

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD TRUMP, in his official capacity as
President of the United States, et al.,
Defendants-Appellants-Cross-Appellees.

Nos. 18-35015,
18-35026

**DEFENDANTS' MOTION TO DISMISS THE APPEAL, AND
TO VACATE THE JUDGMENT AND REMAND
FOR DISMISSAL, ON GROUNDS OF MOOTNESS**

The district court in this case entered a nationwide preliminary injunction barring the enforcement of two provisions of a Memorandum to the President issued on October 23, 2017, by the Secretaries of State and Homeland Security and the Director of National Intelligence (DNI).¹ The challenged provisions (1) temporarily de-prioritized, during a 90-day review period, processing of refugee applications of nationals of 11 countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list, and (2) temporarily

¹ Copies of the preliminary injunction (Op.; DE# 92) and the Memorandum to the President (Agency Memo; DE# 46-2) are included with this motion.

suspended, pending additional security screening procedures, admission of following-to-join (FTJ) derivative refugees. The 90-day SAO review period and de-prioritization specified in the October 23 Memorandum expired by its own terms on January 22, 2018; and on February 1, 2018, the government implemented the additional security screening procedures for FTJ refugees that terminates the FTJ suspension by its own terms. Thus, the district court's injunction no longer has any effect because the enjoined provisions of the Memorandum have both ended by their own terms. Because these cross-appeals are now moot, the government respectfully requests that the Court dismiss the appeal, and vacate the injunction below and remand with instructions to dismiss the underlying claims, on grounds of mootness, pursuant to the doctrine recognized by the Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That "established practice," *ibid.*, was followed by the Supreme Court just last year when the challenged refugee provisions of a related Executive Order expired by their own terms, mooted the Supreme Court's review. See *Trump v. Hawaii*, 138 S. Ct. 377 (Mem.), No. 16-1540 (Oct. 24, 2017).

BACKGROUND

1. Plaintiffs brought these cases (consolidated by the district court) to challenge two provisions in a Memorandum to the President issued on October 23, 2017, which the district court referred to as the "Agency Memo," see Op. 9 & n.4. The Agency Memo explained that an earlier suspension of the United States Refugee

Admissions Program (USRAP) had ended, and that, in light of a multi-agency review, that program could resume. However, the Agency Memo also identified security-related concerns arising from the government's processing of two particular categories of refugee applications:

a. *The SAO Provision.* The Agency Memo explained that the Secretaries of State and Homeland Security and the DNI “continue to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list.” The SAO list, which was first established following the September 11, 2001, attacks, identifies particular countries that pose a higher risk to the national security of the United States. The current version of the refugee SAO list was adopted in 2015 and identifies 11 such countries. Agency Memo 2; Op. 10-11. The Agency Memo explained that the Secretaries of State and Homeland Security, along with the DNI, would “conduct a detailed threat analysis and review” for refugee applicants who were either nationals of the 11 countries previously identified in the SAO list or stateless persons who last habitually resided in one of those countries. *Ibid.* That analysis and review was expected to take 90 days, and during that time “the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries” and reallocate resources “to process

applicants from non-SAO countries.” Agency Memo 2. That 90-day period ended on January 22, 2018 (January 21 was a Sunday). The Agency Memo’s prioritization of refugee applications from non-SAO countries thus no longer has any effect.

b. *The FTJ Provision.* The Agency Memo indefinitely suspended entry into the United States of FTJ refugees. Agency Memo 2-3; Op. 9-10. FTJ refugees are the spouses and unmarried minor children of admitted principal refugees who travel to join the principal refugee more than four months after the principal refugee’s admission. Op. 9 n.5; Agency Memo 2 n.1. As the Agency Memo observed, the majority of FTJ refugees did not then undergo the same security screening procedures as the principal refugees they seek to join in the United States. Agency Memo 2-3. Accordingly, the Agency Memo indefinitely suspended processing of FTJ refugee applications, and directed that “additional security measures must be implemented before admission of following-to-join refugees can resume”; the Agency Memo provided that, “once those enhancements have been implemented,” admission of FTJ refugees “will resume.” *Id.* at 3. Implementation of the security enhancements called for by the Agency Memo has now been completed, as of February 1, 2018, and processing of FTJ refugees now incorporates that additional screening. Because the Agency Memo called for the suspension of FTJ refugee processing to end once those enhancements were completed, the challenged FTJ provision no longer has any effect.

2. The Agency Memo followed an earlier review of refugee policy, called for by the President on March 6, 2017, in Executive Order 13,780 (EO-2). *See* 82 Fed. Reg. 13,209 (Mar. 9, 2017).² In relevant part, Section 6 of EO-2 suspended the travel of refugees into the United States under the USRAP, and also suspended decisions on refugee applications. Both suspensions were to last for 120 days. EO-2 § 6(a). EO-2 also directed the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the DNI, to review the USRAP application process to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and to implement such additional procedures. *Ibid.* Based on that review, the agencies adopted the measures described in the Agency Memo.

A federal district court in Hawaii preliminarily enjoined Section 6 of EO-2, *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017), and this Court partially affirmed, upholding the injunction in substantial part but allowing the Government to conduct its internal review, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). The Supreme Court granted certiorari and partially stayed the injunction, concluding that the injunction should apply only to individuals “who can credibly claim a bona fide

² EO-2 was preceded by Executive Order 13,769, which was revoked by EO-2.

relationship with a person or entity in the United States.” *Trump v. IRAP*, 137 S. Ct. 2080 (2017). After EO-2’s refugee suspension expired by its own terms, the Supreme Court vacated the *Hawaii* decision and remanded to this Court with instructions to dismiss the challenge as moot. *Trump v. Hawaii*, 138 S. Ct. 377 (Mem.), No. 16-1540 (Oct. 24, 2017).

3. Shortly after the Agency Memo, the President issued Executive Order 13,815 on October 24, 2017. See 82 Fed. Reg. 50,055 (Oct. 27, 2017). In relevant part, Executive Order 13,815 stated that the Secretary of State, the Secretary of Homeland Security, and the DNI had informed the President that recent “improvements to the USRAP vetting process are generally adequate to ensure the security and welfare of the United States,” and thus that the refugee program may resume. *Id.* § 2(a). The Order further directed the Secretary of State and the Secretary of Homeland Security to continue to assess and address any risks posed by particular refugees. *Id.* § 3.

4. On December 23, 2017, approximately 30 days before the expiration of the 90-day period for SAO threat analysis and review, the district court entered a nationwide preliminary injunction barring enforcement of the FTJ and SAO

provisions of the Agency Memo.³ The district court first held that plaintiffs have Article III standing to assert their claims; that plaintiffs' claims are not barred by the doctrine of consular nonreviewability; that the Agency Memo constitutes final agency action under the Administrative Procedure Act (APA); and that the Secretary's action is not committed to agency discretion. Op. 19-38. The court then concluded that plaintiffs were likely to succeed on the merits because the Agency Memo failed to comply with notice-and-comment requirements under the APA, Op. 39-46, and because the provisions were contrary to the Immigration and Nationality Act, Op. 47-56. The court declined to reach any other merits argument. Op. 19, 56 n.29. The court found that plaintiffs would suffer irreparable harm in the absence of an injunction, Op. 56-58, and that the balance of the remaining equitable factors warranted injunctive relief, Op. 59-62. The district court entered a nationwide injunction prohibiting enforcement of the challenged portions of the Agency Memo

³ As the district court noted, plaintiffs narrowly challenged only two provisions of the Agency Memo: the 90-day de-prioritization under the SAO provision and the temporary suspension under the FTJ provision. Plaintiffs did not seek to enjoin the government's efforts to implement additional security screening mechanisms for FTJ refugees, nor did plaintiffs seek to enjoin the government's threat analysis and review of the SAO countries to determine if additional safeguards are necessary. Plaintiffs did not seek a guarantee of admissions into the United States for the refugees at issue. Op. 38.

for all foreign nationals with a credible claim of a bona fide relationship with a person or entity in the United States. Op. 61-65.

5. The government filed a notice of appeal on January 4, 2018. Plaintiffs in one of the consolidated cases filed a cross-appeal on January 11, 2018. This Court established a briefing schedule for the cross-appeals, and the Circuit Mediator subsequently entered an order vacating that briefing schedule and establishing a schedule for the Court's consideration of this motion.

6. On January 22, 2018, 90 days after the date of the Agency Memo, the SAO provision challenged in this case expired by its own terms. The government recently informed the district court of subsequent developments, explaining that the Secretary of Homeland Security issued a memorandum on January 29, 2018, outlining additional security enhancements and recommendations to strengthen the integrity of the USRAP. See Notice, Jan. 31, 2018 (DE# 119). As the Department of Homeland Security summarized in a related press release, these security enhancements and recommendations include: (1) "Additional screening for certain nationals of high-risk countries"; (2) "Administering the USRAP in a more risk-based manner when considering the overall refugee admissions ceiling, regional allocations, and the groups of applicants considered for resettlement"; and (3) "A periodic review and update of the refugee high-risk country list and selection criteria." Press Release, Dep't of Homeland Sec., DHS Announces Additional,

Enhanced Security Procedures for Refugees Seeking Resettlement in the United States (last updated Jan. 31, 2018), <https://www.dhs.gov/news/2018/01/29/dhs-announces-additional-enhanced-security-procedures-refugees-seeking-resettlement>.

7. Shortly thereafter, the government implemented the additional security screening procedures for processing FTJ refugees. Processing of FTJ refugee applications using the new screening procedures began on February 1, 2018. The Departments of State and Homeland Security have posted information about the new screening procedures. See <https://travel.state.gov/content/travel/en/us-visas/immigrate/follow-to-join-refugees-and-asylees.html>; <http://www.uscis.gov/i-730> (Special Instructions: “New security measures for following-to-join refugees”).

ARGUMENT

I. THE APPEALS OF THE PRELIMINARY INJUNCTION ARE MOOT

“A case becomes moot – and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III – ‘when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). Thus, even if there is a live controversy when the case is filed, courts should refrain from addressing the merits of claims if “the requisite personal interest that must exist at the commencement of the litigation” is no longer present. *Arizonans for Official*

English v. Arizona, 520 U.S. 43, 67-68 & n.22 (1997). Because the challenged provisions in this case have expired by their own terms, there is no longer a present case or controversy, and plaintiffs lack a legally cognizable interest in the outcome of their challenges to the expired provisions.

The Agency Memo, issued on October 23, 2017, specified that the Secretaries of State and Homeland Security and the DNI would “conduct a detailed threat analysis and review for nationals” from SAO countries and stateless persons who last habitually resided in those countries. Agency Memo 2. The Agency Memo further specified that the de-prioritization of refugees from SAO countries would continue only “[w]hile the temporary review is underway,” and that the review period would be “complete[d] * * * no later than 90 days from the date of this memorandum.” *Ibid.* As the district court observed, plaintiffs “d[id] not seek to enjoin the agencies from conducting their 90-day ‘detailed threat analysis and review’ of the SAO countries to determine what additional safeguards the agencies believe are necessary with respect to the admission of refugees from those countries,” Op. 38, and the district court’s preliminary injunction did not prohibit the government from completing such a review. As specified in the Agency Memo, the government’s SAO review was completed on January 22, 2018, 90 days after the Agency Memo was issued. Accordingly, the de-prioritization of SAO refugees by

the Agency Memo has ended and is now without any effect, as are the portions of the preliminary injunction prohibiting enforcement of the SAO provision.

The FTJ provisions similarly became moot by their own terms when the government implemented additional security screening procedures on February 1, 2018. As with the SAO provision, plaintiffs did not “seek to enjoin the agencies’ efforts to implement screening mechanisms for FTJ refugees,” Op. 38, and the district court’s preliminary injunction did not prohibit the government from doing so. Because the new FTJ security measures have now been implemented, the processing and admission of following-to-join refugees is no longer suspended under the terms of the Agency Memo. Agency Memo 3. Accordingly, as of February 1, 2018, the FTJ provision of the Agency Memo ceased to have any effect, and the preliminary injunction prohibiting enforcement of the FTJ provision similarly ceased to have any effect.

Because the provisions of the Agency memo that plaintiffs have challenged in this case have expired by their own terms, the preliminary injunction has no continuing effect, and the appeals from the district court’s decision are moot. See *University of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (When enjoined conduct has ceased, “the correctness of the decision to grant [the] preliminary injunction * * * is moot.”). The merits of the government’s appeal and the plaintiffs’ cross-appeal thus present questions with no ongoing practical or legal import. A decision

from this Court on any of the merits issues addressed by the district court would be an advisory opinion.

For the same reasons, the Agency Memo itself no longer imposes any harm on plaintiffs. *See Arizonans for Official English*, 520 U.S. at 67 (“To qualify as a case fit for federal-court adjudication, ‘an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.’”) (citation omitted). Even if, as the district court concluded, plaintiffs were harmed by the SAO and FTJ provisions at the time these cases were brought and decided below, Op. 20-21, those provisions have now expired; thus, they will not and cannot cause any ongoing harm.

No exception to mootness applies in this case. The limited exception when a legal question is capable of repetition yet evades review “applies ‘only in exceptional situations,’” where “the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration,” and “there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted; brackets in original). Here, there is no significant likelihood that the same parties will again be subject to the same action, which was expressly temporary and for limited purposes, which have since been met.

The government has completed its review of refugees from SAO countries, and has taken steps to implement the recommendations that resulted from that

review, including (1) additional screening for certain nationals of high-risk countries; (2) administering the USRAP in a more risk-based manner when considering the overall refugee admissions ceiling, regional allocations, and the groups of applicants considered for resettlement; and (3) a periodic review and update of the refugee SAO list and selection criteria. Those recommendations are new steps, not within the terms of the Agency Memo's 90-day review and related temporary SAO de-prioritization. If plaintiffs seek to challenge any new policy, they may do so by filing new or amended complaints, but the current challenge to the temporary de-prioritization of SAO refugees in the Agency Memo is not likely to be repeated.

Similarly, the government has now fully implemented the new FTJ security measures called for in the Agency Memo, and the related temporary suspension of FTJ refugee application processing has accordingly ended by the Agency Memo's own terms. Plaintiffs are not likely to be subjected to another temporary suspension of FTJ refugee processing to allow those new measures to be put in place, because the called-for measures were put in place as of February 1, 2018. *See also America Cargo Transport., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("The government's change of policy presents a special circumstance in the world of mootness").

The exception to mootness for a defendant's "voluntary cessation" of "allegedly illegal conduct" also does not apply here. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). That exception exists because "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 285 n.1 (2001). But the government has not altered its behavior or the terms of the Agency Memo. The terms of the Agency Memo always contemplated that the temporary SAO and FTJ provisions would terminate. The Agency Memo specified that the SAO provision would only continue during the government's 90-day review (which ended on January 22), and that processing of FTJ refugees would resume once new security measures were implemented (which took place February 1). The challenged provisions have thus expired by their own terms.

In *Burke v. Barnes*, 479 U.S. 361 (1987), Members of the House of Representatives sued to challenge the President's pocket-veto of a bill pertaining to U.S. military aid to El Salvador. *Id.* at 363. When the "bill in question expired by its own terms * * * a few weeks after the Court of Appeals entered its judgment," the Supreme Court held "that any issues concerning whether [the bill] became a law were mooted." *Ibid.* The same is true here. The challenged SAO provision expired by its own terms on January 22, and the FTJ provisions expired when new security measures were implemented on February 1. *See also Log Cabin Republicans v.*

United States, 658 F.3d 1162, 1166 (9th Cir. 2011) (“[T]he Supreme Court and our court have repeatedly held that a case is moot when the challenged statute * * * expires * * *.”).

Similarly, after the Supreme Court granted certiorari to review the preliminary injunction against certain provisions of Section 6 of EO-2 and allowed those provisions to take effect on a limited basis, the earlier suspension of USRAP expired by its own terms after 120 days. Relying on *Burke v. Barnes*, the Supreme Court concluded that because the suspension had expired by its own terms, the appeal of the preliminary injunction was moot and no longer presented a live case or controversy. *Trump v. Hawaii*, 138 S. Ct. 377 (Mem.), No. 16-1540 (Oct. 24, 2017). Just as the passage of time resulted in the expiration of the challenged provisions of EO-2 and thus mooted the appeal of a preliminary injunction addressed to those provisions, so too does the expiration of the SAO and FTJ provisions moot this appeal of a preliminary injunction addressed to those provisions.

II. THE DISTRICT COURT’S JUDGMENT SHOULD BE VACATED

Where, as here, an appeal becomes moot before the appealing party can obtain review, the “established practice” is to “vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This rule is “commonly utilized,” *id.* at 41, and is the “normal” procedure for mootness, *Camreta v. Green*, 563 U.S. 692, 713 (2011). The rule serves important

purposes: vacatur “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. In addition, a “party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994).⁴

While there is an exception where the party seeking vacatur has mooted the case by settlement, *Bancorp*, 513 U.S. at 25, or failed to pursue an appeal, *Karcher v. May*, 484 U.S. 72, 83 (1987), vacatur is the proper course when a case becomes moot due to the expiration of a challenged law. *See Burke*, 479 U.S. at 363; *Log Cabin Republicans*, 658 F.3d at 1167 (“The ‘established’ practice when a civil suit becomes moot on appeal is to vacate the district court’s judgment and remand for dismissal of the complaint.”) (citing *Munsingwear*). In *Burke*, where the case was mooted when the challenged bill “expired by its own terms,” the Supreme Court vacated the court of appeals’ judgment and remanded with instructions to dismiss the complaint. *Id.* at 365. And when EO-2 § 6 expired by its own terms after 120 days, the Supreme Court not only instructed this Court to dismiss the challenge as

⁴ Pursuant to this Court’s practice, it may also dismiss the appeal as moot, in conjunction with vacatur and direction to dismiss on remand. *See, e.g., Alaska Wilderness League v. Jewell*, 637 Fed. Appx. 976, 981 (9th Cir. 2015).

moot, but (citing *Burke*) vacated the judgment below following the Court's "established practice." *Hawaii*, 138 S. Ct. 377 (Mem.), No. 16-1540 (Oct. 24, 2017). The same established practice applies here, and the same disposition is appropriate here as well: This Court (like the Supreme Court in *Hawaii*) should vacate the judgment below and remand with instructions to dismiss the claims underlying the injunction as moot.

