NORA A. PRECIADO (SBN 239235)
preciado@nilc.org
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Blvd. #108-62
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911

CECELIA CHANG*
chang@nilc.org
JOSHUA ROSENTHAL*
rosenthal@nilc.org
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 34573
Washington, D.C. 20043
Tel: (202) 216-0261
Fax: (202) 216-0266

Attorneys for Plaintiffs (Additional Counsel listed on next page)

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

Marco VILLADA GARIBAY; Israel SERRATO,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE; John J. SULLIVAN, United States Acting Secretary of State, in his official capacity; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; L. Francis CISSNA, USCIS Director, in his official capacity; Daria L. DARNELL, United States Consul General, Ciudad Juarez, Mexico, in her official capacity; and Robert M. COWAN, Director of the USCIS National Benefits Center, in his official capacity.

Defendants.

Case No. 2:18-cv-2990

COMPLAINT FOR DECLARATORY RELIEF

STACY TOLCHIN (SBN 217431)
Stacy@Tolchinimmigration.com
LAW OFFICES OF STACY TOLCHIN
634 S. Spring St., Suite 500A
Los Angeles, CA 90014
Tel.: (213) 622-7450
Fax: (213) 622-7233

ANDREW J. PINCUS *
apincus@mayerbrown.com
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Tel.: (202) 263-3220
Fax: (202) 263-5220

Attorneys for Plaintiffs

* *Pro hac vice* application forthcoming

INTRODUCTION

1. Plaintiffs Marco Villada Garibay and Israel Serrato seek judicial review of the Department of State's determination that Mr. Villada Garibay is ineligible for permanent residency.

2. Mr. Villada Garibay and Mr. Serrato have been married for four years, and are true partners in life.

3. Mr. Serrato is a United States citizen and Mr. Villada Garibay is a citizen of Mexico.

4. They were married in January 2014, six months after the Supreme Court rejected an attempt to eliminate same-sex marriage in California and ensured federal recognition of their marriage by striking down the Defense of Marriage Act.

5. Mr. Villada Garibay came to the United States at the age of six from Mexico, and attended primary and secondary school in Inglewood, California. He later attended a local community college in Los Angeles, California. Mr. Villada Garibay has spent virtually his entire life in the United States.

6. Mr. Villada Garibay obtained deferred action under the Deferred Action for Childhood Arrivals ("DACA") program in 2013 and—pursuant to that program—had protection from deportation and authorization to work in the United States until 2019.

7. For the past four years, Mr. Villada has worked as a legal assistant at a Los Angeles area law firm and contributed financially to his joint household with Mr. Serrato.

8. After Mr. Serrato and Mr. Villada Garibay were married, they filed the necessary petition and obtained a provisional waiver that would allow Mr. Villada Garibay to obtain status as a Lawful Permanent Resident ("LPR") by virtue of his marriage to a U.S. citizen.

9. Although Mr. Villada Garibay was authorized to work and protected from

deportation under the DACA program until 2019, he departed the U.S. on January 14, 2018, to take the next step in his process to obtain U.S. residency: his consular appointment in Ciudad Juarez, Chihuahua, Mexico. By departing the United States, Mr. Villada Garibay's DACA status was automatically terminated.

10. Mr. Villada Garibay departed the U.S. only because the United States Citizenship and Immigration Services ("USCIS") approved his provisional unlawful presence waiver, allowing him to proceed with an immigrant visa application before the Department of State ("DOS").

11. On January 17, 2018, the United States Consulate in Ciudad Juarez denied Mr. Villada Garibay's visa and prohibited his return to the United States because it found that he was permanently inadmissible, citing two grounds of inadmissibility: (a) departing the United States after more than one year of unlawful presence (8 U.S.C. § 1182(a)(9)(B)(i)(II); and (b) reentering the United States without admission after more than one year of unlawful presence (8 U.S.C. § 1182(a)(9)(C)(i)(I)).

