No. 18-35015, 18-35026

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, ET AL.,
Plaintiffs-Appellees,

JEWISH FAMILY SERVICE OF SEATTLE, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD TRUMP, President of the United States, ET AL.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. C17-cv-01707 (consolidated with 2:17-cv-00178)
Hon. James L. Robart

***JFS* PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

Defendants' Motion to Dismiss is an attempt at evading judicial review of their third effort to unlawfully suspend the congressionally enacted United States Refugee Admissions Program ("USRAP"). Since taking office, this Administration has continuously sought to suspend the USRAP, claiming the need to conduct "reviews"—first in 120-day increments and then for 90 days—and causing irreparable harm to refugees fleeing persecution, their U.S.-based family members, and the organizations that serve them. This Court should reject Defendants' request to dismiss these cross-appeals as moot and vacate the preliminary injunction of the latest suspension, as Defendants have not carried their heavy burden of demonstrating mootness.

Plaintiffs filed this case because, immediately after the end of the second suspension of the USRAP, Defendants issued a Memorandum dated October 23, 2017 (the "Agency Memo"), which suspended processing and admissions of (1) refugees from the eleven countries on the Security Advisory Opinion ("SAO") list, nine of which are Muslim-majority countries, for a minimum of 90 days while the agencies conducted a review, and (2) follow-to-join ("FTJ") refugees seeking family reunification for an indefinite period while the agencies implemented additional security measures. The district court enjoined the suspensions as to refugees with bona fide relationships to U.S. persons and entities and ordered the

reversal of actions taken under the Agency Memo, including the reallocation of resources away from processing SAO refugees.

Defendants now ask this Court to vacate that injunction based on the completion of the SAO country review and the FTJ implementation period, but the Court should remand for factual development because Defendants have provided little information on whether the *suspensions* have actually ended. Defendants have provided no evidence that they have resumed processing FTJ applications. Nor have Defendants represented that they lifted the suspension of SAO admissions at the end of the 90-day review independent of the injunction, or that they have taken all the steps necessary to correct the diversion of resources from the processing of SAO refugees that occurred under the Agency Memo. Indeed, an agency memorandum issued at the end of the 90-day review suggests that any resumption of SAO processing and admissions is happening *because* of the injunction and raises the specter of the suspension continuing under new cover.

Alternatively, if the Court decides the mootness question now, it should find that the record does not support a finding of mootness—especially because Defendants have a still-continuing obligation under the injunction to restore the processing of SAO refugee applications to the status quo ante by reversing the resource reallocation implemented under the Agency Memo. Moreover, that this is Defendants' third attempt to suspend the USRAP makes evident that this case fits

squarely within the "capable of repetition, yet evading review" and "voluntary cessation" exceptions to the mootness doctrine.

Finally, even if this Court were to find the case moot, vacatur is inappropriate. Defendants have devastated Plaintiffs' lives and organizations over the past year through a series of suspensions of the USRAP. The Court should not permit Defendants to wipe clean the court orders that hold them accountable by structuring their unlawful actions in short, successive time periods.

BACKGROUND

I. FACTUAL BACKGROUND

This case is a challenge to the Administration's third attempt to ban refugees from the United States. The first attempt, Executive Order 13,769 ("EO-1"), issued one week after President Trump's inauguration, banned Syrian refugees indefinitely and suspended the USRAP for 120 days while the Secretaries of State and the Department of Homeland Security ("DHS"), and the Director of National Intelligence ("DNI"), were to conduct a security review of the USRAP. *See* Preliminary Injunction Order ("Op."; DE# 92) at 5 (attached to Defs.' Motion to Dismiss). After this first attempt was enjoined, the Administration attempted again to suspend the USRAP for another 120-day review by issuing Executive Order No. 13,780 ("EO-2") on March 6, 2017. *See id.* at 6. This second attempt was enjoined before it could take effect. *See Hawai'i v. Trump*, 859 F.3d 741, 757, 760 (9th Cir.)

