ETHAN P. DAVIS
Acting Assistant Attorney General, Civil Division
BILLY J. WILLIAMS
United States Attorney
AUGUST E. FLENTJE
Special Counsel, Civil Division
WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section
BRIAN C. WARD
Senior Litigation Counsel
COURTNEY E. MORAN
Trial Attorney
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 514-4587
courtney.e.moran@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN DOE #1, et al., Plaintiffs, v. DONALD TRUMP, in his official capacity as President of the United States, et al., Defendants.	CASE NO. 3:19-cv-01743-SI **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

The Court should dismiss this case challenging the implementation and enforcement of Presidential Proclamation 9945, Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System in Order to Protect the Availability of Healthcare Benefits for Americans, 84 Fed. Reg. 53,991 (Oct. 9, 2019) ("Healthcare Proclamation" or "Proclamation"). Plaintiffs have conceded several issues by failing to meaningfully respond to Defendants' arguments in their motion to dismiss, and the arguments they do present are unpersuasive. *See* ECF No. 150, Plaintiffs' Opposition (Opp.).

The Court should dismiss all of Plaintiffs' claims for lack of subject-matter jurisdiction. First, no Plaintiff has alleged any injury that is fairly traceable to any action by the Department of Homeland Security (DHS) or the Department of Health and Human Services (HHS). *See* ECF No. 146, Motion to Dismiss (Mot.), at 8-9. Second, the organizational and individual Plaintiffs have not identified an actual or imminent concrete injury that would result from the Proclamation or its implementation by any Defendants and be sufficient to establish Article III standing. Mot. 9-14. Third, this Court may not review non-constitutional challenges to the political branches' decisions to exclude noncitizens abroad. Mot. 14-16. Fourth, separation of powers prevents this Court from granting injunctive relief against the President. Mot. 16.

Alternatively, the Court should dismiss all of Plaintiffs' claims because they have failed to state any claim upon which relief can be granted. First, Plaintiffs fail to state a claim under the APA because the Proclamation is not reviewable under the APA, and Plaintiffs have not identified any final agency action that is reviewable under the APA. Mot. 17-23. Second, Plaintiffs fail to state an equal protection claim because they do not allege facts to support a finding that the Proclamation does not provide facially legitimate and bona fide reasons for the entry restrictions,

that it is impossible to discern a relationship to legitimate state interests, or that the actions could be motivated only by racial animus. Mot. 23-26. Third, Plaintiffs fail to state a claim that the Proclamation is "ultra vires" because it is plainly authorized by the President's constitutional authority and his authority under 8 U.S.C. § 1182(f) and § 1185(a), and Plaintiffs fail to allege an express conflict between the Proclamation and any other provision of the INA or any other statute. Mot. 26-33. Finally, Plaintiffs fail to state a procedural due process claim because they do not identify any protected "right" or "liberty interest" that is infringed upon by the Proclamation or its implementation, nor do they allege a denial of adequate procedural protections. Mot. 33-35.

II. ARGUMENT

A. The Court lacks subject-matter jurisdiction over this action.

1. Plaintiffs lack standing for claims against DHS and HHS.

As an initial matter, Plaintiffs cannot establish standing for their claims against DHS or HHS. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); Mot. 8-9. Plaintiffs do not identify any action by DHS or HHS that has caused or will cause any injury to Plaintiffs, nor do they identify any injury that is fairly traceable to DHS or HHS. Mot. 8-9.

In response, rather than point to any action by DHS or HHS, Plaintiffs reference their "allegations that the Proclamation assigns to each of these agencies certain functions and responsibilities related to implementation and enforcement of the Proclamation." Opp. 6 (citing FAC ¶¶ 24-27, 36, 46, 51). But these allegations simply challenge the Proclamation itself, not any action by DHS or HHS. Plaintiffs also reference their allegations "discussing DHS responsibility for implementing and enforcing the INA's public charge provisions, which Plaintiffs allege the Proclamation conflicts with." Opp. 6 (citing FAC ¶¶ 124-31). But whatever role DHS has in

implementing the "public charge provisions" is not relevant here, where Plaintiffs do not challenge those provisions (or any other inadmissibility ground in the INA). Rather, Plaintiffs challenge only the Proclamation and its implementation.

Plaintiffs cite *Lee v. State of Oregon*, 891 F. Supp. 1421 (D. Or. 1995), for the proposition that "Plaintiffs need not allege with specificity the agencies' exact roles in the Proclamation's implementation and enforcement to assert that any injury from the Proclamation is traceable to those agencies." Opp. 6. Not so. In *Lee*, the plaintiffs brought a facial constitutional challenge to a statute, and the court held that certain entities were proper defendants because the statute identified "some enforcement responsibilities" of those entities *and* plaintiffs had "alleged [defendants'] *conduct* in recognizing and enforcing an unconstitutional statute." *Lee*, 891 F. Supp. at 1427 (emphasis added). Here, Plaintiffs have not alleged any actions at all by DHS or HHS, let alone alleged any conduct by DHS or HHS recognizing or enforcing the Proclamation. Rather, Plaintiffs are simply attempting to reframe their challenge to the Proclamation itself. Plaintiffs thus have not met their burden to identify a concrete and particularized injury that is fairly traceable to any conduct by DHS or HHS. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Finally, Plaintiffs appear to make a "law of the case" argument by insisting that this Court already resolved this issue when it granted a preliminary injunction that enjoined "all Defendants" from implementing or enforcing the Proclamation. Opp. 7 (citing *Doe v. Trump ("Doe PI")*, 418 F. Supp. 3d 573, 604-05 (D. Or. 2019)). Pursuant to the "law of the case" doctrine, courts have discretion to "refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *East Bay Sanctuary Covenant v. Trump ("East Bay III")*, 950 F.3d 1242, 1261 (9th Cir. 2020) (cleaned up). But the doctrine applies only if the issue in question was "decided explicitly or by necessary implication in [the] previous disposition." *Milgard Tempering,*

Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990). And whether Plaintiffs have adequately alleged action by DHS or HHS, or injury attributable to DHS or HHS, are not issues that this Court explicitly or necessarily decided in its preliminary injunction order. The Court did not even mention DHS or HHS in that order, let alone address standing against those agencies or enjoin those agencies from taking any particular action. Moreover, this Court's order compelling an administrative record explicitly rejected Plaintiffs' argument that DHS and HHS had acted to implement the Proclamation. *Doe v. Trump ("Doe Nov. AR Order")*, 423 F. Supp. 3d 1040, 1045 (D. Or. 2019) ("There is no evidence before the Court of agency action by the Department of Homeland Security or the Department of Health and Human Services.").

