QAEGCLI1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CATHOLIC LEGAL IMMIGRATION NETWORK, *et al.*,

Plaintiffs,

v. 26 Cv. 858 (JAV)

MARCO RUBIO, *et al.*,

Conference

Defendants.

----------x

New York, N.Y.
October 14, 2026
11:00 a.m.

Before:

HON. JEANNETTE A. VARGAS,

District Judge

APPEARANCES

DEMOCRACY FORWARD FOUNDATION
Attorneys for Plaintiffs
BY: EREZ R. REUVENI
-AND-
NATIONAL IMMIGRATION LAW CENTER
BY: JOANNA INGRAM
ELIZABETH H. CHOO
-AND-
COLOMBO & HURD, PL
BY: DAVID KIM
-AND-
THE LEGAL AID SOCIETY
BY: SUSAN E. WELBER
EMILY LUNDGREN
-AND-
SETON HALL LAW SCHOOL CENTER FOR SOCIAL JUSTICE
BY: BAHER AZMY

DOJ-CIV
Attorneys for Defendants
BY: TYLER J. BECKER

(Case called)

(Appearances noted)

THE COURT: Good morning to everyone. We are in an unfamiliar courtroom today because my courtroom is under construction, so I am a little bit also discombobulated this morning because it's not the normal set up, so apologies for that.

And also gratitude for DOJ. I do understand that there was an application to appear remotely today. Given the technical difficulties we had last time attempting to do a Teams conference, the importance of the issues, and the timing constraints, unfortunately, I had to deny that application. So I do understand that it was an inconvenience for you as well. So I appreciate your attendance today.

And let's move forward with now the order to show cause that I issued with respect to enforcement of the partial judgment that I issued about six-ish weeks ago and my growing concern, which led me to issue the order to show cause, that there had not been a sufficient showing by the government that the judgment had been complied with in good faith.

I will outline some of my concerns for you, Mr. Becker, so that you have the opportunity to address them. You have done so in part through the submission of the various Armstrong declarations, which I have before me and which I have reviewed, but overall, I have a concern about the speed with

which this has been happening or really the lack of speed which things have been happening. And I don't have a complete record of what the processing rate for immigration visas was prior to the issuance of the judgment in this case, but I have some indications.

Specifically, I know from the government that approximately 43,000 visas were denied pursuant to the policy. So at a minimum, we know that there was a 43,000 visas that were adjudicated through approximately January 14th, 2026, and August 21, 2026, when my judgment went into effect. Obviously, that was just the ones that were denied solely on the basis of the policy. There were presumably tens of thousands if not magnitudes more that were adjudicated during that same time period.

And then I look at your representation that in the period from August 21st to September 30th, that 41-day period, we had 706 visa adjudications of previously refused visas. And you see the stark disparity that I am seeing in the numbers. So that gives rise to a concern by the Court that the department is perhaps deliberately slow rolling its effectuation of my decree. And I want to give you an opportunity to address that and explain why I don't look at these numbers and say, how is it possible that at one point the agency was doing many thousands of visa adjudications per month, possibly tens of thousands. I don't have those figures,

but certainly we know approximately something on the order of 6,000 per month based on the number of visa denials, just the visa denials, but now it's hundreds.

So let me let you address that initial point, Mr. Becker.

MR. BECKER: Yes, your Honor. Do you prefer me to stand?

THE COURT: Whatever you are comfortable with. There's a podium you're welcome to as well. The main thing is that you have the microphone in front of you and the court reporter is able to hear you.

MR. BECKER: OK. Thank you, your Honor. The department has been implementing the judgment and has been starting beginning to re-adjudicate these visas. Given what has gone on in other cases, including the *Medani* case that the plaintiffs reference a lot, the department has had new public charge guidance and had a worksheet and also had trainings that had to occur in order to really go ahead and make sure that the processes, which had nothing to do with the process, which are different and new processes, to make sure that the relevant adjudicator consular officials had that training and the like to be able to readjudicate these visas.

It's not just as if, given the judgment, that these policy-only denials -- which I think is probably the main focus here, about the 43,000 policy-only denials. I think that the

record shows, as your Honor identified, that there has been nearly a thousand that were adjudicated. There's been some of the members of plaintiffs' organizations that have either received visas or had interviews. So the department is working to readjudicate the visas. I think the judgment said vacated the denials.

And the department is working to adjudicate those. And I think that what the record shows currently is that there is an increase as time has gone on in terms of the number of visas being adjudicated.

THE COURT: So what is that rate currently per week?

MR. BECKER: I don't think I have that number on me, your Honor.

THE COURT: What do you have on you, then, in terms of processing speeds?

MR. BECKER: Your Honor, in terms of processing speeds, we rely on the numbers that are in the Armstrong declaration, which is the 760 that were adjudicated before the 30th.

THE COURT: All right. So when you say that it's increasing in speed, you actually don't have any basis for that?

MR. BECKER: Your Honor, I am referring from your Honor's judgment until September 30th --

THE COURT: All right.

MR. BECKER: -- when I think --

THE COURT: So you went from zero to some amount that was above zero. That is increasing certainly. You started at zero, so by definition, you increased over time.

MR. BECKER: Yes, your Honor.

THE COURT: Because you were doing the trainings, you were doing no interviews, you were at a halt during our very first conference post my opinion. You told me at that time there was nothing happening other than the trainings and the issuance of guidance.

And then since then, some adjudications have happened. So by that metric, certainly things have increased, but you are not representing that week to week the numbers have increased beyond that.

MR. BECKER: No, your Honor. I don't think I have that in the record currently.

THE COURT: OK. How is this different than the policy I vacated? I ask that because the policy I vacated was that we were going to put a pause on the processing of immigrant visas from applicants of 75 countries because we want to issue new public charge guidance.

Isn't that essentially what you are still doing, then, just pausing it to now train and have new paperwork on this new public charge guidance, but wasn't that the policy that I vacated?