(per curiam), *vacated as moot*, 137 S. Ct. 377 (2017). While that injunction was on appeal, the second suspension expired and was replaced by Executive Order No. 13,815 ("EO-4") and the Agency Memo, which are the subject of this action. *See* Op. at 8-9; Agency Memo (attached to Defs.' Mot. to Dismiss).[1]

The Agency Memo claimed the need to review the USRAP for nationals of SAO countries for an additional 90 days, *see* Agency Memo at 2, notwithstanding that USRAP should have already been reviewed for 158 days under the earlier executive orders and that refugees from SAO countries were already subject to heightened security checks, *see* Op. at 11.[2] During this 90-day period, the Agency Memo allocated resources away from processing SAO refugees to processing non-SAO refugees. *See* Agency Memo at 2. Contrary to Defendants' assertion that the reallocation was "temporary," Mot. at 13, the Agency Memo itself acknowledged, and the district court found, that the reallocation would slow down admissions and processing from these countries beyond the 90-day review and "likely further into the fiscal year." Agency Memo add. at 4; *see also* Op. at 11-12. The Agency Memo

[1] Portions of EO-2 that did not affect refugees were replaced with a Presidential Proclamation dated September 24, 2017 ("EO-3"), *see* Op. at 7-8, which was also enjoined, *see Hawai'i v. Trump*, 878 F.3d 662, 673, 702 (9th Cir. 2017) (per curiam), *cert. granted*, 86 U.S.L.W. 3365 (U.S. Jan. 19, 2018) (No. 17-965).

[2] The SAO countries are reportedly nine countries that are at least 87 percent Muslim (Egypt, Iran, Iraq, Libya, Mali, Somalia, Sudan, Syria, and Yemen), plus North Korea and South Sudan. *See* Op. at 10. Defendants agreed that the district court could accept as true the list alleged by Plaintiffs. *See id.* at 10-11 n.6.

also suspended admissions of SAO refugees for an undefined period of time, *id.* at 10. The Agency Memo promised nothing about whether these suspensions would be lifted at the end of the 90-day review period. *See* Declaration of Deepa Alagesan, Ex. A (Tr. of 12/21/17 Prelim. Inj. Hr'g) at 35:3-6 ("COURT: So you're saying [the SAO provision] ends at 90 days, and it cannot be continued? MR. DUGAN: I don't know what will come to pass after the 90-day period."); 38:1-5 ("MR. DUGAN: I mean, perhaps the government will conclude at the end of the 90 days that refugee admissions may resume in March . . . . We just don't know.").

In addition, the Agency Memo indefinitely suspended the FTJ process for refugees until additional security measures had been implemented. *See* Op. at 10. The FTJ process allows the spouses and unmarried minor children of already resettled refugees to join them in the United States. *See id.* at 9-10.

Plaintiffs in this case— including Iraqi former translators for the U. S. military whose lives are at risk because of their service, a transgender woman in Egypt living in perilous conditions, fathers in Ohio and Washington seeking to reunite with their children, and resettlement agencies that effectuate their sincerely held religious beliefs by serving vulnerable refugees—have suffered irreparable harm. *See id.* at 13-17; 56-57. Contrary to Defendants' arguments below that "delay alone does not amount to irreparable harm," *id.* at 57, the SAO and FTJ suspensions have directly impacted the Individual Plaintiffs' ability to reach safety and reunite with their

families, and the Organizational Plaintiffs' ability to carry out their missions, *see* Op. at 57-58. Such delays cascade and reverberate for a long time because of the nature of refugee processing. *Id.* at 16; *see Hawai'i v. Trump*, 871 F.3d 646, 66 (9th Cir. 2017) ("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. Even short delays may prolong a refugee's admittance").

II. PROCEDURAL HISTORY

On December 23, 2017, the district court (Robart, *J.*) granted Plaintiffs' motion for a preliminary injunction, enjoining the Agency Memo's FTJ and SAO suspensions for those refugees with a bona fide relationship to U.S. persons or entities. *Id.* at 4.[3] Specifically, the district court held that Plaintiffs were likely to succeed on their Administrative Procedure Act ("APA") claims that the suspensions were ultra vires and violated notice-and-comment requirements, *id.* at 46, 50-51, 56; Plaintiffs were suffering irreparable harm, *id.* at 58; and the balance of equities and public interest warranted an injunction, *id.* at 63. Defendants filed a notice of appeal on January 4, 2018. Notice of Appeal (DE# 99).[4]

Defendants have twice attempted—unsuccessfully—to modify the scope of

[3] For purposes of this brief, "Plaintiffs" refers to the plaintiffs in *Jewish Family Service of Seattle, et al. v. Trump, et al.*, No. C17-1707JLR (W.D. Wash.).

