which plaintiffs did *not* obtain relief

[10] Defendants have not claimed that they would defy a court order to process Plaintiffs' visa applications on their merits. Nor is there any indication that the government has ever refused to comply with such orders in the past. *See Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (noting that "the INS has, in the past, adjudicated the status of DV Program participants after the end of the fiscal year of the program and issued visas"). In any event, the prospect of a defendant's noncompliance cannot moot a case. *See Chafin*, 568 U.S. at 175-76.

prior to the deadline, have taken care to distinguish that scenario from this one.[11] Conversely, Defendants have been unable to identify any case in which relief has ever been denied to a lottery-winner who secured a judicial order compelling adjudication or freezing the status quo before the end of the fiscal year.

This rule makes sense. Courts have clear authority to compel the government to process visa applications in accordance with the law. But if a court had no power to compel action after the September 30 deadline, this authority would be meaningless: The government could just sit on applications through the end of the fiscal year. As the Seventh Circuit has explained, "[a]llowing [Defendants] to claim inability to issue visas at that point would impinge the authority of the court." *Iddir v. INS*, 301 F.3d 492, 501 n.2 (7th Cir. 2002) (citing *Paunescu*, 76 F. Supp. 2d at 902-03, and *Marcetic*, 1998 WL 173129, at *2-3). Thus, there is little dispute that when a court orders visa-processing before the deadline, but the government fails to comply, the court has continuing authority to vindicate its order. In fact, as the district court said, Defendants have "conced[ed] that under [those] circumstances, equity permits a

[11] *See, e.g.*, *Ahmed v. DHS*, 328 F.3d 383, 387 (7th Cir. 2003) (explaining that under Seventh Circuit precedent, "the case would have been different if it had been filed before the end of the visa year … and if the district court had acted within that time period"); *Coraggioso v. Ashcroft*, 355 F.3d 730, 734 n.8 (3d Cir. 2004) (noting that if petitioner had "sought relief prior to the expiration of the 1998 fiscal year, our analysis may have been different," and that "[t]he Seventh Circuit has explicitly approved" cases to that effect); *Keli v. Rice*, 571 F. Supp. 2d 127, 135 (D.D.C. 2008) (distinguishing between cases in which courts had "order[ed] any injunctive relief *before* the applicable fiscal year ended" and those in which they had not).

court to order the processing of visas after September 30." J.A. 148 n.1; *see* Defts.' Mem. of Points and Authorities at 14, Dkt. 53-1 ("The takeaway from *Paunescu* and *Przhebelskaya* … [is] that courts have inherent power to enforce their prior orders.").

But as the district court also correctly explained, there is no material difference between the district court's September order holding visa numbers for Plaintiffs for later processing and an order directing the government to immediately process visa applications. Under the district court's September order—which Defendants did not appeal—"the State Department was required to not merely reserve the unused visa numbers, but to do so for a specific purpose: the future processing of Plaintiffs' visa applications." J.A. 148. Thus, in this case as in others, "the court is entitled to enforce its prior order" by directing the processing of visa applications, according to law, after the deadline has passed. J.A. 150. Certainly, the district court's decision to delay its ultimate decision in deference to the Supreme Court does not strip the district court of its equitable powers.

In addition, the district court's order freezing the pre-deadline status quo with respect to Plaintiffs fits comfortably within the letter and spirit of the All Writs Act, in which Congress expressly authorized courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). As the Supreme Court has explained in construing this traditional authority, a "court must bring considered judgment to bear

on the matter before it, but that cannot always be done quickly enough to afford relief." *Nken v. Holder*, 556 U.S. 418, 427 (2009). In such circumstances, "[t]he choice for a reviewing court should not be between justice on the fly or participation in what may be an 'idle ceremony.'" *Id.* (citation omitted). Rather, a court's "traditional equipment for the administration of justice" permits it to grant "interim relief" that temporarily suspends legal consequences, preserving the court's jurisdiction and ensuring that it can "act responsibly" and resolve the merits in due course. *Id.* That is exactly what the district court did here.[12]

In any event, Defendants are certainly in no position to complain about the district court's decision not to simply order immediate visa-processing in September, as the courts in *Przhebelskaya* and *Paunescu* did. That choice only *benefited* Defendants, by sparing them an immediate directive to process visa applications they did not wish to process. It would be perverse in the extreme if the district court's decision to defer resolution of the merits—to Defendants' benefit, and over Plaintiffs' objection—had the effect of denying Plaintiffs any opportunity to prove their entitlement to relief.

