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

JANE DOE 1, et al., Plaintiffs, v. CHAD F. WOLF, et al., Defendants.	No. 5:18-cv-02349-BLF (VKD) CLASS ACTION **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** Hearing Date: August 20, 2020 Time: 9:00 a.m. Place: Courtroom 3 (5th Floor) Judge: Hon. Beth Labson Freeman **Oral Argument Requested**

NOTICE OF MOTION

PLEASE TAKE NOTICE that, pursuant to Local Rule 7-2, on a date and at a time, or as soon thereafter as counsel may be heard, before the Honorable Beth Labson Freeman of the United States District Court for the Northern District of California, San Jose Division, located at Courtroom 3, 280 South 1st Street, San Jose, California, 95113, Defendants hereby move pursuant to Federal Rules of Civil Procedure 12(b)(1), (6) to dismiss the First Amended Complaint.

This Motion is supported by the attached Memorandum of Points and Authorities, all pleadings, papers, and files in this action, and such oral argument as may be presented on the Motion.

Dated: July 16, 2020

Respectfully submitted,

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MEMORANDUM SUPPORTING DISMISSAL OF FIRST AMENDED COMPLAINT

Defendants file this Memorandum in Support of Defendants' Motion to Dismiss the First Amended Complaint.

STATEMENT OF ISSUES

1. Whether the Court should dismiss the First Amended Complaint ("FAC") without prejudice because Plaintiffs lack Article III standing.

2. Whether the Court should dismiss the FAC without prejudice for lack of subject-matter jurisdiction, as it alleges only Administrative Procedure Act ("APA") claims, yet does not identify a non-discretionary agency action or a final agency action.

3. Whether the Court should dismiss, with prejudice for failure to state a claim, the FAC's allegation that Defendants failed to follow the notice-and-comment rulemaking requirements under the APA.

INTRODUCTION

Under the Immigration and Nationality Act ("INA"), an alien abroad may not be admitted to the United States as a refugee without having applied for refugee status and been approved pursuant to 8 U.S.C. § 1157(c). Under the INA, the decision to grant or deny a refugee application lies within the discretion of the relevant government agency, now U.S. Citizenship and Immigration Services ("USCIS").[1] This authority extends to the Lautenberg-Specter refugee program, which has modified evidentiary requirements for certain categories of refugee applicants. *See* Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1989), *codified at* 8 U.S.C. § 1157 note.

[1] Although the Department of State ("State") generally oversees the U.S. Refugee Program and arranges most aspects of refugee processing, the Department of Homeland Security ("DHS") determines eligibility for refugee status through a combination of an eligibility determination by USCIS overseas and admission in refugee status by Customs and Border Protection at a U.S. port of entry.

Pursuant to its discretionary authority, and in assessing various applicable inadmissibility grounds in the INA, USCIS considers the threat the alien's admission as a refugee may pose to the safety and security of the United States in deciding whether to grant or deny refugee applications. USCIS assesses such threats by working with various U.S. government agencies, including the Federal Bureau of Investigation ("FBI"). Plaintiffs do not contest USCIS's general authority to do so.

USCIS makes refugee determinations in part by considering responses from other U.S. government agencies with which it partners to vet refugee applicants. This includes the FBI, which runs background security checks on refugee applicants and provides responses through the Security Advisory Opinion ("SAO") Process. Plaintiffs' FAC challenges a change that the U.S. government, including Defendants, made to the SAO vetting program, namely having the FBI move vetting of refugee applicants from its National Name Check Program ("NNCP") to its Foreign Threat Tracking Task Force ("FTTTF"). Plaintiffs allege that this switch has resulted in "the mass denial of Iranian refugees of minority faiths." FAC (Dkt. 384) ¶¶ 1, 5. Plaintiffs further allege that the switch has resulted in a "policy and practice" of denying refugee applications based upon the FBI's "new vetting method" for generating SAO vetting results. *Id.*, ¶¶ 7, 177.

Since 2017, over 800 Iranian religious minorities – which constitutes the vast majority of Lautenberg-Specter applicants during that time – have been approved for admission to the United States, *see* Dkt. 61 at 34-35; Dkt. 97-1 ¶ 14, even though the change to FTTTF vetting in 2016 coincided with an increased number of denials as compared to pre-2016. *See* Dkt. 61 at 34-35; Dkt. 97-1 ¶ 14.

The Court should dismiss the FAC for four reasons. First, Plaintiffs lack standing to pursue these claims. Second, Plaintiffs cannot maintain their APA claim, because the relevant statutes and refugee provisions give USCIS full discretion to vet applicants, and because the APA and INA divest federal courts of jurisdiction over such discretionary determinations. Third, given that USCIS is free to use the FBI's vetting results as they determine is most appropriate, the switch to the FTTTF vetting did not effect a "final agency action" by

Defendants as required for APA review. Fourth, if the Court does conclude that FTTTF vetting enhancements constitute a "rule" under the APA, such rule did not require notice-and-comment rulemaking because it is, at most, a general statement of policy. For the first three reasons, the Court should dismiss the FAC for lack of subject-matter jurisdiction. Alternatively, for the fourth reason, the Court should dismiss the notice and comment portion of the APA claim for failure to state a claim.

