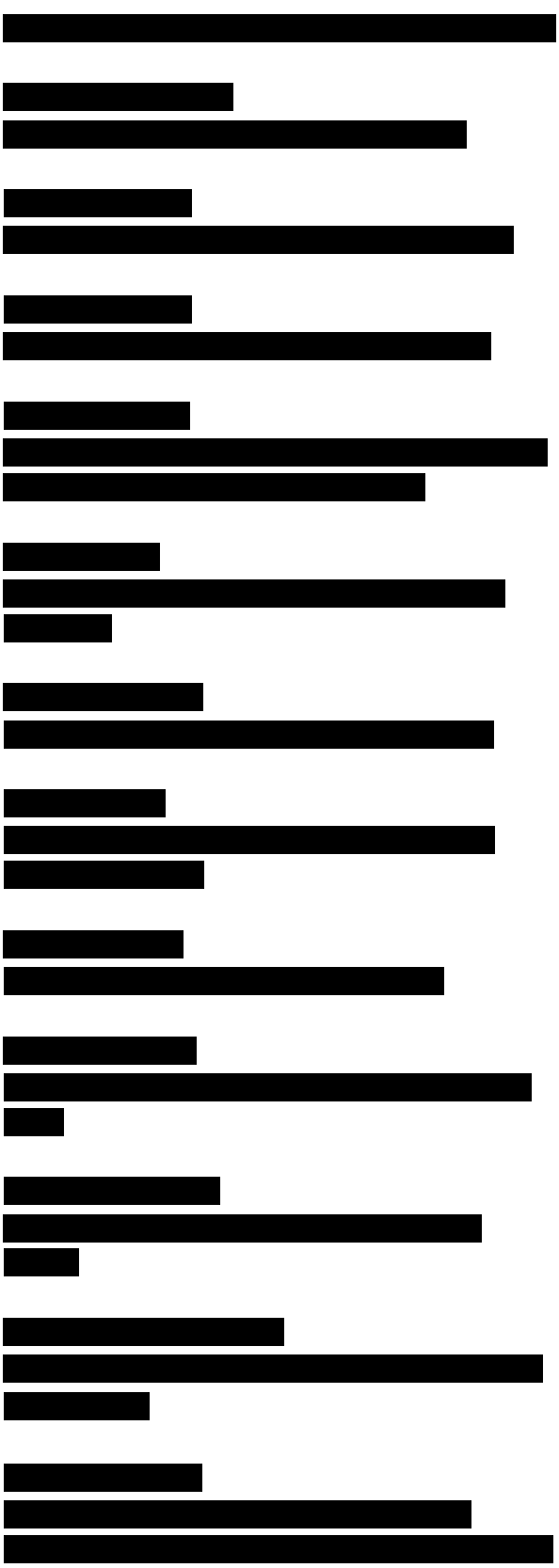
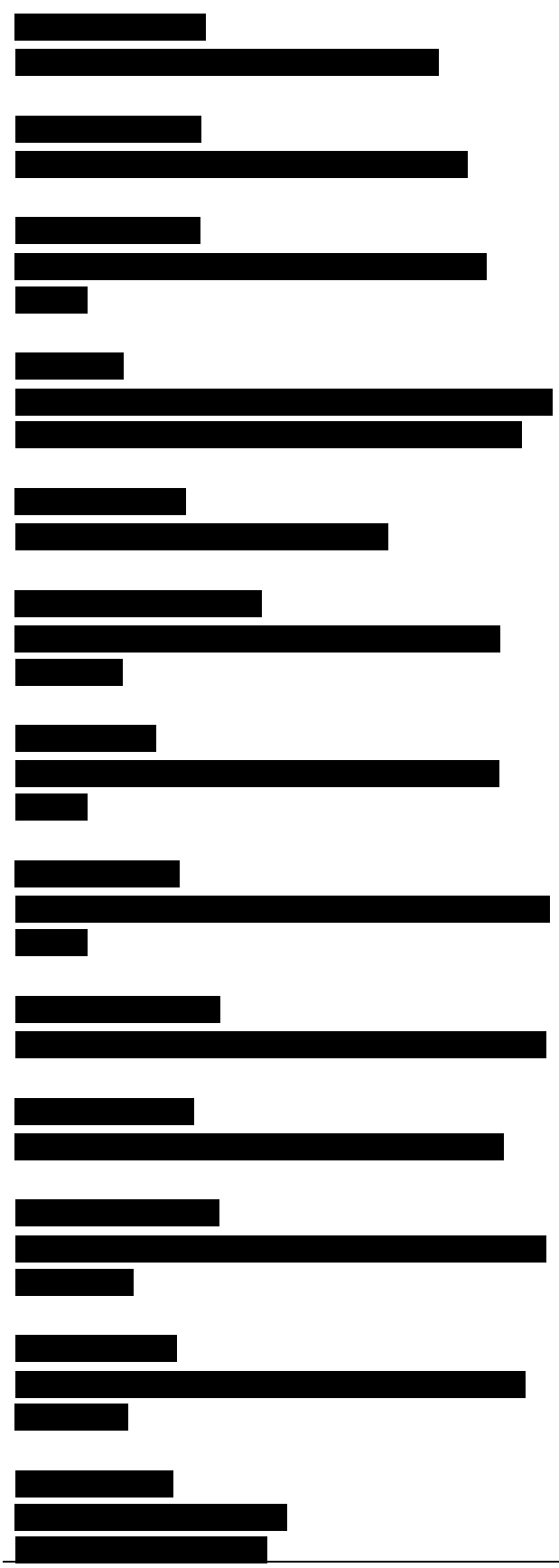
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

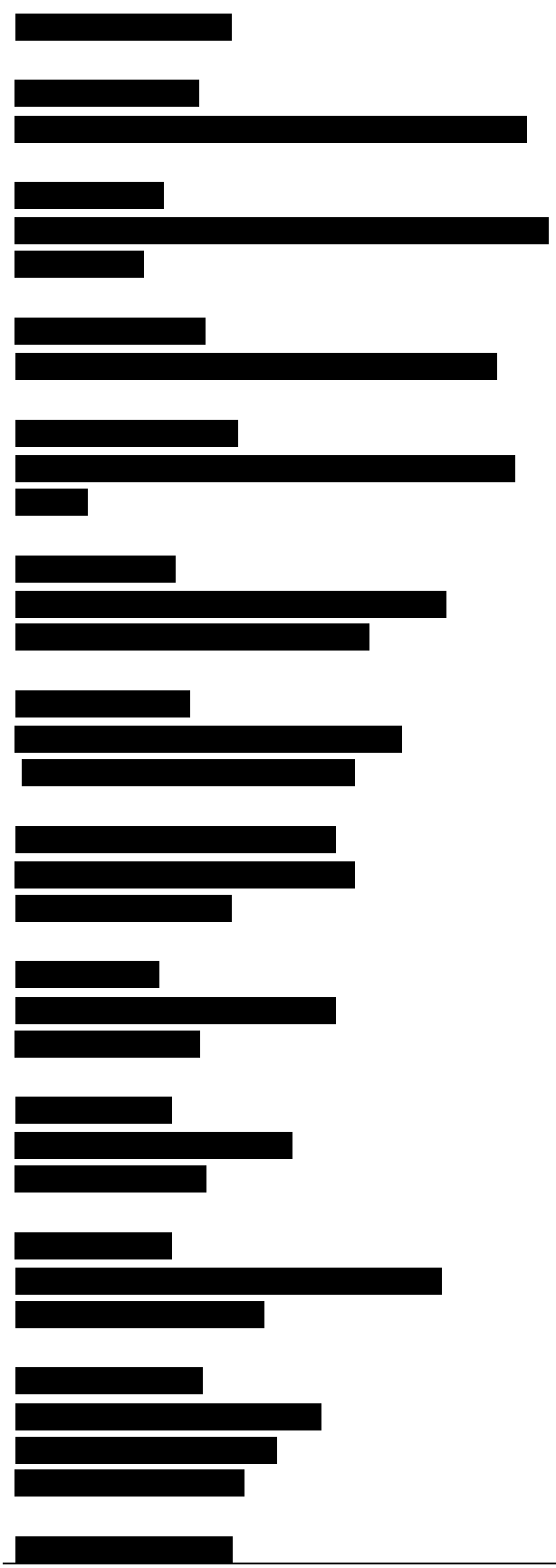
Philip Kinsley
[redacted]

