The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00178-JLR

MOTION FOR PRELIMINARY INJUNCTION

NOTED FOR CONSIDERATION: NOVEMBER 22, 2017

ORAL ARGUMENT SET FOR: DECEMBER 11, 2017

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I. INTRODUCTION

On October 24, 2017, President Trump issued an executive order purporting to "resume" refugee admissions with "enhanced vetting capabilities." But an October 23, 2017 memorandum from the heads of three administrative agencies to the President ("Agency Memo" or "Memorandum") makes clear that the administration has in fact done precisely the opposite for some refugees by imposing an indefinite ban on the children and spouses of refugees who have already been admitted.

The ban irreparably harms Plaintiff Joseph Doe by indefinitely delaying his reunion with his wife and three children, who have already completed the extensive screening process for admission. Under the plain language of the Immigration and Nationality Act ("INA"), Defendants do not have discretion to deny admission to Plaintiff's wife and children or other "following-to-join" derivative refugees. The ban exceeds the agencies' statutory authority, violates Plaintiff's procedural due process rights, and violates the Administrative Procedure Act ("APA"). Plaintiff, on behalf of himself and those similarly situated in Washington state, asks this Court to issue a preliminary injunction enjoining the implementation of the Agency Memo with respect to follow-to-join derivative refugees who have completed and cleared their final screenings.

The Administration cannot do via surreptitious internal memo what courts have already held it cannot do via openly promulgated executive order.

II. FACTUAL BACKGROUND

A. Defendants' Executive Orders and Targeting of Refugees

Executive Order 13815, "Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities," 82 Fed. Reg. 50,055 (Oct. 24, 2017) ("EO-4"), and the

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accompanying Agency Memo[1] (*see* Ex. 1, Decl. of Tana Lin in Supp. of Mot. for Prelim. Inj. ("Lin Decl."), attachments A and B) are the latest installment in a series of executive actions targeting Muslim immigrants and refugees. This Court is familiar with Defendant Trump's prior orders, Executive Order 13769, 82 Fed Reg. 8977 (Jan. 27, 2017) ("EO-1"); Executive Order 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) ("EO-2"); and Presidential Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) ("EO-3"). *See* Temporary Restraining Order, *State v. Trump*, No. 17-141-JLR (W.D. Wash. Feb. 3, 2017), Dkt. # 52; *State v. Trump*, No. 17-141-JLR, 2017 WL 4857088, at *2-4 (W.D. Wash. Oct. 27, 2017).[2] Plaintiff will not recount that history, but EO-4 and the Agency Memo must still be viewed in context.

The President has long demonstrated an irrational prejudice against refugees in general, and a particular concern that the previous refugee admission system favored Muslims over Christians. On the campaign trail, for example, Defendant Trump speculated that Syrian refugees could be a terrorist army in disguise: "Did you ever see a migration like that? . . . They're all men, and they're all strong-looking guys . . . There are so many men; there aren't that many women."[3] He also asserted that a proposal to accept 200,000 refugees could amount to accepting a "200,000-man army," which "could be one of the great tactical ploys of all time."[4] But these numbers are incorrect; of the Syrian refugees admitted to the United States since 2011, 72% are

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[1] Memorandum from Rex W. Tillerson, Elaine Duke, and Daniel Coats to the President (Oct. 23, 2017), http://bit.ly/2z36fdw (last visited Nov. 2, 2017).

[2] Although Plaintiffs challenge EO-3 in their Third Amended Class Action Complaint, this Motion does not request relief related to EO-3. *See State v. Trump*, No. 17-141-JLR, 2017 WL 4857088, at *7 (W.D. Wash. Oct. 27, 2017) (staying motion for a TRO in light of the preliminary injunction in *Hawai'i v. Trump*, 233 F. Supp. 3d 850, 856 (D. Haw. 2017)).

[3] Jenna Johnson, *Donald Trump: Syrian Refugees Might be a Terrorist Army in Disguise*, Wash. Post (Sept. 30, 2015), http://wapo.st/2yZY0RZ (last visited Nov. 4, 2017).

[4] *Id.*

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women and children under age 14.[5] And according to the U.S. Department of State, those percentages are consistent for refugees admitted overall.[6]

At another campaign event, Defendant Trump again brought up Syrian refugees: "[w]e don't even know who they are. There's no paperwork. There's no anything. . . . They're strong looking guys. . . . Is this a Trojan Horse?"[7] In April 2016, Defendant Trump retweeted a graphic showing him denying Syrian refugees entry.[8]

[5] Jie Zong & Jeanne Batalova, *Syrian Refugees in the United States*, MPI (Jan. 12, 2017), http://bit.ly/2zwm7Zh (last visited Nov. 4, 2017).

[6] Fact Sheet: Fiscal Year 2016 Refugee Admissions, U.S. Dep't of State (Jan. 20, 2017), http://bit.ly/2j5ZQdy (last visited Nov. 6, 2017).

[7] Michael Patrick Leahy, *Donald Trump Again Vows to 'Bomb the S*** out of ISIS'; Ridicules Weakness of Obama and Clinton*, Breitbart (Nov. 17, 2015), http://bit.ly/2j1zvNI (last visited Nov. 4, 2017).

[8] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 7, 2016, 7:48 PM), http://bit.ly/29176lp (last visited Nov. 4, 2017).

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Following his inauguration, Defendant Trump issued EO-1 just one week after taking office, suspending the United States Refugee Admissions Program ("USRAP"), and specifically barring Syrian refugees from entering the United States indefinitely. After multiple courts found EO-1 unlawful, Defendant Trump issued EO-2, suspending the travel and application decisions for all refugees.