[4] Plaintiffs cross-appealed the preliminary injunction's limitation to refugees with bona-fide relationships. Notice of Cross-Appeal (DE# 107).

the preliminary injunction. First, they moved for reconsideration of the holding that an assurance from a resettlement agency constitutes a bona fide relationship, a motion the court denied. Defs.' Mot. for Recons. (DE# 93). Second, six days later, Defendants filed an "emergency" motion for a stay of the preliminary injunction pending appeal with the district court. Defs.' Mot. for Stay of Prelim. Inj. (DE# 95).[5] In this motion, Defendants effectively conceded their noncompliance with the injunction, asserting that the injunction did not "require affirmative action to undo any of the steps that were taken to implement the [Agency Memo] prior to [the date of the injunction]," *id.* at 4, and expressing "significant doubt" about their ability to undo such actions, *id.* at 5. Defendants cited only one example of a step they claimed they could not undo: that it was not feasible for them to "modify the universe of refugees to be interviewed during upcoming circuit rides." *Id.*[6] The district court rejected Defendants' "attempts to unilaterally modify the preliminary injunction" and denied the stay motion, confirming that the injunction required them to take affirmative steps to undo any actions taken before its issuance and warning that failure to comply with the injunction could result in a contempt finding and sanctions. *See* Order Denying Mot. for Stay Pending Appeal (DE# 106) at 6-7.

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[5] However, Defendants never filed a stay motion in this Court.

[6] A "circuit ride" is a tour of duty for DHS officers to interview refugee applicants abroad. *See* Gauger Decl. (DE# 114-1) ¶ 4. Dates and locations are scheduled at least one quarter in advance and refugees are then scheduled for interviews. *See id.*

In the face of the district court's warning, Defendants filed a "notice of compliance" on January 16, 2018. The notice stated that Defendants issued guidance to DHS and DOS to resume processing of FTJ and SAO refugees; added an unspecified number of interviews for SAO nationals to the schedule for the second quarter of fiscal year 2018; and "aim[ed]" to add to their third-quarter schedule interview locations with greater percentages of SAO nationals. Defs.' Jan. 16, 2018 Notice (DE# 114) at 1. The notice failed to address a host of questions, including whether all reallocation of resources under the Agency Memo had been reversed and whether and what guidance was provided to other agencies involved in refugee processing. *See* Pls.' Opp. to Defs.' Mot. to Stay Proceedings (DE# 115) at 7-9.

Thereafter, Defendants filed another notice with the district court on January 31, 2018, announcing the end of the Agency Memo's 90-day SAO review on January 22, 2018. Defs.' Jan. 31, 2018 Notice (DE# 119). Although it stated that the "*review period* expired by its terms," *id.* at 1 (emphasis added), the notice did not represent that SAO refugee processing or admissions had resumed and simply referenced, without attaching, a new memorandum from DHS, dated January 29 (the "January 29 Memo"), that supposedly introduced "additional security enhancements and recommendations to strengthen the integrity of the [USRAP]." *Id.* Similarly, Defendants did not specify whether FTJ refugee processing had resumed and made only the unsubstantiated assertion that the implementation of additional procedures

for FTJ refugees was "expected to be completed on or about February 1, 2018." *Id.* at 2. The notice asserted that the January 29 Memo would be implemented consistent with the preliminary injunction and that Defendants would honor commitments made under the injunction. *Id.* at 1.

The January 29 Memo, which Defendants provided to Plaintiffs in redacted form a week after its filing, similarly asserted in conclusory fashion that Defendants are in compliance with the injunction and failed to provide concrete information on whether SAO and FTJ refugee processing or admissions had resumed. *See* Jan. 29 Memo (DE# 122 Ex. C) at 1-2 n.3. Instead, the Memorandum referenced additional guidelines and training that could readily be employed to continue the SAO suspensions under new cover. *See, e.g.*, *id.* at 2-3 (instructing USCIS to "[i]ssue supplementary guidance and train officers on when it may be appropriate to deny refugee applicants as a matter of discretion based on the totality of the circumstances" and to "[d]etermine which SAO nationals . . . will require a re-interview in light of the modifications listed above.").

On February 6, 2018, Defendants filed in this Court a motion to dismiss the pending cross-appeals, vacate the preliminary injunction, and remand the case for dismissal based on purported mootness. Their motion to stay the district court proceedings pending appeal of the preliminary injunction, and Plaintiffs' cross-motion for limited expedited discovery on compliance, remains pending below. *See*

Defs.' Mot. to Stay Proceedings (DE# 110); Pls.' Mot. for Disc. (DE# 121).

ARGUMENT

I. THIS CASE SHOULD BE REMANDED FOR THE DISTRICT COURT TO ADJUDICATE MOOTNESS IN THE FIRST INSTANCE.

Defendants ask this Court to dismiss the case as moot claiming that "the challenged provisions . . . have expired by their own terms," Mot. at 10, but the record here raises factual questions that Plaintiffs are entitled to probe around whether the challenged *suspensions*—not just the SAO review or implementation of additional FTJ security measures—have ended. Accordingly, this Court should remand to the district court for the necessary factual development.