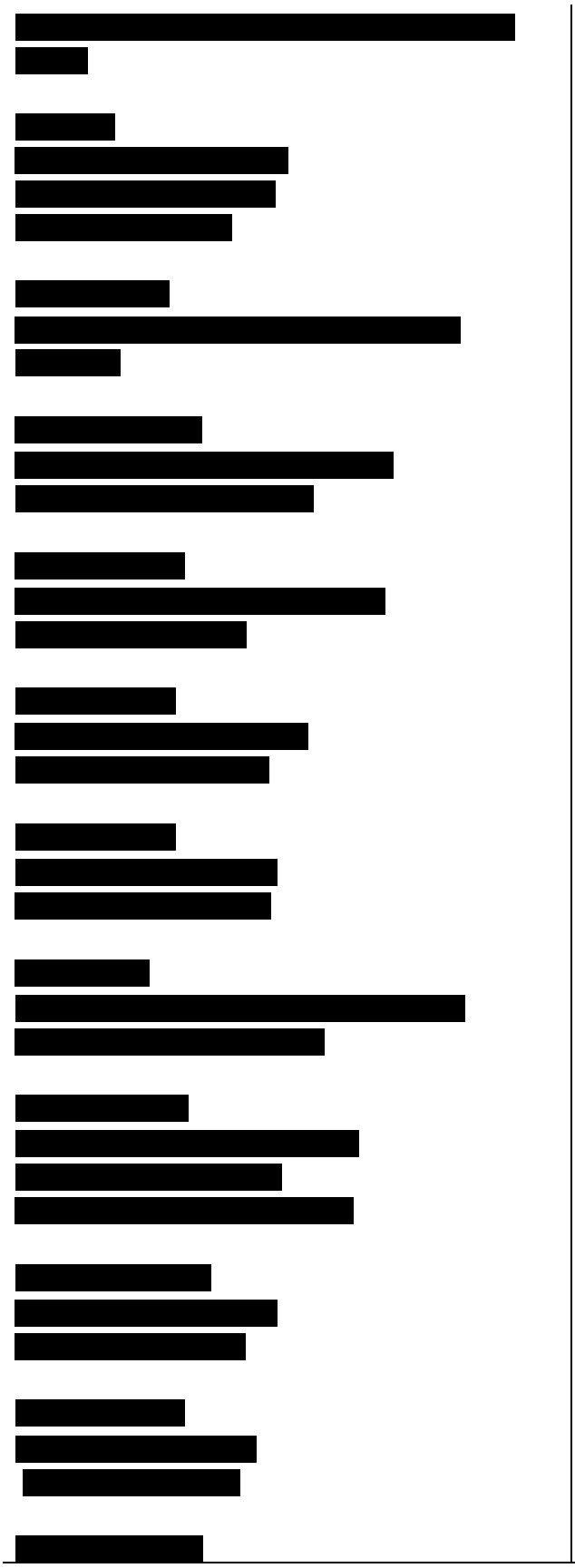
Civil Action No.

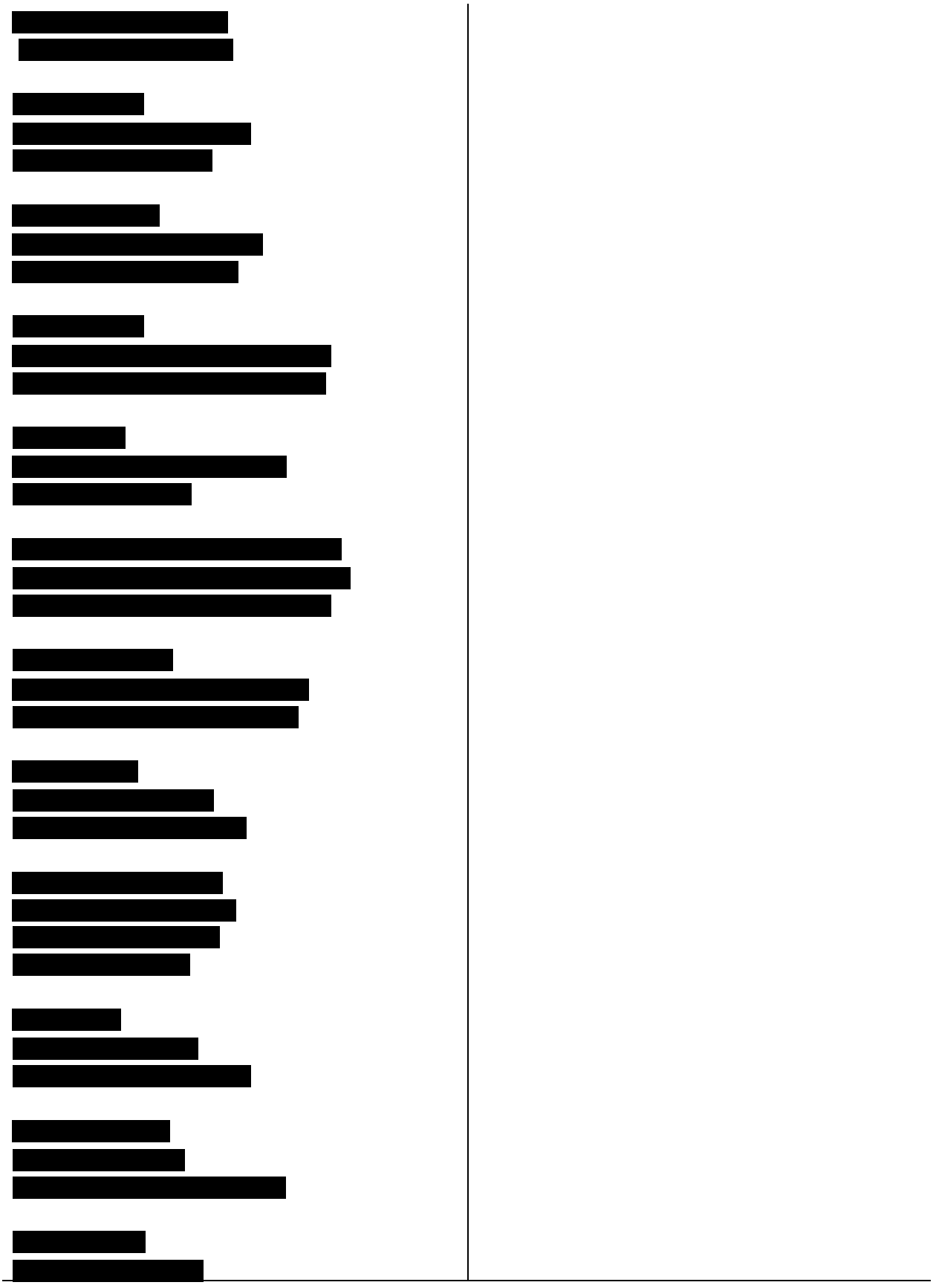
Complaint for Declaratory and Injunctive Relief Under the APA