Although EO-2's refugee suspension was facially neutral, Defendant Trump believed that blocking all refugees had the effect of a nationality-based refugee ban: "'77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries.' (WT) [sic] SO DANGEROUS!"[9] Similarly, Defendant Trump revealed his belief that EO-2's refugee ban favored Christians over Muslims. He declared, "I'm Christian,"[10] and argued that it was easier for Muslims than Christians to be admitted as refugees, adding, "[w]e're going to be helping the Christians big league."[11]

Defendant Trump also cut the total number of refugee admissions by more than half, from FY 2016's cap of 110,000 to 50,000 in FY 2017 and 45,000 in FY 2018.[12] This cap is the lowest ever in the history of the United States' refugee program.[13] Defendants achieved this

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[9] Donald J. Trump (@realDonaldTrump), Twitter (Feb. 11, 2017, 4:12 AM), http://bit.ly/2h3Xnfs (last visited Nov. 4, 2017).

[10] Scott Johnson, *At the White House with Trump*, Power Line (Apr. 25, 2017), http://bit.ly/2ziHMTJ (last visited Nov. 3, 2017).

[11] Charlie Spiering, *Donald Trump Invites Conservative Media to White House for Exclusive Briefing*, Breitbart (Apr. 24, 2017), http://bit.ly/2pcB4Ys (last visited Nov. 3, 2017).

[12] Matt Zapatosky & Carol Morello, *U.S Plans to Cap Refugees at 45,000 in Coming Fiscal Year, According to State Department Report*, Wash. Post (Sept. 27, 2017), http://wapo.st/2iAXsYG (last visited Nov. 6, 2017).

[13] Geneva Sands & Conor Finnegan, *Trump Administration to Announce Decision on Refugee Program After 120-Day Ban*, ABC News, http://abcn.ws/2i1ijnJ (last visited Nov. 3, 2017).

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historic low in part by suppressing a government study on the overall economic benefit of refugees[14] and revising policy papers with spurious statistics about refugees and terrorism.[15]

The Supreme Court's June 26, 2017 Order allowed Defendants to implement their suspension of USRAP, but only for those refugees without a "bona fide relationship" with United States residents. *Trump v. IRAP*, 137 S. Ct. 2080, 2089 (2017).[16] On October 24, 2017, the 120-day suspension of refugee admissions under EO-2 expired. Lin Decl. Ex. A, § 2(a). On the same day, Defendant Trump issued EO-4.

B. The Latest Executive Order and Accompanying Agency Memo

Section 1(d) of EO-4 states that a working group had been convened pursuant to Section 6(a) of EO-2, and that the group "identified several ways to enhance the process for screening and vetting refugees and began implementing those improvements." Lin Decl. Attach. A, § 1(d). Section 2 of EO-4 claims to lift the USRAP suspension and resume refugee resettlement, *id.* § 2, and Section 3 of EO-4 reiterates the lift of the suspension and directs the Secretaries of State and Homeland Security to assess security risks posed by USRAP admissions, to determine whether any actions should be taken to address such risks, and to determine within 90 days whether any such actions should be modified or terminated. *Id.* § 3.

But the day prior to the issuance of EO-4, Defendants Secretary of State Rex Tillerson, Acting Secretary of Homeland Security Elaine Duke, and Director of National Intelligence

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[14] Julie Hirschfeld Davis & Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, N.Y. Times (Sept. 18, 2017), http://nyti.ms/2hdTkAN (last visited Nov. 6, 2017).

[15] Jonathan Blitzer, *How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees*, New Yorker (Oct. 13, 2017), http://bit.ly/2xCePCx (last visited Nov. 6, 2017).

[16] The Supreme Court stayed the Ninth Circuit's mandate with respect to refugees with a formal assurance from a resettlement agency. *Trump v. Hawai'i*, --- S. Ct. ----, No. 17A275, 2017 WL 3975174 (Sept. 11, 2017).

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Daniel Coats sent the President a Memorandum that makes clear all following-to-join derivative refugees are indefinitely banned. According to the Agency Memo, these derivative refugees cannot be allowed to join their families here in the US unless "additional security measures" are implemented. Lin Decl. Attach. B, at 2.

"Derivative refugees" are the spouses and unmarried minor children of an admitted refugee. They are entitled to the same admission status as the principal refugee under the INA. 8 U.S.C. § 1157(c)(2)(A). When derivative refugees travel to join the principal refugee more than four months after the admission of the principal refugee, they are "following-to-join" derivative refugees, rather than "accompanying" derivative refugees. 8 C.F.R. § 207.7(a). Critically, they must complete a comprehensive screening process that includes, *inter alia*, proving the family members' identities and relationship to the petitioner, confirmation of the eligibility of each family member to travel, interviews with either a Department of State consular officer or USCIS officer, digital fingerprint scans, and rigorous medical examinations.[17] The petitioner has the burden of proof to establish the evidence that any person on whose behalf s/he is making a request is an eligible family member. 8 C.F.R. 207.7(e). And each family member must have a sponsorship assurance from a resettlement agency before travel to the United States.[18]

The Agency Memo does not explain the need for "additional security measures." It does not explain why derivative refugees must be barred in order for those measures to be implemented. And it does not provide any timeframe for their implementation, making the ban indefinite: "These additional security measures must be implemented before admission of

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[17] Follow-to-Join Refugees and Asylees, U.S. Dep't of State, http://bit.ly/2ivGXwP (last visited Nov. 4, 2017).
[18] *Id.*

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following-to-join refugees—regardless of nationality—can resume. Once the security enhancements are in place, admission of following-to-join refugees can resume." Lin Decl. Attach. B, Addendum at 4.