CONCLUSION

For these reasons, defendants respectfully request that this Court dismiss the appeal, and vacate the district court's judgment and remand with instructions to dismiss, on grounds of mootness.

Respectfully submitted,

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FEBRUARY 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 3,807 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ H. Thomas Byron III

H. Thomas Byron III

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ H. Thomas Byron III

H. Thomas Byron III

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JOHN DOE, et al.,

Plaintiffs,

11 v.

12 DONALD TRUMP, et al.,

13 Defendants.

CASE NO. C17-0178JLR

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER ISSUING A
PRELIMINARY INJUNCTION

(RELATING TO BOTH CASES)

14 JEWISH FAMILY SERVICES, et
15 al.,

Plaintiffs,

16 v.

17 DONALD TRUMP, et al.,

18 Defendants.

CASE NO. C17-1707JLR

19 **I. INTRODUCTION**

20 The work of this court, and more broadly of the federal Judiciary, is to resolve
21 disputes between parties; that is what the court endeavors to do today in ruling on the two
22 motions before it. Plaintiffs in both cases are refugees, who find themselves in dire

1 circumstances, their family members who yearn to be reunited with them, and
2 humanitarian organizations whose fundamental mission is to help these vulnerable
3 refugees resettle in the United States. Plaintiffs in both cases present compelling
4 circumstances of irreparable harm inflicted by the federal agencies' action at issue here.
5 Nevertheless, the fundamental question the court must resolve is did the federal agencies
6 act within their legal authority? If so, the court does not intervene, but leaves the
7 decision to the other two branches of government—Congress and the Executive. Today,
8 however, the court intervenes and preliminarily enjoins the federal agencies' action. It
9 does so because, at this early stage in the proceedings, Plaintiffs show that they are likely
10 to succeed on their claims that the agencies exceeded their statutory authority and also
11 that they meet the other qualifying factors necessary for preliminary injunctive relief.

12 One further note: This is an area of rapidly developing law with related cases
13 presently on appeal and decisions anticipated shortly.¹ Plaintiffs, however, seek a
14 decision now and are entitled to one given the facts in this case. In deciding these
15 motions, the court must rely on the precedent currently available to it. The court
16 understands that appellate courts may issue additional guidance in the days to come. If
17 the parties believe that the court should revisit any portion of today's decision on the
18 basis of subsequent authority, they should raise this to the court's attention through
19 appropriate motions. The court now turns to the motions at hand.

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21 ¹ Indeed, one such decision was issued last night. See *Hawaii v. Trump*, No. 17-17168,
22 2017 WL 6547095 (9th Cir. Dec. 22, 2017) ("*Hawaii III*"). The court has reviewed that opinion
and incorporated it into this decision.

Before the court are two motions seeking to preliminarily enjoin certain aspects of Executive Order No. 13,815 (“EO-4”), § 3(a), 82 Fed. Reg. 50,055 (Oct. 27, 2017), and its accompanying memorandum to Defendant Donald Trump, President of the United States, from Defendants Rex Tillerson, Secretary of the Department of State (“DOS”), Elaine Duke, Acting Secretary of the Department of Homeland Security (“DHS”), and Daniel Coats, Director of National Intelligence (“DNI”) (Lin Decl. (Dkt. # 46) ¶ 3, Ex. B (attaching a copy of the memorandum) (hereinafter, “Agency Memo”)). Plaintiffs John Doe, Jack Doe, Jason Doe, Joseph Doe, James Doe, Jeffrey Doe, the Episcopal Diocese of Olympia, and the Council on American Islamic Relations-Washington (collectively, “Doe Plaintiffs”) filed the first motion for a preliminary injunction in *Doe, et al. v. Trump, et al.*, No. C17-0178JLR (W.D. Wash.) (“the Doe Case”). (See Doe PI Mot. (Dkt. # 45).) Shortly after Doe Plaintiffs filed their motion, Plaintiffs Jewish Family Service of Seattle (“JFS-S”), Jewish Family Services of Silicon Valley (“JFS-SV”), Allen Vaught, Afkab Mohamed Hussein, John Does 1-3 and 7, and Jane Does 4-6 (collectively, “JFS Plaintiffs”) filed a separate action in *JFS-S, et al. v. Trump, et al.*, No. C17-1707JLR (W.D. Wash.) (“the JFS Case”) and a second motion for a preliminary injunction. (See JFS Compl. (17-1707 Dkt. # 1); JFS PI Mot. (17-1707 Dkt. # 42).)² Recognizing that both cases and motions for preliminary injunction concerned EO-4 and the Agency Memo, the court consolidated the cases. (See OSC re: Consol. (Dkt. # 52);

² References to docket numbers in this order refer to filings the Doe Case, unless the docket number is preceded by “17-1707.” Docket numbers preceded by “17-1707” refer to entries in the JFS Case.

1 Stip. Re: Consol. (Dkt. # 60); Consol. Order (Dkt. # 61).) Following consolidation, Doe
 2 Plaintiffs joined JFS Plaintiffs' motion, and JFS Plaintiffs joined Doe Plaintiffs' motion.
 3 (Doe Joinder (Dkt. #62); JFS Joinder (17-1707 Dkt. # 70).)

4 In addition to the parties' briefing (*see* Doe PI Mot.; JFS PI Mot.; Doe Resp. (Dkt.
 5 # 51); JFS Resp. (Dkt. # 77); Doe Reply (Dkt. # 54); JFS Reply (Dkt. # 79); Doe Joinder;
 6 JFS Joinder ; Doe Supp. Br. (Dkt. # 76); JFS Supp. Br. (Dkt. # 73); Def. Supp. Br. (Dkt.
 7 # 78)), the court has considered the relevant portions of the record, and the applicable
 8 law. Further, the court heard oral argument on December 21, 2017. Being fully advised,
 9 the court (1) GRANTS Doe Plaintiffs' motion for a preliminary injunction, and (2)
 10 GRANTS JFS Plaintiffs' motion for a preliminary injunction except for those refugees
 11 who lack a bona fide relationship with a person or entity in the United States.³ *See*
 12 *Trump v. Int'l Refugee Assistance Project*, --- U.S. ---, 137 S. Ct. 2080, 2089 (2017)
 13 ("IRAP").

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16
 17 ³ In accordance with Federal Rules of Civil Procedure 52(a) and 65(d), this order shall
 18 constitute the court's findings of fact and conclusions of law setting forth the grounds for issuing
 19 the preliminary injunction contained herein. *See* Fed. R. Civ. P. 52(a); Fed. R. Civ. P. 65(d); *see*
 20 *also A.H.R. v. Wash. State Health Care Auth.*, No. C15-5701JLR, 2016 WL 98513, at *1 n.4
 21 (W.D. Wash. Jan. 7, 2016). Although the court has not labeled paragraphs specifically as
 22 findings of fact or conclusions of law, such labels are not necessary. The nature of the findings
 and conclusions that follow is apparent. *See Tri-Tron Int'l v. A.A. Velto*, 525 F.2d 432, 435-36
 (9th Cir. 1975) ("We look at a finding or a conclusion in its true light, regardless of the label that
 the district court may have placed on it. . . . [T]he findings are sufficient if they permit a clear
 understanding of the basis for the decision of the trial court, irrespective of their mere form or
 arrangement.") (internal citations omitted); *In re Bubble Up Del., Inc.*, 684 F.2d 1259, 1262 (9th
 Cir. 1982) ("The fact that a court labels determinations 'Findings of Fact' does not make them so
 if they are in reality conclusions of law.").

II. BACKGROUND

A. The President's Executive Orders on Immigration and Refugees

1. EO-1

One week after his inauguration, President Trump issued Executive Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017) ("EO-1"). In addition to suspending the entry of aliens from seven majority-Muslim countries for 90 days, EO-1 suspended the United States Refugee Admission Program ("USRAP") for 120 days and banned the entry of Syrian refugees indefinitely. *Id.* §§ 3(c), 5(a), 5(c). During the 120-day suspension of USRAP, EO-1 directed the Secretaries of DOS and DHS and the DNI to conduct a security review of USRAP. *Id.* § 5(a). In this period, refugees could be admitted on a case-by-case basis only if their admission was "in the national interest," which was defined to include when a person is "a religious minority in his country of nationality facing religious persecution." *Id.* § 5(e). EO-1 further directed that when USRAP resumed, DOS was to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b).

On February 3, 2017, this court issued a nationwide temporary restraining order ("TRO") enjoining EO-1, including the suspension of USRAP. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017). On appeal, the Ninth Circuit interpreted the court's TRO to be a preliminary injunction and declined the Government's request to stay this

1 court's order. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *appeal dismissed*,
 2 No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017).

3 2. EO-2

4 After the Ninth Circuit's ruling, President Trump abandoned his efforts to defend
 5 EO-1, and issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)
 6 ("EO-2"). EO-2 expressly revoked EO-1. EO-2 § 13. EO-2 was similar to EO-1 except
 7 that it omitted the explicit preference for religious minorities and the indefinite
 8 suspension of Syrian refugees. EO-2 directed another review of USRAP and restarted the
 9 120-day suspension of USRAP during the new review period, subject to case-by-case
 10 waivers. *Id.* §§ 6(a), (c). EO-2 stated that the suspension of USRAP was necessary to
 11 allow the agencies to "determine what additional procedures should be used to ensure
 12 that individuals seeking admission as refugees do not pose a threat to the security and
 13 welfare of the United States." *Id.* § 6(a). EO-2 also stated that at the conclusion of the
 14 review period, USRAP adjudications would resume for stateless persons and nationals of
 15 countries for which the agencies "determined that the additional procedures implemented
 16 . . . [we]re adequate to ensure the security and welfare of the United States." *Id.*

17 Before EO-2 could take effect, a federal district court in Hawaii issued a TRO,
 18 holding that EO-2 violated the Establishment Clause. *See, e.g., Hawaii v. Trump*, 245 F.
 19 Supp. 3d 1227, 1230 (D. Haw. 2017), *hearing en banc denied sub nom. Hawaii v. Trump*,
 20 864 F.3d 994 (9th Cir. 2017), *aff'd in part, vacated in part, remanded sub nom. Hawaii v.*
 21 *Trump*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int'l Refugee*
 22 *Assistance Project*, --- U.S. ---, 137 S. Ct. 2080 (2017), *and cert. granted, judgment*

1 *vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), *and vacated*, 874 F.3d
 2 1112 (9th Cir. 2017), *and appeal dismissed as moot sub nom. Hawaii v. Trump*, 874 F.3d
 3 1112 (9th Cir. 2017). The Ninth Circuit upheld the district court’s decision on the ground
 4 that President Trump failed to invoke the proper authority to suspend refugee admissions.
 5 *Hawaii v. Trump*, 859 F.3d 741, 776 (9th Cir. 2017), *cert. granted sub nom. Trump v.*
 6 *Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017), *and cert. granted, judgment*
 7 *vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), *and vacated*, 874 F.3d
 8 1112 (9th Cir. 2017) (“*Hawaii I*”). In addition, a federal district court in Maryland and
 9 the Fourth Circuit Court of Appeals both concluded that EO-2 likely violated the
 10 Establishment Clause. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539,
 11 544 (D. Md. 2017), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017) (en banc),
 12 *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, --- U.S. ---, 137
 13 S. Ct. 2080 (2017), *and vacated and remanded sub nom. Trump v. Int’l Refugee*
 14 *Assistance Project*, --- U.S. ---, 138 S. Ct. 353 (2017). Pending appeals from both the
 15 Ninth and Fourth Circuit Courts of Appeal, the Supreme Court stayed the preliminary
 16 injunctions issued by the Maryland and Hawaii district courts—except for foreign
 17 nationals and refugees who had a “credible claim of a bona fide relationship with a
 18 person or entity in the United States.” *IRAP*, 137 S. Ct. at 2088-89.

19 3. EO-3

20 While review of EO-2 was pending before the Supreme Court, President Trump
 21 replaced those portions of EO-2 that relate to immigrants (and not refugees), with a
 22 Presidential Proclamation. See Proclamation No 9,645, 82 Fed. Reg. 45,161 (Sept. 27,

2017) (“EO-3”). EO-2’s refugee ban was still in effect at the time President Trump issued EO-3. Federal district judges in Hawaii and Maryland issued preliminarily injunctions blocking implementation of portions of EO-3. *See Int’l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 4674314, at *1 (D. Md. Oct. 17, 2017), *appeal docketed*, No. 17-2231 (4th Cir. Oct. 20, 2017), and *appeal docketed*, No. 17-2240 (4th Cir. Oct. 23, 2017); *Hawaii v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 4639560, at *1 (D. Haw. Oct. 17, 2017), *appeal docketed*, No. 17168 (9th Cir. Oct. 24, 2017). The Ninth Circuit affirmed the Hawaii district court’s ruling in large part, but narrowed the scope of the injunction to give relief only to those with a credible bona fide relationship with the United States, pursuant to the Supreme Court’s decision in *IRAP*, 137 S. Ct. at 2088. *See Hawaii III*, 2017 WL 6547095 at * 26. The ruling from the Maryland federal district court remains on appeal. The Supreme Court has stayed both preliminary injunctions pending further appeals. *See Trump v. Int’l Refugee Assistance Project*, No. 17A560, 2017 WL 5987435, at *1 (U.S. Dec. 4, 2017); *Trump v. Hawaii*, No. 17A550, 2017 WL 5987406, at *1 (U.S. Dec. 4, 2017).

4. EO-4 and the Agency Memo

On October 24, 2017, the same day that EO-2’s 120-day refugee ban expired, President Trump issued Executive Order 13,815, 82 Fed. Reg. 50,055 (Oct. 27, 2017) (“EO-4”). EO-4 stated that continued suspension of refugee admission was not necessary, EO-4 § 3(a), and that the Administration had improved USRAP vetting processes so that they were “generally adequate to ensure the security and welfare of the United States,” *id.* § 2(a). Nevertheless, EO-4 directed a continuing risk assessment as to

1 “[c]ertain [c]ategories of [r]efugees.” *Id.* §§ 3(a)(i)-(ii). The Secretaries of DOS and
 2 DHS and the DNI outlined the risk assessment and the EO-4 categories of refugees in the
 3 Agency Memo, which was dated October 23, 2017, but released on October 24, 2017.⁴
 4 (See Lin Decl. ¶ 3, Ex. B (attaching Agency Memo); see also Burman Decl. ¶ 3, Ex. B
 5 (attaching Agency Memo).)

6 Plaintiffs seek to preliminarily enjoin certain provisions of the Agency Memo that
 7 (1) indefinitely suspend “following-to-join” (“FTJ”) derivative refugees from entering the
 8 United States, and (2) suspend for at least 90-days the entry of refugees who are
 9 “nationals of, and stateless persons who last habitually resided in, 11 particular countries
 10 previously identified as posing a higher risk to the United States through their designation
 11 on the Security Advisory Opinion (“SAO”) list.” (Agency Memo at 2-3; see generally
 12 Doe PI Mot.; JFS PI Mot.)

13 a. The FTJ Provisions

14 The Agency Memo indefinitely suspends the FTJ process for refugees.⁵ (Agency
 15 Memo at 2-3.) Approximately 2,500 refugees in the United States are able to reunite

16 ⁴ An addendum is attached to the Agency Memo, entitled “Addendum to Section 6(a)
 17 Memorandum,” which refers to the review of USRAP directed by Section 6(a) of EO-2
 18 (“Agency Memo Addendum”). (See Burman Decl. (17-1707 Dkt. # 43) ¶ 3, Ex. B.)

19 ⁵ Under the INA, subject to numerical limits set annually by the President, the Secretary
 20 of DHS may admit “any refugee who is not firmly resettled in any foreign country, is determined
 21 to be of special humanitarian concern to the United States, and is admissible (except as otherwise
 22 provided under ([8 U.S.C. § 1157(c)(3)]) as an immigrant.” 8 U.S.C. § 1157(c)(1). Refugees
 admitted under this provision are referred to as “principal refugees.” See 8 C.F.R. § 207.7(a).
 “Derivative refugees” are the spouses and unmarried minor children of an admitted principal
 refugee. See *id.* When derivative refugees travel to join the principal refugee more than four
 months after the principal refugee’s admission, they are FTJ derivative refugees, rather than
 “accompanying” derivative refugees. See *id.*

with their immediate family members annually through the FTJ process. (*Id.* at 2 n.1.) The Agency Memo states that most FTJ refugee applicants do not currently undergo the same security procedures as the principal refugee who has already resettled in the United States. (*Id.* at 2-3.) The Secretaries of DOS and DHS and the DNI determined that FTJ refugees should not be admitted to the United States until additional screening procedures are in place. (*Id.* at 3.) Although the Agency Memo does not exempt Kenya and Thailand from its application, Defendants state that FTJ refugees processed at resettlement centers in those two countries are not affected by the Agency Memo because “adequate review mechanisms are already in place in those countries.” (JFS Resp. at 5, n.3; *see also* Doe Resp. at 5; Higgins Decl. (Dkt. # 51-1) ¶ 11.) At oral argument, Defendants clarified that during the Agency Memo’s indefinite FTJ suspension, the Government was not just barring entry of FTJ refugees, but had completely stopped processing FTJ refugee applications—except for FTJ refugees who are processed in Thailand or Kenya.

b. The SAO Provisions

The Agency Memo also suspends for at least 90 days refugee admission of nationals of 11 countries on the SAO list, as well as stateless persons who last resided in those countries. (*See* Agency Memo at 2.) The Agency Memo does not identify the countries, but Plaintiffs assert that the countries are Egypt, Iran, Iraq, Libya, Mali, Somalia, Sudan, Syria, and Yemen, as well as North Korea and South Sudan.⁶ (*See* JFS

⁶ At oral argument, Defendants declined to confirm this list of the 11 SAO countries on the basis that it was “law enforcement sensitive information.” However, Defendants conceded

PI Mot. at 7; *see also* Smith Decl. (17-1707 Dkt. # 44) ¶ 5.) Countries on the SAO list “have been assessed by the U.S. government to pose elevated potential risks to national security.” (Agency Memo Addendum at 1.) The SAO list for refugees was established after September 11, 2001, and has changed over the years. (*Id.*) The most recent list was updated in 2015. (*Id.*) USRAP already requires additional screening and procedures for refugees from countries on the SAO list. (*Id.*) USRAP subjects these refugees to additional vetting through SAOs, which are “DOS-initiated biographic check[s] conducted by the Federal Bureau of Investigation and intelligence community partners.” (*Id.* at 1 n.1.)

