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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHN DOES, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-0178JLR

ORDER GRANTING MOTION  
FOR DISCOVERY AND  
DENYING MOTION TO  
DISMISS WITHOUT  
PREJUDICE

(RELATING TO BOTH CASES)

JEWISH FAMILY SERVICES, et  
al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-1707JLR

**I. INTRODUCTION**

Before the court are two motions: (1) Consolidated Plaintiffs Jewish Family Services of Seattle, Jewish Family Services of Silicon Valley, Allen Vaught, Afkab

1 Mohamed Hussein, John Does 1-3 and 7, and Jane Does 4-6's (collectively, "JFS  
2 Plaintiffs") motion to reinstate their request for limited discovery<sup>1</sup> (2d MFD (Dkt.  
3 # 131));<sup>2</sup> and (2) Defendants President Donald Trump, United States Department of State  
4 ("DOS"), Secretary of State Mike Pompeo, United States Department of Homeland  
5 Security ("DHS"), DHS Secretary Kirstjen M. Nielsen, United States Customs and  
6 Border Protection ("USCBP"), Commissioner of USCBP Kevin McAleenan, Field  
7 Director of the Seattle Field Office of USCBP Michele James, Office of the Director of  
8 National Intelligence, Director of National Intelligence ("DNI") Daniel Coats's  
9 (collectively, "Defendants") motion to dismiss and dissolve the preliminary injunction as  
10 moot (MTD (Dkt. # 145)).<sup>3</sup> Plaintiffs John Doe, Episcopal Diocese of Olympia, Joseph  
11 Doe, James Doe, Council on American Islamic Relations – Washington, Jack Doe, Jason  
12 Doe, and Jeffrey Doe (collectively, "Doe Plaintiffs") join JFS Plaintiffs' motion. (*See*  
13 5/7/18 Order (Dkt. # 141) (granting Doe Plaintiffs' motion for joinder).) The court has  
14 considered the motions, all submissions filed in support of and in opposition to both  
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17 <sup>1</sup> The motion that JFS Plaintiffs seek to reinstate is Plaintiffs' cross-motion for limited expedited discovery on compliance with the preliminary injunction. (*See* 1st MFD (Dkt. # 121).)

18 <sup>2</sup> The court consolidated this matter with cause number C17-1707JLR. (*See* 11/29/17 Order (Dkt. # 61).) All references in this order to the docket are to cause number C17-0178JLR unless the docket number is preceded by "17-1707." For example, if the docket number in the citation is "17-1707 Dkt. # 1," then the docket reference is to cause number C17-1707JLR.

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20 <sup>3</sup> Under Federal Rule of Civil Procedure 25(d), Secretary of State Pomeo is automatically substituted for former Secretary of State Rex Tillerson, DHS Secretary Nielsen is automatically substituted for Acting DHS Secretary Elaine Duke, and Commissioner McAleenan is now the Commissioner of USCBP rather than the Acting Commissioner. *See* Fed. R. Civ. P. 25(d). The court DIRECTS the Clerk to make these substitutions and corrections on the docket.

1 motions, the relevant portions of the record, and the applicable law. Being fully advised,<sup>4</sup>  
2 the court GRANTS JFS Plaintiffs and Doe Plaintiffs’ (collectively, “Plaintiffs”) motion  
3 for limited discovery as more fully described herein and DENIES Defendants’ motion to  
4 dismiss and dissolve the preliminary injunction as moot without prejudice to refile, if  
5 appropriate, following the conclusion of limited jurisdictional discovery.

## 6 II. BACKGROUND

### 7 A. The President’s First Three Executive Orders

8 On January 27, 2017, President Trump signed Executive Order 13769 (“EO1”),  
9 which suspended for 90 days entry into the United States for nationals of seven  
10 Muslim-majority countries; suspended the U.S. Refugee Admissions Program  
11 (“USRAP”) for 120 days; and indefinitely barred Syrian refugees from entering the  
12 United States.<sup>5</sup> Following a nationwide preliminary injunction against EO1, *see, e.g.*,  
13 *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the President rescinded EO1 and  
14 replaced it with Executive Order 13780 (“EO2”).<sup>6</sup> EO2 suspended for another 90 days  
15 the entry of nationals from six Muslim-majority countries and suspended all refugee  
16 admissions for 120 days. *See* EO2 §§ 2(c), 6(a). The Ninth Circuit enjoined EO2 before  
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18 <sup>4</sup> No party requests oral argument on either motion (*see* MTD at 1; 2d MFD at 1), and the  
19 court determines that oral argument is not necessary for its disposition of the motions, *see* Local  
20 Rules W.D. Wash. LCR 7(b).

21 <sup>5</sup> *See* Executive Order 13769, “Protecting the Nation from Foreign Terrorist Entry into  
the United States,” 82 Fed. Reg. 8,977 (Jan. 27, 2017) (“EO1”).

22 <sup>6</sup> *See* Executive Order 13780, “Protecting the Nation from Foreign Terrorist Entry into  
the United States,” 82 Fed. Reg. 13,209 (Mar. 6, 2017) (“EO2”).

