IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN DOE,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States of America; JOHN F. KELLY, Secretary of the Department of Homeland Security; THE DEPARTMENT OF HOMELAND SECURITY; LORI SCIALABBA, Acting Director of the U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; REX W. TILLERSON, Secretary of State; U.S. DEPARTMENT OF STATE; and THE UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 17-cv-112-wmc

DEFENDANTS' MOTION FOR LEAVE TO FILE A RESPONSE TO PLAINTIFF'S STATEMENT OF PROPOSED FINDINGS OF FACT OUT OF TIME

Defendants, through undersigned counsel, hereby move this Court to grant them leave to file the attached Response to Plaintiff's Statement of Proposed Findings of Fact out of time. This motion is made in good faith and not for the purpose of delay. In support of their motion, Defendants state the following:

1. On March 10, 2017, Plaintiff filed an Amended Complaint and a Renewed Motion for Temporary Restraining Order and Preliminary Injunction, including several exhibits. ECF Nos. 27-33.

2. On March 10, 2017, the Court held a conference concerning Plaintiff's renewed motion for relief and entered a temporary restraining order. ECF No. 34. The Court also ordered Defendants to file responsive briefing by March 16, 2017. The Court directed Plaintiff to file a

reply by noon on March 20, 2017, and scheduled a hearing concerning Plaintiff's motion for March 21, 2017.

3. On March 16, 2017, Defendants filed their Opposition to Plaintiff's Renewed Motion for a Temporary Restraining Order and Preliminary Injunction, including exhibits. ECF Nos. 40, 42. Defendants, however, neglected to include their Response to Plaintiff's Statement of Proposed Findings of Fact.

4. On March 17, 2017, the parties stipulated to an extension of time for Plaintiff to file the reply brief on or before April 5, 2017. The parties also stipulated to rescheduling of the hearing for the week of April 10, 2017. ECF No. 44.

5. On March 20, 2017, the Court granted the parties' joint motion, ordered Plaintiff to file the reply by April 5, 2017, and rescheduled the hearing on Plaintiff's motion for April 11, 2017. ECF No. 45.

6. On March 24, 207, in view of Plaintiff's beneficiaries' interviews with USCIS in Amman, Jordan, scheduled for April 20, 2017, the parties stipulated to a second extension of time for Plaintiff to file the reply brief on or before April 28, 2017. The parties also stipulated to rescheduling of the hearing for the week of May 1, 2017. ECF No. 48.

7. On March 27, 2017, the Court granted the parties' joint motion, ordered Plaintiff to file the reply by April 28, 2017, and rescheduled the hearing on Plaintiff's motion for an undetermined date in May 2017. ECF No. 49.

8. At all times, Defendants have diligently endeavored to meet all deadlines in this action.

9. Plaintiff will not be prejudiced by granting this motion because the Court granted the joint motion providing Plaintiff up to and including April 28, 2017, to file the reply brief. Additionally, no reply to the Defendants' response to Plaintiff's proposed findings of fact is

permitted pursuant to the Court's Procedure to Be Followed on Motions for Injunctive Relief, Section III C.

10. On March 23, 2017, Plaintiff's counsel indicated Plaintiff does not oppose this motion.

11. Defendants humbly request leave to file the attached Response to Plaintiff's Statement of Proposed Findings of Fact. (Ex. A).

12. A proposed Order is attached hereto. (Ex. B).

WHEREFORE, Defendants respectfully request the Court grant their Motion for Leave to File a Response to Plaintiff's Statement of Proposed Findings of Fact Out of Time.

