

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

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

JEWISH FAMILY SERVICE OF
SEATTLE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

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

**DEFENDANTS' OPPOSITION TO
JEWISH FAMILY SERVICE
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND
RESPONSE TO SUPPLEMENTAL
STATEMENTS FILED IN BOTH
CASES**

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INTRODUCTION

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2 Plaintiffs ask the Court to preliminarily enjoin two provisions of a Joint Memorandum
3 issued by multiple Cabinet Secretaries regarding the operation of the U.S. Refugee Admissions
4 Program (USRAP).¹ First, Plaintiffs challenge the joint determination by the Secretaries of State
5 and Homeland Security and Director of National Intelligence that a further review is needed of
6 eleven countries of origin for which certain refugee applicants are currently subject to Security
7 Advisory Opinions (SAOs). During this review (scheduled to last 90 days), the agencies will
8 “temporarily prioritize refugee applications from other non-SAO countries,” but will also consider
9 for admission those from SAO countries on a case-by-case basis. Joint Mem. at 2; Joint Mem.
10 Addendum at 3-4. Second, Plaintiffs seek to enjoin a provision regarding following-to-join
11 refugees. Such refugee applicants are not currently subject to the same screening and vetting
12 procedures as other refugee applicants. To ensure the security and welfare of the United States,
13 the Secretaries directed their agencies to implement screening procedures for following-to-join
14 refugees that are similar to those already used for principal refugees. During this implementation
15 period, while the Departments of Homeland Security and State and their vetting partners make
16 the necessary operational changes, following-to-join refugees processed at most locations will not
17 be admitted to the United States. Admissions will resume once the procedures are in place.

18 As a preliminary matter, the Court should not even consider Plaintiffs’ motion at this time.
19 In two orders issued simultaneously on December 4, 2017, the Supreme Court stayed injunctions
20 against enforcement of the “Presidential Proclamation Enhancing Vetting Capabilities for
21 Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats”
22 (hereafter “Proclamation”).² Lower courts had enjoined enforcement of the Proclamation based
23

24 ¹ See Joint Memorandum to the President from the Secretary of State, Acting Secretary of
25 Homeland Security, and Director of National Intelligence (Oct. 23, 2017) (ECF No. 43-1 (Exhibit
26 B)) [hereafter “Joint Mem.”]. Except where otherwise noted, docket numbers refer to pre-
consolidation filings in the *Jewish Family Service* case, No. 2:17-cv-1707 (JLR).

² See Order, *Trump v. IRAP*, No. 17A560, 2017 WL 5987435 (U.S. Dec. 4, 2017); Order,
Trump v. Hawaii, No. 17A550, 2017 WL 5987406 (U.S. Dec. 4, 2017).

1 on some of the same claims that Plaintiffs raise with respect to the Joint Memorandum. As the
2 Government will explain more fully in a supplemental brief to be filed on December 11, 2017
3 (pursuant to this Court’s Order), just as the Supreme Court concluded that the Government may
4 enforce the Proclamation, the Court would very likely conclude that the Government may enforce
5 the challenged provisions of the Joint Memorandum as well.

6 Apart from this recent Supreme Court guidance, Plaintiffs’ claims fail because they are
7 not justiciable. Plaintiffs fail to satisfy threshold Article III requirements. Further, based on
8 fundamental principles of non-reviewability, Plaintiffs cannot pursue their statutory claims. The
9 Plaintiffs who are aliens outside the United States lack constitutional rights under the
10 Establishment Clause, whereas the Plaintiffs located in the United States have not alleged
11 cognizable violations of their individual constitutional rights. Moreover, Plaintiffs cannot
12 proceed under the Administrative Procedure Act (APA) because the Joint Memorandum is not
13 final agency action, and the decision to admit refugees is committed to agency discretion.

14 Even if Plaintiffs could overcome these jurisdictional hurdles, their claims fail on the
15 merits. With respect to the SAO provision (and not the following-to-join provision), Plaintiffs
16 argue that the Government lacks authority to implement that provision, that the provision violates
17 the APA because it needed to undergo notice-and-comment rulemaking and is arbitrary and
18 capricious, and that the provision conflicts with the Immigration and Nationality Act (INA). But
19 Plaintiffs ignore the wide discretion Congress vested in the Government over admission of
20 refugees and misunderstand the INA. Also, notice-and-comment rulemaking was not necessary
21 because the SAO provision is a procedural rule and falls within the APA’s foreign affairs
22 exception, and Plaintiffs cannot show that the Cabinet Secretaries acted arbitrarily and
23 capriciously in deciding to temporarily prioritize resources for non-SAO countries while they
24 “conduct a detailed threat analysis” of SAO countries for 90 days “to determine what additional
25 safeguards, if any, are necessary” to protect national security and the welfare of the United States.
26 Joint Mem. at 2. Plaintiffs also bring an Establishment Clause claim, arguing that both the SAO

1 provision and following-to-join provision are unconstitutional. But that constitutional claim is
2 governed by, and fails under, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), as the Joint
3 Memorandum’s national-security foundation is plainly “facially legitimate and bona fide.” *Id.* at
4 770. And because the operative policy here is the Joint Memorandum, the relevant
5 decisionmakers are the Secretaries of State and Homeland Security and the Director of National
6 Intelligence. Plaintiffs have not alleged—much less demonstrated—that these decisionmakers
7 were motivated by animus in deciding to implement the Joint Memorandum.

8 **BACKGROUND**

9 Section 6(a) of Executive Order No. 13,780, titled *Protecting the Nation from Foreign*
10 *Terrorist Entry into the United States* (“EO-2”), directed the Secretaries of State and Homeland
11 Security to suspend travel of refugees and decisions on refugee applications under the USRAP,
12 pending a review of existing procedures. *See* 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017). This
13 suspension was necessary to allow the Secretaries, in consultation with the Director of National
14 Intelligence, to “determine what additional procedures should be used to ensure that individuals
15 seeking admission as refugees do not pose a threat to the security and welfare of the United
16 States.” EO-2 § 6(a). During this suspension period, the agencies identified multiple ways to
17 enhance the refugee vetting process, and began implementing some of those improvements. This
18 review and implementation process proceeded in parallel with, and drew upon, a broader review
19 of the visa admission process also prescribed by EO-2. *See* Joint Mem. at 1.

20 Section 6(a) also provided that, at the conclusion of the review period, refugee travel and
21 USRAP adjudications would resume for stateless persons and nationals of countries for which the
22 officials “determined that the additional procedures implemented . . . are adequate to ensure”
23 national security and the welfare of the United States. On October 23, 2017, the Secretaries
24 advised the President, through a Joint Memorandum, that the improvements to the USRAP vetting
25 process were sufficient to allow the general resumption of that program, subject to conditions.
26

1 Plaintiffs seek to enjoin two conditions here. They first challenge the Secretaries'
2 determination that further review is needed for eleven countries of origin for which certain refugee
3 applicants are subject to SAOs because those countries were found, as of 2015, to pose an elevated
4 national-security risk to the United States. *See* Joint Mem. at 2; Joint Mem. Addendum at 3-4.
5 During this 90-day review period, the agencies will “temporarily prioritize refugee applications
6 from other non-SAO countries,” for whom processing may not require as many resources. Joint
7 Mem. at 2; Joint Mem. Addendum at 3-4. Applicants from the eleven countries may still be
8 considered for admission on a case-by-case basis. Joint Mem. at 2; Joint Mem. Addendum at 3.

