

The Honorable James L. Robart

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

John Doe, Jack Doe, Jason Doe, Joseph Doe,
James Doe, Jeffrey Doe, individually, and on
behalf of all others similarly situated; the
Episcopal Diocese of Olympia; and the
Council on American-Islamic Relations-
Washington,

Plaintiffs,

v.

Donald Trump, in his official capacity as
President of the United States; U.S.
Department of State; Rex Tillerson, in his
official capacity as Secretary of State; U.S.
Department of Homeland Security; Elaine
Duke, in her official capacity as Acting
Secretary of Homeland Security; U.S. Customs
and Border Protection; Kevin McAleenan, in
his official capacity as Acting Commissioner
of U.S. Customs and Border Protection;
Michele James, in her official capacity as Field
Director of the Seattle Field Office of U.S.
Customs and Border Protection; Office of the
Director of National Intelligence; and Daniel
Coats, in his official capacity as Director of
National Intelligence,

Defendants.

No. 2:17-cv-00178 (JLR)

**DEFENDANTS' OPPOSITION
TO PLAINTIFF JOSEPH DOE'S
MOTION FOR PRELIMINARY
INJUNCTION**

Noted For Consideration:
November 22, 2017

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INTRODUCTION

Plaintiff Joseph Doe asks the Court to preliminarily enjoin a provision of a Joint Memorandum issued by multiple Cabinet Secretaries regarding the operation of the U.S. Refugee Admissions Program.¹ The Joint Memorandum explains that most following-to-join refugee applicants are not currently subject to the same screening and vetting procedures as other refugees. The Secretaries of State and Homeland Security and the Director of National Intelligence determined that this disparity must be remedied to ensure the security and welfare of the United States. The Joint Memorandum thus directs the relevant agencies to implement screening mechanisms for following-to-join refugees that are similar to those already employed for principal refugees. During this “implementation period,” following-to-join refugees processed at most locations will not be admitted to the United States. But the relevant agencies are working as expeditiously as possible to implement the additional screening procedures. Once those procedures are in place, admissions will resume, as the Joint Memorandum explains.

Plaintiff previously was admitted to the United States as a refugee and seeks to bring his wife and three children here as following-to-join refugees. He asserts that the Joint Memorandum’s implementation period is unlawful and should be enjoined. His claims, however, are all premised on his erroneous belief that the Joint Memorandum indefinitely bars the admission of all following-to-join refugees, thereby depriving him (and his family) of what he asserts are vested statutory rights. But the Joint Memorandum merely provides for a pause in admissions while the agencies align their screening and vetting procedures for following-to-join refugee applicants with those applied to other refugees; it is a pause to allow for updated procedures to be implemented, not an indefinite suspension of the program. Therefore, the Joint Memorandum does not affect any substantive rights. Even assuming Plaintiff had any “entitlement” to the admission of family members (and he does not), the Joint Memorandum would not deprive him of it. At most, the Joint Memorandum will result in some delay in the

¹ See Joint Memorandum to the President from the Secretary of State, Acting Secretary of Homeland Security, and Director of National Intelligence (Oct. 23, 2017) (ECF No. 46-2) [hereafter “Joint Mem.”].

1 processing of following-to-join refugees, but no refugee applicant is entitled to have his or her
 2 application processed at any particular pace or within a specified timeframe. And Plaintiff
 3 certainly has no right to have his family members screened under diminished procedures. For this
 4 reason, and others explained below, Plaintiff's claims under 8 U.S.C. § 1157(c)(2)(A) and the
 5 Fifth Amendment's Due Process Clause fail.

6 Similarly, because the Joint Memorandum's implementation period does not change the
 7 substantive criteria for determining whether Plaintiff's family members qualify for following-to-
 8 join status and are otherwise admissible as immigrants, the implementation period is a procedural
 9 rule that is exempt from the Administrative Procedure Act's (APA) notice-and-comment
 10 requirements. Moreover, the Cabinet Secretaries' decision to implement additional screening
 11 procedures for following-to-join refugees, in order to protect national security and so that
 12 similarly situated refugees are treated alike, is neither arbitrary nor capricious.

13 The Court need not even reach the merits, though, because Plaintiff's claims are not
 14 justiciable at all. Plaintiff lacks standing because he has not shown that his family is even affected
 15 by the provision of the Joint Memorandum that he challenges: it appears that Plaintiff's family
 16 members are located in Kenya, which is one location where enhanced vetting procedures for
 17 following-to-join refugees are already in place, and so the Government is admitting following-to-
 18 join refugees who have been processed in Kenya (subject to other applicable restrictions on
 19 refugee admissions). Congress, moreover, has not authorized review of Plaintiff's statutory
 20 claims, and Plaintiff has not shown that he himself has been deprived of any entitlement without
 21 adequate process. Finally, even if Plaintiff could overcome these jurisdictional hurdles, the Joint
 22 Memorandum's implementation period is not final agency action subject to judicial review.

23 **BACKGROUND**

24 **I. LEGAL FRAMEWORK**

25 Subject to numerical limits set annually by the President, the Secretary of Homeland
 26 Security has discretion to admit "any refugee who is not firmly resettled in any foreign country,

1 is determined to be of special humanitarian concern to the United States, and is admissible (except
 2 as otherwise provided under [8 U.S.C. § 1157(c)(3)]) as an immigrant” under the Immigration
 3 and Nationality Act (INA). 8 U.S.C. § 1157(c)(1); *see also* 8 U.S.C. § 1182(a) (setting forth
 4 general inadmissibility grounds). Refugees admitted in accordance with this provision are
 5 sometimes referred to as “principal” refugees.

6 In addition, certain individuals who are not otherwise admissible as a refugee under
 7 Section 1157(c)(1) may nonetheless be entitled to refugee status if they are accompanying or
 8 following to join a principal refugee. *See* 8 U.S.C. § 1157(c)(2)(A); 8 C.F.R. § 207.7(a). To
 9 obtain this so-called derivative refugee status, an applicant must be the spouse or unmarried child
 10 under the age of 21 of a principal refugee and also must be admissible (except as otherwise
 11 provided under 8 U.S.C. § 1157(c)(3)) as an immigrant under the INA. 8 U.S.C. § 1157(c)(2)(A).
 12 Derivative refugees who are either in the physical company of the principal refugee when he or
 13 she is admitted to the United States or admitted within four months after the principal refugee are
 14 called “accompanying” refugees. 8 C.F.R. § 207.7(a). Derivative refugees who seek admission
 15 more than four months after the principal refugee are called “following-to-join” refugees. *Id.*

16 **II. THE JOINT MEMORANDUM**

17 Section 6(a) of Executive Order No. 13,780 (EO-2) directed the Secretaries of State and
 18 Homeland Security to suspend travel of refugees and decisions on refugee applications under the
 19 U.S. Refugee Admissions Program (USRAP), pending a review of existing refugee procedures.
 20 *See* 82 Fed. Reg. 13,209 (Mar. 6, 2017). This suspension was necessary to allow the Secretaries,
 21 in consultation with the Director of National Intelligence, to “determine what additional
 22 procedures should be used to ensure that individuals seeking admission as refugees do not pose a
 23 threat to the security and welfare of the United States.” EO-2 § 6(a). During this period, the
 24 relevant agencies identified multiple ways to enhance the refugee vetting process, and began
 25 implementing some of those improvements.
 26

1 Section 6(a) of EO-2 provided that, at the conclusion of this review period, refugee travel
 2 and USRAP adjudications would resume for stateless persons and nationals of countries for which
 3 the officials “determined that the additional procedures implemented . . . are adequate to ensure
 4 the security and welfare of the United States.” On October 23, 2017, the officials advised the
 5 President, through a Joint Memorandum, that the improvements to the USRAP vetting process
 6 are sufficient to allow the general resumption of that program, subject to certain conditions.

