IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

B.R., ***a minor*** c/o House with Heart Chamuda Gate Road Kathmandu, Nepal **AARON SKALKA** 720 Fantail Court Annapolis, MD 21401 **EMMA SKALKA** 720 Fantail Court Annapolis, MD 21401 Plaintiffs, v. **ANTONY J. BLINKEN**, *in his official capacity as* Secretary of the U.S. Department of State c/o Executive Office Office of the Legal Advisor Suite 5.600, 600 19th St. NW Washington DC 20522 **UR M. JADDOU**, *in her official capacity as* Director of United States Citizenship and Immigration Services 5900 Capital Gateway Drive Mail Stop 2120 Camp Springs, MD 20588-0009 Defendants.	C/A No. 1:22-cv-1908-TSC **FIRST AMENDED COMPLAINT** for Declaratory and Injunctive Relief Under the APA and Rights Protected Under the First and Fifth Amendments to the United States Constitution

BASIS FOR CONSENT AMENDED COMPLAINT

On July 1, 2022, Plaintiffs filed their Complaint, ECF No. 1. The parties attempted to resolve the outstanding issues and periodically filed joint status reports with the Court. ECF Nos. 5, 7, 8, 9, 10. On March 3, 2023, Defendant, Ur. M. Jaddou denied an application for

humanitarian parole Plaintiffs Emma and Aaron Skalka filed on behalf of their daughter, B.R. Defendants Jaddou and Antony J. Blinken, in their official capacities as Director of United States Citizenship and Immigration Services ("USCIS") and Secretary of the United States Department of State, admit they have "administratively closed" the Skalkas' Form I-600, Petition to Classify Orphan as an Immediate Relative, filed on behalf B.R. on December 2, 2015. Nothing in the Immigration and Nationality Act ("INA") or regulations permit the suspension of an adoption petition and, in fact, forbids the type of discriminatory treatment to Nepali immigrant orphans, like B.R. At bottom, this case is about an unlawful usurpation of power not delegated from Congress that has prevented an adopted child from the love and care of her parents.

With the consent of Defendants, Plaintiffs hereby file this amended complaint pursuant to Rule 15(a)(2) to make immaterial corrections and amend a cause of action to challenge the arbitrary, capricious, and unlawful denial of humanitarian parole. Now that Defendants have admitted they will *never* decide Plaintiffs I-600 petition, this Court should compel Secretary Blinken and Director Jaddou to act in accordance with law. The violations of the Administrative Procedure Act ("APA"), the INA, and regulations are set forth herein.

INTRODUCTION

1. Defendants will not decide the Skalkas' I-600 petition that has been pending for eight years due to discriminatory ban on *deciding* immigrant visa petitions filed on behalf of Nepali children by their adopted, United States citizen parents.

2. Thirteen years ago, without notice and comment, Defendants unilaterally and unlawfully imposed an "initiative" that closed off the ability of United States citizens to sponsor their adopted Nepali children for immigrant visas.

3. The policy was instituted for orphans abandoned in hospitals in January 2015 with the stroke of pen and issuance of a memorandum without public input.

4. The administrative rule violates the rights of United States citizen parents in the protection and preservation of "family relationships." *Moore v. East Cleveland*, 431 U. S. 494 (1977).

5. Plaintiff B.R. is a 12-year-old minor and citizen and national of Nepal.

6. B.R. is the adopted child of Plaintiffs Aaron and Emma Skalka ("the Skalkas") who are United States citizens.

7. Defendants' refusal to act on the Skalkas' immigrant petition for their daughter has caused B.R. to remain in an orphanage for *eight years*.

8. Defendants, Secretary of State Antony Blinken and Director Ur M. Jaddou, through their respective delegates at the Department of State and USCIS have: 1) unlawfully and unreasonably refused to recognize the validity of Plaintiffs' parent-child relationship through unlawfully withholding an adjudication of Plaintiffs' Form I-600, *Petition to Classify Orphan as an Immediate Relative* ("I-600 petition"); and 2) failed to provide a rational, lawful decision to refuse processing and deny B.R.'s alternative application for humanitarian parole for purposes of seeking immediate and urgent medical care.

9. This Court should end this dark chapter of administrative misfeasance and allow the Skalkas to share their life and love with their child.

PARTIES

10. Plaintiff B.R., a minor, citizen and national of Nepal. She is the adopted child of Mr. Aaron Skalka and Ms. Emma Skalka.

11. Plaintiff Aaron Skalka is a United States citizen who resides in Annapolis, Maryland. He is the father of B.R. and spouse of Emma Skalka.

12. Plaintiff Emma Skalka is a United States citizen who resides in Annapolis, Maryland. She is the mother of B.R. and the spouse of Aaron Skalka.

13. Defendant Antony J. Blinken is the Secretary of State and has responsibility for overseeing enforcement and implementation of the consular decisions to process and issue visas. He is sued in his official capacity.

14. Defendant Ur M. Jaddou is the Director of USCIS. In her official capacity, Director Jaddou oversees the adjudication of all immigration benefits petitions, including requests for humanitarian parole. USCIS also shares adjudicatory authority with DOS on Form I-600 petitions. Director Jaddou is sued in her official capacity.

