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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN JOSE DIVISION**

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| JANE DOE 1, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>KIRSTJEN NIELSEN, *et al.*,<br><br>Defendants. | No. 5:18-cv-02349-BLF<br><br>**Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment**<br><br>DATE: June 22, 2018<br>TIME: 9:00 a.m..<br>CTRM: 3, 5th Floor |

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## I. INTRODUCTION

This case arises from the government's careful efforts to individually vet overseas refugee applicants for entry into the United States and to explain, to the maximum extent feasible, its reasons for denying certain applications. Plaintiffs include (1) three unadmitted and nonresident Iranian nationals who received Notices of Ineligibility informing them that their refugee applications under the Lautenberg Amendment were denied as a matter of discretion, and (2) two of their U.S.-citizen relatives. Plaintiffs' lawsuit claims that the denials of the refugee applications and the Notices of Ineligibility were unconstitutional and violative of the Lautenberg Amendment. In their motion for partial summary judgment, Plaintiffs allege only that they are entitled to judicial review of the Notice of Ineligibility, and that those Notices lack sufficient detail in violation of relevant law. Both claims are flawed and should be rejected.

To start, Plaintiffs' claims are not justiciable. The Supreme Court has long held that unless expressly authorized by law, the government's decision to exclude an alien is immune from judicial review. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Because neither the statute governing refugee admissions nor its implementing regulations confer any judicial review over decisions denying admission to refugee applicants, this Court lacks the authority to examine such decisions. To be sure, the Ninth Circuit has recognized that a U.S. citizen who filed an immigration petition on her alien spouse's behalf has a marriage-related liberty interest that entitles her to limited judicial review of his denied entry. *See Cardenas v. United States*, 826 F.3d 1164, 1169-72 (9th Cir. 2016). But courts have refused to extend such review to more distant relatives—in this case, the parent of an adult refugee applicant and the adult son of another. This Court should decline to be the first to do so.

These nonreviewability principles also preclude any review of the claims at issue under the Administrative Procedure Act ("APA"). Indeed, the APA, at 5 U.S.C. §702, states that "other limitations on judicial review" supersede any relief available under it. Because Congress

does not allow an alien present in the United States to obtain review of an exclusion order under the APA, *a fortiori*, nor can aliens abroad or U.S. citizens acting on their behalf.

Even assuming that Plaintiffs' claims were justiciable, they would be meritless. Plaintiffs allege that the Notices of Ineligibility violate the Lautenberg Amendment's notice directive, which requires that the government shall "state, to the maximum extent feasible, the reason for the denial." 8 U.S.C. § 1157(c)(1) (note). But the statutory language implicitly allows the government to withhold specific details in certain cases when disclosure is *not* feasible, as was the case here. Because Congress does not provide any judicial review of the government's determination of infeasibility, this Court may not look behind it.

For these reasons, this Court should deny Plaintiffs' motion for partial summary judgment.

## II. BACKGROUND

### A. Refugee Processing under the Lautenberg Amendment

The Immigration and Nationality Act, 8 U.S.C. § 1157, governs the admission of refugees. The Secretary of the Department of Homeland Security ("DHS") may, in her discretion and pursuant to the appropriate regulations, admit refugees into the United States. 8 U.S.C. § 1157(c)(1); 6 U.S.C. § 557. The only regulations directly pertaining to the adjudication of applications for refugee resettlement are found at 8 C.F.R. § 207.

Since 2004, Iranian religious minorities seeking refugee status are within the scope of the Lautenberg Amendment, a statutory provision that defines certain categories of refugees for whom less evidence is needed to establish refugee status. *See* Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1989). The Lautenberg Amendment does not strip DHS of its discretionary authority to grant or deny refugee applications. The Amendment requires that "each decision to deny an application for refugee status" under its purview "shall be in writing and shall state, to the maximum extent feasible, the reason for the denial." 8 U.S.C. § 1157(c)(1) (note).