1 it took effect. *See Hawaii v. Trump*, 859 F.3d 741, 757, 760 (9th Cir. 2017) (per curiam),  
2 *vacated as moot*, --- U.S. ---, 137 S. Ct. 377 (2017). However, the Supreme Court  
3 allowed Defendants to suspend the entry into the country of immigrants from the six  
4 Muslim-majority countries and to suspend USRAP, but only for immigrants and refugees  
5 without a “bone fide relationship” to a person or entity in the United States. *See Trump v.*  
6 *IRAP*, --- U.S. ---, 137 S. Ct. 2080, 2087-89 (2017).

7       When EO2’s 90-day ban on immigrants from six Muslim-majority countries  
8 expired, President Trump issued a Proclamation (“EO3”) that, among other things,  
9 indefinitely banned immigrants from seven countries—six of which are Muslim-majority  
10 countries.<sup>7</sup> On June 26, 2018, the Supreme Court held that President Trump permissibly  
11 exercised his “broad discretion” under 8 U.S.C. 1182(f) of the Immigration and  
12 Nationality Act (“INA”) in issuing EO3. *See Trump v. Hawaii*, --- U.S. ---, 138 S. Ct.  
13 2392, 2407-10 (2018).

#### 14 **B. The Fourth Executive Order & the Agency Memo**

15       In the meantime, on October 24, 2017, EO2’s 120-day suspension of refugee  
16 admissions expired. (*See* PI Order (Dkt. # 92) at 8.) On the same day, President Trump  
17 issued Executive Order 13815 (“EO4”), entitled “Resuming the United States Refugee  
18 Admissions Program with Enhanced Vetting Capabilities.”<sup>8</sup> Although EO4’s title

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20 <sup>7</sup> *See* Proclamation 9645, “Enhancing Vetting Capabilities and Processes for Detecting  
21 Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” 82 Fed.  
22 Reg. 45,161 (Sept. 24, 2017).

<sup>8</sup> *See* Executive Order 13815, “Resuming the United States Refugee Admissions Program  
with Enhanced Vetting Capabilities,” 82 Fed. Reg. 50,055 (Oct. 24, 2017).

1 indicates that refugee admissions have resumed, the accompanying memorandum—  
2 known as the “Agency Memo”—imposed another ban on certain categories of refugees.  
3 (*See* Lin Decl. (Dkt. # 46) ¶ 3, Ex. B (attaching a copy of the Agency Memo).)<sup>9</sup> The  
4 Agency Memo was dated one day before EO4, but was also released on October 24,  
5 2017. (*See id.*)

6 First, the Agency Memo suspended indefinitely “following-to-join” (“FTJ”)  
7 derivative refugees.<sup>10</sup> Every year, approximately 2,500 refugees in the United States are  
8 able to reunite with their immediate family members through the FTJ process. (Agency  
9 Memo at 2 n.1.) The Agency Memo states that most FTJ refugee applicants do not  
10 currently undergo the same security procedures as the principal refugee who has already  
11 resettled in the United States. (*Id.* at 2-3.) The Secretaries of DOS and DHS and the DNI  
12 determined that FTJ refugees should not be admitted to the United States until additional  
13 screening procedures were in place. (*Id.* at 3.)

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17 <sup>9</sup>An addendum attached to the Agency Memo, entitled “Addendum to Section 6(a)  
18 Memorandum,” refers to the review of USRAP directed by Section 6(a) of EO2. (*See* Burman  
19 Decl. (17-1707 Dkt. # 43) ¶ 3, Ex. B (attaching “Agency Memo Addendum”).)

20 <sup>10</sup> Under the INA, subject to numerical limits that the President sets annually, the  
21 Secretary of DHS may admit “any refugee who is not firmly resettled in any foreign country, is  
22 determined to be of special humanitarian concern to the United States, and is admissible (except  
as otherwise provided under ([8 U.S.C. § 1157(c)(3)]) as an immigrant.” 8 U.S.C. § 1157(c)(1).  
Refugees admitted under this provision are “principal refugees.” *See* 8 C.F.R. § 207.7(a).  
“Derivative refugees” are the spouses and unmarried minor children of an admitted principal  
refugee. *See id.* When derivative refugees travel to join a principal refugee more than four  
months after the principal refugee’s admission, they are FTJ derivative refugees, rather than  
“accompanying” derivative refugees. *See id.*