12. Mr. Villada Garibay reentered the United States only one time—after a trip of a few weeks he took as a minor in 2000. At that time, while he was in high school, at the age of 17, Mr. Villada Garibay's grandfather had passed away in Mexico. Mr. Villada left the United States to console his grandmother after the death of his grandfather. He returned to the United States on September 3, 2000. When he arrived at the San Ysidro port of entry in Tijuana, he presented his high school identification to the immigration officer, and the officer admitted him into the United States.

13. Because the U.S. Consulate denied Mr. Villada Garibay's visa, he and Mr. Serrato have been separated from one another since January, causing them great financial and emotional hardship. And, because the Consulate cited the reentry ground of inadmissibility, Mr. Villada Garibay will not be permitted to return to the United States for at least ten years and may be barred permanently.

14. Mr. Villada Garibay and Mr. Serrato file this action, seeking a declaration that the reasons for Defendants' refusal to issue the visa and admit Mr. Villada Garibay are not facially legitimate nor bona fide nor legally correct. Mr. Villada Garibay did not accrue "unlawful presence" when he was a minor, and he was "admitted" when he returned to the United States in 2000. Alternatively, Mr. Villada Garibay seeks a declaration that the notice of approval provided him with inadequate notice of the risk of another ground of inadmissibility. He therefore is eligible for LPR status and lawfully entitled to return to the United States.

JURISDICTION AND VENUE

15. This Court has jurisdiction over the present action based on 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. § 1346(b) (Federal Defendant), 5 U.S.C. § 704 (Administrative Procedure Act), and 28 U.S.C. § 2201-2 (authority to issue declaratory judgment when jurisdiction already exists).

16. Venue properly lies within the Central District of California pursuant to 28 U.S.C. § 1391(e) (general venue) because this is a civil action in which Defendants are officers of the United States, because Plaintiff Serrato resides in the judicial district; and because there is no real property involved in this action.

PARTIES

17. Plaintiff Marco VILLADA GARIBAY is a citizen and national of Mexico who is married to a United States citizen and seeks to return to the United States as a LPR. He is currently located in Mexico but resides in Los Angeles County, California.

18. Plaintiff Israel SERRATO is a United States citizen and has been married to Mr. Villada Garibay since 2014. Mr. Serrato resides in Los Angeles County, California.

19. Defendant UNITED STATES DEPARTMENT OF STATE ("DOS") is the agency responsible for the granting and denial of immigrant visas for applicants

outside of the United States. *See* 8 U.S.C. § 1104.

20. Defendant John J. SULLIVAN is sued in his official capacity as the United States Acting Secretary of State. Defendant Sullivan is the highest-ranking official within the Department of State and is responsible for the actions of the agency.

21. Defendant Daria L. DARNELL, is sued in her official capacity as the United States Consul General in Ciudad Juarez, Chihuahua, Mexico. Defendant Darnell is responsible for the denial of Mr. Villada Garibay's application for admission to the United States as a LPR. *See* 8 U.S.C. § 1104(a); 22 C.F.R. § 42.61(a).

22. Defendant UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES ("USCIS") is the agency responsible for adjudicating applications for immigration benefits, including provisional waivers of unlawful presence.

23. Defendant L. Francis CISSNA is sued in his official capacity as the Director of USCIS. Defendant Cissna is the highest-ranking official within USCIS and is responsible for the actions of the agency.

24. Defendant Robert M. COWAN is sued in his official capacity as Director of the USCIS National Benefits Center. Defendant Cowan is responsible for the grant of a I-601A provisional unlawful presence waiver without notice of Mr. Villada Garibay's potential inadmissibility.

FACTUAL BACKGROUND

Growing up in the United States and Falling in Love with a United States Citizen

25. Mr. Villada Garibay is a native and citizen of Mexico who was born in Mexico in June 1983 and came to the United States in January 1990 as a six-year-old boy. He has lived in the United States ever since, and is now age 34.