STATEMENT OF RELEVANT FACTS

I. Refugee Vetting and Adjudication

The statute authorizing refugee admission provides in relevant part that the Secretary of Homeland Security "may, in the [Secretary]'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."[2] 8 U.S.C. § 1157(c)(1); *see also id.* § 1101(a)(42); 8 C.F.R. § 207.1. The plain text of the statute commits refugee admission to agency discretion. 8 U.S.C. § 1157(c)(1); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (noting that "'may' expressly recognizes substantial discretion").

USCIS, a component of DHS, administers and enforces the INA's refugee provisions. 6 U.S.C. § 271(b)(3). USCIS has statutory authority to vet refugee applicants for security concerns. *See* 8 U.S.C. § 1357(b) (providing "authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter . . . the United States, or concerning any matter which is material or relevant to the enforcement of [the INA]."); 8 U.S.C. § 1103(a) (outlining DHS's statutory "[p]owers and duties"). Defendants share background check and security vetting information to "determine the eligibility and admissibility of individuals applying for admission to the United States as refugees or any other immigration benefit under United States law." *See* Department of State System of Records Notice ("SORN"), *available* at https://www.gpo.gov/fdsys/pkg/FR-2012-02-06/pdf/2012-2626.pdf (last

[2] The statute states that the Attorney General holds this authority, but discretion has since been transferred to the Secretary of DHS. *See* 6 U.S.C. § 557.

visited July 16, 2020). USCIS likewise is authorized to share this and other information gathered from refugee applicants with its vetting partners, including the FBI, under DHS's own statutory authorities, *see* 8 U.S.C. §§ 1103 and 1157; FAC ¶ 19 (citing 8 U.S.C. § 1103(a)(4)), and consistent with relevant routine uses, *see* DHS SORN, Routine uses E and PP, *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-11-21/pdf/2013-27895.pdf (last visited July 16, 2020).

The FBI, before and after adjudication of Plaintiffs' refugee applications, provides security vetting, which Plaintiffs term here the "new vetting method" and "SAO vetting." *See* FAC ¶¶ 4, 7, 19.

The controlling statute providing USCIS with discretionary adjudication authority over refugee applications does not provide for judicial review of a denied refugee application. *See* 8 U.S.C. § 1157(c)(1); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992) (per curiam) ("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 relevant regulation likewise provides no appeal process. *See* 8 C.F.R. § 207.4 ("There is no appeal from a denial of refugee status under this chapter.").

II. Processing of Plaintiff-Class Members' Refugee Applications

Since 2004, Iranian religious minorities seeking refugee status have been processed in Vienna, Austria, under the Specter Amendment to the Lautenberg Amendment, a statutory provision that defines certain categories of refugees for whom there are modified evidentiary standards for establishing refugee status. *See* Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1989), *codified at* 8 U.S.C. § 1157 note; FAC ¶ 30. The Lautenberg Amendment does not strip USCIS of the discretionary authority to grant or deny refugee applications, but 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." *See* 8 U.S.C. § 1157(c)(1) note.

Although the approval rate for Lautenberg refugee applicants historically has been high, Plaintiffs allege that the FBI's change from refugee vetting previously conducted by FBI's

NNCP to such vetting now conducted by FBI's FTTTF, effective January 1, 2016, has resulted in a greater number of application denials, including the denials of Plaintiffs' applications that prompted this lawsuit. FAC ¶¶ 2-4, 66-68. The FAC describes the process by which Defendants, while functioning as part of the interagency SAO Requirements Review Board, *id*., ¶ 65, and after consideration of the FBI's advice regarding its own vetting capacities, jointly with interagency partners determined the most effective means of obtaining refugee vetting results from the FBI. *Id*., ¶¶ 65, 66, 68 (alleging that, "[a]t the time of the 2015 review of SAO Merlin, the FBI . . . was conducting SAO Merlin vetting through its National Name Check Program .... but proposed that the FBI remain involved in SAO Merlin vetting by transferring the SAO Merlin vetting function to the Foreign Terrorist Tracking Task Force.").

RELEVANT PROCEDURAL HISTORY

On April 18, 2018, Plaintiffs filed their initial complaint, Dkt. 1, and on August 14, 2018, Defendants moved to dismiss the Complaint, Dkt. 96. On September 7, 2018, the Court ordered jurisdictional discovery. Dkt. 102.

On October 22, 2018, after Defendants withdrew their motion to dismiss the original complaint upon the Court's advisement, *see* Dkts. 118, 119, the parties stipulated "that Defendants' motion to dismiss – which they will refile after the conclusion of the jurisdictional discovery period – will be construed as having been timely filed under the Federal Rules." Dkt. 120. An order to this effect followed. Dkt. 121.

Jurisdictional discovery remains open regarding the initial complaint for the sole purpose of resolving Defendants' June 29, 2020 motion seeking reconsideration of sixteen confidentiality designations, *see* Dkt. 379, for which briefing closed on July 14, 2020.

