IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants-Cross-Appellees.

Nos. 18-35015, 18-35026

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THE APPEAL, AND TO VACATE THE JUDGMENT AND REMAND FOR DISMISSAL, ON GROUNDS OF MOOTNESS

Plaintiffs challenged two expressly temporary and limited policies that have since expired by their own terms while this appeal was pending. Pursuant to well-established principles of mootness, this Court should enter the familiar relief recognized by the Supreme Court in *Munsingwear* and its progeny: vacate the now-moot injunction, and dismiss the appeal and remand for dismissal of plaintiffs' claims on grounds of mootness. Although plaintiffs attempt to create confusion about the scope of the issues, the district court expressly limited its injunction to the two policies at issue here, and those policies have come to an end, as designed from the outset.

Plaintiffs urge a remand to the district court to consider mootness in the first instance. Although there are no factual disputes to be resolved, and this Court can and

should enter *Munsingwear* relief of its own accord, the government would not oppose remand if this Court wishes to obtain the district court's views as to mootness in light of the scope of its own order. In all events, however, the parties agree that this Court need not and should not proceed to consider the merits of this appeal in light of subsequent developments.

1. The district court's injunction addressed two temporary provisions of the October 23, 2017, Memorandum to the President (Agency Memo; DE# 46-2): (1) the de-prioritization of refugee applications from countries on the Security Advisory Opinion (SAO) list, which expressly expired by its own terms after the predicate 90-day review period came to an end on January 22, 2018; and (2) the suspension of processing and admission of following-to-join (FTJ) derivative refugees, which expressly expired by its own terms upon adoption of additional security screening procedures that were implemented on February 1, 2018. Plaintiffs' responses to the government's motion in this Court now suggest that they may seek to challenge other policies, but this appeal is not an appropriate vehicle for any such new claims, which cannot affect the mootness analysis in any event.

The Agency Memo was clear about the temporary nature of the two provisions at issue here, and about when they would end. Temporary de-prioritization was put in place while the Departments of State and Homeland Security and the Director National Intelligence "conduct[ed] a detailed threat analysis and review for nationals of these

high risk countries [on the SAO list] and stateless persons who last habitually resided in those countries." Agency Memo 2. "*During this review*, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries." *Ibid.* (emphasis added). And that review would end within 90 days. See *ibid.* ("We will direct our staff to work jointly and with law enforcement agencies to complete the additional review of the SAO countries no later than 90 days from the date of this memorandum * * *."). Thus, the de-prioritization called for in the Agency Memo was limited to the 90-day period of the threat analysis and review for refugees from countries on the SAO list. Once that review ended, so did the de-prioritization called for in conjunction with the review.

Similarly, the suspension of FTJ refugee processing and admission was adopted as an interim measure until additional security measures could be implemented. See Agency Memo 2. The Agency Memo called for "screening mechanisms for following-to-join refugees that are similar to the processes employed for principal refugees, in order to ensure the security and welfare of the United States." *Id.* at 3. Although the FTJ suspension did not have a fixed duration, it would last only until the screening mechanisms were in place, at which time FTJ processing and admission would resume. The Agency Memo was clear that the government "will resume admission of following-to-join refugees once those enhancements have been implemented." *Ibid.* As the government explained in its motion, those procedures have been implemented and are

in place as of February 1, 2018. Mot. 9. The brief suspension of FTJ refugee processing and admission pending implementation of those procedures has accordingly ended.

Plaintiffs challenged only those two provisions of the Agency Memo, and the district court "clarifie[d]" that plaintiffs "do not seek to enjoin the agencies' efforts to implement screening mechanisms for FTJ refugees that are similar to or aligned with the processes employed for principal refugees." Op. 38. Nor did plaintiffs "seek to enjoin the agencies from conducting their 90-day 'detailed threat analysis and review' of the SAO countries to determine what additional safeguards the agencies believe are necessary with respect to the admission of refugees from those countries." *Ibid.* The injunction accordingly did not prohibit the government from conducting its review of SAO countries or implementing enhanced security screening procedures for FTJ refugees. Because those steps have been completed, and the challenged provisions of the Agency Memo have come to an end by their terms, nothing remains to be enjoined.