9 Plaintiffs also challenge the Joint Memorandum’s provision that addresses the different
10 screening procedures currently applied to most “following-to-join” refugee applicants, eligible
11 family members of a “principal” refugee who has already resettled in the United States. *See* Joint
12 Mem. at 2-3. As the Joint Memorandum explains, most following-to-join refugee applicants do
13 not currently undergo the same security procedures as principal refugees or accompanying
14 derivative refugees (who are typically processed at the same time and location as the principal).
15 *See* Joint Mem. at 2-3 & n.1 (explaining these divergent procedures); *see also Doe v. Trump*, No.
16 2:17-cv-00178 (W.D. Wash.), ECF Nos. 51 at 6, 51-1 ¶¶ 3, 12-15. The Secretaries determined
17 that it is necessary to “implement adequate screening mechanisms for following-to-join refugees
18 that are similar to the processes employed for principal refugees, in order to ensure the security
19 and welfare of the United States.” Joint Mem. at 3; *see also* Joint Mem. Addendum at 4
20 (describing some of the additional security measures to be implemented). These officials further
21 determined that following-to-join refugees should not be admitted to the United States until the
22 additional screening procedures are in place. Joint Mem. at 3. The agencies are working
23 expeditiously to implement the additional screening procedures. *See* Joint Mem. Addendum at 4.
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1 Once these procedures are in place, admissions of following-to-join refugees will resume
2 worldwide. *See* Joint Mem. at 3.³

3 Following receipt of the Joint Memorandum, on October 24 the President issued Executive
4 Order No. 13,815, *Resuming the United States Refugee Admissions Program with Enhanced*
5 *Vetting Capabilities*, 82 Fed. Reg. 50,055 (Oct. 24, 2017). The President acknowledged the
6 Secretaries' joint determination that the USRAP may resume and that they will apply "special
7 measures" to certain categories of refugee applicants, and therefore the worldwide suspension
8 directed by EO-2 is no longer required. *See id.* §§ 2(a), (c). Going forward, the President directed
9 the Secretaries of State and Homeland Security to exercise their statutory authority to "continue
10 to assess and address any risks posed by particular refugees," *id.* § 3(a), including by terminating
11 actions taken to address these risks when appropriate, *id.* § 3(a)(ii).

12 Plaintiffs now move to enjoin enforcement of the Joint Memorandum, claiming that the
13 SAO provision violates the APA and is *ultra vires*, and that the SAO and following-to-join
14 provisions violate the First Amendment's Establishment Clause.

15 STANDARD OF REVIEW

16 Plaintiffs must show that they are "likely to succeed on the merits," that they are likely to
17 "suffer irreparable harm in the absence of preliminary relief," that the "balance of equities" tips
18 in their favor, and that "an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S.
19 7, 20 (2008).

20 ARGUMENT

21 I. PLAINTIFFS' CHALLENGES ARE NOT JUSTICIABLE

22 A. The Individual Plaintiffs Lack Article III Standing

23 To satisfy Article III's standing requirements, "a plaintiff must show (1) it has suffered an
24 'injury in fact'[:] . . . (2) the injury is fairly traceable to the challenged action of the defendant;

25
26 ³ As noted below, following-to-join refugee applicants processed at resettlement support centers in Kenya and Thailand are unaffected by the implementation period, as adequate review mechanisms are already in place in those countries.

1 and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a
 2 favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*, 528 U.S.
 3 167, 180-81 (2000). The related doctrine of ripeness rejects as nonjusticiable claims that “rest[]
 4 upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’”
 5 *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted).

6 Plaintiffs’ challenges to the Joint Memorandum are premature. With respect to the
 7 following-to-join provision, only two of the individual Plaintiffs—Afkab Hussein and John Doe
 8 7—describe family members who are awaiting travel as following-to-join refugees. But
 9 Hussein’s challenge fails at the outset, because his family members appear to be located in Kenya.
 10 *See Decl. of Afkab Mohamed Hussein in Support of Pls.’ Mot.*, ECF No. 48 ¶¶ 3, 10-11. As the
 11 Government explained in *Doe v. Trump*, Kenya is one of two countries in which screening
 12 procedures are already in place to ensure that following-to-join and principal refugees receive
 13 comparable scrutiny. *See Decl. of Jennifer B. Higgins*, No. 2:17-cv-00178 (W.D. Wash.), ECF
 14 No. 51-1 ¶ 11 (explaining that the Government is issuing travel authorizations for following-to-
 15 join refugees who have been processed by resettlement support centers in Kenya and Thailand,
 16 subject to other restrictions on refugee admissions). Hussein’s family members are apparently
 17 unaffected by the following-to-join implementation period, and Hussein thus lacks standing to
 18 challenge it. As for John Doe 7, his son has been waiting to travel since November 2016, months
 19 before the first refugee-related executive order took effect. *Decl. of John Doe #7*, ECF No. 58 ¶
 20 4. It would be speculative to infer that the following-to-join implementation period is the source
 21 of any further delay in John Doe 7’s son’s travel, and “speculation is not enough to sustain Article
 22 III standing,” *Finkelman v. NFL*, 810 F.3d 187, 200 (3d Cir. 2016).

23 With respect to the SAO provision, Plaintiffs’ claims are again speculative. Even if one
 24 or more of the identified refugee applicants were on the brink of traveling to the United States, it
 25 is not obvious that the SAO provision would stand in their way, given its allowance for case-by-
 26

1 case admission. *See* Joint Mem. at 2.⁴ Moreover, it is doubtful that these applicants are on the
 2 brink of travel such that the 90-day SAO review period will have any concrete impact on them.
 3 Afkab Hussein, for example, merely states that his wife and son have completed “several stages”
 4 of the following-to-join screening process. ECF No. 48 ¶ 17. John Doe 1 applied for admission
 5 through the Direct Access Program in 2014 and claims he is in the “end stage of processing,” but
 6 he recently had problems with his passport. Decl. of John Doe #1 in Supp. of Pls.’ Mot., ECF
 7 No. 52 ¶¶ 2, 15-16. John Doe 2 was still awaiting security checks as of earlier this year, while
 8 Jane Doe 5 has been awaiting such checks since 2016. *Compare* Decl. of John Doe #2 in Supp.
 9 of Pls.’ Mot., ECF No. 53 ¶ 9, *with* Decl. of Jane Doe #5 in Supp. of Pls.’ Mot., ECF No. 56 ¶ 7.
 10 Jane Doe 4 only completed her International Organization for Migration and U.S. Citizenship and
 11 Immigration Services (“USCIS”) interviews in September. Decl. of Jane Doe #4 in Supp. of Pls.’
 12 Mot., ECF No. 55 ¶ 5. And as noted above, John Doe 7’s son has been waiting to travel since
 13 November 2016. ECF No. 58 ¶ 4.⁵ With nothing more than speculation that the SAO provision
 14 may adversely affect them (as opposed to the many known and incommensurable delays that are
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19 ⁴ For instance, Joseph Doe’s contention that his children should be exempt from the SAO
 20 provision misses the mark. *See Doe Pls.’ Notice Joining the Mot. for Prelim. Inj. in Jewish Family*
 21 *Service of Seattle v. Trump, Doe v. Trump*, No. 2:17-cv-00178JLR (W.D. Wash.), ECF No. 62
 22 (“*Doe Notice*”). The Joint Memorandum continues to allow admission of SAO nationals during
 the 90-day review period on a case-by-case basis. Joint Mem. at 2. Joseph Doe has not shown
 that his children cannot qualify for this exception.

23 ⁵ The *Doe* Plaintiffs have named an additional party, Jeffrey Doe, who joins the *Jewish*
 24 *Family Service* Plaintiffs in challenging the SAO provision. *See Doe Notice* at 4. Jeffrey Doe
 25 has not submitted a declaration, but the *Doe* Plaintiffs allege that Jeffrey’s parents and siblings
 26 applied for refugee status back in 2005 and received an initial approval letter from USCIS in 2006.
See Third Am. Compl. ¶ 89, Doe v. Trump, No. 2:17-cv-00178JLR (W.D. Wash.), ECF No. 42.
 The family members have been assured by the Episcopal Diocese of Olympia since September
 2015, and their most recent medical examinations have expired. In light of these allegations, there
 is no reason to believe Jeffrey Doe’s family members are on the brink of travel.

1 part and parcel of the ordinary refugee admissions process), Plaintiffs have not alleged an injury
 2 that is fairly traceable to the Joint Memorandum and ripe for judicial redress.⁶

3 **B. The Organizational Plaintiffs Lack Article III Standing**

4 The organizational Plaintiffs, Jewish Family Service of Seattle (JFS-S) and Jewish Family
 5 Services of Silicon Valley (JFS-SV), allege that they have been injured by the Joint Memorandum
 6 because the challenged provisions force them to “divert significant resources away from [their]
 7 core mission” and may lead to a loss of funding should the organizations fail to resettle as many
 8 clients as they had anticipated. Mot. for Prelim. Inj. at 12, ECF No. 42 (“Pls.’ Br.”); *see also* Pls.’
 9 Notice Joining the Mot. for Prelim. Inj. in *Doe v. Trump* at 3, ECF No. 70 (“JFS Notice”) (similar).