JURISDICTION AND VENUE

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

16. The Court may also compel agency action that is unlawfully withheld or unreasonably delayed, or which is contrary to law, an abuse of discretion, arbitrary or capricious. 5 U.S.C. §§ 555(b), 706(1), 706(2)(A).

17. Venue is proper under 28 U.S.C. § 1391(e) because this is a civil action in which Defendant is a federal officer of the United States and a substantial part of the events or omissions giving rise to the claims occurred in the District of Columbia. The Department of State's main headquarters remain located in the District and USCIS decides all applications for humanitarian parole in this District.

18. Plaintiffs have exhausted all requisite administrative remedies.

19. The doctrine of consular non-reviewability does not preclude review of Plaintiffs' meritorious challenges to either the denial of humanitarian parole or the withholding of an adjudication of their I-600 petition. *See Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry ("Nine Iraqi Allies")*, 168 F. Supp. 3d 268, 290 (D.D.C. 2016) ("[T]he doctrine of consular nonreviewability is not triggered until a consular officer has a made a decision with respect to a particular visa application.").

20. First, Defendants have unlawfully withheld action and unreasonably delayed adjudication of their I-600 petition, which does not constitute a final denial of a visa abroad.

21. Second, Defendants' ban on processing I-600 petitions for Nepalese children, which is a legislative rule that did not follow notice-and-comment rulemaking, violates 8 U.S.C. § 1152(a)(1)(A) by giving preference, priority or discriminating against Plaintiffs by foreclosing their ability to receive an adjudication on a properly filed and paid for Form I-600 petition *because* the immigrant applicant is a national of Nepal.

22. Third, the March 3, 2023 denial of humanitarian parole does not implicate the doctrine of consular nonreviewability.

23. Fourth, the doctrine of consular nonreviewability does not override Plaintiffs' right to defend their liberty intertest in a parent-child relationship under the Fifth Amendment's Due Process Clause.

24. Plaintiffs have standing before the Court. Defendants' unlawful actions, both procedural and substantive, continue to cause Plaintiffs a concrete and particularized injury that would be redressed by a favorable ruling. Defendant's have refused to decide a properly filed immigrant petition by United States citizens on behalf of their adopted child. The policy that

will shut off any adjudication is a legislative rule instituted without notice and comment. At a minimum, the rule violates the INA's mandatory duty to classify immediate relatives as immigrants and not engage in discriminatory actions against intending immigrants on the basis of nationality, residence, or origin. USCIS has also arbitrarily and capriciously denied the Skalkas' petition for humanitarian parole. The numerous failures and unlawful actions of Defendants have caused prolonged family separation and violated the Skalkas statutory and constitutional rights. An order from the Court to compel a decision on their I-600 petition and set aside the denial of humanitarian parole would redress the injuries.

STATUTORY BACKGROUND

I. Immigrant Visas

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

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

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

28. Immigrant visas are thus issued to foreign nationals intending to relocate permanently to the United States. *See United States v. Idowu*, 105 F.3d 728, 731 (D.C. Cir. 1997).

29. The INA codifies four central tenants of U.S. policy on legal permanent immigration: family reunification; the admission of immigrants with needed skills; the protection of refugees and asylees; and the acceptance of a diverse set of immigrants by country of origin. William A. Kandel, *Congressional Research Service, Permanent Legal Immigration to the United States: Policy Overview* 1 (2018).

30. "Family reunification occurs primarily through family-sponsored immigration. U.S. labor market contribution occurs through employment-based immigration. Humanitarian assistance occurs primarily through the U.S. refugee and asylee programs. Origin-country diversity is addressed through the Diversity Immigrant Visa." *Id*. at i.

31. The INA, 8 U.S.C. §§ 1151-1154, provides a complex scheme for the allocation of two categories of family visas: Immediate Relatives; and Family-Sponsored Preference Relatives. *Mandel*, at 2-3.

32. "Immediate relatives" are defined in the INA as: "the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." 8 U.S.C. § 1151(b)(2)(A)(i).

33. The INA divides Family-Sponsored Preference Relatives into five categories: 1st Preference, the unmarried children of U.S. citizens; 2nd Preference (A), spouses and minor children of LPRs; 2nd Preference (B), the unmarried sons and daughters of LPRs; 3rd Preference, married sons and daughters of U.S. citizens; and 4th Preference, siblings of adult U.S. Citizens. 8 U.S.C. §§ 1153(a)(1)-(4).

34. There is no limit on the number of immediate relative visas, *see* 8 U.S.C. § 1151(b), but the various categories of Family-Sponsored Preference Immigrants have statutory floors and ceilings for the number of visas available each year based on the INA's overall cap which stands at 480,000. 8 U.S.C. § 1151(c), § 1153(a).

35. The definition of a "child" includes:

> a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter

8 U.S.C. § 1101(b)(1)(E)(i).

36. The definition of "child" also includes orphaned children defined as:

> a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen who is at least 25 years of age, at least 1 of whom personally saw and observed the child before or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter . . . .

8 U.S.C. § 1101(a)(1)(F)(i).

II. Process to Classify an Orphan as an Immediate Relative

37. A United States citizen or citizen parents who seeks to classify a "child" adopted outside the United States in a country that is not a signatory to the Hague Convention on adoptions must file a Form I-600 petition, Petition to Classify Orphan as an Immediate Relative. https://www.uscis.gov/i-600 (last visited June 8, 2023); https://www.uscis.gov/forms/explore-my-options/orphan-adoption-process (last visited June 8, 2023).