On July 2, 2020, after briefing and a resulting order granting in part Plaintiffs' motion to amend their complaint, Plaintiffs filed their FAC. Dkt. 384. The FAC substitutes Doe class members, alters the class definition, expands allegations regarding "program changes," and adds a notice and comment claim to the APA allegations in Claim Six, which remains the sole active claim in this matter. *Id*. The only named Plaintiffs pursuing Claim Six are Does 6, 7, and 8. FAC ¶ 155. Doe 6 is an Iranian citizen located in Austria who applied with her family for

refugee resettlement in the United States through the Lautenberg program but was originally denied. *Id*., ¶ 16. Does 7 and 8 are American citizens who sponsored Iranian family members for refugee resettlement in the United States through the Lautenberg program whose applications were denied. *Id*., ¶¶ 17-18. According to the FAC, Doe 6 and all of the named Plaintiffs' family members received asylum in Austria in 2019. *Id*., ¶¶ 133, 145, 152.

Pursuant to this Court's order resulting from the parties' stipulated proposed schedule, Defendants' answer or responsive pleading to the FAC is due July 16, 2020. *See* Dkt. 378. Defendants accordingly submit the instant motion.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) permits a motion to dismiss for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction, and a lack of jurisdiction is presumed until the party asserting jurisdiction proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "Unless the jurisdictional issue is inextricable from the merits of a case, the court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure." *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008). "[N]o presumptive truthfulness attaches to plaintiff's allegations." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (internal quotation marks omitted). Moreover, "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment).

Rule 12(b)(6) permits a motion to dismiss a claim for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). This

tenet—that the court must accept as true all of the allegations contained in the complaint—"is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Twombly*, 550 U.S. at 555). Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Factual allegations that only permit the court to infer "the mere possibility of misconduct" do not show that the pleader is entitled to relief as required by Rule 8. *Iqbal*, 556 U.S. at 679.

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs cannot satisfy the threshold requirement of standing. Article III standing is "a necessary component of subject matter jurisdiction." *Bradley v. T-Mobile US*, No. 17-cv-07232, 2020 WL 1233924, at *5 (N.D. Cal. Mar. 13, 2020) (Labson Freeman, J.). The Supreme Court has repeatedly stated that the "irreducible constitutional minimum of standing" consists of three elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These elements are often referred to as injury in fact, causation, and redressability. *Bradley*, 2020 WL 1233924, at *5 (citation omitted). Plaintiffs bear the burden of establishing the existence of Article III standing and, at the pleading stage, "must clearly allege facts demonstrating each element." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks and citation omitted); *see also Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983) ("The facts to show standing must be clearly apparent on the face of the complaint.").

"In a class action, this standing inquiry focuses on the class representatives." *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019). If none of the named plaintiffs can establish standing to sue, the class action cannot

proceed. *See id.* (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); *accord Gomez v. Trump*, No. 20-cv-01419, 2020 WL 3429786, at *10 (D.D.C. Jun. 23, 2020)).

Even assuming *arguendo* that Plaintiffs can establish an "injury in fact," the FAC nonetheless fails to invoke this Court's subject matter jurisdiction because Plaintiffs do not meet the requirements for causation and redressability. Failure to meet one of these elements is enough to doom the FAC, and they have failed both.

A. Plaintiffs fail to establish causation because it would require the Court to determine that the pre-January 2016 FBI procedures would not have yielded derogatory information that USCIS would deem grounds for issuing denials.

To satisfy the causation requirement, Plaintiffs must sufficiently plead that the injury is "fairly traceable to the challenged action of the defendant, and [is] not the result of the independent action of some third party not before the court." *Va. Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1246 (9th Cir. 1998). Plaintiffs may not rely on allegations that are "conjectural or hypothetical," *Lujan*, 504 U.S. at 560–61; *see also Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990) (holding that Article III standing cannot be based upon "chain of speculative contingencies"). The FAC falls well short of this standard.

Only three named Plaintiffs, Does 6, 7, and 8, assert claims under the FAC's remaining cause of action. FAC ¶ 176. The FAC offers only conclusory statements as to what caused these Plaintiffs' denials. *See* FAC ¶ 134 (Doe 6); ¶ 146 (Doe 7); and ¶ 153 (Doe 8). But nowhere do Plaintiffs contend that if they had been evaluated under the pre-2016 vetting approach they would have been admitted to the United States as refugees. Notably, the FAC does not claim that any information raising the specter of a national security risk would not have been gleaned through the prior SAO vetting process. Instead, Plaintiffs present "speculation" and "guesswork" as to the cause of their denials, rather than such denials being the result of information that may have been elicited under either vetting approach. These threadbare, conclusory allegations are insufficient to establish standing. *See Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1150 (2013). Such "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

Because the FAC fails to plead sufficient facts to show that Plaintiffs' refugee application denials are "fairly traceable" to the change in vetting procedure, Plaintiffs fail to show standing under Article III. Accordingly, the Court should dismiss the FAC.

B. Plaintiffs fail to show that any relief they request from the Court would redress their alleged injuries.

Article III also requires a showing that the alleged injury will *likely* be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (emphasis added). Indeed, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61. Again, the FAC proves inadequate.

Plaintiffs' claims for relief ask this Court to "[d]eclare unlawful the program changes that resulted in the mass denials;" "[s]et aside as unlawful the program changes that resulted in the mass denials and any subsequent actions that relied on such unlawful program changes;" "[a]ward … attorney's fees and costs;" and "[g]rant any other relief the Court deems just and proper." FAC ¶¶ A-E. But Plaintiffs' alleged injuries are the denial of their family members' refugee applications, *id.*, ¶¶ 134, 146, and 153, and none of them has demonstrated how a ruling in their favor by this Court will "likely" remedy their claimed injuries. They do not even ask the Court to reopen or re-adjudicate any previously-denied application.

