UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BALAZS ISTVAN FABRY and GABRIELLA K. TAKACS FABRY, a married couple, and M.B.F., their son, F.G.F, their daughter, and J.E.F., their daughter	)	Case No.: 3:14-cv-01261-JCH
Plaintiffs,	)	
v.	)	
JOHN KERRY, U.S. Secretary of State; MARCIA PRYCE, Chief, Waiver Review Division, U.S. Department of State; JEH JOHNSON, U.S. Secretary of Homeland Security; LEON RODRIGUEZ, Director, U.S. Citizenship and Immigration Services; KATHY A. BARAN, Director, California Service Center, U.S. Citizenship and Immigration Services; the UNITED STATES; and ERIC HOLDER, Attorney General of the United States	)	FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF
Defendants.	)	JANUARY 15, 2015

Plaintiffs by their undersigned lawyer allege as follows:

I. Parties

1. Plaintiff Balazs Fabry ("Mr. Fabry") is a citizen of Hungary. He is currently a resident of New Haven County, Connecticut. His address is 660 Roosevelt Drive, Oxford, Connecticut 06478.

2. Plaintiff Gabriella K. Takacs Fabry ("Mrs. Fabry") is a U.S. citizen. She is a resident of New Haven County, Connecticut. She is married to Mr. Fabry and resides with him.

3. Plaintiff M.B.F. is a U.S. citizen and the eight-year-old son of Mr. and Mrs. Fabry.

4. Plaintiff F.G.F. is a U.S. citizen and the six-year-old daughter of Mr. and Mrs. Fabry.

5. Plaintiff J.E.F. is a U.S. citizen and the five-year-old daughter of Mr. and Mrs. Fabry.

6. Defendant John Kerry is the United States Secretary of State, the head of the United States Department of State, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of State, 2201 C Street N.W., Washington, D.C. 20520.

7. Defendant Marcia Pryce is the Chief of the Waiver Review Division ("WRD") of the Bureau of Consular Affairs of the United States Department of State, an agency of the United States. This office is responsible for making recommendations on waivers pursuant to 8 U.S.C. § 1182(e). She is named in her official capacity. Her address is: Waiver Review Division, CA/VO/L/W, U.S. Department of State, SA-17, 11th Floor, 600 19th Street, N.W., Washington, D.C. 20522.

8. Defendant Jeh Johnson is the United States Secretary of Homeland Security, the head of the United States Department of Homeland Security, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of Homeland Security, Washington, D.C. 20528.

9. Defendant Leon Rodriguez is the Director of the United States Citizenship and Immigration Services ("USCIS"), which is part of the Department of Homeland Security and is an agency of the United States. He is named in his official capacity. His address is: Office of

the Director MS 2000, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave. N.W., Washington, D.C. 20529-2000.

10. Defendant Kathy Baran is the Director of the USCIS California Service Center, an agency of the United States. She is named in her official capacity. Her address is: USCIS California Service Center, P.O. Box 10129, Laguna Niguel, California 92607-1012.

11. Defendant Eric Holder is the Attorney General of the United States. He is named in his official capacity. His address is: U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

II. Jurisdiction and Venue

12. This is an action to review administrative agency action of the U.S. State Department. The action arises under the Immigration and Nationality Act of 1952, as amended (the "Act"), 8 U.S.C. § 1101 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. Subject matter jurisdiction is based on 28 U.S.C. §§ 1331 and 1361 (mandamus). This Court may grant relief pursuant to the Act, the APA, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, 28 U.S.C. §§ 1361, and 28 U.S.C. § 1651 (the All Writs Act).

13. Defendants John Kerry, Marcia Pryce, Jeh Johnson, Leon Rodriguez, and Kathy Baran had duties to act in conformity with the statute, the regulations, the legislative history, and international law in adjudicating Mr. Fabry's J-1 exceptional hardship waiver application.

14. Venue is proper in the United States District Court for the District of Connecticut under 28 U.S.C. §§ 1391(e) and 1402(a)(1), because all plaintiffs reside in the district and the United States is a defendant.

III. Introduction and Legal Background

15. This section of the complaint gives a brief introduction of what happened and what is at stake, then a summary of the legal procedures involved. Waivers pursuant to 8 U.S.C. § 1182(e) will be called "J-1 waivers." Exchange visitors in the United States in "J-1" nonimmigrant (temporary) status will be called "J-1s."

16. The State Department issued a Not Favorable recommendation on Mr. Fabry's application for a waiver of the two-year J-1 foreign residence requirement of 8 U.S.C. § 1182(e) ("the foreign residence requirement"). This required the USCIS to deny the waiver application. Mr. Fabry and his U.S. citizen wife had three small children, all U.S. citizens. Because of Mr. Fabry's immigration status, he was unable to work and could produce almost no income for his family. The family thus had no health insurance and depended on Mrs. Fabry, a ballroom dance instructor, to support them. She relied entirely in turn on her husband to care for their children and to maintain their house while she was working. Without Mr. Fabry's presence in the United States, Mrs. Fabry would have been forced to pay for day care for their children, which she could not possibly have afforded on her meager income.

