

## Exhibit B

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ANTANINA SERAKOVA,

Plaintiff,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants.

Case No. 1:21-cv-02066 (TNM)

**ORDER**

On September 24, 2021, the Court held a hearing on Serakova's Motion for Preliminary Injunction and Temporary Restraining Order. That Motion asks the Court to reserve past September 30, 2021, an unused Fiscal Year 2021 diversity visa. *See* ECF No. 5. For the reasons stated on the record, the Court denies Serakova's Motion.

For the foregoing reasons, it is hereby

**ORDERED** that Plaintiff's [5] Motion for Preliminary Injunction and Temporary Restraining Order is DENIED.

**SO ORDERED.**

This is a final, appealable Order.

Dated: September 24, 2021

The image shows a handwritten signature in black ink, which appears to read "T. N. McFadden". The signature is written over a circular official seal of the United States District Court for the District of Columbia.

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TREVOR N. McFADDEN  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ANTANINA SEROKOVA,

Plaintiff,

vs.

JOSEPH R. BIDEN, JR.,

Defendant.

CV Action  
No. 1:21-2066

Washington, DC  
SEPTEMBER 24, 2021

2:30 p.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION  
BEFORE THE HONORABLE TREVOR N. McFADDEN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JULIA GREENBERG  
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For the Defendant: WILLIAM HERRICK WEILAND  
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Reported By: LORRAINE T. HERMAN, RPR, CRC  
Official Court Reporter  
U.S. District & Bankruptcy Courts  
333 Constitution Avenue, NW  
Room 6720  
Washington, DC 20001  
202-354-3196

P R O C E E D I N G S

1 COURTROOM DEPUTY: Your Honor, this is Civil  
2 Action 21-2066, Antanina Serakova versus Joseph R. Biden,  
3 Jr.

4 Counsel, please come forward to identify yourself  
5 for the record, starting with the plaintiff.

6 MS. GREENBERG: Julia Greenberg for the  
7 petitioner, Antanina Serakova.

8 THE COURT: Good afternoon.

9 MR. WEILAND: William Weiland for the federal  
10 defendants, Your Honor.

11 THE COURT: We are here for motion for a TRO and  
12 preliminary injunction. I would expect to rule on them  
13 together.

14 I'll hear from you, Ms. Greenberg.

15 MS. GREENBERG: Thank you, Your Honor.

16 THE COURT: Approach the podium, ma'am.

17 MS. GREENBERG: In deciding plaintiff's motion,  
18 this court should consider four factors: Movant's  
19 likelihood of success on the merits, irreparable harm to the  
20 movant, whether the injunction would injure others and  
21 whether the plaintiff interest is advanced by this  
22 injunction.

23 I will start first with I think is the most  
24 contentious factor, is the movant likelihood to success on  
25 the merits.

1           Petitioner is a foreign national. She is a  
2 citizen of Belarus, who last year won 2021 diversity visa  
3 lottery. Despite the win and despite petitioner's  
4 compliance with all rules and regulations prescribed for DV  
5 winners, petitioner submitted her DV visa application on the  
6 first day of the fiscal year, which was September 30th,  
7 2020.

8           Despite that, the defendant arbitrarily refused to  
9 enforce U.S. laws as the Congress has written it; to wit, in  
10 1990 the Congress amended INA to provide 55,000 diversity  
11 immigrant visas each year to people in from countries with  
12 low immigration level.

13           Why did the Congress did it? Because it wanted to  
14 diversify U.S. immigration system as opposed to have an  
15 influx of immigrants from only particular countries.

16           THE COURT: Ma'am, the government suggests that  
17 that's a ceiling, not a floor. Do you disagree with that?

18           MS. GREENBERG: I don't disagree with that.

19           THE COURT: Okay.

20           MS. GREENBERG: Requirements of the DV visa  
21 application is -- DV visa applicant had to be educated,  
22 healthy, lack of criminal record and not pose a threat to  
23 national security.

24           DV selectees can apply for immigrant visa only  
25 during the fiscal year. And pursuant to INA, defendants

1 shall adjudicate the application during the fiscal year.  
2 They don't have the discretionary power whether to  
3 adjudicate these applications or not. Defendants in this  
4 case failed to do so.

5           During the first half of the fiscal year,  
6 defendant failed to process any DV visa applications. And  
7 according to the declaration of Ms. Miles, the Kentucky  
8 Consular Center did work remotely. Maybe due to pandemic  
9 there were not sufficient people on site, but that should  
10 not have prevented the Kentucky service center from  
11 processing DV visa applications.

12           THE COURT: Don't you think it explains why things  
13 slowed down? I think, certainly, the court system has  
14 slowed down over the last year and a half. I think FOIA  
15 cases, the federal agencies have definitely slowed down,  
16 especially at the beginning when they were changing to  
17 remote working.

18           MS. GREENBERG: Yes, Your Honor. But the court  
19 did not stop working. I understand that we do not expect  
20 all 55,000 visa cases to be processed and adjudicated, but  
21 we certainly should not expect the Kentucky Consular Center  
22 just to completely stopping adjudicating of DV visa  
23 applications.

24           THE COURT: But is that what they did?

25           MS. GREENBERG: According to Ms. Miles'

1 declaration, and this is my understanding as to what has  
2 happened.

3 THE COURT: That they just have not done any?

4 MS. GREENBERG: Yes.

5 THE COURT: Continuing to today or is that since  
6 the beginning of the year?

7 MS. GREENBERG: Well, according to the declaration  
8 of Ms. Miles, they resumed in June of this year processing  
9 of DV visa application for 2021. I believe they did stop  
10 processing some of the DV visa application for 2020. But  
11 when it comes to DV visa application for 2021, they only  
12 started in June of this year.

13 May I proceed, Your Honor?

14 THE COURT: You may.

15 MS. GREENBERG: Thank you.

16 During the first half of the fiscal year,  
17 defendant failed to process any DV visa applications. The  
18 proclamation 114, on which they relied, in suspending  
19 processing of visa application, did not mandate the  
20 defendant to stop working. It only banned the entry of  
21 immigrants to the United States, not processing their visa  
22 application.