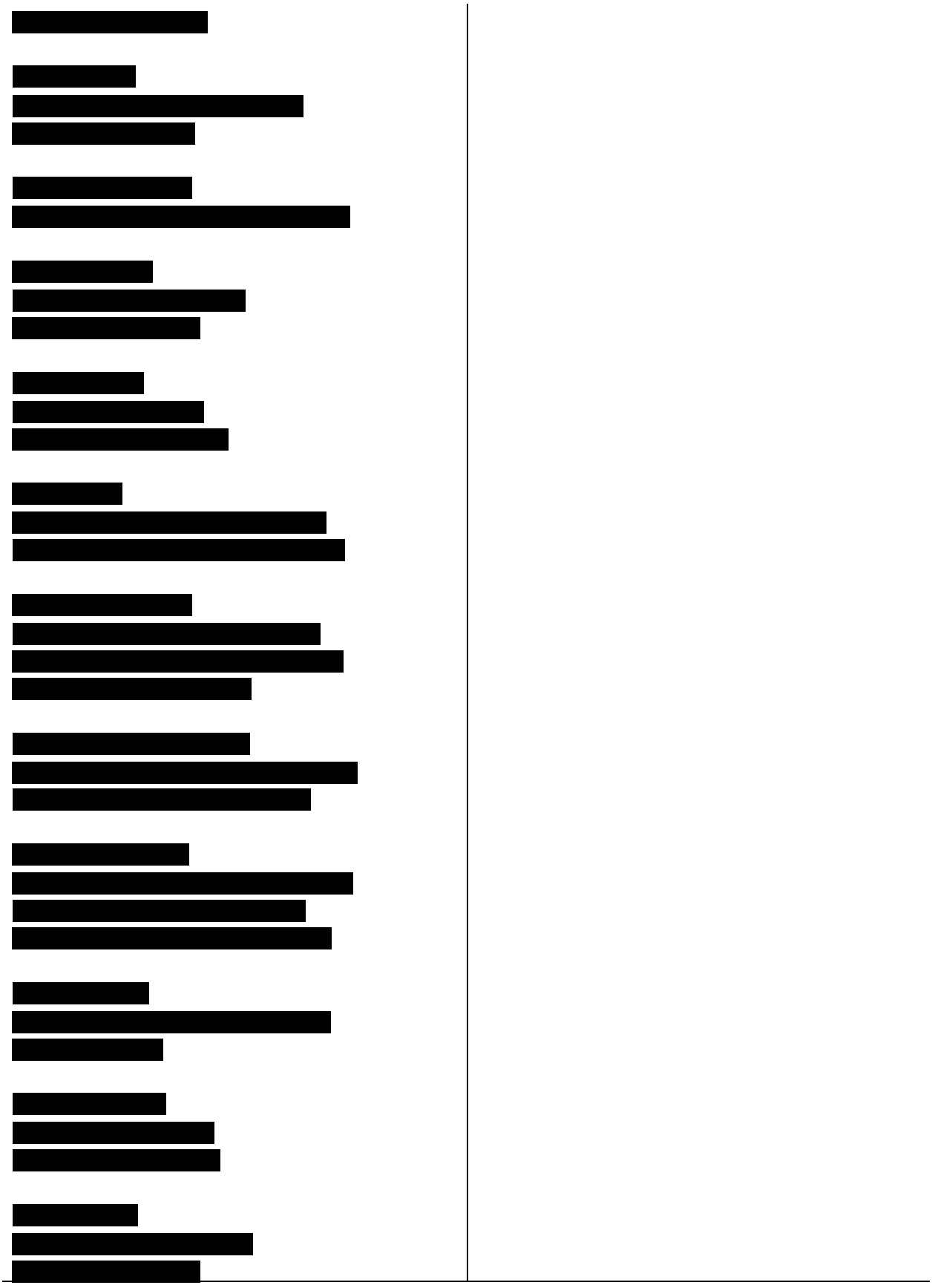


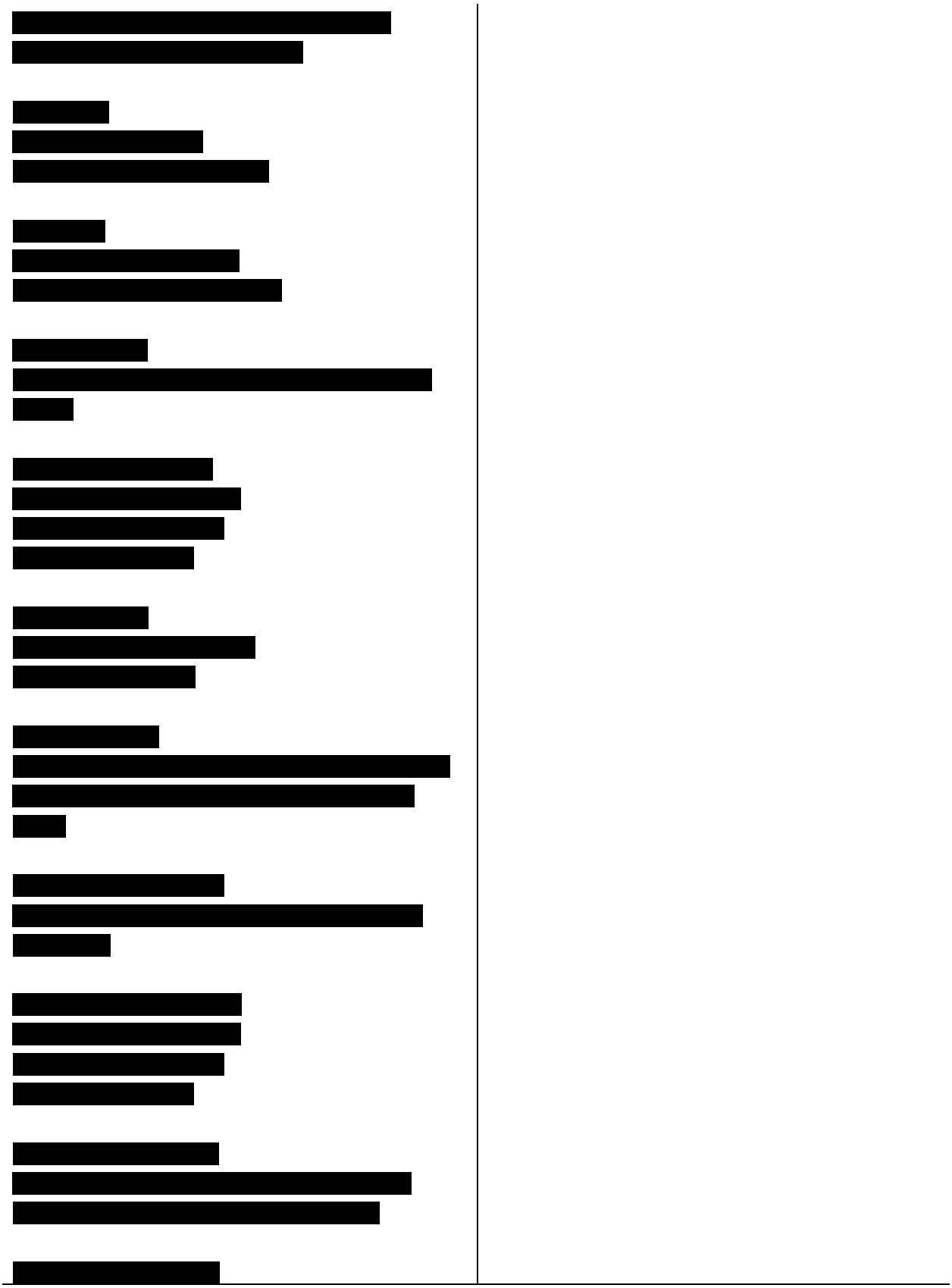


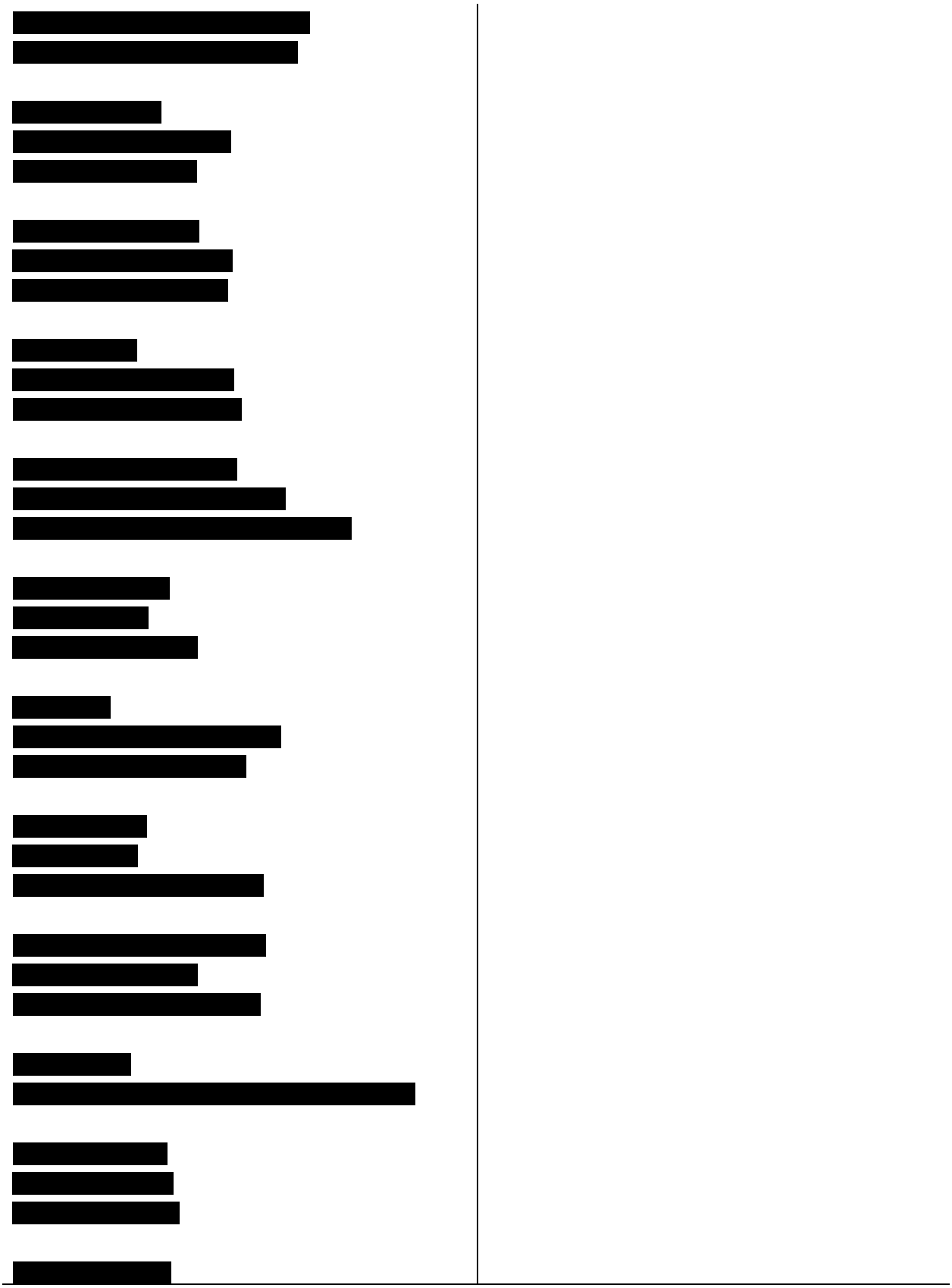












[redacted]

Plaintiffs,

v.

ANTONY J. BLINKEN , Secretary of the
U.S. Department of State
c/o Executive Office
Office of the Legal Advisor
Suite 5.600
600 19th St. NW
Washington, D.C. 20522;

U.S. DEPARTMENT OF STATE Executive Office, Office of the Legal Advisor Suite 5.600 600 19th St. NW Washington, D.C. 20522; Defendants.	

I. INTRODUCTION

1. Defendants have unlawfully interpreted section 212(f) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(f), authorizing the President to temporarily suspend the entry of classes of noncitizens to be a grant of authority to suspend the processing of visas and create exceptions for issuance.

2. This matter involves the unlawful suspension of visa processing for Plaintiffs simply because they temporarily may not enter the United States. Defendants have unlawfully relied on certain suspensions on entry that apply to individuals who were physically present in the Islamic Republic of Iran, the People's Republic of China, the Federative Republic of Brazil, South Africa, the Republic of Ireland, the United Kingdom, and the Schengen area of Europe ("designated countries") during the 14-days prior to seeking entry. These regional *entry* bans based on presence allow for entry after the individual has remained outside the designated countries for 14 days. However, Defendants have refused to issue visas to Plaintiffs which would allow them to quarantine in a third country for fourteen days prior to seeking entry.

3. Due to Defendants' unlawful refusal to issue visas to individuals in these countries, the plaintiffs are subject to a total, inescapable ban on receiving their visas, or even having these visas adjudicated, unless they can meet certain, unlawful and narrowly proscribed exceptions to trigger visa processing. The law authorizes none of this agency action.

4. In response to then-rising cases of COVID-19 in certain regions of the world, former President Trump issued five Proclamations P.P. 9984, 9992, 9993, 9999, 10041, and President Biden issued Proclamation 10143 ("Proclamations" or "PP") that collectively and temporarily suspend the entry of all noncitizens to the U.S., with certain exceptions, if the persons have

been physically present in the designated countries during the 14-day period preceding their entry or attempted entry into the U.S. Exs. A – F.[1]

5. Specifically, the countries that were targeted by these Presidential Proclamations and which currently the suspension on entry of individuals who have been physically present in these countries are China (PP 9984), Iran (PP 9992), the Schengen Area (PP 9993), the United Kingdom and Republic of Ireland (PP 9999), Brazil (PP 10041), and South Africa (PP 10143).

6. Multiple Court decisions have ruled that a § 1182(f) suspension of *entry* does not authorize the Department of State ("DOS") to institute a "no-visa" policy for the affected, eligible individuals prevented from entry into the United States. Defendants refuse to believe otherwise, though countless courts have told them their belief is wrong.