1 Second, the Agency Memo suspended for at least 90-days the entry of refugees  
2 who are “nationals of, and stateless persons who last habitually resided in, 11 particular  
3 countries previously identified as posing a higher risk to the United States through their  
4 designation on the Security Advisory Opinion (SAO) list.” (*Id.* at 2-3; *see also* Agency  
5 Memo Addendum at 1.) The Agency Memo does not identify the countries designated  
6 on the SAO list, but they are believed to be Egypt, Iran, Iraq, Libya, Mali, North Korea,  
7 Somalia, South Sudan, Sudan, Syria, and Yemen. (*See* PI Order at 10-11 n.6; 11/16/17  
8 Smith Decl. (17-1707 Dkt. # 44) ¶ 3.) The Agency Memo required DOS and DHS to  
9 “conduct a review and analysis” of USRAP for refugees from SAO countries for an  
10 additional 90 days—notwithstanding the agencies’ previous review of USRAP pursuant  
11 to EO1 and EO2. (*See id.*) In addition, the Agency Memo diverted resources dedicated  
12 to processing refugees who are citizens of (or stateless persons who last resided in) SAO  
13 countries and reallocated those resources to processing refugee applicants from non-SAO  
14 countries. (*Id.*) Although the review was to last for 90 days, Defendants conceded in  
15 oral argument that the Agency Memo does not direct the government to resume  
16 processing and admitting SAO refugees after the 90-day review is complete. (*See* Tr. of  
17 12/21/17 Hr’g (Dkt. # 113) at 38:1-5 (“I mean, perhaps the government will conclude at  
18 the end of the 90 days that refugee admissions may resume in March, or perhaps the

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1 government will decide that further security measures are needed for certain countries.  
2 We just don't know.”.)<sup>11</sup>

### 3 **C. The Preliminary Injunction**

4 JFS Plaintiffs filed suit and Doe Plaintiffs amended their complaint to challenge  
5 the Agency Memo's suspension of FTJ and SAO refugee admissions (*see* TAC (Dkt.  
6 # 42); Compl. (17-1707 Dkt. # 1)); and Plaintiffs moved for a preliminary injunction  
7 blocking those provisions of the Agency Memo (*see* Doe PI Mot. (Dkt. # 45); JFS PI  
8 Mot. (17-1707 Dkt. # 42)). On November 29, 2017, the court consolidated the two  
9 actions. (*See* 11/29/17 Order.) On December 23, 2017, the court granted both JFS  
10 Plaintiffs' and Doe Plaintiffs' motions and enjoined Defendants from enforcing (1)  
11 “those provisions of the Agency Memo that suspend the processing of FTJ refugee  
12 applications or suspend the admission of FTJ refugees into the United States,” and (2)  
13 “those provisions . . . that suspend or inhibit, including through the diversion of  
14 resources, the processing of applications or the admission into the United States of  
15 refugees from SAO countries.” (PI Order at 64-65.) The court, however, limited its  
16 preliminary injunction to refugees “with a bona fide relationship to a person or entity  
17 within the United States.” (*Id.* at 65.)

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20 <sup>11</sup> In response to Plaintiffs citing this portion of the record, Defendants contend that they  
21 “have never suggested that there was any suspension apart from the 90-day SAO  
22 de[-]prioritization that the [c]ourt enjoined.” (Def. MTD Reply (Dkt. # 150) at 9 n.3.) This  
statement misses the mark. The salient point is not whether the suspension was initially linked to  
the 90-day review, but rather whether there is any direction in the Agency Memo to resume  
processing and admitting SAO refugees at the end of the 90-day review. Defendants' admission  
confirms that there was not.

1           Within a few days, Defendants moved for an “emergency” stay of the injunction  
2 pending appeal. (MFS (Dkt. # 95).) In that motion, Defendants narrowly interpreted the  
3 court’s injunction. (*See id.* at 4-6.) Defendants asserted that they were not required to  
4 undo any actions taken or decisions made prior to December 23, 2017, to implement the  
5 SAO or FTJ suspensions. *See id.* On January 9, 2018, the court denied Defendants’  
6 motion (1/9/18 Order (Dkt. # 106) at 7-16) and rejected their cramped interpretation of  
7 the court’s preliminary injunction (*id.* at 5-7). The court admonished Defendants for  
8 attempting “to unilaterally modify the preliminary injunction” and ordered them to  
9 “restore the status quo prior to the issuance of the Agency Memo with respect to the  
10 processing of applications from FTJ refugees and refugees from SAO countries.” (*Id.* at  
11 5-6.) On January 4, 2018, Defendants filed a notice of appeal concerning the court’s  
12 preliminary injunction. (NOA (Dkt. # 99).)

13 **D. Defendants’ Notices of Compliance with the Preliminary Injunction**

14           On January 19, 2018, Defendants filed a notice of compliance with the court’s  
15 preliminary injunction. (*See* 1/19/18 Notice (Dkt. # 114).) The notice described certain  
16 steps Defendants had taken in response to the court’s orders. (*See generally id.*) The  
17 notice referenced guidance that Defendants had sent to DOS and USCIS personnel in late  
18 December 2017 and early January 2018 “directing their personnel to comply with the  
19 injunction.” (*Id.* at 2-3.) However, Defendants have not produced copies of the guidance  
20 they sent (*see* JFS MTD Resp. (Dkt. # 146) at 4), and Defendants sent all of the guidance  
21 referenced in their January 19, 2018, notice prior to the court’s January 9, 2018, order, in  
22 which the court rejected Defendants’ narrow interpretation of the preliminary



1 injunction.<sup>12</sup> (*See id.*; *see also* 1/9/18 Order at 5-6). Finally, the notice described  
 2 Defendants’ efforts to comply with the preliminary injunction in the scheduling of  
 3 “circuit rides” through which USCIS officers travel to locations worldwide to interview  
 4 refugee applicants.<sup>13</sup> (1/19/18 Notice at 3-5.)