Dated: March 29, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General

WILLIAM C. PEACHEY
Director

GISELA WESTWATER
Assistant Director

By: /s/ *Yamileth G. Davila*
YAMILETH G. DAVILA
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-0137
e-Mail: yamileth.g.davila@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 29, 2017, I served the foregoing by uploading an electronic version of this document to the Court's ECF system. Service will be accomplished via CM/ECF on the following registered users:

Andrei Vrabie, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: avrabie@hsgllp.com

Andrew Breidenbach, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: abreidenbach@hsgllp.com

Lauren Nicole Giudice, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: lgiudice@hsgllp.com

Matthew Noller, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: mnoller@hsgllp.com

Vincent Levy, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue, 26th Floor
New York, NY 10019
646-837-5120
Email: vlevy@hsgllp.com

Lester A. Pines, Esq.
Cullen Weston Pines & Bach LLP
122 W. Washington Ave
Suite 900
Madison, WI 53703
608-251-0101
Fax: 608-251-2883
Email: Pines@cwpb.com

Tamara Beth Packard, Esq.
Cullen Weston Pines & Bach LLP
122 W. Washington Ave
Suite 900
Madison, WI 53703
608-251-0101x316
Fax: 608-251-2883
Email: tpackard@pinesbach.com

/s/
YAMILETH G. DAVILA
Senior Litigation Counsel
United States Department of Justice
Civil Division

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JOHN DOE,

Plaintiff,

v.

DONALD J. TRUMP, as President of the United States of America; JOHN F. KELLY, as Secretary of the Department of Homeland Security; THE DEPARTMENT OF HOMELAND SECURITY; LORI SCIALABBA, as Acting Director of the U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; REX W. TILLERSON, as Secretary of State; U.S. DEPARTMENT OF STATE; and THE UNITED STATES OF AMERICA,

Defendants.

Civil Action No.: 17-cv-112

Chief Judge William M. Conley

DEFENDANTS' STATEMENT OF PROPOSED RECORD FACTS IN OPPOSITION TO PLAINTIFF'S RENEWED APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to the Court's Procedure to Be Followed on Motions for Injunctive Relief, section III A, Defendants, through undersigned counsel, hereby submit the following Response to Plaintiff's Statement of Proposed Record Facts:

Jurisdiction and Venue

1. Disputed. Pursuant to Congress's plenary power to exclude aliens, "for more than a hundred years" courts have treated decisions regarding the admission of aliens to the United States "as discretionary and not subject to judicial review for substantial evidence and related doctrines of administrative law." *Morfin v. Tillerson*, --F.3d--, 2017 WL 1046112, at *1 (7th

Cir. 2017) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 765–70 (1972) (collecting cases)). V92 travel documents for derivative asylees—like visas—are discretionary and issuance is not subject to review. 8 U.S.C. § 1158(b)(3)(A); 8 C.F.R. § 208.21(d); 9 FAM 203.6-8. Although *Mandel* recognized a potential exception for situations in which the denial of admission of an alien violates the constitutional rights of a United States citizen, Plaintiff is not a United States citizen. *See Mandel*, 408 U.S. at 765–70. Additionally, Plaintiff has not raised a colorable procedural due process claim and has no substantive due process rights in the outcome of the processing of his family's derivative asylum petitions overseas. *Cf. Kerry v. Din*, 135 S. Ct. 2129, 2131 (2015) (plurality opinion) ("There is no such constitutional right."); *see also, e.g.*, *Bangura v. Hansen*, 434 F.3d 487, 495-496 (6th Cir. 2006). Further, assuming the Order applies to Plaintiff's petitions, in light of the waiver provisions, Plaintiff's complaint is not ripe because it is entirely possible that Plaintiff's wife and daughter—if they are otherwise admissible—may obtain a waiver. Unless and until Plaintiff's relatives are denied a waiver, their ability or inability to enter—and thus Plaintiff's claimed injury—"rests upon 'contingent future events.'" *Texas v. United States*, 523 U.S. 296, 300 (1998); s*ee Lehn v. Holmes*, 364 F.3d 862, 867 (7th Cir. 2004) ("'Cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts.'") (quoting *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992)). Thus, the Court lacks subject matter jurisdiction over Plaintiff's claims challenging the President's exercise of delegated authority under 8 U.S.C. § 1182(f) to suspend the admission of aliens when he deems it is in the national interest. Finally, whether the Court has jurisdiction is a question of law.