7 One of those conditions (which Plaintiff challenges here) addresses the different screening
 8 procedures that are currently applied to most following-to-join refugee applicants as compared to
 9 other refugee applicants. *See* Joint Mem. at 2-3. As the Joint Memorandum explains, most
 10 following-to-join refugee applicants do not currently undergo the same security and vetting
 11 procedures as principal refugees or accompanying derivative refugees (who are typically
 12 processed at the same time and location as the principal). *See id.* at 2 & n.1. For example,
 13 information is typically solicited earlier in the application process for principal refugees and their
 14 accompanying derivatives than for following-to-join refugee applicants, which allows for a more
 15 comprehensive and thorough screening process. *See id.* at 2-3. And most following-to-join
 16 refugee applicants are not currently vetted against classified databases under the same
 17 circumstances that would trigger such vetting for principal and accompanying derivative refugee
 18 applicants. *See id.*; *see also* Joint Mem. Addendum at 4 (“The majority of following-to-join
 19 refugees do not receive the same, full baseline interagency checks that principal refugees
 20 receive.”); Higgins Decl. ¶¶ 3, 12 (Nov. 16, 2017), attached hereto.

21 Given these differences, the Secretaries of State and Homeland Security and the Director
 22 of National Intelligence determined that, in their judgment, it is necessary to “implement adequate
 23 screening mechanisms for following-to-join refugees that are similar to the processes employed
 24 for principal refugees, in order to ensure the security and welfare of the United States.” Joint
 25 Mem. at 3; *see also* Joint Mem. Addendum at 4 (describing some of the additional security
 26 measures to be implemented); Higgins Decl. ¶¶ 13-16 (same). These officials further determined

1 that following-to-join refugees should not be admitted to the United States until these additional
2 screening procedures are in place. Joint Mem. at 3.

3 The screening procedures currently applied to following-to-join refugee applications
4 processed in two locations—Kenya and Thailand—already are aligned with the procedures
5 employed for principal refugees and accompanying derivative refugees. See Higgins Decl. ¶ 11.
6 Accordingly, the agencies have resumed admissions of following-to-join refugees processed at
7 those two locations, subject to other restrictions set forth in the Joint Memorandum. See *id.* The
8 agencies are working “as expeditiously as possible” to implement the additional screening
9 procedures for all other processing locations. *Id.* ¶ 16; see also Joint Mem. Addendum at 4
10 (explaining that the agencies are working “expeditiously”). Once the additional security measures
11 are in place, admissions of following-to-join refugees will resume worldwide. See Joint Mem. at
12 3.²

13 Following receipt of the Joint Memorandum, on October 24, 2017, the President issued
14 Executive Order No. 13,815 (Refugee Order). See 82 Fed. Reg. 50,055 (Oct. 24, 2017). The
15 President acknowledged the Cabinet Secretaries’ joint determination that the USRAP may resume
16 and that they will apply “special measures” to certain categories of refugee applicants, and
17 therefore the worldwide suspension directed by EO-2 is no longer needed. See Refugee Order
18 §§ 2(a), (c). Going forward, the President directed the Secretaries of State and Homeland Security
19 to exercise their statutory authority to “continue to assess and address any risks posed by particular
20 refugees,” *id.* § 3(a), including by modifying or terminating actions taken to address these risks
21 when appropriate, *id.* § 3(a)(ii).

22
23
24 ² The Joint Memorandum also describes a review the agencies are undertaking of eleven countries whose
25 refugee applicants are currently subject to Security Advisory Opinions (SAOs) because those countries were
26 determined, as of 2015, to pose a higher national-security risk to the United States. See Joint Mem. at 2; Joint Mem.
Addendum at 3-4. During this review period (scheduled to last 90 days), the agencies will “temporarily prioritize
refugee applications from other non-SAO countries,” for whom processing may not require as many resources. Joint
Mem. at 2; Joint Mem. Addendum at 3-4. Plaintiff does not challenge these measures, which apply to both principal
and derivative refugee applicants.

1 **III. PLAINTIFF'S MOTION**

2 Plaintiff Joseph Doe has moved for a preliminary injunction against the Joint
3 Memorandum's implementation period for following-to-join refugees. He claims the
4 implementation period violates 8 U.S.C. § 1157(c)(2)(A), the procedural component of the Due
5 Process Clause, and the APA.

6 **STANDARD OF REVIEW**

7 Plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer
8 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
9 and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S.
10 7, 20 (2008).

11 **ARGUMENT**

12 **I. PLAINTIFF'S CHALLENGES ARE NOT JUSTICIABLE**

13 Plaintiff's claims are nonjusticiable for at least three reasons. First, Plaintiff has not
14 satisfied the threshold standing requirements of Article III because he has not identified an injury
15 to himself that is fairly traceable to the Joint Memorandum's following-to-join provisions.
16 Second, review of Plaintiff's statutory claims is barred by the fundamental separation-of-powers
17 principle that the political branches' decisions about admissibility and entry of aliens abroad are
18 not judicially reviewable absent express authorization by Congress, which does not exist here.
19 While Plaintiff also purports to bring a due process claim, he has not alleged, and certainly cannot
20 prove, that *he himself* has been deprived of any entitlement without adequate process; thus, that
21 claim is likewise not reviewable. Third, the Joint Memorandum's following-to-join provisions
22 simply prescribe an implementation period to improve following-to-join refugee vetting and do
23 not constitute final agency action. Plaintiff, therefore, cannot satisfy this prerequisite for APA
24 review.

1 **A. PLAINTIFF LACKS STANDING**

2 Plaintiff lacks standing to challenge the Joint Memorandum’s implementation period. To
 3 satisfy Article III’s standing requirements, “a plaintiff must show (1) it has suffered an ‘injury in
 4 fact’[;] . . . (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is
 5 likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”
 6 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)
 7 (citation omitted).

8 Here, even accepting that Plaintiff’s separation from his family could constitute a
 9 cognizable injury in fact, Plaintiff has not shown that the following-to-join implementation period
 10 caused or will exacerbate any such injury. Plaintiff’s wife and children apparently are in Kenya,
 11 see Doe Decl. ¶ 9 (ECF No. 47), and Kenya is one of two countries in which screening procedures
 12 are already in place to ensure that following-to-join and principal refugees receive comparable
 13 scrutiny. See Higgins Decl. ¶ 11 (explaining that in Kenya and Thailand, “the security vetting
 14 received for a Form I-730 beneficiary is the same as the screening received for principal refugee
 15 applicants,” and thus the Government is continuing to issue travel authorization to approved
 16 following-to-join refugees who have been processed in these locations, subject to other
 17 restrictions on refugee admissions). Accordingly, following-to-join applicants located in Kenya
 18 (such as Plaintiff’s family) are unaffected by the Joint Memorandum’s implementation period.

19 The Complaint further alleges that Plaintiff’s children “are considered Somali nationals”
 20 and that Somalia is among those countries subject to an SAO requirement. Third Am. Compl.
 21 ¶¶ 62, 215 (ECF No. 42). If Plaintiff’s family members are nationals of an SAO country, then
 22 they are subject to another provision of the Joint Memorandum that temporarily prioritizes refugee
 23 applicants from non-SAO countries while officials determine what additional safeguards, if any,
 24 may be needed to ensure that applicants from SAO countries do not threaten domestic security.
 25 See Joint Mem. at 2; note 2, *supra*. But Plaintiff does not challenge the SAO-related provision of
 26 the Joint Memorandum. Because Plaintiff has not carried his burden of showing that his

1 separation from his family is fairly traceable to the provision of the Joint Memorandum he
2 challenges, he lacks Article III standing.