5 On January 31, 2018, Defendants filed a second notice announcing that they had  
 6 completed the 90-day SAO refugee review on January 22, 2018, and they expected to  
 7 finish implementing the additional procedures for FTJ refugees referenced in the Agency  
 8 Memo on or about February 1, 2018. (*See* 1/31/18 Notice (Dkt. #119) at 1-2.) In the  
 9 notice, Defendants stated that they “do not understand the preliminary injunction . . . to  
 10 prohibit [them] from implementing these enhancements and recommendations.” (*Id.* at  
 11 1.) Defendants also asserted that as a result of these two events—the completion of the  
 12 SAO refugee review and the near-completion of enhanced procedures for FTJ refugee

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 15 <sup>12</sup> The guidance Defendants sent included: (1) guidance issued on December 23, 2017,  
 16 by the Bureau of Consular Affairs to consular posts overseas (1/19/18 Gauger Decl. (Dkt.  
 17 # 114-1) ¶ 3); (2) guidance issued on December 24, 2017, by the Office of Admissions at the  
 18 Bureau of Population, Refugees, and Migration (“PRM”) to implementing partners at  
 19 Resettlement Support Centers (“RSCs”) overseas (*id.* ¶ 2); (3) instructions issued on December  
 20 24, 2017, by the Refugee, Asylum and International Operations (“RAIO”) Directorate at USCIS  
 21 to RAIO officers ordering them to release all FTJ cases previously on hold and process those  
 22 cases under procedures in effect prior to the Agency Memo (1/19/18 Higgins Decl. (Dkt.  
 # 114-2) ¶ 2); and (4) a January 4, 2018, DOS cable with guidance on FTJ refugees sent to all  
 diplomatic and consular posts (1/19/18 Gauger Decl. ¶ 3).

<sup>13</sup> The efforts related to circuit rides included: (1) an inquiry on December 26, 2017,  
 from the Office of Admissions at PRM to the RSCs, which led to additional interviews of SAO  
 nationals during second-quarter circuit rides (1/19/18 Higgins Decl. ¶ 5; 1/19/18 Gauger Decl. ¶  
 5); and (2) plans to add locations to third-quarter circuit rides where large SAO populations are  
 ready for interviews (1/19/18 Gauger Decl. ¶ 7; 1/19/18 Higgins Decl. ¶ 7).

1 processing—Plaintiffs’ claims concerning the Agency Memo would “soon be moot.” (*Id.*  
2 at 2.)

3 **E. Secretary Nielsen’s Memorandum**

4 On or about January 29, 2018, DHS Secretary Nielsen issued a memorandum (“the  
5 Nielsen Memo”) announcing three “determinations” she had made based on the DHS’s  
6 SAO review as ordered by the Agency Memo. (*See* MTD, Ex. 2 (Dkt. # 145-2) (“Nielsen  
7 Memo”) at 2-3.) She determined that (1) “[a]dditional screening and vetting” are  
8 required for “certain nationals of high-risk countries”; (2) the USRAP “should continue  
9 to be administered in a risk-based manner”; and (3) the “SAO list and selection criteria  
10 should be reviewed and updated.” (*Id.*) The Nielsen Memo also stated that “[t]he 90-day  
11 review of SAO countries, as provided in the . . . [Agency Memo], is no longer in effect  
12 by its terms, and the prioritization set forth in the Memorandum is not hereby renewed.”  
13 (*Id.* at 4.)

14 Defendants produced a redacted copy of the Nielsen Memo to Plaintiffs on  
15 February 8, 2018. (Keaney Decl. (Dkt. # 122) ¶¶ 3-4, Exs. B-C.) Plaintiffs requested  
16 that Defendants reconsider the redaction, and if they refused, to state the basis for the  
17 redaction. (*Id.* ¶ 5, Ex. D.) On February 13, 2018, Defendants refused to reconsider the  
18 redaction and asserted that the redaction was based on the law enforcement privilege.  
19 (*Id.* ¶ 6, Ex. E.)

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1 **F. Plaintiffs' Evidence of Non-Compliance with the Preliminary Injunction**

2 1. Communications from the DOS

3 Plaintiffs submit email communications from DOS that they contend contradict  
 4 Defendants' assertions of compliance with the preliminary injunction. (*See* Doe MTD  
 5 Resp. (Dkt. # 147) at 10-11.) First, on January 8, 2018, Congresswoman Pramila  
 6 Jayapal's Manager for Constituent Services sent an email to PRM on behalf of a  
 7 constituent to inquire about the refugee petitions of the constituent's mother and six  
 8 siblings. (5/4/18 Mohamed Decl. (Dkt. # 139) ¶ 3.) On January 12, 2018, the DOS  
 9 Congressional Liaison responded that the case had been "conditionally approved for  
 10 refugee resettlement by DHS/USCIS in Nov[ember] 2015," but was now "on temporary  
 11 hold following the issuance of an Executive Order on October 24, 2017[,] that directed  
 12 [DOS] and DHS to review the refugee processing procedures for nationals of 11  
 13 countries, which includes this case." (*Id.* ¶ 4, Ex. A.)