C. Plaintiff Joseph Doe

Originally from Somalia, Plaintiff Joseph Doe was admitted to the United States as a refugee in late 2014. Ex. 2, Decl. of Joseph Doe in Supp. of Mot. for Prelim. Inj. ("Doe Decl.") ¶¶ 2, 9. Prior to that, he spent over twenty years living in a refugee camp in Kenya. *Id.* ¶ 5. He was a child when civil war broke out in Somalia and his family fled the violent conflict, attempting to stay hidden in the forest while making their way to Kenya on foot, going for weeks without food. *Id.* ¶¶ 3-4. Armed fighters found them in the forest and, in front of Plaintiff Joseph Doe and his family, raped his older sister, who was pregnant at that time and bled to death from the assault. *Id.* ¶ 4. When Plaintiff Joseph Doe's family made it to a Kenya refugee camp and started the process of applying for refugee status, it was 1992, and he was 10 years old. *Id.* ¶ 5. In 2000, Plaintiff Joseph Doe had his initial interview with the United Nations High Commissioner for Refugees ("UNHCR"), along with his mother, two brothers, and three surviving sisters. *Id.* ¶ 6. In 2004, his family disappeared during a raid on the camp by the local Turkana people—he escaped only because he was outside of the camp at the time of the raid. *Id.* ¶ 7. In 2011, Plaintiff Joseph Doe was called for an interview with DHS/USCIS. *Id.* ¶ 8. He had just gotten married, but because his refugee application was begun when he was a child, his wife was not part of his application. *Id.* ¶¶ 8-9. Plaintiff Joseph Doe completed the extensive DHS/USCIS screening process in December 2013, and arrived in the United States as a refugee in January 2014. *Id.* ¶ 9. But he had to leave his wife and three children behind in Kenya; his youngest child was only six months old at the time. *Id.*

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When Plaintiff Joseph Doe first arrived in the United States, he did not know he had the right to petition for his family's arrival. *Id.* ¶ 10. As soon as he discovered he could do so, he filed I-730 petitions for his family. *Id.* In November 2016, his wife and children had their final interviews. *Id.* ¶ 12. They completed their security clearances, and received their medical clearances just days after Defendant Trump issued EO-1. *Id.* ¶ 12. They were only waiting for their travel to the United States to be scheduled (and for the cultural orientation, which takes place a few days prior to departure) as of March 1, 2017. *Id.* But that travel was never scheduled because of Defendants' executive orders. In June 2017, they received formal assurance through a resettlement agency. *Id.* But still Plaintiff Joseph Doe's family waited for travel arrangements and, because the medical clearances expire after six months, they had to redo the medical examination process. *Id.* ¶ 13. His wife and one child have passed their medical exams, but Plaintiff Joseph Doe is still awaiting results for two of his children. *Id.* Plaintiff supports his family through his job here in Washington, *id.* ¶ 14, and he regularly talks to them on the phone. *Id.* ¶ 15. His youngest son, now four years old, often cries for him and asks, "[w]here are you? Why can't you come for us?" *Id.* Every day, Plaintiff has only two wishes—to hug his family and to be a family again, all together in one place. *Id.* ¶ 18.

III. LEGAL STANDARD

To obtain a preliminary injunction, the moving party must show that: (1) she "is likely to succeed on the merits," (2) she "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [her] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is also appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply in the plaintiff's favor," thereby allowing preservation of the status quo

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when complex legal questions require further inspection or deliberation. *State v. Trump*, No. 17-141-JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)). Thus, even where a "a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of the hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance*, 632 F.3d at 1135).

IV. ARGUMENT

A. Plaintiff Is Likely to Prevail on His Claims.

Plaintiff is likely to succeed on his claims because he unquestionably has a statutory entitlement under the INA to be reunited with his family, and Defendants have deprived him of that entitlement. Defendants did so by announcing an indefinite ban via a memo, without providing Plaintiff or others like him with any process at all, and without the necessary statutory authority. Even if Defendants had statutory authority to ban follow-to-join refugees, which they do not, their action was both procedurally improper and arbitrary and capricious under the APA.

1. Plaintiff is likely to succeed on his claim that Defendants' ban of follow-to-join refugees is contrary to law.

"It is central to the real meaning of 'the rule of law,' and not particularly controversial that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so." *Succar v. Ashcroft*, 394 F.3d 8, 20 (1st Cir. 2005) (citation omitted). Administrative agencies "literally ha[ve] no power to act . . . unless and until Congress confers power" to do so. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The APA provides that a reviewing

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court shall "hold unlawful and set aside agency action … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(c); see also *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008); *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside."). Even if the APA does not apply, the Court has the authority to review and set aside ultra vires agency action. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 185 (D.C. Cir. 2006) (holding that "[s]ection 1331 is an appropriate source of jurisdiction for" APA, nonstatutory, and constitutional claims).

Here, not only did Defendants act without Congress's direction, they vastly exceeded their statutory authority by unilaterally suspending a provision of a federal statute properly enacted by Congress. Congress created an entitlement allowing refugees to bring their immediate families—spouses and unmarried children under the age of twenty-one—to join them in the United States. And it did so using plain language that nowhere gives Defendants the authority to rescind that entitlement.

The Court must "begin [its analysis] with the plain language of the statute." *Negusie v. Holder*, 555 U.S. 511, 542 (2009). If the "statutory text is plain and unambiguous[,]" it "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). Here, the statutory language is unambiguous. Although the grant of refugee status to the *principal* refugee is within the agency's discretion, the grant of *derivative* refugee status is not. *Compare* INA § 207(c)(1) (which governs principal refugees), *with* § 207(c)(2)(A) (which governs derivatives):

> (1) [T]he Attorney General **may**, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, **admit any refugee** who is not firmly resettled in any foreign country, is determined to be of

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> special humanitarian concern to the United States, and is admissible . . . as an immigrant under this chapter.
>
> (2)(A) A spouse or child . . . of any refugee who qualifies for admission under paragraph (1) **shall**, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, **be entitled to the same admission status as such refugee** if accompanying, or following to join, such refugee and if the spouse or child is admissible . . . as an immigrant under this chapter.

8 U.S.C. § 1157(c) (emphasis added).[19]

As the first subparagraph above illustrates, Congress knew how to commit a decision to the agency's discretion; the use of the word "may" in subsection (c)(1) contrasts with the use of the word "shall" in the next paragraph. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' in § 3621(e)(2)(B) contrasts with the legislators' use of a mandatory 'shall' in the very same section."). Here, as in *Lopez*, "Congress used 'shall' to impose discretionless obligations." *Id.* And the remaining language it chose only emphasizes the lack of agency discretion in this context: follow-to-join refugees are "entitled" to join the refugee.