MR. BECKER: Your Honor, the policy that you vacated was, as you said, a pause on those 75 countries. Now, there is this new public charge guidance that they have to, consular officers have to adjudicate.

THE COURT: But the pause — as was represented at the time — for the 75 countries was to develop this public charge guidance and presumably do the training of the public charge guidance, right, was that not the stated rationale in the cable?

MR. BECKER: Well, your Honor, that's correct. But now there has been guidance issued. And the department is adjudicating these. For example, under the pause, the members of the plaintiff organizations wouldn't have been able to -- wouldn't have been able to get visas, at least to the numbers they are relying on, whereas now they actually can.

THE COURT: So the only difference is that you're slowly starting to adjudicate where before you had a full pause, but it's still basically the same rationale and the same reasoning?

MR. BECKER: Well, your Honor, the government would say that, actually, that their ability to now get visas does comply with the judgment. And the judgment itself does not give a timeline that's required to adjudicate these particular applications, including the 43,000 that were policy-only denials.

THE COURT: Certainly it didn't because I thought that vacatur and the declaratory judgment would be sufficient under the law relying upon the good faith of the government to then implement those. And perhaps foolishly, I had assumed that meant that the government would go ahead with all reasonable speed in conducting the remand analysis and calling people in for interviews and the like.

But now we are at a point where we are six weeks on and some adjudications have now happened, but I have to consider whether there is a lack of good faith in the implementation given the amount of time that's passed and the slowness with which the government is proceeding.

Is that indicative, and should I take it as an indication of bad faith the government still, notwithstanding my opinion and order and subsequent judgment, an attempt to flout the Court's judgment such that subsequent orders need to issue. That's really what we are here to decide.

And whether that's under the Declaratory Judgment Act, 2202, whether we are talking the All Writs Act, where we are talking about my inherent authority to enforce my own judgments, first of all, I have to determine whether a subsequent order is necessary to implement and effectuate the judgment, or is the government taking steps to actually adjudicate the remanded applications.

MR. BECKER: Yes, I think the government is taking

those steps, as the Armstrong declaration shows that there are members of the plaintiff organizations that have gotten visas. There are people that are being scheduled for interviews. The adjudications are proceeding under the new guidance now that much of the public charge training has been in place.

But, your Honor, I think one of the issues here is that the government has appealed the Court's prior order, and at this point, the Second Circuit has jurisdiction over that order. So there is a difference between enforcing what was in a prior order versus issuing a new order and new injunction, which the government would maintain the Court does not jurisdiction to do, to enforce its prior judgment. That would be a modification. And in that kind of case, you would need, for example, under Federal Rule of Civil Procedure 62.1, you could issue an indicative ruling, and the Second Circuit could remand. I think it's usually done when there's actually a motion of the plaintiffs as opposed to an order to show cause.

But putting that aside, at this point, the judgment does not include this timeline, and I don't think plaintiffs really dispute -- the plaintiffs asked to Court to issue further orders, but they have very little reasoning in their briefing that talks about how the Court would have jurisdiction to do that.

THE COURT: Looking at the *Bautista v. Santacruz* Central District of California, 820 F.Supp.3d 1016, that Court

concluded that notwithstanding an appeal, Courts have authority under 2202 to grant further relief.

Is that not incorrect?

MR. BECKER: Your Honor, to the extent that decision held that you could grant additional reach beyond what is in the judgment, we don't think that decision is correct, but --

THE COURT: It cites a Fifth Circuit case for that same proposition, *United Teachers Association v. Union Labor Life Insurance*, 414 F.3d 558.

Did the Fifth Circuit not hold that?

MR. BECKER: Your Honor, that case has to do -- that case, as many others that both plaintiffs and defendants cite, have to do when a judgment actually required certain action and that was not being complied with. The judgment here required the government to vacate the visa denials, so the government would have to readjudicate them, but it did include a certain date by which those would be adjudicated. The order to show cause asked whether the government should, by a date certain, be required under an injunction to do those adjudications. I think that's the difference with this case, just that it depends on what the prior judgment actually said. And I think lot of briefing is about the interpretation of what the prior judgment said.

THE COURT: I agree with you that my judgment did not require adjudications by a date certain. I don't think that's

in question. I have the authority to interpret my own judgment. I wrote the judgment. I know what the judgment says. It did not say a date certain. However, that, to me, is not the relevant question as to whether or not my judgment said date certain because I am not holding you in contempt. If this was a contempt hearing and I was trying to determine whether the government had violated the expressed term of the court order, that would be one thing.

However, my concern is that my order is not being effectuated. If I vacate a policy and order the underlying visas to be remanded for readjudication and don't have a date certain, could the government hold off and wait one year, two year, three year? At what point does it become a thwarting of the judgment regardless of whether I had a date certain? At some point, certainly, the government is not complying with my order, right, you would agree with that? At some point, your inaction would be flouting the court order.

MR. BECKER: At some point, if there were no adjudications, yes, of course.

THE COURT: So now we are on a continuum, right, where no adjudications certainly would be flouting the court order to at what point does a slow trickle of adjudications that is much less than what the government has shown itself able to do in the past in terms of capability at the very consular outpost.

If they are doing ten a month, is that sufficient? Is

it 20 a month? At what point is this so below the capacity that it really is a flouting of the order that I issued? That's really the question that I am pondering.

Now, the appellate jurisdiction. I don't read the case law to say that I am deprived of jurisdiction while this is pending on appeal to issue an order enforcing my judgment if I find that, in bad faith, the government is not complying with the directive to adjudicate remands regardless of whether there's a date certain.

And so if I, in order to effectuate that existing judgment and order, have to issue a supplemental order that then creates a date certain, the fact that this order is on appeal I think still falls within the discretion that I have even when a judgment is on appeal to issue orders in aid of my jurisdiction, whether you call that under the All Writs Act, whether it's 2202, again, under my inherent authority, to ensure that my orders are complied with.