This Court has long held that remand is appropriate where, as here, there are factual questions around mootness. *See, e.g.*, *United States v. Brandau*, 578 F.3d 1064, 1069-70 (9th Cir. 2009) (remanding case for a district court to hold an evidentiary hearing on mootness); *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1183-84 (9th Cir. 2002) (denying motion to dismiss and remanding where factual dispute as to mootness existed); *see also Sherwood v. Tenn. Valley Auth.*, 842 F.3d 400, 407 (6th Cir. 2016) (remanding case and noting that "[f]ully fleshing out any future mootness claim may require jurisdictional discovery"). In *Brandau*, for example, the government argued that the appeal was moot because the challenged policy, which required shackling of defendants during initial appearances in criminal court, had been replaced while the appeals were pending. The Court remanded the

case for factual development, noting that the government had provided "no information at all regarding the practical effect of the new [policy], and whether or not the de facto policy . . . remains [the same as before]," 578 F.3d at 1067, and that anecdotal information suggested that the shackling practice remained in place despite the change in law. *See id.* at 1069-70.

As in *Brandau*, this case is rife with factual disputes. For example, although the January 29 Memo indicates that the 90-day SAO review period has expired, Jan. 29 Memo at 1, Defendants conceded at oral argument that the SAO suspension itself may continue after the review, *see supra* at 5, and they have never represented that the suspension of SAO admissions has ended independent of the injunction, *see supra* at 8-9. *See also* Mot. at 3-4 (discussing expiration of 90-day review and concurrent reallocation of resources but failing to mention suspension of admissions).[7] And although the January 29 Memo states that "the prioritization [of applications] set forth in the [Agency Memo] is not hereby renewed," Jan. 29 Memo at 3, Defendants have provided no information about reversing the prior reallocation of resources directed by the Agency Memo other than indicating their plans to restore certain circuit rides into the next quarter, *see supra* at 8. The January 29 Memo fails

[7] Similarly, although defendants claim in the motion that the FTJ suspension has ended, they have not submitted any evidence to substantiate that claim. *Cf. Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982) (concluding that the Court "cannot rely on [defendant's] statement alone" in determining that a case is moot).

to provide any concrete information about what Defendants are now doing with SAO or FTJ processing. Instead, it references guidance and trainings that could be construed to continue the SAO suspension and suggests that any SAO processing and admissions taking place now is happening due to the injunction. *See supra* at 9.

Moreover, the limited information Plaintiffs do have, along with Defendants' earlier attempt to unilaterally modify the injunction, *see supra* at 7, raises significant concerns that the suspensions might be continuing despite the injunction. None of the 11 individual Plaintiffs or their family members awaiting resettlement, *see* Op. at 12-16, or approximately 77 affected clients of the organizational Plaintiffs, *see* JFS-S Decl. (DE# 50) ¶ 26; JFS-SV Decl. (DE# 51) ¶ 32, has traveled since the preliminary injunction was issued, even though some were close to travel at the time the Agency Memo was issued, *see* Op. at 13, 14, 23.[8] As of January 26, 2018, only 23 SAO refugees have been admitted since the injunction was issued, which is just two percent of the total number of refugees who have been admitted during that time. *See* Smith Decl. ¶ 4. In contrast, in fiscal years 2016 and 2017, more than 43 percent of refugees admitted to the United States were from SAO countries. *Id.* ¶ 5.

Because of these concerns and the magnitude of harm to Plaintiffs if the suspensions are in fact continuing, *see supra* at 5-6, Plaintiffs have sought limited

[8] One client of an organizational plaintiff was scheduled to travel but had his travel date delayed for unknown reasons. *See* Pls.' Mot. for Disc. at 4 n.6.

discovery on Defendants' compliance. *See* Pls.' Opp. to Defs.' Mot. for Stay of Prelim. Inj. at 12; Pls.' Mot. for Disc at 1. Remand is thus also appropriate to allow this discovery, as this Court has instructed that "appropriate discovery should be granted" where "significant questions regarding compliance have been raised." *Cal. Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1034 (9th Cir. 2008) (explaining that "the kind and amount of evidence of noncompliance required to justify discovery is, necessarily, considerably less than that needed to show actual noncompliance").