The Agency Memo requires the agencies to “conduct a review and analysis” of USRAP for refugees from SAO countries for an additional 90 days—notwithstanding the agencies’ review of USRAP pursuant to EO-1 and EO-2. (*See* Agency Memo at 2.) Like President Trump’s prior EOs, the Agency Memo suspends refugee admission from SAO countries unless resettlement “would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States,” a determination made on a “case-by-case basis” (*Id.*) In addition, the Agency Memo diverts resources dedicated to processing refugees who are citizens of (or stateless persons who last resided in) SAO countries and reallocates those resources to processing refugee applicants from non-SAO countries. (*Id.*) During oral argument, Defendants acknowledged that this would impact the pace of processing for SAO refugees. Thus, even if the SAO

that the court could “rely on Plaintiffs’ allegations for purposes of addressing the issues” presented in these motions.

suspension is lifted after 90-days, it will have a long-term effect. “Refugees have only a narrow window of time to complete their travel, as certain security and medical checks expire and must then be re-initiated.” *Hawaii v. Trump*, 871 F.3d 646, 664 (9th Cir. 2017) (“*Hawaii II*”). “Even short delays may prolong a refugee’s admittance.” *Id.*

B. Facts Pertaining to Specific Plaintiffs

1. Joseph Doe

Joseph Doe is a plaintiff in the Doe Case. (See Doe TAC (Dkt. # 42) ¶¶ 54-71.) He is from Somalia, was first admitted to the United States in 2014 as a refugee, and became a lawful permanent resident in 2016. (Joseph Decl. (Dkt. # 47) ¶¶ 2, 9, 11.) Joseph fled Somalia with his family as a young child; he and his family eventually ended up in a refugee camp in Kenya, where Joseph grew up, married, and began his own family. (*Id.* ¶¶ 3-8.) Joseph’s wife and children were unable to come to the United States with Joseph, remaining in Kenya. (*Id.* ¶¶ 8-9.) Joseph filed an I-730 petition to bring his wife and children to the United States as FTJ refugees. (*Id.* ¶ 10.) Joseph’s wife and children have completed their final interviews, security and medical clearances, received a formal assurance from a refugee resettlement agency, and are on the brink of travel. (*Id.* ¶ 12; Joseph Supp. Decl. (Dkt. # 56) ¶¶ 3-5.) Yet, Joseph’s family has not received permission from DHS to travel. (Joseph Supp. Decl. ¶ 7.) Joseph’s two youngest children were born in Kenya and have never been to Somalia. (*Id.* ¶ 9.) Nevertheless, they are considered to be Somali citizens due to Joseph’s nationality. (*Id.*) Somalia is an SAO country. (Smith Decl. ¶ 5.) Thus, the United States embassy in Somalia informed Joseph that although his wife and oldest step-son, who are both Kenyan citizens, could

1 obtain permission to travel to the United States, his 4-year-old and 5-year-old sons cannot
2 because they are considered Somali citizens. (*See* Joseph Supp. Decl. ¶ 10.)

3 2. John Doe 7

4 John Doe 7 is a plaintiff in the JFS Case. (*See* JFS Compl. ¶ 20.) JFS Plaintiffs
5 base their joinder in the Doe motion for preliminary injunction on facts pertaining to Doe
6 7. (JFS Joinder at 1-2.) Doe 7 is an Iraqi national, who was admitted as a refugee to the
7 United States in 2014, along with his wife and two children. (Doe 7 Decl. (17-1707 Dkt.
8 # 58) ¶ 2.) He filed an I-720 petition for his 19-year-old son from his first marriage to
9 join him as an FTJ refugee, which the Government approved. (*Id.* ¶¶ 3-4.) His son has
10 completed his interview and fingerprinting and received a formal assurance from JFS-S
11 in November 2016. (*Id.* ¶ 4.) Since that time, Doe 7's son has been waiting to travel to
12 the United States. (*Id.*)

13 3. Afkab Mohamed Hussein

14 Afkab Mohamed Hussein is a plaintiff in the JFS Case. (*See* JFS Compl. ¶ 12.)
15 He is a Somali national, who was admitted to the United States as a refugee in September
16 2015. (Hussein Decl. (17-1707 Dkt. # 48) ¶ 1.) His wife, who was pregnant with their
17 son at the time, did not travel with Mr. Hussein to the United States. (*See id.* ¶ 6.) Mr.
18 Hussein filed I-720 petitions for his wife and son to join him in the United States as FTJ
19 refugees, which the Government approved in June 2016. (*Id.* ¶¶ 10, 16.) His wife and
20 son were both born in Kenya but are considered Somali citizens. (*See id.* ¶¶ 11-12.)

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1 4. John Doe 1

2 John Doe 1 is a plaintiff in the JFS Case. (*See* JFS Compl. ¶ 13.) Doe 1 is an Iraqi
 3 former interpreter for the United States military. (Doe 1 Decl. (17-1707 Dkt. # 52) ¶¶ 1,
 4 3.)⁷ Doe 1 and his family were in extreme danger in Iraq due to his work for the United
 5 States military. (*See id.* ¶¶ 3-8.) As a result, in 2014, he fled Iraq for Cairo, Egypt
 6 without his family. (*Id.* ¶¶ 8-9.) In September 2014, he applied for refugee status in the
 7 United States. (*Id.* ¶ 12.) He is currently “in the end stage of processing for refugee
 8 admissions.” (*Id.* ¶ 15.) He was conditionally approved for resettlement in the United
 9 States in December 2015, and has received an assurance of sponsorship from a
 10 resettlement agency. (*Id.*) In early October 2017, the International Organization for
 11 Migration (“IOM”) told Doe 1 to “get ready to travel to the United States.” (*Id.* ¶ 16.)
 12 While he was updating his passport to travel, EO-4 and the Agency Memo went into
 13 effect, preventing him from traveling. (*See id.*)

14 5. John Does 2 and 3

15 John Doe 2 is a plaintiff in the JFS Case. (*See* JFS Compl. ¶ 15.) John Doe 2 is an
 16 Iraqi former interpreter for the United States Army. (Doe 2 Decl. (17-1707 Dkt. # 53)
 17 ¶¶ 1, 3.) In 2010, he came to the United States to complete his PhD. (*Id.* ¶ 5.) Upon
 18 graduation, he travelled back to Mosul, Iraq without his wife and children who remained
 19 in the United States. (*Id.*) While he was in Mosul, ISIS seized control of the city, and he

20

⁷ (*See also* Vaught Decl. (17-1707 Dkt. # 49) ¶¶ 1-24 (describing the declarant’s work
 21 with Doe 1 as an interpreter while the declarant was serving in Falluja, Iraq with the United
 22 States Army Reserve’s Civil Affairs and Psychological Operations Command, his distress in
 having to leave Doe 1 behind in Iraq, his efforts to assist Doe 1 to resettle in the United States,
 and his objections to EO-4 and the Agency Memo).)

has been unable to rejoin his family in the United States ever since. (*Id.* ¶ 6.) In 2015, he applied for admission to the United States as a refugee. (*Id.* ¶¶ 7-8.) He is currently “in the end stage of processing for refugee admissions.” (*Id.* ¶ 9; *see also id.* ¶ 12.) He was “awaiting security checks and travel booking” when he was informed of the restrictions on refugees that apply to Iraqi nationals in EO-1, EO-2, and EO-4. (*Id.*) He has been stranded in Iraq and separated from his family for three years. (*Id.* ¶ 11.) One of his children is now married to a lawful permanent resident, and he has two granddaughters who are United States citizens. (*Id.* ¶ 5.)

John Doe 3 is a plaintiff in the JFS Case. (*See* JFS Compl. ¶ 16.) He is a lawful permanent resident of the United States and the son-in-law of Doe 2. (Doe 3 Decl. (17-1707 Dkt. # 54) ¶ 1.) He is worried about Doe 2’s safety. Doe 2’s family in the United States, which consists of his wife, five children, two sons-in-law, and two granddaughters, miss him dearly, rely on him, and want to be reunited with him. (*Id.* ¶¶ 2, 4-5.)

6. Jane Doe 4

Jane Doe 4 is a plaintiff in the JFS Case. (*See* JFS Compl. ¶ 17.) Doe 4 is an Egyptian, who has applied for refugee status in the United States. (Doe 4 Decl. (17-1707 Dkt. # 55) ¶¶ 1-2.) She is a transgender woman who faces extreme harassment and persecution in Egypt because of her gender identity. (*Id.* ¶ 3; *see also id.* ¶ 6.) Until the recent restrictions on refugee admissions to the United States, USRAP was processing her refugee application on an expedited basis. (*Id.* ¶ 5.)

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1 7. Jane Does 5 and 6

2 Jane Doe 5 is a plaintiff in the JFS Case. (See JFS Compl. ¶ 18.) She is an Iraqi
 3 national and waiting to travel to the United States as a refugee. (Doe 5 Decl. (17-1707
 4 Dkt. # 56) ¶¶ 2-3.) She hopes to live with her sister who resides in Castle Creek, Utah.
 5 (*Id.* ¶ 2.) Her mother, father, another sister, and a brother also live in the United States.
 6 (*Id.* ¶ 8.) In Iraq, Doe 5 works as an interpreter and administrator for American
 7 companies. (*Id.* ¶ 3.) As a result of her work, she faces danger, threats, and harassment
 8 in Iraq. (*Id.* ¶¶ 3-5) In November 2015, Doe 5 was kidnapped by Iraqi militants who
 9 raped her multiple times and held her for about a month. (*Id.* ¶ 4.) When they released
 10 her, they told her they would kill her if she continued to work with the Americans. (*Id.*)
 11 She applied for refugee status in 2012. (*Id.* ¶ 7.) She has completed multiple stages of
 12 the refugee admissions process and has been awaiting security checks and travel booking
 13 since 2016. (*Id.*)

14 Jane Doe 6 is a plaintiff in the JFS Case. (See JFS Compl. ¶ 19.) She is a United
 15 States citizen and the sister of Doe 5. (Doe 6 Decl. (17-1707 Dkt. # 57) ¶ 1.) She fears for
 16 her sister's safety in Iraq and misses her deeply. (See *id.* ¶¶ 2, 4-6.)

17 All of the individual Plaintiffs have been injured by prolonged separation from
 18 their family members. (See, e.g., Hussein Decl. ¶¶ 6, 18; Doe 2 Decl. ¶¶ 5, 10; Doe 3
 19 Decl. ¶ 4; Doe 5 Decl. ¶ 8; Doe 6 Decl. ¶¶ 6-7; Doe 7 Decl. ¶¶ 5-7.) Those individual
 20 Plaintiffs stranded abroad in perilous circumstances are injured by their inability to travel
 21 to safety in the United States. (See, e.g., Doe 1 Decl. ¶¶ 3-11; Doe 2 Decl. ¶¶ 5-10; Doe 4
 22 Decl. ¶ 7; Doe 5 Decl. ¶ 9.)

1 8. The Organizational Plaintiffs

2 JFS Plaintiffs argue in conjunction with their motion for preliminary injunction
 3 that EO-4 and the Agency Memo also harm the organizational Plaintiffs—JFS-S and
 4 JFS-SV.⁸ (JFS PI Mot. at 12-13.) These agencies provide services to and help resettle
 5 refugees in response to the moral, religious, and cultural commands of their religion.
 6 (JFS-S Decl. (17-1707 Dkt. # 50) ¶¶ 2-8, 15-16; JFS-SV Decl. (17-1707 Dkt. # 51) ¶¶ 11-
 7 18.) Due to the anticipated reduction in refugees from Muslim countries as a result of
 8 EO-4 and the Agency Memo, these organizations anticipate that they will need to lay-off
 9 employees, reduce services, divert resources to address fears raised by EO-4 and the
 10 Agency Memo, cancel established programs, and lose relationships and goodwill with
 11 volunteers and community partners who these organizations have cultivated relationships
 12 with over the years. (See JFS-S Decl. ¶¶ 30-34; JFS-SV Decl. ¶¶ 27-35.) Further, the
 13 agencies state that because they hire staff and volunteers and design programs to be
 14 culturally and linguistically relevant to the communities they serve, they cannot simply
 15 divert the lost resources to refugees who hail from other parts of the world and who are
 16 unaffected by EO-4 and the Agency Memo. (JFS-SV Supp. Decl. (Dkt. # 82) ¶¶ 2-4;
 17 JFS-S Supp. Decl. (Dkt. # 81) ¶¶ 3-6.) Indeed, the agencies will be forced to replace
 18 staff, build new community relationships, and redesign programs. (JFS-SV Supp. Decl.
 19 ¶ 4; JFS-S Supp. Decl. ¶¶ 6-7.)

20 //

21 ⁸ Doe Plaintiffs did not assert harm to organizational Plaintiffs Episcopal Diocese of
 22 Olympia or the Council on American-Islamic Relations-Washington in support of their motion
 for a preliminary injunction. (See *generally* Doe PI Mot.)

III. ANALYSIS

Doe Plaintiffs assert that they are entitled to a preliminary injunction because they are likely to succeed on four claims: (1) the Agency Memo's indefinite ban on FTJ refugees is contrary to the INA (Doe PI Mot. at 9-12); (2) the Agency Memo's indefinite ban on FTJ refugees deprives Plaintiffs of due process under the Fifth Amendment (*id.* at 12-14); (3) the Agency Memo violates the Administrative Procedures Act's ("APA"), 5 U.S.C. § 553(b), requirement for notice and comment rulemaking (*id.* at 14-15); and (4) the Agency Memo violates the APA, 5 U.S.C. § 706(2)(A), because it is arbitrary and capricious (*id.* at 14-18).

JFS Plaintiffs assert that they are entitled to a preliminary injunction because they are likely to succeed on four claims: (1) the Agency Memo's SOA provisions violate the Establishment Clause (JFS PI Mot. at 13-17); (2) the Agency Memo's SAO provisions violate the APA, 5 U.S.C. § 706(2)(A), because they are arbitrary and capricious (*id.* at 17-18); (3) the Agency Memo violates the APA, 5 U.S.C. § 706(2)(C), because it is ultra vires and contrary to the INA (*id.* at 19-22); and (4) the Agency Memo violates the APA because the agency failed to engage in required notice and comment rulemaking (*id.* at 20).⁹

Defendants oppose both Doe Plaintiffs' and JFS Plaintiffs' substantive arguments that they are likely to prevail on these claims. (Doe Resp. at 12-21; JFS Resp. at 15-28.)

⁹ JFS Plaintiffs also assert that the FTJ provisions of the Agency Memo violate the APA, the INA, and the Due Process Clause of the Fifth Amendment (JFS PI Mot. at 22-23), and they filed a formal notice of joinder in Doe Plaintiffs' motion (*see* JFS Joinder.)

In addition, Defendants oppose both motions on a variety of justiciability grounds. (Doe Resp. at 7-12; JFS Resp. at 5-15.) The court addresses Defendants' justiciability issues first, and then addresses the substance of the Doe and JFS motions for preliminary injunctions. In addressing the substance of Plaintiffs' motions, the court turns to the statutory issues first. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). Because the court ultimately concludes that Plaintiffs show a likelihood of success on the merits of their statutory claims, the court does not reach either JFS Plaintiffs' Establishment Clause claim or Doe Plaintiffs' due process claim. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

A. Justiciability

Defendants challenge the justiciability of both motions for preliminary injunction on four grounds: (1) Plaintiffs lack Article III standing (Doe Resp. at 7-8; JFS Resp. at 5-9); (2) Plaintiffs' claims are barred by principles of nonreviewability (Doe Resp. at 8-11; JFS Resp. at 10-14); (3) Plaintiffs fail to identify any final agency action (Doe Resp. at 11-12; JFS Resp. at 14-15), and (4) Plaintiffs' claims concerning the SAO provisions are unreviewable under 5 U.S.C. § 701(a) (JFS Resp. at 15). In addition to these issues,

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the court also addresses statutory standing because both Doe Plaintiffs and JFS Plaintiffs raise statutory claims.¹⁰

1. Article III Standing

To satisfy Article III standing, “a plaintiff must show (1) [he or she] has suffered an ‘injury in fact’[;] . . . (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (internal citation omitted). At this preliminary stage of the litigation, Plaintiffs may rely on the allegations in their complaint and whatever other evidence they submit in support of their preliminary injunction motions to meet their burden. *Hawaii I*, 859 F.3d at 762; *Washington*, 847 F.3d at 1159. Defendants challenge the standing of both the individual and organizational Plaintiffs. (JFS Resp. at 6-7; Doe Resp. at 7.)

a. *Individual Plaintiffs*

Plaintiffs allege in their complaints that the SAO and FTJ provisions of the Agency Memo extend the separation of citizens and lawful residents in the United States from their family members abroad. (*See generally* Doe TAC; JFS Compl.) Plaintiffs provide numerous declarations supporting those allegations, which the court has detailed above. *See supra* § II.B.1-7. Prolonged separation from a family member is an injury in

¹⁰ The court does not reach Doe Plaintiffs’ due process claim or JFS Plaintiffs’ Establishment Clause claim. Thus, the court addresses only whether Plaintiffs have standing to challenge the Agency Memo based on their APA and INA claims.

fact sufficient to establish Article III standing.¹¹ See *Hawaii I*, 859 F.3d at 763 (holding that a citizen had Article III standing to challenge EO-2 because EO-2 prolonged the separation of the citizen and his family from reunification with his mother-in-law by stalling her visa application); see also *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) (“The right to live with and not be separated from one’s immediate family is ‘a right that ranks high among the interests of the individual.’”) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982)); *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (recognizing that “important [irreparable harm] factors include separation from family members” (internal quotation marks omitted)); *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 45 F.3d 469, 471-73 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (holding that U.S. resident sponsors had standing to challenge DOS’s refusal to process visa applications because the prolonged separation of immediate family members resulted in injury to the sponsors); *IRAP*, 137 S. Ct. at 2089 (“An American individual . . . that has a bone fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded.”); *Int’l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 4674314, at *12 (D. Md. Oct. 17, 2017) (citizens and lawful permanent residents established “injury in fact” for purposes of Article III standing because EO-3’s “indefinite ban on the issuance of immigrant and nonimmigrant visas for

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¹¹ At oral argument, Defendants conceded that separation from “one’s loved ones” can constitute such harm.