3 **B. PLAINTIFF’S CLAIMS ARE BARRED BY PRINCIPLES OF NONREVIEWABILITY**

4 **1. Plaintiff’s Statutory Claims Are Not Reviewable**

5 The Supreme Court has long recognized that “the power to . . . exclude aliens” is a
6 “fundamental sovereign attribute exercised by the Government’s political departments largely
7 immune from judicial control.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). “[I]t
8 is not within the province of any court, *unless expressly authorized by law*, to review the
9 determination of the political branch of the Government to exclude a given alien.” *United States*
10 *ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (emphasis added)).

11 Courts have distilled from these longstanding principles that the denial or revocation of a
12 visa for an alien abroad “is not subject to judicial review . . . unless Congress says otherwise.”
13 *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *see also Doan v. INS*, 160
14 F.3d 508, 509 (8th Cir. 1998) (“Administrative decisions excluding aliens are not subject to
15 judicial review unless there is a clear grant of authority by statute.”). Courts refer to this rule as
16 the “doctrine of consular nonreviewability,” *Saavedra Bruno*, 197 F.3d at 1159, but the short-hand
17 label merely reflects the context in which the principle most often arises—challenges to decisions
18 by consular officials adjudicating visa applications. The principle underlying that doctrine applies
19 regardless of the manner in which the Executive Branch denies entry to an alien abroad, including
20 a refugee applicant. *See Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992)
21 (per curiam). It would make no sense to bar review of a consular or immigration officer’s case-
22 specific determination while permitting review of determinations by Cabinet Secretaries that are
23 grounded in sensitive national-security judgments and that are applied by lower-level officials in
24 reviewing individual visa or refugee applications.

25 Plaintiff has identified no statute that authorizes judicial review. Plaintiff cites 8 U.S.C.
26 § 1157(c) and the APA, but neither statute overrides the default presumption of nonreviewability.

1 First, Section 1157(c) says nothing about judicial review: it simply provides, in relevant part, that
 2 a spouse or child of a principal refugee is entitled to the same admission status as the principal,
 3 assuming that family member is otherwise admissible as an immigrant. *See Haitian Refugee Ctr.*,
 4 953 F.2d at 1506 (“Contrary to the extensive procedures provided for with regard to aliens within
 5 the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from outside the
 6 United States, makes no provision for judicial review.”). Nor does any other provision of the INA
 7 authorize judicial review under the circumstances Plaintiff alleges here.

8 Second, the APA does not apply “to the extent that . . . statutes preclude judicial review,”
 9 5 U.S.C. § 701(a)(1), a determination that turns not only on the statute’s express language but also
 10 on the “structure of the statutory scheme, its objectives, its legislative history, and the nature of
 11 the administrative action involved,” *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).
 12 Moreover, Section 702 of the APA includes a proviso that preserves “other limitations on judicial
 13 review” that predated the APA. *See Saavedra Bruno*, 197 F.3d at 1158. Here, the conclusion is
 14 “unmistakable” from history that “the immigration laws ‘preclude judicial review’ of [] consular
 15 visa decisions,” *id.* at 1160 (citation omitted), and the same is true of refugee determinations, *see*
 16 *Haitian Refugee Ctr.*, 953 F.2d at 1506. At a minimum, the general rule of “nonreviewability . . .
 17 represents one of the ‘limitations on judicial review’ unaffected by § 702’s opening clause.”
 18 *Saavedra Bruno*, 197 F.3d at 1158.

19 Indeed, when the Supreme Court held that aliens physically present in the United States—
 20 but not aliens abroad—could seek review of their exclusion orders under the APA, *see Brownell*
 21 *v. Tom We Shung*, 352 U.S. 180, 184-86 (1956), Congress responded by abrogating that ruling.
 22 *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-53; *Saavedra Bruno*, 197
 23 F.3d at 1157-62 (recounting history). The House Report accompanying the abrogating statute
 24 explained that APA suits would “give recognition to a fallacious doctrine that an alien has a ‘right’
 25 to enter this country which he may litigate in the courts of the United States against the U.S.
 26 Government as a defendant.” H.R. Rep. No. 87-1086, at 33 (1961), *as reprinted in* 1961

1 U.S.C.C.A.N. 2950, 2976. Because an alien present in the United States cannot invoke the APA
 2 to obtain review of an exclusion order, then *a fortiori* neither can aliens abroad or U.S. persons
 3 acting on their behalf. And given that Congress has generally foreclosed judicial review of visa
 4 revocations, *see* 8 U.S.C. § 1201(i), it is implausible that Congress would permit review of
 5 Executive decisions to restrict entry in the first instance.

6 **2. Plaintiff's Constitutional Claim Is Not Reviewable**

7 The Supreme Court has twice engaged in limited judicial review of constitutional claims,
 8 but only when a U.S. citizen contended that the exclusion of an alien abroad violated the citizen's
 9 own constitutional rights. In *Kleindienst v. Mandel*, the Court reviewed a claim that the denial of
 10 a discretionary waiver of visa-ineligibility to a Belgian national violated U.S. citizens' own First
 11 Amendment rights to receive information. 408 U.S. 753, 756-59, 762-70 (1972). As the Court
 12 explained, the alien himself could not seek review because he "had no constitutional right of entry
 13 to this country." *Id.* at 762. The Court addressed (and rejected on the merits) only the claim of
 14 U.S. citizens that the alien's exclusion violated their own constitutional rights. *Id.* at 770.
 15 Similarly, in *Kerry v. Din*, the Court rejected a claim by a U.S. citizen that the refusal of a visa to
 16 her husband violated her own due process rights. 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia,
 17 J.); *id.* at 2139 (Kennedy, J., concurring in the judgment). Limited review was available in each
 18 case only because the plaintiffs asserted violations of their own constitutional rights as U.S.
 19 citizens.³

20 Here, Plaintiff cannot assert that the Joint Memorandum violates his own procedural due
 21 process rights. Plaintiff relies solely on the alleged "entitlement" created by 8 U.S.C.
 22 § 1157(c)(2)(A), but that statute extends no rights to a principal refugee like Plaintiff. Instead, it
 23 provides that a *derivative* refugee (*i.e.*, the principal refugee's spouse or child) shall, subject to

24 ³ In *Washington v. Trump*, the Ninth Circuit suggested in dicta, without any analysis, that states might have
 25 standing to assert "potential claims regarding possible due process rights" of various groups, including refugees and
 26 persons who "have a relationship with a U.S. resident." 847 F.3d 1151, 1166 (9th Cir. 2017) (*per curiam*). This
 passing observation, however, cannot be squared with *Mandel*'s demarcation between a constitutional claim by an
 alien abroad (unreviewable) and a constitutional claim by a U.S. person (potentially reviewable, provided the person
 alleges a violation of his/her individual rights).

1 certain conditions, “be entitled to the same admission status” as the principal. This conditional
 2 entitlement to refugee status, in other words, belongs not to Plaintiff but to certain of his otherwise
 3 admissible family members. Plaintiff therefore is not asserting his own due process rights, and
 4 his family members, as aliens abroad, of course have no constitutional right of entry to this
 5 country. *See Knauff*, 338 U.S. at 542.

6 **C. PLAINTIFF HAS NOT IDENTIFIED ANY FINAL AGENCY ACTION**

7 Finality is a prerequisite to judicial review of agency actions. *See* 5 U.S.C. § 704. Two
 8 conditions must generally be satisfied before agency action will be deemed final: “First, the action
 9 must mark the consummation of the agency’s decisionmaking process—it must not be of a merely
 10 tentative or interlocutory nature. And second, the action must be one by which rights or
 11 obligations have been determined, or from which legal consequences will flow.” *Fairbanks N.*
 12 *Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591 (9th Cir. 2008) (quoting *Bennett*
 13 *v. Spear*, 520 U.S. 154, 177-78 (1997)).