2. To be sure, the Agency Memo also contemplated that "additional safeguards" might subsequently be "necessary to ensure that the admission of refugees from these [SAO] countries of concern does not pose a threat to the security and welfare of the United States." Agency Memo 2. But any such additional safeguards were not part of the Agency Memo; they accordingly were not, and could not have been, the subject of the injunction. Plaintiffs can file a new or amended complaint if they believe that they are harmed by a new policy adopted following the 90-day review. But they

cannot avoid mootness by trying to bring a new policy within the scope of the injunction here. Indeed, the new policy recently adopted for SAO countries—requiring additional screening and vetting actions; assessing risk when considering the overall refugee admissions ceiling, regional allocations, and the groups of applicants considered for resettlement; and reviewing and updating the SAO list—is far different than the 90-day de-prioritization ordered by the Agency Memo. See Nielsen Mem. 2.[1]

The district court also made clear that plaintiffs did not seek to prohibit the government from implementing the additional screening procedures for FTJ refugees. Op. 38. And plaintiffs do not dispute that those security screenings are lawful and permissible.

Thus, there is no basis to interpret the injunction, or plaintiffs' claims, to address the government's current policies. Any litigation concerning those new policies must proceed separately. Plaintiffs' efforts to transform their claims while on appeal cannot alter the mootness of this injunction, which concerned only temporary policies that have since ended by their own terms.

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[1] The Secretary of Homeland Security set forth her determinations following the 90-day review called for in the Agency Memo. The government provided a copy of that memorandum (redacting a small amount of privileged information) to plaintiffs, who attached it to a recent filing in district court. A copy of the memorandum (Nielsen Mem.; DE# 122, Ex. C) is included with this reply.

3. In their responses to the government's motion, plaintiffs fail to acknowledge the limited scope of their claims and the district court's injunction. But, as explained above, this interlocutory appeal from the carefully limited preliminary injunction does not address any new policies adopted after the 90-day SAO review and implementation of FTJ screening mechanisms. Plaintiffs cannot overcome mootness by recharacterizing their claims to suggest that they now seek to address a more general "suspension" of SAO or FTJ refugee processing that is somehow separate from the two limited policies in the Agency Memo. JFS Opp. 10-13; Doe Opp. 15-17. Nor can misinterpretations of the government's statements undercut the limited and temporary nature of the provisions subject to the injunction.[2]

The injunction on appeal addressed only those two policies in the Agency Memo. Now that the policies have ended, there is no basis to extend the reach of the injunction to policies that have not been alleged, challenged, or litigated, and that are not within the scope of the order on appeal. If plaintiffs allege that there is some new suspension

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[2] Plaintiffs' responses are rife with misunderstandings and misrepresentations of the government's position. For example, in answer to a question about what policy changes would result from the 90-day review of SAO countries, government counsel explained that he could not speculate about any new policy. See JFS Opp. 5 (quoting transcript). That was not a concession that the temporary SAO de-prioritization was somehow unlinked from the 90-day review. See *id.* at 11. In any event, the new policy makes clear that no similar de-prioritization resulted from the 90-day review. See Nielsen Mem. 3 (following the 90-day SAO review, "the prioritization set forth in the [Agency Memo] is not hereby renewed").

in place (and there is nothing to support such a claim), they can challenge it in a new suit; but they cannot recharacterize the claims or the injunction in this case to avoid mootness.

Nor is there any basis for uncertainty about whether the temporary policies have actually ended. JFS Opp. 10-13; Doe Opp. 9-10. The 90-day SAO review period has ended by operation of the passage of 90 days, and the corresponding de-prioritization of SAO refugees—which was expressly linked to that review period—came to an end at the same time. See Nielsen Mem. 3. Similarly, the suspension of FTJ refugee processing and admission was expressly limited to the period until additional security measures could be implemented to ensure that FTJ refugees would be subject to the same screening mechanisms as principal refugees. The government has publicly announced the implementation of those procedures, and has explained to applicants that FTJ refugees are now being processed using those procedures. See https://travel.state.gov/content/travel/en/usvisas/immigrate/follow-to-join-refugees-and-asylees.html; http://www.uscis.gov/i-730 (Special Instructions: "New security measures for following-to-join refugees"). Plaintiffs are thus wrong to assert (Doe Opp. 9) that there is no evidence that the government has resumed processing of FTJ refugee applications following the implementation of new screening procedures. Plaintiffs' bare assertions of uncertainty or disbelief are insufficient to overcome those clear public statements of official (and judicially noticeable) government policy.

