The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Defendants.

No. 2:17-cv-00178-JLR

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NOTED FOR CONSIDERATION:
November 22, 2017

ORAL ARGUMENT SCHEDULED:
December 11, 2017

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I. INTRODUCTION

EO-4 is titled "Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities," even though Defendant Trump knew the Agency Memo ("Memo") he received at least the day before would ban large swaths of refugees. Defs. Opp. Dkt #51 ("Opp.") at p. 5. Defendants' defense of the Memo rests on two claims: (1) the Memo does not actually do what the Memo says it does because the mandatory suspension does not apply to refugees in Kenya and Thailand, Higgins Decl. ¶ 11, Dkt # 51-1 at p.5; and (2) the Memo is only a brief "pause" to align the follow-to-join ("FTJ") vetting processes with those already observed for principal refugees. Opp. at 1.

But if Defendants are in fact admitting refugees to whom the Memo on its face applies, the agencies are operating in precisely the sort of black box of unfettered discretion prohibited by law.[1] Defendants provide neither an end date nor any evidence of an actual national security need for the "pause." Opp. at 1. And Defendants' Reply further makes clear that they seek to insulate from judicial review an indefinite suspension on all FTJ admissions so they can implement screening processes they have already implemented— both for principal refugees worldwide and for FTJ refugees in Kenya and Thailand.[2] Defendants' defense itself underscores the need for judicial scrutiny.

Defendants' actions have real-world impact on the rights of United States residents. Joseph Doe is one such person. The petitions he filed on behalf of his wife and children are **his** petitions, Higgins Decl. ¶ 6, and he seeks "a preliminary injunction enjoining the implementation of the Memo with respect to FTJ derivative refugees." Pl. Mot., Dkt # 45 at p. 1. His challenge includes both the indefinite suspension of FTJ admissions and the implementation of additional

[1] Refugees processed from Kenya and Thailand account for roughly 1 in 6 of the refugees admitted to the United States, a not insignificant percentage. Nowlin Decl. ¶ 6.

[2] Defendants also purportedly identified problems with the refugee screening process before issuing EO-1 in January 2017, and they have been evaluating "vetting procedures for all nations across the board" since at least May 2017. *Int'l Refugee Assistance Project ("IRAP") v. Trump, 4th Cir. Oral Arg.*, C-SPAN, at 00:17:22 (May 8, 2017), http://cs.pn/2mUWtrC.

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security enhancements, one of which is expanding SAO requirements, for FTJ refugees who have completed and cleared their final screenings. Despite Defendants' assurances, Joseph has been unable to unite with his family. Either he and his wife will be forced to contemplate leaving behind their 4- and 5-year-old sons (who have never even set foot in an SAO country but are SAO citizens) or his entire immediate family will be denied entry even though his wife and older child are entitled under Defendants' reading of the Memo.

Defendants present this Court with agency action that deprives people like Joseph of their rights and is ultra vires, arbitrary and capricious, and undertaken without any of the processes specifically designed to ensure transparency and public accountability for such deprivations. Judicial scrutiny of such action is appropriate and necessary. And that scrutiny cannot take place in a vacuum. Opp. at 20 (the Memo "was issued by the Secretaries of State and Homeland Security and the Director of National Intelligence, not the President."). But as "the world is not made brand new every morning," *McCreary Cty. v. ACLU*, 545 U.S. 844, 866 (2005), the Memo cannot be separated from the context in which it arose, and the Agency Defendants cannot be separated from the administration—and President—for whom they work.[3] It is with this context and that referenced in Plaintiffs' Third Amended Complaint ("TAC") that his motion must be reviewed: the Memo constitutes Defendants' **third** attempt to ban Muslim refugees.