17. Furthermore, Mr. Fabry was subject to a ten-year bar if he had to leave the United States. This meant that Mrs. Fabry would have had to raise her three children single-handedly for an entire decade if her husband were denied a waiver. Not only would this have been an enormous source of psychological stress for her and for their three children—who would be forced to grow up without their father during their formative years—but her husband's absence would also have caused enormous career disruption for Mrs. Fabry and exceptional financial hardship for the family.

18. In order to support herself and the children, keep their house, and afford day care, Mrs. Fabry would have had to find a higher-paying job, which could have been very difficult as her entire working life had been spent solely in the field of dance and dance instruction. Such a move would effectively have ended her career, which she had painstakingly built over many years. Moreover, even a high-paying job in another field would not necessarily have been sufficient for a struggling single mother to keep their home and afford basic necessities for the children.

19. Finally, not only would Mr. Fabry's U.S. citizen wife and children have suffered greatly if he were forced to leave the United States for ten years, but the public interest of the United States would suffer as well. Both the Fabrys were actively involved in charitable and volunteer activities within their community. Mr. Fabry was a volunteer firefighter and active in his community church. Mrs. Fabry taught part-time at a high school for children with special needs. Both of them also took part in several other community and charitable activities. There were literally dozens, if not hundreds, of people in their community who would have been negatively affected if Mr. Fabry had been forced to leave their community, and if Mrs. Fabry's time were to have become completely filled by the struggle to survive and to support their family as a single mother.

20. The chief claim of this action is that the State Department must have abused its discretion, because it could not have come to its negative conclusion through a correct process of reasoned decisionmaking.

21. Many foreigners come to the United States as "J-1" exchange visitors ("J-1s"). This is a kind of nonimmigrant (temporary) classification, as set forth in 8 U.S.C. § 1101(a)(15)(J).

22. Under 8 U.S.C. § 1182(e), there are three ways in which a J-1 can become subject to the two-year foreign residence requirement: (1) the J-1 program is funded by the U.S. government or the J-1's government; (2) the J-1 is engaged in training that is on the "Skills List" for the home country; or (3) the J-1 is coming to the United States for graduate medical education. The foreign residence requirement prohibits a J-1 from doing certain things, such as applying for permanent resident status (green card), until he has either fulfilled the requirement by spending two years in his home country or has obtained a waiver of the requirement.

23. As described with more specificity below, Mr. Fabry became subject to the foreign residence requirement because he came to the United States in J-1 status after having received a Fulbright/Blinken grant for graduate study. Although Mr. Fabry's J-1 program was sponsored by the U.S. government, it was entirely funded by former U.S. Ambassador to Hungary Donald Blinken.

24. Under 8 U.S.C. § 1182(e), there are four ways in which a J-1 can pursue a waiver of the foreign residence requirement (these are specified below). The instant action concerns Mr. Fabry's application for a waiver based on the risk of "exceptional hardships" to his U.S. citizen wife and children. This kind of waiver application commences with the filing of a DS-3035 data sheet form with the State Department. This is followed by the main application, which is submitted on Form I-612, with accompanying evidence, to the USCIS California Service Center (CSC).

25. Unlike virtually all other waiver application types in U.S. immigration law, this kind of waiver application is not adjudicated solely by the USCIS. Instead, the waiver can be granted only if the State Department issues a favorable recommendation. In this case, the State Department issued a Not Favorable recommendation. This required the USCIS to deny the waiver application.

IV. Factual Allegations

26. Mr. Fabry first entered the United States on a J-1 visa on July 10, 1999, as a nonimmigrant exchange visitor under 8 U.S.C. § 1101(a)(15)(J) to pursue an M.B.A. at the State University of New York at Binghamton. He graduated with this degree in May 2001.

27. Mr. Fabry's J-1 visa was sponsored by the U.S. Department of State and administered by the Hungarian-American Commission for Educational Exchange ("Fulbright Commission") in Hungary and the Institute of International Education ("IIE") in the United States. As stated above, no government funds were used to finance his study—only the personal monies provided by Ambassador Blinken. These monies financed Mr. Fabry's first year at SUNY Binghamton; for his second year of study he used his personal savings, credit cards, and the small income he was able to earn from a U.S. employer, Birinyi Associates, Inc., in Westport, Connecticut.

28. Mr. Fabry filed a no-objection waiver application in February 2002. His application was denied on January 13, 2004.

29. Mr. Fabry's exchange program officially ended on September 30, 2002, and he left the United States to move back to Hungary on September 29, 2002. He rented an apartment and

began to integrate back into life in Hungary, intending to fulfill his two-year foreign residence requirement.

30. On November 9, 2002, Mr. Fabry returned to the United States on a B-1 visa. Mr. Fabry had met Gabriella Takacs during his earlier time in the United States and asked her now to accompany him to a ceremony he was attending. After meeting again, they quickly fell in love, and Mr. Fabry consulted a lawyer about extending his stay. This was when Mr. Fabry learned that he had already overstayed his visa. He has remained in the United States ever since.

