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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' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Hearing Date: October 1, 2020
Time: 9:00 a.m.
Place: Courtroom 3 (5th Floor)
Judge: Hon. Beth Labson Freeman

Oral Argument Requested

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MEMORANDUM OF REPLY IN SUPPORT OF DISMISSAL OF FIRST AMENDED COMPLAINT

Defendants file this Memorandum of Reply 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"). 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, *as amended by* Department of State, Foreign Operations, and Related Programs Appropriations Act, Pub. L. No. 116-94, Div. G, § 7034(*l*)(2) (2020).

Pursuant to its discretionary authority, and in assessing various applicable inadmissibility grounds in the INA, 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 (Dkt. 384) 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"). Defendants have moved to dismiss the FAC. Mot. to Dismiss (Dkt. 397).

Plaintiffs' opposition brief fails to overcome the deficiencies in their FAC. *See* Pls.' Opp. (Dkt. 408). For the reasons stated in Defendants' motion, the Court should dismiss the FAC. First, Plaintiffs fail to demonstrate 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.

A. Plaintiffs lack standing to pursue this case.

The Court should dismiss the FAC because no Plaintiff has standing to challenge either the decision to transfer SAO vetting to FTTTF, or how USCIS weighs FTTTF vetting results. Courts are not "continuing monitors of the wisdom and soundness of Executive action." *Allen v. Wright*, 468 U.S. 737, 760 (1984). Instead, a court must dismiss a complaint if it determines at any time that it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3); Mot. to Dismiss 6-10.

To have standing, "[t]he 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). Plaintiffs bear the burden of establishing all three of these elements, *id.* at 1547, which "must be clearly apparent on the face of the complaint," *Baker v. United States*, 722 F.2d 517, 518 (9th

Cir. 1983).

First, contrary to their argument that they show more than an "attenuated" "line of causation," Pls.' Opp. 6-7, Plaintiffs fail to establish traceability. "The line of causation between the defendant's action and the plaintiff's harm must be more than attenuated." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013). The FAC fails to plead sufficient facts to show that Plaintiffs' refugee application denials are "fairly traceable" to the change in vetting procedure. Plaintiffs have produced insufficient allegations that FTTTF, and the new standards it allegedly pronounced and imposed, played any role in Plaintiffs' negative refugee determinations. Plaintiffs counter that they had passed vetting prior to leaving Iran, and that the number of "not clear" results increased through Defendants' conduct. Pls.' Opp. 7 & n.1. But the former allegation does not say or mean that Plaintiffs would have received the relief they seek—a refugee determination divorced from FTTTF involvement. *See id.* at 7. And, the latter allegation establishes coincidence, but it does not establish causality. The alleged harms here are therefore not "more than attenuated." *Wash. Envtl. Council*, 732 F.3d at 1141. The FAC accordingly fails to demonstrate causation between the alleged injuries and the switch from the pre-2016 vetting approach to the post-2016 vetting approach, and Plaintiffs' arguments to the contrary are unavailing.

Second, Plaintiffs fail to establish redressability. "The third element of Article III standing, redressability, requires that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Novak v. United States*, 795 F.3d 1012, 1019 (9th Cir. 2015) (cleaned up). Plaintiffs contend that they "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.'" Pls.' Opp. 7 (quoting *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010)). As *Mayfield* makes clear, however, any such presumption fails nonetheless when the requested declaratory relief would not redress the plaintiffs' alleged injuries. 599 F.3d at 971 ("To establish standing, [Plaintiffs] must show a 'substantial likelihood' that the relief sought would redress the injury.") (quoting *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983). Plaintiffs "need to show that there would be a change

in a legal status as a consequence of a favorable decision and that a practical consequence of that change would amount to a *significant increase* in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Novak*, 795 F.3d at 1019-20 (cleaned up; emphasis added). Plaintiffs fail to meet that threshold here, not least because of the firm resettlement bar.

