IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

P.K., *et al.*, on behalf of themselves and all others similarly situated,	)	No. 1:17-cv-01533-TSC
Plaintiffs/Petitioners,	)	
v.	)	
REX W. TILLERSON, *et al.*,	)	
Defendants/Respondents.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF REQUEST FOR PRELIMINARY INJUNCTION

In its August 23, 2017 Order, the Court directed Plaintiffs to identify the current status of Plaintiffs' the visa applications, to discuss whether Plaintiffs still have standing to seek the requested relief, and to address whether the Foreign Affairs Manual is owed deference by the court for its interpretations of the Immigration and Nationality Act. Plaintiffs address these questions below, and support their answers to the first two questions with Supplemental Declarations from Plaintiff P.K., Plaintiff Sorkhab, and Plaintiff Almaqrami.

I. The Status of the Visa Applications

Plaintiff P.K. and his family members

Plaintiff P.K. and his family members believe the administrative processing in their case is complete. *See* Supp. Declaration of P.K. ¶ 2.[1] The United States embassy in Armenia has announced that the administrative processing in his case will expire on September 10. *Id.* The

[1] A redacted version of the declaration is attached as Exhibit A. An unredacted declaration has been filed under seal.

embassy instructs visa applicants "come to our office at your earliest convenience when" the end of administrative processing is announced and not to wait "until the expiration date of your administrative process." *Id.* As a result, the Executive Order is the only obstacle to issuing a visa to him and his family members.

There is some possibility that P.K. and his family will qualify for an exemption from the Executive Order. P.K. has recently been admitted to a graduate program in the United States. *Id.* at ¶ 4 & Ex A. He is currently travelling to Armenia with his family to present the new information to the embassy in hopes of establishing an exemption. *Id.* at ¶ 7-9. However, he does not know whether the embassy will decide that the university admission qualifies him for an exemption. Thus, he does not know whether he will receive an immigrant visa. *Id.* at ¶ 10.

Plaintiff Afshin Asadi Sorkhab and his family members

On August 23, 2017, Plaintiff Sorkhab was informed that he has cleared administrative processing. *See* Declaration of Afshin Asadi Sorkhab ¶ 2 & Ex A (attached as Exhibit B). The United States embassy in Abu Dhabi has stated that the "administrative processing on your file has been completed" and his visa "is ready for issuance." *Id.* at Ex A. However, it indicates that he must prove a bona fide relationship to be "exempt from the Executive Order." *Id.* He cannot currently demonstrate the basis for an exemption from the Executive Order and therefore still cannot receive a visa. *Id.* at ¶ 3. The Executive Order is the only remaining obstacle to issuing a visa to him and his family members.

Plaintiff Hamed Sufyan Othman Almaqrami

Plaintiff Almaqrami remains in administrative processing. *See* Declaration of Hamed Sufyan Othman Almaqrami ¶ 2 & Ex. A (attached as Exhibit C). The United States Embassy in Kuala Lumpur has informed him that he is in administrative processing because of the Executive

Order and may lose his opportunity to obtain a diversity visa as a result. On August 4, 2017, he received an email stating that because he lacked a bona fide relationship, "your application will remain in administrative processing during the 90-day period of this travel restriction. As a reminder, all diversity visa applications will expire on October 1, 2017. Therefore, it is plausible that your case will not be issuable due to the Executive Order." *Id.* at ¶ 3 & Ex B.

Plaintiff Almaqrami has received a job offer in the United States and has attempted to obtain an exemption from the Executive Order on that basis. *Id.* On August 16, 2017, at the request of the embassy, he provided them with a copy of the work contract. On August 18, 2017, they informed him that his case "will remain under administrative processing" and he "did not need to submit additional documents now." *Id.*at ¶ 4 & Ex. C. He believes that they have rejected his request for an exemption based on the job offer and he does not believe that there is currently any other basis for an exemption. *Id.*at ¶ 5. He is not aware of any other reason he is ineligible to receive a visa aside from the Executive Order. *Id.*at ¶ 6. The Executive Order is the only remaining obstacle to issuing a visa to him.