31. Mr. Fabry married Gabriella Takacs ("Mrs. Fabry") on November 30, 2003.

32. Mrs. Fabry became a naturalized U.S. citizen on December 21, 2007.

33. Mr. and Mrs. Fabry's son M.B.F. was born in 2006 in Bridgeport, Connecticut. He is thus a U.S. citizen by birth.

34. Their daughter F.G.F. was born in 2008 in Bridgeport, Connecticut. She is thus a U.S. citizen by birth.

35. Their daughter J.E.F. was born in 2009 in Bridgeport, Connecticut. She is thus a U.S. citizen by birth.

36. Mr. Fabry had been a volunteer firefighter for the Riverside Fire Company in Oxford, Connecticut. At the filing of the waiver application, he was on his way to passing hazmat and additional training to receive the rank of Firefighter I.

37. Mr. Fabry had also long been active in his local church, the Calvin United Church of Christ in Fairfield, Connecticut. Due to his years of service, he was eventually elected Chief Elder and took over the task of rebuilding the community hall. In addition to helping raise over $100,000 and coordinating the work, Mr. Fabry also physically worked on construction of the

building. Mr. Fabry remained actively involved in church activities. During his time in the United States, Mr. Fabry had also been involved in other volunteer activities, such as Meals on Wheels and serving as a Hungarian-language instructor.

38. Mrs. Fabry had also devoted her free time to volunteer activities in her community. Because she began ballroom dancing as a child and believed strongly that dancing helps children's development, she started a ballroom dance program for teenage students at an alternative high school in Milford, Connecticut. She also started ballroom dance programs at two schools in Bridgeport, Connecticut, and she has remained active in these programs ever since.

39. If a waiver for Mr. Fabry were denied, not only would his U.S. citizen wife and three U.S. citizen children be placed in dire psychological and financial circumstances, but Mr. Fabry's community would lose his volunteer services, while Mrs. Fabry would certainly be forced to curtail her volunteer activities. The U.S. public interest would suffer as a result.

V. J-1 Waiver History (Exceptional Hardship Waiver)

40. All applicants for a J-1 exceptional hardship waiver must fill out an electronic Form DS-3035 on the State Department's website.

41. After completing the electronic Form DS-3035, the State Department's website generates (1) a "Waiver Review Division Case Number," (2) a "Waiver Review Division Barcode Page," (3) a "Third Party Barcode Page," (4) an electronic DS-3035 in "pdf" format with the applicant's answers, (5) Supplementary Applicant Information Pages (if necessary), and (6) a "Packet Assembly Checklist" and "Instruction Sheet."

42. All applicants for a J-1 waiver are automatically issued a WRD Case Number from the State Department, which occurs when the DS-3035 is first submitted online.

43. All applicants for a J-1 waiver must pay a $215.00 filing fee to the State Department for the DS-3035. After filing the DS-3035 online, the applicant must send a hardcopy of the form, plus fee, to a State Department lockbox in St. Louis, Missouri.

44. For exceptional hardship and persecution waiver applications, the main waiver application is filed with the USCIS California Service Center (CSC). The application is filed on Form I-612 with accompanying evidence.

45. All applicants for a J-1 waiver must also pay a filing fee to the USCIS. For Mr. Fabry, this fee was $545.00.

46. On March 31, 2005, Mr. Fabry, through counsel, filled out Form DS-3035 on the State Department's website to initiate the application process for a J-1 waiver.

47. The State Department assigned to Mr. Fabry's case WRD Case Number 90378.

48. The State Department generated a "Waiver Review Division Barcode Page" and a "Third Party Barcode Page" for submission with Mr. Fabry's waiver application. Mr. Fabry, through counsel, paid $215.00 to the State Department on February 22, 2008.

49. On August 11, 2008, Mr. Fabry, through counsel, filed his Form I-612 exceptional hardship waiver application with the CSC. The applicant was assigned USCIS Case Number WAC-08-221-50470.

50. Mr. Fabry's I-612 materials included the WRD Case Number as well as his Form DS-3035 and the barcode sheet generated by the State Department.

51. Mr. Fabry was statutorily eligible to seek an exceptional hardship waiver because he had four qualifying relatives, who are co-plaintiffs in this action: his U.S. citizen wife Gabriella K. Takacs Fabry and his three U.S. citizen children M.B.F., F.G.F., and J.E.F.

52. As documented in the application, Mr. Fabry's U.S. citizen family would suffer many exceptional hardships if he were required to return to Hungary for the fulfillment of the two-year foreign residence requirement.

53. Mr. Fabry's exceptional hardship waiver application complied with all statutory and regulatory requirements specified by the defendants.

54. On June 16, 2009, Mr. Fabry's Form I-612 waiver application was reviewed by defendant Kathy Baran, Director of the California Service Center. Ms. Baran made the legal determination that while Mr. Fabry's qualifying relatives had shown that they would suffer exceptional hardship if they had to relocate to Hungary, they had not shown that they would suffer exceptional hardship if they remained in the United States without Mr. Fabry. Ms. Baran specified that "there is no evidence to indicate that the medical, financial and psychological hardships that would be experienced by the spouse and children if the applicant had to leave the United States would be anything other than what is normally experienced when families are separated."

55. This denial was issued after a long delay, with no Prior Request for Evidence, as part of a sudden flood of hostile actions from the CSC on I-612s. The CSC's denial of Mr. Fabry's waiver application was plainly not the result of well-reasoned adjudication.