26. Mr. Villada Garibay has four United States citizen siblings. His 26-year-old brother Christian is serving in the United States Army and is to be sent on his

second deployment, this time to Iraq, in May 2018. His brother is 23 years old and is an airport employee, his sister is age 15 and is enrolled in high school, and his youngest brother is seven and suffers from autism and requires specialized assistance in school.

27. Mr. Villada Garibay went to school in California, and graduated from Morningside High School in Inglewood in 2001. He also attended El Camino Community College and Harbor College in Los Angeles.

28. At the age of 17, in August 2000, Mr. Villada Garibay left California for Guadalajara, Mexico, because his grandfather had passed away. He stayed a few weeks and spent that time with his grieving grandmother.

29. On September 3, 2000, Mr. Villada Garibay flew from Guadalajara to Tijuana, Mexico. He then appeared before the San Ysidro, California port of entry seeking admission into the United States. He presented his high school identification from Morningside High School. An immigration officer questioned him in English and asked where he was going and for what reason. Mr. Villada Garibay explained that he was returning to his home to start his high school senior year the following week.

30. The immigration officer then asked Mr. Villada Garibay for identification, and he again presented the Morningside High School student identification he had obtained for use in the upcoming school year before his departure to Mexico, and told the immigration officer that this was the only identification he had. The immigration officer checked Mr. Villada Garibay's school identification again and admitted Mr. Villada Garibay into the United States.

31. Mr. Villada Garibay finished high school in June 2001, attended college for one semester, and then attended Harbor College to study photography.

32. Mr. Villada Garibay met Mr. Serrato in 2011. They started dating in 2012.

33. At the time they began a relationship, Mr. Serrato was suffering with

depression issues and Mr. Villada Garibay provided support and encouragement in helping him seek treatment and thrive. Going through this experience together strengthened their relationship as best friends and life partners.

34. At the time they met, California would not issue marriage licenses to same-sex couples, and same-sex marriage was not recognized under federal law.

35. On June 26, 2013, the U.S. Supreme Court issued two significant rulings related to same-sex marriage. In the first case, the Court rejected an attempt by opponents of marriage equality to block California from granting marriage licenses to same-sex couples. *See Hollingsworth v. Perry*, 570 U.S. 399 (2013). In the second, the Court struck down the Defense of Marriage Act, which had barred federal recognition of same-sex marriages. *See United States v. Windsor*, 570 U.S. 307 (2013).

36. After learning that they could legally wed in California and that their marriage would be fully recognized by the federal government, Mr. Villada Garibay and Mr. Serrato became engaged to be married.

37. They got married six months later, on January 8, 2014.

38. Mr. Villada Garibay and Mr. Serrato had two wedding celebrations. They had a civil ceremony in January 2014 at the Beverly Hills courthouse witnessed by two close friends. On April 12, 2014 they had their dream wedding celebration at the Royal Palace in Glendale, California, surrounded by 200 friends and family who were there to witness their life-long commitment to each other.

39. After they married, Mr. Villada Garibay and Mr. Serrato lived together in Los Angeles County, California, and formed a joint household. Like many married couples, Mr. Villada Garibay and Mr. Serrato supported each other financially and emotionally. They also financially supported extended family members. Mr. Villada Garibay and Mr. Serrato planned to continue building a life together in California and eventually have children, buy a house, and spend the rest of their lives together.

40. Mr. Villada Garibay had applied for and received protection under the Deferred Action for Childhood Arrivals ("DACA") program in 2013. He applied for renewals in 2015 and 2017, and was granted deferred action and work authorization under DACA until October 2019.

41. Mr. Villada Garibay was able to work lawfully once he was granted DACA, and he has been working as a legal assistant at a Los Angeles area law firm for the last four years.

