No. 18-35015

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, ET AL.,

JEWISH FAMILY SERVICE OF SEATTLE, ET AL.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.,

Defendants-Appellants.

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

DOE PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

In this most recent installment of the Trump Administration's attempts to ban Muslims from the United States, Defendants banned refugees from nine Muslim-majority countries and indefinitely suspended the processing and admission of all "follow-to-join" ("FTJ") refugees—the spouses and children of already admitted refugees. The district court held that Plaintiffs were likely to succeed on their claims that the FTJ suspension violated both the Immigration and Nationality Act ("INA"), which entitles refugees in the United States to reunite with their families, and the Administrative Procedure Act ("APA"), which requires notice-and-comment rulemaking for substantive changes to the FTJ program.[1] The district court issued a nationwide preliminary injunction on December 23, 2017, ordering Defendants to immediately resume FTJ processing and admissions. On January 9, 2018, the district court clarified that Defendants were required to take actions necessary to undo their implementation of the suspension. Defendants'

[1] This appeal arises from the district court's order in two consolidated cases: *Doe v. Trump*, No. 17-0178JLR (W.D. Wash.) (challenging the indefinite suspension of FTJ processing and admissions) and *Jewish Family Services v. Trump*, No. 17-1707JLR (W.D. Wash.) (challenging 90-day suspension of refugees from countries on the Security Advisory Opinion ("SAO") list). The arguments made in the *JFS* Plaintiffs' Opposition to Defendants' Motion ("*JFS* Opposition"), Appeal Dkt. 25-1, also apply to *Doe* Plaintiffs.

submissions before both this Court and the district court serve only to underscore that the need for the injunction is ongoing.

Defendants now seek to evade judicial review, arguing that Plaintiffs' claims are moot[2] and requesting vacatur of the district court's judgment. Curiously, Defendants ask this Court to dismiss *their own* appeal on mootness grounds, even though they presumably knew when they filed the appeal that they intended to resume processing FTJ and SAO applications within weeks—in other words, that they intended to voluntarily cease their conduct in an attempt to moot the case.[3] This Court should reject Defendants' maneuvering to deprive the district court of its proper jurisdiction. On the current record, Plaintiffs' claims are not moot, and this case should be remanded to the district court for it to determine whether the preliminary injunction is still necessary.

Defendants cannot dispose of factual disputes with pro forma compliance notices filed in the district court that raise more questions than they answer. Defendants have not rescinded the administrative agency memorandum ("Memo")

[2] The *Doe* case also asserts claims related to the indefinite ban on entry of non-immigrants from Muslim-majority countries, which are not a subject of this appeal.

[3] Defendants indicated on December 11, 2017, their intention to resume processing FTJ refugee applications on February 1, 2018, and their awareness that the SAO review period would expire on January 22, 2018. Defs.' Suppl. Br. Concerning Supreme Court Stay Orders, DE-78 ("DE-" refers to the district court docket entries).

that indefinitely suspended FTJ admissions, provided any evidence that the Memo is no longer in effect, or guaranteed that they will not invoke the Memo (or some subsequent version of it) in the future. Nor have they acknowledged their continuing obligation under the district court's injunction to ensure that those injured by their actions are made whole—an obligation made even more critical by the Administration's dramatic slowdown of refugee admissions. Defendants' assertion that they will voluntarily disregard the directives in the Memo is belied by their statement that they will continue periodic reviews of the refugee program—presumably to reserve the option to suspend the program again based on those reviews, in accordance with the terms of the FTJ suspension in the Memo, which do not expire and have not been revoked.

Should the Court find it appropriate to rule on mootness on the present record, two exceptions to mootness doctrine apply here: (1) any asserted mootness is the result of voluntary cessation, and (2) Defendants' indefinite suspension of FTJ processing is capable of repetition but evading review. Moreover, Defendants are not entitled to the extraordinary remedy of vacatur. Defendants intentionally sought to moot the case and evade judicial review, and the public maintains a strong interest in the judicial determination of the legality of Defendants' conduct.

II. FACTUAL BACKGROUND[4]

The Memo, Appeal Dkt. 24-3, is the latest in a series of anti-Muslim anti-refugee actions. On January 27, 2017, one week after taking office, President Trump signed Executive Order 13769 ("EO-1"). *See* Prelim. Inj. Order ("PIO") 5, Appeal Dkt. 24-2. EO-1 suspended entry into the United States for 90 days for nationals of seven Muslim-majority countries, suspended the U.S. Refugee Admissions Program (USRAP) for 120 days, and indefinitely barred Syrian refugees. *Id.*

Following court orders striking down EO-1, *see, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), Defendants rescinded EO-1, replacing it with Executive Order 13780 ("EO-2"). PIO 6. EO-2, described by Defendant Trump as a "watered-down version" of EO-1, Third Am. Compl. ("TAC") ¶¶ 5, 176, 291, DE-42, suspended for another 90 days the entry of nationals of six Muslim-majority countries and again suspended all refugee admissions for 120 days. PIO 6. When EO-2's 90-day travel ban expired on September 24, 2017, Defendant Trump issued a Proclamation ("EO-3") that, among other things, imposes an indefinite ban on nationals of six Muslim-majority countries. *Id.* at 7-8.

[4] *Doe* Plaintiffs adopts the Procedural History set forth in *JFS* Opposition and will not repeat it here.

On October 24, 2017, when EO-2's 120-day refugee ban expired, Defendant Trump issued Executive Order 13815, "Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities" ("EO-4"). Although EO-4 purported to resume refugee admissions, it was accompanied by the Memo, which imposed yet another 90-day ban on refugees from eleven SAO countries (nine of them Muslim-majority), and indefinitely suspended the processing and admission of all FTJ refugees. The Memo provided for lifting of the FTJ suspension only after implementation of "additional security measures," without any temporal limitation. Memo 3. Defendants concede that "[t]he [Memo] indefinitely suspended entry into the United States of FTJ refugees." Defs.' Mot. Dismiss Appeal ("Mot.") 4, Appeal Dkt. 24-1.

The Memo is the most recent manifestation of Defendants' animus against Muslims and refugees and their desire to help Christians. *See, e.g.*, TAC ¶¶ 268 (describing Defendant Trump's speculation that Syrian refugees could be a terrorist army in disguise), 177 (documenting Defendant Trump's intent to "'help[] the Christians big league'") (citation omitted). Defendant Trump also claimed that Syrian refugees "'[are] all men, and they're all strong-looking guys.'" *Id.* ¶ 268 (citation omitted). But 72% of the Syrian refugees admitted since 2011 are women and children under age fourteen, *id.*, and almost 80% of dependent refugee arrivals

in FY 2014 and 2015 were children under age sixteen or female spouses. Nowlin Decl. ¶ 5, DE-57.

Defendants' actions have had real-world impact. During the first quarter of FY 2017, 48% of refugees admitted to the United States were Muslim—compared to only 13% so far in FY 2018.[5] The overall number of admitted refugees in these quarters has also plummeted by 79%, from 25,671 refugees to 5,323.[6] The International Rescue Committee anticipates admissions of less than half of the Administration's 45,000 refugee cap.[7]

Plaintiff Joseph Doe was admitted to the United States in 2014 as a refugee, and he filed an I-730 petition to have his wife and young children join him. The INA guarantees principal refugees the right to bring their immediate families to the United States following completion of security and medical clearances. Doe's family was at the end of the comprehensive screening process when Defendants' Muslim bans were first issued, prolonging his separation from his family. When

[5] Press Release, *IRC: Trump Administration on Track to Miss Own Target for Refugee Admissions*, Int'l Rescue Committee (Jan. 25, 2018), https://www.rescue.org/press-release/irc-trump-administration-track-miss-own-target-refugee-admissions.