Moreover, per the FAC, all of the named Plaintiffs' sponsored family members have received asylum in Austria. *Id.*, ¶ 133 ("Doe 6, her husband, and their daughter received asylum in June 2019" in Austria); *Id.*, ¶ 145 ("Doe 7's aunt and her family received asylum in 2019" in Austria); ¶ 152 ("Doe 8's nephew applied for asylum in Austria and received it in 2019."). Because all of the sponsored individuals received asylum in Austria, they are not eligible for refugee resettlement in the United States. Under 8 U.S.C. § 1157(c)(1), a refugee may be admitted "who is not firmly resettled in any foreign country." *See also* 8 C.F.R. § 207.1(b). A refugee is "considered to be 'firmly resettled' if he or she has been offered resident status, citizenship, or some other type of permanent resettlement by a country other than the United States and has traveled to and entered that country as a consequence of his or her flight from persecution." 8 C.F.R. § 207.1(b). Moreover, if an applicant "claims not to be firmly resettled in

a foreign country[, he or she] must establish that the conditions of his or her residence in that country are so restrictive as to deny resettlement." *Id*. Based on the FAC, Plaintiffs fail to show that these individuals are not firmly resettled in Austria after receiving asylum. *See* FAC ¶¶ 133, 145, 152. Accordingly, regardless of vetting results, none of the named Plaintiffs' sponsored family members is statutorily eligible to receive refugee resettlement in the United States. Thus, their requests that this Court order that changes to SAO vetting procedures be declared unlawful and set aside have no likelihood of redressing their claimed injuries.

Even setting aside the named Plaintiffs' discretionary denials and additional statutory ineligibility for refugee resettlement, they have failed to show how an order to return to the prior SAO vetting procedure would otherwise redress their harms or the purported class's harms. They merely allege that the change occurred, that there were mass denials, and that the Court should reverse that change in vetting procedure. They do not ask the Court to reverse any named Plaintiff's denied application or even to reopen the applications of the class members. "[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Plaintiffs do not do that here, and accordingly they have not shown how this Court can redress their injuries.

In short, the named Plaintiffs' lack of standing dooms standing for the class and, even analyzing standing for the class as a whole, the FAC fails to show causation or redressability. Accordingly, the Court should dismiss the FAC.

II. The Alleged Vetting Changes Are Not Reviewable Under the APA Because Those Changes Involve Determinations Committed to Agency Discretion.

The FAC alleges that class members received "Security-Related Notices of Ineligibility or administrative closure letters denying them refugee admission because of changes that Defendants made to SAO Merlin vetting beginning in January 2016." FAC ¶ 176. Specifically, Plaintiffs challenge the following alleged changes to SAO Merlin vetting: (1) Defendants' decision to transfer SAO vetting from the FBI's NNCP to FTTTF to use certain vetting capabilities; and (2) Defendants' decision to adopt a "policy and practice of denying or rejecting

refugee applications based on 'not clear' results from the FBI's SAO Merlin vetting . . . " *See id*., ¶ 177. Plaintiffs conclude that "[t]hese changes constitute final agency actions because they represent the consummation of the agency's decision-making process and because they had the consequence of resulting in denials or rejections of refugee applications." *Id*., ¶ 178.

While the APA permits judicial review for "[a] person suffering legal wrong because of agency action," 5 U.S.C. § 702, it explicitly excludes review "to the extent that . . . agency action is committed to agency discretion by law," *id.* § 701(a)(2). The Supreme Court has thus held that, "if the statute [governing the agency's actions] is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then 5 U.S.C. § 701(a)(2) exempts the agency's decision from review. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The Supreme Court has explained that the primary focus of section 701(a)(2) is whether the governing statute provides the courts with "law to apply":

> [W]e therefore turn to the [applicable federal statute] to determine whether in this case Congress has provided us with "law to apply." If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is "law to apply" under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency . . . decision [is] "committed to agency discretion by law" within the meaning of that section.

Heckler, 470 U.S. at 834-35. Although section 701(a)(2) "is a very narrow exception" and only "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (footnote and internal quotation marks omitted), *overruled on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977), "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler*, 470 U.S. at 830.

A. The decision to transfer SAO vetting to FTTTF in order to employ certain vetting capabilities is unreviewable under the APA because that decision is committed to Defendants' discretion.

Deference to the political branches is at its zenith in matters of national security and foreign affairs. *See Wayte v. United States*, 470 U.S. 598, 611-12 (1985) (stating that "[f]ew interests can be more compelling than a nation's need to ensure its own security"); *see also Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (recognizing that "terrorism or other special circumstances" can warrant "heightened deference to the judgments of the political branches with respect to matters of national security"). "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (noting that the political branches' immigration-related powers are "intricately interwoven" with foreign relations and war powers).

In keeping with that principle, Congress has granted DHS broad authority to consult with law enforcement and intelligence agencies to conduct vetting in order to enforce the INA. *See*, *e.g.*, 8 U.S.C. §§ 1103(a)(4), 1105(a), 1225(d)(3), 1357(b). For instance, 8 U.S.C. § 1105(a) provides the following:

> The Commissioner and the Administrator shall have authority to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information for use in enforcing the provisions of this chapter in the interest of the internal and border security of the United States. The Commissioner and the Administrator shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform, and efficient administration of this chapter, and all other immigration and nationality laws.