10 In support of these allegations, Plaintiffs cite *Havens Realty Corp. v. Coleman*, 455 U.S.
 11 363 (1982). But *Havens Realty* involved a narrow type of injury in which the plaintiff
 12 organization itself had a statutory right to truthful housing information, *see id.* at 373, and the
 13 defendants’ “racially discriminatory steering practices” made it impossible for the organization
 14 to fulfill its mission, *id.* at 379. By its own terms, *Havens Realty* does not satisfy Article III’s
 15 requirement of an injury in fact any time there is “a setback to the organization’s abstract social
 16 interests,” *id.* *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d
 17 1083, 1088 (9th Cir. 2010) (“An organization suing on its own behalf can establish injury when
 18 it suffered ‘both a diversion of its resources and a frustration of its mission.’ It cannot manufacture
 19 the injury by . . . simply choosing to spend money fixing a problem that otherwise would not
 20 affect the organization at all.” (citations omitted)); *see also Nat’l Ass’n of Home Builders v. EPA*,
 21 667 F.3d 6, 12 (D.C. Cir. 2011) (rejecting plaintiff’s theory of organizational standing based on
 22 allocation of resources to regulatory comments, congressional testimony, and litigation).

23 The organizational Plaintiffs’ allegations concerning diversion of resources are the types
 24 of abstract or self-inflicted harms that do not suffice for standing under *Havens Realty* and its
 25

26 ⁶ Several of the Plaintiffs describe a kind of stigmatic injury associated with what they
 perceive as anti-Muslim sentiment. This misguided theory is discussed in Part I.C.2, *infra*.

1 progeny or Article III. Plaintiffs have not shown that the Joint Memorandum impairs their core
 2 mission. The challenged provisions do not suspend refugee admissions; on the contrary,
 3 Executive Order No. 13,815 largely *resumed* the USRAP, subject to conditions for applicants of
 4 special concern. Although those conditions may temporarily alter which individuals are resettled
 5 as refugees, those conditions do not limit or otherwise restrict the overall *number* of individuals
 6 who may be resettled as refugees. Moreover, the Government has long used nationality-based
 7 distinctions in implementing the USRAP and prioritizing certain applicants. *See* Part II.A.1, *infra*.

8 Thus, nothing in the Joint Memorandum prevents JFS-S and JFS-SV from fulfilling their
 9 missions. Rather, they may continue to do so by aiding the resettlement of refugees. Indeed,
 10 these organizations already fulfill their missions by representing such clients who are unaffected
 11 by the challenged provisions. *See* Decl. of Rabbi Will Berkovitz, ECF No. 50 ¶¶ 24, 26 (79 of
 12 133 JFS-S clients are from non-SAO countries, and only 2% of JFS-S resettlements in fiscal year
 13 2016 were following-to-join refugees); Decl. of Mindy Berkowitz, ECF No. 51 ¶ 32 (19 of 42
 14 JFS-SV clients are from non-SAO countries). These organizations do not explain how policies
 15 that may temporarily alter which individuals are resettled as refugees—but do not suspend the
 16 USRAP—impair the organizations’ missions in any meaningful way. Nor do they explain why
 17 they are likely to suffer financial losses when nothing in the Joint Memorandum prevents them
 18 from assisting with resettling refugees who are unaffected by the Joint Memorandum. Assuming
 19 *arguendo* that the organizations have a protected interest in the admission of refugees generally,
 20 they cite nothing giving them an interest in the admission of particular refugees, and they therefore
 21 do not plausibly allege that the Joint Memorandum has injured them.⁷

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 26 ⁷ Apart from their defective claims of injury in their own right, JFS-S and JFS-SV purport to represent the interests of their third-party clients. Pls.’ Br. at 13. But third-party standing is unavailable where, as here, the third party has itself suffered no injury.

1 **C. Plaintiffs’ Claims Are Barred By Principles Of Nonreviewability**

2 **1. Plaintiffs’ Statutory Claims Are Not Reviewable**

3 Plaintiffs’ statutory claims, which concern only the Joint Memorandum’s SAO provision
 4 (not the following-to-join provision), are not subject to judicial review. The Supreme Court has
 5 long recognized that “the power to . . . exclude aliens” is a “fundamental sovereign attribute
 6 exercised by the Government’s political departments largely immune from judicial control.”
 7 *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). “[I]t is not within the province of any
 8 court, *unless expressly authorized by law*, to review the determination of the political branch of
 9 the Government to exclude a given alien.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S.
 10 537, 543 (1950) (emphasis added). Courts have distilled from these longstanding principles that
 11 the denial or revocation of a visa for an alien abroad “is not subject to judicial review . . . unless
 12 Congress says otherwise.” *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999);
 13 *see also Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998) (“Administrative decisions excluding
 14 aliens are not subject to judicial review unless there is a clear grant of authority by statute.”).
 15 Courts refer to this rule as the “doctrine of consular nonreviewability,” *Saavedra Bruno*, 197 F.3d
 16 at 1159, but the short-hand label merely reflects the context in which the principle most often
 17 arises—in challenges to decisions by consular officials adjudicating visa applications. The
 18 principle underlying the doctrine applies regardless of the manner in which the Executive Branch
 19 denies entry to an alien abroad, including a refugee applicant. *See Haitian Refugee Ctr., Inc. v.*
 20 *Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992) (per curiam). It would make no sense to bar review
 21 of consular or immigration officers’ case-specific determinations while permitting review of
 22 Cabinet Secretaries’ determinations (such as the Joint Memorandum’s SAO and following-to-join
 23 provisions) that are grounded in sensitive national-security judgments and that are applied by
 24 lower-level officials in reviewing individual visa or refugee applications.

25 Plaintiffs have identified no statute that authorizes judicial review here. The statute
 26 authorizing refugee admissions—8 U.S.C. § 1157—says nothing about judicial review. It simply

1 provides, in relevant part, that the “Attorney General may, in the Attorney General’s discretion
 2 . . . admit any refugee who is not firmly resettled in any foreign country, is determined to be of
 3 special humanitarian concern to the United States, and is admissible . . . as an immigrant.” 8
 4 U.S.C. § 1157(c)(1);⁸ *see also Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir.
 5 1992) (per curiam) (“Contrary to the extensive procedures provided for with regard to aliens
 6 within the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from
 7 outside the United States, makes no provision for judicial review.”).

8 Nor is the APA any help to Plaintiffs here. The APA does not apply “to the extent that
 9 . . . statutes preclude judicial review,” 5 U.S.C. § 701(a)(1), a determination that turns not only on
 10 the statute’s express language but also on the “structure of the statutory scheme, its objectives, its
 11 legislative history, and the nature of the administrative action involved,” *Block v. Cmty. Nutrition*
 12 *Inst.*, 467 U.S. 340, 345 (1984). Moreover, Section 702 of the APA includes a proviso that
 13 preserves “other limitations on judicial review” that predated the APA. *See Saavedra Bruno*, 197
 14 F.3d at 1158. Here, the conclusion is “unmistakable” from history that “the immigration laws
 15 ‘preclude judicial review’ of [] consular visa decisions,” *id.* at 1160, and the same is true of
 16 refugee determinations, *see Haitian Refugee Ctr.*, 953 F.2d at 1506. At a minimum, the general
 17 rule of “nonreviewability . . . represents one of the ‘limitations on judicial review’ unaffected by
 18 § 702’s opening clause[.]” *Saavedra Bruno*, 197 F.3d at 1160.

19 Indeed, when the Supreme Court held that aliens physically present in the United States—
 20 but not aliens abroad—could seek review of their exclusion orders under the APA, *see Brownell*
 21 *v. Tom We Shung*, 352 U.S. 180, 184-86 (1956), Congress responded by abrogating that ruling.
 22 *See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-53; Saavedra Bruno*, 197
 23 F.3d at 1157-62 (recounting history). The House Report accompanying the abrogating statute
 24 explained that APA suits would “give recognition to a fallacious doctrine that an alien has a ‘right’
 25 to enter this country which he may litigate in the courts of the United States against the U.S.
 26

⁸ This discretion now rests with the Secretary of Homeland Security. *See* 6 U.S.C. § 557.