[6] Refugee Processing Center, *PRM Admissions Graph January 31, 2018*, http://www.wrapsnet.org/s/Graph-Refugee-Admissions-FY2018_01_31.xls.

[7] IRC Press Release, *supra* note 5.

the Memo imposed an indefinite suspension on his right to reunify with his family, he filed a motion for a preliminary injunction.[8] DE-45.

The district court granted the preliminary injunction on December 23, 2017, enjoining Defendants from suspending the processing or admission of FTJ refugees or refugees from SAO countries with a bona fide relationship to a person or entity in the United States. PIO 64-65. Defendants filed a notice of compliance on January 19, 2018, DE-114, and filed an additional notice on January 31, 2018. Second Notice, DE-119 (attached). In the Second Notice, Defendants asserted that "the implementation of the additional procedures for following-to-join refugees set forth in the Joint Memorandum is expected to be completed on or about February 1, 2018[.]" *Id.* at 2. This notice was not accompanied by any declarations or other evidence, but cited to a press release Defendants issued on January 29 and updated on January 31, 2018. *Id.* at 1. In that press release, Defendants "announced additional security enhancements and recommendations to strengthen the integrity of the U.S. Refugee Admissions Program."[9] These enhancements include

[8] *JFS* Plaintiffs Afkab Mohamed Hussein and John Doe 7 joined in the *Doe* Plaintiffs' preliminary injunction motion. JFS Pls.' Notice, *JFS v. Trump*, No. 17-1707JLR, DE-70.

[9] Press Release, U.S. 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.

"[a]dditional screening for certain nationals," "[a]dministering the USRAP in a more risk-based manner," and "[a] periodic review and update of the refugee high-risk country list and selection criteria."[10]

III. ARGUMENT

A. The Court Should Remand for the District Court to Address Mootness in the First Instance.

A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). Here, the preliminary injunction not only enjoins Defendants from enforcing the Memo but also requires them to take steps to undo the harms the Memo has already caused. Stay Order 6, DE-106 (attached). Because FTJ applications were suspended while other refugee applications proceeded, FTJ refugees have been set back respectively—and any delays in the process are compounded because medical clearances expire and are not easy to obtain. *See* PIO 12, Second Suppl. Doe Decl. ¶ 2, DE-91 (describing the need to travel over 500 miles to medical examination site). These concrete injuries are exacerbated by Defendants' dramatic slowdown in overall refugee application processing and, without proactive steps to undo the harm caused by the FTJ suspension, some family reunifications will be delayed by many more months, if not years. On the

[10] *Id.*

present record, it is unclear whether Defendants have actually implemented all necessary steps to "restore the status quo prior to the issuance of the Memo with respect to the processing of applications from FTJ refugees"—and, therefore, whether there is an ongoing need for the injunction. Stay Order 6.

Whether Defendants have in fact complied with the injunction is for the district court to determine. *See United States v. Brandau*, 578 F.3d 1064, 1069-70 (9th Cir. 2009) (denying motion to dismiss and remanding to resolve factual disputes as to the practical effect of new policies and whether challenged policies remained in play). *See also JFS* Opposition, Argument § I. Several factual disputes remain, and Defendants cannot merely declare otherwise.

First, Defendants have not actually rescinded the Memo—whose terms governing the FTJ suspension do not expire, precisely because (as Defendants themselves note) "the [Memo] indefinitely suspended processing of FTJ refugee applications." Mot. 4. Second, Defendants have offered no concrete evidence whatsoever that they have resumed processing FTJ applications or that the indefinite suspension of FTJ refugee admissions has actually been lifted: not a single official statement, internal memorandum, or guidance provided to posts. Third, Defendants' Second Notice—which was filed without any supporting declaration or other evidence—states only that "the implementation of the additional procedures for following-to-join refugees set forth in the Joint

Memorandum is *expected to be completed on or about* February 1, 2018." Second Notice 2 (emphasis added). The notice contains no other information, even though it was filed only one day before the expected completion date of the "additional procedures." A court "cannot rely on [Defendants'] statement[s] alone" in determining mootness. *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982).

This factual backdrop is wholly insufficient to demonstrate mootness. *See, e.g.*, *TRW, Inc. v. FTC*, 647 F.2d 942, 953 (9th Cir. 1981) ("promises to refrain from future violations, no matter how well meant, are not sufficient to establish mootness"); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot[.]"). The cases to which Defendants cite only underscore that they have not met the bar. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (plaintiff challenging state employee speech restriction left her public-sector job); *Univ. of Tex. v. Camenisch*, 451 U.S. 390 (1981) (university obeyed injunction to provide a student with an interpreter and the student then graduated).

The uncertainty in the record calls for remand to the district court for limited discovery regarding the practical effects of Defendants' recent actions, including: whether Defendants have rescinded the Memo with regard to FTJ refugees,

directed FTJ processing and admissions to continue even without the injunction, and complied in full with the injunction, which requires them to undo steps they took to prejudice Plaintiffs.

B. This Case Falls Within Two Exceptions to the Mootness Doctrine.

Even if Plaintiffs' claims were moot, two well-established exceptions to mootness doctrine apply: (1) voluntary cessation and (2) capable of repetition yet evading review. Moreover, the existence of "a public interest in having the legality of the practices settled . . . militates *against* a mootness conclusion." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985) (alteration in original) (quoting *W.T. Grant*, 345 U.S. at 632).

1. Defendants cannot evade review by voluntary cessation of unlawful conduct.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways,'" *id.* at 289 n.10 (alteration in original) (citation omitted)—meaning that "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Therefore, "a defendant claiming that its voluntary compliance moots a case bears

the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Defendants attempt to evade the voluntary-cessation exception—and judicial review—by asserting that the FTJ provisions "became moot by their own terms." Mot. 11. But the Memo did not set any time limits on the FTJ provisions, and Defendants' own briefing acknowledges that "the [Memo] indefinitely suspended processing of FTJ refugee applications." *Id.* at 4. If the FTJ suspension has been lifted, it is a result of Defendants' voluntary action. Accordingly, Defendants bear a "formidable burden" to show the allegedly wrongful behavior could not reasonably be expected to recur. Defendants have not met that burden.

a. Defendants' purported policy change is insufficient to moot the case.

For Defendants to meet their formidable burden through a policy change, they must show that the change is "entrenched" and "permanent." *See Bell v. City of Boise*, 709 F.3d 890, 900 (9th Cir. 2013). In *Bell*, this Court distinguished prior precedent in which a policy change was found to meet this standard "based on the broad scope and unequivocal tone of the new policy." *Id.* (discussing *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000)). The new policy in *White* had been renewed annually for over five years and addressed all of plaintiffs' objections. *Id.* Similarly, in *America Cargo Transport, Inc. v. United States*, 625 F.3d 1176

(2010) (cited Mot. 13), the government adopted the plaintiff's position. *Id.* at 1179. Defendants here have done none of these things. They have not officially withdrawn the Memo or announced a policy change. Nothing in Defendants' actions suggests an "entrenched" and "permanent" policy change.

Defendants rely on cases involving a statutory change, *see* Mot. 14-15 (citing *Burke v. Barnes*, 479 U.S. 361 (1987), and *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011)), but these cases are inapplicable. "[W]hile a statutory change 'is usually enough to render a case moot,' an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (quoting *Bell*, 709 F.3d at 898-900). In *Bell*, this Court explained that an internal policy of a local government agency "is not a formal written enactment of a legislative body and thus was not subject to any procedures that would typically accompany the enactment of a law." 709 F.3d at 900. Thus, even assuming a lack of intent to resume the challenged conduct, "the ease with which the [defendant] could do so counsels against a finding of mootness," in contrast to cases in which a statute (which went through an appropriate process, unlike the Memo here) was repealed or expired. *Id.*

b. Defendants' actions can reasonably be expected to recur.