II. ARGUMENT

A. Plaintiff's Challenges Are Justiciable.

1. Joseph Doe has standing.

Defendants' assertion that Joseph Doe did not challenge the SAO provision of the Memo, Opp. at 7, is false. Joseph's motion seeks "a preliminary injunction enjoining the implementation of the Memo with respect to FTJ derivative refugees," Pl. Mot. at p. 1, which includes a challenge to both the indefinite suspension of FTJ admissions and the implementation of

[3] The evidence is to the contrary—Agency Defendants have done nothing but blindly rush to enforce and implement every single one of the ill-fated Muslim bans. *See, e.g.*, TAC § IV.A.1.

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additional security enhancements—one of which is expanding SAO requirements—for FTJ refugees who have completed and cleared their final screenings. *Id*. at 6, 16-17. *See also* TAC §§ IV.D. and IV.E.2.

Defendants incorrectly claim that Joseph does not have standing because FTJ refugees in Kenya, like his family, are unaffected by the Memo. Defendants' Reply acknowledges that "[i]f Plaintiff's family members are nationals of an SAO country, then they are subject to another provision of the [Memo]…" Opp. at 7. Joseph and his family have fulfilled the requirements for admission under § 207(c)(2)(A) of the INA,[4] and his family had received an assurance, Doe Decl. ¶ 12, Dkt. #47 at p.3, meaning a final determination had been made to approve his Form I-730 petitions. *See* Higgins Decl. ¶ 9. However, because Joseph's 4- and 5-year-old sons are nationals of an SAO country (Somalia), they are subject to the suspension imposed by the Memo, which unlawfully delays their reunification. Doe Supp. Decl. ¶¶ 8-10. The harm caused to Plaintiff exemplifies the arbitrary and capricious nature of the Memo: according to Defendants, the Memo allows Joseph's wife and older child into to the U.S., but not his 4- and 5-year-old children—an outcome divorced from reasoned decision-making or facts.

"An American individual…that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded." *Trump v. IRAP*, 137 S. Ct. 2080, 2089 (2017). Separation from one's family is well recognized as not only an injury but also irreparable harm. *See also* Pl. Mot. § IV.B. Joseph Doe has Article III standing.

2. Joseph Doe's Due Process claim is reviewable.

Defendants again claim—as they have throughout the litigation over their desired Muslim ban—that their actions are not reviewable. Opp. at 8-10. Defendants wrongly assert that the

[4] Since the filing of Plaintiff's motion, his two sons that were waiting the results of new medical examinations have received their clearances. Doe Supp. Decl. ¶ 5. Joseph's family had to obtain new medical clearances since their earlier ones expired while their arrival was delayed due to the prior executive order. *Id.* ¶ 3.

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Memo does not violate Joseph Doe's own procedural due process rights. Opp. at 10, 14-15. But Defendants' own declaration makes clear that the Memo affects his rights directly: "[T]he U.S.-based principal refugee (petitioner) files a Form I-730…" Higgins Decl. ¶ 6. *See also* Form I-730, Ex. A to Lin Supp. Decl. In fact, in another immigration context, the U.S. government has argued that it is only the *petitioner*, and not the beneficiary, who has standing to challenge decisions on USCIS petitions. *See Maramjaya v. U.S. Citizenship & Immigration Servs.*, No. CIV.A. 06-2158 RCL, 2008 WL 9398947, at *4 (D.D.C. Mar. 26, 2008). USCIS regulations define the "affected party" as the one who filed the petition. 8 C.F.R. 103.3(a)(1)(iii)(B)). But as the *Maramjaya* court recognized, "USCIS 'regulations and [agency] case law addressing the issue of standing to appeal a denial or revocation of a visa petition within the INS' do not necessarily determine standing in federal court." *Maramjaya*, 2008 WL 9398947 at *4 (quoting *Ghaly v. INS*, 48 F.3d 1426, 1434 n. 6 (7th Cir.1995)). Instead, a noncitizen "'within the zone of interest regulated or protected' by an immigration statute and who is 'adversely affected' within the meaning of the relevant statute for the purposes of the APA has standing." *Id.* Defendants do not contend that Plaintiff is outside of the zone of interests regulated or protected by the INA, and their only argument that he is not adversely affected by their action is the claim that derivative refugees in Kenya are in fact being processed, which is addressed above.