1 Government as a defendant.” H.R. Rep. No. 87-1086, at 33 (1961). Because an alien present in
 2 the United States cannot invoke the APA to obtain review of an exclusion order, then *a fortiori*
 3 neither can aliens abroad or U.S. persons acting on their behalf. And because Congress has
 4 generally foreclosed judicial review of visa revocations, *see* 8 U.S.C. § 1201(i), it is implausible
 5 that Congress would permit review of Executive decisions to restrict entry in the first instance.
 6 Significantly, Plaintiffs have identified no precedent holding that policies excluding or prioritizing
 7 admission for particular categories of refugees are judicially reviewable.

8 **2. Plaintiffs’ Establishment Clause Claim Is Likewise Not Reviewable**

9 The Supreme Court has twice engaged in limited review of constitutional claims involving
 10 the exclusion of an alien abroad, but only when a U.S. citizen alleged a violation of that citizen’s
 11 own constitutional rights. In *Kleindienst v. Mandel*, the Court reviewed a claim that the denial of
 12 a waiver of visa-ineligibility to a Belgian national violated U.S. citizens’ First Amendment rights
 13 to receive information. 408 U.S. at 756-59, 762-70. As the Court explained, the alien could not
 14 seek review because he “had no constitutional right of entry to this country.” *Id.* at 762. The
 15 Court addressed only the claim of U.S. citizens that the alien’s exclusion violated their own rights,
 16 and then concluded that when the Executive exercises its authority to exclude an alien “on the
 17 basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise
 18 of that discretion” nor balance it against constitutional claims of others. *Id.* at 770. In *Kerry v.*
 19 *Din*, the Court rejected a claim by a U.S. citizen that the refusal of a visa to her husband violated
 20 her own due-process rights. 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *id.* at 2139
 21 (Kennedy, J., concurring in the judgment). Limited review was available in each case only
 22 because the plaintiffs asserted violations of their own constitutional rights as U.S. citizens.⁹

23 The individual Plaintiffs’ claimed constitutional injuries are not cognizable. Of the eleven
 24 named Plaintiffs here, four (John Does 1–2, Jane Does 4–5) are prospective refugees located

25 _____
 26 ⁹ Although the Ninth Circuit previously suggested in dicta that states might have standing
 to assert “potential claims regarding possible due process rights” of various groups including
 refugees, *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (per curiam), *cert. denied*

1 overseas who cannot assert constitutional claims. *Mandel*, 408 U.S. at 762 (“It is clear that . . .
 2 an unadmitted and nonresident alien[] ha[s] no constitutional right of entry to this country as a
 3 nonimmigrant or otherwise.”). Though the remaining Plaintiffs may reside stateside, the Joint
 4 Memorandum concerns the processing of refugees located abroad, not U.S. persons. In *McGowan*
 5 *v. Maryland*, 366 U.S. 420, 429-30 (1961), the Supreme Court held that individuals who are
 6 indirectly injured by alleged religious discrimination against others generally may not sue,
 7 because they have not suffered violations of their own rights. The Court concluded that the
 8 plaintiffs, employees of a store subject to a State’s Sunday-closing law, lacked standing to
 9 challenge that law on free-exercise grounds because they “d[id] not allege any infringement of
 10 their own religious freedoms.” *Id.* at 429. Similarly, in *Elk Grove Unified School District v.*
 11 *Newdow*, 542 U.S. 1, 15-18 & n.8 (2004), *abrogated in part on other grounds by Lexmark Int’l,*
 12 *Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Court held that a non-custodial
 13 parent could not challenge recitation of the Pledge of Allegiance at his daughter’s school because
 14 his “standing derive[d] entirely from his relationship with his daughter,” not from a violation of
 15 his own rights. Likewise here, in challenging the application of the Joint Memorandum to family
 16 members overseas, Plaintiffs are not asserting violations of their own rights. They are instead
 17 seeking to advance the interests of third parties who have not entered the United States and who
 18 themselves have no right to entry under our Constitution. Because Plaintiffs are not asserting any
 19 violations of their own constitutional rights, Plaintiffs cannot benefit from the limited review
 20 afforded in *Mandel* and the *Din* concurrence.

21 The stateside Plaintiffs also claim that the Joint Memorandum contains an anti-Muslim
 22 sentiment that results in stigmatization. But the Joint Memorandum says nothing about religion,
 23

24 *sub nom. Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (Nov. 13, 2017) (mem.), that
 25 passing observation cannot be squared with *Mandel*’s demarcation between a constitutional claim
 26 by an alien abroad (unreviewable) and a constitutional claim by a U.S. person (potentially
 reviewable, provided the person alleges a violation of his/her individual rights). *See also Trump*
v. IRAP, 137 S. Ct. 2080, 2088 (2017) (“An unadmitted and nonresident alien has no constitutional
 right of entry to this country.” (alterations omitted) (quoting *Mandel*, 408 U.S. at 762)).

1 and it certainly does not single out Plaintiffs or other U.S. persons similarly situated to them.
 2 While a plaintiff may suffer a “spiritual” injury from the violation of his or her own rights when
 3 he or she is “subjected to unwelcome religious exercises” or “forced to assume special burdens to
 4 avoid them,” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*,
 5 454 U.S. 464, 486 n.22 (1982), Plaintiffs allege no such requirements or pressures here. In
 6 analogous cases arising under the Equal Protection Clause, the Supreme Court has “ma[de] clear”
 7 that “the stigmatizing injury often caused by [invidious] discrimination . . . accords a basis for
 8 standing *only* to ‘those persons who are personally denied equal treatment’ by the challenged
 9 discriminatory conduct.” *Allen v. Wright*, 468 U.S. 737, 755 (1984) (emphasis added) (citation
 10 omitted), *abrogated in part on other grounds by Lexmark Int’l*, 134 S. Ct. 1377. The same rule
 11 applies to Establishment Clause claims: “the psychological consequence presumably produced
 12 by observation of conduct with which one disagrees” is not the type of “personal injury” that
 13 supports standing to sue, “even though the disagreement is phrased in [Establishment Clause]
 14 terms.” *Valley Forge*, 454 U.S. at 485-86; *see also In re Navy Chaplaincy*, 534 F.3d 756, 764
 15 (D.C. Cir. 2008) (an Establishment Clause plaintiff may not “re-characterize[]” an abstract injury
 16 flowing from “government *action*” directed against others as a personal injury from “a
 17 governmental *message* [concerning] religion” directed at the plaintiff). Since no Plaintiff has
 18 alleged a cognizable violation of his or her own constitutional rights, the doctrine of
 19 nonreviewability controls, and the Court should decline to consider Plaintiffs’ claims.

20 **D. Plaintiffs Cannot Otherwise Proceed Under The APA**

21 Plaintiffs also cannot proceed under the APA because the challenged provisions are not
 22 final agency action. Finality is a prerequisite to judicial review under the APA. *See* 5 U.S.C.
 23 § 704. Two conditions must be satisfied before agency action will be deemed sufficiently final:
 24 “First, the action must mark the consummation of the agency’s decisionmaking process And
 25 second, the action must be one by which rights or obligations have been determined, or from
 26

1 which legal consequences will flow.” *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*,
 2 543 F.3d 586, 591 (9th Cir. 2008) (citation omitted).

3 Even if Plaintiffs could show that the Joint Memorandum satisfies the first requirement
 4 for finality, they cannot establish the second requirement because neither the SAO provision nor
 5 the following-to-join implementation period determine rights or obligations or prescribe legal
 6 consequences. The provisions do not deprive Plaintiffs or their family members of the opportunity
 7 to obtain refugee status. At most, the provisions may delay their admission if they are otherwise
 8 eligible. But a processing delay by itself does not alter a refugee’s “legal situation,” and thus
 9 these provisions are not final agency action. *See Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*,
 10 861 F.3d 944, 952 (9th Cir. 2017) (issuance of pilot program report was not final agency action;
 11 though it was the “final step in completing the pilot program,” clearing the way for permitting of
 12 certain carriers, it “did not change the legal situation,” as agency retained discretion over
 13 whether/when to issue permits).

14 Finally, the admission of refugees is committed to agency discretion by law. *See* 8 U.S.C.
 15 § 1157(c)(1) (“[T]he [Secretary of Homeland Security] may, in the [Secretary’s] discretion and
 16 pursuant to such regulations as the [Secretary] may prescribe, admit any refugee” (emphasis
 17 added)); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (“‘may’ expressly recognizes substantial
 18 discretion”); *see also* Part II.A.1, *infra*. For that separate reason, Plaintiffs’ APA claims are
 19 foreclosed. *See* 5 U.S.C. § 701(a) (“This chapter applies . . . except to the extent that . . . (2)
 20 agency action is committed to agency discretion by law.”).