That the agency may be tasked with determining a derivative refugee's admissibility under the INA makes no difference. In an analogous case involving investor visas available under INA § 203(b)(5), 8 U.S.C. § 1153(b)(5), the Ninth Circuit held that the word "shall" indicates a nondiscretionary statutory duty and, moreover, that the application of statutory eligibility requirements does not make the determination a discretionary one. *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 691 (9th Cir. 2003). The court explained that although the

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[19] The statute refers to the Attorney General's discretion, but the relevant agency is now Defendant Department of Homeland Security. *See* 6 U.S.C. § 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

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INA subsection at issue, 8 U.S.C. § 1154(b), "does allow the Attorney General to 'determine' the petitioner's eligibility, the determination here is clearly guided by the eligibility requirements set out in § 1153(b)(5)," and "[m]oreover, as noted above, § 1154(b) directs that the Attorney General 'shall . . . approve the petition' of any visa petitioner who is determined to be eligible." *Id.* In drafting the INA, Congress was "explicit about where the Attorney General has been granted discretion and where he has not." *Succar*, 394 F.3d at 10 (finding that Congress did not place decision in agency's discretion when it "created mandatory criteria").

Congress purposefully enacted a mandatory statutory entitlement—in likely recognition of the powerful bonds between spouses and their minor children[20]—and set forth the criteria for admissibility "as an immigrant under this chapter." *See* 8 U.S.C. § 1157(c)(2)(A); *id.* § 1182(a). Plaintiff has a legitimate entitlement because the government has no discretion to deny derivative refugee status to admissible family members, and the government has already determined that his family members are admissible. Defendants have exceeded their statutory authority.

2. Plaintiff is likely to succeed on his procedural due process claim.

No person shall "be deprived of life, liberty, or property, without due process of law."[21] U.S. Const. amend. V. "A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). To have a property interest in a statutorily created benefit, an individual must "have a legitimate claim of

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[20] As legislators observed prior to the passage of the Refugee Act of 1980, "admitt[ing] refugees to promote family reunion" was of "special concern." S. Rep. No. 96-265, at 2-3 (1979), *reprinted in* 1980 U.S.C.C.A.N. 146-147.

[21] "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

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entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The INA creates just such an entitlement in § 207(c)(2)(A), where it explicitly states that follow-to-join refugees are "entitled" to admission. 8 U.S.C. § 1157(c)(2)(A).

Plaintiff's entitlement has already vested.[22] His petitions for his family's derivative status were approved and his family members received their security and medical clearances. Doe Decl. ¶ 12. Because USCIS and DHS have deemed his family admissible, and because of the mandatory language in the statute, he has a "legitimate claim of entitlement" to his family's admission that Defendants cannot take away without due process. *Roth*, 408 U.S. at 577.

In an analogous case involving an I-130 petition for immediate relative status,[23] the Ninth Circuit held that the grant of an I-130 petition was nondiscretionary because the statute provided: "After an investigation of the facts in each case, . . . the [Secretary of Homeland Security] *shall*, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative[,] . . . *approve the petition*. . . ." *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013) (footnote omitted) (citation omitted). Therefore, "[i]mmediate relative status for an alien spouse is a right to which citizen applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory and regulatory requirements for eligibility." *Id.* at 1156. The Ninth Circuit concluded that "[t]his protected interest is entitled

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[22] Even if the government had not yet undertaken the determination of his family's status, Plaintiff would still have an entitlement under the mandatory language of INA § 207(c)(2)(A), to having the government determine his family's derivative refugee status. *See Roth*, 408 U.S. at 577 (explaining that in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the welfare recipients "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them," and even though they had not yet demonstrated eligibility, they had a right to the opportunity to do so).

[23] The I-130 is a petition by a citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives (spouses, unmarried children, siblings, and parents) who wish to immigrate to the United States.

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to the protections of due process." *Id.* at 1156. Similarly, in a case involving citizenship applications, which are also nondiscretionary, Judge Jones in this District noted that "[w]hen an applicant has met all the requirements of the law, the privilege accorded him ripens into a right, [and] he is entitled to citizenship." *Wagafe v. Trump*, No. 17-94-RAJ, 2017 WL 2671254, at *8 (W.D. Wash. June 21, 2017) (citation omitted). The reasoning in *Ching* and *Wagafe* applies with equal force here.

In carrying out Congress's immigration directives, "the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Defendants may not deprive Plaintiff Joseph Doe of his protected statutory interest without providing, "at a minimum, notice and an opportunity to respond." *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014). Here, Defendants' Memorandum provided no process at all. *Cf. State v. Trump*, 847 F.3d 1151, 1164 (9th Cir.), *denying recons. en banc*, 853 F.3d 933 (9th Cir. 2017), *denying recons. en banc*, 858 F.3d 1168 (9th Cir. 2017) (holding plaintiffs were likely to succeed on Due Process claim under EO-1, noting that "the Government does not contend that the Executive Order provides for such process").

3. Even if Defendants had not exceeded their statutory authority, their indefinite ban on follow-to-join refugees must be set aside under the APA.

a. Defendants violated the procedural requirements of the APA.

Even if Defendants had the authority to suspend the admission of follow-to-join refugees, which they do not, Defendants failed to do so in "observance of procedure required by law." 5 U.S.C. § 706(2)(D). There can be no question but that the Memorandum is final agency action subject to APA review. There is nothing "tentative or interlocutory" about its suspension of follow-to-join refugee admissions, which is *already* being enforced. *Bennett v. Spear*, 520 U.S.

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154, 177-78 (1997). And its suspension of follow-to-join refugee admissions imposes real and severe "legal consequences" on refugees like Plaintiff and his family. *Id.* at 178 (citation omitted). Such policies must be promulgated using notice-and-comment rulemaking because they have "'binding effect'—'binding' in the sense that the rule does not 'genuinely leave[] the agency . . . free to exercise discretion.'" *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (citation omitted); *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252-53 (D.C. Cir. 2014) (describing what makes a legislative rule).