56. The original application was filed before the birth of Mr. Fabry's third U.S. citizen child, J.E.F., born in Connecticut in 2009. Juliana's birth occurred prior to the filing of an appellate brief; thus Juliana is considered a qualifying relative in the instant hardship waiver application. This is true because the applicant can submit additional evidence on appeal. See 8 C.F.R. § 103.3(a)(2)(vi). The USCIS Administrative Appeals Office (AAO) reviews all cases de

novo and is not restricted to the original record. There are now four U.S. citizen co-plaintiffs who will suffer exceptional hardship should Mr. Fabry not be issued a waiver.

57. After denial of his waiver application by the CSC, Mr. Fabry's counsel filed an appeal on his behalf with the AAO on July 13, 2009. In his appeal brief, counsel alleged that the California Service Center's denial of Mr. Fabry's waiver application contained many errors of law and logic and was an abuse of discretion. The appeal included Form I-290B, Notice of Appeal or Motion, along with a check written to the order of USCIS in the amount of $585.

58. The CSC received notice of appeal to the commissioner on July 14, 2009, and forwarded the appeal to the AAO in Washington, D.C., on July 20, 2009.

59. On December 3, 2009, the appeal was reviewed by John F. Grissom, Acting Chief of the AAO. In his letter from this date, Mr. Grissom stated that Mr. Fabry had established that his U.S. citizen spouse and children would experience exceptional hardship were they to relocate to Hungary and in the alternative, were they to remain in the United States without Mr. Fabry for the requisite period. Mr. Grissom further stated that, "The evidence in the record establishes the hardship the applicant's spouse and children would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families." Mr. Grissom went on to state that "Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514."

60. On January 13, 2010, the CSC Director sent a copy of Form I-613, with Mr. Fabry's amended waiver application, to the Department of State's Waiver Review Division (WRD).

61. On August 26, 2010, defendants John Kerry and Marcia Pryce issued a Not Favorable recommendation and transmitted said recommendation on Form I-613 to the CSC Director.

62. The WRD uses the bottom portion of Form I-613 to state its position on waiver applications for transmission to the Department of Homeland Security. The form contains a box that allows the State Department to explain the basis for a Not Favorable recommendation.

63. In this box is handwritten the following sentence: "The case received a recommendation of denial based on the program, policy, and foreign relations outweighing the hardship claims." There is no other explanation for the denial.

64. On September 27, 2010, USCIS sent a denial letter to Mr. Fabry stating that the State Department had recommended to the USCIS that his waiver application not be approved. This letter was the ultimate denial of Mr. Fabry's waiver application.

65. On information and belief, defendants John Kerry and Marcia Pryce failed to receive and/or review the entire I-612 waiver application and all supporting materials—including the AAO's determination that "the hardship the applicant's spouse and children would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families"—prior to issuing their recommendation.

66. The WRD is required by regulation to review the (1) program, (2) policy, and (3) foreign relations aspects of an I-612 case, make a recommendation, and forward it to the appropriate office at the USCIS.

67. The basis of the denial, set forth above, is a facially insufficient reason to issue a Not Favorable recommendation on a Form-I-612 waiver case under State Department regulations.

68. The WRD's Not Favorable recommendation does not provide any explanation regarding the basis for the denial whatsoever.

69. The WRD's Not Favorable recommendation does not provide any evidence that the WRD balanced the program, policy, and foreign relations considerations against the exceptional hardships in the case.

70. The WRD maintains a website outlining the processes and procedures for seeking a J-visa waiver. Its address is: http://travel.state.gov/content/visas/english/study-exchange/student/residency-waiver.html.

71. The WRD website has a Frequently Asked Questions page that answers the question "Why would a recommendation application be denied by the Waiver Review Division?" The answer states: "Recommendation applications are denied when the reasons given for requesting the waiver do not outweigh the program and foreign policy considerations of the exchange visitor program. For this reason, waiver recommendation applications from exchange visitors who received U.S. government funding are generally denied."

72. The basis of such a denial is facially invalid because the WRD is required to assess the program, policy, and foreign relations aspects of a case under 22 C.F.R. § 41.63.

73. The WRD maintains a website where one can track the progress of a J-1 waiver case. Its address is: http://j1visawaiverstatus.state.gov/.

74. The WRD sometimes issues Requests for Evidence in J-1 waiver cases. The Requests for Evidence issued by the WRD include, for example, requests that the applicant complete the preliminary filing requirements as well as requests for substantive information regarding the application, such as obtaining updated medical information.

75. The procedures used by the WRD for adjudication of J-1 waiver applications have changed over the past several decades. In particular:

76. The Form DS-3035 did not exist prior to the late 1990s.

77. Most J-1 program and waiver matters used to be handled by an agency called the U.S. Information Agency (USIA). The USIA was abolished in 1999. At that time, its "program" functions were transferred to the State Department's Office of Academic Exchange Programs, and its "waiver" functions were transferred to the new WRD within the State Department's Bureau of Consular Affairs. The USIA started charging a filing fee for the Data Sheet form (which later became the DS-3035) in approximately 1998.