Far from satisfying their formidable burden to demonstrate that their unlawful conduct will not recur, Defendants simply assert that "Plaintiffs are not likely to be subjected to another temporary suspension of FTJ processing to allow these new measures to be put in place, because the called-for measures were put in place as of February 1, 2018." Mot. 13. But a "recurrent violation" in this context is not limited to a memorandum calling for the exact same suspension and new measures. Instead, As the Supreme Court has explained, the mootness exception's "repetition" prong does not require "the possibility that the *selfsame* statute will be enacted" in identical form. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). "[I]f that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Id.* This Court has found sufficient repetition in, for example, "a substantially similar preference program… alleged to disadvantage [the plaintiffs] 'in the same fundamental way' as the previous program." *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (quoting *City of Jacksonville*, 508 U.S. at 662). Here, a "recurrent violation" is not limited to an exact repeat of provisions of the Memo.

Furthermore, when determining whether "there exists some cognizable danger of recurrent violation," a court should consider "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *W.T. Grant Co.*, 345 U.S. at 633. Each of these factors weighs against mootness. Defendants have no bona fides when it comes to refugee admissions considering their past actions and words; indeed, they continue to defend the legitimacy of the FTJ suspension. Moreover, they have explicitly reserved the right to conduct periodic reviews of refugee admission criteria, Mot. 13, presumably so that they may re-invoke the Memo's suspension should they see fit. Defendants' statement in briefing that their unlawful conduct has ceased is insufficient to satisfy their burden of demonstrating that the conduct will not recur, particularly since EO-1, EO-2, EO-3, and the Memo demonstrate Defendants' practice is to impose serial blanket bans against refugees any time they review vetting procedures, without evidence of the necessity or efficacy of such a ban. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952). Defendants have failed even to offer protestations of repentance and reform.

The situation here parallels that in *Olagues*, an appeal involving a United States Attorney's investigation of foreign-born, naturalized citizens requesting bilingual ballots, allegedly in violation of the Voting Rights Act. Although the investigation had ceased by the time of the appeal, this Court ruled that the exception to mootness applied. First, the defendant "at all times continued to argue vigorously that his actions were lawful." 770 F.2d at 795. Second, there was no showing that a similar investigation against the same groups would not recur, and the defendant was empowered to conduct such future investigations. Finally, other factors weighed against mootness, including the fear engendered by the investigation, the possibility of a chilling effect on the plaintiff organizations without a determination of the legality of the investigation, and the "significant public interest" in addressing the separation-of-powers questions raised. *Id.*

Here, Defendants (1) have continued to defend the lawfulness of their actions, (2) are empowered to issue additional executive orders and memoranda, and (3) have repeatedly sought to evade review. Further, there is significant public interest in the legality of the government's actions. Defendants cannot meet their formidable burden, and Plaintiffs' claims are not moot.

2. Defendants' suspension of follow-to-join procedures is capable of repetition yet evading review.

Defendants' actions also fall into the well-established exception to mootness for circumstances capable of repetition yet evading review, which "applies where

(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 subject to the same action again." *FEC v. Wisc. Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (citation omitted).

Although the FTJ suspension at issue was indefinite (as opposed to expiring on its own terms), Defendants' own pleadings demonstrate that they have structured the suspension and this litigation as to be capable of repetition but evading review. The suspension is indefinite on its face but implemented as a short-term suspension even more ill-defined than the term-limited suspensions Defendants favor elsewhere—giving Defendants even more flexibility to evade review. Defendants lifted the suspension in response to the district court's preliminary injunction and claim that the injunction is therefore moot before completion of judicial review. But because they did not revoke the mechanism by which the suspension was enacted, i.e., the Memo, they are free to repeat the suspension contemplated by the Memo at any time—and free again to lift the suspension upon being sued, and free again to argue mootness before judicial review can be completed.

That they are, in fact, likely to re-suspend FTJ admissions is evidenced not only by their multiple attempts to suspend refugees admissions over this past year but also the very press release to which they cite—which announces

"enhancements and security recommendations" regarding the refugee program that include "[a]dditional screening for certain nationals," "[a]dministering the USRAP in a more risk-based manner," and "[a] periodic review and update of the refugee high-risk country list and selection criteria."[11] Defendants have provided no assurance or indication that they would not again justify suspending FTJ refugee admissions on the basis of similar "reviews." *See also supra* §§ II, III.B.1.c.

C. Even If This Case Is Moot, Defendants Are Not Entitled to Vacatur.

Even if this Court were to find this appeal moot, it should not vacate the judgment below. Courts dispose of moot cases "in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (alteration in original) (citation omitted). Here, the mootness was entirely caused by Defendants' voluntary action, and Defendants are not entitled to vacatur. In any event, where mootness is caused by the appellant's own conduct, the "established procedure" in this circuit is to remand to the district court so it may balance the relevant equitable concerns and decide whether to vacate its judgment. *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012).

Defendants cite *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), for the proposition that, when a case has become moot, vacating the judgment

[11] *See supra* pp. 7-8.

below is the "established practice." Mot. 15. But as this Court has explained, "after *U.S. Bancorp*, automatic vacatur under *Munsingwear* can no longer be viewed as the 'established practice' whenever a case becomes moot on appeal, and [] the primary inquiry is whether the appellant caused the mootness by his own voluntary act." *Dilley v. Gunn*, 64 F.3d 1365, 1370 n.4 (9th Cir. 1995).

Defendants argue that because the FTJ suspension expired "by its own terms," rather than as a result of their actions, *Munsingwear* applies. Mot. 16. But the Memo's unlawful suspension of FTJ refugee processing was open-ended and indefinite, and only as litigation progressed did Defendants claim that they anticipated implementing certain security measures by February 1, 2018. "*Munsingwear* justified vacatur to protect a litigant who had the right to appeal but lost that opportunity due to happenstance," *Camreta v. Greene*, 563 U.S. 692, 712 n.10 (2011), i.e., "becom[ing] moot due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 82-83 (1987). *Camreta*, for example, involved "the happenstance of [a party] moving across country and becoming an adult," which deprived the petitioner of the right to appeal. 563 U.S. at 713. Far from "happenstance," Defendants alone controlled the circumstances they now argue render this appeal moot—from the structure of the provisions in the Memo, to the timing of and manner in which they pursued their appeal, to the actions they took in response to the injunction.

"[T]he touchstone of vacatur is equity." *Dilley*, 64 F.3d at 1370. Rather than a foregone conclusion, vacatur is in fact an "extraordinary remedy," and the party seeking vacatur has the burden to "demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement" to vacatur. *U.S. Bancorp*, 513 U.S. at 26. Defendants cannot meet this burden. When, as here, a case has been mooted by the appellant's own actions, the Supreme Court has directed that appellate courts should vacate the district court order only in "exceptional circumstances." *Masto*, 670 F.3d at 1066 (quoting *U.S. Bancorp*, 513 U.S. at 29). Contrary to Defendants' argument that *Munsingwear* dictates vacatur any time an appeal is moot, "the equitable principles weighing in favor of vacatur in [*Munsingwear*] cut the other direction where the appellant by his own act prevents appellate review of the adverse judgment." *Id.* Indeed, "granting vacatur to a party who both causes mootness and pursues dismissal based on mootness serves only the interests of that party" and "encourages parties with unfavorable judgments to file an appeal, comply with the judgment, and then request the judgment be vacated." *Amoco Oil Co. v. EPA*, 231 F.3d 694, 699 (10th Cir. 2000).