4. The specific and limited policies challenged here are not capable of repetition yet evading review. That exception to the mootness doctrine applies only where there is a reasonable expectation that a plaintiff will "be subject to the same action again." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Plaintiffs here will not be subject to either the brief de-prioritization pending a specific threat analysis of certain individuals from SAO countries or the temporary suspension of FTJ refugee processing and admission pending implementation of specific security procedures described in the Agency Memo. Those policies cannot occur in the future because the actions on which they were predicated have taken place and come to an end. The review of SAO countries has been completed, and the security mechanisms have been implemented; there is no plausible basis to believe (and plaintiffs do not assert) that they could be repeated.

Plaintiffs assert that a policy similar to the FTJ suspension could conceivably be adopted in the future. Doe Opp. 14. But bare speculation about possible recurrence is not sufficient to overcome mootness. See, *e.g.*, *Foster v. Carson*, 347 F.3d 742, 748-749 (9th Cir. 2003) ("the speculative contingencies present here do not provide us with a basis to pass on Plaintiffs' significant constitutional challenge to the now-expired [policy]"). And unlike the case plaintiffs cite for the proposition that a slight modification to a challenged policy may not result in mootness, no such policy has been

adopted here. See *Associated Gen. Contractors v. California Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013), cited in Doe Opp. 14.

Nor does the natural and intended end of temporary policies by their own terms constitute voluntary cessation warranting an exception to mootness or to the *Munsingwear* doctrine, as the Supreme Court has repeatedly and recently recognized. See *Trump v. Hawaii*, 138 S. Ct. 377 (Mem.), No. 16-1540 (Oct. 24, 2017); *Burke v. Barnes*, 479 U.S. 361, 363 (1987); see also *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011). The very policies in the Agency Memo that plaintiffs challenged identified the basis for their termination, which was well understood by the district court and the parties from the outset. Notably, the district court's limited injunction left the government free to continue its underlying policy efforts. It does not matter whether a challenged policy is time-limited (like the SAO de-prioritization) or set to end when another event takes place (like the FTJ suspension). In both cases, the termination of the policy is due to its own terms rather than to post-litigation decisions by a defendant.

5. Plaintiffs suggest that remand is necessary to resolve factual uncertainty. JFS Opp. 10-13; Doe Opp. 8-11. But there is no factual dispute relevant to mootness. The terms of the policies that plaintiffs challenged are clear from the face of the Agency Memo, as well as the limited injunction entered by the district court. The occurrence of the events that triggered the end of those policies is equally clear, based on the

calendar (for SAO) and official public statements (for FTJ). And, as discussed, whether new policies have allegedly been adopted is not relevant to the mootness of the old policies, but rather to whether a new suit may be filed.

Plaintiffs point out that the government has committed to continue efforts it undertook in compliance with the injunction, taking steps to increase opportunities for refugees from SAO countries to apply for admission under USRAP. JFS Opp. 8, 14-15. Those commitments were undertaken when the injunction was in place, in a good-faith effort to ensure compliance even though the terms of the injunction did not specifically require any steps beyond an end to the temporary SAO de-prioritization and FTJ suspension imposed by the Agency Memo. See Op. 64-65 (enjoining the government only from "enforcing [specified] provisions of the Agency Memo"). Although the injunction no longer has ongoing effect, the government intends to follow through with those commitments. But those commitments do not alter the fact that the challenged provisions in the Agency Memo have expired.

Plaintiffs suggest that they doubt whether the government has complied with the injunction. JFS Opp. 12-13; Doe Opp. 8-9. They offer no support, however, for their bare speculation that the government has failed to meet its obligations. Throughout this litigation, the government has acted in good faith and kept the district court informed of its compliance efforts. In any event, if there were any question about compliance during the period when the injunction was in place, any such dispute would not alter

the mootness that has occurred since then. Questions about compliance with the injunction when it was in effect have no relation to the question whether the parties' dispute over the merits of that injunction is now moot.

Moreover, discovery is unavailable to inquire into compliance based solely on conjecture, in the absence of evidence or even any specific allegation that the government has failed to comply with the injunction. Plaintiffs cannot avoid the injunction's mootness based on the unrelated question whether the injunction was followed while it was in effect, and especially not when they would need to engage in a fishing expedition to support their unfounded question.

There is no need for resolution of any factual issues, and this Court can and should dispose of the appeal under well-settled principles governing cases that become moot while pending on appeal. Nevertheless, the government does not oppose remand if this Court concludes that uncertainty about the scope of the injunction renders it prudent to remand for the district court to consider the mootness issue in the first instance. That legal issue does not require discovery, and it can be addressed by the parties and the district court promptly by motion.

CONCLUSION

Defendants respectfully request that this Court dismiss the appeal, and vacate the district court's judgment and remand with instructions to dismiss, on grounds of

mootness. In the alternative, the Court should remand for the district court to address mootness in the first instance.

Respectfully submitted,

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MARCH 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This reply contains 2,722 words, excluding the parts of the reply excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ H. Thomas Byron III
H. Thomas Byron III

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ H. Thomas Byron III
H. Thomas Byron III

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 29, 2018

MEMORANDUM

TO: L. Francis Cissna
Director
U.S. Citizenship and Immigration Services

FROM: Kirstjen M. Nielsen
Secretary
U.S. Department of Homeland Security

SUBJECT: 90-Day Refugee Review

(U) On October 24, 2017, the President issued Executive Order (EO) 13,815 allowing for the general resumption of the U.S. Refugee Admissions Program (USRAP). Simultaneously, Section 3, "Addressing the Risks Presented by Certain Categories of Refugees," required that I determine within 90 days, as appropriate and consistent with applicable law, whether to modify or terminate any actions taken to address the security risks posed by refugee admissions, in consultation with the Secretary of State and the Director of National Intelligence.

(U) As you know, in the ensuing 90 days, DHS Components, including the DHS Office of Strategy, Policy, and Plans (PLCY) and U.S. Citizenship and Immigration Services (USCIS), the Department of State (DOS), and our law enforcement and intelligence community partners conducted a review to assist me in determining which additional safeguards, if any, are necessary to ensure that the admission of nationals of, and certain stateless persons who last habitually resided in, 11 particular countries[1] does not pose a threat to the security and welfare of the United States. The 90-day review included an in-depth threat assessment of each Security Advisory Opinion (SAO) country from the intelligence community, as well as a review of all relevant information related to ongoing or completed investigations involving refugees admitted to the United States. The review was conducted consistent with all judicial orders in effect.

(U) Based on the results of the review and in consultation with my counterparts, I have made the following determinations:[2]

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[1] (U//~~FOUO~~) These 11 particular countries were previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list. The SAO list for refugee applicants was first established following the September 11th terrorist attacks and has evolved over the years through interagency consultations which include risk assessments and analysis from the intelligence and law enforcement communities.

[2] (U) Any actions shall be undertaken consistent with the nationwide injunction issued by the United States District Court for the Western District of Washington, which prohibits the defendants from "enforcing those provisions of the Agency Memo (Memorandum to Donald Trump, President of the United States, from the Secretary of State, the Acting Secretary of Homeland Security, and the Director of National Intelligence) that suspend or inhibit, including through the diversion of resources, the processing of refugee applications or the admission into the United States of

1. (U) Additional screening and vetting actions are required for certain nationals of high-risk countries.
2. (U) The USRAP should continue to be administered in a risk-based manner.
3. (U) The Refugee SAO list and selection criteria should be reviewed and updated.

I. (U) Additional Screening and Vetting Actions

(U) The Immigration and Nationality Act (INA) as amended provides that the Secretary of DHS "may, in the [Secretary's] discretion…admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible." Even if the applicant has demonstrated that he or she is statutorily eligible for refugee status, the ultimate decision on each application for refugee status by USCIS—and admission of each potential refugee at the port of entry by Customs and Border Protection—involves the exercise of discretion. As with all elements of the refugee adjudication, the burden of proof rests with the applicant to demonstrate that he or she merits admission as a refugee. As such, I am hereby directing that USCIS co-administer the USRAP with the Department of State's Bureau of Population, Refugees, and Migration in a manner consistent with these determinations and DHS statutory authorities—and in consultation with the Attorney General and Director of National Intelligence. More specifically, I am instructing USCIS to implement certain screening and vetting enhancements to the USRAP to more effectively prevent fraud and to identify potential national security risks, criminals, and other nefarious actors.[3] Prior to the start of FY2018 3rd quarter refugee processing, USCIS shall:

- (U) Provide officers adjudicating refugee applications ("officers") with additional training and guidance on national security indictors identified as a result of the review.
- (U) Provide for more in-depth refugee eligibility interviews, as well as additional time for officers to conduct interviews for certain nationals of SAO countries to allow for further exploration of potential national security, inadmissibility, and credibility issues at interview.
- (U//~~FOUO~~) Issue guidance to its officers emphasizing the importance of eliciting testimony from derivative applicants, including certain RE-3 applicants (unmarried, under 21, derivative children) apart from the principal refugee applicant (his or her parent) to further explore potential national security, identity, inadmissibility, and credibility issues.