23 And I think that's primarily what we are relying  
24 on, Your Honor. So we state that defendants erroneously  
25 thought that because of the proclamation of former president

1 Trump, that people could not enter the country on immigrant  
2 visa, they were empowered or entitled to stop processing  
3 those visa applications.

4 Because the proclamation 114 had an expiration  
5 date, I don't see how it was reasonable. Because had they  
6 processed DV visa applications when the proclamation expired  
7 in March or when it was ruled to be in violation of the laws  
8 a month earlier, then people would have been able to enter  
9 the country on the visas that were issued, or at least had  
10 an opportunity to have their cases scheduled at the U.S.  
11 embassies abroad.

12 THE COURT: So you are saying -- your  
13 understanding is that the, I guess, State Department stopped  
14 issuing visas for a time, because of that proclamation, but  
15 they resumed in March. Right?

16 MS. GREENBERG: Well, in March the following  
17 happened, they created this prioritization scheme where they  
18 resumed processing, but they put DV visa applicants in the  
19 lowest tier, as a non-priority, despite the fact that this  
20 is the only visa category that had expiration date.

21 In other words, I understand that there were huge  
22 backlog on family visa categories, employment, but those  
23 visas did not have expiration date. The DV visa application  
24 did have an expiration date, and pretty soon it would have  
25 been expired.



1           And despite that, the Department of State decided  
2           to put them, basically, on the low priority. And because of  
3           that, it was not processing them. I think they started  
4           processing in April of 2021, and then -- excuse me, Your  
5           Honor. I am going to open Ms. Miles' declaration, because I  
6           think it talks about that. Yes, Your Honor.

7           So in April 2021 it started scheduling some of the  
8           low-priority DV visa applications. It is unclear to me, and  
9           maybe the defendants will clarify whether it was 2020 DV  
10          visa applicants reserved or whether that was 2021 DV  
11          applicants.

12          According to Ms. Miles' declaration, it wasn't  
13          until June of this year that they started processing DV-2021  
14          visa applications. And in four months' period, considering  
15          that they are still in low priority, they were able to  
16          process 10,439 DV-2021 visa applications.

17          So had they started earlier and not violated the  
18          laws, the INA, I think my client certainly -- well, other  
19          people similarly situated and my client certainly would have  
20          had a chance to have their DV visa application processed and  
21          scheduled for an interview.

22          THE COURT: So, I mean, as I understand the issue  
23          though, you have all of these different people seeking visas  
24          in different categories. The government is strapped for  
25          manpower because of COVID-19. So they're dealing with this

1 flood of visas, visa applications. They have fewer workers  
2 to handle them. They have this backlog now from 2020.

3 I mean, I just feel very uncomfortable in, kind  
4 of, second guessing their prioritization. We are getting  
5 all of these cases in our court. You probably are bringing  
6 some of them, with some spouse saying that his wife is  
7 trapped in Saudi Arabia or somebody's family is in Pakistan  
8 or whatever. They all want to come in. They all have very,  
9 kind of, compelling stories.

10 As I understand it, nobody is guaranteed a visa.  
11 And the State Department is struggling with a backlog that  
12 they have to, kind of, sort through the best that they can.  
13 It strikes me that by saying, You are doing it the wrong  
14 way, A, I am not sure that that's my role; B, if it was my  
15 role, I am not sure that I would be in a better position  
16 than them to know that fiances should go to the bottom of  
17 the pool and DV visas should go to the top; and C, given all  
18 of that, as I think you are suggesting, there's a lot more  
19 people who want DV visas than who get them.

20 And so the bottom line is, even in a normal year,  
21 your client would not be guaranteed a spot. I don't know  
22 how your client would get to jump to the top of the line  
23 now.

24 MS. GREENBERG: I can address that. But before,  
25 can I address the issue of prioritization and people

1 having -- suing the government because their spouses or  
2 fiance is stuck in another country?

3 I even want to address the Trump's proclamation  
4 114. He made an exception to certain situation where there  
5 was an emergency or -- I don't remember the exact wording  
6 but in certain emergency situation people were allowed to  
7 apply and get visas and embassies did process those visas.

8 So my position is that if the government creates  
9 this prioritization, it has to be reasonable and it  
10 shouldn't be arbitrary and capricious. It has to have a  
11 reason why they decided to prioritize family immigration  
12 over DV visa applicants, knowing full well -- and I don't  
13 even know if they considered the fact that the DV visa  
14 applicants had a deadline that was approaching.

15 If I know that that was part of the equation. And  
16 I think this is just the beginning of this lawsuit. If we  
17 down the line would find out how the government came to this  
18 conclusion, I might concede. But at this point and from  
19 other lawsuits that were decided on the merits, it doesn't  
20 seem to me that the government was reasonable, and didn't  
21 act arbitrary and capricious.

22 THE COURT: I mean, just as an initial matter, I  
23 got to tell you my instinct is that a fiance of a U.S.  
24 citizen probably -- it strikes me as very reasonable that we  
25 would be prioritizing them over someone like your client who

1 -- you know, just kind of wants to come and is coming in  
2 under the diversity program, but doesn't have one of those  
3 familial ties.

4 MS. GREENBERG: True, Your Honor. But the fiance  
5 would ultimately get here. And if we -- if we deem that  
6 Congress decides who comes here or not -- well, to whom to  
7 give an opportunity to come to this country and the Congress  
8 said, We want to people from the low-level of immigration  
9 countries to diversify our country. We want educated  
10 people. We want people who, you know, somehow deserve to  
11 come and have this country thrive.

12 I think it is up to the Congress. If Congress  
13 intended to prioritize, let's say fiance over DV visa  
14 applicants, we wouldn't be here. My issue here is, there  
15 were a lot of things that were done wrong in this case and  
16 we are -- we would have probably discovery. Probably we  
17 would request the government to provide additional  
18 information and then decide.

