IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JANE DOE, *Plaintiff*, – against – UR M. JADDOU, et al., *Defendants*.	**Case No.: 8:24-cv-650-TDC**

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Introduction

Plaintiff Jane Doe seeks to enjoin Defendants' application of their unlawful policy, which requires her to obtain a refugee travel document to return with her children to the United States on her still-valid refugee status before May 9. In response, Defendants do not dispute that their policy treats returning refugees, such as Jane Doe, who lack refugee travel documents as inadmissible. They also do not defend the policy against Jane Doe's argument that it violates Congress' express exemption of refugees from documentation requirements under the Refugee Act. Instead, Defendants mount only two arguments—that Jane Doe's challenge is not judicially reviewable and that it is time barred, ECF 29 Defs. Opp.—which Plaintiff refutes in turn here.

Argument

I. Defendants Do Not Dispute That their Policy Treats Jane Doe as Inadmissible Without a Refugee Travel Document or Defend the Policy on its Merits.

As an initial matter, Defendants do not dispute the vast majority of Jane Doe's legal and factual arguments in support of the motion for a preliminary injunction. Defendants do not contest that their policy is to treat returning refugees without refugee travel documents as inadmissible to the United States, or that their application of this policy to Jane Doe prevents her from returning to the United States with her children. *See* ECF 25 Pls. Mot. at 7-9. Defendants do not attempt to defend how this policy is lawful given the Refugee Act's explicit exemption of refugees from documentation requirements and the many other statutory and regulatory protections for resettled refugees. *See id.* at 17-26. And they do not dispute that Jane Doe is irreparably harmed absent an injunction or that the balance of equities and public interest both weigh in her favor. *See id.* at 26-29.

II. Jane Doe's Challenge to Defendants' Application of Their Refugee Travel Document Policy is Judicially Reviewable.

Agency action is judicially reviewable under the Administrative Procedure Act (APA) unless specifically precluded by statute or committed to agency discretion by law. *Dep't of Commerce v. New York*, 588 U.S. ----, 139 S. Ct. 2551, 2567 (2019) (the APA "embodies a basic presumption of judicial review" (quoting *Abbot Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). Jane Doe's claims are reviewable here because she challenges Defendants' application of their refugee travel document policy as to her, not the substance of the agency's discretionary decision on her application. ECF 1 Compl. at 13; *see also* ECF 25-12 Proposed Order.

Defendants point to 8 U.S.C. § 1252(a)(2)(B)(ii) for their argument that Jane Doe's claims are not subject to judicial review under the APA, but that statute does not preclude review because it exempts only discretionary "decisions made [on] *individual* applications," not challenges to "immigration policy." *Doe 1 v. Mayorkas*, 530 F. Supp. 3d 893, 909 (N.D. Cal. 2021) (finding § 1252(a)(2)(B)(ii) did not bar individually denied refugee applicants' challenge to agencies' "policy and practice of denying refugee applications" under APA § 701(a)(1)). And while 8 U.S.C. § 1157(c)(1) grants agency discretion to "admit any refugee"—i.e. discretion over individual refugee admission decisions—Defendants' sweeping attempt to insulate "any decision or action of when or whether to exercise § 1157(c)(1) discretion" from judicial review, Defs. Opp. at 7, is unsupported. *See Doe v. Trump*, 288 F. Supp. 3d 1045, 1071-72 (W.D. Wash. 2017) (holding § 1252(a)(2)(B)(ii) does not bar a challenge to agency's suspension of refugee adjudications, even if a challenge to an individual "denial of refugee admission" may fall within the agency's discretion per § 1157(c)(1)); *but see* Defs. Opp. at 5-7 (citing *Patel v. Garland*, 596 U.S. 328, 340 (2022) (factual determinations made in requests for individual discretionary relief

are unreviewable); *Polfliet v. Cucinelli*, 955 F.3d 377, 384 (4th Cir. 2020) (agency revocation of individual visa petition is unreviewable); *Thigulla v. Jaddou*, 94 F.4th 770, 773-75 (8th Cir. 2024) (claim to compel USCIS to promptly adjudicate individual status adjustment applications is unreviewable)). It is well established that a challenge to the lawfulness of an agency policy is not barred by § 1252(a)(2)(B)(ii) because it is "not a matter of [the agency's] discretion" exercised on an individual application. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (distinguishing a challenge to "the Attorney General's exercise of discretion" from a challenge to the extent of Attorney General's authority under statute, which is judicially reviewable). Jane Doe's claims are judicially reviewable because she does not challenge Defendants' ultimate authority to grant or deny her readmission under § 1157(c)(1), but rather their authority to adopt and apply a policy treating her as inadmissible because she lacks a refugee travel document.

Defendants' argument that Jane Doe's claims are barred by 5 U.S.C. § 701(a)(2), which precludes judicial review for agency action "committed to agency discretion by law," also fails to find support in the law. This exception to judicial review is read "narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 586 U.S. ----, 139 S. Ct. 361, 370 (2018) (internal quotation marks omitted). Here, there are many standards against which to assess the lawfulness of Defendants' policy to treat Jane Doe as inadmissible unless and until she obtains a refugee travel document, see Pls. Mot. at 17-26—chief among them the Refugee Act's explicit exemption of refugees from documentation requirements. 8 U.S.C. § 1157(c)(3); 8 U.S.C. § 1182(a)(7)(A); 8 U.S.C. § 1181(a), (c). Jane Doe's claims therefore present "legal issue which can be reviewed by the court by reference to statutory standards and legislative intent." *Inova Alexandria Hosp. v.*

Shalala, 244 F.3d 342, 346 (4th Cir. 2001) (citation omitted); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, 413 (1971) (finding "law to apply" where statutes provided "clear and specific directives").