Defendants' argument that Plaintiff's constitutional claim is not reviewable is the same as their argument against the merits of his due process claim. There is no doubt that this Court may review Plaintiff's claim that Defendants have violated the Constitution. *Washington v. Trump*, 847 F.3d 1151, 1162-63 (9th Cir. 2017). Both the Ninth Circuit and this Court have already rejected Defendants' attempt to place the Executive Branch above the law: "the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context." *Id.* at 1162; *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *3 (W.D.

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Wash. Feb. 3, 2017) ("The work of the Judiciary, and this court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution."). The Constitution gives Congress "exclusive[]" authority to set immigration policy, *Ariz. v. U.S*, 567 U.S. 387, 409 (2012), and requires the executive branch to act within the confines of the authority delegated to it. The notion that the judiciary cannot review executive action alleged to have transgressed its lawful authority "runs contrary to the fundamental structure of our constitutional democracy." *Washington*, 847 F.3d at 1161.

3. Joseph Doe's statutory claims are reviewable under the INA and the APA.

Defendants argue that the doctrine of consular nonreviewability is a "short-hand label" for a principle that "applies regardless of the manner in which the Executive Branch denies entry to an alien abroad[.]" *Id.* at 8. And Defendants argue that review under the APA is unavailable under 5 U.S.C. § 701(a)(1) because the INA precludes judicial review. Opp. at 9-10. Both of these arguments are wrong.

The Ninth Circuit has already rejected Defendants' attempt to redefine the doctrine of consular nonreviewability, reiterating that the doctrine limits review of "an *individual* consular officer's decision to grant or to deny a visa pursuant to *valid* regulations[.]" *Hawai'i v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (emphases added), *vacated sub nom. Trump v. Hawai'i*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017). The doctrine in no way prevents courts from reviewing whether a "sweeping immigration policy" violates statutory limits, *id*. (quoting *Washington*, 847 F.3d at 1162), especially where that policy flies in the face of USCIS and DHS determinations that Joseph's wife and children *are* admissible under the INA. *See also Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (doctrine applies only to a particular decision in a particular case and not a general policy). Likewise, the District of Maryland recently held that where the plaintiff asserts "statutory and constitutional claims challenging a broader policy as opposed to individual consular determinations, the doctrine of consular nonreviewability is not

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applicable." *IRAP v. Trump*, No. CV TDC-17-0361, 2017 WL 4674314, at *17 (D. Md. Oct. 17, 2017) (rejecting nearly identical arguments with respect to EO-3). Defendants do not address these cases and instead rely on *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999), *see* Opp. at 8-9, which was about a routine application of the consular nonreviewability doctrine to a single noncitizen's visa denial. *Id.*

Defendants' argument that the INA precludes review is equally unfounded. First, the issue before the Court is whether Defendants' actions are in excess of their statutory authority, a question indisputably subject to judicial review. As the First Circuit explained in an immigration case, a challenge to an agency action as being contrary to the statute is "a classic issue for the court to decide." *Succar v. Ashcroft*, 394 F.3d 8, 19 (1st Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663, 669 (9th Cir. 2005) (explicitly adopting *Succar*'s reasoning). Second, the INA only precludes review in specific instances—where the authority for the agency decision or action "is specified under this subchapter to be in the discretion of the [agency.]" 8 U.S.C. § 1252(a)(2)(B)(ii). The grant of discretion must be specific; "'the language of the statute in question must provide the discretionary authority' before the bar can have any effect." *Soltane v. Dep't of Justice*, 381 F.3d 143, 146 (3d Cir. 2004) (Alito, J.) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003)). "By defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress ensured that it, *and only it*, would limit the federal courts' jurisdiction." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (emphasis added) (holding agency could not grant itself discretion by regulation).