Plaintiff Radad Fuiz Furooz

Plaintiff Furooz has received an immigrant visa on the basis of an exemption to the Executive Order. He has filed a notice of voluntary dismissal.

II. Plaintiffs Continue to Have Standing

Based on the evidence in the record, the remaining Plaintiffs still have standing. All have pending visa applications. They have not yet received visas. For P.K. and his family members and for Sorkhab and his family members, the government has acknowledged that administrative processing is complete. For Almaqrami, he is being held in administrative processing as a result of the Executive Order. The government's communications to these Plaintiffs make clear that the

Executive Order is the sole remaining obstacle to the issuance of a visa. Thus, if anything, the Plaintiffs' injury, its causal connection to the government's illegal conduct, and this Court's ability to redress the injury have been brought into even sharper relief since the case was filed.

Plaintiffs' declarations also underscore the irreparable nature of Plaintiffs' injuries. First, the declarations show that, contrary to the government's assertions at argument, it is not likely to be able to process large numbers of visa applications in the few days between the termination of the Executive Order and September 30. Plaintiff Sorkhab's declaration is instructive. The Abu Dhabi Embassy instructs visa recipients to bring their passports "to the Embassy any Sunday or Tuesday at 1:30 p.m., excluding holidays. In most cases, the visa will be ready for pick-up in 4 to 7 days." *Id.* The entry ban does not expire until Sunday, September 24, 2017. The embassy in Abu Dhabi will be closed on Friday, September 29, and Saturday, September 30. *See* Visas, United States Embassy & Consulate in the United Arab Emirates, *available at* https://ae.usembassy.gov/visas/ (noting that the embassy is open Sunday through Thursday). Thus, once the Executive Order expires, applicants will have just a single time to drop their passports off at the Embassy—Tuesday, September 26, 2017 at 1:30 p.m.—and the visas will need to be issued by no later than the close of business on Thursday, September 28, 2017. That two-day timeframe is substantially shorter than the typical four to seven day processing period.

Second, the declaration of P.K. shows the ongoing harm from the illegal application of the State Department cable even in cases where an individual might be able to establish an exemption. His entire family must travel to Armenia, at significant disruption and expense, and wait an indeterminate amount of time there on the hope that the admission letter might qualify for an exemption. Declaration of P.K. ¶ 7-9. They do not know if they will receive an exemption and could not receive guidance via email. *Id.* at ¶ 5-6. & Ex. B-C.

Third, P.K.'s declaration also undermines the government's argument that it is impracticable to issue visas to Plaintiffs with notations that would prevent those visas from being used to enter the United States prior to the expiration of the Executive Order. Attached to P.K.'s declaration are photos of immigrant visas recently issued to Iranian nationals who have received exemptions or waivers of the Executive Order. *Id.* at ¶ 11 & Ex. C. These visas demonstrate that the government is already adding notations concerning the Executive Order to visas it issues to individuals who have received exemptions or waivers. *Id*. It would be straightforward for the government to modify that language for visas issued to Plaintiffs and indicate that they are not exempt and may not enter while the Executive Order is in effect.

Finally, in addition to their own individual claims for which standing exists, Plaintiffs note that a motion for class certification is pending in this case. That motion was filed with the complaint and the government has neither responded nor sought an extension of time. The time to file a response under the local rules has expired. *See* LCvR 7(b) (parties opposing motions must file within 14 days). Because the government did not file a timely response, "the Court may treat the motion as conceded." *Id.* Plaintiffs request that the Court treat the motion as conceded and enter an order granting the request for class certification. In the alternative, the Court should set a very short deadline for the government to file a response.

A class should be certified here. As outlined in the motion for class certification, the requirements of Rule 23(a) – numerosity, commonality, typicality, adequacy, and ascertainability -- are easily met. Moreover, this case is a straightforward example of a civil rights class action Rule 23(b)(2) was designed to facilitate. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (presenting as "illustrative" of Rule 23(b)(2) class actions the "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class"). The

government has crafted an illegal policy refusing to grant diversity visas to individuals covered by the entry ban. Because the government has acted on grounds generally applicable to the class as a whole, Rule 23(b)(2) authorizes class certification to seek declaratory and injunctive relief. *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997).