7. In *Gomez v. Trump*, No. 20-cv-01419 (APM), 2020 WL 5367010 at *45 (D.D.C. Sept. 04, 2020), Judge Mehta enjoined DOS from implementing its "no-visa" policy as it applied to the class of 2020 diversity visa selectees subject to a suspension of entry for most immigrants, PP10014, finding the no-visa policy likely *ultra vires* as Defendants could identify "no statutory authority that would permit the suspension of this ordinary process." *Id*. At the same time, he found it likely also violative of the Administrative Procedure Act and arbitrary and capricious, stating that "[i]n promulgating the No-Visa Policy, Defendants offered no rational explanation for the policy, nor did they account for the serious consequences the policy would

[1] In 2020, Former President Trump also issued PP 10014, 85 Fed. Reg. 23441 (Apr. 27, 2020) and PP 10052, 85 Fed. Reg. 38263 (June 25, 2020). PP 10014 suspended the entry of almost all immigrants. PP 10052, extended the immigrant ban through December 31, 2020, and expanded the suspensions to include a variety of employment-based nonimmigrant categories. The former President based the suspensions on a finding that the suspensions of entry were necessary to counteract the economic fallout from the COVID-19 pandemic. *Id*. On December 31, 2020, former President Trump extended the bans on entry through March 31, 2021. On February 21, 2021, President Biden rescinded the immigrant ban. 86 Fed. Reg. 11847 (Mar. 1, 2021). The nonimmigrant ban expired on March 31, 2021.

impose on DV-2020 selectees, whose opportunity to receive visas will expire by the end of this fiscal year." *Id.*

8. Despite this order, Defendants implemented the injunction as narrowly as possible, and the "no-visa" policy remained for any other individuals subject to a § 1182(f) entry ban on almost all categories of immigrants.

9. In *Milligan v. Pompeo*, No. 20-cv-2631 (JEB), 2020 WL 6799156 at *10 (D.D.C. Nov. 19, 2020), Judge Boasberg enjoined the Department of State from implementing this no-visa policy in the context of K-1 "fiancé(e) visas," stating succinctly that "a person who falls within a Presidential Proclamation issued pursuant to section 1182(f) is merely ineligible to enter [the United States]," and not ineligible to receive a visa. *Id.*

10. Again, despite this order, Defendants implemented the injunction as narrowly as possible, and the "no-visa" policy remained for all other affected immigrants and nonimmigrants as well as all other K-1 fiance(e)s who were not named plaintiffs in the lawsuit.

11. In *Young v. Trump*, No. 20-cv-07183-EMC, 2020 WL 7319434 (N.D. Cal. Dec. 22, 2020), Judge Chen once again enjoined the DOS from implementing a no-visa policy based on the immigrant entry ban, stating that "Plaintiffs in the case at bar are merely prohibited from *entering* the United States by the Proclamations. They have not been deemed ineligible to *receive a visa*. That determination is made by a consular officer based on, *inter alia*, the grounds described in [8 U.S.C.] § 1182(a). Nothing in § 1182(a) makes the plaintiffs categorically barred from receiving a visa." *Id.* at *22 (emphasis in original).

12. Defendants would only apply this injunction as narrowly as possible, and the "no-visa" policy remained for non-plaintiff immigrants seeking visas worldwide.