As Plaintiffs do not dispute, the firm resettlement bar precludes applicants from obtaining refugee status in the United States if they are "firmly resettled in a foreign country." 8 U.S.C. § 1157(c)(1); *see* Pls.' Opp. 8-9. 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). Taking as true the facts alleged in the FAC, all named Plaintiffs' sponsored family members received asylum in Austria. *Id*. ¶¶ 133, 145, 152. Accordingly, based on the FAC, Plaintiffs are statutorily ineligible for refugee status in the United States.

Plaintiffs' arguments to the contrary are not persuasive. They first argue that the resettlement bar does not apply because they "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," which they contend constitutes a "business purpose, or a similarly transactional purpose, of completing refugee processing." Pls.' Opp. 8. This construction of the regulatory language reaches much too far. The regulation does not inquire into refugees' original intent about where to ultimately obtain asylum, but instead only their purpose for leaving their home country. *See* 8 C.F.R. § 207.1(b). Under every reasonable application of 8 C.F.R. § 207.1(b), Plaintiffs "traveled to and entered [Austria] as a consequence of his or her flight from persecution" in Iran. They are thus "firmly resettled" in Austria.

Next, Plaintiffs' request for the Court's equitable relief is unavailing because the Court lacks jurisdiction to grant the relief Plaintiffs request. Plaintiffs cite "courts' broad discretionary power to fashion injunctive relief," and contend that "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." Pls.' Opp. 9 (citing *Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1132 (N.D. Cal. 2007)). But, as this Court expressly noted in *Brennan*, the Court's equitable powers are curtailed by statute. *Brennan*, 571 F. Supp. 2d at 1132 ("*Unless restricted by statute*, once a district court's equitable powers are properly invoked, it has broad discretionary power in fashioning injunctive relief.") (emphasis added) (internal quotation marks and citations omitted). Courts' "equitable power is displaced only by a 'clear and valid legislative command.'" *Id*. (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Here, there is an undisputedly "clear and valid legislative command" that individuals are not eligible for refugee status in the United States if they are "firmly resettled in a foreign country." 8 U.S.C. § 1157(c)(1); 8 C.F.R. § 207.1(b). Even if the Court could issue equitable relief, such an exercise would not be justified here because Plaintiffs have received asylum in Austria and the FAC makes no allegation that they are in any danger there. *See* 8 C.F.R. § 207.1(b) (putting the burden on the applicant to show that the conditions in the new country of residence are "so restrictive as to deny resettlement").

Finally, Plaintiffs' attempt to shift their pleading burden likewise fails. Plaintiffs argue that "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." Pls.' Opp. 9. In addition to calling into question the appropriateness of class certification, this argument fails to address the issue raised in Defendants' motion: that taking the facts alleged in the FAC as true, none of the *named* Plaintiffs who have been put forward as class representatives is eligible for refugee protection in the United States because they all have received asylum. *See* Defs.' Mot. at 7-9; *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) ("In a class action, this standing inquiry focuses on the class representatives."). 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)). Plaintiffs assert that the firm resettlement bar can be sorted out when the applicants are

re-interviewed, but this argument merely lays bare the futility of Plaintiffs' requested remedy. Pls.' Opp. 9-10. Contrary to Plaintiff's argument that they are not seeking admission, but instead only re-adjudication under the previous vetting process. *id*. at 8, the allegations in the FAC establish that the class representatives are categorically barred regardless of the vetting process, rendering their claims mere requests for an advisory opinion, without seeking "a remedy for a personal and tangible harm," *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Further, Plaintiffs' bare assertion regarding "Plaintiffs' understanding" of Austrian asylum policy, with a citation to a website provided without any context, does nothing to overcome the facts they have pleaded in the complaint. Pls.' Opp. 10. It is Plaintiffs who bear the burden of establishing standing, and they have failed that burden here. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Plaintiffs lack standing. The Court should dismiss the FAC.