Plaintiffs recognize that it is possible that some named plaintiffs might obtain visas during the course of the litigation and, as a result, their individual claims may become moot. The Supreme Court has held that when a class action has been certified, the resolution of the claims of the named plaintiffs does not render the class action moot if the class otherwise remains viable. *Kremens v. Bartley*, 431 U.S. 119, 132 (1977) (recognizing that case does not become moot where "the named plaintiffs had simply 'left' the class, but the class remained substantially unaltered"); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755-56 (1976). If this Court certifies the requested class, the visa status of the named plaintiffs will not undermine the effectiveness of any preliminary injunction or affect this Court's jurisdiction.

Even if all of the named plaintiffs had their claims mooted prior to certifying a class, this Court can still grant the motion. "[I]n some circumstances a class action should not be deemed moot even if the named plaintiff's claim becomes moot prior to certification of the class." *Basel v. Knebel*, 551 F.2d 395, 397 n. 1 (D.C.Cir.1977). When a class action is "inherently transitory," such that the claims of named plaintiffs expire before a class can be certified, the district court retains jurisdiction to act on the class certification motion as long as the named plaintiffs had standing when the case was filed. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). In such cases, this Court has certified class actions even when no named plaintiff has a live claim. *See R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 183 (D.D.C 2015) (certifying an "inherently transitory" class of detained

plaintiffs where detention would last for only "weeks or months"); *R.I.L.-R v. District of Columbia*, 302 F.R.D. 1, 19 (D.D.C 2013).

Alternatively, new plaintiffs who have not received visas can simply be substituted as class representatives. As this Court has recognized, the fact that "the original named class representatives can no longer advance a live case or controversy does not mean that the claims of the putative class members are likewise moot or that they are somehow precluded from seeking class certification." *Daniel v. Fulwood*, 310 F.R.D. 5, 6 (D.D.C 2015). In *Daniel*, plaintiffs sought to substitute class members as representative plaintiffs to replace named plaintiffs whose claims had become moot. Because there is "no constitutional impediment to allowing such a substitution," this Court granted the request. *Id.* If necessary, such substitution can occur here.

III. The Court Should not Defer to the Foreign Affairs Manual

The Court should not accord deference to the Foreign Affairs Manual's interpretations of the Immigration and Nationality Act ("INA"). In particular, no deference is due to the Foreign Affairs Manual's "interpretation" of 8 U.S.C. § 1182(f). *See* Gov't Mem. 21 (citing 9 Foreign Affairs Manual, 302.14-3(B) as the basis for its position that "aliens covered by exercises of the President's Section 1182(f) authority [are] ineligible for visas"). That is so for two reasons. First, the Foreign Affairs Manual is an informal policy document that does not carry the force of law. The Supreme Court has held that agency interpretations of that kind do not receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Second, the particular provision of the Foreign Affairs Manual on which the government relies is devoid of any reasoning or explanation justifying the "interpretation" on which the government relies. Courts do not defer to "interpretations" that are nothing more than *ipse dixit*.

A. The Court Should Not Give *Chevron* Deference to the Foreign Affairs Manual Because It Was Not Promulgated Through Notice and Comment, Nor Does It Carry the Force of Law.

"The Supreme Court has held that "[d]eference in accordance with *Chevron* … is warranted only when 'it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)) (emphasis added). Thus, "[i]nterpretations such as those … contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law[,] do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

The Foreign Affairs Manual is precisely the type of agency document that does not warrant *Chevron* deference. It is an internal guidance document setting forth agency policies so that Department employees can act in a coordinated and consistent fashion. It does not create carry the force of law, because it does not "either determine 'rights or obligations' or result in discernible 'legal consequences' for regulated parties." *Devon Energy Co. v. Kempthorne*, 551 F.3d 1030, 1039 (D.C. Cir. 2008) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). And its interpretations were not "arrived at after … a formal adjudication or notice-and-comment rulemaking." *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (quoting *Christensen*, 529 U.S. at 587). The Foreign Affairs Manual stands in contrast to the many State Department regulations governing the visa issuance process, which were issued through notice and comment. *See* 22 C.F.R. Pt. 42. (Notably, none of these regulations suggests that a bar on entry under 8 U.S.C. § 1182(f) is grounds for denying a visa.)