Id. Moreover, DHS has broad statutory authority "to take and consider evidence" when such information is "material and relevant" to the furtherance of USCIS's delegated authority to administer and enforce the INA. *See* 8 U.S.C. § 1225(d)(3) ("The Attorney General and any

immigration officer shall have power to . . . take and consider evidence of or from any person touching the privilege of any alien . . . to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service."); *see also id.* § 1357(b) (same). Furthermore, under 8 U.S.C. § 1103(a)(4), DHS "may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service."

Here, although directed specifically at Defendants USCIS and State, Plaintiffs challenge the joint decision by the interagency SAO Requirements Review Board, FAC at ¶¶ 65-66, to transfer SAO Merlin vetting from the FBI's NNCP to FTTTF to employ certain vetting capabilities. Initially, this alleged agency action is unremarkable as denials of refugee applications are frequently based on information that other agencies or entities provide to the adjudicating agency. *See, e.g.*, 8 U.S.C. § 1105(a); House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States"); *see also, e.g.*, 8 U.S.C. § 1105(b)(1) (giving the State Department access to criminal history information maintained by other U.S. agencies); 8 U.S.C. § 1187(c)(2)(F) (discussing information sharing with foreign countries with respect to individuals who "represent a threat to the security or welfare of the United States or its citizens"); 8 U.S.C § 1446 note (requiring USCIS to wait for FBI's input to adjudicate N-400s).

Critically, this Court lacks subject matter jurisdiction to review the instant agency action under the APA because such action by Defendants is firmly committed to the statutory authority granted by Congress. *See, e.g.*, 8 U.S.C. §§ 1103(a)(4), 1105(a), 1225(d)(3), 1357(b). Indeed, Plaintiffs recognize that "DHS *may* require or authorize employees of the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed on the

Department . . . and DHS has required or authorized DOJ to perform one aspect of refugee vetting called SAO vetting." FAC ¶ 19 (citing 8 U.S.C. § 1103(a)(4) and emphasis added).

Consequently, both the actual decision and "the Secretary's decisional process is . . . unreviewable" under the arbitrary-and-capricious standard under 5 U.S.C. § 706. *See Bourdon v. DHS*, 940 F.3d 537, 544 (11th Cir. 2019). Given the broad sweep of Defendants' authority for (1) liaising with security and intelligence agencies, such as the FBI, under 8 U.S.C. § 1105(a), (2) taking and considering evidence that is "material and relevant" to the enforcement of the INA under 8 U.S.C. §§ 1225(d)(3), 1357(b), and (3) authorizing certain FBI components to perform SAO vetting under 8 U.S.C. 1103(a)(4), these statutes are "drawn" such that this Court has "no meaningful standard against which to judge [Defendants'] exercise of discretion" regarding which agencies, components, or capabilities to employ for vetting purposes. *See Heckler*, 470 U.S. at 830. Put another way, there are "no legal norms pursuant to which to evaluate the challenged action," and this Court has "no concrete limitation[] to impose on [Defendants'] exercise of discretion." *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011). Accordingly, Plaintiffs' challenge would require this Court to second-guess Defendants' judgments regarding the efficacy of SAO vetting conducted by FTTTF versus the FBI's previous vetting component, NNCP, which is beyond this Court's review under the APA. *See Dist. No. 1, Pac. Coast Dist., Marine Engineers' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 41 (D.C. Cir. 2000) ("Review of the Secretary's decisions would require second guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure, and courts are ill-equipped to conduct reviews of the nation's military policy.") (citing and quoting *Nat'l Fed. of Federal Emps. v. United States*, 905 F.2d 400 (D.C. Cir. 1990)).

Thus, this Court lacks subject matter jurisdiction to review this alleged change in SAO Merlin vetting under the APA.

B. The allegation of a "policy and practice" of denying refugee applications based on "not clear" vetting results is unreviewable because the proper weight to accord such vetting results is committed to agency discretion.

Along with the exclusion of APA jurisdiction under 5 U.S.C. § 701(a)(2), when the challenged "agency action is committed to agency discretion by law," the APA also "withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (alteration in original) (quoting 5 U.S.C. § 701(a)(1)). Under 8 U.S.C. § 1252(a)(2)(B)(ii), "any . . . decision or action of . . . the Secretary of Homeland Security the authority for which is specified ... to be in the discretion of the.... Secretary of Homeland Security" is not subject to judicial review by federal courts. 8 U.S.C. § 1252(a)(2)(B)(ii).