And there's ample case law that says I have the authority, even while a case is on appeal, absent a stay by the Second Circuit. If there had been a stay of my order by the Second Circuit, obviously we would be having a different discussion, but no one has notified me that the Second Circuit has issued such an order. I take it from the fact that the government has not brought that to my attention that there is no stay of my order, then I retain jurisdiction to enforce my

order.

Do I not?

MR. BECKER: Your Honor, the Court, of course, retains jurisdiction to enforce its order. However, it depends on what the original order said. I think that's the government's position, is that when the original order did not include a date certain and if a date certain is added, that would be a modification of the judgment. For example, I think that the best way to look at this is that would be an independently appealable order because it's a modified injunction. It's a new injunction. I think as a result of that, if it's really a new injunction to enforce the prior order, then we do think jurisdiction is barred.

Now, the government has -- on the stay issue, the government has moved for a stay from the Second Circuit and requested a decision by Friday, by this Friday. So we assume that -- I don't think the Court is bound to issue a decision by then, but I'm just noting that for the Court's information.

THE COURT: You have asked for the stay.

There's briefing currently ongoing in the Circuit; is that correct?

MR. BECKER: That is correct. Briefing is ongoing, and the government has asked for a decision by Friday, 10/16.

THE COURT: Great. But it could be referred to next week's motion panel?

MR. BECKER: Your Honor, of course there's no obligation of the Court to issue an order on a particular date.

THE COURT: And often in contested issues that have been briefed, it wouldn't be out of the ordinary for the Circuit to put it on for the motion panel, which I presume is Tuesday?

MR. BECKER: I'm not sure about that, your Honor, but the issue here would be -- well, the government here has moved for a stay. We've also moved for an administrative stay, so it really depends on what the Circuit wants to do.

THE COURT: Well, certainly none of us can forecast what the Circuit will or will not do. And until such time, I'm going to continue with these proceedings. And, as I said, until a stay goes into effect, I am going to take whatever action is necessary to ensure that my order is being effectuated by the government.

What I had hoped to hear from the government today is, perhaps, additional information about the steps it was taking to comply with the order, but it sounds as if you are resting on the existing records as of ten days ago, when I got the last Armstrong declaration; is that correct?

MR. BECKER: Yes, your Honor. The government is relying on what's in the record, but as I think the record demonstrates, there has been compliance with the judgment, there has been adjudications that have occurred, there have

been members of the plaintiff organizations that have received interviews or received even visas. There's examples of the government complying with the injunction or complying with, sorry, the vacatur.

THE COURT: Let me just ask you: I do not recall in your brief whether you addressed the All Writs Act. I certainly recall you addressed 2202, you addressed the Rule 65 factors, but I don't recall that you addressed the All Writs issue and whether or not I can issue an order under the All Writs Act.

MR. BECKER: Your Honor, I think that the All Writs order is -- our arguments on this may not say that explicitly, but I think that would be found in argument section 1A or argument section 1 and A and B. And B, I think, deals with — whether you are issuing an order under the All Writs Act, the Declaratory Judgment Act, or the like — the Court would be required to consider the injunction factors and to issue a narrowly tailored order to effectuate the relief the Court seeks to grant.

THE COURT: Is that correct under the All Writs Act? I thought the case law was to the contrary, that certainly something issued under the All Writs Act had to be narrowly tailored, but I did not think that the Rule 65 factors — you, know, the four traditional factors — necessarily had to be considered in an All Writs Act order.

MR. BECKER: Well, your Honor, I think that the relevant --

THE COURT: Did you cite something to the contrary in your case law?

MR. BECKER: No, your Honor. I think that the Court is considering granting a new injunction however, so I'm not sure when there wasn't a prior injunction issued. So I don't have anything in particular on that. I will say that cases like *CASA* and *Starbucks* from the Supreme Court, those cases demonstrate that usually you have to consider the four factors. A lot of those are in the preliminary injunction context. If you are issuing a new permanent injunction, I think that the Court is required to, under principals of equity, to consider the four injunction factors.

THE COURT: But you have not looked at this issue specifically or briefed this issue?

MR. BECKER: No, we have not.

THE COURT: Because I'm looking at some old Second Circuit case law. And that may no longer be current, but certainly the Second Circuit has said — and I will cite *In re Baldwin-United Corporation*, 770 F.2d 328, which is a case from 1985 — that the injunctive factors under Rule 65 don't apply to injunctions issued in the All Writs Act.

Now, there has certainly been very recent case law by the Supreme Court in the last five years clarifying the four

factor test that must apply to injunctions, even leaving aside *CASA*, which I don't think was on the All Writ Act specifically, so I don't know that's necessarily applicable. But there is a lot of long-standing Second Circuit case law that says that the four injunctive factors don't apply in All Writs Act.

So I was hoping that you could elucidate whether there's more current case law that calls that into question or whether the government is relying upon something else in making its arguments.

MR. BECKER: Your Honor, I think I did say something incorrectly. I think we did brief this issue on pages 10 to 11 of our motion when we cite *Monsanto*, because we are arguing there's a new injunction. Even if it's -- but I agree that we haven't briefed under the All Writs Act whether that would --

THE COURT: I am certainly familiar with *Monsanto* which I believe was also cited in my original opinion, but I, again, don't think that was an All Writs Act case, so it doesn't necessarily speak to this specific issue.

MR. BECKER: Your Honor, so the government would rest on the fact that I think the Supreme Court has been clear. I think its recent Starbucks decision from two years ago is probably the most instructive on this, that those four injunction factors -- that what the Court has to look at is whether the All Writs Act itself sought to deviate from traditional equitable principles. And I don't think there's

any indication that the All Writs Act, which specifically is trying to incorporate ethical principles itself, would allow the Court to not consider the injunction factors, and I think that's the relevant test here.

THE COURT: Well, let me let plaintiffs speak.