38. There is a separate immigration process for adopted children who habitually reside in any country outside of the United States that is a party to the Convention. *Id*.

39. In non-Convention cases, a consular officer with the State Department is required to conduct what is known as a "I-604 investigation" into the validity and veracity of the orphaned child upon the filing of a I-600 petition. 8 C.F.R. § 204.3(k)(1).

40. If the consular officer confirms the veracity of the orphaned child, he or she will adjudicate the Form I-600. *Id*; 8 U.S.C. § 1101(a)(1)(F)(i).

41. However, if the consular officer determines the application is "not clearly approvable" based on the investigation, he or she will refer to the application to USCIS. 8 C.F.R. § 204.3(k)(2).

42. The consular officer must indicate and disclose "indications of fraud, child buying, or other non-bona fide intent." *Id*.

43. USCIS is responsible for reviewing the investigation report and issuing a final determination on the Form I-600 petition. *Id*.

44. USCIS must provide the adoptive parents of the orphan with the opportunity to present contrary evidence. *Id*.

45. Under 8 U.S.C. § 1154(b), USCIS "*shall*" if the agency "determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b) of this title or is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status." *Id*. (*italicized emphasis added*)

46. Once USCIS approves the visa petition, it sends the petition to the Department of State's National Visa Center for an application to be made and issuance of a visa at a consulate abroad. 8 U.S.C. §§ 1201-1202.

III. The Ban on Processing I-600 Petitions for Nepalese Orphans ("Nepal Initiative")

47. On August 6, 2010, DOS suspended the investigation and adjudication of new orphan cases from Nepal. *Nepal Initiative – Filing Form I-600, Petition to Classify Orphan as an Immediate Relative, to Adopt a Child in Nepal; Revision to Chapter 21.5(d) of the Adjudicator's Field Manual (AFM), AFM Update AD10-47*, PM 602-0008 (Aug. 27, 2010) ("Nepal Initiative").

48. DOS did not follow notice and comment rulemaking prior to issuing the Nepal Initiative.

49. Without initiating notice and comment rulemaking of its own, USCIS also suspended the regulatory investigatory and petition process for parents seeking to petition for adopted children in Nepal. *AFM Update AD10-47*, PM 602-0008 (Aug. 27, 2010).

50. The "Nepal Initiative" banned I-600 adjudications unless the petition met one of two listed exemptions. PM 602-0008 at *2.

51. The first exemption applied where the prospective adoptive parents "received a referral letter from the Government of Nepal's Ministry of Women, Children and Social Welfare before August 6, 2010, informing the prospective adoptive parents of a proposed match." *Id*.

52. The second exemption applied where the prospective adoptive parents sought "to adopt a Nepali child who has been relinquished by known parent(s) and whose identity and relationship can be confirmed." *Id*.

IV. Humanitarian Parole

53. In addition to immigrant and nonimmigrant visas, the Secretary of Homeland Security is authorized "to parole any [noncitizen] into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

54. USCIS receives and adjudicates applications for humanitarian parole made on behalf of noncitizens who are outside the United States. https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests (last visited June 8, 2023).

55. A grant of humanitarian parole allows noncitizens to enter the United States temporarily, often for one year, during which they may apply for asylum or other immigration benefits, if eligible. *Id*.

56. Any individual may apply for humanitarian parole on behalf of a noncitizen overseas (or the noncitizen may self-petition) by filing with USCIS a Form I-131 Application for Travel Document and a Form I-134 Affidavit of Support from a sponsor that is willing to provide financial support if needed. *Id*.

57. USCIS charges an application fee of $575 for every application for humanitarian parole. *Id*.

58. At USCIS, humanitarian parole applications are adjudicated by the agency's Humanitarian Affairs Branch.

59. Historically, USCIS has granted humanitarian parole for adopted children in a wide variety of situations, including medical treatment in the United States.

60. When USCIS approves an application for humanitarian parole, a noncitizen generally must then travel to a U.S. consulate to be screened and interviewed.

61. If a noncitizen is approved for travel by the consulate, the U.S. Department of State issues a travel document facilitating air travel to the United States.

STATEMENT OF THE FACTS

62. In 2010, the Skalkas successfully adopted a child, Benjamin, from Nepal and petitioned for his admission to the United States.

63. They have cared for him in the United States.

64. Having successfully navigated the process to adopt and emigrate Benjamin, on June 3, 2015, Aaron and Emma Skalka filed a Form I-600 with USCIS on behalf of B.R., who was about to celebrate her fifth birthday.

65. Eight years later, Plaintiffs remain waiting for USCIS to decide the visa petition.

66. USCIS and DOS have admitted to "administratively closing" the case and have no intention of deciding the petition.

67. B.R. has remained in an orphanage the entire time.

68. B.R. was born on August 18, 2010. *See* Exhibit A (Nepal Children's Organization, Children's Admission Form); Exhibit B (Certificate of Birth Registration).

