1 The Honorable James L. Robart
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7 UNITED STATES DISTRICT COURT
8 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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1 accompanying Agency Memo[1] (*see* Ex. 1, Decl. of Tana Lin in Supp. of Mot. for Prelim. Inj.
2 ("Lin Decl."), attachments A and B) are the latest installment in a series of executive actions
3 targeting Muslim immigrants and refugees. This Court is familiar with Defendant Trump's prior
4 orders, Executive Order 13769, 82 Fed Reg. 8977 (Jan. 27, 2017) ("EO-1"); Executive Order
5 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) ("EO-2"); and Presidential Proclamation 9645, 82
6 Fed. Reg. 45,161 (Sept. 24, 2017) ("EO-3"). *See* Temporary Restraining Order, *State v. Trump*,
7 No. 17-141-JLR (W.D. Wash. Feb. 3, 2017), Dkt. # 52; *State v. Trump*, No. 17-141-JLR, 2017
8 WL 4857088, at *2-4 (W.D. Wash. Oct. 27, 2017).[2] Plaintiff will not recount that history, but
9 EO-4 and the Agency Memo must still be viewed in context.
10
11 The President has long demonstrated an irrational prejudice against refugees in general,
12 and a particular concern that the previous refugee admission system favored Muslims over
13 Christians. On the campaign trail, for example, Defendant Trump speculated that Syrian refugees
14 could be a terrorist army in disguise: "Did you ever see a migration like that? . . . They're all
15 men, and they're all strong-looking guys . . . There are so many men; there aren't that many
16 women."[3] He also asserted that a proposal to accept 200,000 refugees could amount to accepting
17 a "200,000-man army," which "could be one of the great tactical ploys of all time."[4] But these
18 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]

"@DiCristo13: @realDonaldTrump let's have the policy speeches on immigration, economy, foreign policy, and NATO! "

7:48 PM - 7 Apr 2016

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[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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1 court shall "hold unlawful and set aside agency action … in excess of statutory jurisdiction,
2 authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(c); see also *Nw. Envtl.*
3 *Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008); *U.S. ex rel. O'Keefe v.*
4 *McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of
5 rules without valid statutory authority implicates core notions of the separation of powers, and
6 we are required by Congress to set these regulations aside."). Even if the APA does not apply,
7 the Court has the authority to review and set aside ultra vires agency action. *See Trudeau v. Fed.*
8 *Trade Comm'n*, 456 F.3d 178, 185 (D.C. Cir. 2006) (holding that "[s]ection 1331 is an
9 appropriate source of jurisdiction for" APA, nonstatutory, and constitutional claims).
10
11 Here, not only did Defendants act without Congress's direction, they vastly exceeded
12 their statutory authority by unilaterally suspending a provision of a federal statute properly
13 enacted by Congress. Congress created an entitlement allowing refugees to bring their immediate
14 families—spouses and unmarried children under the age of twenty-one—to join them in the
15 United States. And it did so using plain language that nowhere gives Defendants the authority to
16 rescind that entitlement.
17
18 The Court must "begin [its analysis] with the plain language of the statute." *Negusie v.*
19 *Holder*, 555 U.S. 511, 542 (2009). If the "statutory text is plain and unambiguous[,]" it "must
20 apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). Here, the
21 statutory language is unambiguous. Although the grant of refugee status to the *principal* refugee
22 is within the agency's discretion, the grant of *derivative* refugee status is not. *Compare* INA §
23 207(c)(1) (which governs principal refugees), *with* § 207(c)(2)(A) (which governs derivatives):
24
25 > (1) [T]he Attorney General **<u>may</u>**, in the Attorney General's discretion and
26 > 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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1 154, 177-78 (1997). And its suspension of follow-to-join refugee admissions imposes real and
2 severe "legal consequences" on refugees like Plaintiff and his family. *Id.* at 178 (citation
3 omitted). Such policies must be promulgated using notice-and-comment rulemaking because
4 they have "'binding effect'—'binding' in the sense that the rule does not 'genuinely leave[] the
5 agency . . . free to exercise discretion.'" *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995
6
7 F.2d 1106, 1111 (D.C. Cir. 1993) (citation omitted); *see also Nat'l Mining Ass'n v. McCarthy*,
8 758 F.3d 243, 252-53 (D.C. Cir. 2014) (describing what makes a legislative rule).
9 The Agency Memo is a legislative rule for which notice and comment was required. It
10 bans the admission of follow-to-join refugees with a categorical revocation of a legal entitlement
11 granted by the plain language of the INA. And it provides agency personnel no discretion
12 whatsoever, *see McCarthy*, 758 F.3d at 252 (looking to "the agency's characterization" of
13
14 whether its action binds agency personnel). Far from a mere policy statement with "'no legal
15 impact,'" *id.* at 253 (citation omitted), the Memorandum clearly falls on the legislative side of
16 the line. The APA requires notice and comment is required for precisely this type of agency
17 action so that the public can weigh in before people are deprived of substantive rights. Not only
18 have Defendants eviscerated a statutory entitlement, they have done so in relative secrecy via an
19 internal agency memo accompanied by none of the processes required by law. The Court should
20 therefore set aside the Memorandum for failing to conform to the APA's procedural
21
22 requirements.
23 **b. Defendants' indefinite ban of follow-to-join refugees is arbitrary and capricious.**
24
25 Even if notice-and-comment rulemaking were not required, the Memorandum's indefinite
26 suspension is still doomed under the APA, which prohibits agency action that is "arbitrary,