13. In *Tate v. Pompeo*, No. 20-cv-3249 (BAH), 2021 US Dist. Lexis 8813 (D.D.C. Jan 16, 2021), Judge Howell issued yet another injunction against the "no-visa" policy, this time in the context of a nonimmigrant entry ban, PP10052, as it applied to subset of O-1 "extraordinary ability" nonimmigrants. Judge Howell ruled that the "no-visa" policy was "contrary to the text and structure of [8 U.S.C.] § 1182." *Id*. at *9. In this third injunction against the no-visa policy issued by a judge of this Court, as Judge Howell stated, "Defendants have identified no applicable statutory authority permitting the State Department to suspend visa processing on the basis of the entry restrictions provided by the Presidential Proclamations. *Id*. at *11.
14. Once again, despite this order, Defendants implemented this injunction as narrowly as possible, and the "no-visa" policy remains where, as here, it is yet to be enjoined.
15. Defendants remain undaunted. They continue to hold steadfast to an unlawful interpretation that a suspension of entry issued pursuant to § 1182(f) requires a suspension of visa processing. Defendants have not advanced any error in the judicial rulings that have relied on the statutory language of § 1182(f) and numerous other provisions of the INA, and there are none.
16. Plaintiffs hereby call on this Court to strike DOS' stubborn adherence to its unlawful "no-visa" policy as *ultra vires* with regard to the suspensions of entry under PP10143 as arbitrary, capricious and not in accordance with law under the Administrative Procedure Act ("APA").
17. Plaintiffs are immigrant and nonimmigrant visa applicants and their petitioners in several categories. Many are family-based immigrant visa applicants and beneficiaries, who are simply awaiting the Defendants' adjudication of their visa applications in order to be reunited with their families. Others are employment-based immigrant visa applicants and petitioners, who are awaiting the Defendants' adjudication in order to begin permanent work at companies and in fields where insufficient U.S. workers are available. In the nonimmigrant context,

Plaintiffs include a large number of couples seeking K-1 "fiancé(e)" visas, who are simply awaiting the adjudication, issuance, or reissuance of these visas in order to be reunited with their partners and be able to start their families. Nonimmigrants further include temporary, but vital workers, including high-level executives awaiting transfer to the U.S., high-skilled and highly specialized workers awaiting visa issuance in order to commence employment with their U.S.-based employers, and indeed an entire industry on the brink of collapse by the unlawful suspension of visa adjudications for J-1 exchange workers.

II. JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction). This Court has authority to grant relief under the Declaratory Judgment Act (28 U.S.C. § 2201) and the APA, 5 U.S.C. § 702 *et seq*.

19. This Court may also compel agency action that is unlawfully withheld, or which is contrary to law, an abuse of discretion, or arbitrary and capricious. 5 U.S.C. §§ 555(b), 706.

20. This Court also has jurisdiction to review executive action that is *ultra vires*. *See Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

21. Venue in this judicial district is proper under 28 U.S.C. § 1391(e) because this is a civil action in which Defendants are the federal officers and agencies of the United States, a substantial part of the events or omissions giving rise to the claims occurred in this District, and Defendants are headquartered in this District.

22. All administrative remedies have been exhausted by Plaintiffs.

23. The doctrine of consular non-reviewability does not apply because Plaintiffs do not challenge a particular decision by a consular officer denying a visa. *See Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry ("Nine Iraqi Allies")*, 168

F. Supp. 3d 268, 290 (D.D.C. 2016) ("[T]he doctrine of consular nonreviewability is not triggered until a consular officer has a made a decision with respect to a particular visa application."). Rather, Plaintiffs challenge the agency's unlawful "no visa" policy and concomitant delays and refusal to act on the processing of visas for those who may be temporarily restricted from seeking entry to the United States. *See Patel v. Reno,* 134 F.3d 929, 931 (9th Cir. 1997).

24. Plaintiffs have standing. Defendants' unlawful refusal to adjudicate and issue visas to eligible individuals has caused and continues to cause Plaintiffs a concrete and particularized injury by preventing each Plaintiff petitioner and Plaintiff beneficiary of an immigrant or nonimmigrant visa petition from obtaining that visa that will allow them to lawfully enter the United States on a future date. The requested relief will redress these injuries by allowing these individuals to obtain the immigration benefits for which they are otherwise eligible and satisfy a necessary condition precedent to entry.

III. PARTIES

A. Plaintiffs

25. Plaintiffs include petitioners and beneficiaries of approved immigrant and nonimmigrant Petitions whose cases are at various stages of processing with the DOS, but all of whom have had their cases stalled entirely as a result of the Defendants' unlawful interpretation of the Presidential Proclamations restricting *entry* as a mandate to cease visa processing.

Family-based Immigrant Visa Plaintiffs

26. While the Department of State has exempted the parents of minor US citizen children from its no visa policy, other immediate family members remain separated indefinitely. The no visa policy offers no exemption for parents of adult U.S. citizen children, nor for adult children of U.S. citizens.

27. Plaintiffs are ten immigrant visa applicants and their U.S. citizen petitioners. Nine are the adult parents of US citizens, and the tenth is the adult daughter of a US citizen, along with her derivative spouse and child. The family-based immigration program allows citizens to petition for certain relatives, who become permanent residents once they enter the United States with immigrant visas. United States Citizenship and Immigration Services has already approved Plaintiffs' petitions, but the Department of State has refused to adjudicate their relatives' immigrant visa applications. Some cases are languishing at the Department of State's National Visa Center, which refuses to process cases or send them to consulates for interviews. Others already have their visa applications pending at the consulate, but the consulate refuses to schedule interviews or issue visas.

28. The Department of State's refusal to process the immigrant visa applications has caused these Plaintiffs' irreparable harm due to the family separation, financial loss, and other devasting injuries. Most of the citizens are applying for their parents, some of whom are their only remaining family abroad. Some parents are elderly and have suffered due to medical vulnerability and isolation exacerbated by pandemic-related travel restrictions. They are eager to reunite with their families, some of whom have carried the additional financial burden of paying for additional in-home care that will not be necessary once the ailing parent is living with supportive adult children in the United States.

K-1 Fiancé(e) Visa Plaintiffs

29. Plaintiffs are 145 United States citizens and their foreign national fiancé(e)s. The K-1 visa program allows non-citizens to enter the United States to marry their petitioning U.S. citizen spouses and apply for permanent residence. United States Citizenship and Immigration Services has already approved these couple's petitions, but the Department of State has refused

to process their visa applications. Some cases are languishing at the Department of State's National Visa Center, which refuses to process visa applications and send them to consulates for interviews. Others already have their visa applications pending at the consulate, but the consulate refuses to schedule interviews, issue visas, or re-issue already-approved visas for applicants who were unable to travel before visa expiration due to pandemic travel restrictions.

30. The Department of State's refusal to process K-1 visas has caused these Plaintiffs severe harm. Most couples have remained separated for a year or longer, while some have spent thousands of dollars to visit each other. Many are eager to start families, and some worry that they are facing declining fertility due to the prolonged delay. Others have endured severe medical and psychological burdens while separated from their loved ones: one US citizen plaintiff has postponed gender-affirming surgery because she needs her partner present for her difficult recovery; another was recently diagnosed with cancer and faces treatment alone. Several are doctors, pharmacists, or other medical professionals treating COVID-19 patients or administering vaccines daily; they serve on the front lines of the pandemic and end their long workdays in an empty home, with their loved ones only able to comfort them through Facetime. Many couples have endured financial distress because the foreign beneficiary had left a job in anticipation of an imminent move to the United States, while instead the couple must continue to maintain two households indefinitely. Several Plaintiffs have children who are already close to their future stepparents and do not understand why they cannot be together for family events like funerals, graduations, weddings, and holidays.

31. Plaintiffs' pleas to the National Visa Center and their consulates have been ignored or have been met with generic responses stating that the travel ban precludes issuance of visas. The

Department of State has also given generic responses to inquiries by several Plaintiffs' Senators and Representatives, and has denied requests for National Interest Exemptions.

Employment-Based Immigrant Visa Plaintiffs

32. Plaintiffs are 18 noncitizen visa applicants and petitioners facing hardship from the Department of State's refusal to adjudicate employment-based immigrant visa applications. The employment-based immigration program allows United States companies to file employment-based petitions for certain employees when there is a shortage of available and qualified US workers to perform their skilled or professional jobs. Some individuals are eligible to petition for themselves if they can demonstrate unique expertise, professional awards, or notoriety in their field. These noncitizens become lawful permanent residents upon arrival in the United States with their immigrant visas.