The United States has resettled over 800 Iranian religious minorities in the country under the Vienna refugee program since 2017. But changes to the vetting process introduced in 2016, during the prior Administration, have resulted in a greater number of denials. (*Id*. at ¶ 3.)

Since 2017, over 800 Iranian religious minorities have been approved for admission to the United States through the Lautenberg program in Vienna and have been successfully resettled in the United States. (Declaration of Joanna Ruppel ("Ruppel Decl.") at ¶ 7.) However, changes to the vetting process introduced in late 2016—during the prior Administration—have resulted in a greater number of denials. (*Id*. at ¶ 3.)

In February 2018, United States Citizenship and Immigration Services ("USCIS") issued denials to 56 Iranian refugee applicants and their 31 family members in Vienna. (Ruppel Decl. at ¶ 4.) Each denied application was scrutinized individually and was subject to the same rigorous screening process for resettlement as all refugee applicants. (*Id*.) The denials were unrelated to the refugee-related Executive Orders the President has signed since January 2017. (*Id*. at ¶ 3.) The applicants were told in Notices of Ineligibility that they are entitled to request review of their denials. (Plaintiffs' Motion for Partial Summary Judgment ("Pls.' Mot.") at 7-8, ECF No. 25.)

It is the longstanding practice of the Refugee Affairs Division ("RAD"), which is within the Refugee, Asylum, and International Operations ("RAIO") Directorate at USCIS, to use the Notice of Ineligibility for Resettlement – Lautenberg template for all denials of refugee status for applicants adjudicated under the Lautenberg standard. (Ex. at ¶¶ 1, 5.) In order to process a high volume of cases with limited staffing, RAD uses the template to provide denied applicants with basic information outlining the individualized basis for refugee denials. (*Id*. at ¶ 5.) When an application is denied as a matter of discretion, USCIS provides, to the maximum extent feasible, the reasons for each denial, taking into account the inability to disclose classified information and the need to protect the safety of the sources of derogatory information that led to the adverse exercise of discretion. (*Id*.) In cases of conflict between the Adjudicator's Field Manual ("AFM") and guidance provided by the RAIO Directorate or its divisions (including RAD),

agency policy is for adjudicators to follow the guidance from the RAIO Directorate or its divisions. (*Id*. at ¶ 6.)

The relevant regulations do not provide for a formal appeal after a denial of an application for refugee resettlement. 8 C.F.R. § 207.4 ("There is no appeal from a denial of refugee status under this chapter.") In its discretion, however, USCIS may entertain a denied applicant's informal request for review ("RFR") of the denial. (Ruppel Decl. at ¶ 7.) Upon review of the RFR, USCIS determines whether the evidence in the record establishes that the applicant would qualify for refugee resettlement in the United States, including whether USCIS will exercise its discretion to approve the refugee application. (*Id*.)

**B. Individual Plaintiffs' Cases**

Plaintiff Jane Doe 1 is a U.S. citizen whose adult daughter, Plaintiff Jane Doe 3, is an Iranian national whose refugee application under the Lautenberg Amendment was denied in Vienna in February. (Pls.' Mot. at 9.) Plaintiff John Doe 2 is an adult U.S. citizen whose mother, Plaintiff Doe 4, is also an Iranian national whose refugee application under the Lautenberg Amendment was denied in Vienna in February. (*Id*.) Like Jane Doe 3 and Jane Doe 4, Plaintiff Jane Doe 5 is an Iranian national whose refugee application under the Lautenberg Amendment was denied in Vienna in February. (*Id*. at 10.) All three received Notices of Ineligibility from USCIS that included the following text:

> After review of all information concerning your case, including your testimony, supporting documentation, background checks, country conditions, and other available information, your application for refugee resettlement to the United States under [8 U.S.C. § 1157] has been denied as a matter of discretion.

(*Id*. at 7, 9-10.)