B. The Purported Agency Actions at Issue Are Unreviewable Under the APA Because They Are Committed to Defendants′ Discretion

Judicial review is not available over either the decision to transfer SAO vetting or the weight that USCIS accords FTTTF vetting results, because those decisions are committed to agency discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); 5 U.S.C. § 701(a)(2); Mot. to Dismiss 12-18. In short, and contrary to Plaintiffs' assertions, Pls.' Opp. 11-16, the Court has no standards by which to judge Defendants' exercise of discretion, and so must dismiss this claim under the APA.

The Department of Homeland Security's decision to use intelligence-vetting partners such as FTTTF "is committed to agency discretion by law"—in a manner that leaves the Court with no way to assess the use of that discretion—and thus judicially unreviewable under the APA. 5 U.S.C. § 701(a)(2). As the Court has acknowledged, the INA, "[b]y its plain text," "commits refugee admission to agency discretion—authority that now rests with the Secretary of the Department of Homeland Security." Order of July 10, 2018 at 2-3 (Dkt. 87) (citing 8 U.S.C. § 1157(c)(1); 6 U.S.C. § 557). "Accordingly, no foreign individual is entitled to resettlement in the United States under this statute." *Id.* at 3.

That is because the INA simply states that the Secretary of Homeland Security "may, in the [Secretary's] discretion and pursuant to such regulations of the [Secretary] may prescribe, admit any refugee [who meets the specified statutory criteria]," 8 U.S.C. § 1157(c), and thus vests USCIS with broad discretion. As the Supreme Court has found it "important to note" under the substantively identical asylum statute, the Executive "is not required to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that the alien may be granted asylum in the discretion of the Attorney General." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) (cleaned up); *see also INS 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); *see* Mot. to Dismiss 16. As a result, the statute provides "no meaningful standard against which to judge the agency's exercise of discretion," *Webster v. Doe*, 486 U.S. 592, 600 (1988) (citation omitted).

That discretion is further borne out in the myriad INA provisions which contemplate and permit the Secretary to engage with agency partners to vet refugee applicants. Defendants have broad "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)." Mot. to Dismiss 14. Plaintiffs argue that these statutes are irrelevant because they supposedly concern only the Secretary's *authority*, not his discretion. Pls.' Opp. 14-15. Not so. Although the statutes do validate the Secretary's decisions to work with intelligence partners for refugee vetting, they *also* demonstrate that there are no discernable standards that would permit judicial review over those decisions under 5 U.S.C. § 701(a)(2). Again, the core source of Defendants' discretion over all alleged agency action challenged by the FAC is 8 U.S.C. § 1157(c)(1).

And neither the INA nor the Lautenberg Amendment provides any standard by which to judge the lawfulness of including (or excluding) a given consideration in Defendants' refugee

determinations. To the contrary, the INA simply instructs that, for aliens who meet the eligibility requirement, the Secretary "may," and in his "discretion," admit such aliens as refugees. 8 U.S.C. § 1157(c)(1). The statute says nothing more on the Secretary's discretion. The Lautenberg Amendment does not change, modify, or limit that discretion. It only (1) affects the eligibility criteria, which was never in the Secretary's discretion and which is not at issue in this case (i.e., by lowering the evidentiary threshold for certain groups' refugee claims), Pub. L. No. 101-167, § 599D(a), (b), and (2) imposes a requirement that, however the Secretary does exercise his discretion, if he chooses to issue a denial, then he must provide written reasons, *id.* § 599D(c). Neither contains any "meaningful standard" to guide the Secretary's determination. *See Webster*, 486 U.S. at 600.