21 **II. PLAINTIFFS’ CLAIMS ARE NOT LIKELY TO SUCCEED ON THE MERITS**

22 While Plaintiffs’ motion challenges both provisions of the Joint Memorandum, they press
 23 four claims against only the SAO provision, and not the following-to-join provision. Specifically,
 24 they argue that the Government lacks authority to implement the SAO provision, that the
 25 provision violates the APA because it needed to undergo notice-and-comment rulemaking and is
 26 arbitrary and capricious, and that the provision conflicts with the INA. Plaintiffs also bring an

1 Establishment Clause claim, arguing that both the SAO provision and following-to-join provision
 2 are unconstitutional. Each argument fails on the merits.¹⁰

3 **A. The Joint Memorandum’s SAO Provision Does Not Violate The APA Or INA**

4 **1. The Government May Temporarily Prioritize Admission Resources**
 5 **While Conducting A Threat Analysis**

6 Contrary to Plaintiffs’ suggestion, the SAO provision plainly lies within the Government’s
 7 discretion over refugee processing and prioritization. DHS is responsible for “[e]stablishing and
 8 administering rules . . . governing the granting of visas or other forms of permission, including
 9 parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted
 10 for permanent residence in the United States.” 6 U.S.C. § 202(4). Authority over entry into the
 11 United States necessarily encompasses authority to restrict entry. *See Stephenson v. Shalala*, 87
 12 F.3d 350, 354 (9th Cir. 1996) (“Normally, we defer to an executive agency’s expert interpretation
 13 of its enabling legislation when the agency’s view is reasonable and consistent with the statute’s
 14 plain language, whether or not we would have made the same decision were we standing in the
 15 agency’s shoes.”). Further, the INA expressly provides that the Secretary of Homeland Security
 16 “may, in the [Secretary’s] discretion and pursuant to such regulations as the [Secretary] may
 17 prescribe, admit any refugee.” 8 U.S.C. § 1157(c)(1) (emphasis added). Congress plainly vested
 18 “discretion” in the Secretary to admit refugees. *See Alaka v. Attorney Gen. of U.S.*, 456 F.3d 88,
 19 97 (3d Cir. 2006) (“Congress knows how to specify discretion and has done so repeatedly in other
 20 provisions of the INA.”) (citation omitted). And the statute provides that refugees “may” be
 21 admitted—not that they must—and does not demand that the Government make a decision on a
 22 specific timeframe. *See Haig*, 453 U.S. at 294 n.26 (“‘may’ expressly recognizes substantial
 23 discretion”). Refugee resettlement is thus an act of discretion, not an entitlement. *See I.N.S. v.*
 24 *Stevic*, 467 U.S. 407, 426 (1984) (recounting legislative history of Refugee Act of 1980,

25 ¹⁰ To the extent Plaintiffs cross-reference statutory and due process arguments concerning
 26 the following-to-join provision as raised by plaintiffs in the related case of *Doe, et al. v. Trump,*
et al., No. 2:17-cv-00178 (W.D. Wash.), the Government likewise incorporates by reference its
 prior response to those arguments, *see* ECF No. 51 at 12-21.

1 explaining “[i]t was plainly recognized, however, that merely because an individual or group of
 2 refugees comes within the definition will not guarantee resettlement in the United States.”
 3 (citation omitted); *cf.* 8 U.S.C. § 1201(h) (“Nothing in this chapter shall be construed to entitle
 4 any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United
 5 States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under
 6 this chapter, or any other provision of law.”). The discretion to decide who “may” be admitted
 7 logically includes the ability to temporarily prioritize processing of applications from non-SAO
 8 countries while assessing, for “the security and welfare of the United States,” whether additional
 9 safeguards are necessary for applicants from SAO countries. Joint Mem. at 2.

10 Indeed, the Government routinely grants *preferences* on the basis of nationality. The
 11 refugee program employs a priority system to determine which individuals are of special
 12 humanitarian concern for purposes of access to the program. The Government regularly relies on
 13 nationality to make priority designations, such as when it created a program for at-risk children
 14 from certain Central American countries.¹¹ Indeed, the Priority 2 and Priority 3 designations
 15 illustrate the many ways in which nationality is considered in refugee processing and
 16 prioritization.¹² Plaintiffs’ argument would mean that the Government lacks the discretion to
 17 make such distinctions, contrary to the agencies’ longstanding implementation of the USRAP.¹³
 18

19
 20 ¹¹ See USCIS, *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)* (Aug. 16, 2017),
<https://www.uscis.gov/CAM>.

21 ¹² See Report to Congress from the President, *Proposed Refugee Admissions for Fiscal*
 22 *Year 2018*, at 10-11, 13 (2017), <https://www.state.gov/documents/organization/274857.pdf>.

23 ¹³ Plaintiffs apparently read Section 1157(c)(1) to require the agency to promulgate a
 24 regulation each time it exercises its discretion. See Pls.’ Br. at 19. But the INA simply says that
 25 the Government *may* prescribe regulations, not that it *must* do so each time it exercises its
 26 discretion. Indeed, the preferences reflected in the Central America Minors program and Priority
 2 and Priority 3 designations are not memorialized in regulations. The notion that an agency must
 exercise its congressionally delegated powers through APA rulemaking is belied by the vast body
 of agency guidance that is promulgated informally. See Andrew J. Wistrich, *The Evolving*
Temporality of Lawmaking, 44 Conn. L. Rev. 737, 788-89 (2012) (“The volume of formal
 legislative rules promulgated by administrative agencies is dwarfed by the even larger amount of

2. Plaintiffs Cannot Show An APA Procedural Violation

1 The notice-and-comment procedures of the APA do not apply to the Joint Memorandum’s
 2 SAO provision for two separate reasons. First, the APA explicitly exempts “rules of agency
 3 organization, procedure, or practice” from its procedural requirements. 5 U.S.C. § 553(b)(3)(A).
 4 Unlike legislative (or substantive) rules, which “create law” by, for example, establishing or
 5 altering substantive standards, procedural rules involve “technical regulation of the form of
 6 agency action and proceedings.” *S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985).
 7 The procedural rule exemption “covers agency actions that do not themselves alter the rights or
 8 interests of parties, although [they] may alter the manner in which the parties present themselves
 9 or their viewpoints to the agency.” *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994)
 10 (citation omitted). In addition, “[a] procedural rule does not become substantive merely because
 11 it has a substantive impact,” such as “by denying parties the opportunity to appeal if they fail to
 12 comply with certain procedures.” *United States v. Gonzales & Gonzales Bonds & Ins. Agency,*
 13 *Inc.*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010) (citing *Sequoia Orange Co. v. Yeutter*, 973
 14 F.2d 752, 757 (9th Cir. 1992)). As long as a rule does not change substantive standards, it may
 15 qualify as procedural. *See, e.g., James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 317
 16 (D.C. Cir. 2000) (concluding rule was procedural where it “did not alter the substantive criteria
 17 by which [the agency] would approve or deny proposed labels,” but rather, “simply changed the
 18 procedures [the agency] would follow in applying those substantive standards”); *Gonzales*, 728
 19 F. Supp. 2d at 1084 (“[C]hanges in the timing, requirements or manner in which an application or
 20 petition is made are generally considered procedural changes.”).

21 The SAO provision is a procedural rule. It does not change the substantive criteria for
 22 determining whether an applicant can be admitted to the United States as a refugee. Instead, it
 23 prioritizes on a temporary basis applications from non-SAO countries while the agencies “conduct
 24 a detailed threat analysis” “to determine what additional safeguards, if any, are necessary to ensure
 25

26 informal regulations, guidelines, policy statements, letter rulings, and the like. Most agencies
 issue such materials, and their quantity is staggering.” (footnotes omitted)).

1 that the admission of refugees from these countries of concern does not pose a threat to the security
2 and welfare of the United States.” Joint Mem. at 2. Even after the review is complete, the same
3 *substantive* criteria for refugee admissions will apply as before, but potentially subject to
4 additional *procedures* identified during the review. See 8 U.S.C. §§ 1157(c), 1182(a).