33. Plaintiffs include US-based businesses who have petitioned for noncitizen employees, and noncitizen visa applicants, along with their accompanying spouses and minor children. United States Citizenship and Immigration Services has already approved the petitions by these U.S. employers and foreign nationals, but the Department of State has refused to process their immigrant visa applications. Some cases are at the Department of State's National Visa Center, which refuses to process cases and send them to consulates for interviews. Others already have their visa applications pending at the consulate, but the consulate refuses to schedule interviews or issue visas.

34. Many of the individual foreign national plaintiffs share the personal and professional difficulties in the delay of the immigrant visa application. Several Plaintiffs own businesses in the United States and employ American workers. These plaintiffs report their companies have been forced to lay off employees, or have lost client contracts as key employees are not

able to come to the United States to manage their own companies. Similarly, many have purchased homes in the United States anticipating their relocation, and now suffer financially as they maintain two households during the indefinite wait for the Department of State to adjudicate their visa applications.

35. The employer Plaintiffs join to ensure timely processing of their current and prospective employees' visa applications. There are nine U.S.-based companies, who together have approximately 500 current or prospective employees awaiting visa issuance. While the Plaintiff companies represent a broad spectrum of business types, all face loss of business and revenue due to the inability to bring employees to serve in key roles. Several are transportation companies who face a dire shortage of truck drivers in the United States. These companies ensure the delivery of goods to companies throughout the United States, which is critical during a global pandemic. Several report losing large contracts or long-time clients as they are unable to recruit enough drivers to meet their needs.

Employment-based Nonimmigrant Visa Plaintiffs

36. Plaintiffs are 16 noncitizens applying for employment-based nonimmigrant visas, as well as the U.S.-based employers and organizations petitioning and sponsoring them.

37. USCIS has already approved petitions for the Plaintiffs whose cases require them, but the Department of State has refused to process their nonimmigrant visas. Other Plaintiffs have filed visa applications directly at the U.S. Consulate, but the Department of State refuses to schedule interviews or adjudicate their visa applications. Yet others have already attended their visa interviews, but the Department of State refuses to issue the visas.

38. Several Plaintiffs own businesses in the United States that employ U.S. workers. These Plaintiffs are unable to return to the United States and oversee the significant investments they

have made. They have been forced to consider withdrawing their investments at a substantial loss. Others are spouses of U.S. workers who have been unable to return to the United States since the regional entry restrictions went into effect, remaining separated from their families and unable to return home for a year or longer. Several are long-term employees of U.S. companies who have been stuck outside of the United States and whose careers are at risk, as they cannot return to their jobs, homes, and communities. All of the individual Plaintiffs have suffered additional expenses and undue stress and frustration while awaiting the Department of State's resumption of nonimmigrant visa processing.

39. Petitioning employers include a Fortune 500 company seeking to transfer a high-level manager into the United States to lead a sales team with a $250 million customer. The company risks immense losses if it cannot bring this key manager to the United States by June.

40. One Plaintiff, the [redacted] is an association of U.S. employers which has joined to ensure timely processing of visa applications for members of its association. Each year, U.S. employers prepare applications for tens of thousands of J-1 exchange visas to fill temporary positions in the United States. These employers, members of this Plaintiff's association, include K-12 schools, summer camps, universities, seasonal tourist destinations, and others. Each of these U.S. employers and sponsors has suffered significant harm, including loss of revenue and risk of closure, from the Department of State's refusal to process nonimmigrant visa applications. Member organizations have been unable to place teachers in high-need school districts and have cancelled summer camps due to lack of counselors. Sponsoring organizations report losing 50% to 90% of their expected staff, and millions of dollars in revenue due to the Department of State's refusal to process J-1 visas in countries subject to regional entry restrictions.

B. Defendants

41. Defendant DOS is a cabinet-level department of the U.S. federal government. DOS is responsible for the issuance of nonimmigrant visas abroad. The Proclamations assign DOS a variety of responsibilities regarding their implementation and enforcement.

42. Defendant Antony Blinken is the Secretary of State and has responsibility for overseeing enforcement and implementation of the Proclamations by all DOS staff. He is sued in his official capacity.

IV. STATUTORY BACKGROUND

A. The Immigration and Nationality Act

43. Bedrock principles within the Immigration and Nationality Act of 1952 ("INA") and subsequent amendments have focused on four key goals and priorities: 1) family reunification; 2) promoting the availability of foreign-born talent for employment with U.S. businesses; 3) protecting vulnerable individuals through humanitarian relief; and 4) supporting the immigration of diverse individuals from across the globe.

44. Congress has specifically provided that "the term 'application for admission' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa." 8 U.S.C. § 1101(a)(4).

45. Generally, the terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A).

46. Noncitizens seeking a visa to lawfully enter the United States are divided into two categories: 1) immigrants; and 2) nonimmigrants. 8 U.S.C. §§ 1101(a)(15). An immigrant is defined within the INA as any noncitizen who does not fall within the specified nonimmigrant categories. 8 U.S.C. §§ 1101(a)(15)(A)-(V).

47. Immigrants are generally "lawfully admitted for permanent residence," which "means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

48. By contrast, nonimmigrants are admitted for specific temporary periods and must depart upon expiration of the period. 8 U.S.C. §§ 1101(a)(15)(A)-(V).

49. "The term 'nonimmigrant visa' means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter." 8 U.S.C. § 1101(a)(26).

50. "The term 'immigrant visa' means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter." 8 U.S.C. § 1101(a)(16).

B. Overview of U.S. Immigration Process – Immigrant Visas

51. Congress has allowed for the issuance of an unlimited amount of immigrant visas to "immediate relatives" of U.S. citizens, which includes their spouses, parents, and unmarried children under 21 years of age. 8 U.S.C. § 1151(b)(2)(A)(i); *see also id.* § 1101(b)(1) (defining "child" for immigrant visa purposes). It has also created a comprehensive immigrant visa system that allows "worldwide immigration" based on an allocation of "preference" visas divided amongst classes of: family-based visas; employment-based visas; humanitarian visas; and "diversity-based" visas. 8 U.S.C. §§ 1101(a)(15), 1101(a)(27), 1151(a), 1152, 1153. "K-1" fiancé(e) visas, while technically nonimmigrant visas, are treated by the Defendants and processed as immigrant visas, using the same protocols as other immigrant visas.

52. For an individual to receive an immigrant visa under one of these categories, typically a sponsoring employer or family member must first petition for that individual within the United

States through the U.S. Citizenship and Immigration Service ("USCIS"). If and when USCIS approves the immigrant visa petition, and so long as visas are available, the beneficiary of that approved petition may apply for him or herself and his or her derivatives. The process begins with the Department of State's National Visa Center ("NVC"), which conducts pre-processing of immigrant visa applications and coordinates the immigrant visa process with the respective consulates abroad. A visa interview at the consulate is the final step in the visa application process and enables a consular officer, in his or her discretion, to approve and issue a visa that will allow the visa petition beneficiary and any derivatives to travel to the United States and gain admission as a lawful permanent resident. For many immigrant visa applicants, the backlogs associated with this process mean that they must wait decades for a visa to become available.

C. Overview of U.S. Immigration Process – Nonimmigrant Visas

53. The process of obtaining a nonimmigrant visa functions similarly to the immigrant visa process. Congress created numerous nonimmigrant visa categories and sub-categories, ranging from the "A" visa for an "ambassador, public minister, or career diplomat or consular officer who has been accredited by a foreign government," to the "F" and "M" student visas, to the "H" visa, encompassing high-skilled, low-skilled, and agricultural temporary workers, to the "O" visa for individuals who possess "extraordinary ability in the sciences, arts, education, business, or athletics." Nonimmigrant visa categories span nearly the entire alphabet, some with sub-categories of visas, and each with a particular purpose. *See* 8 U.S.C. § 1101(A)-(V).

54. While each nonimmigrant visa has its own application procedures, generally speaking the process begins with a petition filed with USCIS, which, upon approval, transfers the approved

petition to the NVC. Upon consular request, the case moves onward to the consulate for the scheduling of an optional, in-person interview and final adjudication and issuance of the visa. An individual with an approved, unexpired visa may seek admission to the United States at a port of entry.

55. Defendants incorrectly believe, however, that issuance of a visa is precluded if the visa applicant is subject to a suspension of entry under § 1182(f).