LEGAL BACKGROUND

42. The Immigration and Nationality Act ("INA") provides that a United States citizen may petition for an immediate relative immigrant visa, which would grant LPR status, for his non-citizen spouse. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

43. If the petition is granted, one way for the non-citizen spouse to receive the visa is to seek the visa from a U.S. Consulate in his country of origin. This is required for many applicants who are unlawfully present in the United States. At the interview abroad, the Consular Officer evaluates whether the spouse should be granted the immigrant visa by determining whether the spouse is subject to a statutory ground for inadmissibility. *See* 8 U.S.C. § 1182.

44. If the spouse is found to be subject to a ground of inadmissibility that is waivable, USCIS is responsible for determining whether to grant a waiver of that ground of inadmissibility. *See* 6 U.S.C. § 271(b)(5); 8 U.S.C. § 1182.

45. One such ground of inadmissibility is that a non-citizen has spent a period of unlawful presence in the United States. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II). Under this ground of inadmissibility, a non-citizen who was unlawfully present for a year or more and leaves the United States cannot be readmitted into the country for ten years.

46. The statute excludes from the definition of "unlawful presence" any period of time before the non-citizen turns 18 years old. 8 U.S.C. §

1182(a)(9)(B)(iii).

47. USCIS may waive the unlawful presence ground of inadmissibility if denial of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the non-citizen. *See* 8 U.S.C. § 1182(a)(9)(B)(v).

48. Since 2013, USCIS has adjudicated "Provisional Unlawful Presence Waivers" before a non-citizen leaves the United States for a consular interview. *See* 8 C.F.R. § 212.7(e); USCIS, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives* 78 Fed. Reg. 536 (Jan. 3, 2013); USCIS, *Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*, 81 Fed. Reg. 50,244, 50,254 (July 29, 2016). This procedure gives a visa applicant assurance that, so long as the Consular Officer does not identify another applicable ground of inadmissibility, the applicant may return to the United States as a permanent resident.

49. The Provisional Unlawful Presence Waiver application is called Form I-601A.

50. If the Consular Officer identifies another applicable ground of inadmissibility, the Provisional Unlawful Presence Waiver is automatically revoked. *See* 8 C.F.R. § 212.7(e)(14)(i).

51. Until 2016, part of the process for granting a Provisional Unlawful Presence Waiver required USCIS to evaluate whether there was reason to believe that the applicant would be inadmissible under another ground.

52. Form I-601A, for a Provisional Unlawful Presence Waiver, requires the applicant to list all prior entries into the United States.

53. A second ground of inadmissibility is that the applicant was unlawfully present for a year or more, left the United States, and then re-entered the country without admission. *See* 8 U.S.C. § 1182(a)(9)(C)(i)(I).

54. This ground of inadmissibility is classified as a "permanent bar" and may be waived only after the applicant spends at least ten years outside of the United States. *See* 8 U.S.C. § 1182(a)(9)(C)(ii).

55. The INA establishes the unlawful presence and reentry grounds for inadmissibility in mandatory terms. The statute does not delegate authority to immigration or Consular Officers to exercise discretion in determining whether an applicant meets either ground of inadmissibility: the terms of the statute govern.

56. A U.S. citizen "has a protected liberty interest in [his] marriage that gives rise to a right to constitutionally adequate procedures in the adjudication of [his] husband's visa application." *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

57. The liberty interest in marriage "responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

58. In addition, before he departed from the United States for his consular interview, Mr. Villada Garibay was, as a result of his longstanding ties in this country, marriage to a U.S. citizen, and DACA status, a person in the United States with a liberty interest in "the right to stay and live and work in this land of freedom." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (quotation marks omitted).

Applying for a Visa and Facing Exile

59. Mr. Serrato filed a Form I-130 immigrant relative petition for Mr. Villada Garibay on August 26, 2014, which was approved on February 10, 2015.

60. Mr. Villada Garibay then filed a Form I-601A provisional waiver application on November 1, 2016, which was approved on February 23, 2017.