The Agency Memo is a legislative rule for which notice and comment was required. It bans the admission of follow-to-join refugees with a categorical revocation of a legal entitlement granted by the plain language of the INA. And it provides agency personnel no discretion whatsoever, *see McCarthy*, 758 F.3d at 252 (looking to "the agency's characterization" of whether its action binds agency personnel). Far from a mere policy statement with "'no legal impact,'" *id.* at 253 (citation omitted), the Memorandum clearly falls on the legislative side of the line. The APA requires notice and comment is required for precisely this type of agency action so that the public can weigh in before people are deprived of substantive rights. Not only have Defendants eviscerated a statutory entitlement, they have done so in relative secrecy via an internal agency memo accompanied by none of the processes required by law. The Court should therefore set aside the Memorandum for failing to conform to the APA's procedural requirements.

b. Defendants' indefinite ban of follow-to-join refugees is arbitrary and capricious.

Even if notice-and-comment rulemaking were not required, the Memorandum's indefinite suspension is still doomed under the APA, which prohibits agency action that is "arbitrary,

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capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). As the Supreme Court has reiterated specifically in the immigration context, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). In reviewing agency action under the arbitrary-and-capricious standard, courts examine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*; *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must . . . articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."). An agency's decision is arbitrary and capricious when it fails to sufficiently explain the reason for its decision, or when it changes a policy or deviates from existing practice without acknowledging and explaining the reason for the change. *See FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must "display awareness that it *is* changing position" and must "show that there are good reasons for the new policy"); *Judulang*, 565 U.S. at 64 (holding Board of Immigration Appeals policy arbitrary and capricious when Court could not "discern a reason for it").

Regardless of whether the proposed security "enhancements" are justified (the Agency Memo does not explain why they are necessary), the Memorandum provides no explanation at all for why Defendants must suspend follow-to-join admissions in order to implement these enhancements. It simply states that the program is suspended indefinitely without even trying to provide the "reasoned explanation" that the APA requires. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1207 (9th Cir. 2008). And it fails to even mention—much less justify—the indefinite separation its policy will impose on follow-to-join

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refugees and their families. *See Fox*, 556 U.S. at 516 (explaining that it is "arbitrary and capricious to ignore" the "serious reliance interests" that a "prior policy has engendered"). Nothing in the Memo explains why Defendants cannot continue to screen and admit the spouses and children of refugees while implementing these measures. But there is ample evidence of irrational animus, from the refugee bans imposed by EO-1 and EO-2; the Memo's reference to "certain nationals" and SAO countries; and the President's public displays of intense vitriol toward refugees—and Muslim refugees in particular. *See supra* § II.A.

As the Ninth Circuit explained with respect to Defendants' prior attempt to suspend refugee admissions, "EO2 does not reveal any threat or harm to warrant suspension of USRAP for 120 days and does not support the conclusion that the entry of refugees in the interim time period would be harmful. Nor does it provide any indication that present vetting and screening procedures are inadequate." *Hawai'i v. Trump*, 859 F.3d 741, 775 (9th Cir.), *vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017).[24] *See also State*, 847 F.3d at 1168 (dismissing the government's claim of irreparable injury and noting that "the Government has done little more than reiterate" its general interest in combatting terrorism) (internal citations omitted); *See IRAP*, 2017 WL 1018235, at *17 ("Defendants, however, have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history.").

Defendants' insufficient explanation is reminiscent of then-Governor Pence's attempt to keep Syrian refugees out of his state of Indiana based on empty assertions of security risks. The Seventh Circuit rejected the effort, stating that the government "provides no evidence that Syrian

[24] (Add citation that while vacated opinion is not binding, it is still persuasive authority)

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terrorists are posing as refugees or that Syrian refugees have ever committed acts of terrorism in the United States. Indeed, as far as can be determined from public sources, no Syrian refugees have been arrested or prosecuted for terrorist acts or attempts in the United States." *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 904 (7th Cir. 2016). Similarly, the district court found it "beyond reasonable argument to contend that a policy that purportedly deters [Syrian] four year olds from resettling" somehow served an "asserted interest in public safety." *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 737 (S.D. Ind.). Defendants' rationale here, to the extent one is even articulated, is equally empty.

B. Plaintiff Will Suffer Irreparable Harm Absent This Court's Intervention.

Defendants' decision to halt admission of follow-to-join derivative refugees from all nations inflicts severe harm on Plaintiff and others like him. Plaintiff, who has surely endured enough, is alone in the United States and desperately longs to be reunited with his family. Doe Decl. ¶ 18. Defendants' Memorandum closes the door on family reunification indefinitely.

"'Public policy supports recognition and maintenance of a family unit.'" *Hawai'i v. Trump*, 859 F.3d 741, 784 (9th Cir.), cert. granted sub nom. *Trump v. IRAP*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), and cert. granted, judgment vacated, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), and vacated sub nom (quoting *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005)). Indeed, "'[t]he [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.'" *Id.* (quoting *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (explaining that "the humane purpose" of the INA is to reunite families).

Separation from one's family is well recognized as irreparable harm: "important [irreparable harm] factors include separation from family members." *Andreiu v. Ashcroft*, 253

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F.3d 477, 484 (9th Cir.2001) (en banc); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011). The Ninth Circuit recently reiterated that EO-1's having "separated families" was "substantial injur[y] and even irreparable harm[ ]." *State v. Trump*, 847 F.3d 1151, 1169 (9th Cir.), *denying recons. en banc*, 853 F.3d 933 (9th Cir. 2017), and *denying recons. en banc*, 858 F.3d 1168 (9th Cir. 2017).

In this case, Defendants' decision to indefinitely halt the admission of follow-to-join derivative refugees inflicts severe harm on Plaintiff and others like him, who stand on the verge of being reunited with their very closest of family members—their children and spouses—after years of separation. Because Defendants have also lowered the refugee cap to the lowest number in the history of USRAP, the Agency Memo effectively eviscerates any chance Plaintiff's children and spouse, and those of others like him, have to get into the queue for the severely limited number of available spots left for refugees. The problem is compounded by the potentially endless cycle of medical clearances as those clearances expire, creating additional delay each time and the risk that the few available refugee slots will all already be filled each year before they can make it through.

The additional separation resulting from Defendants' actions is irreparable injury—lost time with his wife and young children that Plaintiff can never recover. Accordingly, this factor weighs in Plaintiff's favor.