19 All I ask this court is to preserve the unused  
20 visa for my client. Have we prevail, then she will be able  
21 to use it. Otherwise, in six days, the case will become  
22 moot, and there will be no line. We are not jumping ahead  
23 of line. We are willing to wait as much as it takes, if  
24 other people who are now in line will go ahead of us.

25 But the problem is, I don't see in other cases the

1 court ruling -- preserving visa numbers for others. So in  
2 six days there will be no line. We will be the only people  
3 in that line.

4 THE COURT: Yes, I think you recognize that as a  
5 little bit of a too cute of an argument. Right? You have  
6 jumped over everybody else who was in line, who is no longer  
7 in line at all, by your client being the only person in line  
8 for this one golden ticket that everybody else would have  
9 loved too.

10 MS. GREENBERG: True. And if Your Honor is  
11 amicable to preserve unused visa numbers for all applicants,  
12 that would be even better, because we wouldn't feel that,  
13 you know -- I would feel even good if not only my client but  
14 other people who got this one-in-a-lifetime chance to come  
15 to this country, will get this opportunity, and wait as long  
16 as it takes. If it takes one year or two years, we will  
17 wait. The problem is, there will be no line. The  
18 expiration will come. Nobody else is asking for this  
19 relief.

20 I know that there is a case currently pending  
21 before Judge Mehta. He might be ruling on this issue as  
22 well. I know that on September 9th he made a ruling that it  
23 was premature to reserve visa because we still had a month  
24 ahead of us. We are in a different position. We have six  
25 days.

1 THE COURT: So the government argues that I don't  
2 have the authority to do that. As you've pointed out,  
3 Congress set this deadline; and that it's not the right of  
4 the judicial branch to, kind of, nullify something that  
5 Congress has set. Why are they wrong?

6 MS. GREENBERG: I would refer to the ruling,  
7 again, by Judge Mehta in *Gomez versus Trump* where he ruled  
8 that he does have the authority. Because if he decides the  
9 government actions were illegal or, you know, in violation  
10 of the law, then he should preserve the status quo. So in  
11 *Gomez versus Trump*, the judge did reserve 9,225, I think,  
12 visas for 2020 DV applicants. I would just rely on their  
13 reasoning in that case.

14 THE COURT: Do you know -- I saw you cited several  
15 cases from Judge Mehta, and the government does not seem to  
16 agree with any of them. Is he out on a branch on that or is  
17 he relying on Circuit precedent or some other case law?

18 MS. GREENBERG: Please, Your Honor -- and if this  
19 is the only issue before this court, I am willing to brief  
20 and submit it the first thing Monday morning. I did read  
21 the decision he is relying on. Unfortunately, I don't have  
22 it in front of me.

23 THE COURT: Okay. You said it is *Gomez*?

24 MS. GREENBERG: *Gomez*, yes. There were multiple  
25 cases consolidated. There was *Gomez I*, *Gomez II* and *Gomez*

1        *III*, but I think it was *Gomez I* --

2                THE COURT: Versus Trump?

3                MS. GREENSBURG: Yes, Your Honor.

4                THE COURT: Okay. Anything else, ma'am?

5                MS. GREENBERG: I just want to touch upon the  
6 other factors, the irreparable harm to the movant. I don't  
7 think it is disputed here that she will be harmed by not  
8 being able to proceed with her DV visa application and it's  
9 irreparable. On September 30th, she will forever lose this  
10 opportunity to immigrate.

11                Whether the injunction would injure other  
12 interested people, because -- you know, the Department of  
13 State have not used the allocated 55,000 visas, so if there  
14 will be no line on September 30th, we are not jumping ahead  
15 of others. And whether it's a public interest, I think it's  
16 in public interest that the executive branch enforces the  
17 law as Congress intended it.

18                THE COURT: On the irreparable harm, I am not sure  
19 if the government exactly argues this, but you've got to  
20 show that the harm is certain. It strikes me that there's a  
21 very good chance your client wouldn't get a diversity visa  
22 regardless. Right? There's fewer visas than there are  
23 people who want them. So even if the government had been  
24 processing visas normally, and they were able to amazingly  
25 fill all 55,000 slots, your client still might not have had

1 one of those. How does that not undermine your certain  
2 irreparable harm there?

3 MS. GREENBERG: So my client visa number is  
4 24,000. And I just want to do quick math. I don't know if  
5 the government will use the same math. But in four months  
6 it was able -- with the prioritization scheme in place,  
7 which I contend that it's in violation of the law and they  
8 should have processed more. But in four months they  
9 processed 10,439 visas in just four months.

10 So had they started earlier doing that, given that  
11 my client's visa number is 24,000, she would have gotten it.  
12 This is my contention. If this court declares that the  
13 actions of the government were in violation of the laws,  
14 then it's pretty certain that my client would be able at  
15 least to have an opportunity -- we are not saying, Your  
16 Honor, that she is entitled to this visa. What we are  
17 saying is she is entitled to an opportunity to have it  
18 processed, and then the government can decide if she's  
19 eligible or not.

20 THE COURT: Where is the irreparable harm in that,  
21 though? If you are saying that -- you are agreeing you  
22 don't have the right to the visa. You are saying you have  
23 the right to the visa being processed. An unsuccessful  
24 determination doesn't feel like much of a harm. So if  
25 that's a realistic possibility, which I think I hear you



1 suggesting that it is, what's the difference between that  
2 and where you are now?

3 MS. GREENBERG: Well, I looked at my client's  
4 qualification. I don't see anything why she would be  
5 disqualified. She has high school diploma. In fact, she  
6 has a master's degree from the European University. She has  
7 no criminal record. She is not sick. So in theory, yes,  
8 it's possible. In practical -- and I'm an immigration  
9 attorney, I would -- I can conclude with 99.9 percent  
10 certainty that she would get it.