5 Similar agency decisions to suspend the processing of applications while the agency
6 considers or implements changes to rules or processes have been held to be procedural in nature
7 and thus exempt from notice-and-comment rulemaking. *E.g.*, *Waste Mgmt., Inc. v. U.S. EPA.*,
8 669 F. Supp. 536, 538-40 (D.D.C. 1987) (deferring consideration of applications for ocean
9 incineration permits until the agency promulgated new rules on the topic); *Neighborhood TV Co.*
10 *v. FCC*, 742 F.2d 629, 636-38 (D.D.C. 1984) (deciding to “freeze” processing of certain
11 applications for television translator licenses). As in those cases, the Joint Memorandum does not
12 change the substantive criteria by which applications would ultimately be assessed but at most
13 merely alters the agencies’ “method of operations” or “change[s their] procedures.” *Waste Mgmt.*,
14 669 F. Supp. at 540; see also *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 953 (6th
15 Cir. 1971) (upholding processing freeze adopted without notice and comment as a procedural
16 rule); *Kessler v. FCC*, 326 F.2d 673, 681-82 (D.C. Cir. 1963) (same). As such, the SAO provision
17 is a procedural rule exempt from notice-and-comment rulemaking.

18 Second, the SAO provision is exempt from notice-and-comment rulemaking because it
19 falls within the APA’s foreign affairs exception. The APA provides that notice-and-comment
20 procedures do not apply to regulations involving “a military or foreign affairs function of the
21 United States.” 5 U.S.C. § 553(a)(1). “For the exception to apply, the public rulemaking
22 provisions should provoke definitely undesirable international consequences.” *Yassini v.*
23 *Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980).

24 The consequences that would follow from notice-and-comment procedures here have
25 already been held to trigger the exception in an analogous case. In *Rajah v. Mukasey*, 544 F.3d
26 427, 437 (2d Cir. 2008), the Second Circuit reviewed the National Security Entry-Exit

1 Registration System, a program devised after September 11th that required registration for certain
 2 individuals from specific countries. In doing so, that court held that the Government’s notices
 3 that designated the countries whose nationals were subject to the program fell within the APA’s
 4 foreign affairs exception, explaining that the “relevance to international relations [was] facially
 5 plain” and “at least three definitely undesirable international consequences” were “evident.” *Id.*
 6 The same consequences would result here. First, in “explaining why some of a particular nation’s
 7 citizens are regarded as a threat,” notice-and-comment rulemaking “might” result in “sensitive
 8 foreign intelligence. . . be[ing] revealed.” *Id.* Second, “relations with other countries might be
 9 impaired” if the Government “were to conduct and resolve a public debate over why some citizens
 10 of particular countries were a potential danger.” *Id.* And third, “the process would be slow and
 11 cumbersome, diminishing” the Government’s ability to understand and protect against “a
 12 potential attack by foreign terrorists.” *Id.* Thus, the foreign affairs exception applies. *See also*
 13 *Yassini*, 618 F.2d at 1361 (holding that INS regulation directed at Iranian nationals “fell within
 14 the foreign affairs . . . exception[] to the notice and comment requirements of the APA”).

15 **3. The Joint Memorandum’s SAO Provision Is Neither Arbitrary Nor** 16 **Capricious**

17 Plaintiffs’ argument that the SAO provision is arbitrary and capricious likewise fails.
 18 Review under the APA’s arbitrary and capricious standard is “narrow,” *Arrington v. Daniels*, 516
 19 F.3d 1106, 1112-13 (9th Cir. 2008), and “highly deferential,” *Crickon v. Thomas*, 579 F.3d 978,
 20 982 (9th Cir. 2009). A court must “presum[e] the agency action to be valid and affirm[] . . . if a
 21 reasonable basis exists for [the agency’s] decision.” *Id.* (citation omitted). A reasonable basis
 22 exists so long as “the agency considered the relevant factors and articulated a rational connection
 23 between the facts found and the choices made.” *Id.* (citation omitted). The agency’s decision
 24 “need only be a reasonable, not the best or most reasonable, decision.” *River Runners for*
 25 *Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citation omitted). A court, moreover,
 26 may not “substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of the United*
States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

1 Recognizing that “more than 300 persons who entered the United States as refugees are
2 currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation,”
3 EO-2 § 1(h), the agencies conducted an interagency review to identify multiple ways to enhance
4 the refugee vetting process and began implementing those improvements. Joint Mem. Addendum
5 at 1. In the Joint Memorandum, the officials advised the President that the improvements to the
6 USRAP vetting process are sufficient to allow the general resumption of that program, but that
7 they “continue to have concerns” about the admission of refugees from SAO countries, which
8 were “previously identified as posing a higher risk to the United States.” Joint Mem. at 2. To
9 address these concerns, the officials decided to “conduct a detailed threat analysis” of the SAO
10 countries “to determine what additional safeguards, if any, are necessary to ensure that the
11 admission of refugees from these countries of concern does not pose a threat to the security and
12 welfare of the United States.” *Id.* “This review will be tailored to each SAO country, and
13 decisions may be made for each country independently.” Joint Mem. Addendum at 3. While
14 performing this review, the agencies will temporarily prioritize refugee applications from non-
15 SAO countries, but will also consider for admission those from SAO countries on a case-by-case
16 basis. Joint Mem. at 2; Joint Mem. Addendum at 3-4.

17 Plaintiffs challenge the decision to temporarily prioritize non-SAO countries by
18 characterizing the Joint Memorandum as raising “unspecified concerns” and suggesting that the
19 Cabinet Secretaries have had enough time to conduct a review. Pls.’ Br. at 18 (citation omitted).
20 But their argument ignores that the Cabinet Secretaries’ national security judgment is entitled to
21 extreme deference, *see Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007)
22 (judicial review “in an area at the intersection of national security, foreign policy, and
23 administrative law[] is extremely deferential”); that the agencies performed a worldwide review
24 of the USRAP and implemented improvements to the vetting process; and that this review was
25 the basis for the SAO provision. Joint Mem. Addendum at 1. Moreover, the Joint Memorandum
26 provides at least as much specificity as the SAO list, and thus finding the SAO provision to be

1 arbitrary and capricious could cast doubt on the SAO list itself, despite that the Government has
 2 used such a list since the September 11th attacks. The Cabinet Secretaries' decision to temporarily
 3 prioritize refugee applications from non-SAO countries while they conduct this review is neither
 4 arbitrary nor capricious. Joint Mem. at 2; Addendum at 3-4; *see Neighborhood TV Co.*, 742 F.2d
 5 at 639 (concluding agency's decision to "freeze" processing of certain applications for licenses
 6 while it engaged in rulemaking was reasonable because it "ensure[d] that . . . interim licensing
 7 did not frustrate the ends of the rules ultimately adopted"); *Waste Mgmt., Inc.*, 669 F. Supp. at
 8 542-43 ("An agency in the process of writing new regulations on a topic as sensitive as ocean
 9 incineration of hazardous waste cannot be faulted for maintaining the *status quo* [by not issuing
 10 new operating permits] until it is satisfied that the incineration can proceed as safely as possible.").