Accordingly, Plaintiffs do not have standing to assert claims against DHS and HHS, and they should be dismissed as Defendants in this case.

2. Latino Network lacks standing.

Latino Network cannot establish standing to challenge the Proclamation or its implementation because it has not suffered any concrete injury or alleged any imminent injury from the challenged actions. Mot. 9-11. Plaintiffs' arguments in response do not solve this fundamental problem with their claims. Opp. 7-9.

Latino Network's sole theory of standing is that it "would be required to divert significant resources from its core mission to respond to the Proclamation," Opp. 7; it does not attempt to assert standing on behalf of its members, Opp. 9. Plaintiffs generally maintain that, "[a]bsent the unlawful Proclamation, Latino Network would not have had to divert important staff resources to respond to the Proclamation." Opp. 8. Plaintiffs again raise a "law of the case" argument by primarily relying on this Court's preliminary injunction order, which found that Latino Network "has had to divert significant resources to deal with the Proclamation" and "would have to continue

to divert resources and abandon a significant portion of its core mission if the Proclamation were allowed to go into effect," *Doe PI*, 418 F. Supp. 3d at 599. *See* Opp. 7-8.

First, Defendants respectfully disagree with this Court's prior findings regarding harm to Latino Network. And, pursuant to the law-of-the-case doctrine, the Court has discretion to reconsider this issue, *see East Bay III*, 950 F.3d at 1261, and should do so here based on the specific challenges to Latino Network's standing that the government raised in the motion to dismiss, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation."). Further, the "legal context of the prior decision also affects whether and to what extent it may be treated as law of the case," *East Bay III*, 950 F.3d at 1261, and Plaintiffs do not submit any arguments for why this Court's *preliminary* findings—made on an expedited briefing and hearing schedule less than a month after the lawsuit was filed—should bind the Court in ruling on this motion to dismiss. *See id*. at 1263 (noting that "the record before a district court deciding a preliminary injunction[] is often incomplete").

Notably, the district court's preliminary injunction order was issued before the Ninth Circuit's recent ruling in *East Bay III*—a case on which Plaintiffs rely in their opposition, Opp. 7, 9. This decision provides further guidance on the diversion-of-resources theory of standing. In *East Bay III*, the court found that the challenged rule had "caused the Organizations to divert" "significant resources" to activities that were "not part of [their] core mission," and that they otherwise "would have suffered some other injury," because "[e]ach organization would have lost clients . . . had it not diverted resources toward counteracting the effect of the Rule." 950 F.3d at 1266. But Plaintiffs here have not identified any resources that they have diverted outside their "core mission," let alone significant resources, nor do they allege that they risk losing clients or

any other injury beyond abstract allegations of some diversion of resources. An organization "cannot manufacture the injury" by choosing to expend resources "fixing a problem that otherwise would not affect the organization." *Id*. at 1265-66; *see* Mot. 10.

Plaintiffs also cite *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which held that an organization whose mission was to achieve equal access to housing had organizational standing to bring suit under the Fair Housing Act. Opp. 9. But *Havens* involved an organization that had diverted "significant resources to identify and counteract" the challenged practices. 455 U.S. at 379. *Havens* also involved the Fair Housing Act, which includes a private right of action and extends certain legal rights to "associations" in addition to individuals. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1100 (D.C. Cir. 2015) (Millett, J., dubitante); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'"). There is no similar legally protected organizational interest at issue here. In *El Rescate Legal Services v. EOIR*, 959 F.2d 742 (9th Cir. 1991)—on which Plaintiffs also rely, *see* Opp. 9—the court held that organizations have standing to challenge a practice that "requires the organizations to expend resources in representing clients they otherwise would spend in other ways," *El Rescate*, 959 F.2d at 748. But Plaintiffs here do not identify any "other ways" that Latino Network would have spent the resources that it allegedly has expended as a result of the Proclamation—to the contrary, Latino Network alleges that, even after the Proclamation, it has been in a position to *devote* resources to helping community members access healthcare. Latino Network does not assert that any resources have been *diverted away from* its "core mission." *See East Bay Sanctuary Covenant v. Trump ("East Bay IV")*, No. 19-16487, 2020 WL 3637585, at *8 (9th Cir. July 6, 2020) (finding organizations demonstrated standing because they put forth

"uncontradicted evidence" that the challenged conduct would force them to "overhaul" their practice into a "removal defense program," which also would cause them to "lose significant funding").

Perhaps acknowledging that their complaint itself contains insufficient allegations, Plaintiffs assert that, to evaluate standing, the Court should "review and consider affidavits and other submitted evidence . . . including declarations submitted in support of Plaintiffs' motion for preliminary injunction." Opp. 7 n.2. It is true that a court may allow a plaintiff to amend her complaint or supply affidavits in support of standing, *see Warth v. Seldin*, 422 U.S. 490, 501 (1975), but Plaintiffs already have amended their complaint and did not add allegations to establish standing, nor did they supply affidavits for this purpose. Moreover, the declaration Plaintiffs reference in their opposition still does not allege a sufficient diversion of resources to demonstrate that Latino Network has Article III standing. *See id*. at 502 ("complaint must be dismissed" if "the plaintiff's standing does not adequately appear from all materials of record"). Plaintiffs point to two allegations from that declaration: (1) that Latino Network staff has spent "countless hours" researching healthcare plans that qualify under the Proclamation, and (2) that "ongoing significant expenditures to respond to the Proclamation include[e] a diversion of fifteen percent of paid staff members' weekly time and approximately $14,000 of new training and research expenses." Opp. 8-9 (citing the October 29, 2019, declaration of Latino Network executive director Carmen Rubio, ECF No. 23, ¶¶ 15, 23, 25).

First, "countless hours" provides, on its face, an ambiguous estimate of time that anonymous "staff" spent researching healthcare plans, and there is no mention of what the staff otherwise would have been doing. Furthermore, Plaintiffs do not explain how they calculated the estimates of money and time spent on "respond[ing] to the Proclamation," nor do they explain

what they otherwise would have been doing. Again, part of Latino Network's professed mission is to "educate and empower Multnomah County Latinos to achieve physical and mental health, safe housing, sustainable financial stability, and social support." FAC ¶ 22. In short, Plaintiffs chastise Defendants for "attempt[ing] to wield Latino Network's broad-based mission against it," Opp. 8, but they do not contest that Latino Network does, in fact, have a wide-ranging mission, nor do they explain how the actions they allegedly have taken in response to the Proclamation run contrary to fulfilling that mission. Latino Network does not have standing to challenge every single governmental action that might require the slightest modification of its services when those services remain consistent with its mission. *See East Bay III*, 950 F.3d at 1265-66.