56. Overall, absent rare circumstances where the interview is waived, an interview with a consular officer is required to adjudicate a nonimmigrant visa at the time of the interview. 22 C.F.R. § 41.102(a). The regulations do permit the Secretary of State to *categorically* waive the personal appearance requirement where it is in the national interest, 22 C.F.R. § 41.102(c), or where there are "unusual or emergent circumstances." 22 C.F.R. § 41.102(d). The Secretary of State has not saw fit to permit these waivers except in limited circumstances during the COVID-19 pandemic.

57. Regardless, even with a visa in hand, that visa does not guarantee an individual's entry into the United States, but it is a necessary precedent condition to seeking such entry. Where the President acts under § 1182(f) to suspend a class of individuals from *entering* the United States, 8 U.S.C. § 1185(a)(1) specifically prohibits the individuals from attempting to enter the United States. The statute is careful to delineate between issuance of visa and seeking entry by providing that: "Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued [such as a visa] to enter the United States if, upon arrival in the United States, he is found to be inadmissible." 8 U.S.C. § 1185(a).

D. Presidential Suspensions of Entry Made Pursuant to 8 U.S.C. § 1182(f)

58. Section 1182(f) allows the President to temporarily suspend the *entry* of any class of immigrants or nonimmigrants if he finds that their entry would be detrimental to the interests of the United States. *Id*.

59. As a threshold matter, the word "entry" was, for decades, a term of art Congress used in immigration laws to signify whether a noncitizen could enter or remain in the United States. Congress defined the term "entry" to mean, in relevant part, "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." INA § 101(a)(13); 8 U.S.C. § 1101(a)(13) (1952) (emphasis added).

60. In 1996 the U.S. Congress overhauled many longstanding provisions of the INA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 309-546 ("IIRAIRA").

61. In *most* instances, Congress replaced the term "entry" with the term "admission," which it defined as follows:

> The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

INA § 101(a)(13); 8 U.S.C. § 1101(a)(13).

62. Congress further replaced the term "excludable" – as someone who could not enter the country or should not be allowed to enter – with a new term, "inadmissible." The amendment recategorized and expanded the classes of non-citizens who were subject to removal for having entered without admission or who could not lawfully be admitted from abroad whether or not the individuals had a valid visa. 8 U.S.C. § 1182(a).

63. Congress carefully left specific references to "entry" unchanged within the INA, most notably:

- The definition of admission references a lawful *entry*, 8 U.S.C. § 1101(a)(13);
- The statutory source for the Presidential Proclamations permits the President to suspend the *entry* of any aliens or class of aliens whose *entry* would be detrimental to the interests of the United States, 8 U.S.C. § 1182(f);[2]
- The statutory source for restrictions and prohibitions on *entry* to the United States still makes reference to that entry, while expressly including a subsection stating that an inadmissibility determination can be made separately, 8 U.S.C. § 1185.

In effect, the term entry was generally subsumed by the term admission except for specific statutory provisions where Congress sought to keep the plain language of "entry" unchanged. These express drafting choices represent Congressional intent and legal significance.

64. As relevant here, Congress delegated power to the President to restrict the *entry* of "any alien or class of aliens whose entry would be detrimental to the interests of the United States." Congress did not delegate power to the President or any executive agency to suspend the issuance of visas where the President exercised the delegated authority to suspend entry under § 1182(f).

65. Defendants unlawfully believe otherwise despite numerous cases holding to the contrary, and its unlawful, harmful conduct is the heart of this lawsuit.

V. FACTUAL ALLEGATIONS

66. The coronavirus (aka COVID-19) pandemic has upended life worldwide. Families have remained separated and businesses have struggled to adapt to a constantly changing environment while keeping their employees safe and protected. Former President Trump and

[2] But note Section 308(f)(1)(E) of IIRAIRA replaced the word "entry" with the word "admission" in § 1182(h).

President Biden have suspended the entry of certain classes of immigrants and nonimmigrants pursuant to 8 U.S.C. § 1182(f). Defendants misunderstand that the authority to suspend entry under § 1182(f) does not permit DOS to a suspend the processing, adjudication and issuance of visas. Defendants' have unlawfully and universally adopted a "no visa" policy for classes of noncitizens subject to suspensions of entry under § 1182(f).

A. DOS Implementation of Regional Travel Restrictions

67. Since January 2020, Presidents Trump and Biden have issued six COVID-related geographical proclamations that suspend the entry of individuals to the U.S. from certain countries. All of these entry suspensions currently remain in effect.

68. On January 31, 2020, former President Trump issued Proclamation 9984, restricting the *entry* of all immigrants or nonimmigrants who were physically present within China during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 6709.

69. On February 29, 2020, former President Trump issued Proclamation 9992, restricting the *entry* of all immigrants or nonimmigrants who were physically present within Iran during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 12855.

70. On March 11, 2020, former President Trump issued Proclamation 9993, restricting the *entry* of all immigrants or nonimmigrants who were physically present within Schengen Area during the 14-day period preceding their entry or attempted entry into the U.S. The Schengen Area includes Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. 85 Fed. Reg. 15045.

71. On March 14, 2020, former President Trump issued Proclamation 9996, restricting the *entry* of all immigrants or nonimmigrants who were physically present within the United Kingdom and the Republic of Ireland during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 15341.

72. On May 24, 2020, former President Trump issued Proclamation 10041, restricting the *entry* of all immigrants or nonimmigrants who were physically present within Brazil during the 14-day period preceding their entry or attempted entry into the U.S. 85 Fed. Reg. 31933.

73. On January 18, 2021, former President Trump issued Proclamation 10138, that rescinded the regional restriction imposed by for Schengen area countries, the United Kingdom, the Republic of Ireland, and Brazil as of January 26, 2021. 86 Fed. Reg. 6799.

74. However, on January 25, 2021, President Biden issued Proclamation 10143, which negated Proclamation 10138 and restored the restrictions on the *entry* of all immigrants and nonimmigrants who were physically present in the preceding 14-day period in the Schengen Area, the United Kingdom, the Republic of Ireland, and Brazil. President Biden also expanded the suspension on *entry* to include South Africa. 86 Fed. Reg. 7467.

75. The Department of State, however, as recently as April 6, 2021 has explicitly stated its interpretation of the suspension on "entry or attempted entry" as a suspension on entry, declaring that "[t]hese proclamations, with certain exceptions, place restrictions on visa issuance and entry into to the United States for individuals physically present in China, Iran, Brazil, UK, Ireland, South Africa, and the 26 countries in the Schengen area." Ex. G.

76. This is a factual misstatement, and a continuation of the Defendants ignoring numerous courts explicitly stating that their policy of restricting visa issuance as unlawful. Nowhere in any of these Presidential Proclamations is any reference to visa issuance whatsoever.

77. From the inception of these regional entry bans on March 2020, DOS instructed all posts to immediately suspend routine visa services worldwide due to the coronavirus pandemic. Ex. H; Ex. I-1 at ¶ 1. Some consular services resumed in July 2020. Ex. J.

78. The Department of State also adopted a "no visa" policy for anyone subject to a suspension of entry under any Presidential Proclamations, absent an enumerated exception to the Presidential Proclamations.

79. As a consequence, the number of immigrant and nonimmigrant visas issued in countries subject to the regional entry bans have plummeted while the backlog of pending visas have skyrocketed.

80. In fiscal year 2019, the five consulates in mainland China, excluding Hong Kong, issued a total of 1,157,656 nonimmigrant visas. For fiscal year 2020 – for which half of the year was prior to the March 20th suspension on routine visa services – only 277,838 nonimmigrant visas were issued. Ex. K. This pattern held true for all countries subject to the regional entry bans. Spain saw a reduction of nonimmigrant visa issuances from 40,807 in fiscal year 2019 to 15,301 in fiscal year 2020. *Id*. Brazil saw a reduction from 548,201 nonimmigrant visas to 237,178. *Id*.

81. Issuance of immigrant visas similarly plummeted. In fiscal year 2019, the U.S. consulate in China issued 27,036 immigrant visas. In fiscal year 2020 that number fell to 11,820. *Id*. Brazil's issuance fell from 3,506 to 1,617. *Id*.

82. Meanwhile, some countries that were not subject to travel restrictions actually saw their issuance numbers *rise*. In Turkey, for example, 3,018 immigrant visas were issued in fiscal year 2019. In fiscal year 2020, even with routine visa operations being shut down for months, 3,538 immigrant visas were issued. *Id*.

