IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AFGHAN AND IRAQI ALLIES UNDER SERIOUS THREAT BECAUSE OF THEIR FAITHFUL SERVICE TO THE UNITED STATES, ON THEIR OWN AND ON BEHALF OF OTHERS SIMILARLY SITUATED, Plaintiffs, v. MICHAEL POMPEO, *et al.*, Defendants.	Civil Action No. 1:18-cv-01388-TSC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs' First Amended Class Action Complaint, ECF No. 23, filed on July 12, 2018, asks this Court to order Defendants to adjudicate the "SIV applications" of the putative class members. ECF No. 23 at 27. On September 7, 2018, Plaintiffs moved for a preliminary injunction, asking the Court to direct Defendants to create a plan for adjudicating "SIV applications" based on input from Plaintiffs. ECF No. 34 at 26. Plaintiffs, however, have asserted a harm—imminent danger—that is addressed in the AAPA and RCIA without a connection to timeliness of adjudication. Nonetheless, Plaintiffs assert unreasonable delay and insist that the filing of an Application for Chief of Mission ("COM") Approval, the earliest step in a multi-step, multi-agency process, is what Congress had in mind when it used the words "application for such visa" in the AAPA and RCIA. Because Plaintiffs define their legal injury in this way, they cannot meet the essential requirement for a preliminary injunction—a showing of irreparable harm. Moreover, they fail to show a likelihood of success on the merits, not only because they

fail to state a claim by misconstruing the statute, but also because they lack standing to bring this lawsuit. Finally, Congress demonstrated in the text of the statutory provisions at issue in this case that the national security interest outweighs harms to an applicant related to delay.

For these reasons, this Court should deny Plaintiffs' Motion for Preliminary Injunction.

II. BACKGROUND

The term "special immigrant" is defined at 8 U.S.C. § 1101(a)(27), and covers a wide range of aliens, including certain physicians, religious workers, broadcasters, and many others. The term was introduced to the statute in the 1965 amendments to title 8, United States Code, replacing the term "nonquota immigrant." Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, 916.

Under 8 U.S.C. § 1153(b)(4), Congress set the maximum number of visas to be made available to "qualified special immigrants." Pursuant to that provision, and to determine who is to be classified as a special immigrant, USCIS created the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant ("Form I-360 petition).

When Congress passed the AAPA and the RCIA, it made use of existing terms and categories such as "special immigrant," as well as the procedures already in place at the agencies. Section 602(b) of the AAPA states that the Secretary of Homeland Security "may provide an alien described in subparagraph (A), (B), or (C) of paragraph (2) with the *status of a special immigrant* under section 101(a)(27) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)) . . . ." AAPA § 602(b)(1) (emphasis added). This was not new with the AAPA. Similarly, one of the required steps before DHS may confer "special immigrant" status is that the alien follow the existing procedure—submit a Form I-360 petition, already in use by USCIS. AAPA § 602(b)(1)(A) ("if the alien . . . submits a petition for classification under section

203(b)(4) of such Act (8 U.S.C. 1153(b)(4));").

Congress also specified that the alien must be "otherwise eligible to receive an *immigrant visa*." AAPA § 602(b)(1)(B) (emphasis added). Again, Congress was using existing concepts. Elsewhere, Congress had already required that "[e]very alien applying for an immigrant visa . . . shall make application therefore in such form and manner and at such place as shall be by regulation prescribed." 8 U.S.C. § 1202(a). Similarly, Congress specified that "[a]ll immigrant visa applications shall be reviewed and adjudicated by a consular officer." 8 U.S.C. § 1202(b). The agency regulations require a personal appearance before the consular officer, 22 C.F.R. § 42.62, and specify that the only valid visa application is the Form DS-230 or the Form DS-260. 22 C.F.R. § 42.63.

III. LEGAL STANDARD

A. Preliminary Injunction

To prevail on an application for preliminary injunction, the movant must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Where, as here, the government is the opposing party, the final two factors—harm to the opposing party and the public interest—merge to a single consideration. *Nken v. Holder*, 556 U.S. 418, 435-36 (2009) (observing there is "no basis for the blithe assertion of an 'absence of any injury to the public interest' when a stay is granted" over the objection of the government).