Accordingly, Latino Network does not have standing to bring any of the claims in this action, and it must be dismissed as a Plaintiff.

3. The individual Named Plaintiffs all either lack standing or their claims are moot.

Six of the eight individual Named Plaintiffs—John Doe #1, Juan Ramon Morales, Jane Doe #2, Jane Doe #3, Iris Angelina Castro, and Blake Doe—lack standing to assert any of their claims, Mot. 11-13, and the claims of the other two—Brenda Villarruel and Gabino Soriano Castellanos—are moot, Mot. 13-14.

As to the lack of standing, Plaintiffs again raise a "law of the case" argument by primarily relying on this Court's preliminary injunction order finding a likelihood of irreparable harm to the named Plaintiffs. *See* Opp. 9-12 (citing *Doe PI*, 418 F. Supp. 3d at 598-99). Defendants disagree that this Court's preliminary ruling resolves whether Plaintiffs have demonstrated Article III standing at this juncture. *See East Bay III*, 950 F.3d at 1261. For starters, that decision was issued prior to discovery on class certification issues, which revealed that, contrary to Plaintiffs' assertions, Opp. 10-11, their allegations of harm are entirely speculative and not attributable to the

Proclamation or its alleged implementation, *see Spokeo*, 136 S. Ct. at 1548; Mot. 12-13. Furthermore, Plaintiffs assert that their "obligation at the pleading stage is to generally allege injury stemming from the challenged conduct." Opp. 10. But that does not require this Court to accept their conclusory allegations of "the-defendant-unlawfully-harmed-me" variety, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), particularly where Defendants have brought a factual attack on jurisdiction, *see Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Sangers v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007) ("Conclusory allegations and unreasonable inferences [ ] are insufficient to defeat a motion to dismiss."); *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (A "court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit," or "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."). And here, Plaintiffs have failed to sufficiently allege that the Proclamation has caused or will imminently cause any injury.

Plaintiffs do not meaningfully respond to Defendants' argument that they cannot establish injury if their family members would be denied an immigrant visa for some reason other than the Proclamation. Mot. 12. Plaintiffs say that "the fact that [they] could confront barriers in addition to the Proclamation not only is speculative, but also is irrelevant to the standing analysis." Opp. 11. This is incorrect. First, *Plaintiffs* have the burden to demonstrate their standing with allegations of a "concrete and particularized" injury. *See Lujan*, 504 U.S. at 560-61. The burden is not on Defendants to disprove some presumption of standing. And Plaintiffs' assertion that a visa denial for a reason *other than* the Proclamation is "speculative" demonstrates that their allegations of a visa denial *because of* the Proclamation likewise are entirely "speculative." Furthermore, standing requires "actual or imminent" injury and "*a causal connection* between the injury-in-fact and the

defendant's challenged behavior." *Updike v. Clackamas Cty.*, No. 15-723, 2015 WL 7722410, at *7 (D. Or. Nov. 30, 2015) (Simon, J.) (emphasis added). If the Proclamation would not be the reason for the visa denial, there can be no causal connection between the alleged injury and the Proclamation. *See id*. Accordingly, John Doe #1, Juan Ramon Morales, Jane Doe #2, Jane Doe #3, Iris Angelina Castro, and Blake Doe do not have standing for their claims, and they should be dismissed as Plaintiffs in this case.

As to Brenda Villarruel and Gabino Soriano Castellanos, Plaintiffs do not dispute that their claims are moot. Rather, Plaintiffs say that this Court already deemed their claims "inherently transitory," and thus "the change in status of their applications does not deprive the Court of jurisdiction." Opp. 13 (citing *Doe v. Trump ("Doe Class Cert.")*, No. 3:19-cv-1743-SI, 2020 WL 1689727 (D. Or. Apr. 7, 2020)). But that decision does not control here. The "inherently transitory" exception to mootness applies only to class claims, and while it may allow an individual to represent a class after his claims are moot, *see Nielsen v. Preap*, 139 S. Ct. 954, 962-63 (2019), it does not mean that the individual Plaintiffs' claims are not moot, *see Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1048 (9th Cir. 2014). Indeed, the inherently transitory exception is only necessary where a plaintiff's claims *are* moot. Plaintiffs do not identify any individual relief that Ms. Villarruel or Mr. Castellanos still could obtain in this lawsuit. Accordingly, their individual claims are moot and they should be dismissed as Plaintiffs in this case.[1]

[1] As described in Defendants' motion and below, the Visa Applicant Subclass is comprised entirely of aliens seeking entry into the United States and thus cannot state any claims for relief. Accordingly, the dismissal of Mr. Castellanos—the sole representative of that subclass—is appropriate.

4. Courts may not review non-constitutional challenges to the political branches' decisions to exclude noncitizens.

As Defendants have explained, there is a fundamental principle long recognized by courts that the political branches' decision to exclude noncitizens abroad is not judicially reviewable. Mot. 14-16. The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (recognizing the fundamental proposition that the "power to admit or exclude aliens is a sovereign prerogative" and that the "Constitution gives the political department of the government plenary authority to decide which aliens to admit") (internal quotation marks and citation omitted). The Supreme Court has permitted extremely limited review only where U.S. citizens claim that a visa denial burdens their own constitutional rights. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972). Accordingly, the non-constitutional claims brought by the U.S. citizen Plaintiffs (Claims I and III) are not justiciable, and none of the claims brought by the Visa Applicant Subclass is justiciable.

Plaintiffs' opposition fails to respond to this argument. *See* Opp. 5-14. Plaintiffs make, at most, a passing reference to the portion of this Court's preliminary injunction order that Plaintiffs say "explain[s] why *Fiallo* is not a bar to review of Plaintiffs' constitutional or statutory claims," in the section of their response addressing Defendants' argument that they fail to state an APA claim. Opp. 16 (citing *Doe PI*, 418 F. Supp. 3d at 587). Plaintiffs say no more about it. Plaintiffs'

conclusory contention that they have stated an APA claim is wholly insufficient to respond to Defendants' arguments regarding justiciability. Plaintiffs thus have conceded that the U.S. citizens may bring only constitutional claims against the Proclamation and that the Visa Applicant Subclass may not bring any claims. *See United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011) (party waives argument that is available and not raised); *Johnny T. v. Berryhill*, No. 6:18-cv-829, 2019 WL 2866841, at *2 (D. Or. July 2, 2019) (failure to respond to argument constitutes concession of the issue); *Bolbol v. City of Daly City*, 754 F. Supp. 2d 1095, 1115 (N.D. Cal. 2010) ("[P]laintiff fails to address this issue in her opposition brief and apparently concedes that she may not proceed on this claim.").