This case is thus different from those where the Ninth Circuit found a meaningful standard to apply, which unlike here, involved statutes with language expressing a *cabined* exercise of discretion: language such as "consistent with sound business principles," "if he considers it feasible," where "reliable" and "currently available," and if "likely to assist in promoting the objectives." *Perez Perez v. Wolf*, 943 F.3d 853, 862-63 (9th Cir. 2019) (itself finding a meaningful standard enabling APA review, but because the agency review was over a "determination" that hinged on, *inter alia*, whether the petitioner had suffered physical or mental abuse, and whether the petitioner possessed information about qualifying criminal activity—i.e., judicially manageable standards that are something more than the sole word "may" at issue here). That is far afield from the INA and the Lautenberg Amendment, which in sum say *only* that for eligible applicants, the Secretary "may" exercise discretion to admit them as refugees—*without* specifying what vetting partners and what vetting products Defendants *may* consult in the process.

Finally, a decision about what factors to consider in granting refugee status necessarily entails a "complicated balancing of a number of factors," underscoring its "general unsuitability for judicial review." *Heckler*, 470 U.S. at 831. That this discretion would rest solely with the political branches makes eminent sense, for deciding whether an eligible overseas refugee should be admitted to the United States necessarily involves a "complicated balancing of a

number of factors," making it "unsuitab[le]" for judicial review under the APA. *Id.* At the margins, each additional consideration by the Secretary and his vetting partners yields additional useful information in exchange for potentially lower discretionary admittance rates and concomitantly higher follow-up costs. Deciding whether the benefits outweigh the costs is fundamentally a policy judgment—one that Defendants have made here by engaging with FTTTF. A determination *not* to review such a decision would be consistent with the deference courts should give to the Executive "in matters of national security and foreign affairs." *Id.* at 12 (citing *Wayte v. United States*, 470 U.S. 598, 611-12 (1985); *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001)). To be clear, Defendants are not arguing, as Plaintiffs claim, that national security and foreign affairs issues are "broadly and categorically exempt from APA review." Pls.' Opp. Br. at 11. To the contrary, Defendants raise the point as a background principle to guide the Court's analysis. The point here regarding discretion in such matters merely shows that this case falls within the § 701(a)(2) exception for "one of those areas traditionally committed to agency discretion." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). Congress entrusted such judgments to the Secretary's discretion, 8 U.S.C. § 1157(c)(1), with any review to be conducted by Congress itself, *id.* § 1157(d) ("Oversight reporting and consultation requirements"). Defendants' policy judgment to work with FTTTF, and to use FTTTF reporting as they see fit, is thus precisely the sort of decision that the APA makes immune from judicial second-guessing. 5 U.S.C. § 701(a)(2); *Heckler*, 470 U.S. at 831. Plaintiffs are correct that not every conferral of discretion is unreviewable, Pls.' Opp. at 15, but the lack of standards here and the context in which these statues arise make *this* conferral of discretion unreviewable under the APA.

Plaintiffs claim there are meaningful standards by which the judiciary can evaluate Defendants' discretion. They claim these standards arise from the Refugee Act (i.e., 8 U.S.C. § 1157(c)), from its legislative history, and from agency regulations. Pls.' Opp. 13. Those arguments lack merit. First, Plaintiffs argue that § 1157(c) does provide at least three standards which facilitate judicial review: aliens are ineligible for refugee status if they are "(1) firmly resettled, (2) not of special humanitarian concern, and (3) inadmissible as defined by the INA."

Pls.' Opp. 13. But Plaintiffs confuse refugee *eligibility* with the Secretary's separate *discretion* to grant refugee status. *See also* Defs.' Mot to Dismiss 15 (listing these eligibility factors separate from the favorable exercise of discretion). To receive refugee status, an applicant must surpass both hurdles. 8 U.S.C. § 1157(c)(1). However, the FAC acknowledges that Plaintiffs' denial notices stated that their applications were being "*denied as a matter of discretion*." FAC ¶ 52 (emphasis in original); *see also id.* ¶¶ 2, 29, 54, 154, 160. The eligibility factors, then, are not determinative of this inquiry. *Cf. Abourezk v. Reagan*, 785 F.2d 1043, 1048-51 (D.C. Cir. 1986) (finding visa denials to be judicially reviewable under 5 U.S.C. § 701(a)(2) where they *were* predicated on certain statutory grounds of inadmissibility), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