14 Even if Plaintiff could show that the Joint Memorandum’s implementation period satisfies
 15 the first requirement for finality, he cannot establish the second requirement because the
 16 implementation period does not determine any rights or obligations or prescribe any legal
 17 consequences. The implementation period does not deprive Plaintiff’s family of the opportunity
 18 to obtain refugee status. Assuming *arguendo* that the implementation period affects Plaintiff’s
 19 family at all (and for the reasons set forth above, *see* Part I.A., *supra*, it apparently does not), at
 20 most it delays their admission if they are otherwise eligible.

21 A processing delay by itself does not alter the family’s “legal situation,” and thus the
 22 following-to-join implementation period is not final agency action subject to judicial review. *See*
 23 *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 861 F.3d 944, 952 (9th Cir. 2017) (issuance of
 24 pilot program report was not final agency action; though it was the “final step in completing the
 25 pilot program, clearing the way for the permitting of [certain] carriers,” it “did not change the
 26 legal situation,” as the agency retained discretion over whether and when to issue permits). The

1 delay in receipt of a potential future benefit is not, by itself, final agency action warranting review
2 under the APA.

3 **II. PLAINTIFF’S CLAIMS ARE NOT LIKELY TO SUCCEED ON THE MERITS**

4 **A. PLAINTIFF’S SECTION 1157(c)(2)(A) CLAIM LACKS MERIT**

5 Even if Plaintiff could surmount the jurisdictional and reviewability hurdles above (and
6 he cannot), his claims nevertheless fail on the merits. Plaintiff first argues that 8 U.S.C.
7 § 1157(c)(2)(A) “create[s] an entitlement allowing refugees to bring their immediate families” to
8 the United States, and that the Joint Memorandum’s implementation period for following-to-join
9 refugees “rescind[s] that entitlement.” Mot. for Prelim. Inj. at 10 (ECF No. 45) [hereafter “Pl.’s
10 Mem.”]. But this claim lacks merit both because the implementation period does not rescind any
11 substantive rights and because § 1157(c)(2)(A) does not guarantee admission to the United States.

12 *First*, contrary to Plaintiff’s assertion, the Joint Memorandum’s implementation period
13 does not “rescind” anything. It does not address any substantive rights of following-to-join
14 refugee applicants. Instead, it merely provides a period of time for the agencies to implement
15 additional screening procedures “for following-to-join refugees that are similar to the processes
16 employed for principal refugees.” Joint Mem. at 3. Once those procedures are in place,
17 admissions of following-to-join refugees will resume under the same substantive criteria as
18 before. *Id.* at 3. Thus, the agencies’ standardization of their screening procedures does not take
19 away any substantive, pre-existing right or benefit Plaintiff’s family members may have.
20 Whatever benefits Plaintiff’s family members could qualify for prior to the implementation period
21 will be available to them after admissions resume if they continue to qualify. Plaintiff has no right
22 in the statute or otherwise to diminished screening and vetting procedures for his family members.

23 *Second*, Plaintiff’s claim misinterprets Section 1157(c)(2)(A). That provision states, in
24 relevant part, that a principal refugee’s spouse or unmarried child under the age of 21 “shall . . . be
25 entitled to the same admission status” as that refugee “if the spouse or child is admissible . . . as
26 an immigrant under this chapter.” 8 U.S.C. § 1157(c)(2)(A). The statute provides for a “status,”

1 not guaranteed admission to the United States, let alone admission on any specific timeframe.
 2 *Accord* 8 C.F.R. § 207.7(a) (qualifying individuals “shall be granted refugee status if
 3 accompanying or following-to-join the principal alien”); *id.* § 207.7(f) (explaining that, “[f]or a
 4 derivative . . . arriving in the United States, USCIS will issue a document reflecting the
 5 derivative’s current status as a refugee to demonstrate employment authorization”); Office of
 6 Refugee Resettlement, *Status and Documentation Requirements for the ORR Refugee*
 7 *Resettlement Program* (Oct. 2, 2015), [https://www.acf.hhs.gov/orr/resource/status-and-](https://www.acf.hhs.gov/orr/resource/status-and-documentation-requirements-for-the-orr-refugee-resettlement-program)
 8 [documentation-requirements-for-the-orr-refugee-resettlement-program](https://www.acf.hhs.gov/orr/resource/status-and-documentation-requirements-for-the-orr-refugee-resettlement-program) (providing guidance as to
 9 statuses that confer eligibility for Refugee Resettlement Program benefits). Plaintiff’s argument
 10 that Section 1157(c)(2)(A) requires the Government to admit his family members now, without
 11 further delay, finds no support in the plain text of the provision.

12 Moreover, Section 1157(c)(2)(A) conditions status on admissibility, a finding that requires
 13 the Government to exercise its judgment in determining whether numerous inadmissibility
 14 grounds apply. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(A)(ii) (stating that any alien is inadmissible who
 15 “a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to
 16 enter” to engage in unlawful activity); *id.* § 1182(a)(3)(B)(i)(II) (same, for alien who “a consular
 17 officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable
 18 ground to believe, is engaged in or is likely to engage after entry in any terrorist activity”); *id.*
 19 § 1157(c)(3) (granting Attorney General discretion to waive certain inadmissibility
 20 determinations “for humanitarian purposes, to assure family unity, or when it is otherwise in the
 21 public interest”). Plaintiff suggests that his family is admissible such that Section 1157(c)(2)(A)
 22 requires their admission now. *See* Pl.’s Mem. at 12-13. But the Government is entitled to time
 23 to make that determination itself—using adequate procedures—and that is all that the
 24 implementation period does here, thereby creating what is at most a slight delay in processing as
 25 the Government improves its procedures.
 26

1 In addition, admissibility is not ultimately adjudicated until an individual appears at a port
 2 to seek entry into the United States. See 8 U.S.C. § 1201(h) (“Nothing in this chapter shall be
 3 construed to entitle any alien, to whom a visa or other documentation has been issued, to be
 4 admitted [to] the United States, if, upon arrival at a port of entry in the United States, he is found
 5 to be inadmissible under this chapter, or any other provision of law.”); 8 C.F.R. § 207.7(d)
 6 (explaining that approval of I-730 Petition can be “revoked” prior to entry); Higgins Decl. ¶ 10;
 7 *cf. Kanu v. Lynch*, 652 F. App’x 390, 396-97 (6th Cir. 2016) (rejecting argument that Section
 8 1157(c)(2)(A) “entitles [daughter] to the same refugee status as her mother” and terminating
 9 derivative refugee status because daughter “was in fact inadmissible under the INA at the time of
 10 her admission to the United States”). Thus, Plaintiff cannot demonstrate that his family members
 11 are in fact currently eligible for refugee status, as he surely must before he could even bring a
 12 claim seeking to compel their immediate admission.

13 For these reasons, Plaintiff is not likely to succeed on his Section 1157(c)(2)(A) claim.

14 **B. THE JOINT MEMORANDUM’S IMPLEMENTATION PERIOD DOES NOT VIOLATE**
 15 **THE DUE PROCESS CLAUSE**

16 Plaintiff next claims that the Joint Memorandum violates his procedural due process rights
 17 because it allegedly took away his “legitimate claim of entitlement to his family’s admission”
 18 and, in doing so, “provided no process at all.” Pl.’s Mem. at 13-14 (internal quotation marks
 19 omitted). Analysis under the Due Process Clause typically “proceeds in two steps: We first ask
 20 whether there exists a liberty or property interest of which a person has been deprived, and if so
 21 we ask whether the procedures followed by the State were constitutionally sufficient.” *Swarthout*
 22 *v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). Plaintiff’s claim fails at both steps.