In light of the inadequate record, grave concerns about compliance, and repeated attempts to suspend the USRAP, Defendants' unsupported assertions on the Motion to Dismiss are insufficient for either Plaintiffs or this Court to determine whether this appeal is moot. *See Brandau*, 578 F.3d at 1069 (remanding where Court lacked sufficient information to determine whether "there is an 'ongoing policy'" of the violative conduct or whether it is "absolutely clear" that the challenged policy "will not recur, or that *in practice,* the alleged violations ever ceased, let alone were 'completely and irrevocably eradicated'" (citation omitted)). Remand is necessary for Plaintiffs to take discovery and assess Defendants' assertions.[9]

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[9] Discovery on jurisdictional issues is of course appropriate even in an APA case. *See, e.g.*, *Cal. Native Plant Soc'y v. E.P.A.*, 251 F.R.D. 408, 410 (N.D. Cal. 2008); *Sensient Flavors LLC v. Nat'l Inst. for Occupational Safety & Health*, No. 08-CV-0949, 2008 WL 11383364, at *1 (S.D. Ind. Oct. 31, 2008); *cf. Sherwood*, 842 F.3d at 407 (noting, in APA case, that "[f]ully fleshing out any future mootness claim may require jurisdictional discovery").

II. IN THE ALTERNATIVE, THE APPEAL IS NOT MOOT.

A. The Controversy Is Still Live.

If this Court decides not to remand for a factual determination of mootness, it should decide that the appeal is not moot. A case is not moot where "the issues presented are . . . 'live'" and plaintiffs retain "a legally cognizable interest in the outcome," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). Defendants fail to meet their "heavy" burden, as the moving party, of demonstrating mootness. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1192 (9th Cir. 2011) (citation omitted).

Defendants assert that the controversy is no longer live because the challenged provisions have expired and the preliminary injunction "is now without any effect," Mot. at 11, but this is belied by the record. Not only does the January 29 Memo fail to contain sufficient information on the suspension of SAO or FTJ refugees for assessing mootness, *see supra* at 11-12, it effectively concedes that the injunction *continues* to direct Defendants' conduct by specifying that "[a]ny actions *shall* be undertaken consistent with the nationwide injunction [and] any commitments made by the United States to implement the injunction *will* be honored." Jan. 29 Memo at 1-2 n.3 (emphasis added). Thus, by Defendants' own admission, the injunction remains live, and Plaintiffs should not have to rely on Defendants' word that their commitments to comply with the injunction will be honored even in its absence.

At minimum, those continuing commitments include the restoration of interviews for SAO refugees. Defendants represented that they intended to comply with the injunction's mandate to restore interviews by scheduling additional interviews of SAO nationals in the second quarter (Jan.-Mar.) in several locations and "aim[ing]" to schedule third-quarter circuit rides (Apr.-June) in "locations where greater percentages of SAO nationals are ready for interviews." Defs.' Jan. 19 Notice at 4. Thus, for months to come, Plaintiffs will continue to receive remedies pursuant to the preliminary injunction, compliance with which the district court is responsible for overseeing, and Plaintiffs will retain "a legally cognizable interest in the outcome" of this case. *Already*, 568 U.S. at 91.

These circumstances thus differ sharply from the challenge to EO-2's refugee suspension, which the Supreme Court dismissed as moot. *See Trump v. Hawai'i*, 138 S. Ct. 377, 377 (2017). EO-2 suspended admissions and processing of refugees for a fixed 120-day period and did not order a reallocation of resources that would require affirmative action to reverse. This is not true of the SAO and FTJ suspensions. *See supra* at 5, 8-9, 11-12.[10] Accordingly, Defendants have not met their burden of showing that this case is moot.

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[10] Defendants' reliance on *Burke v. Barnes*, 479 U.S. 361 (1987), to argue mootness, Mot. at 14-15, is similarly misplaced. In *Burke*, the bill in question had expired at the end of the fiscal year under its own terms, mooting after that date the question whether the President properly vetoed the bill. *See* 479 U.S. at 363.

B. The Capable of Repetition yet Evading Review Exception Applies.

Plaintiffs' challenge to this latest refugee suspension falls squarely within the mootness exception for controversies that are "capable of repetition yet evading review." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This is because "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* (citation omitted).

First, it is unreasonable to expect plaintiffs to have obtained complete judicial review of the Agency Memo within the 90-day duration of the review. This Court has found that government actions of even longer duration are too short to be fully litigated prior to their expiration. *See, e.g., Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012) (one-year duration evades review).