11 THE COURT: Okay. Thank you, Ms. Greenberg.

12 MS. GREENBERG: Thank you, Your Honor.

13 THE COURT: Mr. Weiland?

14 MR. WEILAND: Yes. Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. WEILAND: I think maybe a fine point to begin  
17 is with counsel's sort of assertion that it's up to Congress  
18 to decide. Looking at this from a very straightforward  
19 aspect, the relief she is requesting here is beyond your  
20 authority to provide. Congress has spoken clearly that the  
21 eligibility period for a diversity visa expires at the end  
22 of the fiscal year, September 30th.

23 We think the Supreme Court has been -- and other  
24 cases in this Circuit have been pretty clear -- they are not  
25 pointing to any authority, specific authority, of this court

1 to do so. And it would be entirely predicated upon this  
2 court's equitable powers. And those equitable powers cannot  
3 be used to set aside a congressional mandate that is quite  
4 clear as it is in the INA with regards to the period of  
5 eligibility.

6 So by asking you to reserve a visa from the fiscal  
7 year DV-21 -- the fiscal year 21 program over to fiscal year  
8 22 -- you are being asked to rewrite, if you will, or ignore  
9 the statute that says it doesn't carry over.

10 THE COURT: Would Judge Mehta agree with that?

11 MR. WEILAND: With respect, I don't know that he  
12 would, but then again the defendants don't agree with Judge  
13 Mehta on that point, because we think it is a clear mandate  
14 and that the equitable powers of the court don't go that  
15 far.

16 THE COURT: What did he rely on in *Gomez*?

17 MR. WEILAND: I'm understanding that he relied on  
18 his inherent authority to render an equitable decision in  
19 order to remedy what he has perceived as a legal wrong. And  
20 it is the defendant's position that as regettable as it is  
21 that someone might have their application expire at the end  
22 of the fiscal year, that happens every year, and has for a  
23 long time. The period of eligibility terminates on  
24 September 30th. There is no room within the INA to extend  
25 that.

1           The point is that if Congress does want to extend  
2 that period of eligibility, the ball is in Congress' court,  
3 not this Court's and not the Department of State's.

4           THE COURT: I'm trying to think. Every once in a  
5 while courts are asked to strike down statutes. Isn't that,  
6 essentially, an equitable power?

7           MR. WEILAND: No. No one is asking you to strike  
8 down the statute here.

9           THE COURT: Understood. But you are suggesting  
10 that the courts can't kind of dance around something that  
11 Congress has decided.

12           MR. WEILAND: I think if this court were to find  
13 that particular provision of the INA to be  
14 unconstitutional -- which has not been an allegation raised  
15 in here, and I don't think it could be -- there might be a  
16 path where this court might strike that portion of the  
17 statute. But there's not that issue before this court. And  
18 it certainly, I don't think, is one that would hold a lot of  
19 water as far as this court's ability.

20           THE COURT: Did the government appeal Judge Mehta  
21 in *Gomez*?

22           MR. WEILAND: Well, there's not yet a final order  
23 in *Gomez*. The judge has, as I understand it, ruled on the  
24 motions for summary judgment. He has indicated a sense that  
25 he will be reserving a certain number he had reserved in a

1 preliminary fashion last year, DV-20 visas, and he will be  
2 entering some sort of order about an adjudication of those,  
3 but that order has not come out. There is no final order  
4 yet.

5 Reading the *Gomez* opinion and also his opinions in  
6 *Goh*, *Goodluck* and *Filazapovich*, which are DV-21 cases, the  
7 court has clearly said that there is no right to any  
8 particular plaintiff for a diversity visa. And it's, I  
9 think, reasonably expected that Judge Mehta will enter an  
10 order that says a certain number need to be processed, but  
11 not that anyone in particular is going to receive the  
12 benefit of that.

13 Which goes to, I think, plaintiff's irreparable  
14 harm argument, here, which is that this court should reserve  
15 specifically a visa for her. And that, I assert, is based  
16 -- or the defendants assert is based on a false premise that  
17 being selected in the diversity lottery entitles one to a  
18 visa. It only entitles them to the opportunity to apply.  
19 And there are many wickets that have to be hit, if you will,  
20 before the visa can issue. And many, many lottery winners,  
21 folks who have signed up online and received the  
22 opportunity, don't get visas, even in years where we are not  
23 contending with a pandemic.

24 I think this was -- we provided a notice of  
25 supplemental authority yesterday, Your Honor. I think

1 Judge Kollar-Kotelly hit that point pretty clearly in her  
2 ruling on a set of facts and circumstances that are very  
3 similar to the facts and circumstances you have here.

4 THE COURT: All right. So I guess that's your  
5 first point, that you don't think I even have the authority  
6 to do this.

7 MR. WEILAND: Yes, sir.

8 THE COURT: But even if I did, you're suggesting  
9 -- and I think Ms. Greenberg has conceded this -- that  
10 there's no right -- you know, that this 55,000 number is a  
11 ceiling, not a floor. So if you don't adjudicate all of  
12 those, there's no problem.

13 MR. WEILAND: Yes, Your Honor.

14 Even in a year when there is no pandemic, there  
15 are other matters that sometimes preclude the Department of  
16 State from issuing every single possible diversity visa  
17 available under the statute. I think it's 1153(a) that says  
18 it shall not exceed 55,000 or the number in 1153(e), which  
19 is the 55,000 target.

20 Every year some are left on the table that don't  
21 get adjudicated. And that's because the State Department's  
22 -- the guidance from Congress -- and we would submit the  
23 objective here is to adjudicate as many as they can, take  
24 into consideration everything that is going on.

25 And the last two years, I don't think anybody in

1 this courtroom would wish that we have had to go through  
2 everything that has transpired over the last two years with  
3 regards to the pandemic. But it is real. It has had  
4 lasting consequences on both operations at KCC, as you see  
5 in the declarations, and also in the consulates overseas.