Jane Doe 3, Jane Doe 4, and Jane Doe 5 were told initially that USCIS would accept one RFR if it was received within 90 days from the date of the Notice of Ineligibility. (Pls.' Mot. at 2.) On June 4, 2018, USCIS sent a notice to the applicants indicating that it granted an extension of their filing deadline. (Declaration of Stacey I. Young at Ex. A.) USCIS will now allow for

receipt of one RFR that is postmarked or received by USCIS or the Resettlement Support Center no later than 120 days from June 4, 2018, or 120 days from the date that the request for review originally was due—whichever is later. (*Id.*) The applicants were also informed that they may send another RFR even if they have already submitted one that is pending or has been denied. (*Id.*)

**C. Procedural History**

Plaintiffs, seeking relief for themselves and a putative class, filed this action on April 18, 2018. (Complaint ("Compl."), ECF No. 1.) On May 18, they filed an amended motion to certify a class, defined as:

> All Iranian refugees who (1) applied for refugee admission to the United States under the Lautenberg Amendment, whether as a principal applicant or derivative relatives; (2) traveled to Vienna, Austria, for processing; and (3) received denials from the United States government in or after February 2018 with the sole explanation that their application was denied "as a matter of discretion," and their U.S.-based Close Family Members who served as their U.S. ties.

(ECF No. 60.) Plaintiffs define "Close Family Member" as "parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whole or half), and step-relationships, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins." (*Id.* at 1, n.1.) Defendants will file an opposition to Plaintiffs' class certification motion concurrently with this brief.

On April 20—despite the fact that Defendants had not (and still have not) answered or otherwise responded to the complaint—Plaintiffs filed the instant motion for partial summary judgment on the first five claims for relief in their complaint, which concern the Notices of Ineligibility and not the denial decisions themselves. (Pls.' Mot. at 10.) They argue that the Notices of Ineligibility are unlawful and unconstitutional, and seek relief under the APA and the Mandamus Act. (*Id.*) They do not seek summary judgment on their claim that the government's

"program changes that resulted in the mass denials constitute final agency actions that were unlawful, including because they were 'arbitrary, capricious, an abuse of discretion, or not in accordance with law.'" (Compl. at ¶ 96; Pls.' Mot. at 10-11.)

## III. ARGUMENT

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Although Defendants dispute a number of facts that Plaintiffs' relay in their partial summary judgment motion, they agree that there is no genuine issue of *material* fact for purposes of summary judgment. Yet, because none of Plaintiffs' claims are justiciable and their arguments fail on the merits, they are not entitled to partial judgment as a matter of law. Their motion should be denied.

### A. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

As a threshold matter, this Court lacks jurisdiction to review the refugee denials themselves. Congress has divested the courts of jurisdiction over immigration suits that concern decisions or actions that are committed to agency discretion. 8 U.S.C. § 1252(a)(2)(B)(ii); *see Hassan v. Chertoff*, 593 F.3d 785 (9th Cir. 2010) ("[J]udicial review of a discretionary determination is . . . expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(ii)."). In explaining the type of discretionary decisions to which § 1252(a)(2)(B)(ii) applies, the Supreme Court specifically pointed to refugee denials rendered pursuant to 8 U.S.C. § 1157(c)(1) as an example. *Kucana v. Holder*, 558 U.S. 233, 248 (2010) ("decisions specified by statute 'to be in the discretion of the Attorney General,' and therefore shielded from court oversight by § 1252(a)(2)(B)(ii), are of a like kind. *See, e.g.*, § 1157(c)(1)").[1] Thus, the refugee decisions themselves are unreviewable.

[1] Congress did carve out an exception to 8 U.S.C. § 1252(a)(2)(B)(ii): "[C]onstitutional claims or questions of law" are subject to judicial review notwithstanding § 1252(a)(2)(B), so long as an alien plaintiff has been ordered removed from the United States and the alien has duly filed a petition for review of that removal order. *Id.* 8 U.S.C. § 1252(a)(2)(D). But because Plaintiffs have not been ordered removed, their claims do not fit within this exception.

To the extent Plaintiffs challenge the Notices of Ineligibility separate and apart from the decisions to which they relate, their claims are barred by principles of nonreviewability.