Second, Plaintiffs have every reason to believe that their refugee applications will be unlawfully suspended again. Defendants' contention that the suspensions were "expressly temporary and for limited purposes, which have since been met," Mot. at 12, is wrong, as discussed above, s*ee supra* at 5. Furthermore, Defendants' contention rings hollow given this Administration's repeated attempts to suspend the USRAP and halt processing of Plaintiffs' applications over the past year in order to "review" the program. *See supra* at 3-4; *see also* Mot. at 5-6. In fact, SAO refugees are at very real risk of a repeat suspension given that the January 29 Memo

recommended additional reviews of SAO processing, *see* Jan. 29 Memo at 3-4—the same reason that Defendants used to justify the Agency Memo's SAO suspension in the first place, *see* Agency Memo at 2. History indicates that Plaintiffs are more than reasonably likely to be subject to the same unlawful action again.

C. The Voluntary Cessation Exception Applies.

Even if Defendants were correct that the challenged conduct has fully ended, that purported cessation does not moot this challenge because Defendants "cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already*, 568 U.S. at 91. Defendants argue that this exception does not apply because the "terms of the Agency Memo always contemplated that the temporary SAO and FTJ provisions would terminate," Mot. at 14, but, as explained above, that is not so—the FTJ suspension was indefinite, and the suspension of SAO admissions was not necessarily tied to the 90-day review. *See supra* at 5.[11]

Given that the Agency Memo did not guarantee the termination of the

[11] The cases cited by Defendants, *see* Mot. at 14-15, do not support their contention that the voluntary cessation exception does not apply here. Unlike the bill in question in *Burke*, the Agency Memo did not direct that the SAO and FTJ suspensions would expire after a fixed date. *See supra* at 15 n.9 (citing *Burke*, 479 U.S. at 363). And *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011), is inapposite because the challenged statute there did not expire but was repealed by a subsequent statutory enactment. *See id.* at 1167 (distinguishing voluntary cessation from statutory repeal, which is "enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed") (citation omitted).

challenged suspensions, Defendants have not met their "formidable" burden, *Already*, 568 U.S. at 91, to show that "(1) it can be said with assurance that there is 'no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cty. of L.A. v. Davis,* 440 U.S. 625, 631 (1979) (citations omitted). First, given this Administration's clear commitment to banning refugees, and particularly Muslim refugees, Plaintiffs have every reasonable expectation that the unlawful suspension of refugee processing will recur, see *supra* at 16-17, if it has stopped at all. Second, as explained above, the expiration of the 90-day review has not "irrevocably eradicated the effects of the alleged violation," *Davis,* 440 U.S. at 631, not the least because it will take Defendants two fiscal quarters, if not longer, to restore the diversion of resources that occurred as a result of the Agency Memo. *See supra* at 15; *see also Sherwood*, 842 F.3d at 405 (agency's formal abandonment of challenged rule insufficient to moot case where record evidence suggested agency had not reverted back to pre-rule practices and agency "failed to prove that the . . . rule ha[d] no continuing effect"). The voluntary cessation exception mootness should apply here to stop Defendants from mooting the case.

III. IN ANY EVENT, THE PRELIMINARY INJUNCTION SHOULD NOT BE VACATED.

Even if the Court were to find the case moot, it should reject Defendants' attempt to vacate the preliminary injunction under *United States v. Munsingwear,*

Inc., 340 U.S. 36, 41 (1950). S*ee* Mot. at 15. Although *Munsingwear* approved of vacatur where appellate review is precluded by "happenstance" of mootness, 340 U.S. at 40, subsequent decisions of the Supreme Court and this Court have made clear that automatic vacatur is an "extraordinary" remedy and that the party seeking it has the burden to demonstrate "equitable entitlement" to it. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24, 26 (1994) (denying motion for vacatur where mootness caused by settlement); *Dilley v. Gunn,* 64 F.3d 1365, 1370 (9th Cir. 1995) ("[T]he touchstone of vacatur is equity").

Defendants have not met their burden here for an automatic vacatur. Vacatur should not be awarded to a party that caused mootness through voluntary action. *See id.*; *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) (party that moots its own appeal "is in no position to complain that [its] right of review of an adverse lower court judgment has been lost"). Here, for all the reasons explained above, Defendants have not submitted an adequate record on the cause of the mootness and have not addressed the equities of dismissal. *See supra* at 10-13. This Court has directed remand in precisely these situations so that the district court can determine in the first instance "whether mootness was caused by the voluntary action of the party seeking vacatur" and, if so, balance the equities. *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006); *see also Dilley*, 64 F.3d at 1370 (holding that when the appeal is rendered moot by the

appellant, the court's "established procedure" is to remand to consider vacatur in light of "the consequences and attendant hardships" and "the competing values of finality of judgment and right of relitigating of unreviewed disputed").[12]