23 *First*, Section 1157(c)(2)(A) does not create a liberty or property interest in admission to
 24 the United States. As explained above, the provision entitles certain individuals to refugee status
 25 only if they are determined to be admissible and otherwise satisfy the relevant criteria. See Part
 26 II.A, *supra*. Moreover, even if Section 1157(c)(2)(A) did confer some interest in admission, it
 would do so only as to derivative refugee applicants, not principal refugees. See Part I.B.2, *supra*.

1 Plaintiff, therefore, would at most be an incidental beneficiary of Section 1157(c)(2)(A). But
 2 “[o]ver a century ago [the Supreme] Court recognized the principle that the due process provision
 3 of the Fifth Amendment does not apply to the indirect adverse effects of governmental action.”
 4 *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980). Thus, Plaintiff cannot claim a
 5 due process violation here. *See id.* (holding residents could not bring due process challenge
 6 against the government’s decision to disqualify nursing home from Medicaid and Medicare
 7 payments that covered patients’ bills); *Castaneda v. U.S. Dep’t of Agric.*, 807 F.2d 1478, 1480
 8 (9th Cir. 1987); *cf. Fiallo*, 430 U.S. at 795 n.6 (rejecting the premise that “the families of putative
 9 immigrants . . . have an interest in their admission”).

10 *Second*, even if Plaintiff could somehow show that Section 1157(c)(2)(A) provides him
 11 with a constitutionally protected interest, the Joint Memorandum’s implementation period does
 12 not deprive him of that interest. The Joint Memorandum addresses only screening procedures
 13 and timing for following-to-join refugee admissions; it does not change the substantive criteria
 14 for determining whether an individual qualifies as a derivative refugee. Thus, whatever interests
 15 Plaintiff’s family members had prior to the implementation period still exist.

16 *Third*, even if Plaintiff had been deprived of a liberty or property interest, his claim still
 17 fails because the Government is not required to provide notice or individualized hearings where,
 18 as here, it acts through categorical judgments rather than individual adjudications. *See Bi-Metallic*
 19 *Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915); *Yassini v. Crosland*, 618 F.2d
 20 1356, 1363 (9th Cir. 1980) (per curiam). And even if the Government were required to provide
 21 some explanation justifying not admitting following-to-join refugees until after the additional
 22 screening procedures are in place, the Joint Memorandum’s findings amply satisfy the *Mandel*
 23 standard of “facially legitimate and bona fide.” *See Din*, 135 S. Ct. at 2140 (Kennedy, J,
 24 concurring in the judgment) (applying the *Mandel* standard to reject a procedural due process
 25 claim). In particular, the Secretaries of State and Homeland Security and the Director of National
 26 Intelligence determined that implementation of “adequate screening mechanisms for following-

1 to-join refugees that are similar to the processes employed for principal refugees” is necessary “to
 2 ensure the security and welfare of the United States.” Joint Mem. at 3. Plaintiff’s due process
 3 claim thus lacks merit.

4 **C. THE JOINT MEMORANDUM’S IMPLEMENTATION PERIOD DOES NOT VIOLATE**
 5 **THE APA**

6 Plaintiff also erroneously claims that the implementation period for aligning the screening
 7 procedures for following-to-join refugees with those applied to other refugees violates the
 8 procedural and substantive components of the APA. See Pl.’s Mem. at 14-18. The
 9 implementation period is a procedural rule, and thus, it is exempt from the APA’s notice-and-
 10 comment requirements. Moreover, the agencies’ decision to standardize their screening
 11 procedures so that similar individuals are treated alike is neither arbitrary nor capricious. And the
 12 judgment of the Cabinet Secretaries that following-to-join refugees should not be admitted until
 13 the additional security measures are in place “to ensure the security and welfare of the United
 14 States” is entitled to the utmost deference and is reasonable. Joint Mem. at 3.

15 **1. Notice-And-Comment Rulemaking Was Not Required Because The**
 16 **Implementation Period Is A Procedural Rule**

17 The notice-and-comment procedures of the APA do not apply to every agency
 18 pronouncement. As relevant here, the APA explicitly exempts “rules of agency organization,
 19 procedure, or practice” from its procedural requirements. 5 U.S.C. § 553(b)(3)(A). Unlike
 20 legislative (or substantive) rules, which “create law” by, for example, establishing or altering
 21 substantive standards, procedural rules involve “technical regulation of the form of agency action
 22 and proceedings.” *S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985). The procedural
 23 rule exemption “covers agency actions that do not themselves alter the rights or interests of
 24 parties, although [they] may alter the manner in which the parties present themselves or their
 25 viewpoints to the agency.” *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994). In
 26 addition, “[a] procedural rule does not become substantive merely because it has a substantive
 impact,” such as “by denying parties the opportunity to appeal if they fail to comply with certain

procedures.” *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010) (citing *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 (9th Cir. 1992)). As long as a rule does not change substantive standards, it may qualify as procedural. See, e.g., *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 317 (D.C. Cir. 2000) (concluding rule was procedural where it “did not alter the substantive criteria by which [the agency] would approve or deny proposed labels,” but rather, “simply changed the procedures [the agency] would follow in applying those substantive standards”); *Gonzales*, 728 F. Supp. 2d at 1084 (“[C]hanges in the timing, requirements or manner in which an application or petition is made are generally considered procedural changes.”).

The Joint Memorandum’s implementation period for following-to-join refugees is a procedural rule. It does not change the substantive criteria for determining whether an applicant can be admitted to the United States as a derivative refugee. Instead, it merely suspends the admission of following-to-join refugees while the agencies align screening procedures for such refugees with the procedures already applied to principal and accompanying derivative refugee applicants. Once the additional procedures are in place, the agencies will resume admissions under the same substantive criteria that applied before the suspension. See 8 U.S.C. §§ 1157(c)(2)(A), 1182(a); 8 C.F.R. § 207.7.

Courts have held that similar decisions to suspend the processing of applications while an agency considers or implements changes to its rules or processes are procedural in nature and thus exempt from notice-and-comment rulemaking. For example, in *Waste Management, Inc. v. EPA*, 669 F. Supp. 536, 538-40 (D.D.C. 1987), the court held that the agency issued a procedural rule when it decided to defer consideration of applications for ocean incineration permits until the agency promulgated new rules on the topic. And in *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 636-38 (D.C. Cir. 1984), the court determined that an agency’s decision to “freeze” processing of certain applications for television translator licenses was a procedural rule. In both cases, the court relied on the fact that the agency’s decision to suspend the processing of certain applications

1 did not change the substantive criteria by which those applications would ultimately be assessed
 2 or alter the plaintiffs' rights or interest in a permit or license. Rather, the agency had merely
 3 "altered its method of operations; it ha[d] changed its procedures." *Waste Mgmt.*, 669 F. Supp. at
 4 540; *see also Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 953 (6th Cir. 1971)
 5 (upholding processing freeze adopted without notice and comment as a procedural rule); *Kessler*
 6 *v. FCC*, 326 F.2d 673, 681-82 (D.C. Cir. 1963) (same). The same reasoning applies here.