In addition, "[a]s always when federal courts contemplate equitable relief," this Court's decision "must also take account of the public interest." *U.S. Bancorp*, 513 U.S. at 25-26. As the Supreme Court explained, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are

not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* (citation omitted). Indeed, public policy dictates that the party seeking relief from an adverse decision "should not be allowed to 'buy an eraser for the public record.'" *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998) (citation omitted); *see also Ayotte v. Am. Econ. Ins. Co.*, 578 F. App'x 657, 658-59 (9th Cir. 2014) (same). Particularly in the context of a third consecutive refugee ban, allowing Defendants to erase the decision below based on purported mootness would not serve the public interest. The district court's opinion provides useful guidance to the agencies and the public about the rights of resettled refugees and the APA's procedural requirements in this context.

Vacatur here would directly contradict the principles of justice and equity that underlie the remedy, and should be denied.

D. The Supreme Court's Prior Orders to Vacate Are of No Moment Here.

Finally, Defendants' reliance on the Supreme Court's order vacating this Court's decision in *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (Mem.), is unavailing for three reasons.

First, that order involved a challenge to EO-2, which provided for suspension of refugee admissions "for 120 days after the effective date of this order," 82 Fed. Reg. 13,209, 13,215, while here, the Memo's suspension of FTJ

processing is open-ended, resulting in what Defendants themselves concede was an *indefinite* suspension. Mot. 4 ("the [Memo] indefinitely suspended processing of FTJ refugee applications"). The 120-day period expired on its own terms on October 24, 2017, making the present appeal distinguishable with respect to the "principal condition" for evaluating the appropriateness of vacatur—voluntary action by the party seeking that relief.

Second, that order also involved an appeal from a precedential Ninth Circuit opinion; here, the district court's preliminary injunction is not binding on other courts. The concern about an unreviewable circuit court judgment "spawning any legal consequences" does not extend to a district court decision. *Munsingwear*, 340 U.S. at 41.

Third, unlike the prior cases, the district court in this case not only enjoined Defendants from enforcing their unlawful refugee bans but also affirmatively ordered Defendants to "take actions that are necessary to undo those portions of the [Memo] that are enjoined." Stay Order 6. No such proactive actions were ordered in the cases before the Supreme Court. *See supra* § III.A. These additional facts are critical and make vacatur inappropriate here.

IV. CONCLUSION

The Court should remand this matter for limited discovery on whether Plaintiffs' claims are, in fact, moot. Even if Defendants' statements were sufficient

to moot Plaintiffs' claims, exceptions to mootness doctrine apply, because any asserted mootness is the result of voluntary cessation, and Defendants have not satisfied their formidable burden to show that there will be no recurrent violation. Defendants' actions are particularly capable of repetition in light of their stated intention to conduct future periodic reviews, coupled with their repeated use of "temporary" suspensions and bans accompanying "reviews" of USRAP. Finally, even if this Court finds Plaintiffs' claims to be moot, Defendants have not met their heavy burden to justify the extraordinary remedy of vacatur.

DATED this 21st day of February, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(3)(2)(A). This motion contains 5113 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/Tana Lin
Tana Lin

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2018, I electronically filed the foregoing Response with the Clerk of the Court of 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/Tana Lin
Tana Lin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al., Plaintiffs, v. DONALD TRUMP, et al., Defendants.	CASE NO. C17-0178JLR ORDER DENYING MOTION FOR STAY PENDING APPEAL (RELATING TO BOTH CASES)
JEWISH FAMILY SERVICES, et al., Plaintiffs, v. DONALD TRUMP, et al., Defendants.	CASE NO. C17-1707JLR

I. INTRODUCTION

Before the court is Defendants Donald Trump, United States Department of State, Rex Tillerson, United States Department of Homeland Security ("DHS"), United States Customs and Border Protection, Kevin McAleenan, Michele James, Office of the

Director of National Intelligence, Elaine Duke, and Daniel Coats's (collectively, "Defendants" or "the Government") emergency motion for a stay pending the appeal of the court's December 23, 2017, order granting Plaintiffs' motions for preliminary injunctions in the consolidated cases. (MFS (Dkt. # 95); *see also* PI Order (Dkt. # 92).) The court directed Plaintiffs in the two consolidated cases[1] to file separate responses to Defendants' motion. (12/30/17 Order (Dkt. # 97).) The court has considered the motion, Plaintiffs' responses (JFS Resp. (Dkt. # 100); Doe Resp. (Dkt. # 101)), the relevant portions of the record, and the applicable law. Being fully advised, the court DENIES the motion.

II. BACKGROUND

On December 23, 2017, the court issued a preliminary injunction in the consolidated cases against certain aspects of Executive Order No. 13,815 ("EO-4"), 82 Fed. Reg. 50,055 (Oct. 27, 2017), and its accompanying memorandum to President Trump, from Secretary of State Tillerson, Acting Secretary of DHS Duke, and Director of National Intelligence ("DNI") Coats. (*See generally* PI Order; *see also* Lin Decl. (Dkt. # 46) ¶ 3, Ex. B (attaching a copy of the memorandum) (hereinafter, "Agency Memo").)

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[1] Plaintiffs in *Doe, et al. v. Trump, et al.*, No. C17-0178JLR (W.D. Wash.), include John Doe, Joseph Doe, James Doe, Jack Doe, Jason Doe, Jeffrey Doe, Episcopal Diocese of Olympia, and Council on American Islamic Relations–Washington (collectively, "Doe Plaintiffs"). Plaintiffs in *Jewish Family Services, et al. v. Trump, et al.*, No. C17-1707JLR (W.D. Wash.), include Afkab Mohamed Hussein, Allen Vaught, John Does 1-3, Jane Does 4-6, John Doe 7, Jewish Family Service of Seattle ("JFS-S"), and Jewish Family Services of Silicon Valley ("JFS-SV") (collectively, "JFS Plaintiffs"). On November 29, 2017, the court consolidated these two cases under Case No. C17-0178JLR. (Min. Order (Dkt. #61).) Notations of docket entries in this order that are preceded by "17-1707" are docket entries in Case No. C17-1707JLR. Otherwise, docket entry notations refer to entries in Case No. C17-0178JLR.

The preliminary injunction enjoins Defendants[2] "from enforcing those provisions of the Agency Memo that suspend the processing of [following-to-join ("FTJ")] refugee applications or suspend the admission of FTJ refugees into the United States" and "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 [Security Advisory Opinion ("SAO") list] countries." (PI Order at 64-65.)

On December 27, 2017, Defendants filed a motion asking the court to reconsider certain aspects of the preliminary injunction related to SAO countries. (MTR (Dkt. # 93).) Defendants' motion asked the court to reconsider its ruling that a bona fide relationship with an American organization includes refugee applicants covered by a formal assurance from a refugee resettlement agency. (*See generally id.*; *see also* PI Order at 63 n.31.) At the request of the court, Plaintiffs filed a consolidated response. (MTR Resp. (Dkt. # 98); 12/29/17 Order (Dkt. # 94).) On January 5, 2018, the court denied Defendants' motion for reconsideration. (1/5/18 Order (Dkt. # 103).)

Meanwhile, on December 29, 2017, Defendants filed a second motion, which they denominated as an "emergency motion" for a stay of the preliminary injunction pending an appeal. (*See* MFS.) The court again directed Plaintiffs to file a response to Defendants' motion, but this time allowed Doe Plaintiffs and JFS Plaintiffs to file separately. (*See* 12/30/17 Order (Dkt. # 97).) Doe Plaintiffs and JFS Plaintiffs filed their

[2] The preliminary injunction applies to all Defendants except for President Trump. (*See* PI Order at 64 n.32.)

responses on January 4, 2018. (*See* JFS Resp.; Doe Resp.) On the same day, Defendants filed a notice of appeal of the court's preliminary injunction. (Notice of Appeal (Dkt. # 99).) Finally, on January 5, 2018, Defendants filed a "notice," which asked the court to stay that portion of the preliminary injunction that Defendants unsuccessfully challenged in their motion for reconsideration. (Notice re: MFS (Dkt. # 104).) The court now considers Defendants' emergency motion for a stay.