Here, Plaintiffs will be unfairly prejudiced by a vacatur because it is Defendants who have controlled every step of this controversy. Over the course of a year, Defendants have attempted to suspend the USRAP through a series of time-limited review periods. *See supra* at 3-4. When the district court enjoined their latest attempt, Defendants declined to seek expedited appeal and instead waited to file a motion to dismiss this appeal as moot. *See supra* at 7, 9. If the Court were to grant vacatur here, it would prevent litigants from ever holding the government accountable so long as it takes unlawful actions in successive, short time periods.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' motion in its entirety and remand the case to the district court to consider the question of mootness. In the alternative, Plaintiffs respectfully request that the Court deny Defendants' motion on the ground that the case is not moot and consider the merits of the pending cross-appeals.

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[12] Because Defendants have not submitted an adequate record on the threshold question of mootness, neither *Burke* nor *Log Cabin Republicans* nor the Supreme Court's order dismissing the challenge to EO-2 as moot support Defendants' vacatur arguments, s*ee* Mot. at 16-17. *See supra* at 15 n.10, 17 n.11.

Respectfully submitted,

s/ Deepa Alagesan

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2018. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Date: February 21, 2018

s/ Deepa Alagesan
Deepa Alagesan

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, et al.,
Plaintiffs-Appellees,

JEWISH FAMILY SERVICE OF SEATTLE, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD TRUMP,
President of the United States, et al.,
Defendants-Appellants-Cross-Appellees.

Nos. 18-35015,
18-35026

DECLARATION OF DEEPA ALAGESAN IN SUPPORT OF *JFS* PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE APPEAL, AND TO VACATE THE JUDGMENT AND REMAND FOR DISMISSAL, ON GROUNDS OF MOOTNESS

I, Deepa Alagesan, declare as follows:

1. I am a Staff Attorney at the International Refugee Assistance Project and counsel in this action for Plaintiffs-Appellees-Cross-Appellants Jewish Family Service of Seattle, Jewish Family Services of Silicon Valley, Afkab Mohamed Hussein, Allen Vaught, John Does 1-3 and 7, and Jane Does 4-6 (together, "*JFS* Plaintiffs"). I submit this declaration in support of *JFS* Plaintiffs' opposition to Defendants' motion to dismiss the appeal, and to vacate the judgment and remand for dismissal, on grounds of mootness.

2. Attached as Exhibit A is a true and correct excerpt of the Verbatim Report of Proceedings before the Honorable James L. Robart, United States District Judge, held at the United States District Court for the Western District of Washington at Seattle on December 21, 2017.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21st day of February, 2018, at New York, New York.

s/ Deepa Alagesan
Deepa Alagesan

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JOHN DOE, et al., Plaintiffs, v. DONALD TRUMP, et al., Defendants.	CASE NO. C17-00178-JLR SEATTLE, WASHINGTON December 21, 2017 PRELIMINARY INJUNCTION HEARING
JEWISH FAMILY SERVICE OF SEATTLE, et al., Plaintiffs v. DONALD TRUMP, et al., Defendants.	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES L. ROBART
UNITED STATES DISTRICT JUDGE

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1 we look at the supplemental declarations that plaintiffs have
2 been put into the record, it's clear that he is close enough
3 to the brink of travel. I don't have a credible argument to
4 say that he hasn't been injured.
5 THE COURT: Thank you for your candor on that.
6 MR. DUGAN: Yes, Your Honor.
7 And what I do want to say, briefly, though, on that point
8 is that if this court were to enter a nationwide injunction,
9 it would have to find -- well, that circumstances are such
10 that would warrant a nationwide injunction. So not only that
11 the court is persuaded by plaintiffs' arguments on the
12 merits, not only that the court is persuaded that one or more
13 parties has standing, but also that these circumstances
14 warrant broad and expansive relief.
15 And if we look at the declarations that have been put into
16 the record, I think what we see is that most of these
17 individual plaintiffs are not on the brink of travel --
18 right? -- have not demonstrated that but for the challenge
19 provisions, they would either already be in the country or
20 would be able to enter the country during the short time
21 period that remains.
22 THE COURT: Well, "short time period that remains,"
23 where do you get a short time period that remains when it can
24 become indefinite?
25 MR. DUGAN: Well, these policy are not going to be