Second, Plaintiffs claim that the legislative history of the case shows that the agencies' discretion should be "curtail[ed] . . . to 'isolated' and extremely limited' cases." Pls.' Opp. 13. To begin, the only case Plaintiffs cite for this point did not even consider legislative intent. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719-20 (9th Cir. 2011) (considering only the statutory text). More fundamentally, the only snippet of legislative history Plaintiffs cite concerns the Lautenberg Amendment—not the Refugee Act which created 8 U.S.C. § 1157(c). *See* Pls.' Opp. 13. That distinction is crucial because the discretion at issue in this case comes from two interlocking sources: the discretion to admit eligible refugee applicants, 8 U.S.C. § 1157(c), and the discretion to access and coordinate with other agencies to receive vetting information bearing on the safety of the community or the United States, 8 U.S.C. §§ 1103(a)(4), 1105(a), (b)(1), 1187(c)(2)(F), 1225(d)(3), 1446 note, 1357(b); *see* Mot. to Dismiss 12-13. To the extent this short exchange concerning the Senate Immigration Subcommittee's view is even persuasive as to Congress's intent, it is wholly irrelevant: it arose completely apart from the discretionary provisions which permit Defendants to transfer SAO Merlin vetting from the FBI's NNCP to FTTTF to employ certain vetting capabilities, and which permit Defendants to consider FTTTF vetting results for particular refugee applicants. Finally, the Lautenberg Amendment legislative history, at most, speaks to the *frequency* with which discretion (from a separate statute not amended by the Lautenberg Amendment) should

be favorably exercised—not the *standards* by which the (separate) discretion should be exercised. It is irrelevant.

Third, Plaintiffs argue that the regulations in 8 C.F.R. §§ 207.1-.9 provide judicially manageable standards, as they "further detail *eligibility* criteria and outline other facets of refugee processing." Pls.' Opp. 14 (emphasis added). Yet, Plaintiffs do not actually identify, in those regulations, a *single* standard which the Court can supposedly use to review the alleged agency action here. This exemplifies Plaintiffs' general response to Defendants' "committed to agency discretion" argument: Plaintiffs do not identify *any* standard which this Court should be interpreting.[1] Although Plaintiffs state there is a "'comprehensive scheme' set out by statute, regulation and agency policy [that] make[s] Defendants' decision amenable to review," they fail to ever explain what that scheme, or any of its constituent standards, are. *See id.* For that reason, the Court should dismiss the FAC's APA claims for lack of subject-matter jurisdiction.[2]

III. The Vetting Change Does Not Constitute "Final Agency Actions"

Given that Defendants are free to liaise with FTTTF and to use FTTTF vetting results as they determine is most appropriate, the switch to FTTTF vetting did not effect a "final agency action" as required for APA jurisdiction. Under the APA, a "preliminary, procedural, or intermediate agency action or ruling" is—in the absence of a separate statute—"not directly reviewable"; rather, such action is only "subject to review on the review of the final agency action." 5 U.S.C. § 704; *see also, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct.

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[1] Other than a standard relating to grounds of inadmissibility, which Defendants have already argued goes to eligibility and thus is irrelevant to the exercise of discretion. *See supra* pp 9-10.

[2] As Defendants have previously argued in this case, the APA claims are also not subject to review under 5 U.S.C. § 701(a)(1), as a statute specifically prohibits judicial review of individual refugee decisions, which is what the class is essentially requesting. *See* FAC at 39 (asking the Court to declare unlawful and set aside all Plaintiffs' refugee determinations); 8 U.S.C. § 1252(a)(2)(B)(ii). Defendants acknowledge the Court came to a contrary conclusion in its July 2018 order (Dkt. 87), but respectfully stand on their position. *See, e.g.*, Mot. to Dismiss 14-18.