11 **4. The Joint Memorandum's SAO Provision Is Consistent With The INA**

12 Plaintiffs argue that the SAO provision "fundamentally conflicts" with the INA because
 13 it "rewrite[s]" the definition of "refugee" found in 8 U.S.C. § 1101(a)(42), and "impermissibly
 14 alters admissibility standards" set out in 8 U.S.C. § 1182(a). Pls.' Br. at 21. Section 1101(a)(42)
 15 simply defines the term "refugee," and Section 1182(a) states, in relevant part, that "aliens who
 16 are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to
 17 be admitted to the United States," 8 U.S.C. § 1182(a). There is no conflict: Congress has set the
 18 *minimum* required to gain entry as a refugee, but has still vested the Secretary with complete
 19 "discretion" in deciding whether "any refugee" "may" be admitted. 8 U.S.C. § 1157(c)(1); *see*
 20 *also* Part II.A.1, *supra*. There is nothing improper about the Cabinet Secretaries exercising that
 21 discretion to temporarily prioritize admissions from non-SAO countries while reviewing whether
 22 additional safeguards are necessary for those from countries found to "pose elevated potential
 23 risks to national security." Joint Mem. Addendum at 1. And though Plaintiffs apparently fault
 24 the SAO provision for allowing admission of refugees from SAO countries on a case-by-case
 25 basis, Pls.' Br. at 21, the Government's use of its discretion to provide such a waiver is a *virtue*
 26 of the Joint Memorandum. If the agencies have the greater authority to temporarily prioritize

1 admissions from non-SAO countries (and they do), *see* Part II.A.1, *supra*, that necessarily
2 includes the lesser authority to provide for case-by-case exceptions. Indeed, waiver provisions
3 are routinely included in Presidential entry restrictions. *See, e.g.*, Proclamation No. 8693, § 4, 76
4 Fed. Reg. 44,751 (July 24, 2011); Proclamation No. 8342, § 2, 74 Fed. Reg. 4093 (Jan. 21, 2009);
5 Proclamation No. 6958, § 2, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

6 Plaintiffs' contrary theory—that the Executive Branch is *precluded* from acting whenever
7 an INA provision addresses the same topic—is ill-suited to the arena of national security and
8 foreign affairs, which involve delicate balancing in the face of changing circumstances, such that
9 the Executive must be permitted to act quickly and flexibly. *See Zemel v. Rusk*, 381 U.S. 1, 17
10 (1965) (discussing the “changeable and explosive nature of contemporary international
11 relations”); *Jama v. ICE*, 543 U.S. 335, 348 (2005). In this setting, courts typically apply the
12 *opposite* presumption: courts will not assume Congress's intent to foreclose the President's
13 authority over national security and foreign affairs unless Congress has specifically expressed that
14 intent. *See Jama*, 543 U.S. at 348 (“To infer an absolute rule . . . where Congress has not clearly
15 set it forth would run counter to our customary policy of deference to the President in matters of
16 foreign affairs.”); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress
17 specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the
18 authority of the Executive in military and national security affairs.”). Plaintiffs' interpretation of
19 the INA effectively eliminates the discretion Congress expressly provided the Executive Branch.

20 **B. The Joint Memorandum Does Not Violate the Establishment Clause**

21 The Court should not even consider Plaintiffs' Establishment Clause challenge at this time
22 given the Supreme Court's December 4, 2017, orders allowing the Proclamation to take full effect.
23 As the Government will explain in its forthcoming supplemental brief, the Supreme Court has
24 determined that plaintiffs are not likely to succeed on their Establishment Clause challenge to the
25 Proclamation, and Plaintiffs' Establishment Clause claims here are even weaker because they
26 challenge decisions by the Secretaries, whose integrity has not been questioned.

1 However, if this Court is inclined to reach Plaintiffs' Establishment Clause claims now, then
2 it should deny their request for injunctive relief.

3 **1. The Joint Memorandum Is Valid Under *Mandel***

4 The Supreme Court has made clear that, “when the Executive exercises” its authority to
5 exclude aliens from the country “on the basis of a facially legitimate and bona fide reason, the
6 courts will neither look behind the exercise of that discretion, nor test it by balancing its
7 justification against the” asserted constitutional rights of U.S. citizens. *Mandel*, 408 U.S. at 770.
8 *Mandel* involved a First Amendment speech claim, but courts have applied its test to other
9 constitutional claims as well. *See, e.g., Fiallo*, 430 U.S. at 792-96 (equal protection); *Rajah*,
10 544 F.3d at 438 (claims alleging discrimination based on “religion, ethnicity, gender, and race”);
11 *Washington v. Trump*, 858 F.3d 1168, 1179-82 (9th Cir. 2017) (Bybee, J., dissenting from denial
12 of reconsideration en banc) (collecting cases). *Mandel*'s rule reflects that the Constitution
13 “exclusively” allocates power over the admission of aliens to the “political branches,” *Mandel*,
14 408 U.S. at 765 (citation omitted), and that aliens abroad have no constitutional rights at all
15 regarding entry into the country. *See Fiallo*, 430 U.S. at 792-96.¹⁴

16 *Mandel* compels rejecting Plaintiffs' Establishment Clause claim because the Joint
17 Memorandum provides “facially legitimate and bona fide reason[s].” 408 U.S. at 770. For the
18 following-to-join provision, the Secretaries of State and Homeland Security and the Director of
19 National Intelligence determined that implementation of “adequate screening mechanisms for
20 following-to-join refugees that are similar to the processes employed for principal refugees” is
21 necessary “to ensure the security and welfare of the United States.” Joint Mem. at 3. And for the

22 _____
23 ¹⁴ Contrary to Plaintiffs' assertion (Pls.' Br. at 14 n.16), the Ninth Circuit has not rejected
24 *Mandel*'s application to Plaintiffs' Establishment Clause claim. *See Washington*, 847 F.3d at
25 1168 (per curiam) (expressly “reserv[ing] consideration” of Establishment Clause challenge).
26 Moreover, the Supreme Court applied *Mandel* in *Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977),
where it rejected a claim that a statute unconstitutionally discriminated against certain aliens based
on their sex and the legitimacy of their children. In doing so, the Court held that it could “see no
reason to review the broad congressional policy choice at issue [there] under a more exacting
standard than was applied in *Kleindienst v. Mandel*.” *Id.* at 795. *Mandel* likewise applies here.

1 SAO provision, the Joint Memorandum explained that after review of the USRAP’s vetting
 2 procedures, the Cabinet Secretaries “continue to have concerns” about the admission of refugees
 3 from SAO countries, which were “previously identified as posing a higher risk to the United
 4 States.” Joint Mem. at 2. Accordingly, those officials decided to “conduct a detailed threat
 5 analysis” of the SAO countries “to determine what additional safeguards, if any, are necessary to
 6 ensure that the admission of refugees from these countries of concern does not pose a threat to the
 7 security and welfare of the United States.” *Id.*

8 Under *Mandel*’s rational-basis test, see *Sessions v. Morales-Santana*, 137 S. Ct. 1678,
 9 1693 (2017), it is not for Plaintiffs or the Court to second-guess the national-security
 10 determinations of these Executive Branch officials. See, e.g., *Reno v. Am.-Arab Anti-*
 11 *Discrimination Comm.*, 525 U.S. 471, 491 (1999) (courts are generally “ill equipped to determine
 12 the[] authenticity and utterly unable to assess the[] adequacy” of the Executive’s “reasons for
 13 deeming nationals of a particular country a special threat”). Because the Joint Memorandum
 14 provides a facially legitimate and bona fide reason for imposing the conditions Plaintiffs
 15 challenge, Plaintiffs’ constitutional claims fail.

16 **2. Plaintiffs’ Claims Fail Even Apart From The *Mandel* Standard**

17 Plaintiffs’ claims also fail without regard to *Mandel* because the Joint Memorandum is
 18 valid under domestic Establishment Clause precedent. The Establishment Clause requires the
 19 government to “‘pursue a course of neutrality toward religion,’ favoring neither one religion over
 20 others nor religious adherents collectively over nonadherents.” *Bd. of Educ. of Kiryas Joel Vill.*
 21 *Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (internal citation omitted); see *Church of the*
 22 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). The Joint Memorandum
 23 fully comports with that principle. It does not draw “explicit and deliberate distinctions” based
 24 on religion. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). To the contrary, it is entirely
 25 neutral in terms of religion. The Joint Memorandum also was not motivated by a religious
 26 purpose. Even in the domestic context, a court deciding whether official action violates the

1 Establishment Clause because of an improper religious purpose looks only to “the ‘text, legislative
2 history, and implementation of the statute,’ or comparable official act.” *McCreary County v.*
3 *ACLU of Ky.*, 545 U.S. 844, 862 (2005). The court is not to engage in “judicial psychoanalysis
4 of a drafter’s heart of hearts.” *Id.* Rather, it is only an “official objective” of favoring or
5 disfavoring religion that implicates the Clause. *Id.* There is no basis for invalidating the Joint
6 Memorandum under that standard either. The Joint Memorandum’s text does not refer to or draw
7 any distinction based on religion. And its “operation,” *Lukumi*, 508 U.S. at 535, confirms that it
8 is religion-neutral: it applies regardless of one’s religion.