2. Disputed. Plaintiff's action for declaratory and injunctive relief is not authorized where this Court lacks subject matter jurisdiction. "The declaratory judgment act does not give subject

matter jurisdiction." *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1387 (7th Cir. 1992) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 (1950)). Likewise, Federal Rules of Civil Procedure 57 (governing procedures for declaratory judgments) and 65 (governing procedures for restraining orders and injunctions) do not provide this Court with subject matter jurisdiction. Finally, whether the Court has jurisdiction is a question of law.

3. Disputed in part. Whether the Court has venue is a question of law.

Parties

4. Not disputed.

5. Not disputed.

6. Disputed in part. The Secretary of the Department of Homeland Security is responsible for oversight of officers who, among other responsibilities, enforce the Immigration and Nationality Act (INA). 6 U.S.C. §§ 111, 557.

7. Disputed in part. The Department of Homeland Security, among other responsibilities, shares obligations with other federal agencies concerning the enforcement of the INA. 6 U.S.C. §§ 111, 557.

8. Disputed in part. The correct name of the agency is the United States Citizenship and Immigration Services (USCIS).

9. Disputed in part. The correct name of the agency is the United States Citizenship and Immigration Services (USCIS).

10. Not disputed.

11. Disputed. In the case of Form I-730 Refugee/Asylee following-to-join petitions for beneficiaries located in Syria, petitions are processed by the USCIS Field Office in Amman, Jordan. If the beneficiaries are eligible to receive follow-to-join benefits as derivative asylees,

and a favorable exercise of discretion is warranted, the USCIS Amman Field Office will approve the I-730 petitions, and issue V92 travel documents known as transportation letters, which provide evidence that travel to the United States for the purpose of applying for admission as derivative asylees is permitted. *See* Defendants' Opposition, Ex. B ¶7. V92 travel documents are not visas, and they are not issued by the United States Department of State in Amman, Jordan. 8 C.F.R. § 208.21(d); 9 FAM 203.6-8.

Plaintiff's Derivative Asylum Petition

12. Not disputed.

13. Not disputed.

14. Disputed. See responses 15 and 16.

15. Disputed. The government did not confirm the Revoked Order barred the processing of all derivative asylum petitions. Rather, the government informed that on January 28, 2017, USCIS Nebraska Service Center (NSC) management ordered officers to halt processing of applications/petitions where the individual receiving benefits was from one of the seven listed countries, including Syria. ECF No. 23 at 5-6.

16. Disputed in part. Following the injunction, USCIS suspended application of sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Revoked Order for those receiving benefits from one of the seven listed countries, including Syria. ECF No. 23 at 6. Plaintiff's derivative asylum petitions, however, were apparently unaffected by the Revoked Order because, according to the USCIS file tracking system, both I-730 petitions were forwarded on January 28, 2017, from an NSC Congressional Liaison Specialist (who was handling an expedite request for these petitions from the Office of Senator Tammy Baldwin) to an I-730 officer. The tracking system reflects the I-730 officer received the files on Thursday, February 2, 2017.

17. Disputed. On March 14, 2017, the USCIS Amman Field Office received case packets LIN1619450142 and LIN1619450153 for interview, adjudication, and travel document processing. Defendants' Opposition, Ex. B ¶3. Petitions are not approved until there has been an interview and adjudication.

18. Disputed. Executive Order 13,780 of March 6, 2017 (the Order), does not preclude the interview of Plaintiff's spouse and child and, at least in cases where a waiver is appropriate, does not preclude the issuance of travel documents. Further, what the Order means is a question of law. Lastly, the final portion of the derivative asylum process is application for admission at a United States port of entry. *See* 8 U.S.C. § 1181(a).