1 indefinite. Right? I mean, the SAO provision, it's a 90-day
2 window, and we're already more than halfway there.
3 THE COURT: So you're saying it ends at 90 days, and
4 it cannot be continued?
5 MR. DUGAN: I don't know what will come to pass after
6 the 90-day period.
7 THE COURT: So it's indefinite?
8 MR. DUGAN: Not -- not this provision -- right? --
9 not this policy. It may be that the government will
10 implement some further policy based on review that will take
11 place over 90 days.
12 Excuse me.
13 THE COURT: I often have that impact on people.
14 MR. DUGAN: I was told to speak slowly today, Your
15 Honor, which perhaps I'm succeeding at that, but maybe not.
16 THE COURT: I think you're getting a visual clue from
17 the court reporter.
18 MR. DUGAN: Yes, I will take account of that as I
19 proceed.
20 But as we look at --
21 THE COURT: Finish explaining your answer, because
22 I -- so it runs for 90 days?
23 MR. DUGAN: Yes, sir.
24 THE COURT: And then it has the ability to be
25 renewed, and it can be renewed forever. I mean, there's lots

1 of law out there that says exactly that circumstance is an
2 indefinite suspension, and it's not going to be viewed as
3 terminating in 90 days.
4 MR. DUGAN: It might be helpful for the court to
5 think about what the 90-day period represents. Right?
6 So this joint memorandum came about at the conclusion of
7 the 120-day period. Right? The 120-day period that didn't
8 start when it was originally intended to start but eventually
9 took effect, and during that 120-day period, we had internal
10 review -- right? -- the joint memorandum and the addendum to
11 the joint memorandum spell out the review that took place
12 during that period, the fact that there were these working
13 groups that were convened to assess the security risks that
14 different groups of refugee may or may not pose.
15 After that period, we have two documents in October.
16 Right? We had the joint memorandum. We also had the refugee
17 order.
18 THE COURT: I'm going to ask you -- we need to all
19 standardize our terminology. You just called it the "joint
20 memorandum." Is that the same as the agency memorandum?
21 MR. DUGAN: Yes, Your Honor. I will call it the
22 "agency memorandum."
23 THE COURT: Call it that.
24 MR. DUGAN: And "refugee order," of course, by that I
25 refer to President -- yes, okay.

1 So generally speaking at this point -- right? -- the U.S.
2 Refugee Admissions program has resumed, and that's what the
3 agency decision-makers recommended, and that's what the
4 President decided, subject to narrow exceptions that were
5 identified for further review during that 120-day period.
6 So this is kind of a roundabout answer to Your Honor's
7 question, but we're not in a permanent cycle of 90 days, 120
8 days. We have a deliberate sort of case- and
9 country-specific review process that's going on now that
10 flows out of that 120-day review period.
11 I don't know what will happen at the conclusion of the 90
12 days, but I don't think it would be appropriate for the court
13 to enjoin as unlawful, unconstitutional, or in violation of
14 APA standards or what have you, a policy based on what the
15 government might do. We don't know. As I stand here today,
16 I don't know. I haven't been included in those
17 conversations. I'm very low-ranking.
18 The court can decide later, when it see what the
19 government does. And I'm sure if plaintiffs are dissatisfied
20 with whatever actions the government takes, they have very
21 able counsel, I have no doubt they will bring those concerns
22 to the court's decisions.
23 But it seems it would be imprudent, especially this late
24 in the process, we have a month left on the SAO provision,
25 for the court to enjoin it when we don't know if these

1 plaintiffs will be injured. I mean, perhaps the government
2 will conclude at the end of the 90 days that refugee
3 admissions may resume in March, or perhaps the government
4 will decide that further security measures are needed for
5 certain countries. We just don't know.
6 THE COURT: Counsel, it seems to me you're missing
7 two words there: "Irreparable harm." They put in a
8 compelling case that the separation of these people from
9 their families is irreparable harm, and your position on that
10 is kind of, well, tough luck because it may change in the
11 future. That's not the preliminary injunction standard.
12 MR. DUGAN: I -- I agree that separation from one's
13 loved ones can constitute irreparable harm. I don't dispute
14 that. And I think that some of these plaintiffs have very
15 compelling cases. I've read their declarations, and I
16 understand.
17 But for this court to enjoin this policy, this court would
18 have to conclude, on a plaintiff-by-plaintiff basis --
19 right? -- we don't have a class at this point. No class has
20 been certified -- on a plaintiff-by-plaintiff basis that the
21 joint memorandum is causing that harm; that these plaintiffs
22 are not separated from their families because of the plethora
23 of circumstances that can cause refugee admissions to be
24 delayed, complicated, unexpect- --
25 And so when you look at the declarations, what you see --

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 18th day of January 2018.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter