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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JANE DOE 1, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, *et al.*,

Defendants.

Case No. 5:18-cv-2349-BLF-VKD

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

Hearing: October 1, 2020
Time: 10:00 a.m.
Place: Courtroom 3 (5th Floor)

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I. STATEMENT OF ISSUES

1. Whether Defendants' Motion should be denied because Plaintiffs have established Article III standing by sufficiently alleging injury, causation, and redressability?

2. Whether Defendants' Motion should be denied because the policy changes that Plaintiffs have alleged are reviewable under the Administrative Procedure Act ("APA")?

3. Whether Defendants' Motion should be denied because Plaintiffs have sufficiently alleged (a) final agency action to establish jurisdiction under the APA for the arbitrary-or-capricious claim and (b) that Defendants were required to follow the notice-and-comment rulemaking procedures under the APA?

II. INTRODUCTION

Through the Lautenberg and Specter Amendments, Congress created a special refugee program for persecuted religious minorities seeking safety and freedom in the United States. Defendants' unlawful refugee vetting policy changes have obstructed persecuted refugees seeking to flee Iran under the Lautenberg-Specter Program from reuniting with family in the United States, leaving many fearful and stranded in Austria in the process. Defendants' vetting changes have effectively (and unlawfully) added a new ground of inadmissibility for Lautenberg refugees that deems applicants inadmissible if [redacted] Through a series of strawman arguments, Defendants argue that Plaintiffs lack standing, that this Court cannot review Plaintiffs' Sixth Claim for Relief under the Administrative Procedure Act ("APA"), and that Plaintiffs have failed to state a claim. Defendants' arguments are meritless and should be rejected:

First, Plaintiffs easily meet the standing requirements articulated in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), as applicant-Class members were robbed of the opportunity to be processed under a lawful vetting scheme, and Defendants' attempts to invoke the firm resettlement bar in this setting are unfounded.

Second, the lawfulness of the vetting policy changes at issue are reviewable because such polices were not firmly committed to agency discretion and courts in this Circuit have repeatedly

found it appropriate to review agency changes to vetting for immigration benefits, including for refugees. *See, e.g. Doe v. Trump*, 288 F. Supp. 3d 1045, 1070 (W.D. Wash. 2017); *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *10 (W.D. Wash. June 21, 2017).

Third, Plaintiffs have stated APA claims by sufficiently alleging that Defendants' changes to the SAO Merlin vetting regime constitute final agency actions and constitute substantive rules that the APA requires go through the proper notice-and-comment rulemaking procedures in order to keep the public apprised of agency actions, which Defendants failed to perform. *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987).

As explained below, the Court should deny Defendants' Motion to Dismiss in its entirety.

III. BACKGROUND

Plaintiffs. Plaintiffs are a Class of U.S. sponsors and refugee applicants in the Vienna Lautenberg-Spector program who are challenging the mass denial of refugee status to Iranian religious minorities who sought to reunite with family members in the United States under the Vienna-based Lautenberg-Specter Program (the "Lautenberg-Specter Program"). ECF 384. The Lautenberg Amendment facilitates refugee applications from vulnerable groups by lowering their evidentiary burden to prove a well-founded fear of persecution and by ensuring that any denials "shall be in writing and shall state, to the maximum extent feasible, the reason for the denial." Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1089); *see also* Pub. L. No. 108-99, § 213, 118 Stat. 3 (2004); 8 U.S.C. § 1157 (note). In 2004, Congress passed the Specter Amendment, which added Iranian religious minorities to the categories of people eligible for the special protections of the Lautenberg Amendment. ECF 87 ("MSJ Order") at 3. Under the Lautenberg-Specter Program, Iranian refugee applicants travel to Vienna, Austria to complete processing of their refugee applications. *Id.*

Class Certification and Partial Summary Judgment. On April 20, 2018, Plaintiffs moved the Court (1) to certify a class and (2) for partial summary judgment on five of Plaintiffs' six claims. ECF 1, 20, 25; *see also* ECF 60. The Court certified a class pursuant to Rule 23(b)(2) and granted Plaintiffs' motion for partial summary judgment on the First through Fifth Claims for Relief, which challenged the adequacy of the explanation provided in the

notices denying class members' refugee applications. MSJ Order at 10-11, 36-37. The parties stipulated to the withdrawal of Plaintiffs' Fifth Claim for Relief (for violations of the Procedural Due Process Clause of the Fifth Amendment of the U.S. Constitution) given the Court's resolution of Plaintiffs' first four claims. ECF 116.

Jurisdictional Discovery. Defendants first moved to dismiss Plaintiffs' Sixth Claim for Relief for lack of jurisdiction on August 14, 2018. ECF 96. On September 7, 2018, Magistrate Judge DeMarchi ordered jurisdictional discovery regarding the nature of the agency action. ECF 102 at 3-4. The Court instructed Defendants to withdraw their motion to dismiss and refile it after the conclusion of jurisdictional discovery, which Defendants did. ECF 118; 119. Plaintiffs then pursued jurisdictional discovery, which was unnecessarily delayed by Defendants' discovery abuses, including their repeated (and often unfounded) attempts to clawback documents as privileged. *See* ECF 261 (sanctioning Defendants and awarding Plaintiffs $41,546.52 in attorneys' fees for discovery abuses). Although it was unnecessarily onerous, the jurisdictional discovery process was particularly fruitful. Plaintiffs learned about the security vetting program changes that led to the mass denial of class members' applications in February 2018. This discovery shed light on the nature of the final agency actions at issue, which serve as the premise for the Sixth Claim for Relief pursuant to the APA.

Motion for Leave to Amend Granted. On February 25, 2020, Plaintiffs moved for leave to (1) file a first amended complaint, (2) substitute parties and proceed by pseudonym, and (3) amend the class certification order. ECF 290-3. After briefing and oral argument, the Court granted Plaintiffs' motion in part on June 16, 2020. ECF 357; ECF 389 ("Am. Mot. to Amend Order"). The Court granted leave to file a First Amended Complaint as to Plaintiffs' Sixth Claim regarding Defendants' decision to use the new SAO vetting conducted by the FBI Task Force, Defendants' denial of refugee applications based on FBI vetting results, and Defendants' failure to go through notice-and-comment rulemaking for their decision to deny applications based on the FBI vetting results. Am. Mot. to Amend Order at 23. The Court also certified a modified class as to this claim. *Id.*

First Amended Complaint. Plaintiffs filed the First Amended Complaint ("Amended Complaint") on July 2, 2020, ECF 383-3, and Defendants filed their renewed motion to dismiss on July 16, 2020, ECF 397 ("Mot. to Dismiss").

IV. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

A motion under Rule 12(b)(1) challenges the court's subject-matter jurisdiction to hear a case. *Satterwhite v. United States*, No. 20-CV-02116-BLF, 2020 WL 3035806, at *1 (N.D. Cal. June 5, 2020). Whether Plaintiffs have established standing and final agency action are jurisdictional issues. However, as the Supreme Court recently clarified, whether Plaintiffs' claims are reviewable under the APA is *not* a jurisdictional issue, as Defendants appear to contend in their statement of issues. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (distinguishing reviewability from jurisdictional issues); *see also Allen v. Milas*, 896 F.3d 1094, 1102 (9th Cir. 2018) (holding that the doctrine of consular nonreviewability did not strip the court of subject matter jurisdiction).

Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations through either: (1) a "facial" attack, which accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction; or (2) a "factual" attack, which contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A facial attack is resolved under the same standard as a Rule 12(b)(6), while a factual attack is resolved under the "same evidentiary standard that governs in the summary judgment context." *Id.* (citations omitted). To defend a factual attack, the plaintiff "bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Leite*, 749 F.3d at 1121. If the court resolves a Rule 12(b)(1) motion on declarations alone and does not hold an evidentiary hearing, extrinsic evidence may be considered "but all factual disputes should be resolved in favor of the nonmoving party." *Cholakyan v. Mercedes-Benz USA, LLC*, No. CV 10-05944 MMM (JCx), 2012 WL 12861143, at *17 (C.D. Cal. Jan. 12,

2012); *see also Drier v. U.S.*, 106 F.3d 844, 847 (9th Cir. 1996) (resolving all disputes of fact in favor of the non-movant).

Here, Defendants mount a factual attack on jurisdiction with respect to whether the challenged policy changes constitute final agency action. Thus, with respect to only that issue of final agency action, the Court may look beyond the complaint itself to "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 Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990) (holding that "final agency action" is a jurisdictional requirement imposed by the APA). Alternatively, to the extent a jurisdictional issue rests on a factual dispute that is "so intertwined" with the substantive issues, *see* Section IV.C.1, the Court should not resolve the factual issue on a 12(b)(1) motion. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) (finding the district court had erred in dismissing the plaintiff's complaint under Rule 12(b)(1) because "the jurisdictional issue and substantive issues [were] so intertwined that the question of jurisdiction [was] dependent on the resolution of the factual issues going to the merits"); *see also Vera v. BIA*, 738 F. App'x 431 (9th Cir. 2018) (holding that the plaintiff was entitled to "the protections of a summary judgment motion rather than the more limited protections given to a plaintiff responding to a factual attack on jurisdiction" because the "12(b)(1) motion required [plaintiff] to defend a core element of his [case] at the outset.").

B. Federal Rule of Civil Procedure 12(b)(6)

To survive a Rule 12(b)(6) motion, a complaint must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). When adjudicating a Rule 12(b)(6) motion, the Court may not consider extrinsic evidence and "all material facts [must be] accepted as true and construed in a light most favorable to the plaintiff." *Wilson v. Hewlett-Packard Co.*, 668 F. 3d 1136, 1140 (9th Cir. 2012). A court may dismiss a

complaint under Rule 12(b)(6) only if the complaint fails to state a "cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156,1159 (9th Cir. 2016) (citation omitted).

V. ARGUMENT

A. Plaintiffs Have Standing

Defendants' standing arguments are rooted in a fundamental and repeated misunderstanding of Plaintiffs' alleged injury. As both Plaintiffs (and even the Court) have repeatedly noted, Plaintiffs are not challenging the denial of their individual refugee applications. *See, e.g.*, Am. Mot. to Amend Order at 8 ("Here, it is clear that Plaintiffs are not challenging the ultimate decision to deny Plaintiffs' refugee applications but rather Plaintiffs are challenging the changes Defendants made to SAO Merlin vetting beginning in January 2016 that resulted in these denials"). Plaintiffs seek redress for the lost opportunity to have their and their sponsored relatives' refugee applications examined under a lawful *process*, regardless of the *outcome* of the process and notwithstanding the fact that the ultimate decision is discretionary. *See* MSJ Order at 22-25; *see also e.g., Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (rejecting the government's argument that plaintiff lacked standing to challenge her placement on the No Fly List because plaintiff's injury stemmed from the denial of a visa which is discretionary); *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (finding that a lost opportunity to pursue an immigrant visa is a cognizable Article III injury). When examined with a proper understanding of the injury Plaintiffs plead, the Complaint easily surpasses the causation and redressability requirements for standing under *Lujan v. Natl. Wildlife Fed.*, 497 U.S. 871 (1990).

Causation. To establish causation, Plaintiffs need only show a "'line of causation between defendants' action and their alleged harm that is more than 'attenuated.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 757 (1984)). Here, Plaintiffs allege a direct causal link between Defendants' change in vetting policy and Plaintiffs' denials. *See* Am. Compl. ¶¶ 99-100; *Maya*, 658 F.3d at 1070 ("A causation chain does not fail simply because it has several links, provided those links are not hypothetical and remain plausible.") (internal quotation marks and citation omitted). Contrary to Defendants'

assertions, Plaintiffs do not need to show that "if they had been evaluated under the pre-2016 vetting approach they would have been admitted to the United States as refugees," Mot. to Dismiss at 8, because what Plaintiffs seek is an opportunity to be vetted under a lawful process and *not* under the unlawful post-2016 vetting mechanism.[1]

Redressability. Plaintiffs seek relief that will redress Plaintiffs' injury of lost opportunity. Specifically, Plaintiffs seek: (1) declaratory judgment that the change to a dragnet [redacted] vetting scheme and a policy or practice of rejecting of refugees based on "not clear" vetting results under that scheme was unlawful; (2) vacatur of the unlawful program changes and any actions that relied on such changes (i.e., the denial of class members' applications); and (3) any other equitable relief that the Court deems appropriate. *See* Am. Compl. at p.39.

As an initial matter, Plaintiffs are entitled to a presumption of redressability under Ninth Circuit law because they seek "declaratory relief against the type of government action that indisputably caused [plaintiffs'] injury." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010). But even if Plaintiffs were not entitled to a presumption of redressability, and contrary to Defendants' contentions, Mot. to Dismiss at 9-10, the remedies that Plaintiffs seek will require Defendants to re-adjudicate previously denied applications under a lawful vetting process. *See* 5 U.S.C. § 706(2); *Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) ("[W]hen a reviewing court determines that [an agency action is] unlawful, the ordinary result is that the [action is] vacated." (citations omitted)). Finally, the court may also use its equitable powers to grant further injunctive relief as necessary for justice. *See Nw. Envtl. Def. Ctr v. Bonneville Power Adm'r*, 477 F.3d 668, 680-81 (9th Cir. 2007) (rejecting argument that injury

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[1] Although unnecessary, Plaintiffs have also alleged that they likely would have been admitted under the pre-2016 vetting scheme: (1) they passed vetting prior to leaving Iran, Am. Compl.¶ 39; and (2) before the 2016 vetting changes, 99 percent of individuals who had been invited to complete their refugee applications in Vienna were admitted to the United States, *id.* ¶¶ 42, 97 (alleging that "not clear" results increased by 100-fold after January 1, 2016).

was not redressable because a court in equity conducting judicial review under the APA has broad powers to order mandatory affirmative relief necessary to accomplish justice). It is irrelevant that the re-processing of Plaintiffs' applications under a lawful process may not result in admission for some class members; the alleged injury is not the denial of admission, but the denial of the *opportunity* to be admitted (and to reunite with family) under a lawful process.

Redressability Is Not Affected by the Firm Resettlement Bar. Defendants are also wrong in arguing that Plaintiffs' injuries are no longer redressable because Class members are not eligible for refugee admission to the United States under the "firm resettlement bar" now that some Class members may have obtained asylum in Austria during the pendency of this case, *see* Mot. to Dismiss at 9-10. *First*, the firm resettlement bar does not apply to Plaintiffs under Defendants' own policies. *See* MSJ Order at 30-32 (holding DHS accountable to its own regulation and policies under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). Under Defendants' regulations, the firm resettlement bar applies only to those seeking refugee status who were offered or received permanent status or citizenship in the third country that they entered as "a consequence of flight" from persecution. 8 C.F.R. § 207.1(b). Defendants' policy manual makes clear that the phrase "as a consequence of flight" means the firm resettlement bar applies only to those who enter a third country *for the purpose of* fleeing persecution and not for other purposes, such as for business. *See* Decl. of Kathryn C. Meyer in Supp. of Pls.' Opp'n to Defs.' Mot. to Dismiss First. Am. Compl. ("Meyer Decl."), Ex. 1 (USCIS RAIO Directorate Officer Training Module) at 10 (explaining that the bar does not apply to refugees who entered a third country for business purposes and requiring officers to inquire as to the purpose of entry to conduct the analysis). In the unique circumstances of the Lautenberg-Specter program, Plaintiffs did not enter Austria for the purpose of fleeing from Iran to Austria, but instead entered on a transit visa on their way to the United States to be reunified with family. Am. Compl. ¶¶ 35-41. That is, for the business purpose, or a similarly transactional purpose, of completing refugee processing. In fact, Defendants themselves sought to prohibit Plaintiffs from applying for asylum in Austria. *See* Meyer Decl., Ex. 2 (DEF-15846) (script for rejected cases reminding applicants that "beneficiaries of Austrian transit visas may not apply for asylum in any

country of the European Union, including Austria"); *id.,* Ex. 3 (DEF-11138) ("We and HIAS have counseled all of the applicants that the Austrian government expected them to leave with[in] two weeks of receiving their denials and reminded them of commitments not to apply for asylum").

Second, the Court should not apply the firm resettlement bar for equitable reasons. *See Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1132 (N.D. Cal. 2007) (recognizing courts' broad discretionary power to fashion injunctive relief). Plaintiffs only applied for asylum in Austria because Defendants' unlawful vetting policy changes left them stranded in Vienna and with no other option to avoid deportation back to Iran, where they could face harassment, abuse, and even death for attempting to flee to the United States as refugees. Am. Compl. ¶¶ 8, 112, 133, 145, 152, 182. Moreover, despite Plaintiffs' efforts to expedite this case, Defendants committed repeated discovery abuses that unnecessarily prolonged the length of this case. These Defendant-caused delays impeded the progress of this lawsuit and were the primary reason that Plaintiffs needed temporary status while awaiting resolution of their remaining claim. The Court ordered and Plaintiffs agreed to complete jurisdictional discovery in two months (*see* ECF 102 at 4), but Defendants' malfeasance made it last two years. *See, e.g.*, ECF 219 (Decl. of Mariko Hirose in Supp. of Pls.' Mot. to Compel Unredacted Doc. (Sanctions Requested)) ¶¶ 3-54; ECF 261 ("Sanctions Order") (awarding Plaintiffs $41,546.52 in attorneys' fees). It would be a perverse outcome to permit Defendants to dismiss Plaintiffs' case under the theory that the refugee claims are precluded by the firm resettlement bar given Defendants' role in causing this situation.

Finally, even if the firm resettlement bar could apply in these unique circumstances, it would not justify dismissal because Defendants must still apply the firm resettlement bar analysis to each class member. Right now, class members' refugee applications have been denied on the basis of Defendants' change to SAO Merlin vetting policy. Should Plaintiffs prevail, the proper remedy is for the denials to be vacated and for their applications to be re-adjudicated. *See supra* at p.7. In this process, Defendants may re-interview the class members and determine whether the firm resettlement bar applies, which requires a refugee officer to

determine whether the class member (1) entered into Austria as a consequence of flight from persecution and (2) were offered or received (3) permanent status or citizenship in Austria. *See* 8 C.F.R. § 207.1(b). Here, Defendants have not shown that all class members have received asylum—*see* ECF 272 ("Joint Status Report") at n.2 (reporting that Plaintiffs do not know the status of all class members); Am. Compl. ¶ 112—or that *any* class members have received permanent status in Austria. *See Maharaj v. Gonzales*, 450 F.3d 961, 969 (9th Cir. 2006) (holding that the firm resettlement bar requires, "evidence of an offer of permanent, not temporary, residence in a third country where the applicant lived peacefully and without restriction."); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 942 (N.D. Cal. 2019) (requiring a burden-shifting inquiry: "First, the government presents 'evidence of an offer of some type of permanent resettlement,' and second, 'the burden shifts to the applicant to show that the nature of his stay and ties was too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled.'") (citation omitted). Plaintiffs' understanding is that Austrian asylum provides only a "limited resident permit for 3 years." *See* Asylum, subsidiary protection and right to remain, *available at* http://www.asyl-faq.at/content/?lang=en#asylum_sub_prot_right_to_remain (last accessed July 24, 2020). Thus, even if the firm resettlement bar were to apply to any class member (although it should not, as explained above), it would not undermine Plaintiffs' standing in this case.

B. The Challenged Policy Changes Are Reviewable Under The APA

Plaintiffs challenge two interrelated policy changes that effectively added a new ground of inadmissibility for Lautenberg refugees not present in the statutory scheme—namely, whether [redacted]—and are, thus, reviewable under the APA. Plaintiffs' Amended Complaint challenges Defendants' decision to (1) use [redacted] conducted by the FBI Terrorist Tracking Task Force ("FBI Task Force") for SAO Merlin vetting; and (2) adopt the policy and practice of denying or rejecting refugee cases based on a "not clear" result from the FBI's [redacted] Am. Compl. ¶ 177. Defendants argue that both actions are unreviewable because they are "committed

to agency discretion by law," 5 U.S.C. § 701(a)(2), and with respect to the latter decision, because the INA precludes review of individual admission decisions. *Id.* § 701(a)(1). *See* Mot. to Dismiss at 10-18. Defendants' contentions are meritless and fail to overcome the APA's presumption in favor of judicial review.

1. The Challenged Policy Changes Are Not Committed to Agency Discretion By Law

The policy changes that Plaintiffs challenge are reviewable by this Court and are not "committed to agency discretion by law" within the meaning of the "very narrow exception" to the APA's presumption of judicial review in 5 U.S.C. § 701(a)(2). Mot. to Dismiss at 11 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). In arguing that this exception applies, Defendants make two incorrect arguments: one, that the APA categorically bars review of agency actions relating to national security and two, that Defendants' general statutory authority to collect evidence and liaise with law enforcement and intelligence agencies in enforcing the INA somehow exempts their actions from review. The first argument finds no support in Supreme Court or Ninth Circuit precedent. The second entirely misses the relevant analysis, which is not whether Defendants have the authority to engage in the challenged actions as Defendants have briefed the issue, but whether meaningful standards exist by which the Court can judge whether the actions were arbitrary, capricious, or an abuse of discretion. Such standards exist in the statute, regulations, and agency policy governing the administration of the Lautenberg program.

The Challenged Actions Are Not Categorically Exempt From Review. First, contrary to Defendants' principal contention, "matters of national security and foreign affairs," Mot. to Dismiss at 12, are not broadly and categorically exempt from APA review as committed to agency discretion by law. *See ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1068-69 (9th Cir. 2015) (rejecting argument that the APA precludes judicial review of the State Department's implementation of the Exchange Visitor Program because of its implications for foreign relations); *see also, e.g.*, *Gill v. United States Dep't of Justice*, 913 F.3d 1179, 1184-85 (9th Cir.

2019) (finding a policy on inter-governmental sharing of terrorism-related information reviewable). Indeed, many courts in this Circuit have reviewed agency decisions involving vetting procedures in the adjudication of immigration benefits. *See, e.g. Doe*, 288 F. Supp. 3d at 1072 (finding agency decision to temporarily suspend the refugee program to allow for review of vetting protocols, including SAO vetting, was reviewable under the APA); *Wagafe*, 2017 WL 2671254, at *10 (denying motion to dismiss claim that the CARRP vetting process which has delayed and denied thousands of immigration applications is arbitrary and capricious under the APA); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1078-80 (N.D. Cal. 2005) (rejecting governments' national security claims and holding that a post-9/11 policy change governing processing of permanent resident applications was arbitrary and capricious).

Moreover, Defendants conveniently ignore that Section 701(a)(2)'s very narrow exception has been limited to a few categories of cases, such as challenges to a decision not to institute enforcement proceedings, the allocation of funds from a lump-sum appropriation, and the decision by an intelligence agency to terminate an employee in the interest of national security. *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). Given that Plaintiffs challenge policy changes with respect to Defendants' administration of a refugee program, which is not one of the areas traditionally committed to agency discretion, and that courts in this Circuit have previously reviewed vetting policies, Defendants lack any persuasive argument to explain why this Court should forego judicial review here.

The Court Has Meaningful Standards to Review the Challenged Actions. In light of the fact that this case does not present one of the traditional cases that courts deem to be "committed to agency discretion by law," the relevant question for this Court is whether the case is reviewable because there exists a "meaningful standard against which to judge the agency's exercise of discretion," or whether this is the "rare instance[] where statutes are drawn in such broad terms that . . . there is no law to apply." *Overton Park*, 401 U.S. at 410 (quoting legislative history); *see Perez Perez v. Wolf*, 943 F.3d 853, 864 (9th Cir. 2019). A "meaningful standard" can exist in relevant statutory text and purpose, regulations, established agency

practices, and judicial decisions. *See Webster v. Doe*, 486 U.S. 592, 600, 609 (1988) (requiring courts to review statutory text, structure, and purpose); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (same as to regulations or agency practice).

Here, the comprehensive framework governing the Lautenberg-Specter Program created by the Refugee Act, its implementing regulations, and agency policy—which Defendants do not acknowledge at all—provide meaningful standards for the Court to review the challenged actions. First, although 8 U.S.C. § 1157(c)(1) states that the Secretary has the discretion to decide whether to admit an individual refugee – discretion that Plaintiffs have not challenged, the statute requires DHS to make determinations pursuant to regulations it has promulgated and specifies that refugees who are categorically ineligible for admission are those who are (1) firmly resettled, (2) not of special humanitarian concern, and (3) inadmissible as defined by the INA. *See* Mot. to Dismiss at 15 (listing statutory factors that "inform the application determination," which provide meaningful standards for evaluating discretion). As for the last category, the INA spells out specific security-related ineligibility grounds, none of which include being [redacted] by the broad dragnet of [redacted] *See* 8 U.S.C. § 1182(a)(3); Tr. May 21, 2020 Hr'g at 7:8-13, 8:17, 9:19; *cf. Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986) (Secretary of State did not have unfettered discretion to exclude people given explicit inadmissibility criteria in INA), *aff'd*, 484 U.S. 1 (1987).

Second, Congress intended the Lautenberg Amendment to curtail the agencies' discretion to "isolated" and "extremely limited" cases and in fact lowered the evidentiary burden for eligibility for refugee admissions. *See* Am. Compl. ¶¶ 28, 29. Given this statutory framework, this is not a case where "the general purpose of the statute would be endangered by judicial review," *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 719 (9th Cir. 2011): the Refugee Act's stated purpose is to provide a systematic procedure for refugee admissions embodying the American commitment to refugee admissions as a matter of humanitarian concern, Pub. L. No. 96-212 § 101, 94 Stat. 102., and review of Plaintiffs' APA claims would compromise neither that purpose nor the agency's ultimate discretion to decide whether to admit a particular refugee.

Lastly, in addition to the meaningful standards provided by the governing statute, the Court may consider the agencies' own guidance to evaluate the decisions challenged here. DHS has promulgated regulations implementing the Refugee Act that further detail eligibility criteria and outline other facets of refugee processing. *See* 8 C.F.R. § 207.1-9. In *Doe v. Trump*, a case challenging a categorical ban on refugee admissions from certain countries that the plaintiffs alleged unlawfully altered Congress's inadmissibility standards, the court held that § 701(a)(2) did not bar review. *See* 288 F. Supp. 3d at 1071. Acknowledging that 8 U.S.C. § 1157(c)(1) contains discretionary language, the court concluded that review was permissible because the agency's regulations provided meaningful standards against which it could review the agencies' exercise of discretion. *Id.* Defendants have also issued policy guidance, including on security checks and on the exercise of discretion, that add further detail to these standards. *See* Am. Compl. ¶ 54. And finally, Plaintiffs are challenging a *change* in existing agency practice, which provides additional context against which to evaluate Defendants' actions. *Spencer Enters.*, 345 F.3d at 688 (agency practice can provide "meaningful standard" for court's review); *see also Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 150 (E.D.N.Y. 2017), *aff'd in part and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (holding a change in policy reviewable under the APA); *cf. F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agencies must provide reasoned explanation for changes in policy that engendered serious reliance interests). Thus, far from there being no law to apply, the "comprehensive scheme" set out by statute, regulation, and agency policy make Defendants' decision amenable to review. *ASSE*, 803 F.3d at 1070.

Rather than engage with the relevant legal standards for § 701(a)(2) or acknowledge the statutory framework governing Plaintiffs' claims, Defendants argue that review is precluded because DHS has been granted the general *authority* to consult with law enforcement and intelligence agencies and collect information to enforce the provisions of the INA. Mot. to Dismiss at 12-14 (citing 8 U.S.C. §§ 1103(a)(4), 1105(a), 1225(d)(3), 1357(b)). But Defendants' argument misses the mark in two ways. First, Defendants' analysis conflates relevant law; whether Defendants' cited statutory provisions preclude review because they provide Defendants

with discretion is not part of the analysis under section 701(a)(2) but pertains to a different exception to review under section 701(a)(1), as discussed below. *See* Mot. to Dismiss at 14 (citing *Bourdon v. U.S. Dep't of Homeland Sec.*, 940 F.3d 537, 542 (11th Cir. 2019) (finding the relevant statute precluded judicial review under § 701(a)(1) where it specified that the agency's discretion was "unreviewable."). Second, Plaintiffs do not contest Defendants' authority to consult with other agencies and collect and consider evidence, but *authority* to consider vetting information is not synonymous with unreviewable *discretion* in Defendants' administration of the refugee program. *See* Mot. to Dismiss at 12; *see also Spencer Enters.*, 345 F.3d at 690 ("Authority may be defined as the right to exercise powers; to implement laws . . . to command; to judge[,]" while "[d]iscretion means the power to act 'according to [one's] own understanding and conscience.'") (internal quotations omitted). Even if Defendants' cited statutes granted them discretion—and they do not—that has no bearing on whether the § 701(a)(2) exception applies because "the mere fact that a statute contains discretionary language does not make agency action unreviewable." *Pinnacle Armor,* 648 F.3d at 719 (citations omitted); *see also ASSE*, 803 F.3d at 1071 ("Section 701(a)(2) . . . has never been thought to put all exercises of discretion beyond judicial review."); *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (rejecting application of § 701(a)(2) exception even where statute left discretion to the agency). Indeed, as described above, courts have recognized that DHS's authority to conduct vetting for immigration purposes does not insulate its actions with respect to the processing and vetting of applications from review. *See, e.g.*, *Doe*, 288 F. Supp. 3d at 1070; *Wagafe*, 2017 WL 2671254, at *10. And the legal framework governing the Lautenberg-Specter Program, which Defendants completely ignore, provides the context needed to evaluate any exercise of discretion.

The out-of-Circuit cases that Defendants cite are inapposite. *See* Mot. to Dismiss at 14. Those cases involved challenges to the substantive reasonableness of agency decisions made pursuant to specific regulatory factors, and the courts declined to review the plaintiffs' claims because review would involve second-guessing the agencies' assessment of the military value of a base, *see Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990), or the military value of eight vessels transferred from the United States to the Marshall

Islands, *see Dist. No. 1, Pac. Coast Dist., Marine Engineers' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 41 (D.C. Cir. 2000). Here, Plaintiffs are not challenging decisions made pursuant to statutory or regulatory factors (and therefore are not calling for the Court to second-guess determinations made by Defendants). Instead, the decisions Plaintiffs challenge sought to alter the statutory and regulatory scheme applied to Plaintiffs, and review of such action under the APA's requirements for reasoned decisionmaking is wholly appropriate.

2. The INA Does Not Preclude Review of the Challenged Policy Decisions

As this Court has already recognized, Plaintiffs do not challenge Defendants' discretion to adjudicate individual refugee applications. Yet, Defendants argue that the decisions Plaintiffs do challenge are additionally unreviewable because of 5 U.S.C. §701(a)(1), which withdraws APA review "to the extent that . . . statutes preclude judicial review." *See* Mot. to Dismiss at 15. But Defendants' argument that 8 U.S.C. §§ 1252(a)(2)(B)(ii) and 1157(c)(1) preclude APA review because they commit refugee admission decisions to the discretion of DHS, *see* Mot. to Dismiss at 15-16, is the same argument that this Court has rejected at least twice previously. *See, e.g.*, Am. Mot. to Amend Order at 7-8; MSJ Order at 22-25. Section 1252(a)(2)(B) ("Denials of discretionary relief") precludes judicial review of decisions and actions that the INA specifies to be in the discretion of the DHS Secretary. Thus, although section 1252(a)(2)(B)(ii) precludes review of individual refugee admission decisions, which are specified to be in the Secretary's discretion by section 1157(c)(1)—analogous to the well-established doctrine of consular nonreviewability—it does not bar review over policy decisions governing refugee processing. *See Washington v. Trump*, 847 F.3d 1151, 1162-63 (9th Cir. 2017) (rejecting argument that immigration policy, including refugee policy, is non-reviewable); *Doe*, 288 F. Supp. 3d at 1071-72 (rejecting argument that § 1252(a)(2)(B)(ii) bars review of refugee policies). "Plaintiffs challenge Defendants' policy changes and not the ultimate decisions on their refugee applications." Am. Mot. to Amend Order at 8. Therefore, for the same reason that consular nonreviewability does not apply, § 1252(a)(2)(B)(ii) does not preclude review of Plaintiffs'

claims. Defendants have no excuse for continuing to press this argument without so much as recognizing the governing law of the case.[2]

C. Plaintiffs Have Stated APA Claims

Plaintiffs allege two types of APA claims: (1) a claim that Defendants' decision to allow the FBI Task Force to use [redacted] in SAO vetting, and their policy and practice of rejecting a refugee application on the basis of a not clear result under the FBI Task Force's vetting scheme, were arbitrary and capricious; and (2) a claim that those actions were subject to notice and comment rulemaking. *See* Am. Compl. ¶ 177. Defendant DHS mounts a 12(b)(1) jurisdictional argument that Plaintiffs' allegations do not constitute final agency action on the former and a 12(b)(6) argument that Plaintiffs' failed to state a claim because notice and comment rulemaking is not required on the latter. But Defendants blur the lines and fail to adhere to the standards for these types of motions, citing documents outside the four corners of the Amended Complaint for both arguments. Aside from the fact that the new Ruppel Declaration (ECF 397-1) raises issues about Ms. Ruppel's credibility, DHS's decision to cite documents outside of the Amended Complaint in support of its 12(b)(6) argument converts it into a motion for summary judgment and, as outlined below, the conflicts in Defendants' own testimony raise an issue of fact. Regardless, both the 12(b)(1) and 12(b)(6) arguments are based on the false premise that DHS has discretion to grant refugee status over an FBI "not clear" result.

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[2] Similarly, the statutory provisions that Defendants cite for their general authority to collect and consider information in their enforcement of the INA do not foreclose APA review. First, neither INA provision expressly precludes review of any action, let alone the actions challenged here. *See* 8 U.S.C. §§ 1225(d)(3), 1357(b). Second, they do not specify any decision or action to be in the discretion of the agencies such that review would be barred by section 1252(a)(2)(B)(ii).

1. The Challenged Policy Changes Are Final Agency Actions Subject to Arbitrary-or-Capricious Review

Plaintiffs challenge two vetting policy decisions that each constitute reviewable final agency actions. Am. Compl. ¶ 177. With respect to Defendant State Department, Defendants do not contest that these decisions, including the policy of administratively closing cases pre-interview based on SAO "not clear" results, *id.* ¶ 100, constitute final agency actions. All of their arguments relate to USCIS and therefore, DHS. Mot. to Dismiss at 18-20. Thus, the Amended Complaint should move forward as to the Sixth Claim against the Department of State.