The statute authorizing refugee admissions, 8 U.S.C. § 1157, provides, in relevant part, that the "[Secretary of Homeland Security] may, in the [Secretary]'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). This means that the following factors inform the application determination: whether the refugee applicant is admissible under 8 U.S.C. § 1182, and, if not, whether an inadmissibility waiver is available under 8 U.S.C. § 1157(c)(3) for any applicable inadmissibility; whether any waiver of inadmissibility should be granted in the exercise of discretion in the interest of humanitarian purposes, family unity, or otherwise in the public interest under that section; whether the refugee applicant is barred from refugee status on account of being a persecutor under the definition of refugee in 8 U.S.C. § 1101(a)(42); and ultimately whether, as provided in section 1157(c)(1), the Secretary exercises his or her discretion favorably in the determination. *See* Ex. A - Ruppel Decl., ¶ 5. In determining an applicant's eligibility for refugee status based on the above factors, USCIS utilizes, *inter alia*, vetting information provided by national security and law enforcement vetting partners. *See id.*, ¶¶ 5-6. Ultimately, under 8 U.S.C. § 1157, the admission of refugees is committed to the discretion of the Secretary of DHS. *See Mohammed v. Sessions*, 362 F. Supp. 3d 8 (D.D.C. 2019) (citing 8 U.S.C. § 1157(c)(1)).

Here, Plaintiffs challenge USCIS's "decision to adopt the policy and practice of denying or rejecting refugee cases based on a 'not clear' result from the FBI's SAO Merlin vetting . . ."

FAC ¶ 177. Plaintiffs essentially contend that USCIS accorded inappropriate weight to the FBI's vetting result, which "had the consequence of resulting in denials or rejections of refugee applications." *Id.*, ¶ 178; *see* Dkt. 357 at 12 ("[T]he legal consequences occur once DHS decides that the FBI's 'not clear' result weighs more than all of the other information it receives. To find otherwise would be to say that DHS is abdicating its role assigned by Congress for the refugee program to the FBI, which is not alleged in the proposed First Amended Complaint."). The proper weight, however, to assign to the FBI's vetting result in the adjudication of a refugee application is committed to agency discretion by law and is, therefore, unreviewable under the APA.

As discussed above, the governing statute provides that the "[Secretary of Homeland Security] *may*, in the [Secretary]'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) (emphasis added). The plain text of the statute, therefore, commits refugee admission to agency discretion. *See Haig*, 453 U.S. at 294 n.26 ("'[M]ay' expressly recognizes substantial discretion."). Consequently, refugee resettlement is an act of discretion, not an entitlement. *See I.N.S. v. Stevic*, 467 U.S. 407, 426 (1984) (recounting legislative history of Refugee Act of 1980, explaining "[i]t was plainly recognized, however, that merely because an individual or group of refugees comes within the definition will not guarantee resettlement in the United States") (citation omitted). While the statute points to criteria that all applicants must meet in order for USCIS to approve the refugee application – in other words, necessary conditions for approval – the statute does not direct how DHS should exercise its discretion or delineate sufficient conditions for approval. Put another way, there is "no meaningful standard against which to judge" USCIS's exercise of discretion in according the appropriate weight to the FBI vetting result in adjudicating the refugee applications at issue. *See Heckler*, 470 U.S. at 830; *Forsyth Cty. v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1041 (11th Cir. 2011) (holding that agency decision was unreviewable under the APA because "[n]o law provide[d] how the agency should balance these factors in a particular case, or what weight to assign each factor"). This lack of standard counsels that APA review is

inappropriate.

Illustratively, in *National Federation of Federal Employees*, the D.C. Circuit held that the Defense Secretary's decisions regarding military base closures and realignments were "committed to agency discretion by law" and hence not subject to review under the APA. 905 F.2d at 405. Although the Base Closure Act incorporated nine specific criteria that had informed the Secretary's closure and realignment decisions, the court held that his decisions were not reviewable because the "subject matter of those criteria is not 'judicially manageable.'" *Id*. The court concluded that review of the Secretary's decisions would, therefore, require "second guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure," and courts are "ill-equipped to conduct reviews of the nation's military policy." *Id*. at 405-06. Here, too, the consideration of the proper weight to accord to the FBI's vetting result, whether conducted under the legacy SAO vetting component, NNCP, or the instant FTTTF, is not judicially manageable, and such review would require second guessing USCIS's determination, which involves a subject matter at the intersection of national security and foreign policy. *See Haig*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *United States v. Hawkins*, 249 F.3d 867, 873 n.2 (9th Cir. 2001) ("[C]ourts have long recognized that the Judicial Branch should defer to decisions of the Executive Branch that relate to national security."). Indeed, the Ninth Circuit recognized this proposition in *Perez Perez v. Wolf*, 943 F.3d 853, 867-68 (9th Cir. 2019) ("We held that the "invocation of the 'national interest' is a core example of a consideration that lacks a judicially manageable standard of review," as it calls for "broader economic and national-security considerations") (citing *Poursina v. USCIS*, 936 F.3d 868, 871, 874 (9th Cir. 2019)).

Finally, because the weight to accord to the FBI's vetting result is committed to agency discretion by statute, this Court additionally lacks jurisdiction to review Plaintiffs' challenge due to the jurisdiction-stripping provision of 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 decisions rendered pursuant to 8 U.S.C. § 1157(c)(1) as an example. *Kucana v. Holder*, 558 U.S. 233, 248 (2010) ("[D]ecisions 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). . . .").

For these reasons, this Court lacks subject matter jurisdiction to review USCIS's determinations regarding the appropriate weight to accord the FBI's vetting results in the adjudication of the refugee applications at issue.