III. Jane Doe's As-Applied Challenge Is Within the Statute of Limitations.

Jane Doe's challenge to the refugee travel document regulation 8 C.F.R. § 223 is not time barred because it is an as-applied challenge and thus all of Defendants' arguments fail because they misconstrue her claims as a facial challenge. Compl. at 13; *cf.* Defs. Opp. at 3 ("the statute of limitations has run for a facial-challenge to the relevant regulations"). Jane Doe's as-applied challenge falls within the "long-recognized exception under which those affected when an agency seeks to apply a rule after the statute of limitations has passed may challenge that application on the grounds that it conflicts with the statute from which its authority derives." *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 971 F.3d 340, 348 (D.C. Cir. 2020) (quoting *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014)) (internal quotation marks omitted). An agency's "application" of a rule under this exception includes actions such as an agency's denial of an individual petition. *Weaver*, 744 F.3d at 364-65 (collecting cases). As the Fourth Circuit has made clear, "[a] cause of action governed by § 2401(a) accrues or begins to run at the time of 'final agency action[,]" *Hire Ord. Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012), i.e. "when the agency has completed its decisionmaking process, and when the result of that process is one that will directly affect the parties," *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)) (internal quotation marks omitted); *cf. Fed. Energy Regul. Comm'n v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 898

(4th Cir. 2020) ("[S]tatutes of limitation do not run until a plaintiff has a complete and present cause of action[.]") (citing *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013)).

While a facial challenge to this regulation would be outside the six-year statute of limitations, that is plainly not at issue here and Defendants' arguments, premised on treating Jane Doe's claims as a facial challenge, are all inapposite. *See* Defs. Opp. at 4-5 (citing *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 681-82 (4th Cir. 2020) ("facial challenge" to visa program regulations was time-barred); *Hire Ord.*, 698 F.3d at 170 ("facial challenge" to firearm sales ruling was time-barred)). Defendants' reliance on a statute of limitations case currently before the Supreme Court is also a red herring, as it too pertains to a facial challenge. Defs. Opp. at 5; *N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634 (8th Cir. 2022), *cert. granted sub nom. Corner Post, Inc., v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 478 (2023). In that case, the Eighth Circuit addressed "whether a plaintiff which comes into existence more than six years after the publication of a final agency action is barred from bringing an APA *facial* challenge to the agency action" and found that it was, because "[f]or *facial* challenges, liability is fixed[.]" *Id.* at 639, 641 (emphasis added); *see also* Petition for Writ of Certiorari at 17, *Corner Post*, No. 22-1008 (Apr. 13, 2023), 2023 WL 3006876, at *17 (clarifying that an "as-applied challenge . . . refers to the unobjectionable practice of allowing a party to challenge a rule's legality after the limitations period has admittedly run—but as a defense if an agency tries to enforce the allegedly illegal rule against the party, or if an agency denies a petition to reconsider a rule.").

Defendants also argue that Jane Doe could have brought her APA claim on "the day she learned of the travel document requirement in 2016," Defs. Opp. at 5, but that would have been premature, and contending otherwise in these circumstances would produce an inequitable result.

Jane Doe's awareness of the refugee travel document policy alone did not impose the sort of "direct and immediate" harm necessary to challenge agency action under the APA. *Franklin*, 505 U.S. at 797; *see also Jersey Heights*, 174 F.3d at 186. And when Jane Doe applied for a refugee travel document in 2017, Defs. Opp. at 5, she "did not imagine" that it would take the agency over five years—and require a federal lawsuit challenging the agency's processing delays—for Defendants to ultimately adjudicate her application. ECF 25-2 Ex. A Doe Decl. ¶¶ 15, 22. Under Defendants' theory, the agency would have license to run down the six-year statute of limitations clock with its own prolonged delay, thereby depriving an individual of the ability to bring an as-applied challenge.

Deese v. Esper is illustrative on this point. 483 F. Supp. 3d 290 (D. Md. 2020). In that case, the District of Maryland rejected defendants' argument that the statute of limitations barred plaintiff's arbitrary and capricious APA claim against a Department of Defense policy prohibiting service academy graduates living with HIV from being commissioned as officers because the plaintiff "did not suffer a legally cognizable injury, and accordingly could not challenge the Defendants' policies" until the agency discharged him due to his HIV diagnosis. *Id.* at 307 n.9. This was the case even though the plaintiff was aware weeks before his graduation—within six years of the policy's enactment—that he was HIV positive and therefore was ineligible to be commissioned as an officer under the policy. *Id.* at 300-01. Instead of bringing a policy challenge at that time, the plaintiff pursued a medical waiver, which the agency took three years to deny before discharging him. *Id.* But it was the date of his discharge pursuant to the policy that the court used as the starting point for the statute of limitations on his claim. *Id.* at 307 n.9.

Here, Jane Doe filed her as-applied challenge well within the six-year statute of limitations from the agency's (long-delayed) denial of her refugee travel document application in

January 2023. The denial caused her to suffer a "legally cognizable injury" under the APA, see *Deese*, 483 F. Supp. 3d at 307 n.9, and to face the "direct and immediate" sting of the agency's decision to bar her from returning to the United States as a refugee with her children, whose refugee applications it had by that time approved, *Franklin*, 505 U.S. at 797. Jane Doe's as-applied challenge to Defendants' refugee travel document policy is thus timely filed.

Conclusion

For the foregoing reasons and those in Plaintiff's motion for a preliminary injunction, Plaintiff respectfully requests that this Court grant Plaintiff's motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2nd, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all CM/ECF registrants.

By: /s/ *Kathryn C. Meyer*

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