69. B.R.'s birth mother was named Ms. Nimala Rai, who abandoned the child shortly after her birth. Exhibits A & B.

70. The maternity hospital administrator at the Paropakar Maternity Hospital averred that: 1) Nirmala Rai was admitted to the hospital on August 18, 2010; 2) she gave birth to a baby girl; 3) Nirmala Rai "absconded" from the hospital on August 20, 2010; and 4) the hospital could not contact Ms. Rai because she did not provide her correct information upon her admittance to the hospital. Exhibits A, B &C.

71. A police report from the Superintendent of Police, Police Head Office, Crime Investigation Department, Central Police Service Center for Women and Children, Kathmandu, Nepal, indicated that dispatches regarding abandoned children did not identify an inquiry for B.R. Exhibit C.

72. A "Notice to Come Collect Children" published in Nepalese newspapers in September and November 2010 identified B.R. and requested anyone with information to contact the Nepal Children's Organization. *Id*.

73. B.R. remained in the maternity ward until September 23, 2010, when she transferred to an orphanage run by the Bal Mandir or Nepal Children's Organization. Exhibit C (USCIS letter to the Skalkas); Exhibit D (2018 investigation report).

74. B.R. has suffered severe trauma, including emotional, physical, and likely sexual abuse while in the orphanage.

75. B.R. needs long-term medical care that is only available in the United States.

76. Despite no indicia of fraud or evidence to doubt the veracity of B.R.'s status as an orphan, USCIS informed the Skalkas that their I-600 petition was subject to the 2010 ban on

processing and "administratively closed" adjudication of the petition because B.R. was a citizen and national of Nepal. *Id*.

77. USCIS agreed that B.R. was an abandoned orphan. *Id*.

78. USCIS found, however, that the Skalkas petition fell within the "suspension" on intercountry adoptions from Nepal and did not qualify for an exemption because the Skalkas did not identify the child's biological father. *Id*.

79. USCIS confirmed that "no further action" would be taken until the agencies agreed to "lift" the suspension. *Id*.

80. On January 20, 2016, the Skalkas joined three other adoptive parents of Nepalese orphans and the Frank Adoption Center. *Skalka v. Kelly*, 246 F. Supp. 3d 147, 151 (D.D.C. 2017).

81. The Plaintiffs in *Skalka* argued that USCIS had violated a nondiscretionary duty to process I-600 petitions and conduct I-604 investigations. *Id*.

82. The Plaintiffs sought an order from the court compelling action on their I-600 petitions. *Id*.

83. On March 31, 2017, the Court granted the government's motion to dismiss finding that the "suspension is both lawful and reasonable." *Id.* at 153.

84. The Court did not consider whether the 2010 ban on adjudications of orphaned Nepali children constituted a legislative rule that unlawfully bypassed notice-and-comment rulemaking, the mandatory duty 8 U.S.C. § 1154(b) to approve bona fide immigrant visa petitions, whether the ban contravened Plaintiffs constitutional rights or the statutory protection against national origin discrimination when seeking an immigrant visa. *Id*. at 153-54.

85. Notwithstanding that the Court recognized that "the nature of plaintiffs' interests, and that of any orphans in Nepal who would be adopted, is of the most sensitive kind and most certainly involves 'human health and welfare,'" the Court found it inappropriate to interfere with the agencies judgment in temporarily suspending the adjudication of I-600 petitions for Nepalese orphans. *Id*. at 154.

86. In doing so, the Court emphasized that it had only been 2 years since Plaintiffs submitted their petitions and found "this length does not typically require judicial intervention." *Id*.

87. The Court cautioned that "as long as the agencies are regularly revisiting the question whether they can rely on Nepalese sources to provide accurate information, then they are not delaying materially longer than necessary." *Id*. at 154.

88. The Court identified that "[t]he agencies have represented, and the Court has no reason to doubt, that when the situation in Nepal is improved to the point of reliability, the couples' petitions will be reviewed with due haste." *Id*.

89. "Accordingly," the Court concluded "there is no plausible cause of action *at this time* under either the APA or the Mandamus Act because the agencies' action has not been unlawfully withheld or unreasonably delayed." *Id*. at 154-55 (emphasis added).

90. The Skalkas timely filed an appeal of the judge's order with the D.C. Circuit Court of Appeals.

91. They subsequently dismissed the appeal based on affirmative assurances from government officials that USCIS would act favorably on an application for humanitarian parole so B.R. could enter the United States and seek medical treatment.

92. On April 26, 2017, the Nepalese Government through its Ministry of Women, Children, and Social Welfare, issued a final adoption decree to the Skalkas for B.R. Exhibit E (final adoption decree).

93. In 2018, the Skalkas initiated their own investigation to locate B.R.'s birth parents to satisfy USCIS and extricate their daughter from Nepal. Exhibit D.

94. The investigator zeroed in on the village where Nirmala Rai (birth mother) likely lived and visited over 50 houses in search of B.R. *Id*.

95. The investigation revealed that B.R. hid her pregnancy because of the disdain and shame that the tight-knit community has for out-of-wedlock pregnancies. *Id*.

96. The investigation failed to locate B.R. but confirmed the factual circumstances of B.R.'s birth and chain-of-custody thereafter. *Id*.

97. Meanwhile, on July 28, 2017, B.R. filed for humanitarian parole. Exhibit F (2017 parole application).

98. The application included documents describing B.R.'s urgent need for medical treatment, the Skalkas plans for their daughter's treatment, and photographs documenting B.R.'s physical injuries in her current residence. *Id*.