III. The Challenged Changes to SAO Vetting Do Not Constitute "Final Agency Actions."

Plaintiffs challenge two distinct lines of conduct that they allege are agency actions: Defendants' decision (i) to "allow the FBI Task Force to use [certain techniques] in SAO Merlin vetting" of refugee applicants; and (ii) to "adopt the policy and practice of denying or rejecting refugee cases based on a 'not clear' result from the FBI's SAO Merlin vetting . . . " FAC ¶¶ 177, 183. Plaintiffs allege that these decisions constitute final agency action that warrants APA review as "arbitrary, capricious, an abuse of discretion, or not in accordance with law." *Id.*, ¶¶ 178, 183. This portion of Claim Six warrants Rule 12(b)(1) dismissal on the threshold ground that the decisions do not constitute final agency action and therefore are not subject to judicial review under the APA.

A. Legal Standard for Final Agency Action

Under 5 U.S.C. § 704, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The Ninth Circuit approaches review of the APA's "final agency action" requirement as jurisdictional. *See S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 571 (9th Cir. 2019).

"For there to be final agency action, there must first be agency action." *Id.* at 575 (internal citation and quotation marks omitted). To be "final," agency action must represent "the consummation of the agency's decision-making process" and "must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177-78 (internal quotation marks and citation

omitted). Finality also requires that "the action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Id*.

B. The Decision to Transfer SAO Vetting to FTTTF Is Not Final Agency Action.

Assuming that Defendants' decision to transfer SAO vetting to FTTTF is an agency action under the APA, it is not "final" because it determined no "rights or obligations" and did not result in "legal consequences." *See Bennett*, 520 U.S. at 178. Indeed, as this Court has recognized, "the legal consequences occur once DHS decides that the FBI's 'not clear' result weighs more than all of the other information it receives." Dkt. 357 at 12. Thus, significantly, the viability of this allegation turns on whether a "not clear" vetting result essentially constitutes a denial. That is, to succeed on this claim, Plaintiffs must demonstrate that USCIS did not exercise USCIS's statutory authority to adjudicate Plaintiffs' refugee applications in its discretion and that the decisions at issue were instead *pro forma*, vetting-dependent stamps of approval or denial. Yet, while Plaintiffs challenge the "new vetting method" that, they allege, resulted in initial application denials for Doe 3 and Doe 4, FAC at ¶¶ 13, 14, 116, 123, *they also plainly state that these individual Plaintiffs ultimately received approval* of their respective refugee application and are now in the United States. *Id*., ¶¶ 118, 125. Plaintiffs' own allegations, therefore, undermine their narrative that, under the "new vetting method," the outcome of USCIS's refugee application adjudication was predetermined.

Additionally, the record further affirms that USCIS, even upon receipt of negative vetting results from the FBI, continued to exercise its discretion through discussions with the FBI that resulted in USCIS approving several applications for which the FBI initially provided "not clear" or "red" vetting results. *See* Ex. B - Ruppel Tr. at 31:16-20; 36:6-11; 114: 19-25 – 115: 1-12, 20-22; Ex. A - Ruppel Decl., ¶¶ 7, 12-14.

This Court need look no further than the FAC to determine that, by Plaintiffs' own acknowledgement, the decision to allow the FBI to use the techniques the FBI proposed as the most effective for refugee vetting is not final agency action under the APA. The record further

supports such a determination. For these reasons, this claim does not qualify for judicial review under the APA, and the Court should dismiss it pursuant to Rule 12(b)(1).

C. There is no "policy and practice" of relying solely on FTTTF vetting results in adjudicating refugee applications.

USCIS, as *the* refugee application adjudicating agency, continues to make application determinations in its discretion, considering the statutory eligibility criteria that applicants must meet. *See* 8 U.S.C. §§ 1157(c), 1182(a), 1101(a)(42); Ex. A - Ruppel Decl., ¶ 5. The record demonstrates that, contrary to Plaintiffs' allegations, *see* FAC ¶ 177, *see also* ¶ 100, there is no policy to deny refugee applications based on "not clear" vetting results.

As noted above, the *record* explains why such instances occurred. In her Rule 30(b)(6) deposition, Joanna Ruppel, Chief, International Operations, USCIS, testified concerning the extent of coordination that occurred between USCIS and the FBI in certain cases for which the FBI returned "not clear" or "red" vetting results, and that this coordination at times resulted in USCIS's approval where a "not clear" initially existed. *See* Ex. B - Ruppel Tr. at 114:19-25 – 115:1-12, 20-22. Moreover, Ms. Ruppel's declaration attached herewith demonstrates that there were at least eight (8) cases among the class for whom Defendants received "not clear" vetting results from the FBI that, after vetting-related engagement with the FBI, resulted in application approvals by USCIS. *See* Ex. A - Ruppel Decl., at ¶¶ 7, 12-14.

Multiple instances thus demonstrate that the "policy and practice" that Plaintiffs allege and on which they base this claim, does not actually exist and was not applied to the class. On this basis, there is no agency action, as required to maintain an APA challenge. *See* 5 U.S.C. § 704. The Court thus should dismiss this allegation pursuant to Rule 12(b)(1). Alternatively, even if such agency action existed, it would be unreviewable under the APA because, as discussed above, *supra* Section II(b), the weight USCIS assigns to vetting results is, in itself, a matter of statutory discretion left to USCIS per section 1157(c)(1).

IV. If This Court Finds that It Has Jurisdiction to Review the Challenged Changes To SAO Merlin Vetting, It Should Find that the Vetting Changes Do Not Require Notice and Comment Rulemaking.