Specifically, Plaintiffs fail to respond to Defendants' argument that Plaintiffs' "ultra vires" claim—alleging that the President acted in excess of authority granted by statute or violated the separation of powers—is a statutory claim, not a constitutional claim. *See Dalton v. Specter*, 511 U.S. 462, 471-77 (1994); Mot. 15. And review of such claims is generally impermissible when "the statute in question commits the decision to the discretion of the President." *Id.* at 474. The language of § 1182(f) "exudes deference to the President in every clause" and "grants the President broad discretion" with respect to suspension determinations. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018). Under *Dalton*, accordingly, the Proclamation is not subject to judicial review, and Plaintiffs have conceded that point by failing to respond to it, *see McEnry*, 659 F.3d at 902.

Accordingly, the Court should dismiss all of the non-constitutional claims brought by the U.S. citizens and all of the claims brought by the Visa Applicant Subclass.

5. Separation of powers bars injunctive relief against the President.

This Court lacks jurisdiction to grant injunctive relief against the President. *Mississippi v. Johnson*, 71 U.S. 475 (1867); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *see* Mot. 16.

Plaintiffs argue that "[c]ourts do not hesitate to grant relief when they determine that the President acted outside the scope of his authority." Opp. 13-14. But here, as Defendants repeatedly have explained, the President lawfully issued the Healthcare Proclamation pursuant to his constitutional powers and his statutory authority in 8 U.S.C. § 1182(f) and § 1185(a)(1). Mot. 4, 18-19, 26-33. As noted above, the Proclamation is a valid exercise of the Executive's constitutional foreign affairs powers. *See Fiallo*, 430 U.S. at 792; Mot. 14-16, 18-19. Furthermore, § 1182(f) provides the President with broad discretion to suspend the entry of aliens into the United States. *See Hawaii*, 138 S. Ct. at 2408 (explaining that § 1182(f) "exudes deference to the President," and that courts have "previously observed that § 1182(f) vests the President with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA"). Therefore, the Court lacks jurisdiction to grant injunctive relief against the President preventing the implementation or enforcement of the Proclamation.

B. Plaintiffs fail to state a claim upon which relief can be granted.

1. Plaintiffs fail to state a claim under the APA (Claim I).

a. Latino Network cannot seek relief under the APA because it is not within the zone of interests protected by any statute Plaintiffs identify in the complaint.

Even if Latino Network had standing to raise claims, it could not bring a claim under the APA because it is not within the "zone of interests" arguably protected by any statute that Plaintiffs identify in their complaint. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014); Mot. 17. Plaintiffs respond by averring that "Latino Network falls well within the zone of interests of the INA." Opp. 14. But the "zone of interests" analysis focuses on the "*particular provision* of law upon which the plaintiff relies," *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997) (emphasis added), and Plaintiffs cannot rely generally on "the INA" to meet the zone-

of-interests test. The only specific provision that Plaintiffs cite in their opposition is 8 U.S.C. § 1443(h), which Plaintiffs say "requires the Attorney General to work with 'relevant organizations' to 'broadly distribute information concerning' the immigration process." Opp. 15 (quoting 8 U.S.C. § 1443(h)). But Plaintiffs' complaint does not mention that statute, let alone assert any claim related to 8 U.S.C. § 1443(h). Accordingly, Plaintiffs fail to identify any statute in their complaint that extends rights to or regulates the interests of an organization like Latino Network, and thus Latino Network's APA claims must be dismissed.

b. The APA does not authorize claims against the President.

To the extent that Plaintiffs' APA claims challenge the President's issuance of the Proclamation, these claims must be dismissed. Mot. 17-18. The APA authorization of suits by "person[s] suffering [a] legal wrong because of agency action," 5 U.S.C. § 702, does not extend to claims against the President because the President is not an agency within the meaning of the APA. As the Supreme Court has instructed, "the APA does not expressly allow review of the President's actions, [and thus] we must presume that his actions are not subject to its requirements." *Franklin*, 505 U.S. at 801; *see also Dalton*, 511 U.S. at 468 ("The APA does not apply to the President."); *East Bay Sanctuary Covenant v. Trump ("East Bay I")*, 932 F.3d 742, 770 (9th Cir. 2018) ("The scope of our review [under the APA] . . . is limited to agency action, and the President is not an agency. . . . Accordingly, the President's actions are not subject to [APA] requirements.").

Although Plaintiffs' complaint is targeted at the Proclamation and not at any independent agency action that could conceivably be reviewable under the APA, Plaintiffs insist that their APA claim challenges only the "implementation of the Proclamation" and not the Proclamation itself. Opp. 15. Their complaint says otherwise: most of Plaintiffs' APA challenges do not reference "implementation" and are not plausibly connected to agency action, but rather are challenges to

the Proclamation itself. *See* FAC ¶¶ 230(a), (b), (e), (f), (g), (h), (i), (k). The Court should dismiss all of Plaintiffs' APA challenges to the Proclamation.

c. Plaintiffs cannot avoid the barriers to APA review by purporting to challenge agency "implementation" of the Proclamation.

Plaintiffs fail to state an APA claim because they have not identified any "final agency action" that is reviewable under the APA. Mot. 18-21. The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). "[T]wo conditions . . . generally must be satisfied for agency action to be 'final' under the APA. 'First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Hawkes Co.*, 136 S. Ct. at 1813 (quoting *Bennett*, 520 U.S. at 177-78). Accordingly, for Plaintiffs to state an APA claim, they must adequately identify in their complaint final agency actions that carry some legal force by themselves, not simply as a result of the Proclamation. Plaintiffs have failed to do so because the only relevant legal obligations they identify associated with the Proclamation arise from the Proclamation itself.

First, as noted above, Plaintiffs assert that this Court already found their APA claims justiciable because its preliminary injunction order "explain[ed] why *Fiallo* is not a bar to review of Plaintiffs' constitutional or statutory claims." Opp. 16 (citing *Doe PI*, 418 F. Supp. 3d at 587). However, the Court's discussion of justiciability did not address Plaintiffs' APA claim or any agency implementation of the Proclamation. Rather, the Court discussed the general justiciability of Plaintiffs' constitutional and statutory challenges to the Proclamation itself. *See Doe PI*, 418 F.