In a case that is illustrative here, the D.C. Circuit held that review of the agency's determination of eligibility for an L-1B visa was not subject to the INA's jurisdictional bar, "because the relevant provision of the Immigration and Nationality Act does not commit the decision whether to grant an L–1B petition to the independent discretion of the [agency], and because Congress legislated statutory criteria to be applied in deciding such petitions[.]" *Fogo*

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De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127, 1138-39 (D.C. Cir. 2014). The D.C. Circuit explained that "Congress nowhere textually assigned such judgments to the [agency's] sole discretion. Instead, the statute mandates that visa determinations '*shall* be determined by the [agency],' and the criteria for such decisions are laid out in the statute[.]" *Id.* at 1138 (emphasis in original). The same reasoning applies here: Congress did not assign discretion to the agency with respect to derivative refugees, it legislated statutory criteria to be applied in deciding such petitions. The INA therefore does not preclude review by this Court.

4. The Memo is final agency action.

Defendants claim the Memo was not final agency action because it is only a "processing delay." Opp. at 11. But whether it is a "suspension" or a "delay" without end, it affects Plaintiff's rights. His family has completed all screening, including two rounds of medical examinations after the first round expired, and only awaits travel booking. Doe Supp. Decl. ¶¶ 3-7. The Memo has already prevented Plaintiff and others like him from reuniting with their families. The District of Maryland rejected similar arguments with respect to EO-3: "[a]s for Defendants' claim that the agency action to date is not 'final,' the Proclamation is already in effect as to certain individuals and is being enforced by federal agencies, and, as discussed above in relation to ripeness, a formal denial of a visa or waiver is not necessary for the case to be subject to review." *IRAP v. Trump*, No. 17-361, 2017 WL 4674314, at *18 (D. Md. Oct. 17, 2017).

B. Plaintiff Is Likely to Succeed on the Merits.

1. The Memo violates Joseph Doe's right to due process.

Defendants argue that Plaintiff does not have a protected interest based on the entitlement created by INA § 207(c)(2)(A), and that even if he did, the Memo provided all the process necessary. Opp. at 10-11, 14-15. They are wrong on both counts.

Defendants fail to address *Ching v. Mayorkas*, 725 F.3d 1149 (9th Cir. 2013), in which the plaintiff husband filed an I-130 petition for immediate relative status for his wife. The Ninth

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Circuit found that "[w]here a *petitioner* of an immediate relative petition proves that his marriage meets the requirements for the approval of an I-130, *he is entitled*, as a matter of right, to the approval of *his* petition." *Id.* at 1155 (emphasis added). *See also* Pl. Mot. at 13-14. The court also found the grant of the petition nondiscretionary: "[i]mmediate relative status for an alien spouse is a right to which citizen applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory and regulatory requirements for eligibility. This protected interest is entitled to the protections of due process." *Ching*, 725 F.3d at 1156. The I-730 process is precisely the same type of process with the same use of the nondiscretionary term "shall" in the INA.

Defendants misleadingly characterize the FTJ provision of the Memo as an "implementation period" without any consequences. Opp. § II.B. But the Memo indisputably imposes a categorical suspension on the admission of FTJ derivative refugees—including those like Joseph Doe's family, who have already been finally determined to be admissible, subjecting them post-hoc to a new set of rules without any notice or process. The Ninth Circuit has already ruled that categorical judgments, such as the ones Defendants have repeatedly attempted to impose via executive order, are subject to procedural due process requirements. *Washington*, 847 F.3d at 1165. Those requirements are especially important in cases just like this one: "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Joseph and other Washington residents like him who have had their Form I-730 petitions approved, *see* Higgins Decl, ¶ 9, are entitled under Section 207of the INA to have their families proceed with the admissions process and to challenge Defendants' suspension of that right without due process of the law. And, as argued in his opening brief, Plaintiff is likely to succeed on all these points. *See* Pl. Mot. § IV.A.2.