99. On December 19, 2017, USCIS denied the request. *See* Exhibit M (denial notice).

100. The Skalkas timely sought reconsideration of USCIS' decision, with evidence that included: 1) a letter from a Regional Staff Counselor at UNICEF describing the urgent need for medical care in the United States; 2) evidence refuting the notion that the Skalkas could relocate to Nepal for two years and then return with their daughter; and 3) a letter from Senator Ben Cardin to the Skalkas confirming that the decision on parole lay solely with USCIS. Exhibit G (reconsideration request).

101. On March 9, 2018, USCIS refused to reconsider its prior decision. Exhibit H (USCIS denial of reconsideration).

102. USCIS found that the evidence failed to "overcome" the agency's prior findings that humanitarian parole was unwarranted because the Skalkas could relocate to Nepal for two years and the agency had suspended intercountry adoptions for Nepalese children. *Id.*

103. On January 9, 2020, B.R. submitted a new application for humanitarian parole. Exhibit I (2020 parole request).

104. B.R. submitted new evidence showing that: 1) she needed urgent medical care to treat her emotional, physical and sexual abuse; 2) the treatment remained unavailable in Nepal; 3) the Skalkas would care for their child and pay medical expenses; 4) the government had denied all prior immigration benefit requests; and 5) a favorable grant of parole would allow the Skalkas to file a petition for permanent residency on behalf of their daughter. Exhibit I.

105. On February 6, 2020, USCIS sent B.R. a request for evidence and the Skalkas provided detailed evidence in response to each point raised in the RFE. Exhibit J (RFE).

106. USCIS requested updated financial information for the Skalkas as well as information about how the Skalkas "were involved in" B.R.'s "day to day life." *Id.*

107. USCIS further requested an updated letter from a physician in Nepal who recently treated B.R. to explain her diagnosis and the need for treatment in the United States. *Id.*

108. USCIS also requested additional evidence to show that the Skalkas could not relocate to Nepal for 2 years to complete the immigration process from Nepal. *Id.*

109. USCIS further asked for information on the guardian who would accompany B.R. to the United States as well as information for her caretaker in Nepal to schedule an appointment if parole were approved. *Id.*

110. B.R. timely responded to the request for evidence. Exhibit K (RFE response).

111. B.R. detailed her current living conditions at the "House with Heart Children's home in Kathmandu, Nepal, where she is one of a few dozen residents." *Id*.

112. B.R. also described her communication and contact with the Skalkas and her brother in the United States. *Id*.

113. The Skalkas further documented their financial well-being and careers in the United States as well as the extreme difficulty and economic imposition on relocating to Nepal for two years. *Id*.

114. The Skalkas agreed that they would fly to Nepal and accompany B.R. to the United States upon a grant of parole. *Id*.

115. On July 17, 2020, USCIS denied B.R.'s request for humanitarian parole. Exhibit L (denial notice).

116. Without discussing any evidence of record, USCIS concluded that B.R. "failed to establish by a preponderance of the evidence that there are urgent humanitarian reasons or significant public benefit reasons that would justify a favorable exercise of discretion to parole the beneficiary into the United States." *Id*.

117. On August 22, 2022, after filing a complaint in this case, ECF 1, the Skalkas filed another application for humanitarian parole.

118. The Skalkas provided updated information showing a present and urgent need for B.R. to receive medical treatment in the U.S. and that such treatment was unavailable at the orphanage and throughout Nepal.

119. This evidence included a letter from Dr. Dorothy Morgos, Regional Staff Counselor for UNICEF for the East and South Africa, and a clinical psychologist. Exhibit O.

120. Dr. Morgos specialized in childhood trauma and averred that early intervention to address B.R.'s childhood trauma was critical and "necessary now" or she "may not be able to fully benefit from any modality and treatment." *Id.*

121. On March 3, 2023, USCIS denied the application. Exhibit N.

122. USCIS concluded that the Skalkas "did not submit documentation that is current as to the urgent humanitarian reason for this parole request." *Id.*

123. USCIS further found that the Skalkas did not show "parole is the only option" because they could file a Form I-130 immigrant visa petition once they resided with B.R. for two years. *Id.*

124. In doing so, USCIS admitted that the Nepal Initiative was a farce lacking any rational basis other than to impair and delay the immigrant petition process for adopted children from Nepal. *Id.*

125. In other words, the Nepal Initiative required United States citizen parents of adopted children to relocate outside the United States for two years to petition for an immigrant visa for adopted children, but only those from Nepal. *Id.*

FIRST CAUSE OF ACTION
APA § 706(2)(A) -- Arbitrary and Capricious Agency Action

126. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

127. Under the APA, courts must set aside agency action "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

128. An action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in

view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (*quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

129. To survive an APA challenge, the agency must articulate "a satisfactory explanation" for its action, "including a rational connection between the facts found and the choice made." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

130. The APA also provides for redress against administrative action that is "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. § 706(2)(B).

131. To issue a rule, the APA requires an agency to adhere to specific procedural requirements. The agency must first publish a notice in the Federal Register, allow for comments, and incorporate comments into a final rule. 5 U.S.C. § 553; *see id*. §§ 551 (defining "rule" and "rule making"), 706(2)(D) (concerning agency action "without observance of procedure required by law").