6 I would also submit that compounding the issue,  
7 with regards to this particular plaintiff, is this case is  
8 one that is assigned to the embassy in Moscow. There have  
9 been other factors beyond the control of the defendants with  
10 regards to the capacity of that particular consulate to  
11 operate as normal. The Russian government has taken a  
12 series of measures against the U.S. mission in the Russian  
13 federation that has severely curtailed their ability to meet  
14 the obligations of the State Department.

15 And it's a matter of, I would submit, extreme  
16 sensitivity that I think this court expressed some reticence  
17 of wading into the middle of decisions made by a chief of  
18 mission as to what is the best course of conduct with  
19 regards to ensuring he can operate and meet his or her  
20 mission safely and in the confines of the diplomatic  
21 relations of the United States.

22 THE COURT: So Ms. Greenberg has focused on the  
23 Kentucky service center, but it sounds like you don't think  
24 that's really where the pinch is.

25 MR. WEILAND: No, Your Honor. If you look at the

1 Miles' declaration, before the proclamation was rescinded --  
2 and I want to address that a little bit further -- but  
3 before it was resigned, KCC was already pushing out, in  
4 February of this year, already pushing out information to  
5 the consulates for slotting into appointments, with the view  
6 that it was going to expire. President Biden took action to  
7 terminate it ahead of its expiration date, but they were  
8 already working that as early as February.

9           The clear context of that is they can't push out  
10 applications in February, if they hadn't started working  
11 them beforehand. It's not an instantaneous thing. KCC  
12 wasn't sitting on its hands. It was -- consulates were  
13 scheduling with limited resources, scheduling those  
14 resources based on the priorities that they had in front of  
15 them.

16           The obligation to deal with not just the global  
17 backlog, which we think the declaration show exploded to  
18 almost 500,000 cases, but also the local backlog. When  
19 these consulates have to shut down, terminate appointments,  
20 send people home, there were folks who had interview slots  
21 who are now having to be rescheduled locally as well. It's  
22 not just the global backlog, but it's a compounding problem.  
23 You had an appointment in March. You're not going to be  
24 able to come in March? You have to come in April. You  
25 cannot come in April? You're going to have to come in May.

1 THE COURT: Remind me, which comes first, Kentucky  
2 or the consulate?

3 MR. WEILAND: Kentucky.

4 THE COURT: So is she through Kentucky?

5 MR. WEILAND: No.

6 THE COURT: Why does it matter what is happening  
7 at the Russian consulate?

8 MR. WEILAND: The reason she is not through,  
9 Kentucky is the end of the pipeline and the Russian  
10 consulate is small. I think the number was -- they shut  
11 down three of the four consulates. So there is only the one  
12 left in Moscow. They are operating at around 20 percent of  
13 capacity, I believe is the number. Don't quote me on this,  
14 Your Honor. It is more clearly stated in the declaration.

15 So you can only push so many cases through the  
16 pipeline to come out that end. In the declaration you will  
17 see there are at least 596 other people who are ready,  
18 documentarily qualified, ahead of her for the remaining  
19 interview slots in this fiscal year.

20 THE COURT: They'd have to be interviewed by the  
21 end of this month?

22 MR. WEILAND: I can -- if you give me a moment,  
23 Your Honor.

24 THE COURT: Sure.

25 MR. WEILAND: Your Honor, I am referring now to



1 Exhibit A of the defendant's submission, page --

2 THE COURT: This is the Miles' declaration?

3 MR. WEILAND: Yes, sir. Paragraph 17, Page 6 of  
4 that declaration, ECF Page No. 7. So as of September 21st,  
5 there are at least 596 cases representing 1375 diversity  
6 visa applicants ahead of her in the queue for Moscow? So,  
7 yes, they also have the impending deadline. She is behind  
8 them.

9 THE COURT: So you are saying that even if she was  
10 kind of cycled through Kentucky today, there's no way she  
11 would, absent some sort of extraordinary court order, be  
12 interviewed and get a visa by the end of this month.

13 MR. WEILAND: Right, Your Honor. I don't know  
14 where she is in the queue. There is also a bunch at KCC,  
15 but based on this information from Mr. Miles, there are at  
16 least 596 other cases, 1375 other applicants, ahead of her.  
17 So to get her in you would have to move her ahead of all of  
18 those folks, who have been waiting their turn.

19 THE COURT: So as I understand it, though, if you  
20 are not going to use all 55,000 spots this year because  
21 you're just not going to get to them, is she really jumping  
22 the line though if we're kind of taking a -- one of those  
23 55,000 spots, that is not actually going to be used anyway,  
24 and holding it for her?

25 MR. WEILAND: Yes, sir, because at least 596 cases

1 are in front of her. Right? They would also have the same  
2 or superior claim to one of those slots. So she would be  
3 jumping in line.

4 Even by preserving it past the September 30th  
5 deadline, which defendants don't believe this court can do,  
6 you would be moving her interests ahead of all of these  
7 folks who are similarly situated.

8 THE COURT: Can you respond to Ms. Greenberg's  
9 arguments about the potentially arbitrary and capricious way  
10 that State has prioritized other types of visas over DV  
11 visas?

12 MR. WEILAND: Yes, Your Honor.

13 First, I would submit that's not in her complaint.  
14 There's no 7062 claim here that the policy is arbitrary and  
15 capricious. So we don't think she can rely on that for the  
16 purposes of this motion. She hasn't brought that claim.

17 I believe Your Honor is asking about the November  
18 2020 prioritization scheme.

19 THE COURT: Yes. She is saying that, you know,  
20 the DV visas were pushed to the bottom. They are the only  
21 ones with this expiration date.

22 MR. WEILAND: Sure.

23 THE COURT: That kind of or perhaps suggests  
24 Congressional prioritization that the executive branch has  
25 ignored.