78. J-1 waiver applicants were not required to submit any materials directly to the USIA or State Department prior to some time in the 1990s. In earlier times, in cases where the Immigration and Naturalization Service (INS, the predecessor to the USCIS) made a finding of exceptional hardship, the District Director would submit a complete copy of the application materials to the USIA or State Department to obtain that agency's recommendation. This required no independent action on the part of the applicant.

79. On August 26, 2010, defendants John Kerry and Marcia Pryce issued a Not Favorable recommendation on Form I-613 to the CSC Director, consisting of one sentence: "The case received a recommendation of denial based on the program, policy, and foreign relations outweighing the hardship claims." There was no accompanying letter or any other documentation provided to show the underlying reasoning for this decision. There was no evidence that Waiver Review Division officials had actually balanced the exceptional hardships presented against the program, policy, and foreign relations aspects of the case.

80. Furthermore, John Kerry and Marcia Pryce issued this denial despite the fact that the Administrative Appeals Office had already explicitly found that Mr. Fabry's U.S. citizen wife and children would suffer exceptional hardship were he to be required to return to Hungary for two years. This further begs the question of why such a deserving application would be denied, and why no explanation for this denial was provided.

81. There is no administrative appeal from the September 27, 2010, decision.

82. The plaintiffs have exhausted their administrative remedies.

83. The September 27, 2010, recommendation by the State Department is irrational and contrary to the statutory standards of the APA and the Immigration and Nationality Act, the Department of Homeland Security and State Department regulations, the intent of Congress in enacting the J-1 visa waiver, and the due process of law, in that it fails to state any basis for the denial, or to discuss any facts relevant to the decision, or to demonstrate that it balanced the exceptional hardships with the program, policy, and foreign relations aspects of this case.

84. On information and belief, the WRD has engaged in a pattern and practice of failing to adhere to its own regulations, and the Constitution, and committing other legal violations in adjudicating hardship waiver applications that involved U.S. government funding.

85. On information and belief, the WRD denies the majority of the waiver applications it receives when U.S. government funding is involved.

86. On October 21, 2014, a District Judge for the United States District Court for the Western District of Washington at Seattle reached a decision on a Motion for Attorneys' Fees in an analogous J-1 waiver case. *See Guerra v. United States of America*, No. 09-cv-01027 (W.D.

Wash. filed July 20, 2009). Ms. Guerra's J-1 program was funded by the United States government. *See* Doc. No. 50 at ¶ 14 and Doc. No. 130 at 2.

87. The District Judge in the *Guerra* case noted that the USCIS, the State Department, and a Department of Justice, Office of Immigration Litigation attorney asserted multiple inconsistent standards of adjudication in the litigation. *See* Guerra Doc. No. 130 at 9-10.

88. The District Judge in *Guerra* found that the prelitigation actions of the Defendants in the *Guerra* case reflected a pattern of willful misconduct that continued throughout the course of the litigation. *Id*. at 8. The Judge also found that the USCIS improperly manipulated the administrative record. *Id*. He further found that the "Defendants consistently misrepresented to the Court and to the Plaintiffs the scope of the evidence considered by USCIS and by the State Department in adjudicating Ms. Guerra's hardship waiver." *Id*.

89. The *Guerra* case calls into question the actions of the Defendants in the instant case and gives rise to a widespread pattern and practice claim.

90. To establish the pattern and practice of constitutional and statutory violations, Plaintiffs require jurisdiction in district court so that a record adequate for purposes of judicial review can be created. *See McNary v. Haitian Refugee Ctr*., 498 U.S. 479, 97 (1991). Specifically, the one-line decision from the WRD may mean that the State Department did not in fact engage in review required by the regulations and other sources of law and that the courts will not be able to determine whether a pattern and practice of lawful violations exists without the development of an adequate record that will permit review.

91. Mr. Fabry's waiver application is meritorious and should be approved.

VII. Irreparable Injury

92. Absent approval of Mr. Fabry's waiver application, plaintiffs will suffer irreparable injury and many severe and exceptional hardships.

93. U.S. citizens Gabriella Takacs Fabry, M.B.F., F.G.F., and J.E.F. will face exceptional medical, psychological, and financial hardships should Mr. Fabry be forced to return to Hungary.

94. In her denial of Mr. Fabry's waiver application, Defendant Kathy A. Baran, the Director of the California Service Center, stated that "the Service concedes that the applicant's spouse and children would suffer an exceptional hardship if they were to accompany the applicant abroad for the stipulated two year term." However, the USCIS AAO found that Mrs. Fabry and the children will also suffer exceptional hardships under any travel option if the applicant's two-year foreign residence requirement is enforced.

95. Mr. Fabry overstayed his B visa. He is now subject to a ten-year bar to reentry if he leaves the United States. This means that if Mr. Fabry is denied a waiver and must leave the United States, his separation from his wife and children will be five times longer than the usual two-year foreign residence requirement. This will make the exceptional hardships suffered by his U.S. citizen wife and three children even more difficult.

96. Because Mr. Fabry could not obtain employment authorization, his U.S. citizen wife and children had no medical insurance, which exposed them to very serious health risks. They could not afford basic preventive health care, and common childhood illnesses were a potential financial catastrophe for the family.