1 nationals of the Designated Countries has imposed an actual, imminent injury on [the
2 plaintiffs] by prolonging their separation from family members.”).

3 Nevertheless, Defendants argue that none of the individual Plaintiffs have
4 demonstrated that suspension of FTJ refugee processing has caused them harm. First,
5 Defendants argue that Joseph fails to show any injury because his wife and children are
6 from Kenya, and Kenya is one of two countries in which the Government is continuing to
7 process FTJ refugee applications because screening procedures are already in place to
8 ensure appropriate FTJ scrutiny. (Doe Resp. at 2, 6-7; Higgins Decl. ¶ 11 (explaining
9 that in Kenya and Thailand “the security vetting received for a Form I-730 beneficiary is
10 the same as the screening received for principal refugee applicants,” and therefore the
11 Government is continuing to issue travel authorization to approve FTJ refugees who are
12 processed in those locations).) However, as noted above, two of Joseph’s children are
13 considered Somali citizens and are, therefore, subject to the Agency Memo’s SAO
14 provisions. (See Joseph Supp. Decl. ¶ 9.) Accordingly, the processing of their FTJ
15 refugee applications remain on hold. (See *id.* ¶ 10.)

16 Defendants also argue that Mr. Hussein’s family is in Kenya, and thus he has no
17 standing to challenge the FTJ provisions of the Agency Memo. (JFS Resp. at 6 (citing
18 Higgins Decl. ¶ 11).) However, Mr. Hussein’s family members are also Somali
19 nationals, and therefore subject to the SAO provisions. (See Hussein Decl. ¶¶ 10-11.)
20 Because both Joseph’s and Mr. Hussein’s FTJ refugee applications for their family
21 members are subject to the Agency Memo’s SAO provisions, Joseph and Mr. Hussein
22 have standing to challenge the Agency Memo. Indeed, during the December 21, 2017,

1 hearing on Plaintiffs' motions, Defendants withdrew their argument that Joseph lacked
2 standing.

3 In any event, Doe 7 also has an approved FTJ refugee application for his 19-year
4 old son to come to the United States. (Doe 7 Decl. ¶ 4) Doe 7's son is an Iraqi national
5 (*id.* ¶ 3), and so Doe 7's FTJ application and the processing of his son's FTJ refugee
6 status are subject to both the FTJ and SAO provisions of the Agency Memo (*id.* ¶¶ 3-10).
7 Accordingly, the court concludes that Doe 7 has standing. One party with standing is
8 sufficient to fulfill Article III's case-or-controversy requirement. *Rumsfeld v. Forum for*
9 *Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006).

10 Nevertheless, Defendants argue that it is speculative to infer that the Agency
11 Memo's FTJ and SAO provisions are the source of any delay in the processing of Doe 7's
12 FTJ refugee application as opposed to any other number of factors that might delay a
13 refugee's application. (JFS Resp. at 6.) Whether Doe 7's son's application has other
14 hurdles to cross, however, does not diminish the fact that the SAO and FTJ provisions of
15 the Agency Memo add two more. Removing these hurdles would speed the resolution of
16 any others that may exist since processing of these applications is not presently
17 proceeding at all. (See Agency Memo.) In any event, the evidence before the court is
18 that Doe 7's FTJ application for his son has been approved, his son has completed his
19 interview and fingerprinting, has received an assurance from a refugee resettlement
20 agency in the United States, and is waiting to travel. (Doe 7 Decl. ¶ 4.) At this stage of
21 the proceedings, this is sufficient to establish harm for purposes of Article III standing
22 with respect to both the SAO and FTJ provisions.

Defendants also argue that the individual Plaintiffs have no standing to challenge the SAO provisions because the Agency Memo provides for exceptions on a case-by-case basis. (JFS Resp. at 6-7.) Defendants argue that Plaintiffs cannot demonstrate harm until they demonstrate that they “cannot qualify for this exemption.” (*See id.* at 7 n.4.) In *Hawaii I*, the Ninth Circuit rejected a virtually identical argument when it concluded that EO-2’s discretionary waiver did not undermine Article III standing. 859 F.3d at 768. Indeed, the Ninth Circuit stated that the plaintiffs would “face substantial hardship if [the court] were to first require that they try to obtain a waiver before [the court] . . . consider[ed] their case.” *Id.*; *see also Hawaii III*, 2017 WL 6547095, at *6 (“[EO-3’s] waiver provisions are not a sufficient safety valve and do not mitigate the substantial hardships Plaintiffs have already suffered and will continue to suffer due to [EO-3].”) (internal quotation marks omitted); *Int’l Refugee Assistance Project v. Trump*, 2017 WL 4674314, at *16 (stating in the context of analyzing the ripeness of challenges to EO-3 that “the waiver process itself presents an additional hurdle not faced by other visa applicants which would delay reunification, thus creating a harm not contingent on future events”).

Finally, Defendants parse the various individual Plaintiffs’ declarations and argue “it is doubtful that these applicants are on the brink of travel such that the 90-day SAO review period will have any concrete impact on them.” (JFS Resp. at 7.) Whether Defendants are on the brink of travel or not, however, their separation from their family members will be prolonged as a result of the SAO provisions. The Agency Memo specifically states that, during the 90-day review, DOS and DHS will “take resources that

1 may have been dedicated to processing nationals of, or stateless persons who last
 2 habitually resided in, SAO countries and . . . reallocate them to process applicants from
 3 non-SAO countries for whom the processing may not be as resource intensive.” (Agency
 4 Memo at 2.) Indeed, Defendants conceded that during the suspension the Government is
 5 redirecting “processing resources” away from SAO countries and that refugee
 6 applications will not be processed at the same pace. Thus, even assuming refugee
 7 applications from SAO countries are processed at all during the review period, they will
 8 undoubtedly be slowed by this resource diversion, prolonging the individual Plaintiffs’
 9 separation from their family members.

10 In sum, the court concludes that the individual Plaintiffs have sufficiently
 11 demonstrated harm due to the SAO provisions and that at least one individual Plaintiff—
 12 Doe 7—has sufficiently alleged harm due to the FTJ provisions. The court concludes
 13 that the final two aspects of Article III standing—causation and redressability—are also
 14 satisfied. These Plaintiffs’ injuries are traceable to EO-4 and its accompanying Agency
 15 Memo, and, if Plaintiffs prevail, a decision enjoining portions of the Agency Memo
 16 would redress those injuries.

17 *b. Organizational Plaintiffs*

18 Plaintiffs assert that JFS-S and JFS-SV have standing as organizational Plaintiffs
 19 because the Agency Memo has caused them to divert resources away from their core
 20 mission of resettling refugees. (*See* JFS PI Mot. at 12; *see generally* JFS-S Decl.;
 21 JFS-SV Decl.) This is ordinarily sufficient to demonstrate harm underpinning Article III
 22 standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (diversion of

resources confers Article III standing); *Fair Hous. Council of San Fernando Valley v. Roomate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (“[A]n organization has ‘direct standing to sue [when] it showed a drain on its resources from both a diversion of its resources and frustration of its mission.’”) (second alteration in original) (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)).

Defendants argue that JFS-S and JFS-SV have not shown that the Agency Memo impairs their core mission because EO-4 largely resumes USRAP, “subject to conditions for applicants of special concern.” (JFS Resp. at 9.) Further, Defendants contend that, although the Agency Memo may temporarily alter the composition of refugees entering the country, it does not alter the overall number of refugees entering the country. (*Id.*) Thus, according to Defendants, the organizational mission of the agencies is not impaired. (*Id.*)

JFS-S and JFS-SV, however, cannot make up the deficits in the arrival of FTJ refugees and refugees from SAO countries by receiving and serving other refugees. Each organization devoted significant resources to serving Muslim and Arabic-speaking refugees because these refugees represent a large percentage of their clients, including by hiring staff and designing programs specifically devoted to serving these clients. (JFS-S Supp. Decl. ¶¶ 5-7; JFS-SV Supp. Decl. ¶¶ 3-4.) Yet, the effect of the Agency Memo is likely to be a significant reduction in the admission of Muslim refugees into the United States. Over 40% of all refugees resettled in the United States within the last two fiscal years came from one of the SAO countries. (Smith Decl. ¶ 15.) Of that group, 99% came from one of the nine Muslim-majority SAO countries, and over 80% identified as

Muslim. (*Id.* ¶¶ 15, 17.) The Agency Memo’s FTJ provisions are also likely to have a disproportionate effect on Muslim refugees because it is generally available only to refugees admitted in the last two years, 8 C.F.R. § 207.7(d), which is the period of time when the admission of Muslim refugees reached a record high. (Burman Decl. ¶ 41, Ex. NN.) The resources JFS-S and JFS-SV devoted to Muslim and Arabic-speaking refugees cannot simply be shifted to serving other refugees from other parts of the world; instead these resources are wasted, and the agencies’ organizational purpose is thereby frustrated. (See JFS-S Supp. Decl. ¶¶ 6-7; JFS-SV Supp. Decl. ¶ 4); *see, e.g., El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Rev.*, 959 F.2d 742, 748 (9th Cir.1992) (legal services organizations “established to assist Central American refugee clients, most of whom [we]re unable to understand English,” who were seeking asylum and the withholding of deportation, had standing to challenge government policy of not providing full translation of those proceedings).¹² Accordingly, the court concludes that both JFS-S and JFS-SV have standing as organizational plaintiffs.

JFS-S and JFS-SV also assert third-party standing because they have a close relationship to the individual Plaintiffs whose claims they raise and these individual Plaintiffs are unable to protect their interests on their own. (JFS PI Mot. at 13 (citing

¹² The *El Rescate* court expounded on the issue of organizational standing immediately after declaring the issue moot, 959 F.2d at 748, and so this portion of the decision is arguably dicta. However, at least one subsequent Ninth Circuit panel described this part of *El Rescate* as a holding. *See Fair Hous. of Marin*, 285 F.3d at 904-05 (“This Court . . . held that “[t]he allegation that the [the government’s] policy frustrates these goals [of helping refugees obtain asylum and withhold deportation] and requires the organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing.”) (second and fourth alterations in original) (emphasis added).

1 *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991)).) Defendants’ only response is that the
 2 organization’s clients have suffered no injury. (JFS Resp. at 9, n.7.) The court, however,
 3 concludes otherwise. *See supra* § III.A.1.a. Accordingly, the court also concludes based
 4 on the record presented at this point in the proceedings that JFS-S and JFS-SV have third-
 5 party standing.

6 2. Statutory Standing

7 Although Defendants do not raise this issue, because the various individual
 8 Plaintiffs, as well as JFS-S and JFS-SV, assert a statutory claim under the INA, the court
 9 “must also determine whether they meet the requirement of having interests that ‘fall
 10 within the zone of interests protected by the law invoked.’” *Hawaii I*, 859 F.3d at 766
 11 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, --- U.S. ---, 134 S. Ct.
 12 1377, 1388 (2014)). The “‘zone of interests’ test is ‘not meant to be especially
 13 demanding,’ and a court should deny standing only ‘if the plaintiff’s interests are so
 14 marginally related to or inconsistent with the purposes implicit in the statute that it cannot
 15 reasonably be assumed that Congress intended to permit the suit.’” *Cetacean Cmty. v.*
 16 *Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S.
 17 388, 399 (1987)). The “benefit of any doubt goes to the plaintiff.” *Match-E-Be-Nash-*
 18 *She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

19 In *Hawaii I*, the Ninth Circuit had “little trouble concluding that [the citizen
 20 plaintiff] [wa]s within the zone of interests of the INA to challenge EO2 based on [his
 21 INA] statutory claim,” because “[h]e assert[ed] that the travel ban prevents his mother-in-
 22 law from reuniting with his family.” 859 F.3d at 766 (citing *Legal Assistance for*

1 *Vietnamese Asylum Seekers*, 43 F.3d at 471-72 (“The INA authorizes the immigration of
 2 family members of the United States citizens and permanent resident aliens. In originally
 3 enacting the INA, Congress implemented the underlying intention of our immigration
 4 laws regarding preservation of the family unit. Given the nature and purpose of the
 5 statute, the resident appellants fall well within the zone of interest Congress intended to
 6 protect.”) (internal quotation marks, citations, and alterations omitted)). Does 3 and 6, a
 7 lawful permanent resident and a citizen, respectively, both claim that the Agency Memo
 8 prevents reuniting with their family members. *See supra* §§ II.B.5, 7. The court finds no
 9 legitimate basis for distinguishing the present situation from that of the plaintiff in
 10 *Hawaii I*. Accordingly, the court concludes that Does 3 and 6 fall within the zone of
 11 interest of the INA and the Refugee Act of 1980.

12 JFS-S and JFS-SV Plaintiffs also fall within the zone of interest of the INA and
 13 the Refugee Act of 1980. In *Hawaii I*, the Ninth Circuit held that the States’ “interest in
 14 effectuating its refugee resettlement policies and programs also falls within the zone of
 15 interests protected by the INA.” 859 F.3d at 766. The Ninth Circuit noted that INA
 16 provisions concerning refugees “were amended to provide a ‘systematic procedure’ for
 17 the admission of refugees into the United States, as well as ‘uniform provisions for the
 18 effective resettlement and absorption of those refugees admitted.’” *Id.* at 766-67 (quoting
 19 Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980)). Making
 20 provisions for the resettlement and absorption of refugees into the United States is the
 21 core mission of both JFS-S and JFS-SV. (JFS-S Decl. ¶¶ 2-7, 15-16, 30, 34; JFS-SV
 22 Decl. ¶¶ 11, 18, 36-37.) Thus, these organizations’ interests in effectuating refugee

1 resettlement and absorption falls within the zone of interest protected by the INA and the
2 Refugee Act of 1980.¹³

3 3. Nonreviewability

4 Like they have in other cases involving the President's various EOs on
5 immigration, Defendants assert that the "doctrine of consular nonreviewability" applies
6 to bar the court's review of Doe and JFS Plaintiffs' statutory claims. (See Doe Resp. at
7 8-10; JFS Resp. at 12-13.) Courts have traditionally applied the doctrine of consular
8 nonreviewability to bar challenges to decisions by consular officials adjudicating
9 individual visa applications. See *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971
10 (9th Cir. 1986) ("[I]t has been consistently held that the consular official's decision to
11 issue or withhold a visa is not subject either to administrative or judicial review.").
12 Defendants rely on out-of-circuit authority to argue for a significant expansion of the
13 doctrine and support their position by stating that "[t]he principle underlying that doctrine
14 applies regardless of the manner in which the Executive Branch denies entry to an alien
15 abroad, including a refugee applicant." (See Doe Resp. at 8 (citing *Haitian Refugee Ctr.,*
16 *Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992).)¹⁴

18 ¹³ The court does not decide if Plaintiffs who are located abroad have statutory standing
19 under the INA because "[i]f one party to an action has standing, a court need not decide the
20 standing issue as to other parties when it makes no difference to the merits of the case." See
21 *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 472 (declining to decide if refugees
in Hong Kong or the organizational plaintiff had standing because the court had already found
that the family members of refugees in the United States were within the zone of interest of the
INA).

22 ¹⁴ In *Baker*, the Eleventh Circuit relied in part on the doctrine of consular
nonreviewability to preclude review of an Executive Order and agency guidelines that were

But the Ninth Circuit has already rejected Defendants’ position. Just as in *Hawaii I*, individual Plaintiffs here “do not seek review of an individual consular officer’s decision to grant or to deny a visa pursuant to valid regulations, which could implicate the consular nonreviewability doctrine,” but rather the government’s “promulgation of sweeping immigration policy.” 859 F.3d at 768. “Courts can and do review both constitutional and statutory ‘challenges to the substance and implementation of immigration policy.’” *Id.* (quoting *Washington*, 847 F.3d at 1163; see *Hawaii III*, 2017 WL 6547095, at *6-*7 (concluding that the doctrine of consular nonreviewability did not apply to bar the court’s review of EO-3); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (without discussing consular nonreviewability, but over the Government’s objections that the doctrine applied and barred review, reviewing the merits of a statutory claim challenging an EO that blocked the entry of Haitians); *Sale v. Haitian Ctrs. Council, Inc.*, 1993 WL 754941 (U.S.), 16-22 (U.S. Oral. Arg., 1993) (arguing that the doctrine bars review). Thus, the court rejects Defendants’ assertion that this doctrine bars judicial review of EO-4 and the Agency Memo.¹⁵

promulgated thereunder, which provided for the interdiction and return of Haitians on the high seas who were deemed to be economic rather than political refugees. 953 F.2d at 1507.