1 MR. WEILAND: Responding to that directly, Your  
2 Honor -- and I do want to touch on the no-visa policy  
3 assertion she made about the presidential proclamation,  
4 which, just real quickly, was over in February. She  
5 wouldn't have standing to complain about that. She filed  
6 her lawsuit in this case in July. There is nothing for this  
7 court to enjoin. The proclamation has been recinded. And  
8 the term, "no-visa policy", which is relatively opaque in  
9 her pleading, is a direct reference to Judge Mehta's term, a  
10 term he coined, which specifically means the State  
11 Department's legal position in policy that proclamation  
12 10014's, restriction on entry by operational law, rendered  
13 diversity visa selectees ineligible to receive a diversity  
14 visa.

15 Your Honor is not being asked in this complaint to  
16 render an assessment of that no-visa policy to the extent  
17 that that phrase is out there. There's never been a State  
18 Department policy memo on this front that says no-visa  
19 policy.

20 With regards to the question about the  
21 prioritization scheme, I think this goes to TRAC factors 1  
22 and 2, which we raised with regards to her failure to state  
23 a claim, which is the rule of reason. You will find in  
24 enclosure 1 -- enclosure B-1 of Mr. Lanning's declaration,  
25 the policy memorandum that lays out the specific thought

1 process of the State Department, it is a reasoned  
2 consideration based on their interpretation of the different  
3 priorities Congress has expressed in the INA. The INA's  
4 focus from the start, and for a long period of time, since  
5 the beginning, since the fifties, has been on family  
6 unification.

7 So it's not unreasonable, it's not irrational for  
8 the State Department to look at that and say, Given an  
9 environment in which we have limited resources available to  
10 adjudicate visas, given our focus on citizen services --  
11 first, that's an expectation of our citizenship or  
12 citizenry -- we will focus as much effort as we possibly can  
13 on bringing families together. U.S. citizens, spouses,  
14 their children, their minor children, is in the top  
15 category.

16 You will also see in that memorandum -- and it's  
17 exhibit 1 -- you will see that they prioritize special  
18 immigrants, those who have rendered a service to our country  
19 that merit some significant consideration. The most recent  
20 news on that is our Afgahn friends and allies who have  
21 sacrificed quite a bit to support us. And the State  
22 Department is focused on providing them. Fiances of  
23 American citizens is a priority.

24 When you look at -- I guess my point is, it is all  
25 based on a rule of reason. The State Department in their

1 understanding has gone and taken a hard look at the INA and  
2 said, This is how we need to work through these cases.

3 Now, the State Department is -- and I will note,  
4 Judge Mehta did issue a preliminary injunction in *Goodluck*  
5 where he said the prioritization scheme cannot be applied to  
6 diversity visa applicants, removing them from the November  
7 2020 guidance. And defendants are complying with that  
8 ruling. They have sent instructions to the field that the  
9 field is to make their best efforts to process diversity  
10 visas before the end of the year.

11 Judge Mehta was also clear he is not asking them  
12 to drop everything and do only diversity visas. He's not  
13 asking them to cancel appointments for spouses or minor  
14 children of U.S. citizens. He has just ruled that the  
15 prioritization plan cannot be used as a basis of denying  
16 them a slot.

17 The State Department has made their best efforts  
18 and has moved -- I think you will see in the numbers, the  
19 tables there, they are moving as much as they can. It's a  
20 bit of a math problem, if you will, Your Honor. There are  
21 only so many days left in the fiscal year and only so many  
22 people who can do the job.

23 THE COURT: Sure. Anything else, Mr. Weiland?

24 MR. WEILAND: If I could just have a moment, Your  
25 Honor.

1           Barring any further questions from the Court, Your  
2 Honor, I am happy to rely on our briefing.

3           THE COURT: Thank you.

4           MR. WEILAND: Thank you, sir.

5           THE COURT: Ms. Greenberg, I will give you the  
6 last word.

7           MS. GREENBERG: Thank you, Your Honor.

8           Your Honor, on the issue of whether in our initial  
9 petition we have requested this Court to review whether the  
10 agency actions were arbitrary and capricious. I would refer  
11 to column 2 of our petition where we brought this suit under  
12 the violation -- we allege that the defendant violated the  
13 Administrative Procedure Act, which provided court shall  
14 compel agency action unwilfully withheld or unreasonably  
15 delayed.

16           On the issue of the embassy in Moscow -- first of  
17 all, the Kentucky Consular Center has the ability to  
18 transfer cases, particularly DV cases from one consular post  
19 to another. And, in fact, on June 25th, I sent an email to  
20 the Kentucky consular service advising them that petitioner  
21 wanted to proceed with her case in Warsaw.

22           In Miles' declaration, Warsaw does process cases,  
23 and it has much less backlog than Moscow. From the top of  
24 my head I think it has currently over a thousand cases  
25 pending and already one-third of that being scheduled for an

1 interview.

2 Even if we have not emailed the Kentucky Consular  
3 Center, Ms. Miles also acknowledges that when they see that  
4 the embassy has no available slots or unable to process visa  
5 application, they can, by themselves, send cases to another  
6 consulate post. I don't understand why no cases from Moscow  
7 were transferred considering that in the chart that  
8 Ms. Miles provided there is zero interviews scheduled as of  
9 now in the U.S. embassy in Moscow.

10 And lastly, Your Honor, if the issue comes to  
11 whether you have authority to reserve unused visas, I would  
12 ask to provide this Court with supplemental brief as early  
13 as 9:00 on Monday, and give you a table of authorities as to  
14 why we think you do have that authority to reserve unused DV  
15 visas past September 30th deadline.

16 THE COURT: Okay. Thank you, ma'am.

17 Let's take a break. I will be back with you all  
18 shortly.

19 (Break.)

20 THE COURT: All right. Before the Court is  
21 plaintiff's motion for a preliminary injunction and  
22 temporary restraining order. Ms. Serakova has filed a  
23 complaint in this court challenging the government's failure  
24 to act on her application for a diversity visa. Under the  
25 applicable statutes and regulations, she will no longer be

1 eligible for that type of visa after September 30th, 2021,  
2 which marks the end of the fiscal year.

3 To avoid her case becoming moot on that date,  
4 Serakova asked this Court for a temporary restraining order  
5 and preliminary injunction to direct the government to  
6 reserve a diversity visa for her. That visa would be  
7 reserved past the fiscal-year deadline on September 30th.

8 This kind of preliminary relief is an  
9 extraordinary and drastic remedy that the court issues only  
10 upon a clear showing by the moving party; that's from *Winter*  
11 *versus Natural Resources Defense Counsel*, 555 U.S. 7, Page  
12 22 from 2008.

13 As an initial matter, I find that Serakova has not  
14 made a clear showing as to whether the Court has any  
15 authority to reserve diversity visas past September 30th.  
16 Under federal statutory law, someone selected in the lottery  
17 for a diversity visa remains eligible for that visa, "only  
18 through the end of the specific fiscal year for which she  
19 was selected". That is from 8 U.S.C. 1154(a)(1)(I)(ii).  
20 That eligibility runs out once the fiscal year ends.

21 Even sitting in equity this court, "cannot ignore  
22 the judgment of Congress as deliberately expressed in  
23 legislation." That's from *United States versus Oakland*  
24 *Cannabis Buyers' Co-op*, 532 U.S. 483, Page 497 from 1983.  
25



1           That is especially true in the area of immigration  
2           in which courts are without authority to sanction changes or  
3           modifications to the terms and conditions specified by  
4           Congress; that's from *INS versus Pangilinan*, 486 U.S. 875,  
5           Pages 883 to 884 from 1998. Yet Serakova asked the court to  
6           do just that. She applied for a visa in fiscal year 2021  
7           and accordingly remains eligible only for that fiscal year.  
8           The Court would flout statutory guidelines if it reserved a  
9           visa for her into the following year. This Court cannot  
10          take such an action contrary to the clear text of the  
11          statute.

12           In oral argument just now, we've been discussing a  
13          *Gomez* case from another judge of this district. I think  
14          there was perhaps some confusion over the citation, but I  
15          think the case that plaintiffs were referring to was  
16          490 F.Supp.3d 276, from 2020, *Gomez versus Trump*.

17           Another judge did reserve diversity -- some sort  
18          of visas -- I think it was diversity visas past the  
19          statutory deadline in reliance on *Almaqrami versus Pompeo*,  
20          933 F.3d. 774, where the D.C. Circuit, in 2019, rejected an  
21          argument from the government that a case was moot because a  
22          fiscal year deadline had passed, finding that it was not  
23          implausible that the District Court here could rely on  
24          equity to take steps to compel the issuance of diversity  
25          visas notwithstanding the end of FY-2017. That is from Page

1 781 of the D.C. Circuit case.

2 As I read that D.C. Circuit case, the D.C. Circuit  
3 suggests that Ms. Serakova may be right, that there may be  
4 authority to do this type of thing. I certainly don't think  
5 the D.C. Circuit held that. It merely found that a decision  
6 from the District Court was not moot and remanded to the  
7 District Court to do further consideration there.

8 My inclination is that I don't have the authority  
9 to do this for the reasons I stated, but I know the  
10 plaintiffs have sought to do additional briefing on this.  
11 Obviously, this is a very short time frame, and I think this  
12 is something of a close call on that question. So rather  
13 than have the plaintiff do further briefing, I am going to  
14 go on and even assuming that the plaintiff was right that I  
15 do have the authority to grant this type of relief, I would  
16 not grant the relief for these additional reasons.

17 First, Congress allows for approximately 55,000  
18 diversity visas per fiscal year. As both parties agree,  
19 that number is a ceiling, not a floor. Indeed, the State  
20 Department has awarded fewer visas than that in recent  
21 years. I'm looking to the government's opposition at Page  
22 3. And as the government notes, the State Department's own  
23 website for the diversity visa expressly says that  
24 applicants are not guaranteed a visa simply if they are  
25 picked in the lottery. That is from Page 4 of the

1 government's opposition.

2 Serakova was picked in the lottery, but that makes  
3 her merely eligible. She must then submit documents and be  
4 scheduled for a consular interview. Nothing requires that  
5 all of those steps must occur before September 30th, and  
6 indeed, it doesn't for many people. As I said, that 55,000  
7 number is just a cap.

8 I therefore find that Serakova has not made a  
9 clear showing that she has a right to a diversity visa at  
10 all, much less to have such a visa reserved for her beyond  
11 September 30th.

12 And even if the Court is wrong about its authority  
13 and about her entitlement to having a diversity visa  
14 reserved for it, I still believe that the contents of her  
15 complaint would not justify the extraordinary relief of a  
16 TRO or a preliminary injunction under the *Winter* factors.

17 To do that, she must show a likelihood of success  
18 in the merits of her claim. Second, that she will likely  
19 suffer irreparable injury in the absence of the TRO. Third,  
20 that the balance of equity tips in her favor. And fourth,  
21 that the proposed order advances the public's interest.  
22 Those last two factors merge when the government is the  
23 defendant.

24 For her APA claim, Serakova has not clearly shown  
25 a likelihood of success on the merits. I reach this

1 conclusion based in large part on my analysis in a very  
2 similar case, *Dastagir versus Blinken*, 2021 West Law  
3 2894645, from earlier this year. There the plaintiff, like  
4 Serakova, objected to the delayed processing time for a visa  
5 application submitted to the U.S. embassy in Moscow.

6 This Court reviewed the six TRAC factors and found  
7 that the 29-month delay was reasonable in light of COVID-19  
8 and the Russian government's restrictions that Russian  
9 nationals could not work in the U.S. embassy. I think a  
10 very similar analysis would apply here, and I incorporate  
11 the analysis from that case by reference.

12 Serakova has dealt with a much shorter delay on  
13 her visa, and the circumstances on the ground in Russia have  
14 continued, providing ample justification for that delay.  
15 The government cannot control pandemics, nor can they  
16 control restrictions imposed by third-party governments.