132. These requirements apply to all legislative, or substantive, rules. *See National Council for Adoption v. Blinken*, 4 F.4th 106, 114 (D.C. Cir. 2021); *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68, 87 (D.D.C. 2020).

133. "A legislative rule is one that has legal effect or, alternatively, one that an agency promulgates with the intent to exercise its delegated legislative power by speaking with the force of law." *Nat'l Council for Adoption*, 4 F.th at 114, *quoting National Resources Defense Council v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020) (cleaned up).

134. In contrast, an interpretive rule "derives a proposition from an existing document, such as a statute, regulation, or judicial decision, whose meaning compels or logically justifies the proposition." *Id*. (cleaned up).

135. "The critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Nat'l Council for Adoption*, 4 F.th at 114, *quoting Perez v. Mortgage Bankers Association*, 575 U.S. 92, 97, (2015) (cleaned up). "In that sense, an interpretive rule explains 'pre-existing legal obligations or rights' rather than 'creating legal effects.'" *Natural Resources Defense Council*, 955 F.3d at 83.

136. The policy to suspend intercountry adoptions of Nepalese children that began in 2010 and has continued to remain in effect after further, subsequent review by USCIS, is a legislative rule. *Nat'l Council for Adoption*, 4 F.th at 114.

137. While the six-year statute of limitations may have passed for Plaintiffs to challenge Defendants' unlawful promulgation of the rule, *see* 28 U.S.C. § 2401, its application to Plaintiffs for eight years is arbitrary and capricious.

138. Defendants' adherence to an unlawful legislative rule is not barred by the statute of limitations. *Id*.

139. In *Nat'l Council for Adoption*, 4 F.th at 114-15, the D.C. Circuit Court of Appeals vacated the State Department's guidance "barring adoption agencies from referring certain children to certain parents."

140. The Court concluded that State's "categorical prohibition" on certain adoptions had to follow the notice-and-comment process and only "[a]fter that process, State *might* be able to promulgate a rule – like the Guidance -- that applies to each internationally adopted child in a manner that accords with the Administrative Procedure Act." *Id*. at 115 (emphasis added).

141. The same is true with respect to the suspension at issue for intercountry adoptions for Nepal. The so-called initiative created new law that contravened the INA by banning I-600

petitions filed for petitioners, like the Skalkas, and prioritized, provided preference, and discriminated against visa applicants based on their national origin.

142. The policy required notice and comment under the APA and while the failure to follow proper rulemaking may no longer be challenged to strike the rule in total, the application of the policy to Plaintiffs is arbitrary, capricious, and not in accordance with law and may be set aside as to Plaintiffs.

143. The failure of Defendants to heed the APA when promulgating the Nepali Initiative was not an issue raised in *Skalka v. Kelly*, 246 F. Supp. 3d 147 (D.D.C. 2017).

144. Defendants' continued nonfeasance pursuant to the Nepal initiative violates the APA.

SECOND CAUSE OF ACTION
APA § 706(2)(A) -- Actions Not In Accordance With Law

145. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

146. The INA, 8 U.S.C. § 1152(a)(1)(A), provides, with limited exceptions specified in law that do not apply here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

147. The ban on processing immigrant petitions filed by United States citizens on behalf of Nepalese children -- the Nepal Initiative -- violates 8 U.S.C. § 1152(a)(1)(A) because it categorically provides preference and priority in the issuance of an immigrant visas to non-Nepalese orphaned children.

148. The disparate treatment to Nepalese children due to the Nepal Initiative operates to deprioritize issuance of an immigrant visa because of the place of birth, nationality, or residence of Nepalese children who are adopted by United States citizens.

149. The Nepal Initiative is contrary to 8 U.S.C. § 1152(a)(1)(A).

150. The categorical suspension of immigrant visas has harmed Plaintiffs because Defendants have failed to process the I-600 petition on behalf of their adopted daughter for eight years because she is a child born in Nepal.

151. The violation of 8 U.S.C. § 1152(a)(1)(A) was not an issue raised or addressed in *Skalka v. Kelly*, 246 F. Supp. 3d 147 (D.D.C. 2017).

152. This Court should set aside this unlawful and unjustified conduct.

THIRD CAUSE OF ACTION
Fifth Amendment to the U.S. Constitution – Violation of Due Process

153. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

154. The Due Process Clause of the Fifth Amendment states that no person will "be deprived of life, liberty, or property, without due process of law."

155. U.S. citizens and lawful permanent residents have constitutionally protected liberty interests in family unity. Individuals must be given due process prior to any deprivation of these liberty interests.

156. Defendants' failure to process Plaintiffs' I-600 petition pursuant to the Nepal Initiative or otherwise grant humanitarian parole to B.R. as the adopted minor daughter of the Skalkas has unconstitutionally denied Plaintiffs their constitutional rights and prevented family unification, which is the cornerstone of our nation's immigration law and policy.

157. Defendants' actions have unjustifiably interfered with Plaintiffs' parent-child relationship without the process due under the Fifth Amendment.