Accordingly, the Ninth Circuit has held that the Foreign Affairs Manual's interpretations do not receive *Chevron* deference. *Scales*, 232 F.3d at 1166. Instead, the Foreign Affairs Manual's interpretations are "entitled to respect … only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). That conclusion accords with the D.C. Circuit's holdings refusing to apply *Chevron* deference to other, similar agency policy manuals. *See, e.g.*, *Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 660 (D.C. Cir. 2003) ("[T]he Supreme Court has twice cited 'agency manuals' as an archetype of the kind of document that is not entitled to such deference."); *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 186 (D.C. Cir. 2001) (collecting cases, including *Scales*, refusing to defer to informal statements of agency policy such as agency manuals).[2]

B. The Interpretation Relied Upon by the Government Does Not Warrant Deference of Any Kind, Because It Is Devoid of Reasoning or Explanation.

A court owes no deference at all to an agency's position—whether under *Chevron* or under *Skidmore*—when "there is no reasoned agency reading of the text to which [the court] might defer." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 211-12 (2011) (quoting *Smith v. City of Jackson*, 544 U.S. 228, 248 (2005) (O'Connor, J., concurring in the judgment)). Thus, even if the Foreign Affairs Manual did carry the force of law (it does not) and thereby warranted

[2] On a few occasions, the D.C. Circuit has deferred to an agency's interpretations in situations other than notice-and-comment rulemaking and formal adjudications. But as the D.C. Circuit has explained, it did so where "the agency interpretations were clearly intended to have general applicability and the force of law," and "the agency decisions were thoroughly explained." *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012) (discussing *Barnhart v. Walton*, 535 U.S. 212 (2002), *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319 D.C. Cir. 2011), and *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272 (D.C. Cir. 2004)). Here, the Foreign Affairs Manual does not carry the force of law for the reasons explained in Part A, and the relevant decision is not explained at all, as discussed in Part B.

Chevron deference as a general matter, "that document contains no interpretation [of the statute] to which [the court] might defer." *Pub. Citizen*, 332 F.3d at 661; *Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012) (holding that even an agency interpretation to which *Chevron* applies may still "fail for want of reasoned decisionmaking"). As the D.C. Circuit has explained, even under *Chevron*, "we defer to an agency's statutory interpretations not only because Congress has delegated law-making authority to the agency, but also because that agency has the expertise to produce a reasoned decision . . . If an agency fails or refuses to deploy that expertise—for example, by simply picking a permissible interpretation out of a hat—it deserves no deference." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

Here, the government cites 9 FAM 302.14-3(B) to support its position that "aliens covered by exercises of the President's Section 1182(f) authority [are] ineligible for visas." That portion of the Foreign Affairs Manual, however—at least the part that is publicly accessible—contains no explanation whatsoever for why 8 U.S.C. § 1182(f) should be read to bar eligibility for visas. As Plaintiffs explained in their Preliminary Injunction Memorandum, the government's position depends upon eliding the distinction between visa issuance and entry, so that a bar on entry becomes a basis for denying visa issuance. To be sure, the Foreign Affairs Manual reaches that conclusion. *See* 9 FAM 301.4-1(b)(12), (c)(11)(b). But the conclusion is *ipse dixit*. The Foreign Affairs Manual does not provide any analysis of the statutory text to justify or explain that conclusion.