III. ANALYSIS

In analyzing Defendants' motion, the court first considers its own jurisdiction to decide the motion. Next, the court considers certain statements in Defendants' motion, which impliedly modify the court's preliminary injunction unilaterally. Finally, the court considers the merits of Defendants' motion to stay.

A. Jurisdiction

Because Defendants filed a notice of appeal (*see* Notice of Appeal), the court first considers its own jurisdiction to decide Defendants' emergency motion for a stay pending appeal. "While a preliminary injunction is pending on appeal, a district court lacks jurisdiction to modify the injunction in such a manner as to 'finally adjudicate substantial rights directly involved in the appeal.'" *A & M Records v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (quoting *Newton v. Consolidated Gas Co.*, 285 U.S. 165, 177 (1992)). Nevertheless, Federal Rule of Civil Procedure 62(c) allows the court to issue further orders with respect to an injunction, even during an appeal, in order to preserve the status quo or ensure compliance with its earlier orders. *See Nat. Res. Def. Council, Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). Indeed, "[t]he plain

language of Rule 62(c) allows the district court to 'suspend, modify, restore, or grant an injunction' during the pendency of [an] interlocutory appeal, and such action can inure to the benefit of plaintiffs or defendants." *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (quoting Fed. R. Civ. P. 62(c)); *see also* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for the following relief: (A) a stay of the . . . order of a district court pending appeal; . . . or (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending."). Based on these authorities, the court concludes that it has jurisdiction to consider Defendants' emergency motion to stay the preliminary injunction despite the pending appeal. The court's exercise of jurisdiction, however, may "not 'materially alter the status of the case on appeal.'" *Mayweathers*, 258 F.3d at 935 (quoting *Nat. Res. Def. Council, Inc.*, 242 F.3d at 1166).

B. Defendants' Attempts to Unilaterally Modify the Preliminary Injunction

Defendants declare in their motion they "do not understand the preliminary injunction to require affirmative action to undo any of the steps that were taken to implement the Joint Memorandum prior to December 23." (MFS at 4; *see also id.* at 6 ("Defendants do not understand the preliminary injunction to require them to take affirmative steps to undo decisions that were made consistent with the [Agency Memo] prior to the preliminary injunction's issuance.").) To the extent that this declaration is an attempt to unilaterally modify the preliminary injunction, the court rejects it.[3]

[3] At this point, the court declines to consider the possibility that Defendants' declaration is an improper attempt to excuse noncompliance with the court's order. The court simply notes

The court's preliminary injunction requires Defendants to take actions that are necessary to undo those portions of the Agency Memo that are enjoined. For example, if Defendants sent guidance suspending the admission of FTJ refugees or refugees from SAO countries, they must rescind that guidance. If they issued instructions to de-prioritize the processing of applications from SAO countries, they must reverse those instructions. Defendants are required to restore the status quo prior to the issuance of the Agency Memo with respect to the processing of applications from FTJ refugees and refugees from SAO countries. Contrary to Defendants' assertions (*see* MFS at 5), this requirement does not transform the preliminary injunction into a mandatory one, *see Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060-61 (9th Cir. 2014) (holding that an injunction that prohibits the enforcement of a new law or policy is prohibitory, not mandatory, even where the policy has already taken effect prior to filing the lawsuit).

In any event, Defendants' arguments that they should be excused from taking any "affirmative actions" to comply with the preliminary injunction are conclusory and unsupported by any evidence. (*See, e.g.*, MFS at 5 (asserting without evidence that there "is significant doubt about whether it would even be possible for Defendants to undo some of their prior decisions").) Indeed, the only concrete example that Defendants provide to support their argument relates to certain "circuit rides" that Defendants scheduled for the second quarter of fiscal year 2018 pursuant to the Agency Memo's directive to divert resources away from processing SAO refugee applications. (*See id.* at

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that, in the absence of a stay, Defendants' failure to comply with the preliminary injunction could result in a possible finding of contempt and the possible imposition of sanctions.

4-5.) Defendants posit that they "might" have to cancel the presently scheduled "circuit rides" and refugee applicant interviews if they are required to comply with the preliminary injunction. (*See id.* at 4-5 (asserting this possibility without evidentiary support).) First, contrary to Defendants' assertions, nothing in the preliminary injunction requires Defendants to cancel any already-scheduled circuit rides or refugee interviews. Complying with the preliminary injunction, however, does require Defendants to restore any circuit rides that they would have scheduled absent the Agency Memo. Second, Defendants have submitted no evidence that such interviews could not be restored without cancelling previously scheduled interviews. (*See* MFS; *see generally* Dkt.) Indeed, the time to submit such evidence, to the extent it exists, would have been when the court was considering Plaintiffs' motions for preliminary injunction. Thus, the court rejects Defendants' apparent attempts to unilaterally modify the preliminary injunction and again orders Defendants to comply with the preliminary injunction as written.

C. Motion to Stay

In the Ninth Circuit, "[t]he standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Granting a stay is within the court's discretion, and the party seeking the stay bears the burden of demonstrating "that the circumstances justify the exercise of that discretion." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (quoting *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)). The court's discretion is guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (internal quotation marks omitted).

1. Defendants Fail to Make a Strong Showing that They Are Likely to Succeed on the Merits

Defendants fail to make the necessary "strong showing" that they are likely to succeed on the merits. *See id.* Defendants offer no new arguments or analysis concerning their likelihood of success on the merits. (*See* MFS at 10-12.) Instead, Defendants simply rehash arguments this court has already rejected. (*See id.*) The court has previously explained why (1) the suspension of the FTJ refugee program is inconsistent with 8 U.S.C. § 1157(c)(2)(A) (PI Order at 48-51), (2) the suspension of refugees from SAO countries is inconsistent with the Refugee Act of 1980 (*id.* at 51-56), and (3) promulgation of the Agency Memo required notice and comment rulemaking under the Administrative Procedures Act ("APA") (*id.* at 39-46).[4] Nothing in Defendants' motion for a stay causes the court to reevaluate those rulings.

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[4] Defendants assert that the court's ruling that Plaintiffs are likely to succeed on their APA rulemaking claim would "threaten agencies' abilities to take important actions . . . on a timely basis" or to "quickly and continually revise screening procedures" during national emergencies. (*See* MFS at 12.) However, the court's ruling does not throw open the door to rulemaking in every instance. For example, the APA contains a "good cause" exception to rulemaking, *see* 5 U.S.C. § 553(b)(B), which Defendants chose not to invoke here.