17 Serakova asserts in her reply that the lack of  
18 staffing in Moscow has nothing to do with the delay in  
19 processing her visa. She instead lays blame at the Kentucky  
20 Consular Center. But as I understand it, to obtain a visa,  
21 she must have an interview at the embassy. Thus, even if  
22 the consular center had forwarded her materials, the  
23 conditions at Moscow might help explain any delay in  
24 processing her visa, thus the lack of staffing there, to say  
25 nothing of COVID restrictions, remains relevant.

1           Here at oral argument, counsel for Serakova also  
2 mentioned the Warsaw office. But, again, I think the same  
3 general issue applies where there are hundreds of people who  
4 are seeking these interviews in the last few days of the  
5 fiscal year. And I find that the plaintiff has not shown  
6 why the Court can or should insert itself and order the  
7 center to handle her request before any other. Such an  
8 order interferes with the agency's unique position to  
9 allocate its own resources in an optimal way.

10           More, Ms. Serakova asked to be placed at the front  
11 of the line for diversity visa, ahead of many others waiting  
12 for one. As recognized by several courts in this district,  
13 the agency is best situated to deal with immigration  
14 backlogs and to adjust resources accordingly. I am looking,  
15 for instance, in addition to *Dastagir*, to *Tate versus*  
16 *Pompeo*, from this district earlier this year.

17           I know Ms. Greenberg argues she's not really  
18 asking for her client to be put to the front of the line,  
19 but rather that she would be the only one left in the line.  
20 Frankly, I think however we describe it, she's asking for  
21 her client to receive special treatment that other people  
22 who are ahead of her, who sent their materials in ahead of  
23 her, who have gone through the consular center ahead of her,  
24 who have equally compelling reasons for wanting to come to  
25 the United States, why she is leap frogging them, and they

1 are going to be left without visas.

2 More, if I am ordering the government to give her  
3 special treatment, it's hard to see how that wouldn't  
4 disadvantage someone else who the government would be  
5 interviewing instead, whose paperwork they would be  
6 processing instead. I don't think it is appropriate for me  
7 to micromanage that process.

8 And although this Court sympathizes with  
9 Serakova's predicament, she is not alone. The Court cannot  
10 override how the agency has chosen to triage so many  
11 competing applicants for a diversity visa. Also, here in  
12 oral arguments, we discussed whether there was something  
13 arbitrary and capricious about the way that the government  
14 has prioritized some of these family-related visas over the  
15 diversity-related visas.

16 I am not sure that's really before me, but in any  
17 event, I don't think under the preliminary injunction  
18 standards, the plaintiff has shown that there's anything  
19 arbitrary or capricious with the government prioritizing  
20 family separation cases over cases like the defendant, who  
21 is primarily just seeking to come to the United States for  
22 the first time and with no similar familial ties to the  
23 country.

24 The same analysis would pertain for the mandamus  
25 claim. She must show she has a clear right to the relief

1 she seeks. As the Court has already noted, she has not  
2 clearly shown her right to a diversity visa in fiscal year  
3 2021, despite being picked in the visa lottery. Nor has she  
4 shown, for the reasons already stated, that she has a clear  
5 right to the reservation of visas beyond the statutory  
6 deadline of September 30th.

7 Thus, I find in both of her claims, Serakova has  
8 not shown a clearly likelihood of success in the merits, and  
9 she therefore has not met the first *Winter* factor. That  
10 alone would justify, again, denying the preliminary  
11 injunction. But I also find that she has not clearly shown  
12 irreparable injury here. As I said, the Court sympathizes  
13 with her difficulties, but she is in the same boat as a lot  
14 of other people.

15 As I said, and as Ms. Greenberg admits, she's not  
16 claiming that she's entitled to a visa. She's claiming that  
17 she's entitled to a visa adjudication. It's not clear to me  
18 how failing to get a visa adjudication is a certain  
19 irreparable injury here. For all of those reasons I find  
20 that irreparable harm has not been shown.

21 Finally, the third and fourth *Winter* factors  
22 combined, because the government is the non-moving party,  
23 Serakova has not clearly shown that the equities tip in her  
24 favor or that a TRO is in the public interest

25 As I mentioned earlier, her motion would vault her

1 to the head of the line for a visa; that maneuver would  
2 incur further delays for other applicants. The State  
3 Department would also be unable to direct its resources as  
4 it sees fit. Eliminating agency resources in this way is  
5 particularly problematic when faced with COVID and  
6 restrictions from local governments. For all these reasons,  
7 the Court denies the motion for a preliminary injunction and  
8 for a TRO.

9 All right. Ms. Greenberg, I think at this point  
10 we just proceed with the complaint; is that your  
11 understanding, ma'am?

12 MS. GREENBERG: Yes, Your Honor.

13 THE COURT: Okay. I think the government -- well,  
14 the government has still not yet been properly served. I'll  
15 just note, ma'am, federal rule of civil procedure 4.1  
16 requires that a plaintiff must deliver the summons and  
17 complaint to the United States attorney. I've seen -- the  
18 only information I've seen from you is that you've mailed  
19 your materials to the U.S. Attorney's Office. I don't think  
20 that is sufficient process under the federal rules.

21 Federal rule of civil procedure 4 also requires a  
22 plaintiff to send by registered or certified mail the  
23 complaint to the attorney general of the United States. It  
24 looks to me that you sent them by first class mail, but I'll  
25 ask you, just to make sure, that you are doing proper



1 service on the United States. And I'll look for the  
2 government's response in due course.

3 Ms. Greenberg, anything further for plaintiff?

4 MS. GREENBERG: No, Your Honor.

5 THE COURT: And Mr. Weiland?

6 MR. WEILAND: Nothing further, Your Honor. Your  
7 last explanation about service cleared up our question.

8 THE COURT: Okay. Thanks, folks. Have a good  
9 weekend.

10 MS. GREENBERG: You too. Thank you.

11 (Proceedings concluded at 3:56 p.m.)

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C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court Reporter**, certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

\_\_\_\_\_  
**DATE**

/s/ \_\_\_\_\_  
**Lorraine T. Herman**