158. As United States citizens, the Skalkas enjoy a right protected by the Due Process Clause of the Fifth Amendment to exercise freedom concerning the health and well-being of their children. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Griswold*

v. Conn., 381 U.S. 479 (1965).

159. The liberty interest of "parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized" by the Supreme Court. *Troxel v. Granville,* 530 U.S. 57, 65 (2000), *citing Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)).

160. The unilateral refusal to process an immigrant visa petition for the adopted child of United States citizens strikes at the core of the liberty interest in a right to the existence of a parent child relationship and to receive process due under the law. *Stanley*, 405 U.S. at 651 (internal quotation marks omitted) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

161. There is no compelling reason to justify Defendants' interference with Plaintiffs rights and suspension on the adjudication of immigrant visa petitions for adopted Nepali children.

162. Defendants' decision to "close off" any adjudication of Plaintiffs' I-600 petition because the child was born in Nepal is outrageous and "has no place in law under the Constitution." *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., *dissenting*).

163. Defendants' actions to suspend processing of Plaintiffs' I-600 petition violates the

constitution and must be set aside.

FOURTH CAUSE OF ACTION
APA § 706(1) -- Action Unlawfully Withheld

164. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

165. Defendants have a nondiscretionary duty to "conclude a matter presented to" them "within a reasonable time." 5 U.S.C. § 555(b).

166. The Court has the authority under the APA to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

167. The APA defines "agency action" to "includ[e] the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

168. The issuance of decisions on immigrant visa petitions is not discretionary. The reviewing court's authority under the APA applies generally to agency action or inaction "except to the extent that . . . (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Id. § 701(a)(1)-(2).

169. The INA provides that all immigrant "visa applications *shall* be reviewed and adjudicated by a consular officer." 8 U.S.C. § 1202(b) (emphasis added).

170. The Department has discretion on the manner of visa processing and the outcome of decisions, but it has no discretion on whether to decide a visa application properly submitted to the agency. *See Marwah Al Ihsan Al-Gharawy v. U.S. Dep't of Homeland Security*, --- F.Supp.3d ---, 2022 U.S. Dist. LEXIS 133589, *20-21, 2022 WL 2966333 (D.D.C. July 27, 2022).

171. The INA mandates the decision of immigrant visa petitions. 8 U.S.C. § 1154(b).

172. Furthermore, 8 U.S.C. § 1153(e) provides a mandatory duty regarding the "order of consideration" for issuance of immigrant visas. The statute provides:

> Order of consideration.
>
> (1) Immigrant visas made available under subsection (a) or (b) *shall be issued to eligible immigrants* in the order in which a petition in behalf of each such immigrant is filed with the Attorney General (or in the case of special immigrants under section 101(a)(27)(D) [8 USCS § 1101(a)(27)(D)], with the Secretary of State) as provided in section 204(a) [8 USCS § 1154(a)].
>
> (2) Immigrant visa numbers made available under subsection (c) (relating to diversity immigrants) *shall be issued* to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.
>
> (3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

8 U.S.C. § 1153(e).

173. In *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. 2015), the D.C. Circuit concluded that 8 U.S.C. § 1153(e)(1) is "a precise section of the INA" that "establish[ed] a specific principle of temporal priority that clearly reins in the agency's discretion." Plaintiffs are entitled to a determination of whether the State Department reasonably complied with its discrete, legally required duty.

174. The ban on deciding Form I-600 petitions on behalf of Nepalese children runs afoul of the nondiscretionary duty to adjudicate immigrant visa petitions in order of consideration because it unlawfully withholds – in fact precludes - a nondiscretionary decision on Plaintiffs' immigrant visa.

175. The district court in *Skalka v. Kelly*, 246 F. Supp. 3d 147 (D.D.C. 2017), did not provide Defendants' license to indefinitely delay and withhold action on the Skalkas' petition.

176. The withholding of action violates APA § 706(1) and must therefore be set aside.

FIFTH CAUSE OF ACTION
APA § 706(1) -- Action Unreasonably Delayed

177. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

178. A failure to act under 5 U.S.C. § 551(13) falls under 5 U.S.C. § 706(1), which allows courts to compel agency action "unlawfully withheld or unreasonably delayed."

179. Defendants' eight-year "suspension" on any action to decide Plaintiffs' I-600 immigrant visa petition constitutes action unreasonably delayed.

180. Defendants have closed any chance for a decision indefinitely.

181. They have not routinely reconsidered its suspension and the Plaintiffs are the only family subject to the Nepal Initiative with a pending form I-600 petition.

182. The Administrative Record and Discovery is necessary to decide whether Defendants have unreasonably delayed action on the Skalkas' Form I-600 petition.

183. Defendants have an asymmetric view of its "suspension" and whether they have taken unilateral action against the Skalkas because they have remained steadfast in their rights to due process and an adjudication of their Form I-600 petition.

184. The pain caused from Defendants' delay in reuniting this family is unthinkable and at odds with this nation's immigration laws and moral standards.

185. The circumstances, as they exist today, warrant relief in favor of Plaintiffs.

186. The district court in *Skalka v. Kelly*, 246 F. Supp. 3d 147 (D.D.C. 2017), did not hold an eight-year delay on the adjudication of the Skalkas' petition would be reasonable.