97. If Mr. Fabry has to leave the United States for ten years, such a prolonged absence would cause exceptional psychological hardship for his U.S. citizen wife and young children. Not only would Mrs. Fabry have to live without her husband for ten years, but the children would be forced to grow up without their father. The family would probably not even be able to visit Mr. Fabry, since they would find it very difficult to afford to travel abroad. It is highly unlikely that the children would be able to see their father often, if at all, during this entire ten-year period.

98. Mr. Fabry had been a daily, constant presence in his children's lives since they were born. Because Mrs. Fabry was the breadwinner in the family and left her children daily in order to teach, her husband had always been the parent who did the caretaking. His sudden absence for ten years would be emotionally devastating for his three children. Instead of having their father around all the time, they would not see him at all. Instead, the children would see their mother—harassed by financial difficulties, working around the clock to make ends meet, and miserable herself because she would be missing her husband. Moreover, the children would likely see their mother far less frequently, since she would be constantly at work. In essence, the Fabry children would be losing both their parents.

99. Traumatic separation from a parent can have serious psychological consequences for a child. It typically causes great stress and anxiety, which can also cause diminished academic performance, increased risk of depression and other mental disorders, increased likelihood of anti-social behavior, and in turn increased risk of medical problems later in life.

100. With Mr. Fabry's ten-year absence, his U.S. citizen wife would essentially become a single mother. All the myriad daily acts of living and caring for a family and watching the children grow up would be experienced by Mrs. Fabry alone. All the pleasures of married life, of

sharing responsibilities, and of growing older with a partner would be denied her—through no fault of her own. Her marriage would be threatened, she would be emotionally isolated, and her psychological well-being would be at grave risk. Mrs. Fabry would become solely responsible for ensuring her children's health and well-being, as well as maintaining the family home.

101. Because Mr. Fabry lacked employment authorization, he could not help support his family. This meant that Mrs. Fabry, a professional dance instructor, was the sole breadwinner in the family. Her salary had to be stretched to cover mortgage payments, car payments, utilities, food, and all other living expenses. Mrs. Fabry depended on her husband to take care of the children and maintain the house, and his help had been critical in this regard.

102. If Mr. Fabry were forced to leave the United States for ten years, Mrs. Fabry would have no choice but to pay for childcare, as well as for routine maintenance and repairs on their house, and there was simply no way in which her salary could possibly cover that. It was already stretched to the limit, and Mrs. Fabry, who emigrated to the United States as an adult, had no family in the United States who could assist her with childcare or with living expenses. The Fabry family were already living as frugally as possible; doing without Mr. Fabry's invaluable presence as a parent and caretaker would push the family into actual poverty.

103. If Mr. Fabry is denied a waiver, this would also cause serious career disruption to his U.S. citizen wife. Mrs. Fabry was a professional ballroom dancer and instructor who emigrated to the United States when she was 25. She left Hungary, her country of origin, because she loved dance and could foresee no future for herself as a professional dancer and instructor in a country that was still shedding the vestiges of communism and struggling economically.

104. Since her arrival in the United States in 1997, Mrs. Fabry had painstakingly built up her own business as a dance instructor. Initially she rented a studio space, but this became too expensive. The Fabrys searched for a long time for an affordable house that would allow Mrs. Fabry to have a studio. They finally found one in Oxford, Connecticut, and Mr. Fabry did most of the renovation work. Mrs. Fabry ran her dance business out of this small studio. Her clientele had slowly grown, so that eventually her business was thriving.

105. If Mr. Fabry must leave the United States for ten years, his U.S. citizen wife would no longer have someone to care for their children and maintain their house. It would be impossible for Mrs. Fabry to teach her students, run her business, care for her children, and maintain their house, all at the same time. She would have to pay for childcare, and her current income simply did not stretch that far. Mrs. Fabry would be forced to search for a higher-paying job, likely in an office. However, she has never had any job experience outside the world of dance. Without any professional qualifications or skills besides dance, her chances of finding better-paying employment would be slim. It is possible that Mrs. Fabry and her children will become destitute. Furthermore, her dance business would be ruined. It takes many years to develop a reputation in the arts, and Mrs. Fabry had spent 17 years building up her business. If she were forced to work at a higher-paying job, she would be forced to close her studio, and her successful business that she had worked so hard to build would end.

106. It would also be a hardship to the public interest of the United States if Mr. Fabry were compelled to return to Hungary to fulfill the two-year foreign residence requirement. Mr. Fabry was a volunteer firefighter and active in his community church. In fact, he was elected Chief Elder of his church several years ago and oversaw fundraising and construction of a new

community hall for the church, even physically assisting with construction efforts himself. Mr. Fabry had also volunteered with other charity organizations, such as Meals on Wheels, and he had volunteered as a Hungarian-language instructor.

107. Because she firmly believed that ballroom dance helps children's development, Mrs. Fabry started a ballroom dance program for an alternative high school in Milford, Connecticut. After the family moved to Oxford, Connecticut, she also started a children's ballroom dance program with the Thurgood Marshall Middle School and the Six to Six Magnet School, both in Bridgeport, Connecticut. Mrs. Fabry had remained heavily involved in the latter two programs ever since.