7 Because the implementation period is a procedural rule exempt from notice-and-comment
 8 rulemaking, Plaintiff's procedural APA claim fails.⁴

9 **2. The Implementation Period Is Neither Arbitrary Nor Capricious**

10 Review under the APA's arbitrary and capricious standard is "narrow," *Arrington v.*
 11 *Daniels*, 516 F.3d 1106, 1112-13 (9th Cir. 2008), and "highly deferential," *Crickon v. Thomas*,
 12 579 F.3d 978, 982 (9th Cir. 2009). A court must "presum[e] the agency action to be valid and
 13 affirm[] . . . if a reasonable basis exists for [the agency's] decision." *Id.* A reasonable basis exists
 14 so long as "the agency considered the relevant factors and articulated a rational connection
 15 between the facts found and the choices made." *Id.* The agency's decision "need only be
 16 reasonable, not the best or most reasonable, decision." *River Runners for Wilderness v. Martin*,
 17 593 F.3d 1064, 1070 (9th Cir. 2010). A court, moreover, may not "substitute its judgment for that
 18 of the agency." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins.*
 19 *Co.*, 463 U.S. 29, 43 (1983).

20 The agencies' decision to standardize their screening and vetting procedures for all
 21 refugees and not to admit following-to-join refugees until the additional security measures are in
 22 place readily satisfies the arbitrary-and-capricious standard. As the Joint Memorandum explains,
 23

24 ⁴ Plaintiff does not appear to challenge, on procedural APA grounds, the agencies' decision to use similar
 25 screening procedures for following-to-join applicants and other refugee applicants. Even if he did, however, that
 26 claim would also fail for the reasons explained above. The agencies are merely adjusting the procedures they use in
 processing applications, not the substantive criteria for obtaining derivative refugee status, which are set forth in
 existing statutes and regulations. *See, e.g., Erringer v. Thompson*, 371 F.3d 625, 633 n.15 (9th Cir. 2004)
 ("'[P]rocedural' rules are those that are 'legitimate means of structuring [the agency's] enforcement authority.'" (citation omitted)).

1 “[t]he majority of following-to-join refugees do not [currently] receive the same, full baseline
 2 interagency checks that principal refugees receive.” Joint Mem. Addendum at 4. And
 3 “implement[ing] adequate screening mechanisms for following-to-join refugees that are similar
 4 to the process employed for principal refugees” is necessary, in the judgment of the Secretaries
 5 of State and Homeland Security and the Director of National Intelligence, “to ensure the security
 6 and welfare of the United States.” Joint Mem. at 3.

7 It is not arbitrary or capricious for agencies to treat similarly situated individuals alike.
 8 Indeed, the typical rule is just the opposite. When an agency fails to “treat similar cases in a
 9 similar manner,” a court may determine that the agency acted arbitrarily and capriciously “unless
 10 [the agency] can provide a legitimate reason” for the different treatment. *Indep. Petroleum Ass’n*
 11 *of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996); *see, e.g., Kort v. Burwell*, 209 F. Supp.
 12 3d 98, 111-12 (D.D.C. 2016); *Hansen v. Salazar*, No. C08-0717-JCC, 2013 WL 1192607, at *7
 13 (W.D. Wash. Mar. 22, 2013) (“The APA requires an agency to treat similarly-situated parties
 14 alike or provide an adequate explanation to justify treating them differently.”). It was certainly
 15 rational for the Cabinet Secretaries to conclude that following-to-join refugees should be screened
 16 in the same manner as principal refugees.

17 Plaintiff asserts that the agencies did not provide an adequate explanation for suspending
 18 the admission of following-to-join refugees while the additional screening procedures are
 19 implemented. *See* Pl.’s Mem. at 16-18. But the Joint Memorandum makes clear that the
 20 Secretaries of State and Homeland Security and the Director of National Intelligence determined
 21 that admitting following-to-join refugee applicants who had undergone only the current
 22 procedures would not “ensure the security and welfare of the United States.” Joint Mem. at 3.
 23 Instead, in those officials’ judgment, admissions should resume only after the necessary screening
 24 and vetting procedures are implemented, so that those procedures can be applied to refugee
 25 applicants before they are admitted. This national security judgment is entitled to extreme
 26 deference. *See Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007)

(judicial review “in an area at the intersection of national security, foreign policy, and administrative law[] is extremely deferential”). Accordingly, the agencies’ decision not to admit following-to-join refugees for a brief period while they “expeditiously” implement the additional procedures is neither arbitrary nor capricious. Joint Mem. Addendum at 4; *see Neighborhood TV Co.*, 742 F.2d at 639 (concluding agency’s decision to “freeze” processing of certain applications for licenses while it engaged in rulemaking was reasonable because it “ensure[d] that . . . interim licensing did not frustrate the ends of the rules ultimately adopted”); *Waste Mgmt.*, 669 F. Supp. at 542-43 (“An agency in the process of writing new regulations on a topic as sensitive as ocean incineration of hazardous waste cannot be faulted for maintaining the *status quo* [by not issuing new operating permits] until it is satisfied that the incineration can proceed as safely as possible.”).

Plaintiff also argues that statements made by the President during his campaign and shortly after he took office show that the Joint Memorandum was motivated by animus toward refugees and/or Muslims. *See* Pl.’s Mem. at 1-5, 17. Such extra-record material, however, cannot be considered in adjudicating Plaintiff’s APA claim. “When a party challenges agency action as arbitrary and capricious[,] the reasonableness of the agency’s action is judged in accordance with its *stated* reasons.” *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (emphasis added).

Although a court may consider extra-record material when a plaintiff makes a strong “showing of agency bad faith,” *Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (emphasis added), Plaintiff has not made that showing here. The Joint Memorandum was issued by the Secretaries of State and Homeland Security and the Director of National Intelligence, not the President. As the relevant decisionmakers, therefore, it is those officials’ actions that should inform the Court’s determination of whether the administrative record may be supplemented (and, if so, that should likewise inform the ultimate merits assessment). *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (a plaintiff must show “bad faith on the part of the agency” before a court can consider

extra-record material (emphasis added)); *cf. Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411-12 (3d Cir. 2004) (concluding that “statements made by other County officials” who were not “the decision-maker for the County with respect to the Plaque” were not relevant to the Establishment Clause purpose analysis). Plaintiff has never alleged, let alone made the necessary “strong showing,” that these Cabinet Secretaries were motivated by animus toward refugees or Muslims. *United States v. Wash. Dep’t of Transp.*, 450 F. Supp. 2d 1207, 1213 (W.D. Wash. 2006). Plaintiff thus cannot prevail on his APA claim.

III. THE REMAINING PRELIMINARY INJUNCTION FACTORS WEIGH AGAINST RELIEF

Apart from Plaintiff’s inability to demonstrate a likelihood of success on the merits, he has not shown that “irreparable injury is likely in the absence of an injunction.” *Winter*, 555 U.S. at 22 (emphasis omitted). He has not established that the implementation period has caused or will cause him an injury *at all*, let alone an irreparable one. As previously discussed, Plaintiff has not shown that the Joint Memorandum’s implementation period even applies to his family members, because their applications apparently have been processed in Kenya. *See* Part I.A., *supra*. Moreover, the Joint Memorandum simply prescribes an implementation period to bring screening procedures for following-to-join and principal refugees into parity that would at most delay the entry of Plaintiff’s family members. Such delay alone does not amount to irreparable harm, as processing times for refugees can vary widely and on average are quite lengthy. *See* U.S. Dep’t of State, *U.S. Refugee Admissions Program*, <https://www.state.gov/j/prm/ra/admissions/index.htm>. Because Plaintiff has not shown that the implementation period will irreparably harm him, he is not entitled to the “extraordinary remedy” of preliminary injunctive relief. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation omitted).

Conversely, an injunction would cause direct, irreparable harm to the Government and the public interest. “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct.