Indeed, the portions of the Foreign Affairs Manual that do explain the President's authority under Section 1182(f) describe that provision solely in terms of a bar on entry, and say nothing about visa issuance. 9 FAM 302.14-3(B)(1)(a) sets forth the substance of Section 1182(f):

> INA 212(f) authorizes the President to *suspend entry* into the United States of "any aliens or any class of aliens" or to "impose *on the entry* of aliens any restrictions he may deem appropriate" for such period as he deems necessary upon determining that *their entry* "would be detrimental to the interests of the United States.".

9 FAM 302.14-3(B)(1)(a) (emphasis added).

9 FAM Section 302.14-3(B)(1)(b) goes on to explain how the authority in Section 1182(f) is exercised, again acknowledging that the authority under Section 1182(f) pertains only to *entry*: "The President exercises this authority by issuing a Presidential Proclamation ('PP') barring certain aliens or a class of aliens *ineligible for entry* into the United States or imposing appropriate restrictions *on their entry*." 9 FAM Section 302.14-3(B)(1)(b) (emphasis added). The Manual then goes on to list examples of Presidential Proclamations, all of which relate to bars on *entry*. *See id.* §302.14-3(B)(1)(b)(2) (providing example of Presidential Proclamation that "*bar[s] entry* based on affiliation" (emphasis added)); *id.* § 302.14-3(B)(1)(b)(3) (providing example of Presidential Proclamation that "*suspend[s] the entry* of persons based on objectionable conduct" (emphasis added)). Thus, in the provisions specifically discussing Section 1182(f), the Foreign Affairs Manual does not even recognize its conflation of visa issuance with entry, let alone explain why that conflation is justified.

Worse still, when the Foreign Affairs Manual discusses how an entry bar under Section 1182(f) interrelates to grounds of inadmissibility, it distinguishes between the two and states that "statutory inadmissibilities are to be considered prior to determining whether a Presidential Proclamation applies." 9 FAM Section 302.14-3(B)(1)(c). Yet under 8 U.S.C. § 1182(a), only inadmissibility makes an alien *both* "ineligible to receive visas *and* ineligible to be admitted to the United States," 8 U.S.C. § 1182(a) (emphasis added). Section 1182(f), by contrast, says nothing at all about visa ineligibility but operates merely to "suspend[] *the entry* of all aliens or any class of aliens as immigrants or nonimmigrants, or impose *on the entry* of aliens any

restrictions [the President] may deem to be appropriate." 8 U.S.C. § 1182(f). The Foreign Affairs Manual neither acknowledges the disconnect between the statutory text and the conclusion that visas cannot be issued to individuals falling within Section 1182(f), nor attempts to explain that disconnect away. The same tension exists between the regulations, which were adopted through notice and comment, and the Foreign Affairs Manual, which was not. The regulations define in detail the "classes of inadmissible aliens who are ineligible to receive visas and who shall be ineligible for admission into the United States," 22 C.F.R. § 40.9, and none of those classes include aliens subject to an entry bar promulgated under Section 1182(f).

So, although the government asserts that the Foreign Affairs Manual "interprets" Section 1182 to bar the issuance of visas to individuals falling within Section 1182(f), the Manual provides no explanation of why that interpretation is a permissible reading of the statute, let alone the best reading; how that interpretation can be squared with the express language of Section 1182(a), which distinguishes between visa issuance and entry; how that interpretation can be squared with the express language of Section 1182(f), which addresses only entry; and how that interpretation can be reconciled with the regulations, which expressly state that visas can be denied for reasons of inadmissibility, but despite laying out in detail the classes of aliens who are inadmissible, say nothing at all about persons falling within Section 1182(f). To the extent that the Foreign Affairs Manual offers any interpretation at all, it is not one that warrants any deference whatsoever in light of the absence of any reasoned explanation for that interpretation. "[S]o conclusory a statement cannot substitute for a reasoned explanation, for it provides neither assurance that the [agency] considered the relevant factors nor a discernable path to which the court may defer." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (citation omitted); *Vill. of Barrington*, 636 F.3d at 650.

August 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on August 28, 2017, I caused the foregoing Plaintiffs' Supplemental Brief in Support of Request for Preliminary Injunction to be served on all counsel of record via CM/ECF.

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