Both of Defendants' 12(b)(1) arguments rest on their misleading assertion that, contrary to the Complaint's allegations (*see, e.g.*, Am. Compl. ¶ 100), USCIS policy allows officers to exercise discretion to approve or deny refugee applications under the new vetting scheme despite a SAO "not clear" result from the FBI's [redacted] *See* Mot. to Dismiss at 19-20 (e.g., alleging that "the viability" of Plaintiffs' APA claim "turns on whether a 'not clear' vetting result essentially constitutes a denial."). But the Ruppel Declaration confirms that, at the time of the initial denials that led to the filing of this lawsuit, DHS' policy was to deny admission to refugee applicants on the basis of the FBI's "not clear" response. Ruppel Decl. ¶ 9.[3] In fact, nothing in the Ruppel Declaration contradicts the allegations that USCIS *still*

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[3] Ms. Ruppel also states that in addition to the "not clear" response, the FBI sent DHS a "description of the derogatory information that led to the NCL response," seemingly suggesting that DHS retained discretion to make a meaningful independent decision about the merits of the derogatory information. Ruppel Decl. ¶ 9. In her deposition, however, Ms. Ruppel explained that this "description" was in fact limited to the explanation that Defendants used [redacted]—i.e. that the "[redacted]" Meyer Decl., Ex. 4 ("Ruppel Dep.") at 133:11-19; 136:7-18-; *see also id.*, Ex. 5 (DEF-5921.0002, 0001) ("[redacted]

will not admit any refugee over a "not clear" result from FBI Task Force's [redacted] vetting. Although Ms. Ruppel declares that this Court's order prompted the FBI to provide DHS with more specific derogatory information regarding each of the SAO-denied class members and Defendants note that "eight (8) cases among the class for whom Defendants received 'not clear' vetting results" initially were ultimately admitted, *see* Mot. to Dismiss at 20; Ruppel Decl. ¶¶ 10-14, nowhere in her Declaration does Ms. Ruppel state that USCIS actually *has* approved a case to resettle in the United States where the FBI's SAO [redacted] vetting result remained "not clear." The Ruppel Declaration thus fully supports Plaintiffs' allegations that DHS adopted the very policy Plaintiffs' challenge—denying refugee applications based on a SAO "not clear" response received from the FBI Task Force's dragnet vetting scheme.

Defendants also deceptively point to the reversal of two named Plaintiffs' application denials (Does 3 and 4) to argue that the FBI's SAO "not clear" results did not "predetermine[]" USCIS's admission decisions. *See* Mot. to Dismiss at 19-20 (citing Ruppel Decl. at ¶¶ 7, 12-14). [redacted], and thus their subsequent admission is irrelevant to the question of USCIS's discretion in SAO "not clear" cases. *See* Meyer Decl., Ex. 6 (DEF-1916); *see also* ECF 386 (Pls.' Admin. Mot. for Clarification Regarding the Court's June 16, 2020 Order (ECF 357)) (Plaintiffs' unopposed request to clarify that Does 1-4 are not class representatives for the sixth claim "because they are not class members under the modified definition of amended Claim Six"—i.e. those who "received denials under SAO security vetting conducted by the FBI after the change in SAO vetting . . . .").

To the extent that the newly produced Ruppel Declaration could be read to support Defendants' broad assertions that USCIS has and always had discretion to admit refugees whose SAO results are "not clear," it contradicts DHS's prior testimony and submissions and should not be permitted. *Hamilton v. Willams*, No. CV F 02-6583 AWI SMS, 2005 WL 8176419, at *9

[redacted]

(E.D. Cal. Dec. 21, 2005) (granting motion to strike declaration that contradicted deposition testimony) (citing *Messick v. Horizon Indus. Inc.*, 62 F.3d 1227, 1231 (9th Cir.1995). In a previously filed declaration, USCIS stated that "USCIS will not approve a refugee application unless USCIS receives a clear result from . . . the Security Advisory Opinion [SAO]." ECF 95-1 (Decl. of Mary Margaret Stone, "Stone Declaration") at ¶ 10. Ms. Ruppel, testifying as DHS's 30(b)(6) witness, also previously confirmed that the Stone Declaration was "an accurate representation of USCIS policy." Meyer Decl., Ex. 4 ("Ruppel Dep.") at 114:13-15. Defendant DHS's own Security Check Lesson Plan instructs refugee officers that "all case members requiring an SAO 'Merlin' must have unexpired ***cleared*** SAO results in order for a case to be approved." Meyer Decl., Ex. 7 (DEF-21466) (emphasis added); Meyer Decl., Ex. 8 (DEF-21460). While Defendant Department of State does not challenge the APA claims against it, its policies comport with DHS's. Specifically, the DOS instructions to resettlement support centers are that they "should close cases with an SAO NCL" (i.e. "not clear") that are pre-USCIS interview and that "USCIS *will* send" denial letters for "cases with SAO NCL" that are post-USCIS interview. Meyer Decl., Ex. 9 (DEF-14511) (emphasis added). Similarly, DOS requires that an applicant whose SAO clearance expires before departure to obtain a new SAO "generated and ***cleared*** before an applicant can arrive in the U.S." *Id.*; Ex. 10 (DEF-16914) § 4.8.3 at DEF-16951 (emphasis added).

Defendants argue that USCIS can engage with the FBI Task Force about derogatory information to attempt to persuade it to change the vetting result to "clear", *see, e.g.*, Mot. to Dismiss at 19-20. But the fact that USCIS can attempt to change the FBI's opinion does not change the evidence that USCIS denies admission if the FBI's vetting result remains "not clear." In fact, Ms. Ruppel, again testifying as DHS's 30(b)(6) repeatedly confirmed that USCIS will not, and has not, approved a single case *despite* a SAO "not clear." *See* Meyer Decl., Ex. 4 ("Ruppel Dep.") at 116:5-6 (stating that USCIS has "not approved [applications] over an object or a not clear"); *id.* at 242:6-9 ("Q. But as we discussed before, if the SAO remains not clear, USCIS will not approve the case? A. Right . . . ."); *id.* at 71:1-5 ("Q. And you're not aware of

any cases where DHS had decided to approve the case where there was still a not clear? A. Never. And nobody that I've talked to can recall a case where we've done that.").