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2. The Memo violates the INA and the APA because it exceeds Defendants' statutory authority.

Rather than dispute Plaintiff's plain statutory entitlement, Defendants mischaracterize his argument under INA § 207(c)(2)(A) as seeking a guarantee of immediate admission for his family members. But Plaintiff's claim is that the agency does not have statutory authority to suspend derivative refugee processing at will. Based on the clear language of the statute, he is likely to succeed on that claim. *See* Pl. Mot. § IV.A.1.

The statute is clear: under INA § 207(c)(2)(A), the Agency Defendants are limited to determining admissibility of derivative refugees based on non-discretionary, statutorily defined criteria. When Congress created an entitlement for the spouses and children of refugees, it did not give the agencies any discretion to stop, terminate, or suspend this entitlement ("shall…be entitled"). Defendants' argument that "admission" occurs at the port of entry, Opp. at 14, is beside the point. Plaintiff seeks an order enjoining Defendants' indefinite suspension, not an order guaranteeing immediate admission for his family. The relief he requests is only that the process he started in June 2015 be allowed to move forward so that he may reunite with his family, who have already passed security clearances, medical clearances, and been determined admissible. Doe Supp. Decl. ¶¶ 3-5; Doe Decl. ¶ 12, Dkt. #47 at p.3, Higgins Decl. ¶ 9.

3. The Memo is arbitrary and capricious.

Even if Defendants had the statutory authority to suspend admissions, their action is still arbitrary and capricious because it lacks any reasoned decision-making or factual support. An agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Defendants' Reply only confirms the irrationality of the Memo, which apparently implemented an indefinite ban on *all* FTJ refugee admissions despite the fact that (1) the screening procedures

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in Kenya and Thailand are sufficient, *see* Higgins Decl. ¶ 11, and (2) they seek only to "align" the screening procedures for FTJ refugees with those *they already implement* for principal refugees. Higgins Decl. ¶ 3. Further, the contemplated SAO requirements will apply to derivative refugees even where potential risk is entirely absent, as with Joseph Doe's 4- and 5-year-old sons who have never stepped foot in a SAO country.

In lieu of evidence, Defendants offer only the assertion that the suspension will "ensure the security and welfare of the United States." *See* Memo 3; Opp. at 19-20. Although issues of national security are indeed owed a degree of deference, deference "is not equivalent to acquiescence." *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). "Incantation of the magic words 'national security' without further substantiation is simply not enough to justify [an agency's actions]." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 190 (D.D.C. 2015). There is simply no evidence to support an indefinite ban on all FTJ refugees—the vast majority of whom are women and children. Of dependent refugee arrivals in fiscal years 2014-2015, almost 80% were children under sixteen or female spouses. Of the dependent refugee children, 78% were children under sixteen. Nowlin Decl. ¶¶ 3, 5.

In marked contrast to Defendants' lack of national security related evidence is ample (and to-date uncontested) evidence that blanket suspensions of any groups of refugee admissions are not necessary for national security. *See e.g.*, TAC ¶¶ 233, 239, 245, 247, 263 (dissent of nearly 1,000 current State Department officials to, *inter alia*, a broad group-based refugee ban,[5] DHS reports finding country of citizenship to be an unreliable indicator of potential terrorist activity,[6] and declarations and letter from numerous former national security experts regarding the ability

[5] Steve Herman & Nike Ching, *Sources: Nearly 1,000 at State Department Officially Dissent on Immigration Order*, VOA News (Jan. 31, 2017), http://bit.ly/2kOEUHR (last visited Nov. 3, 2017) (Ex. B Lin Suppl. Decl.).

[6] *Report, Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, U.S. Dep't of Homeland Sec. (Feb. 2017), Ex. C to Lin Supp. Decl.; Rachel Maddow, *TRMS Exclusive: DHS Document Undermines Trump Case for Travel Ban*, MSNBC (Mar. 2, 2017), http://on.msnbc.com/2mRo5ZF (last visited Nov. 3, 2017) (Ex. D to Lin Supp. Decl.).