The notice-and-comment procedures of the APA do not apply to the FTTTF vetting rubric for two separate reasons detailed below. Accordingly, the Court should dismiss this claim with prejudice for failure to state a claim.

The vetting change is exempt from notice-and-comment rulemaking requirements as a "general statement[] of policy," as it merely guides refugee officers' authority. 5 U.S.C. § 553(b)(A). A statement of policy aims, in part, to "educate" and "provide direction to the agency's personnel in the field, who are required to implement its policies and exercise its discretionary power in specific cases." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). "The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case . . . ." *Id.* (internal quotation marks omitted); *see Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1186 (9th Cir. 2019).

That is exactly what FTTTF vetting does. Rather than "impose legally binding obligations or prohibitions on regulated parties," it provides USCIS with guidance on how it "will exercise [their] broad enforcement discretion" under 8 U.S.C. § 1157(c), the refugee-status-granting provision. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (Kavanaugh, J.). The FAC itself affirms Defendants' authority to obtain and consider vetting results such as those at issue here. FAC ¶ 19 ("DHS may require or authorize employees of the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed on the Department, 8 U.S.C. § 1103(a)(4), and DHS has required or authorized DOJ to perform one aspect of refugee vetting called SAO vetting.").

Contrary to Plaintiffs' allegation, *see* FAC ¶ 100, an FTTTF "not clear" or "red" result is not "outcome determinative." The attached Ruppel Declaration demonstrates that, in eight cases where Defendants received a "not clear" vetting result from the FBI, USCIS approved the application after discussions with the FBI. *See* Ex. A - Ruppel Decl., ¶¶ 12-14. And the Ruppel transcript further affirms that discussions with the FBI resulted in approval of applications previously denied based on "not clear" vetting results. Ex. B - Ruppel Tr. at 114:19-25 – 115:1-

12, 20-22. Additionally, the FAC itself undermines Plaintiffs' argument that the "new vetting method" is outcome determinative. As the FAC alleges, the "new vetting method" resulted in an initial denial of Doe 3 and Doe 4. FAC ¶¶ 13, 14, 116, 123. Yet, Plaintiffs' allegations also plainly state that each of these Plaintiffs ultimately received approval of their respective refugee application and is now in the United States. *Id.*, ¶¶ 118, 125. Plaintiffs' allegations regarding these two instances belie their narrative that the "new vetting method" predetermines the outcome of USCIS's refugee adjudication.

As part of USCIS's discretionary refugee adjudication under 8 U.S.C. § 1157(c)(1), USCIS is authorized to thoroughly examine the application of each applicant. *See* 8 U.S.C. § 1357(b) (explaining that the DHS Secretary may designate officers with "power and authority to administer oaths and take and consider evidence concerning the privilege of any person to enter . . . the United States"). Sometimes the adjudicating officer will grant the application and sometimes the officer will deny it. *See* FAC ¶¶ 96-97. At base, FTTTF vetting constitutes one component among many procedures that Defendants have established as part of the discretionary refugee adjudication process, and it therefore qualifies as a statement of agency organization or policy in the course of USCIS's larger "exercis[e of] a discretionary power" in its refugee adjudications. *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citation omitted).

That FTTTF vetting is one component among the larger discretionary adjudication process – and therefore is a statement of agency organization or policy – is consistent with other general statements of policy embodied where an agency has discretion and entertains broad suggestions, but not orders, on how to exercise that discretion. The Ninth Circuit in *Mada-Luna* rejected the argument that the repeal could not constitute a general statement of policy because it diminished the likelihood of receiving deferred action for a class of individuals. *Mada-Luna*, 813 F.2d at 1016. Also, the Ninth Circuit in *Innovation Law Lab* found, in the context of granting a stay pending appeal, that the Migrant Protection Protocols, "a new inspection policy along the southern border," "qualifies as a general statement of policy because immigration officers designate applicants for return on a discretionary case-by-case basis." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). And the Ninth Circuit in *Regents*

concluded that the rescission of the Deferred Action for Childhood Arrivals ("DACA") program was a general statement of policy, even if the rescission "would undoubtedly result in the loss of deferred action for the vast majority of the 689,800 people who rely on the program," because it "did not forbid the agency from granting [DACA] requests." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 512-14 (9th Cir. 2018);[3] *see also Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1309-10 (N.D. Cal. 2018) (determining, in the decision below later affirmed, the DACA rescission was a general statement of policy even though that policy—unlike FTTTF SAO refugee vetting here—"categorically eliminates" certain applicants' eligibility for benefits, namely advance parole).

FTTTF vetting, as applied to Plaintiffs, is therefore a general statement of policy (if it is a rule at all). Notice and comment procedures are therefore not required. *See* 5 U.S.C. § 553(b)(A).

CONCLUSION

For the aforementioned reasons, this Court should dismiss the FAC for lack of subject-matter jurisdiction. In the alternative, if the Court finds jurisdiction, the Court should dismiss with prejudice for failure to state a claim the notice-and-comment rulemaking portion of Claim Six.

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[3] The Supreme Court reversed in part and vacated in part this decision, but on other grounds. 140 S. Ct. 1891 (2020). The Court expressly declined to address the notice-and-comment claim. *Id.* at 1903 n.1.

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