83. Broken down by month, the effect of the "no visa" policies enacted by DOS in response to the suspensions on entry becomes starker. For example, in January of 2021, London issued only 114 immigrant visas across all categories, down from 279 a year prior. Exs. L, M. Guangzhou, China issued only 185 immigrant visas, down from 2,906 a year prior. *Id.* The nonimmigrant visa issuance rate similarly plummeted, with, for example, Berlin, Germany issuing 175 nonimmigrant visas across all categories in January 2021, down from 1,776 the year prior. Exs. N, O.

84. Importantly, the Presidential Proclamations do not bar the entry of individuals from these countries entirely. Indeed, it is only where individuals have been physically present in these countries in the preceding 14 days that they are barred from entering the U.S. This means that those who already possess valid visas, or those who circumvent the visa process to obtain a special visitor permit through Customs and Border Protection called the "Electronic System for Travel Authorization" or "ESTA" are able to quarantine in a country not subject to a regional entry ban for 14 days before being allowed to enter the United States. Indeed, in a March 1, 2021 "Briefing with Consular Affairs Acting Deputy Assistant Secretary for Visa Services Julie M. Stufft on the Current Status of Immigrant Visa Processing at Embassies and Consulates," the following exchange took place:

> **QUESTION:** Hi, everyone. Thanks for doing this. I'm just wondering if you can address – you mentioned that you will continue not to process immigrant visas for people subject to the COVID ban (inaudible) Schengen ban.
> I'm wondering if you can address why, because those bans are structured not as sort of bans on nationals of countries, but of – if they've been present there in the previous 14 days. And I know some folks with non-immigrant visas that are not – that are – that were not subject to other bans were able to go to places like Turkey or Mexico for two weeks before entering the United States lawfully.
>
> **MS STUFFT:** There certainly is the opportunity – **because you're right, those are based on presence, not citizenship. So if there is capacities in other posts, the situation that you lay out is possible**. We definitely advise people to check with other embassies and the

> consulates to find out if there is capacity in those places. Of course, in the – in both the NIV and the IV context, they would have to get into the line that exists at that post for processing, but yes, it's possible. Thanks.
>
> Ex. P (emphasis added).

85. This "loophole" lays out the unlawful and arbitrary practical effect of DOS' implementation of the regional entry bans. They are inviting people to travel through multiple countries during a pandemic to obtain a visa from a U.S. Consulate rather than having the individual remain-in-place and receive consular processing. So, on one hand, visa processing at consulates subject to these travel restrictions has ceased, but individuals with the ability and money to travel may attempt to receive processing of a pending visa because the suspensions on *entry* "are based on presence, not citizenship." *Id.*

86. Regardless of the rational basis to suspend or delay entry based on prior presence in certain countries, there is no rational and lawful reason to explain why DOS has implemented a policy for visa processing based on presence.

87. Even the Department of State understands that these proclamations require a simple quarantine before entry into the United States, and yet they have decided not only that consular interviews may not take place, but indeed the processing of cases must be halted entirely. Rather than pre-processing cases so that when local conditions allow, interviews can be expeditiously conducted, the Department of State has arbitrarily interpreted a restriction on the entry of individuals who have been physically present in a proclamation country to mean that they, as an agency, are completely paralyzed and must risk bottlenecks at unaffected consulates. Rather than issuing visas subject to quarantine requirements, or scheduling interviews only for those individuals who are willing to undergo a third-country quarantine to comply with the regional travel restrictions that are, as the Department of State itself states, based only on presence,

DOS has, in an arbitrary, capricious, and *ultra vires* interpretation, halted nearly all consular operations within countries subject to the regional entry bans.

88. In effect, they have permitted the creation of a currently undisclosed, but unquestionably immense backlog of nonimmigrant visa applicants waiting for their appointments, and a disclosed backlog of 473,000 immigrant visa cases pending at the NVC, which does not even include "cases already at embassies and consulates that have not yet been interviewed or applicants still gathering the necessary documents before they can be interviewed, and also, of course, petitions awaiting USCIS approval." *Id*.

89. By suspending all visa processing for countries subject to entry restrictions, Defendants have, in many ways, manufactured the crisis-level backlogs of visa petitions and increasing wait times for those seeking visa processing, even considering the impact COVID-19 has had on their operations.

90. At the core of Defendants arbitrary, capricious, and *ultra vires* policy of refusing to adjudicate visas at consulates subject to the regional entry bans lies its unlawful belief that a suspension of entry under § 212(f) requires a suspension of visa processing and issuance.

FIRST CAUSE OF ACTION
(Arbitrary and Capricious Actions in Violation of the Administrative Procedure Act (5 U.S.C. § 706(2)(A))

91. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

92. Pursuant to 5 U.S.C. § 701(b)(1), the Department of State is subject to the APA.

93. This Court may review and set aside final agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

94. This Court may further review and set aside final agency action in excess of statutory jurisdiction, authority, or limitations, or without observance of procedure required by law. 5 U.S.C. §§ 706(2) (C)-(D).

95. In the INA, Congress carefully distinguished between the terms: entry; admission; and visa issuance. Section 1182(f) authorizes the President to suspend the *entry* of certain aliens into the United States. The statute plainly does not authorize the DOS to suspend the *issuance* of visas due to an entry restriction under Section 1182(f).

96. DOS has implemented the Proclamations in a manner that suspends the issuance of nearly all immigrant and nonimmigrant visas in countries subject to the regional entry bans.

97. Defendants' no visa policy constitutes reviewable final agency action.

98. Because Defendants lack the authority to suspend issuance or reissuance of visas due to a suspension of an entry under § 1182(f), Defendants mistaken position to the contrary is arbitrary, capricious, and not in accordance with law.

99. Defendants' no visa policy also exceeds its authority in violation of 5 U.S.C. § 706(2)(C) of the APA, as entry suspensions issued pursuant to § 1182(f) do not permit Defendants to suspend the issuance of visas or deprive consular officers of the authority to issue visas to individuals "who ha[ve] made proper application therefore." 8 U.S.C. § 1201(a)(1).

100. This Court should set aside Defendants' no visa policy and order them to resume issuance and reissuance of visas to Plaintiffs.

SECOND CAUSE OF ACTION
(Non-Statutory Action for *Ultra Vires* Conduct)

101. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

102. DOS' expansion of the Proclamations' suspension on the entry of Plaintiffs to the issuance and reissuance of immigrant and nonimmigrant visas and the adjudication of applications constitutes *ultra vires* agency action.

103. Absent specific preclusion of judicial review from Congress, "when an executive acts ultra vires, courts are normally available to reestablish the limits on his authority." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quoting *Dart v. United States*, 848 F.2d 217, 244 (D.C. Cir. 1988)). Further, "[n]othing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review. . . . It does not repeal the review of *ultra vires* actions." *Id*.

104. This Court possesses this jurisdiction to "reestablish the limits" on DOS' *ultra vires* no visa policy as it relates to the implementation of the Presidential Proclamations.

105. This Court should order DOS to resume adjudication, issuance, and reissuance of visas without regard to the President's temporary suspensions on entry.

RESERVATION OF RIGHTS

Plaintiffs reserve the right to add additional allegations of agency error and related causes of action upon receiving the certified administrative record.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(1) Assume jurisdiction over this matter;

(2) Enjoin the Department of State from suspending the adjudication, issuance and reissuance of nonimmigrant and immigrant visas.

(3) Order the immediate reissuance of visas to Plaintiffs whose visas have expired due to their inability to previously enter the United States during the coronavirus

pandemic due to the Presidential Proclamations restricting the entry of these individuals from their respective countries;

(4) Order the immediate issuance of visas to Plaintiffs who have been approved but who have not received issuance of their visas;

(5) Order the immediate rescheduling of interviews or waive such interviews for Plaintiffs who have submitted the required documentation and who either had their interviews cancelled or who are waiting on new interviews;

(6) Order any other relief that may be necessary, such as the extension of the validity dates for the medical exam and police clearance certificates, such that issuance of Plaintiffs' visas will not be further delayed;

(7) Order that all of the above shall be done expeditiously;

(8) Award Plaintiffs costs of suit and reasonable attorney's fees under the Equal Access to Justice Act, 42 U.S.C. §1988, and any other applicable law;

(9) Enter all necessary writs, injunctions, and orders as justice and equity require; and

(10) Grant such further relief as this Court deems just and proper.

Respectfully submitted this the 7th day of April, 2021

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