And you can address these questions I had with respect to the All Writs Act and then make your case generally.

MR. REUVENI: Thank you, your Honor. Just making sure that this works.

Good morning, your Honor. Erez Reuveni on behalf of the plaintiffs. Just to start where we ended. So we addressed this in our papers. Your Honor is exactly right, the All Writs Act, the Second Circuit — and it's still good law cited by the recent decisions in the District Courts in this Circuit and elsewhere — has made clear that under the All Writs Act, once a decision is issued and the Court is preserving its jurisdiction and preserving the judgment, essentially, while an appeal is pending, the Rule 65 factors do not apply. That is good law and remains good law. I am not aware of any Circuit Court decision, let alone a Supreme Court decision, overruling that.

I also note that the Court has similar authority under the APA because, as *CASA* made clear, the equities issue in *CASA* and that footnote ten, that they reserve the issue, that does not beat Judiciary Act of 1789. Whatever they were saying there does not extend to the APA. Under the APA, you issued a

vacatur. Now we are at the stage where you would be assessing whether you should enforce that vacatur, and we think you have authority, as we articulated in our brief, under 5, USC, 705, which is very similar the All Writs Act in the sense that it gives you authority to preserve rights and status quo — those are both in the statute — pending an appeal and pending further review. Neither of those authorities are subject to this four factor test that defendants are pointing out to you.

And going just on a related point before I address some of the record as it exists now, also this appeal point. So it is, I think, beyond dispute that the Court has jurisdiction to enforce its order notwithstanding the appeal. And granted that this was not in our papers but responding now to the government's papers, it's not just that *Bautista* case we cited in our papers out of C.D. Cal., but this is Second Circuit law. I can give you a couple cases in the District Courts. *SEC v. Xia*, 2024 WL3447849 *5, collection of cases at trial Court has a long-established right to make orders appropriate to preserve the status quo while a case is pending on appeal.

Similar, relying on different authority, *Flatiron Health v. Carson*, 602 F. Supp. 3d 482 at 486. That's an SDNY decision from 2020 citing *Brighton Miller*, among other things. Rule 62D codifies the inherent power of Courts to make whatever order is deemed necessary to preserve the status quo and to

insure the effectiveness of the eventual judgment.

That status quo language is very important here because what the government is telling you is that they — as to use the Court's words, and I think this a very apt description — can engage in a slow trickle, now seven-plus weeks from your Honor's order. By my count, using their numbers, 1.6 percent of the 43,000 and more than half of them refused, so that slow trickle is .8 percent of the visas issued since August 21. At that rate, it's six years we are talking about for this to get done.

I think we can all agree that six years is probably not complying with the Court's vacatur. The Court has authority to ensure that the government, through its actions, doesn't extinguish the rights of individuals subject to your order. What does your order do? It's a vacatur, and it remanded visas to the agency, and the vacatur establishes the status quo. What is the status quo? It's the last peaceable state of affairs between the parties. And what is the last peaceable state of affairs? It's January 13th, 2026, before the illegal visa ban went into effect.

And actually, if I can point to the Court to a case. this wasn't in our papers. I heard Mr. Becker talk about equities i*n CASA*, but I think that actually cuts the other way. This is *North American Soccer League*, 883 F.3d 32 at 37 note 3. It's the Second Circuit decision from 2018 defining what the

status quo actually means: The status quo ... is really the status quo ante. This special ante formulation of the status quo if the realm of equities shuts out defendants seeking shelter under the current status quo precipitated by their wrongdoing.

That's exactly what we have here. For seven weeks, the government has done everything within its power to not adjudicate these visas promptly, to not provide relief required by the Court's order, which was effective immediately, and to set up an entirely new edifice and framework that now allows them to deny -- or sorry, "refuse" is the technical term — all of these visas anew. Looking at their own data from the Armstrong declaration, which we have a number of questions about. It's very incomplete, and I want to get to that in a minute, but responding to the initial questions your Honor has. 706 visas adjudicated in that September 21 to -- I'm sorry, August 21 to September 30 span, 388 of them refused, and all of them apparently either refused because of -- we don't know, they don't say, but I have to assume many of them are based on this new public charge framework.

So from day one, they sent a DOJ attorney into Court in August 31st who assured you multiple times, as we cite in our brief, this is not going to be applied to anyone or, at most, a few people that have stale records and documents, medical, police reports. They assured you of that responding

to your point that this would be grossly inequitable to do otherwise and not consistent about your order. And then eight days later, they send in Mr. Armstrong with a declaration saying we are doing the exact opposite. Everybody is going to be subject to this new public charge framework.

And ever since, every day since then, there's a new trickle of what the government is really doing. We have to find out about this and the Court has to find out about this not from a submission from the Department of Justice, where you would assume if they have some guidance implementing your order they would have told you about it, we have to look at dockets in other cases. We have to reach out to attorneys in those cases to ask for those filings because they are filed under seal, not on the public docket. We have to see what's going on in the community and talk to our clients and prospective clients.

Going through this since the Armstrong declaration, the Armstrong declaration from September 8th says there's a worksheet, there's additional tools, four new training requirements. That wasn't the whole picture. Then in a September 1 cable — which they didn't submit to this Court, we had to do that — apparently the training has to be done within 60 days, and no one can process. No consular officer has authority to process. That takes you into November.

Now, there have been some changes to that. I will get

to that in a minute. Mr. Armstrong asserted in that same first declaration at paragraph 7: We will notify applicants to request missing documents.

That hasn't happened. Just look at paragraph 10 of the latest declaration. We have multiple of our own plaintiffs who have had their visas refused for lack of documents. They have received no notice from the government. And this is for folks they have rushed to adjudicate after the Court's show cause order. I have no idea what they are doing with the other 43,000 people. For our people, you issued a show cause order, and low and behold, suddenly our plaintiffs see some movement.

That's not really, to me, suggesting good faith compliance with the Court's order; you caught us, we will do the bare minimum to avoid another order.