Supp. 3d at 587-89. Indeed, because the Court found a likelihood of success on other grounds, it explicitly did not address "Plaintiffs' due process challenge to the Proclamation or challenges to agency action under the APA." *Id*. at 598.

Plaintiffs next argue that this Court has "rejected" Defendants' argument that they failed to allege final agency action. Opp. 16 (citing *Doe Nov. AR Order*, 423 F. Supp. 3d at 1046). That, too, is incorrect. In ruling on Plaintiffs' motion to compel an administrative record before the preliminary injunction hearing, the Court concluded that "it cannot, at this juncture, determine whether there has been final agency action." *Id*. Furthermore, several of the actions discussed in that order and in Plaintiffs' opposition—such as a cable sent to consular officers and draft amendments to the Foreign Affairs Manual, *see id*.—are not identified in Plaintiffs' complaint. Even though Plaintiffs had received those documents before amending their complaint, they chose not to add any allegations about those actions. Plaintiffs are correct that Defendants "attack[] the sufficiency of Plaintiffs' allegations without asking the Court to reach the merits of the APA claim based on the administrative record." Opp. 16 n.8. Plaintiffs' assertions regarding the adequacy of the administrative record are not only incorrect, they are also wholly irrelevant at the motion to dismiss stage. Here, Plaintiffs' "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. Although Plaintiffs have chosen a peculiar order of litigation and added arguments to their briefing that are not tethered to any allegations in their complaint, the Court may not look beyond the complaint in ruling on a motion to dismiss for failure to state a claim. *See id*. Indeed, the Supreme Court recently cautioned courts against deciding issues not presented by the parties. *See Sineneng-Smith*, 140 S. Ct. at 1579 ("As a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and

argument entitling them to relief." (cleaned up)). Plaintiffs have had ample opportunity to request an opportunity to amend their complaint a second time, and they have chosen not to do so.

As Defendants explained, the only agency "actions" Plaintiffs identify and assert as "final" in their complaint are a Department of State website posting, FAC ¶¶ 40-42, and a Department of State Notice of Information Collection, FAC ¶¶ 43-44. First, as to the website, this Court's prior order regarding the administrative record did not vindicate Plaintiffs' argument that the website posting could constitute agency action or create or alter any legal rights or obligations. Plaintiffs assert that the website posting "issued a directive" with a "new requirement" not identified in the Proclamation itself because it informed applicants that they must establish their eligibility "at the time of the interview." Opp. 17. But it has long been the case that an immigrant visa applicant must establish her eligibility at the time of the visa interview. *See* 8 U.S.C. § 1201(a)(1), (g); 22 C.F.R. §§ 42.71, 42.81(a). The website posting informing the public of the Proclamation did not create any new procedure. Second, Plaintiffs contend that "Defendants misstate the significance" of the Notice of Information Collection. Opp. 19. But it is Plaintiffs who confuse the purpose of the notice, and indeed they do not respond to Defendants' argument that the notice was issued to comply with the Paperwork Reduction Act. The notice thus marked neither the "consummation of [a] decision making process" nor was it an action from which "legal consequences will flow." *Bennett*, 520 U.S. at 178.

In short, Plaintiffs' simply attempt to repackage their challenges to the Proclamation as challenges to some sort of independent action by the State Department, but they fail to direct their complaint against any actual "final agency action" as required to raise an APA claim. Plaintiffs' nebulous challenge to the State Department's attempts to notify the public about the Proclamation and actions taken to comply with the Paperwork Reduction Act must be dismissed. The Court

likewise must dismiss Plaintiffs' claim that Defendants were required to engage in formal rulemaking before the Proclamation could go into effect. Mot. 21. Plaintiffs entirely fail to respond to this argument and thus have conceded that dismissal of this claim is proper. *See McEnry*, 659 F.3d at 902.

d. The doctrine of consular nonreviewability prevents Plaintiffs from challenging consular officers' decisions on visa applications.

Even if Plaintiffs had identified a final agency action, the doctrine of consular nonreviewability recognizes that Congress has empowered consular officers with the authority to issue or refuse an application for a visa made overseas. *See* 8 U.S.C. §§ 1104(a), 1201(a), (g); Mot. 22-23. Plaintiffs do not contest that this doctrine would apply "to challenges to individual visa denials" but insist that they are challenging only "blanket executive agency action." Opp. 20. But, as explained above, Plaintiffs have not identified any final agency action that would be reviewable under the APA. Thus, to the extent Plaintiffs are actually attempting to challenge individual consular visa decisions, they may not do so. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999).

2. Plaintiffs fail to state an equal protection claim (Claim II).

Plaintiffs have failed to state an equal protection claim on behalf of the U.S. citizen Plaintiffs and U.S. Petitioner Subclass because they have not alleged any facts that could establish that the Proclamation does not provide on its face "legitimate and bona fide reasons" for the entry restrictions, that it is "impossible to discern a relationship to legitimate state interests," or that the actions are "inexplicable by anything but animus." *Hawaii*, 138 S. Ct. at 2421. Mot. 23-26.[2] In

[2] By not challenging Defendants' argument that the Visa Applicant Subclass cannot raise such a claim, Plaintiffs have conceded that issue. *See McEnry*, 659 F.3d at 902.

Plaintiffs' opposition discussing their procedural due process claim, they concede that constitutional challenges to a proclamation restricting entry of noncitizens must be evaluated under the deferential standard of review set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and reaffirmed in *Hawaii*. Opp. 30. Despite this, Plaintiffs do not address the *Mandel* standard in their arguments regarding their equal protection challenge. Instead, Plaintiffs assert that they meet the standard for pleading racial animus as laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), Opp. 21-26, or at least that their allegations satisfy the rational basis standard applied in *Hawaii*, 138 S. Ct. at 2420, Opp. 26-28.