1 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). This principle applies with at least
 2 equal force to the national-security judgments of the Secretaries of State and Homeland Security
 3 and the Director of National Intelligence on behalf of the Nation as a whole. “It is ‘obvious and
 4 unarguable’ that no governmental interest is more compelling than the security of the Nation.”
 5 *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted). These Cabinet Secretaries have
 6 determined that admitting following-to-join refugee applicants who have not received the same
 7 screening that principal refugees receive would not “ensure the security and welfare of the United
 8 States,” and thus “additional security measures must be implemented before admission of
 9 following-to-join refugees can resume.” Joint Mem. at 3. This Court should not second-guess
 10 the Secretaries’ considered judgment.

11 **IV. ANY INJUNCTION SHOULD BE NARROWLY TAILORED TO ADDRESS** 12 **ONLY PLAINTIFF JOSEPH DOE’S ALLEGED INJURY**

13 Even if some injunctive relief were appropriate (and it is not), the Court should reject
 14 Plaintiff’s request for injunctive relief “on behalf of himself and the I-730 Refugee Class,”
 15 Proposed Order at 2 (ECF No. 45–1), and instead tailor any remedy to address only Plaintiff’s
 16 alleged injury.

17 Constitutional and equitable principles require that any injunctive relief be limited to
 18 redressing a plaintiff’s own cognizable injuries. Article III requires that “a plaintiff must
 19 demonstrate standing . . . for each form of relief that is sought.” *Town of Chester v. Laroe Estates,*
 20 *Inc.*, 137 S. Ct. 1645, 1650 (2017). The remedy sought therefore must “be limited to the
 21 inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518
 22 U.S. 343, 357 (1996). Equitable principles also require that injunctions “be no more burdensome
 23 to the defendant than necessary to provide compete relief to the plaintiffs.” *Madsen v. Women’s*
 24 *Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

25 In addition, this Court has not certified a class, and binding precedent recognizes that
 26 classwide preliminary injunctive relief absent class certification is improper. *See, e.g., Nat’l Ctr.*
for Immigrants Rights, Inc. v. INS, 743 F.2d 1365, 1371 (9th Cir. 1984) (holding that, in the

1 absence of class certification, preliminary injunctive relief may cover only the named plaintiffs);
 2 *M.R. v. Dreyfus*, 697 F.3d 706, 738-39 (9th Cir. 2012) (same); *Zepeda v. INS*, 753 F.2d 719, 727
 3 (9th Cir. 1983) (same); *cf. L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)
 4 (The rule that “injunctive relief should be no more burdensome to the defendant than necessary
 5 to provide complete relief to the plaintiffs’ before the court . . . applies with special force where
 6 there is no class certification.” (citations omitted)).

7 In light of these principles and this binding precedent, any injunction the Court enters
 8 should be limited to relieving whatever irreparable injury the Court concludes Plaintiff has
 9 suffered or imminently will suffer as a consequence of the following-to-join implementation
 10 period. The injunction should not extend beyond Plaintiff and his family members. Nor should
 11 it apply to provisions of the Joint Memorandum that Plaintiff does not challenge here.

12 CONCLUSION

13 The Court should deny Plaintiff’s motion for a preliminary injunction.

14 DATED: November 16, 2017

Respectfully submitted,
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26 *Attorneys for Defendants*

CERTIFICATE OF SERVICE

I hereby certify that, on November 16, 2017, a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 16th day of November, 2017.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT

The Honorable James L. Robart

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

John Doe, Jack Doe, Jason Doe, Joseph Doe,
James Doe, Jeffrey Doe, individually, and on
behalf of all others similarly situated; the
Episcopal Diocese of Olympia; and the
Council on American-Islamic Relations-
Washington,

Plaintiffs,

v.

Donald Trump, in his official capacity as
President of the United States; U.S.
Department of State; Rex Tillerson, in his
official capacity as Secretary of State; U.S.
Department of Homeland Security; Elaine
Duke, in her official capacity as Acting
Secretary of Homeland Security; U.S. Customs
and Border Protection; Kevin McAleenan, in
his official capacity as Acting Commissioner
of U.S. Customs and Border Protection;
Michele James, in her official capacity as Field
Director of the Seattle Field Office of U.S.
Customs and Border Protection; Office of the
Director of National Intelligence; and Daniel
Coats, in his official capacity as Director of
National Intelligence,

Defendants.

No. 2:17-cv-00178 (JLR)

**DECLARATION OF JENNIFER B.
HIGGINS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFF JOSEPH DOE'S
MOTION FOR PRELIMINARY
INJUNCTION**

I, Jennifer B. Higgins, for my declaration pursuant to 28 U.S.C. § 1746, hereby state and
depose as follows:

1 1. I am the Associate Director of the Refugee, Asylum and International Operations
 2 (RAIO) Directorate, within the United States Department of Homeland Security (DHS). I have
 3 held this position since 2017. In my current position, I oversee RAIO operations, which
 4 includes conducting refugee processing activities in more than 67 international locations;
 5 processing requests for asylum at eight Asylum offices domestically; and providing
 6 immigration services at U.S. Citizenship and Immigration Services (USCIS) offices in 21
 7 countries abroad. I submit this declaration in support of Defendants' Opposition to Plaintiff
 8 Joseph Doe's Motion for Preliminary Injunction. The statements made herein are based on my
 9 personal knowledge and information made available to me in the course of carrying out my
 10 duties and responsibilities as Associate Director.

11 2. There are two ways for spouses and unmarried children of refugees to come to the
 12 United States as derivative refugees: 1) as derivatives processed with the principal refugee
 13 through the U.S. Refugee Admissions Program (USRAP) ("accompanying derivative
 14 refugees"); or 2) as beneficiaries of approved Forms I-730, Refugee/Asylee Relative Petitions
 15 (Form I-730), filed by principal refugees already admitted to the United States as refugees
 16 ("following-to-join derivative refugees"). In either case, the spouse or unmarried child is
 17 admitted as a refugee and counts against the annual refugee ceiling.

18 3. While the substantive criteria for admission as a derivative refugee are the same
 19 regardless of whether the qualified family member is processed with the principal refugee
 20 through the USRAP or as a following-to-join refugee through the Form I-730 process, the
 21 operational processes and responsible parties processing these types of cases differ. As a result,
 22 the vetting associated with these two processes has somewhat diverged over the years,
 23 particularly as the DHS, the Department of State (DOS) and our vetting partners have enhanced
 24 screening for refugees coming through the USRAP. Subject to age or nationality requirements,¹

25 ¹ Individuals of certain age and nationality (and previously gender) may be subject to additional checks,
 26 such as the Security Advisory Opinions (SAOs). If the principal refugee is from a country for which an SAO check
 is required, but the derivative refugee spouse is from a non-SAO country, the spouse would not receive the exact
 same screening as the principal refugee.

1 a spouse or child listed as a derivative on the principal applicant's Form I-590 who is also
2 processed at the same time as the principal refugee applicant receives the same vetting as the
3 principal refugee applicant. However, if that same spouse or child were to come to the United
4 States as a following-to-join refugee through the Form I-730 process, in most cases, he or she
5 would currently not receive the same screening.

6 4. Pursuant to Section 6(a) of Executive Order 13780, *Protecting the Nation from Foreign*
7 *Terrorist Entry into the United States*, a 120-day review was conducted of the USRAP. Based
8 on this review, the Secretaries of State and Homeland Security and the Director of National
9 Intelligence made a joint determination that certain additional procedures were necessary to
10 enhance the refugee application and adjudication processes. This joint determination included
11 instituting procedures to more closely align the vetting for Form I-730 refugee beneficiaries
12 with that of refugees admitted under the USRAP.

13 5. Under the Form I-730 process, a principal refugee may file a Form I-730 with USCIS
14 within two years following admission as a refugee to request that a spouse or unmarried child
15 follow-to-join him or her in the United States. As in the case of a spouse or child
16 accompanying the principal refugee processed through the USRAP, the Form I-730 petitioner
17 must establish the existence of the qualifying relationship and that the beneficiary is admissible.
18 Unlike the principal refugee, however, a Form I-730 refugee beneficiary does not need to
19 establish past persecution or a well-founded fear of persecution based on a protected ground.