**1. Plaintiffs' claims are barred by principles of nonreviewability.**

Plaintiffs are not entitled to judicial review. The Supreme Court has long recognized that "the power to . . . exclude aliens" is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo*, 430 U.S. at 792. "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Courts have distilled from these longstanding principles that the denial or revocation of a visa for an alien abroad "is not subject to judicial review . . . unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *see also Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998) ("Administrative decisions excluding aliens are not subject to judicial review unless there is a clear grant of authority by statute."). Courts refer to this rule as the "doctrine of consular nonreviewability," *Saavedra Bruno*, 197 F.3d at 1159, but the short-hand label merely reflects the context in which the principle most often arises—in challenges to decisions by consular officials adjudicating visa applications. The principle underlying the doctrine applies regardless of the manner in which the Executive Branch denies entry to an alien abroad, including a refugee applicant. *See Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992) (per curiam).

Under the doctrine of nonreviewability, an "unadmitted and nonresident alien" has "no constitutional right of entry into the country," *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544; *see also Bustamante v. Mukasey*, 531 F.3d 1059, 1062-63 (9th Cir. 2008); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986). Plaintiffs have identified no statute that authorizes judicial review here, and indeed, no such

statute exists. The statute authorizing refugee admissions, 8 U.S.C. § 1157 (including the Lautenberg Amendment), does not confer any judicial review over denials of refugee applications. The law simply provides, in relevant part, that the "Attorney General may, in the Attorney General's discretion . . . admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant." 8 U.S.C. § 1157(c)(1);[2] *see also Haitian Refugee Ctr.*, 953 F.2d at 1506 ("Contrary to the extensive procedures provided for with regard to aliens within the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from outside the United States, makes no provision for judicial review.").

The Ninth Circuit and district courts within it have recently determined that in readily distinguishable cases—when plaintiffs do not seek review of individual adjudicatory decisions, but rather the government's "promulgation of sweeping immigration policy" (in particular, certain executive orders or actions issued recently)—courts may review both constitutional and statutory challenges. *Doe v. Trump*, 288 F. Supp. 3d 1045, 1069 (W.D. Wash. 2017) (finding that consular nonreviewability does not preclude challenge to Executive Order No. 13,815, § 3(a) and its accompanying memorandum to the President) (internal quotation omitted). As the Ninth Circuit explained in a challenge to Executive Order 13,769 (which, among other changes to immigration policies and procedures, banned for 90 days the entry into the United States of individuals from seven countries), "exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard." *Washington v. Trump*, 847 F.3d 1151, 1163 (9th Cir. 2017) (narrow ruling on an appeal of a temporary restraining order); *see also Hawaii v. Trump*, 878 F.3d 662, 769 (9th Cir. 2017) (concluding that the doctrine of consular nonreviewability did not bar the court's review of § 2 of the president's Proclamation 9645), *cert. granted sub. nom. Trump v. Hawaii*, 138 S. Ct. 923 (2018); *Sale v. Haitian Crts. Council, Inc.*, 509 U.S. 155 (1993) (without discussing consular nonreviewability, but over the

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

government's objection that the doctrine applied and barred review, reviewing the merits of a statutory claim challenging an executive order that blocked the entry of Haitians). These holdings are inapposite for purposes of whether the refugee denials in this case are reviewable.

Here, Plaintiffs do not challenge the Executive's promulgation or implementation of immigration policy at the "highest levels of the political branches." *Washington*, 847 F.3d at 1163. Rather, they seek review only over individual adjudications. Judicial review of individual exclusion findings for unadmitted and nonresident aliens is the core of what the doctrine of nonreviewability precludes. *See Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (allowing for judicial review only because the plaintiffs did "not seek review of an individual consular officer's decision to grant or deny a visa pursuant to valid regulations, which could implicate the consular nonreviewability doctrine.") (vacated and remanded on other grounds); *Doe*, 288 F. Supp. 3d at 1068 (same). Accordingly, under this firmly entrenched principle of nonreviewability and the Supreme Court and Ninth Circuit jurisprudence that cements its footing, Plaintiffs are entitled to no judicial review of any aspect of the refugee application denials in question.