2. Defendants Fail to Show Irreparable Harm Absent a Stay or that the Public Interest Favors a Stay

Defendants fail to show that they will be irreparably injured absent a stay or that the public interest favors a stay.[5] First, Defendants assert that "[e]ven a single State 'suffers a form of irreparable injury' '[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." (MFS at 3 (alterations in original) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012)).) Here, however, it is Defendants who—based on the Agency Memo—seek to override statutes enacted by Congress. As the court explained in its preliminary injunction, the enjoined Agency Memo provisions concerning FTJ refugees run roughshod over the nondiscriminatory family reunification provision of 8 U.S.C. § 1157(c)(2)(A). (PI Order at 48-51.) In addition, the Agency Memo's SAO provisions (1) seek to evade the "permanent and systemic procedure" for refugee admission and resettlement that Congress established in the Refugee Act of 1980, (2) rework the Act's definition of "refugee" under 8 U.S.C. 1101(a)(42), and (3) impermissibly alter the admissibility standards set by Congress in 8 U.S.C. § 1182(a). (*Id.* at 51-56.) Where the Government's actions thwart Congressional intent and undermine Congressionally-enacted statutes, the public interest is best served by curtailing those actions. *See Hawaii v. Trump*, --- F.3d ----, 2017 WL 6554184, at *23 (9th Cir. 2017) ("*Hawaii III*") ("It is axiomatic that the President must exercise his

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[5] As the court noted when ruling on Plaintiffs' preliminary injunction motions, when the Government is a party, analysis of the public interest element tends to overlap with other elements central to the court's analysis. (*See* PI Order at 59.) Accordingly, although the public interest and irreparable harm to Defendants in the absence of a stay are separate factors, the court considers them together here.

executive powers lawfully. When there are serious concerns that the President has not done so, the public interest is best served by 'curtailing unlawful executive action.'") (quoting *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided court*, --- U.S. ---, 136 S. Ct. 2271 (2016)).

Further, although the Government has a "compelling" interest in national security, *see Haig v. Agee*, 453 U.S. 280, 307 (1981),[6] Defendants cannot simply rely on unspecified security concerns, *see Ziglar v. Abbasi*, --- U.S. ---, 137 S. Ct. 1843, 1862 (2017) (explaining that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins'").[7] Here, although the Agency Memo states that the Secretaries who authored it continue to have indeterminate, general "concerns" regarding the admission of nationals, and stateless persons who last habitually resided in, SAO list countries (Agency Memo (Dkt. # 46-2) at 2), Defendants offer no evidence in support of their assertion that the preliminary injunction poses national security harms (*see generally* Dkt.). Indeed, there is no

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[6] *See also Hawaii v. Trump*, 859 F.3d 741, 784 (9th Cir.), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, --- U.S. ---, 137 S. Ct. 2080 (2017), *and cert. granted, judgment vacated on other grounds as moot*, --- U.S. ---, 138 S. Ct. 377 (2017), *and vacated on other grounds as moot*, 874 F.3d 1112 (9th Cir. 2017) ("*Hawaii I*") ("National security is undoubtedly a paramount public interest.").

[7] *See also Hawaii III*, 2017 WL 6554184, at *22 (holding that in the absence of "sufficient findings that the 'entry of certain classes of aliens would be detrimental to the national interest,'" national security interests did not outweigh harm to plaintiffs); *Washington*, 847 F.3d at 1168 (similarly holding that the Government's general interest in combatting terrorism, without more, was insufficient to outweigh likely harm to the plaintiffs).

evidence in the record that either SAO or FTJ refugees pose a security threat.[8] Countering Defendants' general and unspecified concerns, Plaintiffs offer detailed testimony from numerous former national security officials concretely describing how the Agency Memo will harm our national security and foreign policy interests. (*See* Joint Decl. Former Nat'l Sec. Officers.) Based on the record before it, the court cannot conclude that Defendants have met their burden of establishing that the public interest favors a stay.

In addition, Defendants' own actions undermine their position that they or the public interest will be harmed absent a stay. Defendants assert that they have tracked down Joseph Doe's family and that a "[p]roposed interim guidance" of the U.S. Citizenship and Immigration Services ("USCIS") would allow travel to the United States of Joseph's family and all other FTJ refugee applicants who obtained valid travel documents on or before October 24, 2017—the day that Defendants issued EO-4 and the Agency Memo.[9] (MFS at 9; Smith Decl. ¶¶ 2-4.) Indeed, Defendants state that they

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[8] "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 11 listed countries in the [Agency Memo]." (Joint Decl. Former Nat'l Sec. Officers (17-1707 Dkt. # 46) ¶ 12.)

[9] Defendants state that the proposed interim guidance "was in the process of being reviewed for clearance before the Preliminary Injunction was issued." (Smith Decl. (Dkt. # 95-1) ¶ 2.) But Defendants did not so inform the court while it was considering the preliminary injunction. Further, the declaration describes the interim guidance as merely "[p]roposed." (*Id.* ¶ 2.) Thus, although USCIS may have processed Joseph Doe's wife and children "[b]ased on the proposed USCIS guidance," it is unclear if USCIS has generally adopted the interim guidance with respect to processing all FTJ refugee applicants who had received valid travel documents prior to October 24, 2017. (*See id.* ¶ 3.)

expect to know the date of travel booking for Joseph's family by January 2, 2018.[10] (Smith Decl. ¶ 4.) Thus, Defendants have decided to admit certain FTJ refugees, including those from SAO countries, prior to implementation of the additional screening procedures for FTJ refugees or completion of the additional threat analysis of SAO countries that the Agency Memo prescribes. This decision undermines Defendants' position that the preliminary injunction impairs national security or that Defendants will be irreparably harmed absent a stay. Defendants' decision to permit Joseph Doe's family, as well as other FTJ and SAO refugees, to travel to the United States so long as they received their travel papers prior to October 24, 2017, confirms that the government will suffer no irreparable harm by allowing such refugee admissions during the pendency of their appeal.

Finally, Defendants again rely on the Supreme Court's December 4, 2017, stay orders in *Trump v. Hawaii*, No. 17A550, 2017 WL 5987406 (U.S. Dec. 4 2017), and

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[10] Defendants may be attempting to moot Joseph Doe's claims by creating an exception for him. (*See* MFS at 9; *see also* Doe Resp. at 8-10 (asserting that such attempts are unavailing).) Although the court need not rule on this issue for purposes of determining the present motion to stay, the court notes that Joseph seeks to represent a class. (*See* Mot. for Class Cert. (Dkt. # 19).) Mootness of a named plaintiff's claim after class certification does not moot the action. *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (citing *Sosna v. Iowa*, 419 U.S. 393, 401 (1975)). Further, where the named plaintiff's claim is transitory such that the trial court does not have sufficient time to rule on a motion for class certification before the proposed representative's individual claim expires, the 'relation back' doctrine preserves the merits of the case for judicial resolution. *See id.*; *see also Pitts v. Herbst, Inc.*, 653 F.3d 1081, 1090-91 (9th Cir. 2011) ("[A]lthough [the plaintiff's] claims are not inherently transitory as a result of being time sensitive, they are acutely susceptible to mootness in light of the defendant's tactic of picking off lead plaintiff's with a Rule 68 offer to avoid a class action. . . . The result is the same: a claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review." (internal quotation marks, citations, and alterations omitted)).

Trump v. Hawaii, No. 17A560, 2017 WL 5987435 (U.S. Dec. 2017), to argue that their national security interests outweigh Plaintiffs' interests and that the court should impose a stay here as well. (MFS at 2.) Defendants' reliance on these two stay orders is misplaced. First, the court has already declined to speculate on the reasons for the Supreme Court's December 4, 2017, stay orders, which involved preliminary injunctions against portions of Presidential Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("EO-3"), and were devoid of any analysis. (*See* PI Order at 61-62 n.30.)

Second, the balancing of the equities here is necessarily different here than in the cases challenging EO-3. This case involves refugees—individuals "who are fleeing danger" and "who have been persecuted by actual terrorists"—and their families or other individuals or organizations in the United States with whom those refugees have a bona fide relationship. (*See* Joint Decl. Former Nat'l Sec. Officers ¶ 14.f; *see also id.* ¶ 17.) The two cases stayed by the Supreme Court on December 4, 2017, challenged EO-3 and did not involve refugees or those here in the United States with a bona fide relationship to refugees. Further, in this case, Defendants have acknowledged that they will process the applications of FTJ refugees and refugees from SAO countries so long as the refugees received their travel papers prior to October 24, 2017. As discussed above, this acknowledgement undermines Defendants' assertion of national security concerns regarding the admission of FTJ and SAO refugees pending Defendants' appeal and necessarily affects the balancing of equities in this case in a manner not applicable to the cases challenging EO-3.