A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). In addition to a likelihood of success on the merits, the moving party must demonstrate some injury, as "[t]he

basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)). Moreover, the injunction is available only upon an evidentiary showing of "certain," "great," and imminent harm. *Wisc. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

The purpose of a preliminary injunction is merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When, "a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo" during litigation, the party is held to a higher burden of proof. *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997) (internal quotation marks omitted) (*quoting Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994)), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998).

IV. ARGUMENT

Plaintiffs allege that Defendants have unreasonably delayed an agency decision. ECF No. 23, ¶¶ 72-77 (Count Two), 78-83 (Count Three). They define unreasonable delay by the language in AAPA § 602(b)(4)(A) and RCIA § 1242(c)(1). *Id*. These provisions, however, unmistakably refer to applications for a visa and not to applications for Chief of Mission Approval. Moreover, as Defendants argue in briefing filed contemporaneously with this Response, the State Department and USCIS have consistently adhered to the statutory usage of "visa" and the regulations prescribing what qualifies as an "application for visa." *See* Reply in Support of the Motion to Dismiss at 5. In presenting their claim in this way, Plaintiffs have not alleged a legally cognizable harm and a preliminary injunction is inappropriate.

Where injunctive relief intrudes on the core concerns of the executive branch, such as national security, a plaintiff must "make[s] an extraordinarily strong showing" as to each

element. *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1978). In *Adams*, the Court of Appeals considered it a deep intrusion into the function of the State Department for the district court to instruct the Secretary of State regarding foreign relations. *Id*. Plaintiffs make a similarly intrusive request, asking that they, as applicants for immigrant visas, be appointed to determine a plan for adjudicating those same visas. ECF No. 34-1 ¶¶ 4, 5. Plaintiffs cannot make the 'extraordinarily strong showing' necessary for such an injunction.

As such, the Court should deny the motion for preliminary injunction and instead permit the parties to litigate the case fully.

A. No Strong Likelihood of Success on the Merits

1. Failure to State a Claim

As Defendants argued in their Motion to Dismiss, Congress did not mandate a deadline for adjudication. ECF No. 30 at 32-34. Congress can compel an agency to act within a certain time period while leaving "the manner of its action … to the agency's discretion," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) ("SUWA"), and Congress knows how to formulate such a requirement. In *SUWA*, the Supreme Court offered 47 U.S.C. § 251(d)(1) as an example of just such a requirement. *Id*. That statute provides that "[w]ithin 6 months after February 8, 1996, the Commission *shall* complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1) (emphasis added).

Further, a statutory or regulatory time limit is not mandatory unless it both (1) "expressly requires an agency or public official to act within a particular time period," and (2) "specifies a consequence for failure to comply with the provision." *Brock v. Pierce Cty.*, 476 U.S. 253, 259 (1986) (internal citation and quotations omitted); *see United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) ("If a statute does not specify a consequence for noncompliance

with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."); *United States v. Montalvo-Murillo*, 495 U.S. 711, 711-12 (1990) ("There is no presumption or rule that for every mandatory duty imposed upon the . . . Government . . . there must exist some corollary punitive sanction for departures or omissions, even if negligent.").

Here, the gravamen of Plaintiffs' claims rests on their unsupported assumptions that Congress mandated a nine-month deadline for the Executive to decide Afghan and Iraqi SIV applications, and that the clock starts to run when the alien submits an application for COM Approval (as opposed to when the alien reaches Step 10, where the agency reviews the documents for completeness. *See* Motion to Dismiss at 15, 20). The substance of Congress' mandate, however, can be found by looking to where it uses the word "shall." In both the AAPA and RCIA, Congress stated

> [T]he Secretary of State and the Secretary of Homeland Security, in consultation with the Secretary of Defense, *shall* improve the efficiency by which applications for special immigrant visas under paragraph (1), are processed …

AAPA § 602(b)(4)(A); RCIA 1242(c)(1); *see also* discussion of "Clauses A, B, and C" in Motion to Dismiss at 18-19. The only activity that Congress mandated the Secretaries of State and Homeland Security to take was to "improve the efficiency" of steps incidental to the issuance of such visas AAPA § 602(b)(4)(A).