**2. The U.S.-citizen plaintiffs do not qualify for even limited judicial review.**

Plaintiffs assert (Pls.' Mot. at 17-19) that the Notices of Ineligibility violate the due-process rights of Jane Doe 1 and John Doe 2, both U.S. citizens. They are wrong.

The Ninth Circuit has held that a U.S.-citizen spouse who filed an I-130 immigrant visa petition on behalf of her unadmitted and nonresident alien-spouse has a protected liberty interest that entitles her to limited judicial review over the denial of her spouse's visa application.[3] *See Bustamante*, 531 F.3d at 1062 ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause"); *Cardenas*, 826 F.3d 1164, 1169-72. The Supreme Court addressed this issue in *Kerry v. Din*, 135 S. Ct. 2128 (2015). Justice Kennedy—in his concurring opinion—reserved judgment on the issue, but determined

[3] No court has allowed a U.S.-citizen relative who did not file a petition on her relative's behalf the same limited judicial review.

that assuming such a right exists, a visa denial is valid when it is made "on the basis of a facially legitimate and bona fide reason." *Id*. at 2141 (quoting *Mandel*, 408 U.S. at 770).[4] Justice Scalia, writing for the plurality, found that "[t]here is no such constitutional right." *Id*. at 2131.

But the due-process interest recognized in *Bustamante* and *Cardenas* is distinguishable because it was tied to the fundamental right to marry. No case supports extending due-process rights to the entry of more distant family members, such as the parent of an adult child or an adult child himself. In fact, other courts have rejected extending review under *Din* to such relationships. *See Santos v. Lynch*, 2016 WL 3549366, at *3-4 (E.D. Cal. June 29, 2016) (declining to extend *Din* to find "liberty interest as an adult child to live in the United States with her parents"); *L.H. v. Kerry*, No. 14-06212, slip op. 3-4 (C.D. Cal. Jan. 26, 2017) (same for daughter, son-in-law, and grandson).

A marital relationship is simply not the equivalent of an adult child-parent relationship for due-process purposes. Plaintiffs cite *Lemire v. Ca. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013), for the proposition that the "Ninth Circuit has recognized that both parents and children have a liberty interest in the companionship and society of each other." (Pls.' Mot. at 18.) But *Lemire* found that "only official conduct that 'shocks the conscience'" and separates a parent and child "is cognizable as a due process violation." 726 F.3d at 1075 (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)); *cf. Butera v. Dist. of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001) ("a parent does not have a constitutionally protected liberty interest in the companionship of a child who is past minority and independent."); *Russ v. Watts*, 414 F.3d 783, 791 (7th Cir. 2005) (declining to recognize a "constitutional right to recover for the loss of the companionship of an adult child" where the parent-child relationship "is terminated as an incidental result of state action"); *McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003) (dismissing section 1983 claim against police officers implicated in the fatal shooting of

[4] The Ninth Circuit recognized Justice Kennedy's concurrence in *Din* as the relevant standard. *Cardenas*, 826 F.3d at 1171 ("The government argues that Justice Kennedy's concurrence controls. We agree.").

plaintiff's son on the ground that "the fundamental guarantees of the Due Process Clause do not extend to a parent's interest in the companionship of his independent adult child"). Plaintiffs do not and could not allege that the Notices of Ineligibility rise to that level. More to the point, *Lemire* did not address whether a parent has a constitutional interest in living in the United States with her noncitizen adult child, or whether an adult child has the same interest in living with his noncitizen parent. The Ninth Circuit's use of the phrase "in matters of marriage and family life" has not extended and does not extend beyond the marriage context, and Plaintiffs provide no persuasive authority to the contrary. *Bustamante*, 531 F.3d at 1062.