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Moreover, the EO-3 cases before the Supreme Court involved entry prohibitions by the President and specific authorities that Congress granted the President in 8 U.S.C. §§ 1182(f) and 1185(a)(1). Those authorities and the unique role the President may play based on those authorities is not at issue here. (*See* PI Order at 51 (discussing statutory authorities invoked in this case).) Indeed, the restrictions at issue here were put into place by agency officials after the President found that his suspension of entry of refugees was no longer necessary. (*Compare* EO-4 § 3(a) ("Presidential action to suspend the entry of refugees under [United States Refugee Assistance Program ("USRAP")] is not needed at this time to protect the security and interests of the United States and its people."), *with* Agency Memo at 2-3 (suspending the processing of applications and entry of refugees from SAO countries for 90 days and FTJ refugees indefinitely).)

Third, Defendants again ignore the Supreme Court's earlier, reasoned opinion denying a stay in relevant part in *Trump v. International Refugee Assistance Project*, --- U.S. ---, 137 S. Ct. 2080, 2089 (2017) ("*IRAP*"). *IRAP*, like this case, involved a purportedly temporary ban on refugees contained in Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"), which the Government justified by indicating its desire to study and upgrade vetting procedures. *IRAP*, 137 S. Ct. at 2084. Nevertheless, the Supreme Court denied a stay of the injunctions on EO-2 as to the same refugees protected by the preliminary injunction here—those with a bona fide relationship to Untied States persons or entities. *Id.* at 2089. Thus, for all of the foregoing reasons, the court again rejects Defendants' argument that the Supreme Court's December 4, 2017,

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stay orders concerning EO-3 require this court to balance the equities in Defendants' favor or to impose a stay on the preliminary injunction in this litigation as well.

Based on the foregoing analysis, the court concludes that Defendants have failed to demonstrate that they will be irreparably injured absent a stay or that the public interest favors a stay.

3. Issuance of the Stay Will Substantially Injure the Other Interested Parties

Defendants' contentions concerning a lack of injury to individual Plaintiffs in the event of a stay pending appeal again reiterate arguments that this court has already rejected. (*Compare* Mot. at 6-10 *with* PI Order at 12-16, 20-25, 56-57.) Defendants provide the court with no basis to reevaluate its prior rulings that Plaintiffs will be irreparably harmed in the absence of a preliminary injunction. Further, Defendants ignore the harm to organizational Plaintiffs, such as JFS-S and JFS-SV, in their motion seeking a stay. (*See generally* MFS.) These organizational Plaintiffs would also suffer substantial harm in the event of a stay. (*See* PI order at 25-28.) The court concludes that Defendants failed to demonstrate that this factor favors a stay.

Having evaluated all the factors that guide its exercise of discretion, the court denies Defendants' motion for a stay. In addition, for the same reasons as stated herein and in its order denying Defendants' motion for reconsideration (*see* 1/5/18 Order), the court also denies Defendants' request in their January 5, 2018, notice for a more limited stay concerning those refugees who have a bona fide relationship with an entity in the United States through a resettlement assurance agency (*see* Notice re: MFS).

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IV. CONCLUSION

Based on the analysis and authority cited above, the court DENIES Defendants' motion to stay the court's preliminary injunction order pending appeal (Dkt. # 95) and their request for a more limited in stay contained in their January 5, 2018, notice (Dkt. # 104).

Dated this 9th day of January, 2018.

JAMES L. ROBART
United States District Judge

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

Civil Action No. 2:17-cv-00178JLR

JEWISH FAMILY SERVICE OF SEATTLE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

Civil Action No. 2:17-cv-01707JLR

DEFENDANTS' NOTICE OF COMPLIANCE WITH PRELIMINARY INJUNCTION

(RELATING TO BOTH CASES)

U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-3259

INTRODUCTION

Defendants respectfully submit this Notice of Compliance with the Court's preliminary injunction Order dated December 23, 2017 ("PI Order"). As set forth below and in the attached Declarations, Defendants have acted promptly to comply with the injunction. In particular, Defendants have taken steps to include Security Advisory Opinion (SAO) nationals in this quarter's upcoming "circuit rides," and in furtherance of their compliance with the Court's Order, aim to establish a third-quarter schedule that will include trips to areas where more SAO nationals can be interviewed. These actions and others demonstrate Defendants' good-faith compliance with the injunction.

PROCEDURAL HISTORY

On December 23, 2017, the Court preliminarily enjoined Defendants from enforcing two provisions of the October 23, 2017, Memorandum to the President ("Joint Memorandum" or "Agency Memo"). In that PI Order, the Court held that Defendants are enjoined from enforcing those provisions of the Joint Memorandum that "suspend the processing of [following-to-join (FTJ)] refugee applications or suspend the admission of FTJ refugees into the United States" and 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." *Doe v. Trump*, Nos. C17-0178JLR & C17-1707JLR, 2017 WL 6551491, at *26 (W.D. Wash. Dec. 23, 2017), *appeal docketed*, No. 18-35015.

Following entry of the PI Order, Defendants filed an emergency motion to stay the injunction pending appeal. The Court denied that emergency motion in a January 9, 2018, Order. *See Doe v. Trump*, Nos. C17-0178JLR & C17-1707JLR, 2018 WL 341597 (W.D. Wash. Jan. 9, 2018) ("Stay Denial Order"). In doing so, the Court suggested that Defendants may have attempted through their motion to "unilaterally modify the preliminary injunction." *Id.* at *2. The Court elaborated:

U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Ave., NW
Washington, DC 20530
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> At this point, the court declines to consider the possibility that Defendants' declaration is an improper attempt to excuse noncompliance with the court's order. The court simply notes that, in the absence of a stay, Defendants' failure to comply with the preliminary injunction could result in a possible finding of contempt and the possible imposition of sanctions.

Id. at *2 n.3.

Defendants respectfully submit that they made no attempt to modify the injunction. Defendants hereby offer this Notice to inform the Court of Defendants' efforts to scrupulously adhere to the Court's PI Order. The Court ordered "Defendants to take actions that are necessary to undo those portions of the Agency Memo that are enjoined." *Id.* at *3. As explained herein, Defendants have done exactly that.[1]

STATEMENT OF COMPLIANCE

In support of this Notice of Compliance, Defendants offer two Declarations: the first by Kelly A. Gauger, Acting Director of the Admissions Office of the Bureau of Population, Refugees, and Migration at the Department of State ("Gauger Decl.," attached hereto as Exhibit A); and the second by Jennifer B. Higgins, Associate Director of the Refugee, Asylum and International Operations Directorate at the Department of Homeland Security ("Higgins Decl.," attached hereto as Exhibit B).

In its Stay Denial Order, the Court observed: "if Defendants sent guidance suspending the admission of FTJ refugees or refugees from SAO countries, they must rescind that guidance. If they issued instructions to de-prioritize the processing of applications from SAO countries, they must reverse those instructions." *Doe*, 2018 WL 341597, at *3. As the two attached Declarations explain, both State and USCIS issued prompt guidance directing their personnel to comply with the injunction. On December 24, 2017, State "issued guidance to its implementing partners at the Resettlement Support Centers (RSCs) overseas . . . so that the[se] implementing partners could

[1] The Court also observed in its Stay Denial Order that Defendants' prior arguments about the injunction's scope and impact were "conclusory and unsupported by any evidence." *Doe*, 2018 WL 341597, at *3. In order to avoid a similar conclusion here, Defendants proffer the two attached Declarations to substantiate their compliance.