19. Not disputed.

20. Disputed. The Order took effect on March 16, 2017, at which time it cancelled the Revoked Order of January 27, 2017, and replaced it with substantially revised provisions. *See Sarsour v. Trump*, No. 1:17-cv-00120, ECF No. 36 at 4, 21-23 (E.D. Va. Mar. 24, 2017); *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Mar. 16, 2017), ECF No. 163 at 5-6. The Order is significantly different from the Revoked Order. Unlike the Revoked Order, the Order did not go into immediate effect. *See* Order § 14. Whereas section 3(c) of Revoked Order suspended entry into the United States for ninety days for nationals of seven countries, section 2(c) of the Order omits any suspension for nationals of Iraq. *Compare* Revoked Order § 3(c), *with* the Order § 2(c). Section 6(a) of the Order suspends aspects of the United States Refugee Admissions Program for 120 days, but—unlike the Revoked Order—it eliminates the indefinite suspension of refugees from Syria and contains no preference for religious-persecution claims of religious minorities. *Compare* Revoked Order §§ 5(b), 5(c), 5(e), *with generally* the Order. In addition to these substantive distinctions, the scope of the Order's application is narrower

because it expressly does not apply to lawful permanent residents of the United States, to foreign nationals who are admitted or paroled into the United States on or after the effective date of this order, dual nationals of one of the six-designated countries listed under section 2, any foreign nationals traveling on a diplomatic visa, foreign nationals who have been granted asylum, refugees who have already been admitted into the United States, and other individuals who have been granted withholding from removal, advance parole, or protection under the Convention Against Torture. *See* the Order § 3(b). Further, the Order does not "limit the ability of an individual to seek asylum." *Id.* § 12(e). Finally, the Order offers a specific analysis of the conditions in each of the six-listed countries. *See id.* § 1(e). The Order also includes a robust wavier provision whereby waivers may be granted under certain circumstances to authorize the issuance of a visa to, or permit the entry of, a foreign national from whom entry is otherwise suspended by the Order. Accordingly, the Order is not an "updated" version of the Revoked Order of January 27, 2017, but explicitly canceled and replaced the Revoked Order.

21. Not disputed.

22. Disputed. The Order's central, explicit purpose is to enable the President and his Administration to assess whether current screening and vetting procedures are sufficient to detect terrorists seeking to infiltrate the United States. Order § 1(f). To facilitate that important review, the President ordered an assessment of screening procedures, including for certain foreign nationals from six nations previously "identified as presenting heightened concerns about terrorism and travel to the United States" by Congress or the prior Administration: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 1(a), (d)-(f).

23. Disputed. Nothing in the new Order requires the processing of derivative asylum petitions to stop. *See* Order.

24. Disputed. Nothing in the new Order requires the processing of derivative asylum petitions to stop. *See* Order. Even if the Order were applied to V92 travel documents, the Order contains waiver provisions that would also apply. Additionally, it is entirely speculative whether these discretionary petitions would be granted even if the Order had not issued. *See* 8 U.S.C. § 1158(b)(3)(A); 8 C.F.R. § 208.21(d); 9 FAM 203.6-8.

25. Not disputed.

26. Disputed in part. On March 9, 2017, and March 10, 2017, Defendants' counsel informed Plaintiff's counsel that consideration of his questions was ongoing and requested up-to-date information on the location of Plaintiff's family because it affected when and where they would be interviewed for their petitions.

27. Disputed. The Order does not bar processing of Plaintiff's beneficiary I-730 petitions. The Order also contains exception and waiver procedures that effect the scope of the Order's suspension of entry provisions.

28. Disputed in part. The Plaintiff's petitions are currently being processed by USCIS Amman, and his spouse and child are scheduled for an interview on April 20, 2017. Additionally, if the petitions are approved, Plaintiff's spouse and child will receive V92 travel documents, not visas.

29. Disputed. Paragraph 29 of Plaintiff's Statement of Proposed Record Facts inaccurately paraphrases the text of the Order, omitting language from section 3(b)(iii) regarding travel documents issued after the effective date of the Order. Additionally, the meaning of the Order is a question of law.