1807, 1812 (2016) (distinguishing between "preliminary" jurisdictional determinations by the agency and "approved" determinations that "can be administratively appealed and are defined by regulation to 'constitute a Corps final agency action'").

In other words, the vetting program switch and Defendants' treatment of the vetting information fails the first of the "two conditions that generally must be satisfied for agency action to be 'final' under the APA"—"'the action must mark the consummation of the agency's decisionmaking process.'" *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett v. Spear*, 520 U. S. 154, 177-78 (1997)); Mot to Dismiss 18-19. Defendants' current vetting is not the consummation of any of their decisionmaking processes with respect to Plaintiffs or the class: the adjudication of their refugee applications (while not judicially reviewable) is such a consummation. Nor does the current vetting regime meet the second condition for finality: that it give rise to "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178. The current vetting regime has no legal consequences because (as already shown) it does not bind Defendants, Plaintiffs, or anyone else. *See* Order 12 (Dkt. 357) ("[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."). Plaintiffs' own allegations, including that some individual Plaintiffs who initially received "not clear" results did receive approval of their refugee applications, as well as testimony by Joanna Ruppel, confirm this. Mot. to Dismiss 19-20. 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). On a Rule 12(b)(1) motion for lack of jurisdiction, Defendants may cite material outside of the FAC. Defs.' Mot to Dismiss 6 (collecting cases). Thus, Plaintiffs' contention that "Defendants blur the lines and fail to adhere to the standards for these types of motions" with regard to the "final agency action" argument is meritless. *See* Pls.' Opp. 17; *see also id.* at 4 (asserting, without support, that *no* APA issue is jurisdictional—when the Ninth Circuit has held the opposite, *S.F. Herring Ass'n*, 946 F.3d at 571).

Plaintiffs raise three claims in response, none of which are convincing. First, they dismiss the fact that Does 3 and 4 were admitted as refugees because of their specific denial bases. Pls.' Opp. 19-20. But Plaintiffs overstate Defendants' point. Plaintiffs imply inaccuracy

in Defendants' point that—under the Plaintiff-termed "new vetting method," and after its application to Plaintiff-class members—certain class members nonetheless received application approval, a demonstration that Defendants maintained adjudication discretion. *Id.* at 27. But Defendants' point is not inaccurate. The fact is that, under the "new vetting method," some applicants for whom Defendants had various approval concerns under FTTTF vetting—even those who arguably were most severely "affected by" it from Plaintiffs' perspective—nonetheless received application approval; Plaintiffs themselves allege as such in the FAC. FAC at 35 n.20. The takeaway here is that Lautenberg applicants are still being approved, showing FTTTF vetting does not demonstrate a lack of Defendants' discretion in adjudication.

Second, Plaintiffs claim that the Ruppel Declaration should be disregarded because it conflicts with Ms. Ruppel's prior testimony and an affidavit by Mary Margaret Stone. Pls.' Opp. 19-20. Again, Plaintiffs paint with too broad a brush by ignoring the full context of Ms. Ruppel's testimony, which establishes USCIS's maintenance of its discretion to push back on FBI vetting results. *See* Mot. to Dismiss 19 (citing Dkt. 397-2, Ruppel Tr. at 31:16-20; 36:6-11; 114:19-25 to 115:1-12, 20-22).

Third, Plaintiffs argue that Defendant Department of State "does not challenge the APA claims against it." Pls.' Opp. 20. That is clearly contradicted by Defendants' motion, where both Defendants challenge the APA claims, not least on jurisdictional grounds such as a lack of final agency action. *See, e.g.*, Mot. to Dismiss 13 (arguing for both "Defendants USCIS and State" that the Court does not have jurisdiction over Plaintiffs' APA claims), 19 (arguing that "[a]ssuming that Defendants' decision to transfer SAO vetting to FTTTF is an agency action under the APA, it is not 'final'"), 20 (discussing how Defendants received "not clear" vetting results for at least eight cases, which led to approvals by USCIS). Both Defendants are therefore entitled to dismissal of all the APA claims for lack of jurisdiction. Plaintiffs make throwaway assertions suggesting that the Department of State independently reached final agency actions based on FAC-alleged "instructions to resettlement support centers" and a "require[ment] 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." Pls.' Opp. 20 (internal citations and quotation

marks omitted). Notably, Plaintiffs do not point the Court to any place in the FAC where they made such a claim. *See id*. These instead are post-hoc attempts to overcome the deficiency of Plaintiffs' pleadings and should be disregarded.