Because the limited review available for U.S. citizens who petition on behalf of their alien spouses does not apply to Jane Doe 1 and John Doe 2, the principles of nonreviewability fully apply and foreclose judicial review in this case.[5]

**3. Plaintiffs cannot otherwise proceed under the Administrative Procedure Act.**

The nonreviewability principles discussed above also preclude any review under the APA, 5 U.S.C. § 706(2). The APA does not apply "to the extent that . . . statutes preclude judicial review," 5 U.S.C. § 701(a)(1), a determination that turns not only on the statute's express language but also on the "structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved," *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Moreover, Section 702 of the APA preserves "other limitations on judicial review" that predated the APA. *See Saavedra Bruno*, 197 F.3d at 1158. Here, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of [] consular visa decisions," *id*. at 1160, and the same is true of refugee determinations, *see Haitian Refugee Ctr.*, 953 F.2d at 1506. At a minimum, the general rule of "nonreviewability . . . represents one of the 'limitations on judicial review' unaffected by § 702's opening clause[.]" *Saavedra Bruno*, 197 F.3d at 1160.

[5] Defendants note that the government is not attempting to forbid parents and adult children from living together. Jane Doe 1 and John Doe 2 are free to live with their family members anywhere in the world where they are permitted to reside. *See Din*, 135 S. Ct. at 2138 (plurality opinion).

Indeed, when the Supreme Court held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the APA, *see Brownell v. Tom We Shung*, 352 U.S. 180, 184-86 (1956), Congress responded by abrogating that ruling. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-53; *Saavedra Bruno*, 197 F.3d at 1157-62 (recounting history). The House Report accompanying the abrogating statute explained that APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 87-1086, at 33 (1961). Because an alien present in the United States cannot invoke the APA to obtain review of an exclusion order, then *a fortiori* neither can aliens abroad or U.S. citizens acting on their behalf. And because Congress has generally foreclosed judicial review of visa revocations, *see* 8 U.S.C. § 1201(i), it is implausible that Congress would permit review of Executive decisions to restrict entry in the first instance. Significantly, Plaintiffs have identified no precedent holding that the type of refugee denials at issue here are judicially reviewable.

Plaintiffs are also not entitled to a writ of mandamus under 28 U.S.C. § 1361 or relief under 5 U.S.C. § 706(1). (Pls.' Mot. at 21-24.) The nonreviewability principles that preclude review under § 706(2) apply to § 706(1) and the Mandamus Act with equal force. Moreover, both statutory provisions allow a district court to compel a United States officer or agency to perform a duty not yet performed. *See* 28 U.S.C. § 1361; 5 U.S.C. § 706(1); *Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003). Because USCIS did provide Plaintiffs with notices, relief under the § 702(1) and the Mandamus Act is inappropriate.

## B. PLAINTIFFS' CLAIMS FAIL ON THE MERITS

### 1. Plaintiffs' statutory challenge fails on the merits because the government fully complied with the Lautenberg Amendment's notice directive.

Even if Plaintiffs were not prohibited by principles of nonreviewability from challenging the Notices of Ineligibility, the Lautenberg Amendment's plain language belies Plaintiffs' claim that the Notices violate its mandate.[6]

In crafting the Lautenberg Amendment, Congress communicated its desire for the government to disclose its reasons for denying refugee applicants when possible. *See* 8 U.S.C. § 1157 (note). But disclosure is not mandated in *every* instance; Congress was careful to allow for officials to withhold specific details in certain cases. The Amendment requires that each refugee denial "shall be in writing and shall state, *to the maximum extent feasible*, the reason for the denial." *Id*. (emphasis added). The logical corollary of the directive is that when it is *not* feasible to state a robust reason for a denial, the government need not do so. Congress does not provide for any judicial review of the government's determination of infeasibility.

In this case, USCIS denied Jane Doe 3's, Jane Doe 4's, and Jane Doe 5's refugee applications after identifying compelling reasons for why conferring refugee status would be inappropriate. (Ruppel Decl. at ¶ 4.) USCIS determined—after careful consideration of individual applications and following input from all relevant departments and agencies, as it does in all cases—that the maximum extent to which it could explain the denials was to state that they were denied as a matter of discretion after reviewing all the information in each of their individual records. (*Id*. at ¶ 5.) Plaintiffs' unsupported assertion that it is "certainly feasible to explain the exercise more maximally than was done here" (Pls.' Mot. at 13) is speculative and false.