61. In his waiver application, Mr. Villada Garibay informed USCIS that he had departed the United States in 2000 as a minor and reentered on September 3,

2000. USCIS's approval of the provisional waiver did not inform Mr. Villada Garibay that his reentry in 2000 could subject him to a separate ground of inadmissibility that was not waived by the grant of the I-601A provisional waiver. *See* 8 U.S.C. § 1182(a)(9)(C)(i)(I).

62. The document granting Mr. Villada Garibay's provisional waiver described other grounds of inadmissibility in confusing boilerplate.

63. The document granting Mr. Villada Garibay's provisional waiver described "other grounds of inadmissibility besides unlawful presence, for example criminal grounds, fraud, or prior removals." Mr. Villada Garibay knew that he had no criminal convictions, had not engaged in fraud, and had no prior removals. A layperson reading this language would reasonably believe that the provisional waiver applies to any ground of inadmissibility that involves unlawful presence.

64. On information and belief, Defendants are aware that the language of the I-601A Provisional Unlawful Presence Waiver approval is confusing and induces individuals to leave the US without being aware that they would be barred from readmission.

65. On January 14, 2018, Mr. Villada Garibay departed the United States to attend his visa interview in Ciudad Juarez, Chihuahua, Mexico. When he departed the United States, his DACA status automatically terminated.

66. On January 17, 2018, Mr. Villada Garibay appeared at his visa interview in Ciudad Juarez and was questioned about any trips outside the United States. Mr. Villada Garibay shared details about his trip to Mexico in 2000 as a high school student. Mr. Villada Garibay informed the Consular Officer that he had returned to the United States presenting his high school identification and that the immigration official in 2000 had permitted him to enter the United States and return home.

67. The United States Consulate in Ciudad Juarez denied Mr. Villada Garibay's immigrant visa. The decision cites 8 U.S.C. § 1182(a)(9)(B)(i)(II)

(unlawful presence) and 8 U.S.C. § 1182(a)(9)(C)(i)(I) (unlawful presence and reentry without admission) as the bases for the denial of the visa.

68. No factual justifications for the denial of the visa were provided by the Consular Officer.

69. The Consular Officer's finding of additional grounds of inadmissibility and ineligibility for Mr. Villada Garibay's visa automatically revoked the approval of his I-601A provisional waiver.

70. On March 7, 2018, Mr. Villada Garibay, through counsel, contacted the United States Consulate in Ciudad Juarez by email regarding his visa denial and explained that he was "admitted" when he returned to the United States as a minor in 2000 because he presented his school identification and the immigration official allowed him to pass through. On March 8, 2018, Mr. Villada Garibay sent a package to the United States Consulate in Ciudad Juarez with a statement explaining his 2000 entry in which he presented his high school identification, and a copy of that exact school identification. On April 2, 2018 the United States Consulate in Ciudad Juarez affirmed the original visa denial.

71. Defendants' refusal to admit Mr. Villada Garibay was legally erroneous.

72. Defendants could not reasonably believe or believe in good faith that Mr. Villada Garibay is inadmissible under prevailing law, and therefore the refusal to admit him was not facially legitimate nor bona fide.

73. Mr. Villada Garibay and Mr. Serrato continue to be separated because Mr. Villaday Garibay is unable to return to the United States. As a result, they are suffering emotionally and financially, and are experiencing great anxiety because Mr. Villada Garibay is unable to return to the United States for at least ten years. The threat of prolonged separation impairs Mr. Villada Garibay's and Mr. Serrato's ability to live together as a married couple, form a family, and plan for the future.

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CAUSES OF ACTION

COUNT ONE

(*Defendants Department of State, Sullivan, and Darnell*)

(Denial of Immigrant Visa Under 8 U.S.C. § 1182(a)(9)(B)(i)(II) Not Facially Legitimate Nor Bona Fide Nor Legally Correct; Due Process Clause and Administrative Procedure Act)

74. Mr. Villada Garibay and Mr. Serrato incorporate the allegations in the paragraphs above as though fully set forth here.