C. The Public Interest and Balance of Equities Weigh Heavily in Favor of Granting Injunctive Relief.

The balance of the equities and public interest factors tip sharply in favor of Plaintiffs. *See Winter*, 555 U.S. at 24. The harms the Memorandum inflicts are immediate and severe, and

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"it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

The Supreme Court recently balanced nearly identical equities when it held that EO-2's travel ban "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. at 2088. Likewise for EO-2's suspension of refugee admissions: "An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction." *Id.* at 2089. The Court explained that with respect to individuals, "the sort of relationship that qualifies" as a "bona fide relationship" is "a close familial relationship." *Id.* at 2088. Follow-to-join refugees by definition have a "close family relationship" with a U.S. resident because only spouses and children are eligible.

The effect of the Memorandum on Plaintiff is particularly cruel because he has already waited years while his family members went through the exhaustive screening required by USRAP and because the ban on his family is indefinite. Defendants, in contrast, have offered no exigency that demands such an indefinite ban, much less that the ban will actually prevent terrorism. The federal government's interest in enforcing laws related to national security, absent any evidence of a threat, cannot outweigh the real harms that Plaintiffs face at Defendants' hands.

Accordingly, this Court should find that the balance of interests presented in this case tips in the favor of Plaintiff.

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V. CONCLUSION

The latest installment in the saga of Defendants' proclaimed "Muslim Ban" targets some of the world's most vulnerable: refugees and their families. Because Plaintiff will be irreparably harmed by the implementation of the Memorandum, because he is likely to succeed on his claims, and because the balance of equities tips in his favor, Plaintiff respectfully requests that this Court grant his motion and issue a preliminary injunction preventing Defendants from suspending admission of follow-to-join derivative refugees.

DATED this 6TH day of November, 2017

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By: /s/ Lisa Nowlin

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I electronically filed the foregoing Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses on the Court's Electronic Mail Notice List.

DATED this 6th day of November, 2017.

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Succar

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00178-JLR

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff Joseph Doe, on behalf of himself and the I-730 Refugee Class, moves this Court for a Preliminary Injunction.

Upon consideration of Plaintiff's Motion for Preliminary Injunction, the parties' briefing, oral argument, if any, the Court GRANTS Plaintiff's Motion for Preliminary Injunction.

PRELIMINARY INJUNCTION

Accordingly, it is hereby ORDERED that Defendants[1] and their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, from the date of this Order, are enjoined and restrained from enforcing the provisions in the October 23, 2017 Memorandum to the President entitled "Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities," from Defendants Secretary of State Rex Tillerson, Acting Secretary of Homeland Security Elaine Duke, and Director of National Intelligence Daniel Coats, with respect to the suspension of admission of "following-to-join" derivative refugees.

IT IS SO ORDERED.

DATED this _____ day of _____, 2017.

JAMES L. ROBART
UNITED STATES DISTRICT JUDGE

[1] This injunction does not run against the President.

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4819-0070-6900, v. 1

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00178-JLR

DECLARATION OF TANA LIN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Pursuant to 28 U.S.C. § 1746, I, Tana Lin, hereby declare and state:

1. I am a partner at the law firm of Keller Rohrback L.L.P. ("Keller Rohrback").

2. Attached hereto as Exhibit A is a true and correct copy of Executive Order 13815, "Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities."

3. Attached hereto as Exhibit B is a true and correct copy of the October 23, 2017 Memorandum to the President from Defendants Tillerson, Duke, and Coates titled "Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities."

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 6th day of November, 2017, at Seattle, Washington.

Tana Lin

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EXHIBIT A

Presidential Documents

Executive Order 13815 of October 24, 2017

Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy*. (a) It is the policy of the United States to protect its people from terrorist attacks and other public-safety threats. Screening and vetting procedures associated with determining which foreign nationals may enter the United States, including through the U.S. Refugee Admissions Program (USRAP), play a critical role in implementing that policy. Those procedures enhance our ability to detect foreign nationals who might commit, aid, or support acts of terrorism, or otherwise pose a threat to the national security or public safety of the United States, and they bolster our efforts to prevent such individuals from entering the country.

(b) Section 5 of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), directed the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to develop a uniform baseline for screening and vetting standards and procedures applicable to all travelers who seek to enter the United States. A working group was established to satisfy this directive.

(c) Section 6(a) of Executive Order 13780 directed a review to strengthen the vetting process for the USRAP. It also instructed the Secretary of State to suspend the travel of refugees into the United States under that program, and the Secretary of Homeland Security to suspend decisions on applications for refugee status, subject to certain exceptions. Section 6(a) also required the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to conduct a 120-day review of the USRAP application and adjudication process in order to determine, and implement, additional procedures to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States. Executive Order 13780 noted that terrorist groups have sought to infiltrate several nations through refugee programs and that the Attorney General had reported that more than 300 persons who had entered the United States as refugees were then the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(d) The Secretary of State convened a working group to implement the review process under section 6(a) of Executive Order 13780. This review was informed by the development of uniform baseline screening and vetting standards and procedures for all travelers under section 5 of Executive Order 13780. The section 6(a) working group compared the process for screening and vetting refugees with the uniform baseline standards and procedures established by the section 5 working group. The section 6(a) working group identified several ways to enhance the process for screening and vetting refugees and began implementing those improvements.

(e) The review process for refugees required by Executive Order 13780 has made our Nation safer. The improvements the section 6(a) working group has identified will strengthen the data-collection process for all refugee applicants considered for resettlement in the United States. They will also

bolster the process for interviewing refugees through improved training, fraud-detection procedures, and interagency information sharing. Further, they will enhance the ability of our systems to check biometric and biographic information against a broad range of threat information contained in various Federal watchlists and databases.

(f) Section 2 of Proclamation 9645 of September 24, 2017 (Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats), suspended and limited, subject to exceptions and case-by-case waivers, the entry into the United States of foreign nationals of eight countries. As noted in that Proclamation, those suspensions and limitations are in the interest of the United States because of certain deficiencies in those countries' identity-management and information-sharing protocols and procedures, and because of the national security and public-safety risks that emanate from their territory, including risks that result from the significant presence of terrorists within the territory of several of those countries.