[12] Because this is an APA case, the district court also enjoyed comparable, overlapping authority to "issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Finally, if this Court concludes that the district court's decision not to order visa processing in September 2017 somehow bars Plaintiffs' claims, it should remand and permit the district court to enter an order mandating visa-processing as of that time *nunc pro tunc*. "An order nunc pro tunc (literally 'now for then') is an equitable remedy traditionally used to apply a court's own order or judgment retroactively." *Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995). Such orders are "available in order to promote fairness to the parties, and as justice may require." *Id.* (quotation marks omitted). They are particularly appropriate where, as here, "the delay in rendering a judgment or a decree arises from the act of the court" or "any other cause not attributable to the laches of the parties." *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880). In this case, Plaintiffs sought relief nearly two months before the end of the fiscal year, and the district court found it appropriate to postpone resolution of the merits until after the fiscal year. If this Court determines that an order actually compelling visa processing needed to issue *before* that time to be enforceable after the deadline, the district court will have the power (indeed, the "duty") to enter such an order retroactively and "see that the parties shall not suffer by the delay." *Id.* at 65.

E. The Current Entry Suspension Does Not Moot This Case.

Because this appeal concerns mootness, one other circumstance warrants comment. When EO-2 lapsed, the President ordered a new entry suspension for

nationals of Iran and Yemen, among other countries. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3"). As a result, Plaintiffs may not be able to use their visas immediately upon issuance. But the government has never suggested that EO-3 moots this case, and for good reason.

First, EO-3, like its predecessor, is expressly temporary. As the Supreme Court emphasized in reversing the preliminary injunctions against enforcement of this latest order, the order's "'conditional restrictions' will remain in force only so long as necessary to 'address' the identified 'inadequacies and risks' within the covered nations," and the government claims that it will "'relax or remove' the entry restrictions '*as soon as possible*.'" *Hawaii II*, 138 S. Ct. at 2410 (quoting EO-3, pmbl. and §1(h)) (alterations omitted; emphasis added). "To that end, [EO-3] establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated." *Id.* (citing EO-3, §§ 4(a), 4(b)). "Indeed, after the initial review period, the President determined that Chad had made sufficient improvements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals." *Id.*; *see* Proclamation No. 9723, 83 Fed. Reg. 15,937, 15,938 (Apr. 10, 2018) (delisting Chad and reporting that "identity-management and information-sharing practices are improving globally"). The President has also removed Sudan and Iraq from the entry suspension since he first imposed it in January 2017—further confirming that the scope of the

suspension is far from static. *See Hawaii II*, 138 S. Ct. at 2422. Plaintiffs thus have reasonable grounds to expect that the entry suspensions for their countries might soon be lifted as well.

Second, Plaintiffs also have reason to expect that they may qualify for a waiver under EO-3 at some point during the validity period of their visas. *See Hawaii II*, 138 S. Ct. at 2422 (emphasizing that EO-3 "creates a waiver program open to all covered foreign nationals seeking entry as immigrants"); *see also id.* at 2429-30 (Breyer, J., dissenting) (detailing "the Proclamation's elaborate system of exemptions and waivers" and explaining that "[t]he Proclamation does not exclude individuals from the United States if they meet the criteria for a waiver or exemption" (quotation marks omitted)). But Defendants' refusal to process Plaintiffs' applications, if it becomes final, will preclude Plaintiffs from seeking entry waivers on various grounds, pursuant to EO-3's criteria, during the pendency of their visas. *Cf. CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("[A] plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* … even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity."). For this

reason, too, Plaintiffs stand to benefit from an order compelling the processing and ultimate issuance of their visas.[13]

Finally, because Sudan was covered by EO-2 but is not covered by EO-3, EO-3 is irrelevant for Sudanese members of the putative class. Accordingly, if the Court somehow found that EO-3 mooted this case with respect to the named plaintiffs, the proper course would be to remand so that Sudanese class members may intervene as new lead plaintiffs. *See* 1 William B. Rubenstein, *Newberg on Class Actions* § 2:17 (5th ed. 2011) ("When mootness of the named plaintiff's claims occurs, intervention by absentee members is freely allowed in order to substitute them as class representatives."); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (explaining that "when questions touching on justiciability are presented in the class action context," a court must account for "the rights of putative class members as potential intervenors"); *Thornburgh*, 869 F.2d at 1509 (collecting cases).