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refugees from SAO countries." *Doe, et al. v. Trump, et al.*, No. 17-178 (W.D. Wash.); *Jewish Family Services, et al. v. Trump, et al.*, No. 17-1707 (W.D. Wash.). In addition, any commitments made by the United States to implement the injunction will be honored. The court made clear, however, that this portion of the preliminary injunction only applies to the restrictions imposed by the prior Joint Memorandum with respect to refugees with a bona fide relationship to a person or entity within the United States. Additionally, the preliminary injunction does not apply to the defendants' "efforts to conduct a detailed threat assessment for each SAO country" pursuant to the Joint Memorandum.

[3] (U) These instructions are issued pursuant to 8 U.S.C. § 1103(a)(3) in order to carry out my statutory authorities relevant to the USRAP, including 8 U.S.C. §§ 1101(a)(42), 1157, and 1182(a)(2), (3). Where applicable and consistent with these authorities related to processing petitions for Form I-730, *Refugee/Asylee Relative Petitions* filed by refugees for following-to-join family members, USCIS will work with DOS to develop and implement processes to apply these enhancements to the processing of those petitions.

- (U) Issue supplementary guidance and train officers on when it may be appropriate to deny refugee applicants as a matter of discretion based on the totality of the circumstances.
- (U//FOUO) Work with DOS and relevant vetting partners to ensure relevant derogatory information [redacted] is considered in the decision-making process, similar to the current Interagency Check (IAC) procedure.
- (U//~~FOUO~~) Ensure that any previously undisclosed wounds or injuries identified by an International Organization for Migration or other panel physician during an applicant's medical examination will be documented on the appropriate DOS medical forms. DOS will then coordinate the reporting of the information to USCIS.
- (U) Determine which SAO nationals who have already undergone a USCIS interview will require a re-interview in light of the modifications listed above.

(U) In addition, I am directing USCIS to coordinate with USRAP program partners and vetting agencies to:

- (U//~~FOUO~~) Work with DHS PLCY, DOS, and relevant vetting partners to initiate a review of SAO adjudication thresholds and update them as appropriate to ensure they are in line with thresholds applied to other security checks, most notably the IAC.
- (U//~~FOUO~~) Identify whether there are additional indicators that would trigger a "deep dive" review by vetting agencies.
- (U) Continue ongoing discussions with the Office of the United Nations High Commissioner for Refugees (UNHCR) to integrate biometrics collected by UNHCR into USRAP identity management for those cases referred by UNHCR.

(U) USCIS will interview and adjudicate cases of SAO nationals under these new procedures. The 90-day review of SAO countries, as provided in the Joint Memorandum, is no longer in effect by its terms, and the prioritization set forth in the Memorandum is not hereby renewed. As with other new screening and vetting enhancements implemented by the Department and interagency partners in the past, these modifications may lengthen processing times and will take time to implement, but I have determined that they are critical to strengthening the security and integrity of the USRAP and should be put in place as expeditiously as possible.

II. (U) Risk-Based Approach to USRAP Administration

(U) The aforementioned enhancements will improve the security of the U.S. homeland. It is also my judgment that the USRAP is not being administered in a sufficiently risk-based manner informed by past experience or ongoing analysis of threats to U.S. interests. As such, USCIS should work with DOS to adopt a more risk-based approach to the USRAP when it develops the annual report to Congress on proposed refugee admissions for FY2019. The report should take into consideration national security risk as well as operational and resource realities when considering the overall refugee admissions ceiling, regional allocations, and the groups of refugee applicants that will be considered for resettlement next fiscal year.

III. (U) Review of Refugee SAO List

(U//~~FOUO~~) Finally, I have recommended to my interagency counterparts that DHS and DOS conduct a full review of the SAO list and, within six months, propose an updated SAO list as necessary based on broader public safety and national security considerations, including terrorism threats, transnational organized crime, and other relevant factors. I have also recommended that this list be reviewed, and updated, as appropriate, every six months thereafter to better inform screening and vetting policies and procedures based on any changes in risk factors and the overseas threat landscape. USCIS participation in these discussions will be critical.

IV. (U) No Private Right of Action

(U) In implementing this guidance, I direct DHS Components to consult with legal counsel to ensure compliance with all applicable laws, including all judicial orders in effect. In addition, USCIS shall, through the Office of the General Counsel, ensure that the Department of Justice is informed of the measures described herein and the proposed timelines for implementation.

(U) This document provides only internal DHS policy guidance, which may be modified, rescinded, or superseded at any time without notice. This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.