75. Mr. Serrato is a United States citizen who has a protected liberty interest in his marriage that "gives rise to a right to constitutionally adequate procedures in the adjudication of [his] husband's visa application." *Bustamante*, 531 F.3d at 1062.

76. Mr. Villada Garibay has a liberty interest in living in the United States– the only home he has known, the home of his U.S. citizen spouse, and the country that authorized his presence for almost six years through the DACA program.

77. The Due Process Clause requires constitutionally adequate procedures in light of these liberty interests.

78. One of the two independent grounds for denying Mr. Villada Garibay's visa is that he is purportedly inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i)(II)) for having departed the United States after a year or more of unlawful presence.

79. Mr. Villada Garibay was age 17 when he departed the United States in 2000.

80. Defendant DOS is aware that Mr. Villada Garibay was a minor when he departed the United States in 2000.

81. Mr. Villada Garibay's time spent unlawfully present in the U.S. as a minor prior to his 2000 departure cannot be used to trigger the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II). Time spent as a minor is not included as unlawful presence. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I).

82. To the extent that the denial was based on Mr. Villada Garibay's trip to Mexico following his grandfather's death, it was legal error to treat Mr. Villada Garibay's 2000 departure as triggering the unlawful presence bar for purposes of 8 U.S.C. § 1182(a)(9)(B)(i)(II), and that ground is not a facially legitimate, bona fide, or legally permissible reason to deny an immigrant visa to Mr. Villada Garibay.

83. This error is subject to judicial review under the Due Process Clause and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

84. Denying Mr. Villada Garibay's immigrant visa on this ground was "arbitrary, capricious, an abuse of discretion, [and] . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT TWO

(*Defendants Department of State, Sullivan, and Darnell*)

(Denial of Immigrant Visa under 8 U.S.C. § 1182(a)(9)(C)(i)(I) Not Facially Legitimate Nor Bona Fide Nor Legally Correct: Due Process Clause and Administrative Procedure Act)

85. Mr. Villada Garibay and Mr. Serrato incorporate the allegations in the paragraphs above as though fully set forth here.

86. When Mr. Villada Garibay reentered the United States in 2000 after a short trip, he presented his student identification to the immigration official at the border. The immigration official accepted this identification and waved him through.

87. Defendant DOS was made aware of the circumstances of Mr. Villada Garibay's admission in 2000 during his consular interview.

88. After the interview, Mr. Villada Garibay provided to the U.S. Consulate in Juarez, Chihuahua, Mexico a sworn statement describing the nature of his admission and a copy of the student identification card that was presented in 2000.

89. Controlling precedent establishes that a wave through at the port of entry is an "admission." *See Matter of Quilantan*, 25 I. & N. Dec. 285, 293 (BIA 2010)

(noting that an individual who was waved through the port of entry was "admitted" to the United States, and has not entered without inspection); *Saldivar v. Sessions*, 877 F.3d 812, 819 (9th Cir. 2017) (following *Quilantan* and finding that an individual waved across the border has been "admitted.")

90. Because Mr. Villada Garibay was admitted, his entry does not constitute an "entry without admission." The ground of inadmissibility for entry without admission after a period of unlawful presence therefore cannot lawfully apply. *See* 8 U.S.C. § 1182(a)(9)(C)(i)(I).

91. Because it was legal error to treat Mr. Villada Garibay's entry in 2000 as an entry without admission, 8 U.S.C. § 1182(a)(9)(C)(i)(I) is not a facially legitimate, bona fide, or legally permissible reason to deny an immigrant visa to Mr. Villada Garibay.