Plaintiffs do not explain why the *Mandel* standard would apply to their due process constitutional claim but not their equal protection constitutional claim. In *Hawaii*, the Supreme Court clarified that challenges to a proclamation brought by U.S. citizens claiming a violation of their constitutional rights are evaluated under the deferential standard of review set forth in *Mandel*. *See Hawaii*, 138 S. Ct. at 2419 (noting that the Supreme Court has "reaffirmed and applied [*Mandel*'s] deferential standard of review across different contexts and constitutional claims"); *id.* at 2420 n.5 (stating that *Mandel*'s "circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals"). *Mandel* allows a "circumscribed judicial inquiry" where an alien's denial of entry "allegedly burdens the constitutional rights of a U.S. citizen." *Id.* at 2419. But "[g]iven the authority of the political branches over admission," judicial review is narrow and limited to "whether the Executive gave a 'facially legitimate and bona fide' reason for its action." *Id.* (citing *Mandel*, 408 U.S. at 769). Specifically, *Mandel* explains that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its

justification" against the asserted constitutional interests of U.S. citizens.[3] *Mandel*, 408 U.S. at 770. That deferential standard reflects the Constitution's "exclusive[]" allocation of power over the admission of aliens to the "political branches." *Mandel*, 408 U.S. at 765 (citation omitted). The Fourth Circuit recently clarified in reviewing the same proclamation at issue in *Hawaii* that *Hawaii* had "confirmed *Mandel*'s continuing vitality . . . in assessing" proclamations regarding the entry of noncitizens. *Int'l Refugee Assistance Project v. Trump*, 961 F.3d 635, 651 (4th Cir. 2020).

Given the Supreme Court's conclusion that the proclamation in *Hawaii* satisfied *Mandel*'s standard, *see Hawaii*, 138 S. Ct. at 2417-23, the Proclamation here plainly satisfies that standard. The President issued the Proclamation to address the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare." 84 Fed. Reg. 53,991. The President found that challenges caused by uncompensated care are exacerbated by admitting to the United States thousands of immigrants annually who have not demonstrated any ability to pay for their healthcare costs. *Id*. Accordingly, the President found that continuing to allow entry into the United States of "certain immigrants who lack health insurance or the demonstrated ability to pay for their healthcare" would be "detrimental to the interests of the United States," including protecting and addressing the challenges facing our healthcare system and protecting American taxpayers from the burden of uncompensated care. *Id*. To be sure, Plaintiffs disagree with these findings, but the findings plainly meet the "facially legitimate and bona fide" standard under *Mandel*. In their arguments

[3] While the Supreme Court in *Hawaii* acknowledged that *Mandel*'s "narrow standard of review" has particular force in cases that implicate national security concerns, this circumscribed judicial inquiry is not limited to such cases. 138 S. Ct. at 2419. The Court cited multiple opinions applying and affirming this "deferential standard of review across different contexts and constitutional claims," including cases where no national security concerns were raised. *Id*. (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring); *Fiallo*, 430 U.S. at 795).

regarding their procedural due process claim, Plaintiffs assert that "there can be no facially legitimate and bona fide reason for denying a visa under the Proclamation because the Proclamation itself is irrational, internally inconsistent, and will likely increase uncompensated care costs." Opp. 31. But the government disputes these assertions and resolving the dispute would require the Court to go beyond the face of the Proclamation, and that kind of inquiry is not permitted under *Mandel*. Under the proper application of *Mandel*, the Executive gave a facially legitimate and bona fide reason for its action, and nothing more is required.

Even if this Court were to engage in rational basis review, as the Supreme Court in *Hawaii* did in the alternative, 138 S. Ct. at 2420, Plaintiffs still could not state an equal protection claim. Under rational basis review, Plaintiffs must allege that it is "impossible to discern a relationship to legitimate state interests" or that the actions are "inexplicable by anything but animus." *Hawaii*, 138 S. Ct. at 2421; *see Int'l Refugee Assistance Project*, 961 F.3d at 651. The Supreme Court, when analyzing action under rational basis review, "hardly ever strikes down a policy as illegitimate." *Hawaii*, 138 S. Ct. at 2420.

Plaintiffs first assert that their allegations "plausibly show" that the Proclamation is "inexplicable by anything but animus" and point to "the President's statements and other indicia of racial animus" as "motivations behind the Proclamation." Opp. 27. This is not nearly enough under rational basis scrutiny. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (noting that, under rational basis scrutiny, as long as there is some conceivable set of facts that would justify a classification, the classification prevails, regardless of the actual rationale underlying the Government's action and regardless of whether the conceivable basis is borne out by evidence). The Proclamation contains legitimate and well-recognized public policy goals such as decreasing uncompensated healthcare costs. And the Proclamation does not distinguish visa

applicants based on nationality, race, or ethnicity, other than exempting certain Iraqis and Afghans. *See* 84 Fed. Reg. at 53,992.

Plaintiffs next argue that it is "impossible to discern a relationship to legitimate state interests" in the Proclamation because it "contains no factual findings, is internally inconsistent, and is contrary to the INA." Opp. 27. Again, Plaintiffs may disagree with the factual findings within the Proclamation, but that does not mean there are no findings, and requiring new immigrants to obtain healthcare plans that they can afford with their own resources is consistent with its stated goals. Moreover, Plaintiffs' assertion that the Proclamation is "contrary to the INA" is both incorrect, as Defendants have explained, and irrelevant to whether it is *possible* to discern a legitimate state interest in the Proclamation. *See Hawaii*, 138 S. Ct. at 2421.

Finally, the Court should decline Plaintiffs' request to apply the *Arlington Heights* standard for pleading racial animus. Opp. 21-26. Under *Arlington Heights*, a plaintiff who wishes to plead animus "must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (quoting *Arlington Heights*, 429 U.S. at 266). "Possible evidence includes disparate impact on a particular group, '[d]epartures from the normal procedural sequence,' and 'contemporary statements by members of the decisionmaking body.'" *Id*. (quoting *Arlington Heights*, 429 U.S. at 266-68). Plaintiffs contend that the *Arlington Heights* standard should apply here because the Supreme Court recently applied it in the "immigration context" in *Regents*. Opp. 25.

Regents does not support Plaintiffs' argument. In *Regents*, the government had not argued that the *Hawaii* standard applied to the plaintiffs' equal protection challenge to the rescission of Deferred Action for Childhood Arrivals ("DACA"). *See id*. at 1901, 1915. Instead, the government

relied on *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*, 525 U.S. 471 (1999), which holds that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation," *id*. at 488. The plaintiffs in *Regents* responded by arguing that *AADC* did not apply because they were "not challenging individual enforcement proceedings." *Regents*, 140 S. Ct. at 1915. Rather than "resolve this debate," the plurality concluded that, even if such a claim were "cognizable," the plaintiffs had alleged insufficient facts to support it. *Id*.[4] First, an alleged disproportionate impact on Latinos was not enough to state a claim, in part because "virtually any generally applicable immigration policy" could have some disparate impact on Latinos, who "make up a large share of the unauthorized alien population." *Id*. at 1915-16. Further, there was "nothing irregular about the history leading up to" the rescission, which "was a natural response to a newly identified problem." *Id*. at 1916. Finally, alleged statements by the President that the plaintiffs contended "evince[d] discriminatory intent" were "unilluminating" because they were "remote in time and made in unrelated contexts." *Id*.