(g) The entry restrictions and limitations in Proclamation 9645 apply to the immigrant and nonimmigrant visa application and adjudication processes, which foreign nationals use to seek authorization to travel to the United States and apply for admission. Pursuant to section 3(b)(iii) of Proclamation 9645, however, those restrictions and limitations do not apply to those who seek to enter the United States through the USRAP.

(h) Foreign nationals who seek to enter the United States with an immigrant or nonimmigrant visa stand in a different position from that of refugees who are considered for entry into this country under the USRAP. For a variety of reasons, including substantive differences in the risk factors presented by the refugee population and in the quality of information available to screen and vet refugees, the refugee screening and vetting process is different from the process that applies to most visa applicants. At the same time, the entry of certain refugees into the United States through the USRAP poses unique security risks and considerable domestic challenges that require the application of substantial resources.

Sec. 2. *Resumption of the U.S. Refugee Admissions Program*. (a) Section 6(a) of Executive Order 13780 provided for a temporary, 120-day review of the USRAP application and adjudication process and an accompanying worldwide suspension of refugee travel to the United States and of application decisions under the USRAP. That 120-day period expires on October 24, 2017. Section 6(a) further provided that refugee travel and application decisions could resume after 120 days for stateless persons and for the nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence jointly determine that the additional procedures identified through the USRAP review process are adequate to ensure the security and welfare of the United States. The Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have advised that the improvements to the USRAP vetting process are generally adequate to ensure the security and welfare of the United States, that the Secretary of State and Secretary of Homeland Security may resume that program, and that they will apply special measures to certain categories of refugees whose entry continues to pose potential threats to the security and welfare of the United States.

(b) With the improvements identified by the section 6(a) working group and implemented by the participating agencies, the refugee screening and vetting process generally meets the uniform baseline for immigration screening and vetting established by the section 5 working group. Accordingly, a general resumption of the USRAP, subject to the conditions set forth in section 3 of this order, is consistent with the security and welfare of the United States.

(c) The suspension of the USRAP and other processes specified in section 6(a) of Executive Order 13780 are no longer in effect. Subject to the conditions set forth in section 3 of this order, the Secretary of State may resume

travel of qualified and appropriately vetted refugees into the United States, and the Secretary of Homeland Security may resume adjudicating applications for refugee resettlement.

Sec. 3. *Addressing the Risks Presented by Certain Categories of Refugees*. (a) Based on the considerations outlined above, including the special measures referred to in subsection (a) of section 2 of this order, Presidential action to suspend the entry of refugees under the USRAP is not needed at this time to protect the security and interests of the United States and its people. The Secretary of State and the Secretary of Homeland Security, however, shall continue to assess and address any risks posed by particular refugees as follows:

(i) The Secretary of State and the Secretary of Homeland Security shall coordinate to assess any risks to the security and welfare of the United States that may be presented by the entry into the United States through the USRAP of stateless persons and foreign nationals. Under section 207(c) and applicable portions of section 212(a) of the INA, 8 U.S.C. 1157(c) and 1182(a), section 402(4) of the Homeland Security Act of 2002, 6 U.S.C. 202(4), and other applicable authorities, the Secretary of Homeland Security, in consultation with the Secretary of State, shall determine, as appropriate and consistent with applicable law, whether any actions should be taken to address the risks to the security and welfare of the United States presented by permitting any category of refugees to enter this country, and, if so, what those actions should be. The Secretary of State and the Secretary of Homeland Security shall administer the USRAP consistent with those determinations, and in consultation with the Attorney General and the Director of National Intelligence.

(ii) Within 90 days of the date of this order and annually thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall determine, as appropriate and consistent with applicable law, whether any actions taken to address the risks to the security and welfare of the United States presented by permitting any category of refugees to enter this country should be modified or terminated, and, if so, what those modifications or terminations should be. If the Secretary of Homeland Security, in consultation with the Secretary of State, determines, at any time, that any actions taken pursuant to section 3(a)(i) should be modified or terminated, the Secretary of Homeland Security may modify or terminate those actions accordingly. The Secretary of Homeland Security and the Secretary of State shall administer the USRAP consistent with the determinations made under this subsection, and in consultation with the Attorney General and the Director of National Intelligence.

(b) Within 180 days of the date of this order, the Attorney General shall, in consultation with the Secretary of State and the Secretary of Homeland Security, and in cooperation with the heads of other executive departments and agencies as he deems appropriate, provide a report to the President on the effect of refugee resettlement in the United States on the national security, public safety, and general welfare of the United States. The report shall include any recommendations the Attorney General deems necessary to advance those interests.

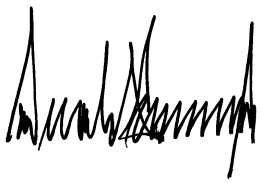
Sec. 4. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
October 24, 2017.

[FR Doc. 2017–23630
10–26–17; 11:15 am]
Billing code 3295–F8–P

EXHIBIT B

MEMORANDUM TO THE PRESIDENT

OCT 23 2017

FROM: Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of Homeland Security

Daniel Coats
Director
Office of the Director of National Intelligence

RESUMING THE UNITED STATES REFUGEE ADMISSIONS PROGRAM WITH ENHANCED VETTING CAPABILITIES

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

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

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

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

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

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

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

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

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

Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of
Homeland Security

Dan Coats
Director
National Intelligence

UNCLASSIFIED

Addendum to Section 6(a) Memorandum

Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*

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

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

Interagency Approach to the Review

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

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

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

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

Additional Procedures for Refugee Applicants Seeking Resettlement in the United States

Application Process:

- **Increased Data Collection:** Additional data are being collected from all applicants in order to enhance the effectiveness of biographic security checks. These changes will improve the ability to determine whether an applicant is being truthful about his or her claims, has engaged in criminal or terrorist activity, has terrorist ties, or is otherwise connected to nefarious actors.

- **Enhanced Identity Management:** The electronic refugee case management system has been improved to better detect potential fraud by strengthening the ability to identify duplicate identities or identity documents. Any such matches are subject to further investigation prior to an applicant being allowed to travel. These changes will make it harder for applicants to use deceptive tactics to enter our country.