By stating the reason for the denials to the maximum extent feasible, the government complied fully with the Lautenberg Amendment's notice instructions. Plaintiffs may believe that

[6] Agency decisions may be set aside under the APA if they are "arbitrary, capricious, an abuse of discretion, or not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiffs cannot meet this deferential standard or any other standard because the notices comply with the law.

a "statement that refugee status is being denied as a 'matter of discretion' is tantamount to providing no reason at all" (Pls.' Mot. at 12), but the Lautenberg Amendment is clear: When it is not feasible to do so, the government may withhold the basis for a denial. Requiring the government to disclose any more information would render the statute's "maximum extent feasible" language a nullity. Thus, Plaintiffs' statutory argument lacks merit and this Court should deny their partial summary judgment motion.

**2. The government did not violate 8 C.F.R. § 103.2(b)(16)(i) or USCIS's internal adjudication manual because neither pertains to refugee adjudications.**

Plaintiffs' claim that the Notices of Ineligibility violate 8 C.F.R. § 103.2(b)(16)(i) fails because the regulation does not apply to refugee applications adjudicated under 8 U.S.C. § 1157(c)(1). Part 103 of the Code of Federal Regulations, which contains 8 C.F.R. § 103.2(b)(16)(i), cites only the following as governing authority: "5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. § 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 et seq.); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub.L. 112-54." The refugee statute—8 U.S.C. § 1157—is not included.

Despite Plaintiffs' suggestion to the contrary, the *only* regulation that applies directly to refugee applications is 8 C.F.R. § 207, and as Plaintiffs acknowledge, "DHS has not published regulations regarding the Lautenberg Amendment in particular." (Pls.' Mot. at 13.). Indeed, 8 C.F.R. § 207 cites, *inter alia*, 8 U.S.C. § 1157 as its statutory authority. *See Doe v. Trump*, 288 F. Supp. 3d 1045, 1075 (2017) ("8 C.F.R. part 207 [are] the regulations implementing the Refugee Act of 1980"). Plaintiffs' regulatory challenge would lack merit even under the proper regulation—no subsection of 8 C.F.R. § 207 allows for a refugee applicant to inspect evidence or the record that constitutes the basis for a decision, to receive any degree of specificity with a denial notice, or to appeal a denial. *See generally* 8 C.F.R. § 207.

Plaintiffs' assertion that the Notices of Ineligibility violate the AFM misses the mark for a similar reason—the AFM does not apply to refugee denials under the Lautenberg Amendment. Although the AFM relates to the adjudication of immigration benefits generally, when it conflicts with guidance from the RAIO Directorate or its divisions (including RAD), RAD officers must follow the guidance from the RAIO Directorate or its divisions. (Decl. at ¶ 6.)

In this case, RAD's guidance states that officers adjudicating refugee applications under the Lautenberg Amendment should use the Notice of Ineligibility for Resettlement – Lautenberg template. (*Id*. at ¶ 5.) That template, which was used to notify Jane Doe 3, Jane Doe 4, and Jane Doe 5, follows the Lautenberg Amendment's statutory language by requiring an officer who denies an application as a matter of discretion to state the reasons for doing so to the maximum extent feasible. (*Id*. at ¶ 5.) RAD's guidance conflicts with the requirement under AFM 10.7(b)(3) that a fuller explanation be given, but under agency policy, RAD's guidance prevails. Thus, Plaintiffs' claim that USCIS violated the AFM is misplaced.[7]

## IV. CONCLUSION

For the foregoing reasons, Defendants respectfully ask this Court to deny Plaintiffs' motion for partial summary judgment.

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[7] Plaintiffs' argument that the Notices of Ineligibility are unlawful under the *Accardi* doctrine necessarily fails because 8 C.F.R. § 103.2(16)(i) and AFM 10.7(b)(3) do not apply to refugee adjudications.

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Respectfully submitted,

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