¹⁵ In *Hawaii I*, the Ninth Circuit declined to apply *Mandel*’s “facially legitimate and bona fide” standard in the context of a statutory challenge to EO-2. 859 F.3d at 769 n.9. The court recognizes that the Supreme Court vacated *Hawaii* following the expiration of EO-2. See *Hawaii v. Trump*, 874 F.3d 1112, 1112 (9th Cir. 2017) (“In view of the Supreme Court order dated October 24, 2017, the court’s opinion filed June 12, 2017, is vacated and the appeal is dismissed as moot.”). But *Hawaii I*, 859 F.3d at 769 n.9, remains persuasive authority despite the Supreme Court’s vacatur. See *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (following as persuasive authority a decision vacated by the Supreme Court as moot). *Hawaii I* is closely analogous and related to the issues presently before this court, and as a district court within the Ninth Circuit, this court is unwilling to ignore it or depart from its reasoning.

4. Final Agency Action

Finality is a prerequisite to judicial review of agency action. *See* 5 U.S.C. § 704.

To be final, the agency action first “must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591 (9th Cir. 2008). Second, the action “must be one by which rights or obligations have been determined, or from which consequences will flow.” *Id.*

Defendants do not contest the first requirement. (*See* JFS Resp. at 14-15; Doe Resp. at 11-12.) But Defendants contend that, even if Plaintiffs could show the first requirement, they cannot show the second requirement “because the implementation period does not determine any rights or obligations or prescribe any legal consequences.” (*JFS Resp. at 14-15; Doe Resp. at 11.*) Indeed, according to Defendants, a processing

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Nevertheless, during oral argument, Defendants argued that the Supreme Court’s decision in *Fiallo v. Bell*, 430 U.S. 787 (1977), trumped the Ninth Circuit’s rulings in both *Hawaii I*, 859 F.3d at 769 n.9, and *Washington*, 847 F.3d at 1161-64, concerning the applicability of the *Mandel* standard. However, *Fiallo* is distinguishable. In *Fiallo*, the Supreme Court was not considering a challenge to agency action that was alleged to be ultra vires or outside of the agency’s statutory authority under the INA. Rather, *Fiallo* involved an action to enjoin provisions of the INA itself as constitutionally invalid. 430 U.S. at 788 (“This case brings before us a constitutional challenge to §§ 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952.”). In that context, the Supreme Court noted the “limited scope of judicial inquiry into *immigration legislation*” and emphasized “‘over no conceivable subject is *the legislative power of Congress* more complete than it is over’ the admission of aliens.” *Id.* at 792 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (emphasis added)). Accordingly, the Court limited its review of the statutory provision at issue to the “facially legitimate and bona fide” standard found in *Mandel*. *Id.* at 795 (citing *Mandel*, 408 U.S. at 770). Because the issues before this court involve a statutory challenge to agency action in the form of the Agency Memo, and not a constitutional challenge to any provision of the INA, *Fiallo* is not applicable here.

1 delay alone does not alter the family’s “legal situation,” and thus the FTJ implementation
2 program is not a final agency action subject to judicial review.¹⁶ (*Id.*)

3 To the contrary, whether the Agency Memo produces a “suspension” or an
4 indefinite delay, the Agency Memo has significant real-world impacts on Plaintiffs’
5 various situations. *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (explaining
6 that “the core question is whether . . . the result of that [challenged agency] process is one
7 that will directly affect the parties.”). Under similar circumstances involving EO-3, the
8 district court in Maryland stated: “As for Defendants’ claim that the agency action to
9 date is not ‘final,’ [EO-3] is already in effect as to certain individuals and is being
10 enforced by federal agencies.” *Int’l Refugee Assistance Project v. Trump*, 2017 WL
11 4674314, at *18. The same is true here. As discussed above, the individual Plaintiffs are
12 subject to the Agency Memo’s provisions, and the effect of those provisions is to prolong
13 the separation of family members in some cases and prevent escape from perilous
14

15 ¹⁶ The cases Defendants rely upon are readily distinguishable. In *Fairbanks*, the Ninth
16 Circuit held that the Army Corps of Engineers’ determination that certain municipal property
17 contained wetlands subject to regulation under the Clean Water Act was only “a bare statement
18 of the agency’s opinion” that neither required the municipality to do or to forebear from
19 anything. 543 F.3d at 594. As such, the Corps’ opinion did not determine any of the
20 municipality’s rights or obligations or result in any legal consequences. *Id.* at 595. Defendants’
21 reliance on *International Brotherhood of Teamsters v. U.S. Department of Transportation*, 861
22 F.3d 944, 952 (9th Cir. 2017), is also misplaced. In that case, an agency’s report on a pilot
program involving Mexico-domiciled trucking companies’ long-haul operations in the United
States had no legal consequences, but was merely the last step in completing a pilot program to
clear the way for Mexico-domiciled carriers. *Id.* As such, the report “did not change the legal
situation” and was not, therefore, final agency action. *Id.* In contrast to the opinion and report in
the cases cited by Defendants, the Agency Memo’s FTJ and SAO provisions are presently being
implemented by USCIS. (*See Higgins Decl.* ¶¶ 11-16.) Those requirements have concrete
impacts upon Plaintiffs by delaying the reunification of families or the departure from dangerous
circumstances. *See supra* §§ II.B.1-7.

1 circumstances in others. *See supra* § IIB.1-7. And, as the Ninth Circuit in *Hawaii II*
 2 noted, even short delays can have cascading effects that prolong a refugee’s processing
 3 and ultimate admission. 871 F.3d at 644 (“Refugees have only a narrow window of time
 4 to complete their travel, as certain security and medical checks expire and must then be
 5 re-initiated. Even short delays may prolong a refugee’s admittance.”); (*see also* JFS-S
 6 Supp. Decl. ¶ 8 (explaining the cascading effects of even a short delay in processing).)
 7 Based on the foregoing record and authorities, the court concludes that the Agency Memo
 8 represents final agency action.

9 5. Agency Discretion

10 Defendants argue in two conclusory sentences that the court is stripped of
 11 jurisdiction to review Plaintiffs’ statutory challenges to the Agency Memo’s SAO
 12 provisions under 5 U.S.C. § 701(a). (*See* JFS Resp. at 15.) Specifically, Defendants
 13 argue that 8 U.S.C. § 1157(c)(1) commits the admission of refugees to the Secretary’s
 14 discretion, whereas 5 U.S.C. § 701(a) prohibits APA review of agency action that “is
 15 committed to agency discretion by law.” The court rejects Defendants’ argument. There
 16 is a “strong presumption that Congress intends judicial review of administrative action.”
 17 *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998). Section
 18 701(a) overcomes this presumption only in “rare instances where statutes are drawn in
 19 such broad terms that in a given case there is no law to apply, thereby leaving the court
 20 with no meaningful standard against which to judge the agency’s exercise of discretion.”
 21 *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011). “[T]he mere
 22 fact that a statute contains discretionary language does not make agency action

1 unreviewable.” *Id.* Indeed, section 701(a)(2) has “never been thought to put exercises of
2 discretion beyond judicial review.” *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th
3 Cir. 2015).

4 *ASSE International, Inc. v. Kerry* presents an analogous situation. *See* 803 F.3d. at
5 1069-72. In that case, although the authorizing statute gave the DOS complete discretion
6 in determining whether to create certain exchange programs, the Ninth Circuit found that
7 the DOS’s regulations “provide more than an ample basis in law for [the court] to review
8 its decision under the APA.” *Id.* at 1070. These regulations created the program, provide
9 who is eligible to become a sponsor, and “establish[ed] a comprehensive scheme for
10 administering an exchange program.” *Id.* Because these regulations “have the force of
11 law” and carry “real consequences for [those] failing to abide by them,” the Ninth Circuit
12 concluded that judicial review was not prevented by the discretionary language in the
13 authorizing statute. *Id.* at 1070-71.

14 Defendants have similarly failed to rebut the strong presumption of judicial
15 reviewability. Although 8 U.S.C. § 1157(c)(1) contains discretionary language, the
16 subsequent regulations promulgated by DHS provide the “meaningful standard” by which
17 the court can review Defendants’ exercise of discretion. *See* 8 C.F.R. § 207; *Pinnacle*
18 *Armor, Inc.*, 648 F.3d at 719. Like the regulations in *ASSE International*, the regulations
19 governing the admission of refugees implement the Refugee Act of 1980, detail
20 eligibility to apply for refugee status, and lay out “a comprehensive scheme” for the
21 refugee program. *See* 803 F.3d at 1070; 8 C.F.R. §§ 207.1-9. These regulations are
22 binding, and failure to abide by these regulations results in “real consequences.” *See* 803

1 F.3d at 1070; 8 U.S.C. § 1157(c)(1). Thus, as in *ASSE International*, the regulations
 2 provide a “meaningful standard” and “more than an ample basis in law” against which to
 3 judge the Defendants’ decisions under the APA. *See also Hawaii III*, 2017 WL 6547095,
 4 at *8 (concluding that 5 U.S.C. § 701(a)(2) did not apply to bar review of EO-3 “where,
 5 as here, a court is tasked with reviewing whether an executive action has exceeded
 6 statutory authority”).

7 Nor does 8 U.S.C. § 1252(a)(2)(B)(ii) strip the court of jurisdiction over this
 8 action.¹⁷ Section 1252(a)(2)(B)(ii) states that no court shall have jurisdiction to review:

9 Any other decisions or action of the Attorney General or Secretary of
 10 Homeland Security the authority for which is specified under this subchapter
 11 to be in the discretion of the Attorney General or the Secretary of Homeland
 12 Security[.]

13 Section 1157(c)(1) specifies that the admission of refugees is within the Secretary’s
 14 discretion. Were Plaintiffs challenging a denial of refugee admission, section
 15 1252(a)(2)(B)(ii) may well bar judicial review. Instead, Plaintiffs are challenging the
 16 failure to act on refugee applications. And while section 1157(c)(1) grants the Secretary
 17 discretion in deciding the outcome of a refugee application, it does not specify that the
 18 Secretary has discretion to suspend adjudicating such applications. *See* 8 U.S.C.
 19 § 1157(c)(1). In other words, the Secretary may have discretion over what the decision
 20 will be, but not over whether a decision will be made. *See* 5 U.S.C. § 555(b) (“With due

21 ¹⁷ Defendants do not mention 8 U.S.C. § 1252(a)(2)(B)(ii) in their discussion of
 22 jurisdiction stripping, focusing instead only on 5 U.S.C. § 701(a). (*See* JFS Resp. at 15.)
 However, because section 1252(a)(2)(B)(ii) implicates the court’s subject matter jurisdiction, the
 court addresses the issue.

1 regard for the convenience and necessity of the parties or their representatives and within
 2 a reasonable time, each agency *shall* proceed to conclude a matter presented to it.”
 3 (emphasis added)). Thus, neither section 1157(c)(1) nor any other statute provides the
 4 “specified” discretionary authority to suspend adjudicating refugee status that would
 5 trigger section 1252(a)(2)(B)(ii)’s bar on judicial review.¹⁸ See *Spencer Enters., Inc. v.*
 6 *United States*, 345 F.3d 683, 690 (9th Cir. 2003).

7 Alternatively, section 1252(a)(2)(B)(ii) does not divest this court of jurisdiction
 8 because it applies only to acts that are “matters of pure discretion, rather than discretion
 9 guided by legal standards.” See *Spencer*, 345 F.3d at 690. The decision regarding
 10 refugee admission, however, is guided by a series of eligibility requirements set out in
 11 sections 1157(c)(1) and 1101(a)(42). See 8 U.S.C. §§ 1101(a)(42), 1157(c)(1).
 12 Moreover, section 1157(c)(1) requires the Secretary to adhere to all adopted regulations,
 13 and as discussed above, the Secretary has promulgated such regulations that provide
 14 specific standards limiting its discretion. For these reasons, it is not certain that the
 15 Secretary’s obligations with respect to processing refugee applications are discretionary
 16 within the meaning of section 1252(a)(2)(B)(ii), as construed in *Spencer*.

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 20 ¹⁸ Many district courts have adopted this reasoning in the analogous context of
 21 immigration status adjustments. See, e.g., *Asmai v. Johnson*, 182 F. Supp. 3d 1086, 1091-92
 22 (E.D. Cal. 2016); see also *Hong Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1256-57 (W.D. Wash.
 2012) (collecting cases). When the statute grants discretion only as to the ultimate decision but
 not as to the timing of when that decision is made, jurisdiction is not barred by section
 1252(a)(2)(B)(ii). See, e.g., *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1165 (N.D. Cal. 2007).

In sum, neither 5 U.S.C. § 701(a) nor 8 U.S.C. § 1252(a)(2)(B)(ii) bar the court from hearing this matter. Having disposed of Defendants’ justiciability arguments, the court now turns to the substance of Plaintiffs’ motions for preliminary injunction.

B. Motions for Preliminary Injunction

Doe Plaintiffs seek to enjoin both the SAO and FTJ provisions of the Agency Memo to the extent those provisions indefinitely suspend the processing of FTJ refugee applications or prohibit the entry of FTJ refugees into the United States. (*See generally* Doe PI Mot.; Doe Reply; *see also* Doe TAC.) The JFS Plaintiffs join in this motion. (*See* JFS Joinder; JFS PI Mot. at 22-23.) In the JFS Case, Plaintiffs also seek to enjoin the SAO provisions of the Agency Memo to the extent those provisions suspend the admission of refugees or inhibit the processing of refugee applications from those SAO countries for 90 days. (*See generally* JFS PI Mot.; JFS Reply; *see also* JFS Compl.) Doe Plaintiffs join in this motion as well. (*See* Doe Joinder.)

The court also clarifies what Plaintiffs in both cases do not seek. Plaintiffs do not seek to enjoin the agencies’ efforts to implement screening mechanisms for FTJ refugees that are similar to or aligned with the processes employed for principal refugees. Plaintiffs do not seek to enjoin the agencies from conducting their 90-day “detailed threat analysis and review” of the SAO countries to determine what additional safeguards the agencies believe are necessary with respect to the admission of refugees from those countries. And finally, Plaintiffs do not seek a guarantee of immediate admission into the United States for the refugees at issue. (*See* Doe Reply at 9.) Rather, as indicated above, they seek an order preliminarily enjoining those provisions of the Agency Memo that (1)

1 prohibit the admission of refugees from SAO countries and impede the processing of
 2 their refugee applications for 90-days, and (2) indefinitely prohibit the admission of FTJ
 3 refugees and indefinitely suspend the processing of their refugee applications. With
 4 those clarifications, the court now considers their motions.

5 1. Standard

6 “A preliminary injunction is ‘an extraordinary remedy that may only be awarded
 7 upon a clear showing that the plaintiff is entitled to such relief.’” *Feldman v. Ariz. Sec’y*
 8 *of State’s Office*, 843 F.3d 366, 375 (9th Cir. 2016) (quoting *Winter v. Nat. Res. Def.*
 9 *Council*, 555 U.S. 7, 22 (2008)). To obtain such relief, “[a] plaintiff . . . must establish
 10 that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
 11 absence of preliminary relief, that the balance of equities tips in his favor, and that an
 12 injunction is in the public interest.” *Winter*, 555 U.S. at 20. A plaintiff must make a
 13 clear showing as to each of these elements.¹⁹ *Feldman*, 843 F.3d at 375.

14 2. Notice and Comment Rulemaking under the APA

15 Plaintiffs assert that the court should set aside the Agency Memo as it relates to
 16 both the indefinite FTJ suspension and the 90-day SAO suspension because it represents
 17 a “legislative rule” for which notice and comment rulemaking under the APA is required.
 18 (Doe PI Mot. at 14-15; JFS PI Mot. at 19-20.) “Under the APA, a federal administrative

19 ¹⁹ In the Ninth Circuit, “‘if a plaintiff can only show that there are ‘serious questions
 20 going to the merits’—a lesser showing than likelihood of success on the merits—then a
 21 preliminary injunction may still issue if the ‘balance of hardships tips sharply in the plaintiff’s
 22 favor,’ and the other two *Winter* factors are satisfied.” *Feldman*, 843 F.3d at 375 (quoting *Shell*
Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1282, 1291 (9th Cir. 2013)). Here, because the
 court concludes that Plaintiffs meet the *Winter* standard for issuing a preliminary injunction,
 there is no need for the court to consider the alternate standard.

agency is required to follow prescribed notice-and-comment procedures before promulgating substantive rules.” *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009); *see* 5 U.S.C. § 553. Courts require agencies to engage in notice and comment rulemaking when implementing policy changes with substantive consequences for refugees and other immigrants. *See, e.g., Texas v. United States*, 809 F.3d 134, 171-78 (5th Cir. 2015) (as revised), *aff’d by an equally divided court*, --- U.S. ---, 136 S. Ct. 2271 (2016) (holding that plaintiffs were likely to succeed on the merits of their APA claim that notice and comment rulemaking required for immigration policy granting deferred action status to certain undocumented immigrants); *Zhang v. Slattery*, 55 F.3d 732, 744-47 (2d Cir. 1995), *superseded by statute on other grounds*, 8 U.S.C § 1101(a)(42) (finding notice and comment rulemaking is required for the agency’s interim rule recognizing fear of coercive family practices as basis for refugee status).

Defendants do not deny that the Agency Memo represents a rule; rather, they argue the Agency Memo is exempt from APA rulemaking procedures because it represents a procedural—not substantive—rule for which a notice and comment period is not required. (Doe Resp. at 16; JFS Resp. at 18-19); *see* 5 U.S.C. § 553(b)(3)(A) (stating that APA rulemaking “does not apply . . . to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice”). Defendants argue that the Agency Memo does not change the substantive criteria for determining whether a refugee applicant can be admitted to the United States, it merely suspends the admission of refugees from SAO countries for 90 days and the admission of FTJ refugees until such

1 time as the agencies can align the screening procedures for FTJ refugees with the
2 screening procedures employed for principal refugees. (Doe Resp. at 17; JFS Resp. at
3 18-19.)