Interview and Adjudication Process:

- **Fraud Detection and National Security:** DHS's U.S. Citizenship and Immigration Services (USCIS) will forward-deploy specially trained Fraud Detection and National Security (FDNS) officers at refugee processing locations to help identify potential fraud, national security, and public safety issues on certain circuit rides to advise and assist interviewing officers. With FDNS officers on the ground, the United States will be better positioned to detect and disrupt fraud and identify potential national security and public safety threats.

- **New Guidance and Training:** USCIS is strengthening its guidance on how to assess the credibility and admissibility of refugee applicants. This new guidance clarifies how officers should identify and analyze grounds of inadmissibility related to drug offenses, drug trafficking, prostitution, alien smuggling, torture, membership in totalitarian parties, fraud and misrepresentation, certain immigration violations, and other criminal activity. USCIS has also updated guidance for refugee adjudicators to give them greater flexibility in assessing the credibility of refugee applicants, including expanding factors that may be considered in making a credibility determination consistent with the REAL ID Act. This enhanced guidance supplements the robust credibility guidance and training USCIS officers already receive prior to adjudicating refugee cases. Additionally, the updated guidance equips officers with tactics to identify inadequate or improper interpretation.

- **Expanded Information-Sharing:** State and USCIS are exchanging more in-depth information to link related cases so that interviewing officers are able to develop more tailored lines of questioning that will help catch potential fraud, national security threats, or public safety concerns.

System Checks:

- **Updating Security Checks:** Measures have been put in place to ensure that if applicants change or update key data points, including new or altered biographic information, that such data is then subject to renewed scrutiny and security checks. This will add an additional layer of protection to identify fraud and national security issues.

- **Security Advisory Opinions (SAOs):** Departments and agencies have agreed to expand the classes of refugee applicants that are subject to SAOs, thereby ensuring that more refugees receive deeper vetting.

    - USCIS' Fraud Detection and National Security Directorate is also expanding its "enhanced review" process for applicants who meet SAO criteria. This includes checks against certain social media and classified databases.

Additional Review Process for Certain Categories of Refugee Applicants

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

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

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

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

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

Form I-730 Refugee Following-to-Join Processing

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

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

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00178-JLR

DECLARATION OF JOSEPH DOE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, "Joseph Doe," do hereby declare and state:

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
TELEPHONE: (206) 624-2184

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

1. I have personal knowledge of the matters contained herein and, where I do not have direct knowledge, I believe them to be true and correct based upon the information available to me.

2. I am originally from Somalia. I currently live in Des Moines, Washington.

3. When I was a child, my family and I fled Somalia because of the violent civil war in our country, to escape persecution and the risk of being killed because of our clan membership.

4. While we were trying to reach safety, we spent weeks trying to stay hidden in the forest while trying to get to Kenya on foot and without food. Fighters from one of the warring factions found us in the forest and raped my older sister in front of me and my family. My mother tried to stop the rape, but the men clubbed her in the head with the butt of their guns. My sister was pregnant at that time, and she had so much bleeding after the assault that she died.

5. We eventually got to Kenya and began living in a refugee camp. I lived in refugee camps in Kenya starting in 1992 when I was approximately 10 years old. I was in refugee camps for nearly 22 years.

6. I first initially interviewed with the United Nations High Commissioner for Refugees in 2000 with my mother, two brothers, and three surviving sisters.

7. One day in 2004 when I returned to the refugee camp after going out to try and earn some money for my family, I learned that the local Turkana people had raided the camp while I was gone, and my family had disappeared. I have not seen them since although I recently learned after all these years that some of my family are still alive.

8. By the time I finally interviewed with USCIS/DHS in 2011, I had met my wife and gotten married. We have three children.

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9. I finally completed the extensive DSH/USCIS screening process in December 2013 and arrived in the United States on January 28, 2014, as a refugee. But my refugee status only applied to myself, not my wife and children, as the refugee process was started when I first arrived at a refugee camp as a child. I had to leave my wife and three children behind in Kenya. My youngest child was only six months old at the time I left.

10. In June 2015, I filed a Refugee/Asylee Relative Petition, Form I-730, for my wife and for my children, who are now 4, 5, and 9 years old. I would have filed the petitions right away but I didn't know I could petition for my family. When I first arrived in the U.S., everything was new and I didn't understand the process. Eventually, after asking people who had been here longer than I had, I found out that I had the right to ask for my family to be admitted, and my caseworker at the International Rescue Committee helped me file the petitions.

11. I became a lawful permanent resident in 2016.

12. My wife and children had their final interviews in November 2016, which they successfully passed; they have completed the security clearance; they completed their medical clearance on January 31, 2017; and they received their final required immunizations on March 1, 2017. My family was assured by a refugee resettlement agency on June 5, 2017, and we were then only waiting for them to be scheduled for travel to the United States.

13. With the suspension of the refugee admissions program, the medical clearances for my wife and children had expired, and they had to go through that part of the process all over again. My wife and one of my children have received their new medical clearances. My two other children have been re-examined but we are still waiting for their results.

14. I work a full-time job to support my family.

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15. I regularly talk to my wife and children on the phone. My youngest son, now four years old, often cries for me and constantly asks me, "Where are you? Why can't you come for us?"

16. With the continued suspension of admissions for I-730 follow-to-join family like mine, my family's travel to the United States will be further delayed—and possibly indefinitely if the refugee cap is met before they are admitted, and I will be prevented from being reunited with my wife and children.

17. With every delay, I worry that my family will be stuck in a cycle of receiving their medical clearances but then having them expire, which would require them to repeat that part of the process, as has already happened once.

18. There isn't a day that I do not think of my wife and children, wish that I could just hold and hug them, and dream of being able to be a family again, all together in one place. Often at night I can't fall asleep because I am thinking about my family and wondering if tomorrow will be the day that I get the news that my family's travel has been scheduled and I will be reunited with them.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 4th day of November, 2017, at Seattle, Washington.

Joseph Doe

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