On September 10th, they finally issued guidance three weeks after this Court's order, three weeks. So for three weeks, consular officers have not heard of your order. As I understand the state of affairs in the record, some senior official at the Bureau of Consular Affairs was notified of the order, but no one on the line actually adjudicating these who has the statutory responsibility and requirement to adjudicate these visas has heard anything about this until 9/10. And again, we don't see this cable. We read about it vaguely third hand online. It was submitted as an exhibit in the *Medani* case on 9/10.

I would think if the government were complying in good faith with your order, they would have had rushed to provide this guidance to show they were in compliance with your court order, yet it took them three weeks, and they didn't do anyone in this case the courtesy of submitting it here. During that three-week period, they are rushing to implement this new public charge framework which clearly ratchets up whatever they are doing from the November 5 cable — which separate issue at issue in this case — and told you in their cable from January 14th they are going to create all these new tools and public charge assessments. Maybe this is it, maybe it isn't, but it's awfully strange that all it came after your order. None of it before.

They have one thing, the August 15th checklist, which there's an August 15th cable that alludes to the checklist. This is a new set of public charge questions, and they assure you this was long planned and happening for months, although nothing under oath actually supports that. It's something we would get to a minute, ask you to order them to actually explain. But if it were so that these were long in the plans, I would think a couple of things. One, they would have canceled interviews after August 15th because now there's this whole new public charge checklist for training. They didn't do that. They canceled interviews several hours after your Honor's order, not before.

And I would think that if this was long planned, then Mr. Kurz, when he came to Court on August 31st, because they had been planning this since January of early this year, would have had something to say about this other than it's not going apply to anyone, don't worry about it. So either — and both of these are not great looks for the government — Mr. Kurz misinformed the Court with knowledge — and I don't think that's what happened — or his client, The Department of State, withheld the information from him so he could come into Court and have plausible deniability and say, nothing to worry about, your Honor, we are totally doing this.

If it's a third option, they told him to say it won't apply to anybody and then they bait and switch in the next eight days because they managed to convince you there was nothing to see here, don't worry about, that's even worse. But none of those three possibilities of what happened in that period of time suggest good faith compliance with the Court's order.

So where we are now: A state of affairs we have had to piece together through multiple different cables submitted in different cases and questions to the government as to why are you not submitting these in these cases and can you share these cables, is that they directed everyone to pause all adjudications after your order, they directed everyone to undergo heightened training that until that point in time, had

not been known to the public and do it within 60 days, and to not adjudicate any visas until that training is done.

And that to us, based on the record here, seems to strongly suggest that the government was trying to run out the clock on the Court's order and set up a new, different set of guiding frameworks under the public charge rule, whatever they are doing — which we still don't know — to at least allow them to deny a majority of the visa adjudications that would be subject to this Court's order.

We know their data. I'd love to see more data, but with the record as it exists now, 55 percent of the visas they have adjudicated that are subject your Court's order have been refused. Until they tell us otherwise, I have to assume that's based on the new public charge criteria. All of these people, as we discussed at the last hearing, all of them are admissible, and none of them has any basis to find them subject to public charge based on the prior adjudications.

The only reason they don't have their visas today is because of the pause. And without that pause, we would have 43,000 people reunited with their families, working towards furthering their careers, working in the United States, contributing to their communities, and that's the status quo for the purposes of this case. All of those people should have a visa but for the pause. So here we are today.

THE COURT: Mr. Reuveni, let me ask you something that

Mr. Becker alluded to earlier, which is: Certainly you are right that the status quo as it existed at the time of the policy was that these individuals had been determined by a consular officer to be admissible, not ineligible, because that is whom my vacatur order applies to. If they are found inadmissible on another ground, then the vacatur would not be appropriate. It is only for those whom the consular officers already interviewed them, examined the paperwork, determined that everything was in order, and but for the policy pausing the issuance of visas, they would presumably then have received their -- they would not have been refused their visa. Can't say conclusively, but that is the presumption given what we know of those individuals.

However, we can't fully restore the status quo. We can't go back in time to that point in time. And certainly, the point has been made in the government's papers at the prior conference and today that a consular officer who is now looking at an immigrant's application, do they not have a regulatory and statutory requirement to consider any changes in circumstance that might have arisen between January and today?

So, for example, if they no longer would apply for under the regulations regarding their medical status, if there were other changes such as a criminal conviction, law enforcement concerns, certainly I can't simply say the consular officer has to ignore all of that and adjudicate this person as

if the file was closed on January 26th. Instead, under the statute, under the regulations, the consular officer has a legal duty to look at all of the current information that might have come in effect. And I assume that you don't disagree with that.

MR. REUVENI: I think I have to distinguish two things in answering that question. So, first, the general premise. No, we don't disagree with that. Although to be clear, the government could choose to waive some of these documentary lapses. It's in ranks. For example, police background check, they could waive that. They are choosing not to. They don't need to do a second interview under the regs under the foreign affairs manual. It's optional. They are choosing to do that. They are taking that burden onto themselves. And to us, it seems like they are doing that to find reasons to refuse.

So to the extent there's lapse of documents, and I know that the government talks about why that should prevent some sort of date certain order because different people are at different stages. Maybe some people don't have lapsed documents. Take our plaintiffs for example, paragraph 10A, we have four individuals — they are in this Armstrong declaration — four individuals who they call "documentarily eligible," meaning all the documents are present. They should have their visa. Those people, there's no issue with like stale documents and the record changing, a new criminal conviction or anything.

Those are people that they acknowledge are ready to go. They should have their visas right now.

(Continued on next page)

MR. REUVENI: But updating medical records, updating, like, my address has changes or I have a new job, I had a kid, anything new, that is very different from an order enforcing the *status quo*, by which I mean an order saying, "You cannot apply these new public charge frameworks, to the extent you with find that this was pretext to avoid complying with the Court's order, you have to adjudicate it without applying that."