Similarly, here, even if the *Arlington Heights* standard discussed in *Regents* did apply to Plaintiffs' equal protection claim, they have failed to allege facts that would state a claim for relief. As in *Regents*, Plaintiffs have not plausibly alleged any disparate impact on a particular group, anything irregular about the issuance of the Proclamation, or any contemporary statements by the President evincing racial animus. *See id*. at 1915-16. Plaintiffs allege that the "Proclamation has a disparate impact on nonwhite immigrants that is greater than those immigrants' share of the overall

[4] In total, eight Justices concurred in the Supreme Court's judgment rejecting the plaintiffs' attempt to plead an equal protection claim. *See id.* at 1919 n.1 (Thomas, J., joined by Alito and Gorsuch, JJ., concurring in the judgment in part and dissenting in part); *id*. at 1936 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

immigrant population." Opp. 26 (citing FAC ¶¶ 8, 57, 171-73). But this "outsized share" allegation is not contained in Plaintiffs' complaint, which supports the opposite conclusion by alleging that "most family-based visa immigrants in recent years have originated in Asia, Africa, and South America." FAC ¶ 171. In any case, this is similar to the assertion of "disproportionate impact" on Latinos that the Supreme Court rejected in *Regents*. 140 S. Ct. at 1915-16. Plaintiffs also assert that they have "alleged that the Proclamation reflects a departure from the normal procedural sequence." Opp. 24 (citing FAC ¶¶ 3, 8, 150-52, 67-71). But Plaintiffs do not explain what "procedural sequence" is required for a Proclamation and instead simply reiterate their disagreements with the merits of the Proclamation. Finally, Plaintiffs point to their allegations that the President "has repeatedly made statements demonstrating racial animus towards nonwhite immigrants," Opp. 22, and that "the Proclamation is part of the Administration's anti-immigrant agenda focused on excluding non-white immigrants," Opp. 23. But, as in *Regents*, Plaintiffs identify only statements that were "remote in time and made in unrelated contexts," 140 S. Ct. at 1916—indeed, Plaintiffs point to no statements even mentioning the Proclamation. For these reasons, Plaintiffs fail to state a claim even under the *Arlington Heights* standard.

Plaintiffs insist that their "well-pleaded factual allegations must be taken as true" at this stage. Opp. 28. That is correct, so long as the allegations are "well-pleaded." Plaintiffs' conclusory allegations of "the-defendant-unlawfully-harmed-me" variety are not entitled to the assumption of truth. *See Iqbal*, 556 U.S. at 678-79. Plaintiffs have failed to state an equal protection claim, and this claim must be dismissed.

3. Plaintiffs fail to state a claim that the Proclamation is "ultra vires" (Claim III).

Plaintiffs fail to state a claim that the Proclamation is "ultra vires" because they have not alleged facts that could show the Proclamation exceeds the President's authority under the INA or

violates separation of powers. Mot. 26-33. As explained above, this is a statutory claim that is not justiciable here, and Plaintiffs have waived any response to that argument. *See McEnry*, 659 F.3d at 902.

Moreover, rather than respond to Defendants' arguments, Plaintiffs again rely on this Court's preliminary injunction order and the Ninth Circuit's order denying Defendants' motion for a stay of the preliminary injunction pending appeal. Opp. 29 (citing *Doe PI*, 418 F. Supp. 3d at 598; *Doe v. Trump ("Doe Stay Order")*, 957 F.3d 1050 (9th Cir. 2020)). Those decisions do not necessarily mean that this claim can survive a motion to dismiss. *See East Bay III*, 950 F.3d at 1261. In resolving this motion to dismiss for failure to state a claim, the Court must review the actual allegations contained in Plaintiffs' complaint—rather than the additional arguments in their prior briefing that are not based on any allegations in their complaint. *See Sineneng-Smith*, 140 S. Ct. at 1579 (courts "do not, or should not, sally forth each day looking for wrongs to right").

To begin with, this Court previously credited Plaintiffs' allegations that the Proclamation constitutes an "indefinite" suspension of entry, *see Doe PI*, 418 F. Supp. 3d at 596, but this conclusion squarely conflicts with the Supreme Court's ruling in *Hawaii*. Mot. 28-29. Furthermore, this Court previously concluded that Plaintiffs were likely to succeed on a claim that the Proclamation violates the nondelegation doctrine, *Doe PI*, 418 F. Supp. 3d at 589-93, but Plaintiffs' complaint does not contain such a claim. Rather, in support of Plaintiffs' "ultra vires" claim, they assert only that the Proclamation "exceeds" the President's authority under the INA, FAC ¶ 246, and "violates constitutional separation of power principles," FAC ¶ 247. This Court previously found Plaintiffs likely would be able to show a conflict between the Proclamation and the "public charge" provisions of the INA, including the VAWA exception to this ground of inadmissibility, *see Doe PI*, 418 F. Supp. 3d at 594-95, 597, based on arguments in Plaintiffs' prior

briefing. But, as Defendants explained in their motion, Plaintiffs' complaint does not identify any express conflict with the public charge provisions or any other provision of the INA. Mot. 29-30. This Court need not liberally construe Plaintiffs' complaint to encompass allegations they chose not to raise even when they amended their complaint. *See Sineneng-Smith*, 140 S. Ct. at 1579. Plaintiffs are represented by a team of experienced lawyers who this Court has deemed adequate to represent a nationwide and worldwide class of individuals. *See Doe Class Cert.*, No. 3:19-cv-1743-SI, 2020 WL 1689727 at *17. If they intended to plead a conflict between the Proclamation and a specific provision of the INA, they were more than capable of doing so in their complaint or amended complaint, or, at the very least, of seeking leave to amend their complaint again as the litigation progressed.