187. Defendants' delay is not guided by a rule of reason, it is guided by unlawful action.

188. The INA mandates the decision of immigrant visa petitions. 8 U.S.C. § 1154(b).

189. There is no authority to support a country-specific ban on adjudication of immigrant visa petitions for the children of United States citizens.

190. The INA precludes discrimination on the processing of immigrant visa petitions, like the policy adopted by Defendants here toward the adopted children of United States citizens on the basis of their Nepalese nationality.

191. Third, there is no rational explanation that would justify a continuation of the suspension; it will prolong needless family separation that is affecting Plaintiffs human health and welfare, especially regarding the care and well-being of their adopted daughter who is in dire need of medical care. *Doe v. Risch*, 398 F. Supp. 3d 647, 657-58 (N.D. Cal. 2019) (holding "health and human welfare" and "interests prejudiced" TRAC factors tip in plaintiffs' favor where family separation caused plaintiffs to suffer extreme anxiety and depression).

192. Defendants' actions have caused, and will continue to cause, irreparable harm to Plaintiffs due to the family separation. *Tate v. Pompeo*, 513 F.Supp.3d 132, 151 (D.D.C. 2021) (recognizing that family separation constitutes "irreparable harm"), *citing Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011).

193. Discovery is necessary to decide the continued reasons for the suspension, if any, as the Skalkas are the only United States citizens with a pending I-600 subject to the Nepal Initiative.

194. Discovery is needed to develop the material facts establishing the delay in adjudicating the Skalkas' Form I-600 petition is not due to a rule of reason.

SIXTH CAUSE OF ACTION
APA § 706(2)(A) -- Arbitrary, Capricious, and Unlawful Denial of Humanitarian Parole -- *Defendant Ur M. Jaddou Only*

195. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

196. The March 3, 2023 denial of humanitarian parole violates APA § 706(2)(A).

197. The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). "It requires agencies engage in 'reasoned decisionmaking.'" *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020), *quoting Michigan v. EPA*, 576 U.S. 743, 750, (2015). When they fail to do so, courts must "set aside" their actions as "arbitrary" or "capricious." 5 U.S.C. § 706(2).

198. "[G]overnment agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions." *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 60-61 & n.3 (D.D.C. 1998); *see Damus v. Nielsen*, 313 F. Supp. 3d 317, 336–37 (D.D.C. 2018) (agency must abide by its rules regarding parole, "and particularly those that affect individual rights"); *see also United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

199. The humanitarian parole statute provides that the agency will make parole decisions "only on a case-by-case basis." 8 U.S.C. § 1182(d)(5)(A).

200. Contrary to the unsupported, arbitrary conclusion of the officer, USCIS has used humanitarian parole to allow the adopted children of United States citizens to travel to the country with rates of approval near 40%.

201. In its March 3, 2023 decision to deny B.R. humanitarian parole, the agency did not adequately evaluate the new and updated evidence Plaintiffs submitted to demonstrate the present compelling need for B.R. to receive medical care in the United States. Exhibit N.

202. Dr. Morgos provided a professional opinion that the trauma caused by physical and sexual abuse in her previous orphanage coupled with B.R.'s current age of eleven, made it necessary for the child to receive care now. *Id*. Care that is not available in Nepal. *Id*.

203. USCIS irrationally ignored and disregarded Dr. Morgos' opinion and cited to none of the other evidence presented that corroborated the humanitarian need for advance parole.

204. USCIS acknowledged that the agency will not adjudicate the Form I-600 petition and yet stated other available options existed. Exhibit N. That finding is nonsensical. *Id*.

205. Suggesting that other alternatives exist so long as the Skalkas move outside the United States for two years is remarkably tone deaf and indefensible. *Id*.

206. The Court may only consider "the grounds that the agency invoked when it took the action." *Michigan*, 576 U.S. at 758; *see Regents of the Univ. of Cal.*, 140 S. Ct. at 1909–10 ("An agency must defend its actions based on the reasons it gave when it acted.").

207. The finding that parole was not the only option for B.R. is belied by the suspension of the immigrant visa processing the agency acknowledged. Exhibit N.

208. Accordingly, the Court should set aside USCIS denial of humanitarian parole.

PRAYER FOR RELIEF

Plaintiffs pray that the Court will:

A. Take jurisdiction over this case;

B. Declare the Nepal Initiative to stop processing Plaintiffs' immigrant visa is arbitrary, capricious, and not in accordance with law or their rights protected under the Fifth Amendment to the United States Constitution;

C. Declare Defendants acted contrary to 8 U.S.C. § 1152(a)(1)(A) in providing priority or preference or discriminating against Plaintiffs in the issuance of an immigrant visa because of

their nationality, place of birth, and place of residence.

D. Declare Defendants have unlawfully withheld, and unreasonably delayed processing Plaintiffs' I-600 petition.

E. Enter an order compelling Defendants to decide Plaintiffs' I-600 petition and issue B.R. an immigrant visa.

F. Enter an order, in the alternative, vacating USCIS' arbitrary decision to deny B.R. humanitarian parole so the child can receive necessary medical treatment.

G. Award Plaintiffs attorneys' fees and costs under the Equal Access to Justice Act or any other provision of law; and

H. Enter and issue other relief that the Court deems just and proper.

Date: July 6, 2023

Respectfully Submitted,

/s/Jesse M. Bless

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