4 The court need not accept an agency's characterization of its own rule. *Hemp*
5 *Indust. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003); *see also Reno-Sparks Indian*
6 *Colony v. U.S. E.P.A.*, 336 F.3d 899, 909 (9th Cir. 2003) ("The agency is not entitled to
7 deference [concerning its decision not to engage in rulemaking] because complying with
8 the notice and comment provisions when required by the APA is not a matter of agency
9 choice.") (internal quotation marks omitted). Further, the exceptions to APA rulemaking
10 must be "narrowly construed and only reluctantly countenanced." *Alcaraz v. Block*, 746
11 F.2d 593, 612 (9th Cir. 1984). At times, distinguishing between rules that require APA
12 rulemaking and those that do not is challenging. *Stoddard Lumber Co. v. Marshall*, 627
13 F.2d 984, 987 (9th Cir. 1980) (noting that distinguishing between such rules "has proved
14 to be quite difficult"). There are, however, guideposts as described in the authority relied
15 upon by Defendants. (See JFS Resp. at 19; Does Resp. at 17-19.) Whether a rule is
16 "substantive" or "procedural" requires a court to make "legal conclusions that depend
17 upon their settings for definition." *Neighborhood Television, Inc. v. FCC*, 742 F.2d 629,
18 637 (D.C. Cir. 1984); *Brown Exp., Inc. v. United States*, 607 F.2d 695, 701 (5th Cir.
19 1979). To determine the nature of a rule, the court must look at the rule's effect on those
20 interests ultimately at stake in the agency proceeding. *Neighborhood Television*, 742
21 F.2d at 637. If a rule does not substantially affect or jeopardize those ultimate interests,

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1 then it is procedural and not substantive. *Waste Mgmt., Inc. v. U.S.E.P.A.*, 669 F. Supp.
2 536, 539 (D.D.C. 1987). In short, context matters.

3 In their response to Plaintiffs’ motion, Defendants rely on two thirty-plus-year-old
4 decisions out of the District of Columbia—neither of which is analogous to the
5 facts-at-hand. (Doe Resp. at 17-18.) In *Waste Management*, 669 F. Supp. at 538-40, the
6 court held that the agency issued a procedural rule when it decided to defer consideration
7 of applications for ocean incineration permits until the agency promulgated new rules on
8 the topic. In *Neighborhood Television*, 742 F.2d at 636-38, the court determined that an
9 agency’s decision to “freeze” processing of certain applications for television translator
10 licenses was also a procedural rule. The status sought by Plaintiffs here—refugee
11 status—is far-afield from either an ocean incineration permit or a television translator
12 license. Further, in both cases, the courts focused on the fact that the delay caused by a
13 suspension did not by itself undermine the interests at stake, and in both situations, the
14 delay itself was related to the agencies’ ongoing notice and comment rulemaking efforts.
15 See *Waste Mgmt.*, 669 F. Supp. at 539-40; *Neighborhood Television*, 742 F.2d at 636-38.
16 Unlike the challengers’ interests in those cases, Plaintiffs’ interests—to reunite with
17 family members or to flee perilous situations and find refuge in the United States—are
18 undermined by any delay. *Hawaii II*, 871 F.3d at 644 (“Refugees have only a narrow
19 window of time to complete their travel, as certain security and medical checks expire
20 and must then be re-initiated. Even short delays may prolong a refugee’s admittance.”);
21 (see also JFS-S Supp. Decl. ¶ 8 (explaining the cascading effects of even a short delay in
22 processing).)

Further, 8 C.F.R. part 207, the regulations implementing the Refugee Act of 1980, and subsequent amendments outlining procedures for the FTJ program, were subject to notice and comment before they were codified. *See* Aliens and Nationality; Refugee and Asylum Procedures, 46 Fed. Reg. 45,116 (Sept. 10, 1981) (to be codified at 8 C.F.R. pt. 207); Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792 (Jan. 27, 1988) (to be codified at 8 C.F.R. § 207.7). Where the original rule was adopted after a notice and comment period, courts have generally found the decision to alter those rules to be substantive, and therefore subject to APA rulemaking procedures as well. *See, e.g., Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 (9th Cir. 1992) (ruling that the decision to alter voting procedures was subject to APA rulemaking requirement because the original voting procedures were adopted after notice and comment); *Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1100 (5th Cir. 1976).

In addition, “[w]hen a policy acts as a substantive rule and alters an existing regulatory scheme,” the agency “must adopt that policy according to procedures set forth in the APA.” *Mt. Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988). The Agency Memo indefinitely suspends the entire FTJ refugee program, and it suspends the admission of all refugees (with limited exceptions) from the 11 SAO countries. As discussed above, the regulatory scheme for processing principal and derivative refugees, such as FTJ refugees, is set forth in detail in 8 C.F.R. part 207. The court has little

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1 difficulty in concluding that such changes “alter” that “existing regulatory scheme.”²⁰

2 *See Mt. Diablo*, 860 F.2d at 956.

3 Defendants also assert that the SAO provisions are exempt from rulemaking
4 because they fall within the APA’s foreign affairs exception. (JFS Resp. at 19-20); *see* 5
6 U.S.C. § 553(a)(1) (“This section applies . . . except to the extent that there is involved
7 . . . a . . . foreign affairs function of the United States.”). The Ninth Circuit cautions that
8 the “foreign affairs exception would become distended if applied to INS actions
9 generally, even though immigration matters typically implicate foreign affairs.” *Yassini*
10 *v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980). Indeed, “[f]or the exception to apply,
11 the public rulemaking provisions should provoke definitely undesirable international
12 consequences.” *Id.* Although the Ninth Circuit cautioned that a rule of law “that would
13 inhibit the flexibility of the political branches should be adopted with only the greatest of
14 caution,” nevertheless “[r]eview of decisions involving aliens . . . remains available.” *Id.*

15 Defendants rely on *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008), in which
16 the Second Circuit reviewed the National Security Entry-Exit Registration System, a
17 program devised after September 11, 2001, that required registration for certain
18 individuals from specific countries. (*See* JFS Resp. at 19-20.) The Second Circuit found
19 that rulemaking was not required due to the foreign affairs exception. *Rajah*, 544 F.3d at
20 437. The Second Circuit was concerned that in explaining why some of a particular

21 ²⁰ In addition, those refugees who fall within the SAO provisions of the Agency Memo
22 and who would otherwise meet the definition of “refugee” are now barred from admission for at
least 90 days unless they can demonstrate the additional, agency-created requirement that their
admission would “fulfill critical foreign policy interests.” (Agency Memo at 2.)

1 nation's citizens were regarded as a threat, (1) sensitive foreign intelligence might be
2 revealed, (2) relations with other countries might be impaired, and (3) the process would
3 be slow and diminish the Government's ability to protect against a potential terrorist
4 attack. *Id.*

5 The court agrees with Plaintiffs, however, that *Rajah* is inapposite for a number of
6 reasons. (See JFS Reply at 9.) First, Plaintiffs do not seek rulemaking on whether
7 particular countries should be on the SAO list, but rather on whether and how the USRAP
8 should be suspended while the review is conducted. (See *id.*) Second, it is not evident
9 that such rulemaking would "provoke definitively undesirable international
10 consequences," see *Yassini*, 618 F.2d at 1360 n.4, and Defendants proffer no evidence
11 that it would (see generally Dkt.). The court is simply unwilling to apply the exception
12 without some evidence to support its application. Compare *Yassini*, 618 F.2d at 1360-61
13 (applying the exception only after examining the affidavits of the Attorney General and
14 Deputy Secretary of State establishing the directive's relationship to the Iran hostage
15 crisis); with *Jean v. Nelson*, 711 F.2d 1455, 1477 (11th Cir. 1983) (holding that a rule
16 directing the detention of Haitians at the border was not within the exception given the
17 lack of evidence of any consequences), *aff'd*, 472 U.S. 846 (1985).

18 Finally, when the *Rajah* and *Yassini* courts applied the foreign affairs exception,
19 they were grappling with agency directives issued in response to dire national
20 emergencies—the September 11 attack and the Iranian hostage crisis. See *Rajah*, 544
21 F.3d at 433; *Yassini*, 618 F.2d at 1361. Although not determinative, the circumstances in
22 which the courts applied the exception provides context for their decisions. Here,

Defendants offer no evidence that the agencies issued the SAO suspension in response to a national security or foreign affairs crisis. Indeed, all the Agency Memo states to justify the 90-day suspension of refugees from SAO countries (with limited exceptions) is that the Secretaries of DOS and DHS and the DNI “continue” to have unspecified “concerns” regarding their admission. (Agency Memo at 2.)²¹ Thus, the exigent factual circumstances under which the agency directives were issued in *Yassini* and *Rajah* is another distinguishing factor that diminishes the applicability of those cases here.

For the foregoing reasons, the court agrees with Plaintiffs that the foreign affairs exception to rulemaking is inapplicable to the SAO provisions and that the agencies should have engaged in APA rulemaking before issuing both the SAO and FTJ provisions at issue in the Agency Memo. Accordingly, the court concludes that Plaintiffs have demonstrated that they are likely to succeed on the merits of their claim that the agencies violated the APA’s rulemaking requirement.²²

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²¹ The court notes that the only evidence in the record is to the contrary—that operating USRAP in SAO countries does not pose a significant risk to the country. (Joint Decl. Former Nat’l Sec. Officers (17-1707 Dkt. # 46) ¶ 12 (“During the four decades from 1975 to the end of 2015, over three million refugees have been admitted to the United States. Despite this number, only three refugees have killed people in terrorist attacks on U.S. soil during this period. None of these refugees were from the [SAO] countries.”).) Instead, the evidence before the court is that the SAO provisions of the Agency Memo undermine the country’s national security and foreign policy interests, “rather than making us safer.” (*Id.* ¶ 14.)

²² Concluding that Plaintiffs are likely to succeed on the merits of this statutory claim is sufficient to fulfill this requirement for preliminary relief. Nevertheless, the court also considers a second statutory claim.

3. INA Challenges

Plaintiffs also argue that the Agency Memo violates the INA. The Doe Plaintiffs argue that the FTJ provisions of the Agency Memo violate 8 U.S.C. § 1157(c)(2)(A) of the INA by indefinitely suspending the processing of FTJ derivative refugee applications and indefinitely barring their entry into the country. (Doe PI Mot. at 9-12.) The JFS Plaintiffs argue that the SAO provisions of the Agency Memo are ultra vires under the APA because they suspend the processing of refugee applications from SAO countries and bar the entry of refugees from those countries (with limited exceptions) for at least 90 days in violation of 8 U.S.C. § 1157(c)(1) of the INA. (JFS PI Mot. at 19, 21-22.)

The APA provides a right of action for plaintiffs who challenge administrative actions that violate a federal statute. Any “person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702; *see also Cetacean Cmty.*, 386 F.3d at 1176-77 (“[T]he end result is the same whether the underlying statute grants standing directly or whether the APA provides the gloss that grants standing. In both cases, the plaintiff can bring suit to challenge the administrative action in question. In the first case, the substantive statute grants statutory standing directly to the plaintiff. In the second case, the substantive statute is enforced through Section 10(a) of the APA.”); *Hernandez-Avalos v. I.N.S.*, 50 F.3d 842, 846 (10th Cir. 1995) (“[A] plaintiff who lacks a private right of action under the underlying statute can bring suit under the APA to enforce the statute.”). The court has already determined that Plaintiffs in both cases fall within the zone of interest protected by the Refugee Act of 1980 and the INA. *See supra* § III.A.2. Because 5

U.S.C. § 702 applies, Plaintiffs in both the Doe Case and the JFS Case can bring their INA statutory challenges under the APA. Under 5 U.S.C. § 706(2)(C), a “reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C); *see also Texas*, 809 F.3d at 178. The court will address whether Plaintiffs have demonstrated that they are likely to succeed on each claim.

a. FTJ Provisions

Doe Plaintiffs argue that the suspension of processing FTJ refugee applications and the indefinite bar on their entry into the United States violates the INA. (*See Doe PI Mot. at 9-12.*) Specifically, Plaintiffs argue that the award of FTJ refugee status in 8 U.S.C. § 1157(c)(2)(A) is not up to the Secretary’s discretion. Instead, this section of the INA contains indisputably mandatory language:

A spouse or child . . . of any refugee who qualifies for admission under paragraph (1) **shall**, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, **be entitled to the same admission status** as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible . . . as an immigrant under this chapter.

8 U.S.C. § 1157(c)(2)(A) (emphasis added). Doe Plaintiffs contrast the use of the word “shall” with permissive language Congress utilized in the same section concerning principal refugees, which states in pertinent part that the Secretary “may, in the [Secretary’s] discretion . . . admit any refugee.” 8 U.S.C. § 1157(c)(1).²³ The Supreme

²³ The statute refers to the “Attorney General,” but the statutory references to the Attorney General in this provision are now deemed to refer to the Secretary of DHS. 6 U.S.C. § 557; *see Durable Mfg. Co. v. U.S. Dep’t of Labor*, 548 F.3d 497, 499 n.1 (7th Cir. 2009)

1 Court has observed that Congress’s use of “may” contrasts with its use of “a mandatory
 2 ‘shall’ in the very same section” and has interpreted Congress’s use of “shall” under such
 3 circumstances “to impose discretionless obligations.” *Lopez v. Davis*, 531 U.S. 230, 241
 4 (2001). Plaintiffs assert that the remaining language Congress used in Section
 5 1157(c)(2)(A)—that FTJ refugees are “entitled to the same admission status” as the
 6 principal refugee—only reinforces Congress’s intent to abrogate the agency’s discretion
 7 in this instance. (Doe PI Mot. at 11.) The court agrees.

8 Defendants argue that 8 U.S.C. § 1157(c)(2)(A) does not guarantee admission into
 9 the United States because FTJ refugees must still be found to be otherwise admissible
 10 under the chapter. (Doe Resp. at 12-13.) Indeed, Defendants argue that 8 U.S.C.
 11 § 1157(c)(2)(A) conditions FTJ refugee status on admissibility, which is not ultimately
 12 adjudicated until an individual appears at a port to seek entry to the United States. (*Id.* at
 13 13 (citing 8 U.S.C. § 1201(h) (“Nothing in this chapter shall be construed to entitle any
 14 alien, to whom a visa or other documentation has been issued, to be admitted [to] the
 15 United States, if, upon arrival at a port of entry in the United States, he [or she] is found
 16 to be inadmissible under this chapter, or any other provision of law.”)) and 8 C.F.R.
 17 207.7(d) (explaining that approval of an I-730 Petition for a FTJ refugee can be
 18 “revoked” prior to entry)).) However, in *Spencer*, the Ninth Circuit held that the word
 19 “shall” in 8 U.S.C. § 1153(b)(5) indicated a nondiscretionary statutory duty to grant a

21 (“Under 6 U.S.C. § 557, references in federal law to any agency or officer whose functions have
 22 been transferred to DHS shall be deemed to refer to the Secretary of DHS or other official or
 component to which the functions were transferred.”).

1 type of visa under the immigrant investor program. 345 F.3d at 691. Further, the
2 application of statutory eligibility requirements did not render the agency’s determination
3 a discretionary one. *Id.* Accordingly, the court rejects Defendants’ argument.

4 Defendants also respond that Plaintiffs’ argument lacks merit because the Agency
5 Memo does not “rescind” anything, but only suspends the admission of FTJ refugees
6 until such time as security or screening procedures are reinforced. (JFS Resp. at 12.)
7 However, Defendants cite no authority for the proposition that the Secretary can
8 indefinitely suspend a nondiscretionary statutory duty, and so the court rejects this
9 argument, too.

10 Further, Defendants mischaracterize Plaintiffs’ claim as “seeking to compel their
11 immediate admission” or “suggest[ing] . . . that [8 U.S.C. §] 1157(c)(2)(A) requires their
12 admission now.” (Doe Resp. at 13-14.) As noted above, Plaintiffs do not claim that they
13 or their family members are entitled to immediate admission into the United States;
14 rather, Plaintiffs claim that Defendants are not entitled to, and do not have the statutory
15 authority to, indefinitely suspend FTJ refugee processing at will. By using mandatory
16 language in 8 U.S.C. § 1157(c)(2)(A), Congress created an entitlement for spouses and
17 children of principal refugees to “the same refugee status” as the principal refugee—
18 assuming the spouse and children are otherwise admissible. Nothing in the statute
19 authorizes the Secretary to stop, terminate, or suspend the ability of otherwise qualified
20 applicants from seeking and obtaining that entitlement.

21 Based on the foregoing authorities and analysis, the court concludes that Plaintiffs
22 have demonstrated that they are likely to succeed on the merits of their claim that the

1 Agency Memo’s FTJ provisions of the Agency Memo at issue here violate 8 U.S.C.
 2 § 1157(c)(2)(A) of the INA and, therefore, also violate 5 U.S.C. § 706(2)(C) of the APA.

3 *b. SAO Provisions*

4 JFS Plaintiffs argue that the 90-day suspension of processing for refugees
 5 applications (with limited exceptions) from SAO countries and the bar to entry into the
 6 United States violates the INA. (See JFS PI Mot. at 19, 21-22.) Despite suspending over
 7 40 percent of all refugees currently admitted under USRAP,²⁴ the Agency Memo itself
 8 provides no statutory basis for the 90-day SAO suspension. (See Agency Memo at 2.) In
 9 their briefing and argument to the court, Defendants point to two INA provisions as
 10 underpinning the suspension—6 U.S.C. § 202(4) and 8 U.S.C. § 1157(c)(1).²⁵ (See JFS
 11 Resp. at 16.) The court addresses each of these statutory grounds and finds neither to
 12 confer the necessary authority. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374
 13 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers
 14 power upon it.”).

15 Section 202(4) of Title 6 states that the Secretary of DHS is responsible for
 16 “[e]stablishing and administering rules . . . governing the granting of visas or other forms
 17 of permission, including parole, to enter the United States to individuals who are not a
 18 citizen or an alien lawfully admitted for permanent residence in the United States.” (JFS
 19 Resp. at 16 (quoting 6 U.S.C. § 202(4)).) Without citation to legal authority, Defendants

20 ²⁴ (See Smith Decl. ¶ 15 (“Out of the 138,710 refugees resettled in the United States in
 21 Fiscal Years 2016 and 2017, 60,309, or 43.5%, were from one of the 11 SAO countries.”).)