108. Both Mr. and Mrs. Fabry had long given back, and continue to give back, to their community. Denial of a waiver would cause harm to many U.S. citizens and would harm the U.S. public interest.

COUNT ONE: ABUSE OF DISCRETION
AND VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

109. Paragraphs 1 through 108 above are repeated and realleged as though fully set forth herein.

110. The defendants's denial of Mr. Fabry's I-612 waiver application is contrary to the statutory standards, the regulations, the legislative history, and the intent of Congress, and it is therefore arbitrary and capricious, because the defendants failed to consider all the evidence in the record before rendering a decision, ignored substantial evidence in the record without any rational basis, failed to weigh the evidence presented against the program, policy, and foreign relations aspects, and failed to state a valid reason for the denial.

111. The defendants's adjudication of the I-612 waiver application is contrary to the statutory standards, regulations, legislative history, and intent of Congress because there is no evidence that the defendants reviewed the program, policy, and foreign relations aspects of this case, and the defendants routinely fail to provide any valid explanation for their recommendations in such cases.

112. On information and belief, the State Department intentionally does not provide the basis for its decisions in J-1 waiver cases so that it can evade judicial review.

113. On information and belief, the State Department has engaged in a pattern and practice of summarily issuing not favorable recommendations in nearly all U.S. government-funded waiver applications without properly reviewing the program, policy, and foreign relations aspects of such cases, and without stating a valid reason for the unfavorable recommendation, which is contrary to the statutory standards, regulations, legislative history, congressional intent, and due process of law.

114. The defendants acted outside the scope of discretion granted by Congress.

115. The defendants's denial of the application therefore violates the Administrative Procedure Act, 5 U.S.C. §§ 555(b), 702, and 706(1), and otherwise constitutes abuse of discretion.

COUNT TWO: DUE PROCESS VIOLATION (RIGHT TO FAMILY UNITY)

116. Paragraphs 1 through 115 above are repeated and realleged as though fully set forth herein.

117. U.S. citizens M.B.F., F.G.F., J.E.F., and Gabriella Takacs Fabry have a fundamental right to family unity with Balazs Fabry.

118. In J-1 exceptional hardship waiver application cases, the USCIS and the WRD apply a multi-pronged hardship waiver analysis that examines whether sufficient hardship exists under all travel alternatives.

119. Reviewing the hardships in all travel alternatives ignores the fundamental rights of U.S. citizens to remain in the United States and the fundamental right to family unity.

120. The Defendants's pattern and practice of summarily denying nearly all U.S. government-funded waiver applications violates the fundamental rights of the Plaintiffs.

121. The defendants's actions in this case violated M.B.F.'s, F.G.F.'s, J.E.F.'s, and Gabriella Takacs Fabry's fundamental rights under the United States Constitution.

COUNT THREE: DUE PROCESS VIOLATION (PROPERTY INTEREST)

122. Paragraphs 1 through 121 above are repeated and realleged as though fully set forth herein.

123. Mr. Fabry has a property interest in the application fee that he paid to the State Department.

124. The defendants's pattern and practice of summarily denying nearly all U.S. government-funded waiver applications violates the plaintiffs's right to due process of law under the Fifth Amendment to the United States Constitution.

125. The defendants's denial of Mr. Fabry's waiver application without any rational basis violates the plaintiffs's right to due process of law under the Fifth Amendment to the United States Constitution.

COUNT FOUR: FAILURE TO FOLLOW MORE RELAXED ADJUDICATION STANDARD INTENDED BY CONGRESS

126. Paragraphs 1 through 125 above are repeated and realleged as though fully set forth herein.

127. Congress has suggested that a more relaxed attitude should be taken in determining whether a waiver should be granted in a case like Mr. Fabry's. *See* House Report 721, Subcommittee of the House Committee on the Judiciary, 87 Cong., 1st Sess. (1961), at 122. *See also Matter of Duchneski*, 11 I. & N. Dec. 583 (Dist. Dir. 1966) (waiver recommended for approval by State Department), and *Matter of Coffman*, 13 I. & N. Dec. 206 (Dep. Assoc. Comm'r 1969) (waiver recommended by State Department).

128. Based on congressional intent, and program, policy, and foreign relations considerations, Mr. Fabry's case should have been reviewed under the relaxed standard, because the applicant came to the United States in J-1 status not only to gain but also to impart his already-acquired knowledge, heritage and culture, a duty which he faithfully and successfully performed.

129. The defendants's denial of Mr. Fabry's I-612 waiver application is contrary to the law and an abuse of discretion because the defendants failed to apply the more relaxed standard of review to his case.

COUNT FIVE: VIOLATION OF TREATY

130. Paragraphs 1 through 129 above are repeated and realleged as though fully set forth herein.

131. Ratified treaties constitute the supreme law of the land under Article VI of the United States Constitution.

132. President Jimmy Carter signed the International Covenant on Civil and Political Rights ("I.C.C.P.R.") on October 5, 1977. On June 8, 1992, the I.C.C.P.R. was ratified by the United States Senate pursuant to Article II, Section 2 of the United States Constitution. The United States is therefore a party to the I.C.C.P.R.