20 6. To initiate the Form I-730 process, the U.S.-based principal refugee (petitioner) files a
21 Form I-730 with USCIS Service Center Operations (SCOPS). SCOPS reviews the Form I-730,
22 supporting documentation, and the Alien File for the petitioner and beneficiary, if available.
23 SCOPS evaluates whether the petition is timely, whether the requisite relationship exists, and
24 whether there is any evidence indicating that the beneficiary may be inadmissible.

25 7. If SCOPS finds that the petitioner is ineligible to file or is unable to establish eligibility
26 of the beneficiary, SCOPS will deny the Form I-730 and notify the petitioner. If SCOPS finds

1 that the beneficiary is eligible, SCOPS will take one of two actions, depending on whether a
2 USCIS officer or DOS consular officer will process the beneficiary abroad.

3 8. If the beneficiary is located abroad in a country where USCIS does not have an
4 international office, SCOPS will approve the Form I-730 and send it via the Department of State
5 National Visa Center (NVC) to the appropriate U.S. Embassy or Consulate for a consular
6 officer to make a travel eligibility determination. After collection of biometrics, interview,
7 security vetting, and medical examination, a consular officer is responsible for confirming the
8 validity of the relationship and determining whether the beneficiary is subject to any applicable
9 inadmissibility grounds. If the consular officer finds that the relationship is bona fide and no
10 inadmissibility grounds apply, DOS will coordinate with the Refugee Processing Center (RPC),
11 which is operated by the Bureau of Population, Refugees and Migration (PRM) at the
12 Department of State and which supports the USRAP, to obtain an assurance for the beneficiary,
13 meaning that a resettlement agency in the United States will be prepared to receive the
14 beneficiary upon arrival and reunite the beneficiary with the principal refugee.

15 9. If the beneficiary is located abroad in one of the 21 countries where USCIS has an
16 international field office, SCOPS sends the Form I-730 to the NVC where it is then forwarded
17 to the proper USCIS international field office for final adjudication after collection of
18 biometrics, interview, security vetting, and medical examination. A USCIS adjudications
19 officer stationed abroad will make the final determination on whether to approve or deny the
20 Form I-730 and, if approved, will coordinate with the RPC for the beneficiary's sponsorship
21 assurance.

22 10. Once assurance is obtained in either situation, and the medical examination and security
23 vetting are successfully completed, DOS or USCIS will issue travel authorization documents in
24 the form of a boarding document. This boarding document allows an eligible beneficiary to
25 travel to the United States to request admission as a refugee. Customs and Border Protection
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1 determines admissibility at the port of entry and, if admissible, the beneficiary is admitted to the
2 United States as a refugee.

3 11. In two countries only—Thailand and Kenya—USCIS processes Forms I-730 with the
4 support of DOS-funded Resettlement Support Centers (RSCs) particularly to help facilitate
5 processing in refugee camps in those locations where neither USCIS nor DOS consular staff
6 have a presence.² The RSC carries out administrative and processing functions for Form I-730
7 refugee beneficiaries in these two countries pursuant to cooperative agreements between PRM
8 of DOS and non-governmental organizations. This RSC support enables USCIS to process
9 Form I-730 refugee beneficiaries in these countries using the same processes as used for
10 principal refugee applicants, including intake, data collection, and use of the USRAP case
11 management system for communicating information with vetting partners. As such, in these
12 locations only, subject to age and nationality requirements, the security vetting received for a
13 Form I-730 beneficiary is the same as the screening received for principal refugee applicants.
14 Because the screening for principal and following-to-join refugee applicants is already aligned
15 in these locations, no changes were needed to address the concerns identified in the joint
16 determination in these locations. Therefore, the Government is continuing to issue travel
17 authorization to following-to-join refugees with approved Forms I-730 who have had their
18 Forms I-730 processed by an RSC in Thailand or Kenya, subject to other restrictions on refugee
19 admissions.

20 12. As noted in paragraph 3, the vetting protocols for principal refugee applicants and their
21 accompanying family members have been enhanced over time and diverged from the vetting
22 protocols for Form I-730 refugee following-to-join family members, which are handled through
23 different processes and by different parties. As such, when a USCIS international field office
24 (without the assistance of an RSC), as described in paragraph 9, or a DOS consular officer, as
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26 ² RSCs provide support in Kenya and Thailand because a number of Form I-730 refugee beneficiaries
reside in refugee camps in those countries, making it difficult for applicants to independently arrange for travel to
the U.S. Embassy for interview.

1 described in paragraph 8, processes the Form I-730, the beneficiary does not receive the same
2 Inter-Agency Check (IAC) as a principal refugee applicant. The check differs both in terms of
3 the information sent to vetting partners for review and which vetting partners conduct the
4 review. The systems used to initiate checks for Form I-730 following-to-join derivative refugee
5 applicants do not contain the same amount of biographic information as the system used to
6 initiate checks for accompanying derivative refugee applicants, nor do the systems
7 communicate with all the same vetting partners.

8 13. Pursuant to the October 23, 2017 Joint Memorandum to the President, titled *Resuming*
9 *the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, and in
10 order to more closely align the Form I-730 vetting processes for following-to-join refugee
11 applicants with that of principal refugee applicants (and other accompanying derivative refugee
12 applicants processed with the principal refugee applicant), USCIS and DOS will make changes
13 to their procedures and vetting protocols. Aligning Form I-730 screening processes for
14 following-to-join derivatives with that of principal refugee applicants will require modifications
15 both to the processes carried out by posts abroad and to the technical platforms which support
16 those processes.

17 14. Additionally, USCIS and DOS must put into place procedures to institute Enhanced
18 Fraud Detection and Nationality Security Review (EFR) for Form I-730 beneficiaries who are
19 nationals of countries subject to Security Advisory Opinions (SAOs), as is currently conducted
20 for principal refugee applicants and accompanying derivative family members who receive
21 SAOs.

22 15. To make the changes noted above in paragraphs 13 and 14 and more closely align
23 screening for all refugee applicants, USCIS is in the process of implementing procedures to
24 request that Form I-730 beneficiaries submit completed Forms I-590 earlier in the process, as
25 opposed to requesting that a beneficiary bring the Form I-590 to the interview as is currently
26 done. This change will enable USCIS to initiate certain checks earlier in the process and

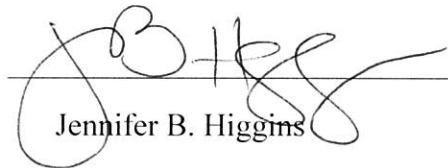
1 provide any resulting information to the USCIS or DOS officer prior to the interview. Having
2 information from certain checks prior to the interview strengthens the value of the interview by
3 leading to more informed lines of questioning and also allows USCIS and DOS to input
4 necessary information into systems to enable screening partners to conduct more complete
5 checks.

6 16. Alignment of vetting requires systems changes, as well as development of notices and
7 new procedural guidance for implementing staff. It also requires working with DOS to institute
8 procedures to ensure that in all locations abroad, regardless of whether USCIS or DOS
9 processes the case, the full IAC is completed, as well as EFR where required. DOS is currently
10 analyzing the procedures with interagency partners to determine the magnitude of the
11 modifications that will be required. USCIS and DOS will continue working in earnest to make
12 necessary changes and are committed to instituting new procedures as expeditiously as possible.

13 I declare under penalty of perjury that the foregoing is true and correct. Executed on

14 November 16, 2017.

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Jennifer B. Higgins