14 Second, on April 4, 2018, the same DOS Congressional Liaison<sup>14</sup> wrote to a staff  
 15 member of Congressman Mark Vessey's office that the refugee about whom the staff  
 16 member had inquired had been fully approved in September 2017. (5/3/18 Doe 1 Decl.  
 17 (Dkt. # 132) ¶ 3, Ex. A.)<sup>15</sup> However, the Liaison continued that "USRAP was unable to  
 18 complete final processing of the case prior to the Oct[ober] 24, 2017[,] Executive Order

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20 <sup>14</sup> Defendants represent that the same DOS employee authored both the January 12, 2018,  
 21 and April 4, 2018, emails. (Def. 2d MFD Resp. (Dkt. # 142) at 4.)

22 <sup>15</sup> Mr. Doe 1's declaration contains two paragraphs numbered "3." (*See* 5/3/18 Doe 1  
 Decl. at 2.) The paragraph number three referenced above is the second such paragraph.

1 directing the temporary suspension of the movement of nationals from eleven countries,  
2 including Iraq, until a further review of the procedures for processing these cases was  
3 completed.” (*Id.*) The Liaison also stated that the “suspension ended on Jan[uary] 22,  
4 2018” (*id.*), which is the same day Defendants state in their January 31, 2018, notice to  
5 the court that they completed the 90-day SAO refugee review (*see* 1/31/18 Notice at 1-2).

6 Those DOS communications to two different Congressional offices make no  
7 reference to the preliminary injunction or any implementation thereof. (*See id.*; 5/4/18  
8 Mohamed Decl. ¶ 4, Ex. A.) In response, Defendants submit the declaration of Kelly A.  
9 Gauger, the Acting Director of the Admissions Office of PRM of DOS. (*See* 5/14/18  
10 Gauger Decl. (Dkt. # 142-1).) She reiterates that “the requirements of the December 23,  
11 2017, [preliminary] injunction . . . were immediately sent to PRM’s implementing  
12 partners at the [RSCs] overseas so that the RSCs could resume processing . . . applicants  
13 within the scope of the injunction at the start of the next business day.” (*Id.* ¶ 5.) She  
14 also states that the representations in the DOS Congressional Liaison’s emails “are  
15 incorrect and the result of inadvertent error.” (*Id.* ¶ 6.) Defendants do not, however,  
16 submit a declaration from the DOS Congressional Liaison himself explaining the content  
17 of his emails, his sources, or his methods of inquiry. (*See generally* Dkt.)

## 18 2. Statistical Evidence

19 JFS Plaintiffs also submit statistical evidence indicating a precipitous drop in  
20 refugee admissions during 2018 despite the court’s preliminary injunction and order  
21 requiring Defendants to “restore the status quo prior to the issuance of the Agency Memo  
22 with respect to the processing of applications from FTJ refugees and refugees from SAO

1 countries.” (See 1/19/18 Order at 5; *see generally* PI Order.) For example, in the first  
2 four months following the preliminary injunction, the admission of refugees from SAO  
3 countries remained at a standstill. Although in fiscal years 2016 and 2017 refugees from  
4 SAO countries comprised 43.5 percent of the refugee admissions under the USRAP (*see*  
5 1/29/18 Smith Decl. (Dkt. # 118) ¶ 5), between October 1, 2017, and April 1, 2018, only  
6 4.2 percent of the total refugees admitted under the USRAP were from SAO countries  
7 (*see* 5/3/18 Smith Decl. (Dkt. # 133) ¶ 4). Further, between December 23, 2017—the  
8 date of the preliminary injunction—and April 1, 2018, the percentage of refugees from  
9 SAO countries dropped even further. (*See id.* ¶ 5). Following the court’s preliminary  
10 injunction, the percentage of SAO nationals dropped to just 2.7 percent of all refugee  
11 admissions.<sup>16</sup> (*See id.*)

12 Defendants do not dispute these statistics but rather attribute them to (1) the  
13 effects of the Agency Memo prior to the preliminary injunction and (2) the government’s  
14 enhanced screening and vetting protocols implemented as a result of the 120-day review  
15 authorized by EO2 and the 90-day review authorized by the Agency Memo. (*See*  
16 *generally* Def. 2d MFD Resp. at 5-6.)

### 17 3. Defendants’ Record of Compliance with Prior Preliminary Injunctions

18 JFS Plaintiffs also point to the government’s record of compliance with other  
19 preliminary injunctions issued in response to EO1. (*See* JFS MTD Resp. (Dkt. # 146) at

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22 <sup>16</sup> Doe Plaintiffs represent that there is no publicly available data on FTJ refugee admissions. (Doe MTD Resp. (Dkt. # 147) at 12.)