The portions of the AAPA and RCIA that refer to the nine-month timeframe upon which Plaintiffs place so much weight begin with the word "should," and are based on the date of submission of "an application for such visa." AAPA § 602(b)(4)(A). Further, the RCIA and the AAPA include (1) a rule of construction that prioritizes both national security and proper determination of eligibility over institutional efficiency and timeliness, AAPA § 602(b)(4)(B),

and (2) a protection-of-aliens provision that operates as safety valve for "immediate danger." AAPA § 602(b)(6). The rule-of-construction provision states:

> (B) CONSTRUCTION.—Nothing in this section shall be construed to limit the ability of a Secretary referred to in subparagraph (A) to take longer than 9 months to complete those steps incidental to the issuance of such visas in high-risk cases for which satisfaction of national security concerns requires additional time.

Id.

In other words, rather than requiring the agencies to choose between (a) admitting an alien where security issues are in doubt, and (b) denying the application because a certain number of days have elapsed, Congress made clear that the agency may take more time in high-risk cases where "satisfaction of national security concerns requires additional time." *Id*.

The protection-of-aliens provision states:

> (6) PROTECTION OF ALIENS.--The Secretary of State, in consultation with the heads of other appropriate Federal agencies, shall make a reasonable effort to provide an alien described in subparagraph (A), (B), or (C) of paragraph (2) who is seeking special immigrant status under this subsection protection or to immediately remove such alien from Afghanistan, if possible, if the Secretary determines, after consultation, that such alien is in imminent danger.

AAPA § 602(b)(6). The incorporation of the safety valve in the statutory scheme is consistent with the use of "should" indicating a non-mandatory timeframe. Rather than prescribe negative consequences for the agencies for judicially-determined unreasonable delay, Congress instead directed that the agency "make a reasonable effort to . . . remove such alien" from the imminent danger. *Id*.

The decision in *Nine Iraqis* effectively made the rule of construction provision a nullity by framing it as part of a "rule-and-exception structure." *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 294 (D.D.C. 2016). Congress, however, explicitly framed it as a rule of construction. AAPA § 602(b)(4)(B). The sensible construction is that this clause operates to explicitly allow the agency to keep an

individual application pending even if nine months have passed since the submission of the materials required "to complete the application of such visa." AAPA § 602(b)(4)(A). The alternative, in the presence of national security concerns, is to deny the application.

Plaintiffs' reliance on *In re People's Mojahedin Org. of Iran*, 680 F.3d 832 (D.C. Cir. 2012) for the proposition that the inclusion of a nine-month timeframe in the AAPA and RCIA "cuts strongly" in favor of relief if nine months have passed, is misplaced. *See* Motion for Preliminary Injunction at 18 (ECF No. 34). There, the Court of Appeals issued a writ of mandamus emphasizing the presence of the word "shall" in the statute. *Id*. at 834. ("While the Secretary may revoke a designation at any time, the Act directs that she 'shall' revoke a designation if . . . ").

The provisions in the statute make clear that Congress did not establish a mandatory timeframe for a consular decision. Because of this, Plaintiffs are not likely to succeed in showing that there is a cause of action under the APA whereby SIV applicants may request that courts could direct a consular officer that the time had come to decide on an application for an immigrant visa.

2. TRAC Does not Apply Where Plaintiffs Seek Relief that is Programmatic Rather than Discrete

Courts can only redress agency action that is unreasonably delayed when that final action is discrete and mandatory. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("SUWA"). The relief requested by Plaintiffs in this Motion for Preliminary Injunction is not directed toward a discrete action, but instead asks this Court to require Defendants to formulate a plan based on Plaintiffs' input. *See* Motion for Preliminary Injunction at 1. Plaintiffs improperly seek to make "*wholesale* improvements of this program by court decree, rather than in the offices

of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (emphasis in original).