30. Disputed. Even if the Order were applied to V92 travel documents, the Order specifically identifies, as one example of circumstances in which a waiver may be appropriate, cases where a

"foreign national seeks to enter the United States to visit or reside with a close family member (e.g., spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted." Order § 3(c)(iv). The Order sets out that a waiver is considered as part of processing, thus any effect on processing time is speculative. Additionally, the meaning of the Order is a question of law.

31. Not disputed.

32. Disputed. Processing of Plaintiff's derivative petitions is continuing and would continue even if the Order were not enjoined, and his spouse and child are scheduled for interviews on April 20, 2017. Even if the Order were applied to V92 travel documents, the Order contains waiver provisions that would also apply. Defendants' Opposition, Ex. B ¶¶3, 5, 7.

33. Disputed. Plaintiff was separated from his family when he fled Syria in 2014, before promulgation of the Order. *See* Doe Decl. ¶13. Processing of Plaintiff's derivative petitions is ongoing, and Plaintiff's spouse and child are currently scheduled for interviews on April 20, 2017. Even if the Order were applied to V92 travel documents, the Order contains waiver provisions that would also apply. Defendants' Opposition, Ex. B ¶¶3, 5, 7.

34. Disputed. Processing of Plaintiff's derivative petitions is ongoing and Plaintiff's spouse and child are currently scheduled for interviews on April 20, 2017, in Amman, Jordan. They are not prevented from leaving Aleppo, Syria, because of the Order. Defendants' Opposition, Ex. B ¶¶3, 5, 7.

35. Disputed. The Order contains no provision blocking Plaintiff's spouse and child from leaving Syria. Processing of these petitions is ongoing and Plaintiff's spouse and child are scheduled for interviews in Amman, Jordan on April 20, 2017.

36. Defendants lack knowledge to confirm or deny this assertion.

37. Defendants lack knowledge to confirm or deny this assertion.

38. Disputed in part. Plaintiff has received notice of his spouse and child's scheduled interview with USCIS Amman, Jordan, on April 20, 2017.

Dated: March 29, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General

WILLIAM C. PEACHEY
Director

GISELA WESTWATER
Assistant Director

By: /s/ *Yamileth G. Davila*
YAMILETH G. DAVILA
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-0137
e-Mail: yamileth.g.davila@usdoj.gov

Attorneys for Defendants

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Andrei Vrabie, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: avrabie@hsgllp.com

Andrew Breidenbach, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: abreidenbach@hsgllp.com

Lauren Nicole Giudice, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: lgiudice@hsgllp.com

Matthew Noller, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue
26th Floor
New York, NY 10019
646-837-8381
Email: mnoller@hsgllp.com

Vincent Levy, Esq.
Holwell Shuster & Goldberg LLP
750 Seventh Avenue, 26th Floor
New York, NY 10019
646-837-5120
Email: vlevy@hsgllp.com

Lester A. Pines, Esq.
Cullen Weston Pines & Bach LLP
122 W. Washington Ave
Suite 900
Madison, WI 53703
608-251-0101
Fax: 608-251-2883
Email: Pines@cwpb.com

Tamara Beth Packard, Esq.
Cullen Weston Pines & Bach LLP
122 W. Washington Ave
Suite 900
Madison, WI 53703
608-251-0101x316
Fax: 608-251-2883
Email: tpackard@pinesbach.com

/s/
YAMILETH G. DAVILA
Senior Litigation Counsel
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Civil Action No. 17-cv-112-wmc

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR LEAVE TO FILE A RESPONSE TO PLAINTIFF'S STATEMENT OF PROPOSED FINDINGS OF FACT OUT OF TIME

Before the Court is Defendants' motion to file their Response to Plaintiff's Statement of Proposed Findings of Fact Out of Time. Having considered the motion, the Court HEREBY GRANTS the motion.

Dated: _____

_____
Hon. William M. Conley
United States District Judge