92. This error is subject to judicial review under the Due Process Clause and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

93. Denying Mr. Villada Garibay's immigrant visa on this ground was "arbitrary, capricious, an abuse of discretion, [and] . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT THREE

(*Defendants Department of State, Sullivan, and Darnell*)

(Denial of Immigrant Visa Under 8 U.S.C. § 1182(a)(9)(C)(i)(I) Not Facially Legitimate Nor Bona Fide Nor Legally Correct; Due Process Clause and Administrative Procedure Act)

94. Mr. Villada Garibay and Mr. Serrato incorporate the allegations in the paragraphs above as though fully set forth here.

95. Mr. Villada Garibay was age 17 when he departed the United States in 2000.

96. Defendant DOS is aware that Mr. Villada Garibay was a minor when he

departed the United States in 2000.

97. Defendant DOS was made aware of the circumstances of Mr. Villada Garibay's departure as a minor in 2000 during his consular interview.

98. The INA excludes from the definition of "unlawful presence" any period of time before the non-citizen turns 18 years old. 8 U.S.C. § 1182(9)(B)(iii)(i).

99. Time spent in the United States as a minor is not included as unlawful presence. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I). That definition is incorporated into the term "unlawful presence" as used in 8 U.S.C. § 1182(a)(9)(C)(i)(I).

100. Because it was legal error to treat Mr. Villada Garibay's 2000 departure as triggering the unlawful presence bar for purposes of 8 U.S.C. § 1182(a)(9)(C)(i)(I), that ground is not a facially legitimate, bona fide, or legally permissible reason to deny an immigrant visa to Mr. Villada Garibay.

101. This error is subject to judicial review under the Due Process Clause and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

102. Denying Mr. Villada Garibay's immigrant visa on this ground was "arbitrary, capricious, an abuse of discretion, [and] . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT FOUR

(All Defendants)

(Unlawful Termination of I-601A Provisional Waiver; Due Process Clause and Administrative Procedure Act)

103. Mr. Villada Garibay and Mr. Serrato incorporate the allegations in the paragraphs above as though fully set forth here.

104. Through the grant of the I-601A provisional waiver, USCIS waived the unlawful presence bar (8 U.S.C. § 1182(a)(9)(B)(i)(II)) for Mr. Villada Garibay for his 2018 departure from the United States when he left to appear at his consular interview in Ciudad Juarez, Chihuahua, Mexico.

105. For the reasons discussed above, DOS erred in its determination that Mr. Villada Garibay was subject to the reentry bar (8 U.S.C. § 1182(a)(9)(C)(i)(I)).

106. Mr. Villada Garibay was not legitimately subject to any other ground of inadmissibility.

107. Because there was no legitimate additional ground of inadmissibility that applied to Mr. Villada Garibay, it was unlawful for USCIS to terminate his I-601A Preliminary Unlawful Presence Waiver.

108. This error of law is subject to judicial review under the Due Process Clause and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

109. The termination of Mr. Villada Garibay's waiver was "arbitrary, capricious, an abuse of discretion, [and] . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT FIVE

(Defendants United States Citizenship and Immigration Services, Cissna, and Cowan)

(Alternative Claim: Inadequate Notice on I-601A Provisional Waiver; Due Process Clause and Administrative Procedure Act)

110. Mr. Villada Garibay and Mr. Serrato incorporate the allegations in the paragraphs above as though fully set forth here.

111. Mr. Serrato is a person within the United States has a protected liberty interest in his marriage to Mr. Villada Garibay.

112. Mr. Villada Garibay was, until after the USCIS's actions, a person within the United States and he has a liberty interest in his marriage to Mr. Serrato.

113. Because of USCIS's actions described below, Mr. Serrato and Mr. Villada Garibay are unable to provide companionship and care to each other, or to share in life's experiences.

114. Mr. Villada Garibay was, until USCIS's actions, a person in the United

States with a liberty interest in "the right to stay and live and work in this land of freedom." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (quotation marks omitted).