And I'll point the Court to Judge Ali in the District Court for the District of Columbia's decision in *Storie*, which we cited in our brief. In that case, he issued an order as to the plaintiffs providing that, one, "Promptly restore any plaintiff's position in the application processing queue to the extent it was impacted by the pause." So, if they would have done that here, all these people should be first in line. Although I understand, and we don't dispute they have some flexibility to prioritize based on limited resources and competing obligations and differing orders.

But the important part is the second part: "Promptly and within no more than 30 days complete the adjudication of any plaintiff's application that was refused based on the pause without regard to any refusal issued pursuant to the pause, including issuing a visa to any plaintiff that would have received one absent the pause." Now, I don't read that to say you should direct them to issue 43,000 visas, that's not what

we're suggesting, but I do read that to show that courts did have authority to say, "You have some ability to reconstruct the *status quo* when the government has not acted in good faith." And the government here has not acted in good faith. They've done everything they can to delay, to obfuscate, to prevaricate so that they have a new infrastructure in place that allows them to deny, by their own data, over 55 percent-plus -- sorry, refuse -- refuse 55 percent-plus of the relevant visas. And again, we're talking six years before this gets done at the rate they're going.

So, I think those are two different things, and you have authority to do the one and not the other. But if you do think that the record is insufficient at this point to make the sort of finding about restoring the *status quo*, we think the Court should issue an order for very prompt -- we're talking days, not weeks, months, the government is talking about a report two weeks from now. That's not enough. I mean, at this point, like, the government needs to show its work. The government needs to explain a number of things. I want to walk through that a little bit, but I also want to say before I do that, given that I'm responding, in part, to the government's position in their briefs, we could submit a proposed order if that's of interest, outlining the things that should be in such a status report pretty quickly, perhaps tomorrow by open of business, so that you have what we are actually articulating in

one place.

But we think that report needs to, among many things, show that the government had not planned all along to use this new public charge framework to frustrate the Court's order. So, they tell you this was long planned. Okay, give us a declaration, give the Court a declaration that shows when the decision was made to cancel interviews, who gave the order, when the decision to do training went in effect, why weren't all the interviews canceled after August 15th when they promulgated this new form, why was it only in literally the minutes and hours after your Honor's order on August 21st.

Also, on this 1.6 percent slow trickle, they do say, in their most recent declaration and submission, that all posts are processing, but we know that can't be right. Maybe one officer at a post might be processing, but if they were processing at full capacity, like your colloquy with Mr. Becker suggested earlier, they should be granting thousands based on prior capacity, not 706 in the span of six weeks.

Granted, they have many other applicants and visas, and again I'm not trying to suggest the Court issue any kind of order managing the internal prioritization of limited resources, it's not what we're looking for here, but 706 -- I think they should be required to tell the Court and tell us grants, refusals, denials by nationality and by post, so we can get a sense of, is there only one consular officer doing this

in, say, the 75 country visa bank countries, and maybe there's 20 of them doing it in the United Kingdom, just to throw out a country there, because that will tell you if they're really serious about adjudicating these visas in good faith.

THE COURT: Well, I had understood that these numbers were just for the 43,000 denied under the -- refused under the pause; correct? It's not a total number of immigrant visas adjudicated throughout the world.

But, Mr. Becker, can you clarify that? The numbers referred to in the Armstrong declaration, those are just the number of adjudications of the 43,000 remanded?

MR. BECKER: Yeah, that is my understanding.

And I'll note, I think, that there have been other visa adjudications, I guess, that somewhat overlap with this visa: The diversity visa program, for example, that ended at the end of September and, as a result -- it ends at the end of the fiscal year, I should say, and as a result, there was an order in the *Medani* case that plaintiffs cite, so there was many or adjudications than that of visas.

THE COURT: All right.

MR. REUVENI: Yeah. We're not suggesting reporting on every possible visa everywhere, we're talking about this universe of what is subject to your order, the 43,000, give or take. Although I will not that the Armstrong declaration is a little bit squishy. They're walking back their representation

about 43,000, telling us now that some officers didn't follow the instruction to note things correctly and some officers put in two reasons instead of one. That's not our job to unpack that, we think the government should explain that in more detail so we actually know what they're doing. But, yes, of those 43,000 and our plaintiffs and organizational members and clients specifically as well, 1.6 percent isn't good faith. And if the reason for that is they've diminished processing capacity on top of creating this whole new public charge regime and review structure, their most recent declarations refer to secondary managerial review, review out of Washington, D.C. by someone outside of the consular officer review chain, review by perhaps an app/algorithm who does who-knows-what.

So, even when they say that 306 have been issued and 388 have been -- and I want to be clear, they don't say "issued," issued or eligible to be issued, of those 306, this review process could come in and claw it all back. So, that number, 55 percent, could definitely go even higher.

On top of that, I'm looking at the September 14th declaration that they submitted which really walks through -- I mean, again, this is September 14th, it's now October 15th, so a month later we're finally seeing this. It says what they need to do in adjudication review for public charge -- it's entirely redacted. Like, we have no idea what they're doing. And so we would ask that you order the government to produce

these documents unredacted to the Court and to plaintiffs, and it can be done pursuant to a protective order, if that's of issue, so that we can actually see what they're doing and understand what they're doing.

And I think I just want to make another -- I want to distinguish between the 60-day order, which is what the government takes issue with, this 60-day date certain order for everyone, and this order with respect to the public charge framework. So, I see these as two different things.

I think with respect to our plaintiffs, our individual plaintiffs, organizational plaintiffs, their clients, their members, as we laid out in our brief, we think the order could direct them to do this within 30 days. That's entirely consistent with the FAM, and not just the FAM but the statute that we cite in our brief, the NDAA from, I believe, 2019. I may be getting that date wrong. It says it's the policy of the Department of State to adjudicate family-based petitions in 30 days and other certain types of petitions, including some family petitions, in 60 days.