The Ninth Circuit's stay order is even further removed from the allegations contained in Plaintiffs' complaint. At the threshold, the Ninth Circuit motions panel emphasized that its ruling did not "prejudge the merits of the appeal" but rather assessed "the necessity of a stay pending presentation to a merits panel." *Doe Stay Order*, 957 F.3d at 1062. In that context, the motions panel concluded Defendants had not made the requisite "strong showing" regarding a lack of conflict between the Proclamation and the "public charge" provisions of the INA, including the VAWA exception to this ground of inadmissibility, *see id.* at 1062, 1064; again, such claims are not well-pled in Plaintiffs' complaint. The panel also found a possible conflict between the Proclamation and the Affordable Care Act. *See id.* at 1062-64. But this Court did not even address that claim in its preliminary injunction ruling, and, as Defendants explained, it is similarly not well-pled in Plaintiffs' complaint. Mot. 32-33.

Finally, in their opposition, Plaintiffs respond only to Defendants' argument that their complaint fails to challenge the President's authority to issue the Proclamation under 8 U.S.C.

§ 1185(a)(1). Opp. 29. And § 1185(a)(1) allows the President to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe." Mot. 26. Despite not raising § 1185(a)(1) in their complaint, Plaintiffs essentially ask this Court to infer such a claim because they used the phrase "reasonable rules" in one paragraph of their complaint. Opp. 29 (citing FAC ¶ 246). Again, Plaintiffs' team of lawyers is not entitled to a lenient standard of complaint construction. *See Sineneng-Smith*, 140 S. Ct. at 1579. If Plaintiffs intend to bring a challenge under a certain statute, they must include that statute in their complaint (or amended complaint). The fact that the Proclamation had dual grounds of authority and Plaintiffs chose to challenge only one of them is reason enough to dismiss their "ultra vires" claim. At the very least, to the extent Plaintiffs attempt to challenge the President's authority under § 1185(a)(1), such a challenge must be dismissed for their failure to adequately plead a claim.

Accordingly, Defendants respectfully ask the Court to dismiss Plaintiffs' "ultra vires" claim because Plaintiffs' complaint reveals insufficient—and in some instances, nonexistent—allegations to state such a claim.

4. Plaintiffs fail to state a procedural due process claim (Claim IV).

Plaintiffs fail to state a procedural due process claim under the Due Process Clause of the Fifth Amendment. Mot. 33-35. As noted above, Plaintiffs concede that this constitutional challenge to the Proclamation must be evaluated under the deferential standard of review set forth in *Mandel*. Opp. 30. But Plaintiffs do not explain how their allegations have stated a claim under this "circumscribed judicial inquiry." As described above, the Proclamation is plainly justified on its face by legitimate and bona fide reasons. Furthermore, Plaintiffs have neither alleged a "constitutionally protected liberty or property interest" nor a "denial of adequate procedural

protections" sufficient to plead a procedural due process claim. *See Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018).

Plaintiffs first assert that "courts in the Ninth Circuit may assume that a citizen has a protected liberty interest in living together with a family member whom they have sponsored for a visa." Opp. 30. That is wrong. The Ninth Circuit has held the opposite: even if there is some "generic right to live with family," there is no "specific right to reside in the United States with non-citizen family members." *Gebhardt*, 879 F.3d at 988; *see also Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1022 (N.D. Cal. 2019) (dismissing plaintiffs' due process challenge to Presidential proclamation based on an alleged right to the "integrity of the family unit"). Plaintiffs thus fail to identify any protected liberty or property interest implicated by the Proclamation.

Even if Plaintiffs had identified a protected interest, they have not alleged the denial of adequate procedural protections. As an initial matter, Plaintiffs' opposition improperly raises a host of concerns that are not identified in their complaint. *See Sineneng-Smith*, 140 S. Ct. at 1579. In fact, their opposition does not cite to any of the paragraphs contained in their due process claim. The only alleged procedural defect in Plaintiffs' complaint is that "a consular officer with no medical training" must assess compliance with the Healthcare Proclamation. FAC ¶ 250. Defendants have explained why that assertion fails, Mot. 34-35, and Plaintiffs have abandoned it by not mentioning it in their opposition, *see McEnry*, 659 F.3d at 902. Instead, Plaintiffs assert that, even if they "did not have constitutional rights, they would still have a statutory right to have their admissibility determined in a manner consistent with the scheme Congress established in the INA." Opp. 31. Plaintiffs do not clarify to whom "they" refers, but, as explained, the immigrant visa applicants do not have any constitutional or statutory rights to have their admissibility determined in any particular way. The U.S. citizen petitioners may bring, at most, a constitutional

claim. *See Hawaii*, 138 S. Ct. at 2419. Plaintiffs offer no support for their contention that the U.S. citizen petitioners would have a statutory right to have their relatives' admissibility determined in any particular way. Similarly, Plaintiffs assert that they were "taken by surprise" by the Proclamation, Opp. 34, which is not in their complaint, nor is there any support for the proposition that a President must provide notice in any particular way before issuing a Proclamation. Further, Plaintiffs ignore that the President issued the Proclamation on October 4, 2019, setting an effective date of November 3, 2019; Plaintiffs do not explain how a month's notice constitutes a "surprise."

Finally, Plaintiffs argue that the immigrant visa applicants who are "already on U.S. soil" must have due process protections similar to individuals in removal proceedings. Opp. 32-33 (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)). But whatever protections these individuals may have in removal proceedings do not extend to their immigrant visa adjudications abroad—they do not have more rights to entry simply because they already have been living in the United States without authorization for some time. Furthermore, the assertion that these individuals are "present in the United States pursuant to waivers," Opp. 33, is a fundamental misunderstanding of the provisional unlawful presence waiver ("Form I-601A"). That provisional waiver does not authorize presence in the United States but rather, as its name indicates, provisionally waives the *unlawful presence* ground of inadmissibility that necessarily will be triggered upon the applicant's departure from the country for the visa interview. *See* 8 U.S.C. § 1182(a)(9)(B)(v); 8 C.F.R. § 212.7(e) ("A pending or approved provisional unlawful presence waiver does not constitute a grant of a lawful immigration status or a period of stay authorized by the Secretary.").

Plaintiffs' procedural due process claim must be dismissed for failure to state a claim upon which relief can be granted.

V. CONCLUSION

For the foregoing reasons, and the reasons in Defendants' motion to dismiss, the Court should dismiss this case for lack of subject-matter jurisdiction and for failure to state any claim for which relief can be granted.

Dated: July 24, 2020

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General, Civil Division

BILLY J. WILLIAMS
United States Attorney

AUGUST E. FLENTJE
Special Counsel, Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation

BRIAN C. WARD
Senior Litigation Counsel

/s/ Courtney E. Moran
COURTNEY E. MORAN
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 514-4587
courtney.e.moran@usdoj.gov