22 ²⁵ Defendants rely on no other statutory grounds for the SAO provisions in the Agency
 Memo. (See JFS Resp. at 16-17.)

1 assert that the authority granted in 6 U.S.C. § 202(4) over entry into the United States
 2 “necessarily encompasses authority to restrict entry.” (JFS Resp. at 16.) They assert that
 3 this is all that the SAO provisions do—restrict entry for all refugees from SAO countries.

4 Defendants also rely on 8 U.S.C. § 1157(c)(1), which states:

5 [The Secretary] may, in the [Secretary’s] discretion and pursuant to such
 6 regulations as the [Secretary] may prescribe, admit any refugee who is not
 7 firmly resettled in any foreign country, is determined to be of special
 humanitarian concern to the United States, and is admissible . . . as an
 immigrant under this chapter.

8 8 U.S.C. § 1157(c).²⁶ Defendants argue that the permissive language in this section
 9 invests the Secretary with the discretion to admit any refugee and thus implicitly also
 10 confers the discretion to exclude any refugee without time limitation.

11 But taking Defendants’ position to its logical end, the court would be required to
 12 conclude that these two statutory provisions provide the Secretary with the authority to
 13 exclude all refugees, and indeed—in the case of 6 U.S.C. § 202(4)—all immigrants from
 14 admission to the country. When the court asked in oral argument for Defendants to
 15 provide some limiting principle that would avoid this result, they could not. This cannot
 16 be what Congress intended when it drafted these two provisions.

17 Congress’s stated purpose in passing the Refugee Act of 1980 was as follows:

18 The objectives of this Act are to provide a permanent and systematic
 19 procedure for the admission to this country of refugees of special
 20 humanitarian concern to the United States and to provide comprehensive and
 uniform provisions for the effective resettlement and absorption of those
 refugees who are admitted.

21 ²⁶ See *supra* note 21.
 22

1 Refugee Act of 1980, Pub. L. No. 96-212 § 101(b), 94 Stat. 102. Defendants’
2 interpretation of 6 U.S.C. § 202(4) and 8 U.S.C. § 1157(c) is untenable in light of this
3 stated purpose. Defendants’ interpretation would allow either provision to swallow
4 whole the remainder of the Refugee Act of 1980. *See Abourezk v. Reagan*, 785 F.2d
5 1043, 1057-58 (D.C. Cir. 1986), *aff’d*, 484 U.S. 1 (1987) (finding “persuasive” the
6 plaintiff’s argument that the government’s statutory interpretation violated provisions of
7 the INA “because it effectively swallow[ed] up” another provision, thereby “nullif[ying]
8 the contours of existing inadmissibility grounds and “evad[ing] the limitations of
9 Congress”).

10 Although it involved different INA provisions, the Fifth Circuit recently dealt with
11 a similar overreach of statutory interpretation by the Government. In *Texas*, several
12 states challenged the DHS Secretary’s creation of the “Deferred Action for Parents of
13 Americans and Lawful Permanent Residents” (“DAPA”) program. 809 F.3d at 146. In
14 striking down DAPA as “an unreasonable interpretation that is ‘manifestly contrary’ to
15 the INA,” the Fifth Circuit held that the Government’s “interpretation of [the INA]
16 statutory provisions that the Secretary advance[d, which] would allow him to grant lawful
17 presence and work authorization to any illegal alien in the United States,” was “an
18 untenable position in light of the INA’s intricate system of immigration classifications
19 and employment eligibility.” 809 F.3d at 184. Likewise, Defendants’ broad
20 interpretation of both 6 U.S.C. § 202(4) and 8 U.S.C. § 1157(c)(1), which they argue
21 allows them to exclude all refugees of certain national origins, and by extension would
22 allow them to exclude all refugees, is untenable because it allows the DHS Secretary to

1 simply ignore the “permanent and systematic procedure” for refugee admission and
 2 resettlement that Congress established in the Refugee Act of 1980. *See* Refugee Act of
 3 1980, Pub. L. No. 96-212 § 101, 94 Stat. 102; *see also Hawaii III*, 2017 WL 6547095, at
 4 *11-13 (concluding that EO-3 “conflicts with the statutory framework of the INA by
 5 indefinitely nullifying Congress’s considered judgments on matters of immigration”).

6 Plaintiffs also argue that the SAO provisions conflict with the INA and Refugee
 7 Act of 1980 in additional ways. First, Plaintiffs assert that the SAO provisions run
 8 roughshod over the Refugee Act’s definition of “refugee.” (JFS PI Mot. at 21.) In 8
 9 U.S.C. § 1101(a)(42), Congress set forth the specific statutory elements that individuals
 10 must satisfy to be admitted as a refugee.²⁷ *Id.* Congress also specified criteria as to who
 11 would be excluded from the definition. *Id.* By either prohibiting refugees from SAO
 12 countries from participating in USRAP or by grafting on the additional requirement that
 13 refugees from SAO countries must also “fulfill critical foreign policy interests” to
 14 qualify, the agencies impermissibly redefine the term “refugee.” They either add to the
 15

16 ²⁷ In defining a refugee, Congress set forth specific criteria including that (1) the person
 17 must be outside his or her country of nationality or outside any country in which he or she last
 18 habitually resided, (2) the person must be unable or unwilling to return to, or unable or unwilling
 19 to avail himself or herself of the protection of, that country, (3) this inability or unwillingness
 20 must be due to persecution or a well-founded fear of persecution, and (4) the persecution must be
 21 on account of race, religion, nationality, membership in a particular social group, or political
 22 opinion. *Id.* In addition, Congress has specified that a person who has been forced to abort a
 pregnancy or to undergo involuntary sterilization, or been persecuted for their refusal to do these
 things or for other resistance to a coercive population control program, is deemed to have met
 some of the qualifications for refugee status listed above. *Id.* Finally, Congress specified criteria
 that would exclude a person from refugee status. Specifically, the term “does not include any
 person who ordered, incited, assisted, or otherwise participated in the persecution of any person
 on account of race, religion, nationality, membership in a particular social group, or political
 opinion.” *Id.*

criteria that Congress delineates to exclude one from refugee status or add an element to Congress’s carefully-crafted definition. Either way, the Agency Memo impermissibly conflicts with this provision.

Second, the nation-based SAO suspension impermissibly alters the admissibility standards set by Congress in 8 U.S.C. § 1182(a). An individual refugee may enter the country only if she is not subject to one of the inadmissibility bars. *See* 8 U.S.C. § 1157(c)(1) (“[The Secretary] may . . . admit any refugee who . . . is admissible . . . as an immigrant under this chapter.”). Section 1182(a) contains a long list of detailed inadmissibility bars, including on “criminal,” “security,” “terrorist,” and “foreign policy” grounds. *See* 8 U.S.C. § 1182. The INA “emphatically did not commit the decision to exclude an alien to standardless agency discretion; the statute lists [numerous] distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of exclusion power.” *Abourezk*, 785 F.2d at 1051. Defendants cannot alter the contours of admissibility as sculpted by Congress or evade these congressional limitations by creating a new and separate inadmissibility ground that does not exist in the INA.²⁸

²⁸ Defendants’ observation that the “Government routinely grants *preferences* on the basis of nationality” under the Refugee Act (JFS Resp. at 17 (*italics in original*)) supports rather than undermines Plaintiffs. Such preferences are granted either pursuant to a Presidential determination required by the Refugee Act, 8 U.S.C. § 1157(a)(3) (requiring the President to allocate refugee admissions after appropriate consultation with Congress), as is the case with the Priority 2 designations—including the Central American Minors program—and Priority 3 designations, *see* U.S. Dep’t of State, Proposed Refugee Admissions for FY 2018, at 7 (Oct. 4, 2017) (report to Congress), (noting that section 207(a)(3) of the INA grants authority to determine the USRAP priority system), or pursuant to a duly issued regulation that permits the Secretary to prioritize certain refugee admissions based on appropriate criteria, including “reuniting families, close association with the United States, compelling humanitarian concerns, and public

Based on the foregoing authorities and analysis, the court concludes that Plaintiffs have demonstrated that they are likely to succeed on the merits of their claim that the Agency Memo's SAO provisions at issue here violate the INA and, therefore, also U.S.C. § 706(2)(C) of the APA.²⁹

4. Irreparable Harm

To qualify for a preliminary injunction, Plaintiffs must show that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. The individual Plaintiffs argue that the suspensions in the Agency Memo will prolong the separation of their family members and that this is an irreparable harm. They are correct. This Circuit has repeatedly found that "separation from family members" is an irreparable harm. *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). The related Executive Order litigation has reaffirmed this holding. *See Hawaii I*, 859 F.3d at 782-83 ("prolonged separation from family members" is irreparable harm); *Washington*, 847 F.3d at 1169 (identifying "separated families" as an irreparable harm); *see also Int'l Refugee Assistance Project*, 857 F.3d at 583-84.

Defendants respond that the Agency Memo "would at most delay the entry of Plaintiff's family members." (Doe Resp. at 21; JFS Resp. at 30-31.) According to

interest factors," 8 C.F.R. § 207.5 (2017). Although section 207.5 may permit the agency to preference certain admissions based on these criteria, this authority—on which Defendants did not base their actions—does not encompass the categorical suspension at issue here.

²⁹ Because the court concludes that Plaintiffs are likely to succeed on two of their statutory claims, it does not consider Plaintiffs' third statutory claim or Plaintiffs' constitutional claims.

Defendants, “[s]uch delay alone does not amount to irreparable harm, as processing times for refugees can vary widely and on average are quite lengthy.” (*Id.*) Defendants do not distinguish delayed unification from prolonged separation, nor do they cite any authority that delay is not irreparable harm. (*See* Doe Resp.; JFS Resp.) Further, the Ninth Circuit has at least implicitly rejected the notion that delay is not irreparable harm. *See Hawaii I*, 859 F.3d at 768 (holding that the plaintiffs “will face substantial hardship if we were to first require that they try to obtain a waiver before we will consider their case”). No matter which synonym one uses, the court finds that the Agency Memo causes irreparable harm to individual Plaintiffs whose separation from their family members is prolonged.

The organizational Plaintiffs also suffer irreparable harm from the Agency Memo. JFS-S and JFS-SV have dedicated significant resources to helping refugees from the SAO countries. (JFS PI Mot. at 12-13.) Due to the Agency Memo’s suspension of refugees, the organizations claim that they will need to lay-off employees, reduce services, cancel established programs, lose institutional knowledge, and ultimately lose goodwill with volunteers and community partners. (*See id.*) “Evidence of threatened loss of . . . goodwill certainly supports a finding of the possibility of irreparable harm.” *Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001); *see also Rent-A-Ctr. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

Defendants recycle their “delay” argument to claim that the organizations have not suffered irreparable harm. (*See* JFS Resp. at 30-31.) This argument is similarly unavailing here. Moreover, the indefinite duration of the “delay” in admitting refugees

1 leaves the organizations unable to operate or plan effectively, further deteriorating
2 goodwill and adding to their harms. Defendants also argue that the organizations are not
3 irreparably harmed because “these organizations already fulfill their missions by
4 representing such clients who are unaffected by the challenged provisions.” (*Id.* at 12.)
5 The evidence before the court, however, is that JFS-S and JFS-SV are not able to simply
6 shift resources to “unaffected” refugees. Rather, these organizations have built programs
7 specifically to serve Muslim and Arabic-speaking refugees. (JFS-S Supp. Decl. ¶¶ 6-7;
8 JFS-SV Supp. Decl. ¶ 4.) Throughout the time it will take JFS-S and JFS-SV to
9 adequately build programs to service other populations, the organizations will suffer
10 irreparable harm. *See Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718,
11 739 (S.D. Ind. 2016), *aff’d*, 838 F.3d 902 (7th Cir. 2016) (“Although the funding denied
12 to [the agency] could be reimbursed, [the agency] has presented evidence that, in the
13 interim, its organizational objectives would be irreparably damaged by its inability to
14 provide adequate social services to its clients.”); *see also Hawaii I*, 859 F.3d at 782-83
15 (finding the “State’s inability to assist in refugee resettlement” was an irreparable harm).
16 Further, as explained above, any sudden shift in the organizations’ priorities will threaten
17 their relationships and goodwill with community partners. In short, the Agency Memo
18 threatens the organizational Plaintiffs’ mission, services, and goodwill, and therefore
19 causes them irreparable harm.

20 Based on the foregoing, the court concludes that Plaintiffs are likely to suffer
21 irreparable harm in the absence of preliminary relief.

22 //

1 5. Public Interest and Balancing the Equities

2 The balancing of the equities and the public interest inquiries are distinct. *See*
 3 *Winter*, 555 U.S. at 20. In weighing equities, a court “must balance the competing claims
 4 of injury and must consider the effect on each party of the granting or withholding of the
 5 requested relief.” *Id.* at 24 (internal citation omitted). Conversely, when determining the
 6 public interest, a court “primarily addresses impact on non-parties rather than parties.”
 7 *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752
 8 F.3d 755, 766 (9th Cir. 2014). That said, “[t]hese factors may merge where the
 9 Government is a party” because the Government purports to be acting in the public
 10 interest. *See Colo. River Indian Tribes v. Dep’t of Interior*, No. ED CV14-02504 JAK
 11 (SPx), 2015 WL 12661945, at *34 (C.D. Cal. June 11, 2015); *see also Hawaii*, 241 F.
 12 Supp. 3d at 1139-40 (combining the balance of equities and public interest analyses).
 13 Here, the Defendant’s sole argument for the balancing of equities and public interest
 14 factors is the Government’s weighty interest in national security. (*See Doe Resp.* at 24;
 15 *JFS Resp.* at 28.) The court, therefore, considers these factors together.

16 The court agrees that the Government has a “compelling” interest in national
 17 security. *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see also Hawaii I*, 859 F.3d at 78
 18 (“National security is undoubtedly a paramount public interest.”). Defendants, however,
 19 do not point to any specific national security threat that the Agency Memo curtails. At
 20 most, the Agency Memo expresses general “concerns” with admitting FTJ refugees and
 21 refugees from SAO countries. (*See Agency Memo* at 2-3.) Further, Defendants have not
 22 put forth evidence of how a preliminary injunction might cause specific injury or harm in

1 this instance or how the recent preliminary injunction of EO-1's or EO-2's suspensions of
2 all or portions of USRAP caused any harm or injury. (*See generally* Dkt.)

3 On the other hand, former national security officials—many of whom held “the
4 most senior responsibility within the U.S. Government for overseeing the refugee
5 resettlement process”—expressed that they are “unaware of any national security threat
6 that would justify” the Agency Memo. (Joint Decl. Former Nat'l Sec. Officers ¶¶ 4, 7.)
7 In fact, the former officials detailed concretely how the Agency Memo will harm the
8 United States' national security and foreign policy interests. (*Id.* at ¶¶ 14-15.) Enjoining
9 portions of the Agency Memo will simply restore refugee procedures and programs to the
10 position they were in prior to its issuance, which already includes “the most thorough
11 vetting of any travelers to the United States. (*Id.* ¶ 8); *see Hawaii I*, 859 F.3d at 783
12 (noting this same effect of enjoining portions of EO-2).

13 In any event, national security, although undoubtedly “a paramount public
14 interest,” *see Hawaii I*, 859 F.3d at 784, does not always override all other public
15 interests, *see IRAP*, 137 S. Ct. at 2088-89. Moreover, the agencies must exercise national
16 security authority lawfully. “[C]urtailing unlawful executive action” also serves the
17 public interest. *Texas*, 809 F.3d at 187; *see also Hawaii I*, 859 F.3d at 784. Further,
18 suspending the FTJ refugees program and the processing of refugee applications (with
19 limited exceptions) from SAO countries hinders Plaintiffs' ability to reunite with their
20 families while increasing refugees' exposure to perilous circumstances abroad, and its
21 also disrupts and hinders JFS-S's and JFS-SV's ability to resettle and serve refugees. *See*
22 *supra* § II.B. Thus, “[t]he public interest in uniting families and supporting humanitarian

efforts in refugee resettlement support the conclusion that the public interest is served by preliminarily enjoining [portions of the agency Memo] and maintaining the status quo.”

See Hawaii I, 859 F.3d at 784 (citing *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (“Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.”)). Further, the INA should be construed in accordance with its “humane purpose . . . to reunite families.” *Kaliski v. Dist. Dir. of Immigration & Naturalization Serv.*, 620 F.2d 214, 217 (9th Cir. 1980). In *Hawaii I*, the Ninth Circuit concluded that, because a preliminary injunction of EO-2 would serve the foregoing interests, it was in the public interest. 859 F.3d at 784-85. Likewise, this court concludes that Plaintiffs have demonstrated that a preliminary injunction of the FTJ and SAO suspensions here is in the public interest.