We are now, what, at day 54 from your order, so we're almost at 60, so that's clearly not being followed. So, we would ask that it be an order for 30 days, we would ask that their reporting have to show the grants that they're doing, the refusals that they're doing within those timelines, if they're meeting those timelines. We're not asking to direct them to do

it by a specific number of visas by a date certain.

I would note also for the organizations, we'd ask that any such order as to a date certain would allow the organizations the option to find plaintiffs or their members so it's not some kind of mad dash that they have to go find a list and give it to the government. So, I would ask that it be something like 30 days from when the organizational plaintiffs notify the government of specific impacted individuals.

And then I want to address the government's point about, well, you know, documentarily they may not be complete. So, they told you on September 8th, paragraph seven of the Armstrong declaration version 1.0, "We will notify people if they have incomplete documents." They obviously haven't done that. We know that from their most recent declaration, as with respect to our plaintiffs at least. So, to address their concern that people may be at a different stage at a different time, order them, at least for our plaintiffs, within three days, tell them what they're missing, give them the chance to submit it, and then adjudicate within 30 days.

On the larger question of the remand order, we think the real issue is not so much the date-certain injunction that your Honor discussed in the show cause order and that we're discussing today, but this PC framework that they've clearly put in place to facilitate wide-scale refusals of visas that should have been granted long ago, and we think you have

authority to issue an order staying the effective date of this new visa regime to these individuals that are subject to your remand order. That would recreate the *status quo*.

But if the Court doesn't think the record supports that, again, we think what needs to happen is very tight, very detailed reporting so that the government can actually show its work to the Court that they are, in fact, good faith complying with the Court's order, and maybe down the line there's a need to have an order about a date certain when it's clear they're not actually complying in good faith.

THE COURT: In my original opinion in order, however, I very specifically said that I'm not going to dictate to the consular officers the process or the outcome of their adjudication on remand. That was the language, I believe, in my original opinion and order. Because, once you go down that path, certainly we run into consular non-reviewability issues, and it is not for the Court to tell the consular officer how it must adjudicate a particular petition. I can't dictate outcome, I certainly don't think I am able to dictate process. My order was confined to the vacatur of the policy. And of that policy, I did find that under the APA, because it was a prospective government-wide policy, it did not run afoul of the limitations on my jurisdiction under consular reviewability doctrine.

So, were I to go down the path that you are now

suggesting of staying the public charge implementation of particular processes, which, frankly, I don't have a record of what those processes are -- that has not been put before me, I don't know what these worksheets are. They're vaguely alluded to in the Armstrong declaration, but certainly there's been no finding that any of these practices are unlawful. I understand that there's a separate challenge that's raised in this suit, but we haven't had motion practice, I don't have a record before me, I don't have a factual basis at this point to conclude one way or the other whether these new policies/practices with regard to conducting the public charge review of applications is in any way unlawful. And so given that record, what would be my bases for issuing an order telling consular officers that they can't apply the public charge provisions?

MR. REUVENI: So, I think two responses to that, your Honor.

First, I think defendants conflate in their papers an initial form of relief and injunction and an order enforcing that order under the inherent authority or the AWA or the APA. And so we're suggesting you have authority to reinstate the *status quo* as it existed January 14th. And again, nobody disputes that but for this pause, those 43,000 individuals would have visas and would be in this country today, absent some other new derogatory information since then like they

committed a crime or something of that sort so they're not admissible. That's the *status quo ante* in this case.

And we're not asking you to enjoin any specific individual or to direct any specific outcome. It's the same sort of relief under the APA in enforcing your order: Just they cannot apply the changed *status quo* to these people because that is not reinstating the *status quo*, and they have to have authority to do that under 705 and 706.

That said, to your second point, you're right, the government hasn't really submitted anything. The Armstrong declaration raises more questions than answers. Each time they submit something, more stuff pops up later in another case. They have not yet, to date, been forced to submit to this Court a comprehensive detailed record of what it is they're doing and how fast they're doing it and what their resources are to do it and where are visa being refused, why are visas being refused, what is this new PC framework.

So, in the context of enforcement, rather than a new suit in an amended complaint purporting to implement the November 5 cable, we think if you don't feel like the record, your Honor, allows for this sort of enforcement order that we've just discussed, we think very tight reporting requirements are necessary and document production in a declaration explaining all this, as we've outlined in our papers. And that would be the next step before the Court were

to get to the point of, "I actually think I have a basis to stay your ability to apply this new framework to these 43,000 individuals." So, we think the next steps for the larger world, if you don't think the record supports something along the lines we've just discussed, is document production, declaration, reporting.

And again, we're happy to promptly, as quickly as we can, give you a proposed order. We'd suggest tomorrow morning just so we have time to work with it on our team. And we think that reporting should happen -- inn *Medani* it's happening three times a week to keep the government honest, and we think something similar here is appropriate. Maybe twice a week, not three times a week. The once-in-two-weeks and once-in-a-month reporting the government is suggesting seems far too inadequate for what the record suggests is their not-good-faith compliance with the Court's order.

THE COURT: Let me ask you a question regarding the specific plaintiffs in this case and issuing an order that was specific to the named plaintiffs and the members of the plaintiff organizations versus the general population of the 43,000. Do they stand on different footing with regards to my ability to issue a date-certain order, or do they all fall within the same category from the plaintiff's perspective?

MR. REUVENI: So, certainly it is an easier path to do it for them. They are plaintiffs in this case. We dispute the

government's four-factor analysis that needs to happen here, but with respect to the named plaintiffs, there's an ample record that shows the harms to these individuals, the separation that has occurred, the harms to the agencies. So, you would be able, even if this four-factor test that the government says you need to apply that Rule 65 and equities apply here, which we dispute, they don't have that issue. That's an argument for the larger 43,000 group. Just we think, just as Judge Ali did in *Storie*, for the plaintiffs and the organizations, clients, and their members, you absolutely can issue a date certain injunction. You can craft it to deal with the issues that Mr. Becker, in his brief, raises with respect to, what if someone doesn't have certain paperwork, what if the medical has lapsed. We've suggested ways you can deal with that. We don't think any of the issues the government raises applies to our plaintiffs at all, so we don't see those two as squarely together.