Plaintiffs do not allege final agency action by Defendants for this Court to review. The Court lacks jurisdiction over Plaintiff's APA claims, and must dismiss the FAC.

IV. The Vetting Change Does Not Require Notice and Comment Rulemaking

FTTTF vetting, and Defendants' use of it, is exempt from notice-and-comment rulemaking as a "general statement[ ] of policy," 5 U.S.C. § 553(b)(A), because it "advise[s] the public prospectively of the manner in which the agency proposes to exercise [its] discretionary power" under 8 U.S.C. § 1157(c). *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citations omitted). The vetting change is also 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). The changes to the vetting process aim, 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). On this basis, the notice-and-comment procedures of the APA do not apply to FTTTF vetting, and the Court should dismiss this part of Claim Six with prejudice for failure to state a claim. *See generally* Mot. to Dismiss 20-23. Plaintiffs claim that Defendants make a Rule 12(b)(1) jurisdiction argument only as to the arbitrary or capricious part of Claim Six, and that Defendants make a Rule 12(b)(6) failure to state a claim argument only as to the notice and comment rulemaking part of Claim Six. Pls.' Opp. 17. That is not correct; Defendants have argued that the entire FAC must be dismissed under Rule 12(b)(1) for lack of jurisdiction. Should the Court deny that part of the motion and conclude it has jurisdiction over the FAC, then Defendants assert the notice and comment rulemaking part of Claim Six must be dismissed under Rule 12(b)(6).

Plaintiffs also protest that the three cases Defendants cited "are inapposite" because they "involved policy changes that permitted agency discretion," "unlike here where Plaintiffs have alleged that the policy changes cabined discretion." Pls.' Opp. 22; *see Mada-Luna*, 813 F.2d at

1016; *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019), *cert. filed*, No. 19-1212; *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 512-14 (9th Cir. 2018). But that is not a distinction acknowledged by any of the three cases. Nor is it a distinction acknowledged by the APA, meaning a court cannot impose that new requirement on the agencies. *See* 5 U.S.C. §§ 701(b)(2), 551(4) (defining "rule" as required for notice and comment rulemaking in § 553); *cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.") (cleaned up). Thus, these cases support Defendants' argument that the vetting changes constitute (at most) a general statement of policy, and not a substantive rule.

Second, Plaintiffs aver that Defendants are relying on evidence outside the four corners of the FAC to show that the vetting scheme is a general statement of policy, which is prohibited under Rule 12(b)(6). Pls.' Opp at 17. Defendants do not need to rely on evidence outside the FAC for this point. The Court, construing the FAC's allegations "in a light most favorable to" Plaintiffs, need look no further than the FAC itself for allegations demonstrating that the Plaintiff-termed "new vetting method" did not require notice and comment rulemaking. Despite the vetting enhancements, Defendants nonetheless were able to exercise adjudicatory discretion. That is, Plaintiffs acknowledge that, under the "new vetting method" they challenge in this lawsuit, numerous individuals who were subject to this challenged "new vetting method," including derogatory vetting results generated by it, have traveled to the United States as refugees. Dkt. 405 at 35 n.20.

FTTTF vetting is, if indeed a rule, only a general statement of policy. The FAC fails to state an APA notice-and-comment claim and the Court should dismiss this count with prejudice.

CONCLUSION

The 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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Respectfully submitted,

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