3. Even if the TRAC Factors Apply, They Do Not Indicate Mandamus is Appropriate

The six TRAC factors operate as a test "for when the writ should issue." *TRAC*, 750 F.2d at 80. When applying the TRAC factors, Plaintiffs disregard the statutory language of the RCIA and AAPA and the competing interests that Congress asked the agencies to balance—individual eligibility for a visa and national security. When one accounts for these, the TRAC factors demonstrate that Defendants should prevail. The second factor looks to the statutory scheme for "a timetable or other indication of the speed with which it expects the agency to proceed…." *Id*. With the AAPA and the RCIA, the provision is specifically directed at intuitional efficiency—operations in the aggregate, AAPA § 602(b)(4)(A)—and provides an explicit rule of construction that forecloses application of a timetable. AAPA § 602(b)(4)(B). The fourth factor – competing priorities at the agency – is a question Congress has sought to oversee itself and a question that Congress sought for the agencies to balance without court intervention. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal citation and quotations omitted); *Reno v. Flores*, 507 U.S. 292, 305 (1993) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and [non-citizens] has been committed to the political branches of the Federal Government"). The reporting requirements in the statute are clear indications that Congress is exercising its oversight and Constitutional grant of authority. U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have power to . . . establish a uniform rule of naturalization . . . ."). Congress has demonstrated that it can and will direct the agencies with regard to how resources are allocated. The fifth factor—the

nature and extent of the interests prejudiced by delay—is addressed by the statute where the agencies are given the discretion to keep applications as pending even where the time exceeds nine months.

B. Plaintiffs Have Not Established That They are Likely to Suffer Irreparable Injury

The standard for establishing irreparable harm is particularly high. *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017) (Chutkan, J.). This "considerable burden" requires proving that Plaintiffs' purported injuries are "certain, great and actual—not theoretical—and imminent, creating a clear and present need for extraordinary equitable relief to prevent harm." *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (internal quotation marks omitted). In addition, "the certain and immediate harm that a movant alleges must also be truly irreparable in the sense that it is 'beyond remediation.'" *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 44 (D.D.C. 2014) (citation omitted). There must be evidence of irreparable harm and "the movant [must] substantiate the claim that irreparable injury is likely to occur" and "provide . . . proof indicating that the harm is certain to occur in the near future." *Wis. Gas Co.*, 758 F.2d at 674 (internal quotation marks and citation omitted). This is because "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

Plaintiffs place before the Court harm that is serious. And these are the harms that motivated Congress to create the SIV Process, so that Defendants can identify those who are eligible for the SIV program and ultimately determine which individuals are eligible for special immigrant visas. But these harms Plaintiffs articulate are not addressed in terms of the timeliness

of the visa adjudication. To the extent there is imminent danger for an alien during the SIV process, the statute contemplates that this be remedied via the protection-of-aliens provision. AAPA § 602(b)(6).

Because the statute establishes a benchmark for evaluating the efficiency of the agencies, it does not set out timeline for establishing unreasonable delay even if measured from the time the alien submits documents to complete the visa application. That is because Congress specified that the nine-month metric should be applied only to those aliens who have been determined to be eligible by a consular officer at the visa application interview, which can only be known in retrospect. In other words, it applies in hindsight, as part of a benchmark to measure whether the efficiency of the process is improving, rather than as a prospective deadline. *See* Motion to Dismiss at 19.

C. Plaintiffs Cannot Show That Any Hardship to Them Outweighs the Public Interest

"Few interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985). Any order that enjoins a governmental entity from enforcing statutes enacted by the duly elected representatives of the people constitutes an irreparable injury that weighs heavily against the entry of injunctive relief. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977).

Congress recognized that the agencies naturally place a priority on protecting the country from national security threats. By including a rule of construction at AAPA § 602(b)(4)(A), Congress made it so visa applications would not need to be denied because the agency ran out of time while conducting necessary security reviews. But this means that, in balancing the interests of (a) bringing to United States aliens who qualify under this program; and (b) protecting the national security of the United States, Congress has explicitly provided that any tension is

resolved by granting the agency *more time*. Therefore, Congress has foreclosed, in this statutory scheme, the relief Plaintiffs now seek—relief from the extra time for the decision.

V. CONCLUSION

For the reasons state herein, the Court should deny Plaintiffs' motion for preliminary injunction.

Date: September 28, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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