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1 capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). As the Supreme Court has
2 reiterated specifically in the immigration context, "courts retain a role, and an important one, in
3 ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S.
4 42, 53 (2011). In reviewing agency action under the arbitrary-and-capricious standard, courts
5 examine "whether the decision was based on a consideration of the relevant factors and whether
6 there has been a clear error of judgment." *Id.*; *Motor Vehicle Mfrs. Ass'n of United States, Inc. v.*
7 *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must . . . articulate a
8 satisfactory explanation for its action including a rational connection between the facts found and
9 the choice made."). An agency's decision is arbitrary and capricious when it fails to sufficiently
10 explain the reason for its decision, or when it changes a policy or deviates from existing practice
11 without acknowledging and explaining the reason for the change. *See FCC v. Fox Tel. Stations,*
12 *Inc.*, 556 U.S. 502, 515 (2009) (agency must "display awareness that it *is* changing position" and
13 must "show that there are good reasons for the new policy"); *Judulang*, 565 U.S. at 64 (holding
14 Board of Immigration Appeals policy arbitrary and capricious when Court could not "discern a
15 reason for it").
16
17 Regardless of whether the proposed security "enhancements" are justified (the Agency
18 Memo does not explain why they are necessary), the Memorandum provides no explanation at
19 all for why Defendants must suspend follow-to-join admissions in order to implement these
20 enhancements. It simply states that the program is suspended indefinitely without even trying to
21 provide the "reasoned explanation" that the APA requires. *Ctr. for Biological Diversity v. Nat'l*
22 *Highway Traffic Safety Admin.*, 538 F.3d 1172, 1207 (9th Cir. 2008). And it fails to even
23 mention—much less justify—the indefinite separation its policy will impose on follow-to-join
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1 refugees and their families. *See Fox*, 556 U.S. at 516 (explaining that it is "arbitrary and
2 capricious to ignore" the "serious reliance interests" that a "prior policy has engendered").
3 Nothing in the Memo explains why Defendants cannot continue to screen and admit the spouses
4 and children of refugees while implementing these measures. But there is ample evidence of
5 irrational animus, from the refugee bans imposed by EO-1 and EO-2; the Memo's reference to
6 "certain nationals" and SAO countries; and the President's public displays of intense vitriol
7 toward refugees—and Muslim refugees in particular. *See supra* § II.A.

8 As the Ninth Circuit explained with respect to Defendants' prior attempt to suspend
9 refugee admissions, "EO2 does not reveal any threat or harm to warrant suspension of USRAP
10 for 120 days and does not support the conclusion that the entry of refugees in the interim time
11 period would be harmful. Nor does it provide any indication that present vetting and screening
12 procedures are inadequate." *Hawai'i v. Trump*, 859 F.3d 741, 775 (9th Cir.), *vacated*, No. 16-
13 1540, 2017 WL 4782860 (U.S. Oct. 24, 2017).[24] *See also State*, 847 F.3d at 1168 (dismissing
14 the government's claim of irreparable injury and noting that "the Government has done little
15 more than reiterate" its general interest in combatting terrorism) (internal citations omitted); *See*
16 *IRAP*, 2017 WL 1018235, at *17 ("Defendants, however, have not shown, or even asserted, that
17 national security cannot be maintained without an unprecedented six-country travel ban, a
18 measure that has not been deemed necessary at any other time in recent history.").

19 Defendants' insufficient explanation is reminiscent of then-Governor Pence's attempt to
20 keep Syrian refugees out of his state of Indiana based on empty assertions of security risks. The
21 Seventh Circuit rejected the effort, stating that the government "provides no evidence that Syrian
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[24] (Add citation that while vacated opinion is not binding, it is still persuasive authority)

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1 terrorists are posing as refugees or that Syrian refugees have ever committed acts of terrorism in
2 the United States. Indeed, as far as can be determined from public sources, no Syrian refugees
3 have been arrested or prosecuted for terrorist acts or attempts in the United States." *Exodus*
4 *Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 904 (7th Cir. 2016). Similarly, the district
5 court found it "beyond reasonable argument to contend that a policy that purportedly deters
6 [Syrian] four year olds from resettling" somehow served an "asserted interest in public safety."
7 *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 737 (S.D. Ind.). Defendants'
8 rationale here, to the extent one is even articulated, is equally empty.
9
10 **B. Plaintiff Will Suffer Irreparable Harm Absent This Court's Intervention.**
11 Defendants' decision to halt admission of follow-to-join derivative refugees from all
12 nations inflicts severe harm on Plaintiff and others like him. Plaintiff, who has surely endured
13 enough, is alone in the United States and desperately longs to be reunited with his family. Doe
14 Decl. ¶ 18. Defendants' Memorandum closes the door on family reunification indefinitely.
15
16 "'Public policy supports recognition and maintenance of a family unit.'" *Hawai'i v.*
17 *Trump*, 859 F.3d 741, 784 (9th Cir.), cert. granted sub nom. *Trump v. IRAP*, 137 S. Ct. 2080, 198
18 L. Ed. 2d 643 (2017), and cert. granted, judgment vacated, No. 16-1540, 2017 WL 4782860
19 (U.S. Oct. 24, 2017), and vacated sub nom (quoting *Solis-Espinoza v. Gonzales*, 401 F.3d 1090,
20 1094 (9th Cir. 2005)). Indeed, "'[t]he [INA] was intended to keep families together. It should be
21 construed in favor of family units and the acceptance of responsibility by family members.'" *Id.*
22 (quoting *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (explaining that "the
23 humane purpose" of the INA is to reunite families).
24
25 Separation from one's family is well recognized as irreparable harm: "important
26 [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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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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