[13] At a minimum, both of the issues noted above—i.e., how long the remaining countries will likely remain subject to a travel suspension, and how likely Plaintiffs are to qualify for waivers—turn on factual issues that were not raised or developed below. Accordingly, dismissal on the existing record would be improper. *See, e.g.*, *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981) (explaining that, while "factual determinations decisive of a motion to dismiss for lack of jurisdiction are within the court's power," "the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss"); *see also Weisberg v. U.S. Dep't of Justice*, 543 F.2d 308, 310 (D.C. Cir. 1976) (holding that a dismissal on mootness grounds based on matter outside the pleadings is held to the summary judgment standard).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and remand for further proceedings.

Dated: September 4, 2018

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,164 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman 14-point.

Dated: September 4, 2018

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Matthew E. Price
Matthew E. Price

ADDENDUM

INDEX

8 U.S.C. § 1153

§ 1153. Allocation of immigrant visas

****

(c) Diversity immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General--

(i) shall identify--

(I) each region (each in this paragraph referred to as a "high-admission region") for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify--

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions

The Attorney General shall determine--

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a low-admission region is the product of--

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of--

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien--

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

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8 U.S.C. § 1154

§ 1154. Procedure for granting immigrant status

(a) Petitioning procedure

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(1)(I)(i) Any alien desiring to be provided an immigrant visa under section 1153(c) of this title may file a petition at the place and time determined by the Secretary of State by regulation. Only one such petition may be filed by an alien with respect to any petitioning period established. If more than one petition is submitted all such petitions submitted for such period by the alien shall be voided.

(ii)(I) The Secretary of State shall designate a period for the filing of petitions with respect to visas which may be issued under section 1153(c) of this title for the fiscal year beginning after the end of the period.

(II) Aliens who qualify, through random selection, for a visa under section 1153(c) of this title shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected.

(III) The Secretary of State shall prescribe such regulations as may be necessary to carry out this clause.

(iii) A petition under this subparagraph shall be in such form as the Secretary of State may by regulation prescribe and shall contain such information and be supported by such documentary evidence as the Secretary of State may require.

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8 U.S.C. § 1182

§ 1182. Inadmissible aliens

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(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose

on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

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Executive Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017)

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

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Sec. 2. Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.

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(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

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22 C.F.R. § 40.6

§ 40.6 Basis for refusal.

A visa can be refused only upon a ground specifically set out in the law or implementing regulations. The term "reason to believe", as used in INA 221(g), shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations. Consideration shall be given to any evidence submitted indicating that the ground for a prior refusal of a visa may no longer exist. The burden of proof is upon the applicant to establish eligibility to receive a visa under INA 212 or any other provision of law or regulation.

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22 C.F.R. § 42.33

§ 42.33 Diversity immigrants.

(a) *General*—(1) *Eligibility to compete for consideration under section 203(c).* An alien will be eligible to compete for consideration for visa issuance under INA 203(c) during a fiscal year only if he or she is a native of a low-admission foreign state, as determined by the Secretary of Homeland Security pursuant to INA 203(c)(1)(E), with respect to the fiscal year in question; and if he or she has at least a high school education or its equivalent or, within the five years preceding the date of application for a visa, has two years of work experience in an occupation requiring at least two years training or experience. The eligibility for a visa under INA 203(c) ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility.

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(g) *Further processing*. The Department will inform applicants whose petitions have been approved pursuant to paragraph (c) of this section of the steps necessary to meet the requirements of INA 222(b) in order to apply formally for an immigrant visa.

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