9 Plaintiffs nevertheless argue that the Joint Memorandum “target[s] . . . primarily majority-
10 Muslim countries.” Pls.’ Br. at 14, 17. But the following-to-join provision applies worldwide,
11 without regard to nationality or religion. And the list of eleven current SAO countries was not
12 selected based on the religious beliefs of the countries’ nationals; rather, the countries were
13 identified in 2015 through interagency consultations as countries that “pose elevated potential
14 risks to national security.” Joint Mem. Addendum at 1; *cf. Rajah*, 544 F.3d at 439 (holding that
15 a program regulating aliens from certain countries survived rational-basis review and was not
16 motivated by an improper animus toward Muslims even though all of the selected countries,
17 except North Korea, were predominantly Muslim).

18 Plaintiffs also rely on past judicial determinations regarding previous Executive Orders
19 that are not at issue here, as well as campaign-trail statements or other remarks that do not address
20 the Joint Memorandum. *See* Pls.’ Br. at 14-15. Because none of those decisions or statements
21 address the Joint Memorandum, they are not relevant to the Government’s purpose in issuing the
22 Joint Memorandum. Moreover, the relevant decision here is set forth in the Joint Memorandum,
23 which was issued by the Secretaries of State and Homeland Security and the Director of National
24 Intelligence. As the relevant decisionmakers, therefore, it is those officials’ purpose and intent
25 that are relevant to the Establishment Clause analysis. *See, e.g., Vill. of Arlington Heights v.*
26 *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (examining the “decisionmaker’s purposes”

1 in assessing equal protection claim); *Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d
 2 Cir. 2004) (concluding that “statements made by other County officials” who were not “the
 3 decision-maker for the County with respect to the Plaque” were not relevant to the Establishment
 4 Clause purpose analysis). Plaintiffs have not alleged, let alone demonstrated, that the relevant
 5 officials here were motivated by a religious purpose or harbored anti-Muslim animus.¹⁵

6 Even if the Court were to associate the Cabinet Secretaries’ actions here with past
 7 decisions or statements by other officials (and it should not), the conclusion is the same: the Joint
 8 Memorandum rests on sound constitutional footing. In the context of EO-2’s temporary
 9 suspension of the refugee program, the district court in *IRAP v. Trump*, 241 F. Supp. 3d 539, 565
 10 (D. Md. 2017), *aff’d in part and vacated in part*, 857 F.3d 554 (4th Cir. 2017), declined to enjoin
 11 that provision, holding that there was insufficient evidence of animus connected to the refugee
 12 program specifically.¹⁶ Plaintiffs fail to point to anything in the interim to change that conclusion.
 13 Moreover, the President in EO-2 expressly disavowed any intent to benefit one religion over
 14 another, *see* EO-2 § 1(b)(iv). Plaintiffs’ Establishment Clause claim fails.¹⁷

15 **III. THE REMAINING FACTORS WEIGH AGAINST INJUNCTIVE RELIEF**

16 Apart from their inability to demonstrate a likelihood of success on the merits, Plaintiffs
 17 have not shown that “irreparable injury is likely in the absence of an injunction.” *Winter*, 555
 18 U.S. at 22 (emphasis omitted). They have not established that the Joint Memorandum has caused
 19 them an injury *at all*, let alone an irreparable one. Refugees from SAO countries may still qualify
 20

21 ¹⁵ Past actions cannot “forever taint” future government efforts. *McCreary*, 545 U.S. at
 22 874. The “specific sequence of events” leading to the issuance of the Joint Memorandum—
 23 especially the extensive, multi-agency process and decisions by the Secretaries of State and
 24 Homeland Security and Director of National Intelligence—severs any connection between past
 25 executive orders’ supposed religious purpose and the Joint Memorandum. *Id.* at 866.

26 ¹⁶ *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *vacated as moot*, 874 F.3d 1112 (9th
 Cir. 2017), did not address whether EO-2’s refugee provision violated the Establishment Clause.

¹⁷ Plaintiffs add that the Joint Memorandum “violates the equal protection component of
 the Due Process Clause.” Pls.’ Br. at 17 n.17. Issues averred in a perfunctory manner are waived,
see, e.g., Daily v. Astrue, No. CV-12-00389-JLQ, 2013 WL 5372897, at *5 (E.D. Wash. Sept. 25,
 2013). In any event, Plaintiffs cannot show an equal protection violation, *see* Part I.C.2, *supra*.

1 for admission on a case-by-case basis during the review period, while the following-to-join
2 provision simply prescribes an implementation period to bring screening procedures for
3 following-to-join and principal refugees into parity. At most these provisions *might* delay the
4 entry of *some* refugee applicants, but such delay does not constitute irreparable harm. After all,
5 processing times for refugees can vary widely and on average are quite lengthy. *See* U.S. Dep’t
6 of State, *U.S. Refugee Admissions Program*, [https://www.state.gov/j/prm/ra/admissions](https://www.state.gov/j/prm/ra/admissions/index.htm)
7 [/index.htm](https://www.state.gov/j/prm/ra/admissions/index.htm). Because Plaintiffs have not shown that the challenged provisions will irreparably
8 harm them, they are not entitled to the extraordinary remedy of preliminary injunctive relief.

9 Conversely, an injunction would cause direct, irreparable harm to the Government and the
10 public interest. “[A]ny time a State is enjoined by a court from effectuating statutes enacted by
11 representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct.
12 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). This principle extends naturally to the
13 national-security judgments of Cabinet Secretaries. “It is ‘obvious and unarguable’ that no
14 governmental interest is more compelling than the security of the Nation.” *Haig*, 453 U.S. at 307
15 (citations omitted). These officials have jointly determined that, with certain exceptions,
16 admitting refugees from SAO countries without conducting a further review of those countries
17 and admitting following-to-join refugee applicants who have not been vetted through screening
18 processes similar to those employed for principal refugees would not be in the nation’s best
19 interest. This Court should not second-guess the Secretaries’ judgment, particularly in light of
20 the Supreme Court’s orders staying injunctions against the Proclamation. These stay orders
21 suggest that a majority of the Justices have concluded that, in this immigration and national-
22 security context, the balance of equities favors the Government.

23 **IV. A GLOBAL INJUNCTION WOULD BE INAPPROPRIATE**

24 Even if some relief were appropriate (and it is not), the Court should tailor any remedy to
25 address only the alleged injuries of Plaintiffs who have made an adequate showing to satisfy
26 Article III’s justiciability requirements. Article III requires that “a plaintiff must demonstrate

1 standing . . . for each form of relief that is sought.” *Town of Chester v. Laroe Estates, Inc.*, 137
 2 S. Ct. 1645, 1650 (2017). The remedy sought therefore must “be limited to the inadequacy that
 3 produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357
 4 (1996). Equitable principles likewise require that injunctions “be no more burdensome to the
 5 defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health*
 6 *Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Any injunction the Court enters should be
 7 limited to relieving whatever irreparable injury the Court concludes one or more named Plaintiffs
 8 have suffered or imminently will suffer as a consequence of the challenged provisions.¹⁸

9 CONCLUSION

10 The Court should deny Plaintiffs’ Motion for Preliminary Injunction.

11
 12 DATED: December 7, 2017

Respectfully submitted,

13 CHAD A. READLER
 14 Principal Deputy Assistant Attorney General

15 JENNIFER D. RICKETTS
 16 Director, Federal Programs Branch

17 JOHN R. TYLER
 18 Assistant Director, Federal Programs Branch

/s/ Joseph C. Dugan

19 MICHELLE R. BENNETT

DANIEL SCHWEI

20 KEVIN SNELL

JOSEPH C. DUGAN

21 Trial Attorneys

U.S. Department of Justice

22 Civil Division, Federal Programs Branch

23 20 Massachusetts Avenue, NW

24 ¹⁸ The *Jewish Family Service* Plaintiffs attempt to justify a “nationwide injunction” by
 25 contending that they “hail from all over the country.” *JFS* Notice at 3. But Plaintiffs collectively
 26 reside in just five states. In any event, Plaintiffs’ proposed nationwide injunction is tantamount
 to an award of classwide injunctive relief, but no class has been certified here. An “injunction
 must be limited to apply only to the individual plaintiffs unless the district judge certifies a class
 of plaintiffs.” *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983).

Washington, DC 20530
Tel: (202) 514-3259
Fax: (202) 616-8470
Email: joseph.dugan@usdoj.gov

Attorneys for Defendants

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CERTIFICATE OF SERVICE

I certify that on December 7, 2017, a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 7th day of December, 2017.

/s/ Joseph C. Dugan
JOSEPH C. DUGAN

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