133. The defendants have a duty to adhere to the I.C.C.P.R. when adjudicating waiver applications.

134. The defendants's action in denying Mr. Fabry's I-612 waiver application without any rational basis violates the United States's obligations under various articles of the I.C.C.P.R. In particular, it violates Articles 17 and 23, in addition to possible violations of other articles.

COUNT SIX: VIOLATION OF CUSTOMARY INTERNATIONAL LAW

135. Paragraphs 1 through 134 above are repeated and realleged as though fully set forth herein.

136. Customary norms of international law are incorporated into federal law.

137. The right to family life and family unity is a well-established norm of customary international law.

138. The defendants's actions in denying the I-612 waiver in light of the evidence of the numerous and overwhelming hardships presented in the hardship waiver application violate the United States's obligations under customary international law.

COUNT SEVEN: DECLARATORY JUDGMENT

139. Paragraphs 1 through 138 above are repeated and realleged as though fully set forth herein.

140. This Court has authority to issue a declaratory judgment regarding the rights, privileges, and duties of the parties under 28 U.S.C. § 2201.

141. This Court should issue a declaratory judgment establishing that Mr. Fabry is eligible for a J-1 waiver and that due to the exceptional hardships that will be suffered by his U.S. citizen wife and three children, he is entitled to a waiver.

142. This Court should declare that the defendants's adjudication of waiver applications without properly reviewing the program, policy, and foreign relations aspects of the case, and without stating a valid reason for the Not Favorable recommendation, is contrary to statutory standards, regulations, legislative history, congressional intent, and due process of law.

143. This Court should declare that the defendants's practice of summarily denying nearly all U.S. government-funded waiver applications without properly reviewing the program, policy, and foreign relations aspects of the case, and without stating a valid reason for the unfavorable recommendation are contrary to the statutory standards, regulations, legislative history, congressional intent, and due process of law.

144. This Court should declare that if the WRD issues a favorable recommendation, the USCIS is required by law, under 8 U.S.C. § 1182(e), to grant the waiver application.

145. This Court should declare that the denial of Mr. Fabry's waiver application violates his family's right to due process of law under the Fifth Amendment to the United States Constitution.

146. This Court should declare that M.B.F., F.G.F., J.E.F., and Gabriella Takacs Fabry have a fundamental right to family unity with Balazs Fabry.

147. This Court should declare that the USCIS and WRD policy of examining all travel alternatives violates the fundamental right to family unity and the fundamental right of U.S. citizens to reside in the United States.

148. This Court should declare that the defendants's actions in this case violated M.B.F.'s, F.G.F.'s, J.E.F.'s and Gabriella Takacs Fabry's rights under the United States Constitution.

149. This Court should declare that Mr. Fabry has a property interest in the application fee that he paid to the State Department.

150. This Court should declare that the defendants's denial of Mr. Fabry's waiver application without any rational basis violates the plaintiffs's right to due process of law under the Fifth Amendment to the United States Constitution.

151. This Court should declare that Congress suggested that a more relaxed standard be applied in a waiver case like Mr. Fabry's.

152. This Court should declare that Mr. Fabry's case should be reviewed under the relaxed standard suggested by Congress, which has historically been followed by the defendants.

153. This Court should declare that the defendants have a duty to adhere to the I.C.C.P.R. when adjudicating waiver applications.

154. This Court should declare that the defendants's denial of the I-612 hardship waiver application violates various articles of the I.C.C.P.R.

155. This Court should declare that the defendants's denial of the I-612 hardship waiver violates customary international law norms.

156. This Court should declare that the United States government has a statutory duty under 8 U.S.C. § 1182(e) to protect the lives of U.S. citizen qualifying relatives if it is proven that such a relative would face exceptional hardship.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for the following relief:

A. Declare the defendants's adjudication of Mr. Fabry's I-612 waiver application to be in violation of the statute, regulations, legislative intent, agency procedures, treaty law, customary international law, and the Constitution;

B. Declare that Mr. Fabry is statutorily eligible for a waiver under 8 U.S.C. § 1182(e);

C. Declare that the defendants's denial of Mr. Fabry's waiver application was unlawful, arbitrary and capricious, contrary to the statute, regulations, legislative history, congressional intent, and in violation of the Constitution, the I.C.C.P.R., and customary international law;

D. Declare that Mr. Fabry's waiver application is meritorious and should be approved;

E. Issue a Writ and Order of Mandamus compelling Defendants to carry out their obligations under the ICCPR in adjudicating Mr. Fabry's waiver application;

F. Order the defendants to approve the waiver;

G. Grant an award of attorneys's fees and costs; and

H. Grant such other relief as the Court may deem just and proper.

Dated: January 15, 2015

/s/ Brian C. Schmitt

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th of January, 2015, a copy of the First Amended Complaint for Declaratory, Injunctive, and Mandamus Relief was served on the following recipients in accordance with the Notice of Electronic Filing ("NEF") that was generated as a result of electronic filing in this Court:

Carolyn A. Ikari
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Hartford, CT 06103

/s/ Brian C. Schmitt
Brian C. Schmitt