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to add enhancements without resorting to blanket bans);[7] TAC §IV.E. *See also* November 9, 2017 Joint Declaration of Former National Security Officials filed in *JFS*, Dkt. #46.[8] The ban on FTJ refugees is overly broad, unfounded, and unlimited, and is therefore arbitrary and capricious.

4. The suspension of FTJ admission is a substantive rule subject to notice-and-comment rulemaking.

Defendants' attempt to characterize the suspension as a procedural rule exempt from the protections of notice and comment rulemaking is also unavailing. The "APA's exception for procedural rules usually is interpreted narrowly." *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 (9th Cir. 1992). A rule is "procedural" if it does not "alter the rights or interests of parties." *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010) (quoting *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 349 (4th Cir.2001)). A rule that simply prescribes "the manner in which the parties present themselves or their viewpoints to the agency" [and] does not alter the underlying rights or interests of the parties" and is a procedural rule. *Inova Alexandria Hosp.*, 244 F.3d at 349. By contrast, substantive rules are rules that create law or implement existing law. *S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir.1985). The Memo creates new law: it bans the entry of all FTJ refugees. It is hard to conceive of a rule that could have more substantial impact.

When an agency rule "jeopardizes the rights and interests of parties . . . , it must be subject to public comment," even if the rule can in some sense be called "procedural." *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980). The changes adopted in the Memo "were of a kind calculated to have a substantial effect on ultimate [agency] decisions." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974) (holding rules not procedural because they went "beyond formality and substantially affect[ed]" rights). In *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011), the court rejected the agency's argument

[7] Declarations and letters attached to Lin Supp. Decl. as Exhibits E, F, and G.
[8] Ex. H to Lin Supp. Decl.

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that its new procedure imposed no new substantive obligations on passengers (as they always had to undergo screening because the agency's action was "cast in 'mandatory language' so 'the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.'" *Id.* at 7 (citation omitted). Similarly, compliance with the Memo is not optional.

The cases on which Defendants rely miss the point—they *all* deal with rules that addressed the manner in which the public interacted with the agency. *See, e.g.*, *James v. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 279 (D.C. Cir. 2000) (changing manner in which USDA accepted applications for approval of food labels).

C. The Court Should Broadly Enjoin the FTJ Provision of the Memo.

Defendants' request to limit any relief to Plaintiff Joseph Doe alone because a class has not yet been certified ignores the history of court orders enjoining Defendants' previous unlawful actions. *See Trump v. IRAP*, 137 S. Ct. at 2089 (leaving nationwide injunctions in place even in absence of class certification); *Washington*, 847 F.3d at 1166-67 (enjoining previous iterations of Defendants' travel bans because "a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy"); *Hawaii*, 859 F.3d at 788 ("[n]arrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA").[9] The Court should enjoin the Defendant Agencies' suspension of admissions of the FTJ program not just for Joseph Doe but in its entirety and broadly.[10]

[9] Two of Defendants' cases—*M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2012) and *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644 (9th Cir. 2011)— involved inapposite Medicare/Medicaid claims. *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) fares no better as it concerns whether an injunction can issue "against an entity that is not a party to the suit." In *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984 the plaintiff had not yet moved for class certification. Plaintiff Doe moved for class certification on April 11, 2017. Mot. for Class Certification, Dkt. #19. If the Court is inclined to grant relief limited to Joseph Doe, Plaintiff requests the Court allow him to proceed with his class certification motion and revisit this issue once a ruling is issued, if appropriate.

[10] In *Jewish Family Service of Seattle v. Trump*, 2:17-cv-01707 (W.D. Wash.), plaintiffs include an affected I-730 petitioner and preserved their right to seek relief regarding the FTJ provision of the Memo. *See* Dkt. # 42 at p. 22.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the attached document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses on the Court's Electronic Mail Notice List.

DATED this 22nd day of November, 2017.

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