Nevertheless, the court’s analysis would not be complete without considering the Supreme Court’s recent decision in *IRAP*, 137 S. Ct. 2080, and the court will tailor any preliminary injunction it issues to the confines of that ruling.³⁰ When evaluating whether

³⁰ The court recognizes that the Supreme Court recently stayed two preliminary injunctions relating to EO-3, pending appeals in the Fourth Circuit and Ninth Circuit, respectively. *See Trump v. Int’l Refugee Assistance Project*, No. 17A560, 2017 WL 5987435, at *1 (U.S. Dec. 4, 2017); *Trump v. Hawaii*, No. 17A550, 2017 WL 5987406, at *1 (U.S. Dec. 4, 2017). The Court’s rulings, however, do not provide any analysis or explanation why it stayed the injunctions. On December 5, 2017, this court ordered the parties “to provide supplemental briefing concerning what impact, if any, the Supreme Court’s December 4, 2017, orders have concerning the two pending motions for preliminary injunction.” (Supp. Br. Order (Dkt. # 68) at 2; *see also* Doe Supp. Brief; JFS Supp. Brief; Def. Supp. Brief.) After considering the parties’ supplemental briefs and the Supreme Court’s December 4, 2017, rulings, this court will still rely on *IRAP*, 137 S. Ct. 2080 (2017), the only reasoned opinion from the Supreme Court on a related matter to date. Nothing in the December 4, 2017, rulings expressly undermines, let alone mentions, *IRAP*. Moreover, the December 4, 2017, rulings dealt exclusively with immigrants—

1 to issue a stay of the EO-2 preliminary injunctions, the Supreme Court determined that
2 the balance of equities favored “foreign nationals who have a credible claim of a bona
3 fide relationship with a person or entity in the United States.” *Id.* at 2088. The Court
4 recognized that the Government’s interest in protecting national security was at its apex
5 when considering the admission of foreign nationals with no connection to the United
6 States. *Id.* However, the Supreme Court found that the balance of equities was different
7 when considering the admission of aliens who had a credible claim of a bona fide
8 relationship with a person or entity within the United States. *Id.* With respect to these
9 individuals, the Supreme Court upheld the lower courts’ injunctions against enforcement
10 of EO-2. *Id.* The Court also specifically extended this balancing of equities to refugees:
11 “[a]n American individual or entity that has a bona fide relationship with a particular
12 person seeking to enter the country as a refugee can legitimately claim concrete hardship
13 if that person is excluded.” *Id.* at 2089.

14 By statutory definition, as Defendants conceded at oral argument, all FTJ refugees
15 have a bona fide relationship with a person in the United States. *See* 18 U.S.C. § 1157(c).
16 Thus, a preliminary injunction will be applicable to all FTJ refugees. The same,
17 however, is not true for all refugees from SAO countries. These refugees are not
18 necessarily in a relationship with a United States person or organization. The *IRAP* Court
19 held that for “refugees who lack any such connection to the United States . . . the balance

20
21 _____
22 not refugees or the INA provisions currently at issue. It is simply impossible to say how the
Court considered the equities in the December 4, 2017, rulings, and whether the Court’s analysis
applies here.

tips in favor of the Government’s compelling need to provide for the Nation’s security.” 137 S. Ct. at 2089. Thus, any preliminary injunction concerning refugees from SAO countries will apply only to individuals with a bona fide relationship to a person or entity within the United States.³¹ *See id.*

For the reasons stated above and with the noted limitations based on the Supreme Court’s decision in *IRAP*, the court finds that the balance of equities and the public interest factors weigh in favor of enjoining the FTJ and SAO provisions in the Agency Memo at issue here.

6. Scope of the Injunction

Defendants argue that any preliminary injunction should apply to the individual Plaintiffs in this action only. (Doe Resp. at 22-23; JFS Resp. at 28-29.) An injunction is not necessarily overbroad by extending benefits or protection to persons other than the prevailing parties—even in the absence of a certified class—if such breadth is necessary to give the prevailing parties the relief to which they are entitled. *Hawaii I*, 859 F.3d at 788. “Narrowing the injunction to apply to only Plaintiffs would not cure the statutory violation identified, which in all applications would violate provisions of the INA.” *Id.* In addition, partial implementation of the challenged provisions in the Agency Memo

³¹ With respect to a “bona fide relationship” with an American organization, the Supreme Court held that for such a relationship to exist, it “must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order at issue].” *See IRAP*, 137 S. Ct. at 2088. The Ninth Circuit has interpreted this language to include refugee applicants covered by a formal assurance from a refugee resettlement agency. *See Hawaii II*, 871 F.3d at 658. Thus, those refugees from SAO countries who have a formal assurance from JFS-S, JFS-SV, or some other refugee resettlement agency or humanitarian organization, would be covered by the preliminary injunction.

would undermine uniform enforcement of the nation’s immigration laws. *See Texas*, 809 F.3d at 155 (issuing nationwide injunction concerning the DAPA program because “partial implementation of the Executive Order ‘would undermine the constitutional imperative of ‘a uniform Rule of Naturalization’ and Congress’s instruction that ‘the immigration laws of the United States should be enforced vigorously and uniformly’”) (footnotes omitted) (quoting U.S. CONST, art. I, § 8, cl. 4 and Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384); *see also Hawaii III*, 2017 WL 6547095, at *25 (holding that the “the district court did not abuse its discretion by granting a nationwide injunction” with respect to EO-3).

Accordingly, the court issues a nationwide preliminary injunction³² as follows:

1. Defendants and their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them from the date of this Order, are enjoined and restrained from enforcing those provisions of the Agency Memo that suspend the processing of FTJ refugee applications or suspend the admission of FTJ refugees into the United States. This portion of the preliminary injunction does not apply to Defendants’ efforts to implement “additional security measures” or align “the screening mechanisms for [FTJ] refugees” with “processes employed for principal refugees” as described in the Agency Memo.

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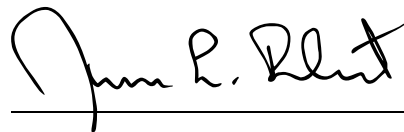
³² The preliminary injunction does not apply to the President. *See Hawaii I*, 859 F.3d at 788 (holding that the court lacked jurisdiction to enjoin the President). However, the preliminary injunction runs against all other Defendants. *See id.* (“Injunctive relief . . . may run against all other executive officials, including the Secretary of Homeland Security and the Secretary of State.”).

2. Defendants and their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them from the date of this Order, are enjoined and restrained from enforcing those provisions of the Agency Memo that suspend or inhibit, including through the diversion of resources, the processing of refugee applications or the admission into the United States of refugees from SAO countries. However, this portion of the preliminary injunction only applies to FTJ refugees or other refugees with a bona fide relationship to a person or entity within the United States. *See IRAP*, 137 S. Ct. at 2088 89. Further, this portion of the preliminary injunction does not apply to Defendants' efforts to conduct a detailed threat assessment for each SAO country.

IV. CONCLUSION

Based on the foregoing analysis, the court GRANTS Plaintiffs' motion in the Doe Case (Dkt. # 45), and GRANTS Plaintiffs' motion in the JFS Case (17-1707 Dkt. # 42) except for those refugees who lack a bona fide relationship with a person or entity in the United States.

Dated this 23rd day of December, 2017.



JAMES L. ROBART
United States District Judge

MEMORANDUM TO THE PRESIDENT

OCT 23 2017

FROM: Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of Homeland Security

Daniel Coats
Director
Office of the Director of National Intelligence

RESUMING THE UNITED STATES REFUGEE ADMISSIONS PROGRAM WITH ENHANCED VETTING CAPABILITIES

In section 6(a) of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), you directed a review to strengthen the vetting process for the U.S. Refugee Admissions Program (USRAP). You instructed the Secretary of State to suspend the travel of refugees into the United States under that program, and the Secretary of Homeland Security to suspend decisions on applications for refugee status, for a temporary, 120-day period, subject to certain exceptions. During the 120-day suspension period, Section 6(a) required the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and to implement such additional procedures.

The Secretary of State convened a working group to implement the review process under section 6(a) of Executive Order 13780, which proceeded in parallel with the development of the uniform baseline of screening and vetting standards and procedures for all travelers under section 5 of that Executive Order. The section 6(a) working group then compared the refugee screening and vetting process with the uniform baseline standards and procedures established by the section 5 working group. This helped to inform the section 6(a) working group's identification of a number of additional ways to enhance the refugee screening and vetting processes. The Secretary of State and the Secretary of Homeland Security have begun implementing those improvements.

Pursuant to section 6(a), this memorandum reflects our joint determination that the improvements to the USRAP vetting process identified by the 6(a) working group are generally adequate to ensure the security and welfare of the United States, and therefore that the Secretary

of State may resume travel of refugees into the United States and that the Secretary of Homeland Security may resume making decisions on applications for refugee status for stateless persons and foreign nationals, subject to the conditions described below.

Notwithstanding the additional procedures identified or implemented during the last 120 days, we continue to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015. To address these concerns, we will conduct a detailed threat analysis and review for nationals of these high risk countries and stateless persons who last habitually resided in those countries, including a threat assessment of each country, pursuant to section 207(c) and applicable portions of section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1157(c) and 1182(a), section 402(4) of the Homeland Security Act of 2002, 6 U.S.C. 202(4), and other applicable authorities. During this review, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive.

While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of countries on the SAO list, or of stateless persons who last habitually resided in those countries, and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security will admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States. We will direct our staff to work jointly and with law enforcement agencies to complete the additional review of the SAO countries no later than 90 days from the date of this memorandum, and to determine what additional safeguards, if any, are necessary to ensure that the admission of refugees from these countries of concern does not pose a threat to the security and welfare of the United States.

Further, it is our joint determination that additional security measures must be implemented promptly for derivative refugees—those who are “following-to-join” principal refugees that have already been resettled in the United States—regardless of nationality.¹ At present, the majority of following-to-join refugees, unlike principal refugees, do not undergo enhanced DHS review, which includes soliciting information from the refugee applicant earlier

¹ When a refugee is processed for admission to the United States, eligible family members located in the same place as the refugee (spouses and/or unmarried children under 21 years of age) typically are also processed at the same time, and they receive the same screening as the principal refugee. Each year, however, resettled principal refugees also petition, through a separate process, for approximately 2,500 family members to be admitted to the United States as following-to-join refugees. The family member may be residing and processed in a different country than where the principal refugee was processed, and while most following-to-join refugees share the nationality of the principal, some may be of a different nationality.

in the process to provide for a more thorough screening process, as well as vetting certain nationals or stateless persons against classified databases. We have jointly determined that additional security measures must be implemented before admission of following-to-join refugees can resume. Based on an assessment of current systems checks, as well as requirements for uniformity identified by Section 5, we will direct our staffs to work jointly to implement adequate screening mechanisms for following-to-join refugees that are similar to the processes employed for principal refugees, in order to ensure the security and welfare of the United States. We will resume admission of following-to-join refugees once those enhancements have been implemented.



Rex W. Tillerson
Secretary
Department of State



Elaine Duke
Acting Secretary
Department of
Homeland Security



Dan Coats
Director
National Intelligence

UNCLASSIFIED**Addendum to Section 6(a) Memorandum****Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States***

Section 6(a) of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), required a review of the United States Refugee Admissions Program (USRAP) application and adjudication process during a 120-day period to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States. The Secretary of State (State), in conjunction with the Secretary of Homeland Security (DHS) and in consultation with the Director of National Intelligence (ODNI) established an interagency working group (the Section 6(a) Working Group) to undertake this review.

This addendum provides a summary of the additional procedures that have been and will be implemented. A classified report provides further detail of this review and enhancements. The interagency working group has recommended and implemented enhanced vetting procedures in three areas: *application, interviews and adjudications, and system checks.*

Interagency Approach to the Review

To conduct the review, the Section 6(a) Working Group conducted a baseline assessment of USRAP application and adjudication processes and developed additional procedures to further enhance the security and welfare of the United States. The Section 6(a) Working Group ensured alignment with other concurrent and relevant reviews undertaken under the Executive Order, such as the review under Section 5, which established uniform baseline screening standards for all travelers to the United States.

All individuals admitted through the USRAP already receive a baseline of extensive security checks. The USRAP also requires additional screening and procedures for certain individuals from 11 specific countries that have been assessed by the U.S. government to pose elevated potential risks to national security; these individuals are subject to additional vetting through Security Advisory Opinions (SAOs)¹. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The most recent list was updated in 2015. The Section 6(a) Working Group agreed to continue to follow this tiered approach to assessing risk and agreed that these nationalities continued to require additional vetting based on current elevated potential for risk. Each additional procedure identified during the 120-day review was evaluated to determine whether it should apply to stateless persons and refugees of all nationalities or only certain nationalities.²

¹ The SAO is a DOS-initiated biographic check conducted by the Federal Bureau of Investigation and intelligence community partners. SAO name checks are initiated for the groups and nationalities designated by the U.S. government as requiring this higher level check.

² Stateless persons in this regard means persons without nationality who last habitually resided in one of these countries.

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Additional Procedures for Refugee Applicants Seeking Resettlement in the United States

Application Process:

- **Increased Data Collection:** Additional data are being collected from all applicants in order to enhance the effectiveness of biographic security checks. These changes will improve the ability to determine whether an applicant is being truthful about his or her claims, has engaged in criminal or terrorist activity, has terrorist ties, or is otherwise connected to nefarious actors.
- **Enhanced Identity Management:** The electronic refugee case management system has been improved to better detect potential fraud by strengthening the ability to identify duplicate identities or identity documents. Any such matches are subject to further investigation prior to an applicant being allowed to travel. These changes will make it harder for applicants to use deceptive tactics to enter our country.

Interview and Adjudication Process:

- **Fraud Detection and National Security:** DHS's U.S. Citizenship and Immigration Services (USCIS) will forward-deploy specially trained Fraud Detection and National Security (FDNS) officers at refugee processing locations to help identify potential fraud, national security, and public safety issues on certain circuit rides to advise and assist interviewing officers. With FDNS officers on the ground, the United States will be better positioned to detect and disrupt fraud and identify potential national security and public safety threats.
- **New Guidance and Training:** USCIS is strengthening its guidance on how to assess the credibility and admissibility of refugee applicants. This new guidance clarifies how officers should identify and analyze grounds of inadmissibility related to drug offenses, drug trafficking, prostitution, alien smuggling, torture, membership in totalitarian parties, fraud and misrepresentation, certain immigration violations, and other criminal activity. USCIS has also updated guidance for refugee adjudicators to give them greater flexibility in assessing the credibility of refugee applicants, including expanding factors that may be considered in making a credibility determination consistent with the REAL ID Act. This enhanced guidance supplements the robust credibility guidance and training USCIS officers already receive prior to adjudicating refugee cases. Additionally, the updated guidance equips officers with tactics to identify inadequate or improper interpretation.
- **Expanded Information-Sharing:** State and USCIS are exchanging more in-depth information to link related cases so that interviewing officers are able to develop more tailored lines of questioning that will help catch potential fraud, national security threats, or public safety concerns.

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- **Updating Security Checks:** Measures have been put in place to ensure that if applicants change or update key data points, including new or altered biographic information, that such data is then subject to renewed scrutiny and security checks. This will add an additional layer of protection to identify fraud and national security issues.
- **Security Advisory Opinions (SAOs):** Departments and agencies have agreed to expand the classes of refugee applicants that are subject to SAOs, thereby ensuring that more refugees receive deeper vetting.
 - USCIS' Fraud Detection and National Security Directorate is also expanding its "enhanced review" process for applicants who meet SAO criteria. This includes checks against certain social media and classified databases.

Additional Review Process for Certain Categories of Refugee Applicants

The Department of Homeland Security continues to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the SAO list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015.

As such, for countries subject to SAOs, the Secretary of State and the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Attorney General, will coordinate a review and analysis of each country, pursuant to existing USRAP authorities. This review will include an in-depth threat assessment of each country, to be completed within 90 days. Moreover, it will include input and analysis from the intelligence and law enforcement communities, as well as all relevant information related to ongoing or completed investigations and national security risks and mitigation strategies.

This review will be tailored to each SAO country, and decisions may be made for each country independently. While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of, and stateless persons who last habitually resided in, countries on the SAO list and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security may admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States.

In addition, during this review period, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary

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review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive. This means that refugee admissions for nationals of, and stateless persons who last habitually resided in, SAO countries will occur at a slower pace, at least during the temporary review period and likely further into the fiscal year, as the deployment of additional screening and integrity measures have historically led to lengthier processing times. While DHS prioritizes its resources in this manner until the additional analysis is completed, DHS will interview refugee applicants as appropriate from SAO countries on a discretionary basis.

Form I-730 Refugee Following-to-Join Processing

A principal refugee applicant may include his or her spouse and unmarried children under 21 years of age as derivative refugee applicants on his or her Form I-590, Registration for Classification as a Refugee. When these family members are co-located with the principal, the derivative applicants generally are processed through the USRAP and, if approved, travel to the United States with the principal refugee applicant. These family members receive the same baseline security checks as the principal refugee and, if found eligible, are admitted as refugees. Alternatively, a principal refugee admitted to the United States may file a Form I-730, Refugee/Asylee Relative Petition, for his or her spouse and unmarried children under 21 years of age, to follow-to-join the principal refugee in the United States. If DHS grants the petition after interview and vetting, the approved spouse or unmarried child is admitted as a refugee and counted toward the annual refugee ceiling. While the vast majority of eligible refugee family members admitted to the United States each year accompany, and are screened with, the principal refugee, principal refugees admitted to the United States file petitions for approximately 2,500 family members to join them in the United States through the following-to-join process. Following-to-join family members may be residing and processed in a different country than where the principal refugee was processed, and while most share the nationality of the principal refugee, some may be of a different nationality. In any given year, DHS receives petitions for beneficiaries representing over 60 different nationalities. In recent years, the nationalities most represented were Iraqi, Somali, Burmese, Congolese, Ethiopian and Eritrean.

The majority of following-to-join refugees do not receive the same, full baseline interagency checks that principal refugees receive. Nor do following-to-join refugees currently undergo enhanced DHS review, which includes soliciting information from the refugee earlier in the process to provide for more thorough screening and vetting of certain nationals or stateless persons against classified databases. DHS and State are expeditiously taking measures to better align the vetting regime for following-to-join refugees with that for principal refugees by 1) ensuring that all following-to-join refugees receive the full baseline interagency checks that principal refugees receive; 2) requesting submission of the beneficiary's I-590 application in support of the Form I-730 petition earlier in the process to provide for more thorough screening; 3) vetting certain nationals or stateless persons against classified databases; and 4) expanding SAO requirements for this population in keeping with the agreed-to expansion for I-590 refugee applicants. These additional security measures must be implemented before admission of following-to-join refugees—regardless of nationality—can resume. Once the security enhancements are in place, admission of following-to-join refugees can resume.

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