In the context of the 12(b)(1) argument, these factual disputes create a question for the Court because the Court may (1) consider the extrinsic evidence and resolve all factual disputes in Plaintiffs' favor, (2) hold an evidentiary hearing to resolve the factual disputes, or (3) determine that the factual disputes are so intertwined with the merits of the case that the Court should defer a determination on the jurisdictional issue until summary judgment. *See Cholakyan*, 2012 WL 12861143, at *17 (noting that a court may consider extrinsic evidence and resolve disputes of fact in favor of the non-movant or hold an evidentiary hearing); *see also Drier v. U.S.*, 106 F.3d 844, 847 (9th Cir. 1996) (resolving all disputes of fact in favor of the non-movant); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) (finding the district court had erred in dismissing the plaintiff's complaint under Rule 12(b)(1) because "the jurisdictional issue and substantive issues [were] so intertwined that the question of jurisdiction [was] dependent on the resolution of the factual issues going to the merits"). Here, to the extent that the Court believes that factual disputes exist at all, Plaintiffs believe that the Court should either resolve the factual disputes in Plaintiffs' favor or defer the issue to summary judgment because the question of whether USCIS has discretion to approve over an SAO not clear is so intertwined with the merits of Plaintiffs' case that it is more appropriately considered when the Court has a full factual record before it.

Critically, Defendants do not contest that if Plaintiffs' allegations are accurate, they would satisfy both prongs of the final agency action test articulated in *Bennett*. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). Thus, if DHS's factual attack on jurisdiction fails – and it should for all of the reasons explained above – DHS concedes that the Court has jurisdiction. The parties have already litigated this issue and the Court held that it would not be futile to amend Plaintiffs' final agency actions as alleged in the amended complaint, *see* Am. Mot. to Amend Order at 11. Indeed, courts in this Circuit have repeatedly found vetting policies akin to those at issue here constitute final agency action. *See Gill*, 913 F.3d at 1185 (standard for sharing terrorism-related information was final agency action); *Wagafe v. Trump*, No. C17-0094-

RAJ, 2017 WL 2671254, at *10 (finding secret government immigration vetting program, CARRP, was final agency action because it was an "active program" that was the "culmination of USCIS' decision making process" and resulted in "distinct legal consequences" when qualified applicants were "allegedly indefinitely delayed or denied" due to the vetting scheme). Defendants do not raise any new arguments that would prevent Plaintiffs from moving forward to obtain judicial review of the challenged final agency actions.

2. The Challenged Policy Changes Are Substantive Rules That Required Notice-and-Comment Rulemaking

To state a claim that a policy change required notice-and-comment rulemaking, Plaintiffs must allege that the agency action was a substantive rule and not a general statement of policy, with the critical difference being "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." *Mada-Luna*, 813 F.2d at 1013 (internal citations omitted). Here, Plaintiffs allege that the refugee vetting policy change left the agencies with no discretion to admit refugees who had SAO not clear results—in effect, creating a new substantive ground of ineligibility for refugees. Am. Compl. ¶ 100. As Defendants acknowledge, Mot. to Dismiss at 21, an agency policy change is a "binding rule of substantive law" that requires rulemaking under the APA when it "narrowly limits administrative discretion or establishes a binding norm that so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion." *Mada-Luna*, 813 F.2d at 1014; *see also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1125 (9th Cir. 2009) (citation omitted) (recognizing that the agency's freedom to exercise its discretion is the critical inquiry).

The cases that Defendants rely on are inapposite because, unlike here where Plaintiffs have alleged that the policy changes cabined discretion, Am. Compl. ¶ 100, Defendants' cases involved policy changes that permitted agency discretion, *see* Mot. to Dismiss at 22-23 (citing *Mada-Luna*, 813 F.2d at 1016; *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 512-14 (9th

Cir. 2018)). Defendants' bid to dismiss this claim is fatally flawed because, despite making a 12(b)(6) argument, Defendants rely on evidence outside the four corners of the complaint. *See Wilson v. Hewlett-Packard Co.*, 668 F. 3d 1136, 1140 (9th Cir. 2012) (When adjudicating a Rule 12(b)(6) motion, the Court may not consider extrinsic evidence and "all material facts [must be] accepted as true and construed in a light most favorable to the plaintiff."); *see also* Mot. to Dismiss at 21-23. Thus, their challenge is not based on any legal argument, but solely on the same factual disagreement that underlies their challenge to final agency action. On this basis alone, the court should reject it. *See generally*, *Chief Prob. Officers of Cal. v. Shalala*, 118 F.3d 1327, 1332 (9th Cir. 1997) (describing the question as a merits question); *Doe*, 288 F. Supp. 3d at 1073 (same); *see also Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 979 (E.D. Cal. 2012) (holding that a factual challenge as to whether a rule is a substantive rule requiring rulemaking cannot be resolved on a motion to dismiss and must await the production of the administrative record).

Plaintiffs' allegations are thus sufficient to state a claim. *See e.g.*, *Doe*, 288 F. Supp. 3d at 1073-77 (finding likelihood of success on claim that agency changes to the refugee program that altered existing regulatory scheme required rulemaking); *Wagafe*, 2017 WL 2671254, at *11 (denying dismissal of claim that the implementation of the CARRP immigration vetting program required notice-and-comment rulemaking because it creates a substantive regime for application processing); *see also J.L. v. Cissna*, 374 F. Supp. 3d 855, 868 (N.D. Cal. 2019) (holding that adoption of an immigration policy manual that prevented plaintiffs from obtaining special immigrant juvenile status was a substantive rule requiring rulemaking). And in any event, if the Court were to review extrinsic evidence, Plaintiffs' allegations that the vetting changes constituted substantive rules that required notice and comment rulemaking are fully supported by evidence uncovered in discovery.

VI. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss in its entirety.

Dated: August 13, 2020

Respectfully submitted,

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ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the signatories hereto.

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