1 12 n.9.) On January 18, 2018, the Office of the Inspector General (“OIG”) of DHS  
2 issued a report regarding DHS’s implementation of EO1 and CPB’s response to various  
3 court orders enjoining the implementation of EO1. *See* Office of the Inspector Gen.,  
4 Dep’t of Homeland Sec., *DHS Implementation of Executive Order # 13769* (Jan. 18,  
5 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf>.

6 The report “highlights” its findings as follows:

7       Regarding [CBP’s] compliance with multiple federal court orders that were  
8 issued between the January 27, 2017 release of [EO1] and the February 3,  
9 2017 nation-wide injunction in *Washington v. Trump*, we found that at the  
10 ports of entry, CBP largely complied with court orders, albeit with some  
11 delay and confusion as to the scope of some orders. But while CBP complied  
with court orders at U.S. ports of entry as to travelers who had already  
arrived, CBP was aggressive in preventing affected travelers from boarding  
aircraft bound for the United States. We believe those actions violated two  
separate court orders that enjoined CBP from this activity.

12 *Id.*

13       Defendants do not dispute the contents of the OIG’s report, but instead argue that  
14 they are entitled to a presumption that they have discharged their duties properly. (*See*  
15 Def. MTD Reply at 7 n.2.) Defendants also highlight that the OIG “did not substantiate  
16 any claims of misconduct on the part of CPB Officers . . . at the ports of entry,” and that  
17 “at the port of entry, CPB largely complied with court orders, albeit with some delay and  
18 confusion as to the scope of some orders.” (*See id.*)

#### 19 **G. Remand from the Ninth Circuit**

20       On February 6, 2018, following the completion of the 90-day SAO refugee review  
21 on January 22, 2018, and the implementation of additional procedures for FTJ refugees  
22 on or about February 1, 2018 (*see* 1/31/18 Notice at 1-2), Defendants moved to dismiss

1 as moot their appeal (and Plaintiffs' cross-appeal) in the Ninth Circuit. *See Doe v.*  
2 *Trump*, No. 18-35026 (9th Cir.), Dkt. # 24 at 2. On March 29, 2018, the Ninth Circuit  
3 denied Defendants' motion to dismiss and instead granted Plaintiffs' request to remand  
4 the consolidated case so that this court could address the issue of mootness in the first  
5 instance. (3/29/18 9th Cir. Ord. (Dkt. # 126); 9th Cir. Mandate (Dkt. # 144).)

6 While their appeal was pending, Defendants filed a motion to stay the proceedings  
7 here. (*See* MTS (Dkt. # 110).) Plaintiffs responded with a motion seeking limited  
8 discovery on Defendants' compliance with the preliminary injunction. (*See* 1st MFD.)  
9 In response to the Ninth Circuit's remand order, the court indicated that it was likely to  
10 deny as moot Defendants' motion to stay and removed both that motion and Plaintiffs'  
11 motion for limited discovery from the court's calendar. (4/10/18 Order (Dkt. # 128) at 2.)  
12 The court also ordered the parties to file a joint status report proposing how the court  
13 should proceed on remand to address the issue of mootness. (*Id.* at 3.) In accordance  
14 with their joint status report (JSR (Dkt # 129)), JFS Plaintiffs filed their present motion to  
15 reinstate their request for limited discovery on compliance (*see* 2d MFD), in which Doe  
16 Plaintiffs joined (*see* 5/7/18 Order), and Defendants filed their motion to dismiss based  
17 on mootness (*see* MTD). The court now considers both motions.

### 18 **III. ANALYSIS**

#### 19 **A. Legal Standard**

20 A party may move to dismiss an action for lack of subject matter jurisdiction.  
21 Fed. R. Civ. P. 12(b)(1). A federal court does not have jurisdiction "to give opinions  
22 upon moot questions or abstract propositions, or to declare principles or rules of law

1 | which cannot affect the matter in issue in the case before it.” *Church of Scientology of*  
2 | *Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653  
3 | (1895)). Thus, mootness deprives federal courts of subject matter jurisdiction because  
4 | federal courts are empowered to hear only cases and controversies. U.S. Const. art. III  
5 | § 2; *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

6 |       “A claim is moot if it has lost its character as a present, live controversy.”  
7 | *Rosemere Neighborhood Ass’n v. U.S. Env’tl. Prot. Agency*, 581 F.3d 1169, 1172-73 (9th  
8 | Cir. 2009) (quoting *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th  
9 | Cir. 1997)). To determine mootness, “the question is not whether the precise relief  
10 | sought at the time the application for an injunction was filed is still available. The  
11 | question is whether there can be *any* effective relief.” *NW Env’tl. Def. Ctr. v. Gordon*,  
12 | 849 F.2d 1241, 1244-45 (9th Cir. 1988) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403  
13 | (9th Cir. 1986)). If a course of action is mostly completed but “changes can still be made  
14 | to help alleviate any adverse effects,” the case is not moot. *Tyler v. Cuomo*, 236 F.3d  
15 | 1124, 1137 (9th Cir. 2000). A case becomes moot “only when it is impossible for a court  
16 | to grant any effectual relief whatever to the prevailing party.” *Chafin v. Chafin*, 133 S.Ct.  
17 | 1017, 1023 (2013) (citation omitted). The party alleging mootness bears a “heavy”  
18 | burden to establish that the court can provide no effective relief. *See Karuk Tribe of Cal.*  
19 | *v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v.*  
20 | *Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