For the 43,000, we've taken our position in the brief that you have authority beyond the issues in *CASA* because this is an APA case, but the issues Mr. Becker raises do not apply to the named individual plaintiffs and the organizations.

THE COURT: The organizational plaintiffs, how many do we think fall within that category?

MR. REUVENI: That I don't know, and that is why I asked earlier to set the order up in such a way that the

organization has the option to opt in at the pace it can to identify individuals who would be subject to the order. We reached out to our clients before the argument, of course, and during the course of the week. We don't have a list, and it would take some doing to find that list. It's not to suggest it's not doable, but we would ask that the order not require them to submit a list of every single person, and if you're not on this list, to bad, so sad, on a very short timeline. We'd ask instead we do the inverse: Let them opt in. And once they show you who the person is and bring it to the government's attention, then the 30-day trigger would obtain.

THE COURT: Thank you very much.

MR. REUVENI: Thank you, your Honor.

THE COURT: Let me hear one last time from Mr. Becker.

MR. BECKER: Thank you, your Honor.

So, starting with the last point first, I think as to the order involving whether it should involve the unnamed parties or just the individual members, the government's view is that the Court, under *CASA*, can only issue -- this is not a vacatur, so this would be a new injunction, so the Court would have to both consider the injunction factors as well as issue relief that -- complete relief as to the parties in this case.

Now, plaintiffs include 11 individuals and a couple of organizations, and at this point there has not been -- there is not in the record really the identities beyond, I think -- I

mean, as to the organization ACT, there's one member, one identified member. And I think that allowing -- I'm not really sure what the -- I mean, of course if you issued relief to the organizations, then their members would also get that relief, but the government, obviously, has no knowledge of who is a member of said organizations, but we do think that the Court would have to limit the relief to the plaintiffs.

As to the issue of the four factors and the All Writs Act, I think that what opposing counsel has said is that there is Second Circuit precedent that would allow this Court to not consider the four factors. And government doesn't think that's correct. And under *Starbucks* and the Supreme Court's decisions on equitable relief, the Court would need to look at, I think it's, 28 U.S.C. 1651, the All Writs Act, and go through and decide whether the All Writs Act incorporates traditional equitable principles, which I think it does because of the language about being necessary and appropriate, *et cetera*, which I think is basically the same language the Supreme Court in *Starbucks* had required in consideration of the traditional injunction factors.

As to the injunction against the new guidance that has issued or against the new public-charge framework, I think your Honor is correct that the Court's order did not say how the readjudication needed to go on, and I don't think the record currently supports having such an injunction. I believe

that plaintiffs' plan to amend their complaint potentially to challenge this new guidance or a new adjudication framework, but I don't think that's at all covered by the original court order, and as a result, there's really no basis at this point to issue a new injunction, which I think is something different from the show-cause order that the Court issued generally.

THE COURT: If the Court were to find eventually, and I think plaintiffs are right that a further development of the record would be necessary, but were the record then to support that this new public charge training/pause/framework was developed by the Department of State specifically in response to the opinion and order that I issued as an attempt to evade compliance with that, would the government then agree that that would be a basis for me to find that in order to enforce my original opinion and order, I could then stay the implementation of that public charge new framework?

MR. BECKER: No, I don't think so, your Honor, because the new guidance and new order had nothing to do with your Honor's original order.

THE COURT: Well, I just posed a hypothetical to you, which is, if the evidence were to show that the new public-charge framework was announced, developed, and then implemented as a direct result of my opinion and order and as an attempt to thwart the implementation of my order, then would the government agree that I have the authority to stay that as

part of my inherent authority to effectuate my orders?

MR. BECKER: No, your Honor. The government would maintain that plaintiffs would need to bring a motion under 705 or 706 to seek a stay of that sordor, to seek a stay of the new public-charged framework.

THE COURT: So, the government could deliberately implement a policy designed to prevent the effectuation of court orders and I do not have the inherent authority to act against that. That is your position.

MR. BECKER: Your Honor, the original court order did not prescribe and specifically rejected prescribing a particular framework under which the Court's order would -- or 43,000 visas would need to be readjudicated, so I don't think there would be any violation of the order itself to have a different framework.

THE COURT: But your position is that if they did so to thwart the implementation of my order, and that was the government's intent, that there's nothing I could do about that.

MR. BECKER: Your Honor, the government does not think that the new guidance would thwart the Court's order because the Court's order did not specifically require, for example, certain visas to be granted or certain visas to be granted under a certain framework or adjudicated under a certain framework, so the government would be able to -- well, the

government should be able to create a new framework for consular officers to adjudicate these visas that was not prohibited by the prior order at all.

THE COURT: Any other points you'd like to make?

MR. BECKER: No, your Honor.

Actually, one small point. As to the numbers that we were talking about, and I don't think Mr. Reuveni actually disagrees with this, but given the *Medani* case, it is true there may have been more of these visas adjudicated than the 700 we mentioned. It's hard to separate them out given that there's application with the diversity visa applicants, and I think that the Armstrong declaration deals with that a little bit more when we're talking about the numbers in paragraph nine.

THE COURT: I'm going to reserve decision.

Mr. Reuveni, if you would like to submit that proposed order with respect to reporting requirements and what plaintiffs would like to see with respect to any reports that I order the government to provide, you may do so by noon tomorrow.

MR. REUVENI: Thank you, your Honor.

THE COURT: All right. Thank you very much to all sides for your advocacy. It's very appreciated. And as I said, I will take this under advisement but will be issuing an order shortly. Court is adjourned. (Adjourned)