115. Defendant USCIS granted a Provisional Unlawful Presence Waiver to Mr. Villada Garibay without individualized notice that Mr. Villada Garibay could be found inadmissible due to the closely related inadmissibility ground of entry without admission following a period of unlawful presence. *See* 8 U.S.C. § 1182(a)(9)(C)(i)(I).

116. The document granting the provisional waiver indicated that it did not address "other grounds of inadmissibility *besides unlawful presence*," suggesting that Mr. Villada Garibay would not be found inadmissible on a ground related to unlawful presence.

117. The discussion of other grounds of inadmissibility in the document was buried in confusing, boilerplate language. *See Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998) (holding that a "confusing" notice is insufficient to provide procedural due process); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 () (holding that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties" of a pending action and opportunity to object).

118. Mr. Villada Garibay's I-601A provisional waiver application provided Defendant USCIS with all of the information that USCIS relied on to exclude him from the U.S. pursuant to the 1252(a)(9)(C)(i)(I) bar.

119. Due to the lack of notice of a potential closely related ground of inadmissibility, Mr. Villada Garibay left the country for his consular interview.

120. If Mr. Villada Garibay had known that he could have been subjected to the additional ground of inadmissibility and that he would not be permitted to return to the United States, notwithstanding his I-601A provisional waiver, he would not have left for his consular interview and would have remained in the United States

with DACA protection. *See also Martinez de Bojorquez v. Ashcroft*, 365 F.3d 800, 803-05 (9th Cir. 2004) (identifying a due process violation arising from the unknowing abandonment of an opportunity to remain in the United States).

121. When Mr. Villada Garibay left the United States, USCIS stripped him of his deferred action and work authorization under DACA. Defendant USCIS's grant of a Provisional Unlawful Presence Waiver without providing notice of the potential application of a closely related ground of inadmissibility resulted in Mr. Villada Garibay departing the United States, terminating his DACA status, and being stranded outside of the country for at least ten years, violating his right to procedural due process.

122. Defendant USCIS's grant of a Provisional Unlawful Presence Waiver without providing notice of the potential closely related ground of inadmissibility deprived Mr. Villada Garibay and Mr. Serrato of the enjoyment of their marriage without due process of law, violating their rights to procedural due process.

123. Defendant USCIS's grant of a Provisional Unlawful Presence Waiver without providing notice of the potential application of a closely related ground of inadmissibility was contrary to Mr. Villada Garibay and Mr. Serrato's constitutional rights, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 702(2)(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

(1) Declare that the Department of State's determination that Mr. Villada Garibay is ineligible to immigrate to the United States is contrary to 8 U.S.C. § 1182(a)(9)(B)(i)(II) and 8 U.S.C. § 1182(a)(9)(C)(i)(I) and is neither facially legitimate nor bona fide nor legally permissible;

(2) Declare that Defendants cannot rely on that determination, or on its underlying rationales, in denying Mr. Villada Garibay's visa

or in denying him entry into the United States;

(3) Alternatively, declare that the I-601A notice of approval provided Mr. Villada Garibay with inadequate notice of the risk of another ground of inadmissibility, depriving him and Mr. Serrato of their Fifth Amendment procedural due process rights.

(4) Order the reinstatement of Mr. Villada Garibay's I-601A Preliminary Unlawful Presence Waiver;

(5) Award costs and reasonable attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b); and

(6) Grant such further relief as the Court deems just and proper.

Dated: April 10, 2018

Respectfully submitted,
/s/ Nora A. Preciado
Nora A. Preciado
NATIONAL IMMIGRATION LAW CENTER

Cecelia Chang*
Joshua Rosenthal*
NATIONAL IMMIGRATION LAW CENTER

Stacy Tolchin
LAW OFFICES OF STACY TOLCHIN

Andrew J. Pincus *
MAYER BROWN LLP

Attorneys for Plaintiffs

* *Pro hac vice* application forthcoming