21 |       When a party requests discovery to respond to a motion to dismiss on  
22 | jurisdictional grounds, the court ordinarily should grant discovery “where pertinent facts



1 bearing on the question of jurisdiction are controverted or where a more satisfactory  
2 showing of the facts is necessary.” *Laub v. U.S. Dep’t of the Interior*, 342 F.3d 1080,  
3 1093 (9th Cir. 2003) (quoting *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d  
4 535, 540 (9th Cir. 1986)) (discussing discovery in the context of standing). On the other  
5 hand, “a refusal to grant discovery to establish jurisdiction is not an abuse of discretion  
6 when ‘it is clear that further discovery would not demonstrate facts sufficient to  
7 constitute a basis for jurisdiction.’” *Id.* (quoting *Wells Fargo & Co. v. Wells Fargo*  
8 *Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

9 “It is well-established that ‘[t]he burden is on the party seeking to conduct  
10 additional discovery to put forth sufficient facts to show that the evidence sought exists.’”  
11 *Gager v. United States*, 149 F.3d 918, 922 (9th Cir. 1998) (quoting *Conkle v. Jeong*, 73  
12 F.3d 909, 914 (9th Cir. 1995)). However, a plaintiff seeking jurisdictional discovery  
13 need not “first make a prima facie showing that jurisdiction actually exists.” *Hall v.*  
14 *United States*, No. 16-CV-02395-BAS-RBB, 2017 WL 3252240, at \*4 (S.D. Cal. July 31,  
15 2017) (quoting *NuboNau, Inc. v. NB Labs, Ltd.*, No. 10-cv-2631-LAB-BGS, 2011 WL  
16 5237566, at \*3 (S.D. Cal. Oct. 31, 2011)). “Such a showing is necessary to survive a  
17 motion to dismiss, and ‘[i]t would . . . be counter intuitive to require a plaintiff, *prior* to  
18 conducting discovery, to meet the same burden that would be required in order to defeat a  
19 motion to dismiss.’” *NuboNau, Inc.*, 2011 WL 5237566, at \*3 (quoting *Orchid*  
20 *Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 673 (S.D. Cal. 2001)).

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1 **B. Preliminary Motion to Strike**

2 Although Defendants do not agree that limited discovery is warranted, Defendants  
3 did not object to Plaintiffs moving to reinstate their prior motion for discovery. (*See JSR*  
4 at 1-2; *see also* Def. 2d MFD Resp. at 1, 3.) However, Defendants object that Plaintiffs  
5 seek “far more than . . . reinstatement,” and improperly “attempt to supplement a  
6 fully-briefed motion without leave of court.” (Def. 2d MFD Resp. at 1; *see also id.* at 3-  
7 4.) Defendants ask the court to strike Plaintiffs’ motion for this reason. (*Id.* at 1 (“The  
8 [c]ourt should strike JFS Plaintiffs’ anomalous filing on procedural grounds.”).)

9 The court declines to strike Plaintiffs’ motion. “Motions to strike are disfavored  
10 and ‘should not be granted unless it is clear that the matter to be stricken could have no  
11 possible bearing on the subject matter of the litigation.’” *Harper v. Collection Bureau of*  
12 *Walla Walla, Inc.*, No. C06-1605-JCC, 2007 WL 4287293, at \*3 (W.D. Wash. Dec. 4,  
13 2007) (quoting *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal.  
14 1991)). In their motion, Plaintiffs bring to the court’s attention evidence that came to  
15 light only after Plaintiffs filed the underlying discovery motion. (*See* 2d MFD at 3-4  
16 (discussing a recently discovered email from DOS Congressional Liaison and statistical  
17 evidence from the first half of 2018).) As discussed below, that evidence is relevant to  
18 the issues before the court. *See infra* § III.C. Further, Defendants suffer no prejudice  
19 because they have had a full opportunity to respond to the new material in Plaintiffs’  
20 motion. (*See generally* Def. 2d MFD Resp.); *Liberty Mut. Fire Ins. Co. v. City of Seattle*,  
21 No. C15-1039-JCC, 2016 WL 5792691, at \*1 n.1, 2 n.2 (W.D. Wash. Oct. 4, 2016)  
22 (denying the plaintiff’s request to strike an argument and “new evidence” on grounds that

1 there was no prejudice to the plaintiffs in considering either the evidence or the  
2 argument). Accordingly, the court denies Defendants' request to strike Plaintiffs'  
3 motion.<sup>17</sup>

#### 4 **C. The Parties' Motions**

5 Defendants argue that the Agency Memo provisions at issue expired while the  
6 cross-appeals of the court's preliminary injunction were pending. (MTD at 1-2.)  
7 Accordingly, they argue that the court should dissolve the preliminary injunction and  
8 dismiss as moot Plaintiffs' underlying claims concerning the Agency Memo. (*Id.*)  
9 Specifically, Defendants argue that both the 90-day SAO review and the period to  
10 implement additional screening procedures for FTJ refugee applicants are over. (*Id.* at 4.)  
11 They also argue that the "temporary guidance that was the subject of the injunction has  
12 been superseded by [the Nielsen Memo]." (*Id.*)