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implement the injunction immediately upon opening of business after the federal holiday on December 25, 2017." Gauger Decl. ¶ 2. "The guidance instructed the RSCs to resume processing all follow-to-join refugees . . . and nationals of . . . the 11 countries on the SAO list who have a bona fide relationship to a person or entity within the United States." *Id.* Further, the State Department's Bureau of Consular Affairs advised consular posts on December 23, 2017, to adjudicate FTJ applications as normal. *Id.* ¶ 3. USCIS apprised its personnel of the injunction's immediate impact on December 24, 2017. Higgins Decl. ¶ 2.

The Stay Denial Order addressed the agencies' scheduling of "circuit rides." State and DHS work closely with one another to schedule circuit rides, through which USCIS officers travel to different locations worldwide to interview refugee applicants. Gauger Decl. ¶ 4; Higgins Decl. ¶ 3. State typically submits requests for circuit rides to USCIS many weeks prior to each quarter of the fiscal year. *See* Gauger Decl. ¶ 4; Higgins Decl. ¶ 4. After a schedule is set, in-country RSCs slot in refugee applicants for interviews. Gauger Decl. ¶ 4. The schedule for circuit rides occurring in the second quarter of fiscal year 2018 (January 1 through March 31) is appended as Exhibit 1 to the Higgins Declaration.

The Court wrote that "nothing in the preliminary injunction requires Defendants to cancel any already-scheduled circuit rides or refugee interviews." *Doe*, 2018 WL 341597, at *3. Defendants have accordingly not done so, and instead, have attempted to add SAO nationals to the already-scheduled circuit rides. Specifically, on December 26, 2017, State reached out to the RSCs to inquire whether any SAO nationals might be ready for interviews at locations already included on the second-quarter calendar. Gauger Decl. ¶ 5. "As a result of this request, additional interviews for SAO nationals have been added to the circuit rides to Indonesia and to Nauru and Manus." *Id.*

The Court added that "[c]omplying with the preliminary injunction . . . require[s] Defendants to restore any circuit rides that they would have scheduled absent the Agency Memo." *Doe*, 2018 WL 341597, at *3. As the Higgins Declaration explains, it is not feasible to determine

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with particularity what circuit rides or interviews would have been scheduled absent the Joint Memorandum. Higgins Decl. ¶ 4. Preparation for circuit rides is a complicated and time-consuming endeavor involving many factors, and as a result, circuit rides must be scheduled weeks, if not more than a month, in advance. *See id.* ¶¶ 3-4. USCIS officers must make travel arrangements, obtain visas, obtain and verify necessary vaccinations, secure country clearances, and schedule and deliver site-specific pre-departure trainings and in-country briefings on arrival. *Id.* ¶ 3. State and USCIS began scheduling second-quarter (January 1 through March 31, 2018) circuit rides in October 2017, long before the injunction took effect. *Id.* ¶ 4. As a result, these previously scheduled circuit rides did not include locations with relatively high numbers of SAO nationals. *Id.*

Nevertheless, the Government, in furtherance of its compliance with the Court's PI Order, aims to establish a schedule for its third-quarter circuit rides that would include locations where greater percentages of SAO nationals are ready for interviews, namely, Iraq, Jordan, Turkey, and, potentially Kenya. *See* Gauger Decl. ¶ 6; Higgins Decl. ¶ 7.[2] "Scheduling circuit rides to these locations in the relatively near future is far preferable from a programmatic perspective" to canceling planned circuit rides during the second quarter. Gauger Decl. ¶ 6. Cancellations of already-scheduled circuit rides would "waste resources, slow down the refugee pipeline overall (adversely affecting all refugee applicants), and cause undue hardship for those whose interviews were already scheduled to take place, especially those who have been notified of their upcoming interview." *Id.*

Adding such locations for third-quarter circuit rides makes sense for an additional reason: it is not feasible for the agencies to add new locations to the second-quarter schedule. As set forth in the Higgins Declaration, all available officers will be participating in the circuit rides already planned for this quarter. *See* Higgins Decl. ¶ 6. The agencies could not add new locations to the

[2] Once the locations for the third-quarter circuit rides are finalized, Defendants can share that information with the Court upon the Court's request.

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second-quarter schedule without either reassigning personnel who are carrying out other governmental obligations or canceling already-scheduled circuit rides. *See id.* Neither possibility is reasonable or appropriate, as both would cause significant inefficiencies and hardship.

To summarize: the agencies promptly issued the necessary guidance to inform the field of its obligation to comply with the injunction. The agencies have also taken steps to include SAO nationals in the second-quarter circuit rides as scheduled, and aim to establish a third-quarter schedule that includes locations where greater percentages of SAO nationals are processed because it is not feasible to do so in the second quarter. These actions show the agencies' good faith commitment to compliance with the PI Order.

As the Court has allowed, the 90-day review for SAO countries has continued even as the agencies have implemented the PI Order. Defendants cannot know or determine with certainty the timing or impact of any further policies resulting from that review. Defendants intend to notify the Court of any new policy once a final determination has been made.

CONCLUSION

For the reasons stated herein, Defendants respectfully submit that they are in compliance with the PI Order.

DATED: January 19, 2018

Respectfully submitted,

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on January 19, 2018, a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 19th day of January, 2018.

/s/ Joseph C. Dugan
JOSEPH C. DUGAN

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The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

Civil Action No. 2:17-cv-00178JLR

JEWISH FAMILY SERVICE OF SEATTLE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

Civil Action No. 2:17-cv-01707JLR

DEFENDANTS' NOTICE FOLLOWING CONCLUSION OF 90-DAY SAO REFUGEE REVIEW

(RELATING TO BOTH CASES)

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Defendants respectfully submit this Notice regarding the conclusion of the 90-day Security Advisory Opinion (SAO) review period prescribed by the October 23, 2017, Memorandum to the President ("Agency Memo" or "Joint Memorandum"). That review period expired by its terms on January 22, 2018 (January 21 was a Sunday).

As stated in the Court's Order of December 23, 2017, the preliminary injunction that barred the suspension of SAO refugee processing did "not apply to Defendants' efforts to conduct a detailed threat assessment for each SAO country." *Doe v. Trump*, No. C17-0178JLR, 2017 WL 6551491, at *26 (W.D. Wash. Dec. 23, 2017). Those efforts continued, and on January 29, 2018, the Secretary of Homeland Security signed a memorandum outlining additional security enhancements and recommendations to strengthen the integrity of the U.S. Refugee Admissions Program (USRAP). 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.

As further set forth in the press release, actions will be "undertaken consistent with the nationwide injunction issued by the United States District Court for the Western District of Washington. In addition, any commitments made by the United States to implement the injunction will be honored." *Id.*

Defendants do not understand the preliminary injunction that is currently in place in this case to prohibit Defendants from implementing these enhancements and recommendations. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 1045950, at *3-4 (W.D. Wash. Mar. 16,

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2017) (declining to enforce preliminary injunction against EO-1 to prohibit Defendants from implementing EO-2).

Finally, because the 90-day SAO review period has concluded, and because (as Defendants previously represented) the implementation of the additional procedures for following-to-join refugees set forth in the Joint Memorandum is expected to be completed on or about February 1, 2018, the *Jewish Family Service* case and the claims regarding the Joint Memorandum in the *Doe* case will soon become moot. The Government expects to file a motion in the U.S. Court of Appeals for the Ninth Circuit seeking remand of the cross-appeals with instructions to dismiss as moot, as well as vacatur of the underlying injunction and dismissal of the appeal as moot.

DATED: January 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 31, 2018, a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 31st day of January, 2018.

/s/ Joseph C. Dugan
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