13 With regard to the SAO provisions, Defendants assert that the Agency Memo  
14 "makes plain" that the suspension<sup>18</sup> of SAO refugee applications was only to occur

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16 <sup>17</sup> Doe Plaintiffs also move to strike Defendants' argument that President Trump should  
17 be dismissed as a named defendant. (*See* Doe Surreply (Dkt. # 152); Def. MTD Reply at 16-17.)  
18 However, as discussed below, the court declines to reach the substance of Defendants' motion to  
dismiss until after Plaintiffs conduct limited discovery, *see infra* § III.C, and therefore, the court  
need not resolve Doe Plaintiffs' motion to strike.

19 <sup>18</sup> The parties dispute whether the Agency Memo results in a "suspension" or a  
20 "de-prioritization" of SAO refugee admissions. (*Compare* JFS MTD Resp. (Dkt. # 146) at 2  
21 (describing the Agency Memo's effect on SAO refugee admissions as a "de-prioritization"), *with*  
22 MTD at 1 ("The Agency Memo . . . directs a process that results in a suspension of the  
processing and admission of SAO refugees.") The Agency Memo states that during DOS and  
DHS's "detailed threat analysis and review" for nationals from SAO countries, the agencies "will  
temporarily prioritize refugee applications from other non-SAO countries" and will "take  
resources that may have been dedicated to processing [SAO refugees] and . . . will reallocate

1 during the SAO review period. (*Id.* at 9.) The 90-day review period expired on January  
2 22, 2018—exactly 90 days following the Agency Memo’s October 23, 2017, issuing date.  
3 (*Id.*) One week later, DHS Secretary Nielsen issued a memorandum to USCIS setting  
4 forth her determinations following the 90-day SAO review, which included “certain  
5 screening and vetting enhancements” that USCIS would implement. (*See* Nielsen Memo  
6 at 2-3.) She also stated that “the prioritization set forth in the [Agency Memo] is not  
7 hereby renewed.” (*Id.* at 3.) Thus, Defendants assert that the passage of the 90-review  
8 period, along with the Nielsen Memo, moots JFS Plaintiffs’ claims concerning the  
9 Agency Memo. (MTD at 9.)

10 Defendants also assert that the FTJ implementation period concluded on February  
11 1, 2018. (*Id.* at 10.) On that day, “USCIS and [DOS] implemented new procedures to  
12 ensure that all individuals admitted as refugees receive similar, thorough vetting—  
13 whether they are principal refugees, accompanying family members, or [FTJ] refugees.”  
14 (*Id.* (quoting *I-730, Refugee/Asylee Relative Petition*, U.S. Citizenship & Immigration  
15 Serv., <https://www.uscis.gov/i-730> (last updated June 18, 2018)); *see also* 5/14/18  
16 Higgins Decl. (Dkt. # 142-2) ¶ 8.) Defendants argue that with the enhanced screening  
17 mechanisms in place, the processing of FTJ refugee applications and admissions would

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them to process applicants from non-SAO countries.” (Agency Memo at 2.) Further, “[w]hile  
the review is underway,” the DHS Secretary “will admit on a case-by-case basis only [SAO]  
refugees whose admission is deemed to be in the national interest and poses no threat to the  
security or welfare of the United States.” (*Id.*) Whether this action is called a “de-prioritization”  
or a “suspension” of SAO refugee admissions, the result was the same—a precipitous fall in the  
number of SAO refugee admissions following the Agency Memo’s implementation. *See supra* §  
II.F.2.

1 have resumed by February 1, 2018, even without the court’s preliminary injunction. (*Id.*)  
2 Defendants argue that the Agency Memo expressly states that the government “will  
3 resume admission of [FTJ] refugees once those enhancements have been implemented,”  
4 and accordingly, Doe Plaintiffs’ claims are now moot. (*Id.* at 11 (quoting Agency Memo  
5 at 3).)

6 JFS and Doe Plaintiffs respond that Defendants fail to carry their burden of  
7 establishing mootness. (JFS MTD Resp. at 7-13; Doe MTD Resp. (Dkt. # 147) at 7-14.)  
8 Plaintiffs also argue that their claims fall within two well-established exceptions to the  
9 mootness doctrine: (1) voluntary cessation;<sup>19</sup> and (2) capable of repetition yet evading  
10 review.<sup>20</sup> (JFS MTD Resp. at 13-17; Doe MTD Resp. at 14-22.) Finally, both sets of

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13 <sup>19</sup> Under the voluntary cessation exception to mootness, a case is not moot if a challenged  
14 policy is “abandoned voluntarily and might reasonably recur.” *United States v. Brandau*, 578  
15 F.3d 1064, 1068 (9th Cir. 2009); *see also Knox v. Serv. Emps. Int’l Union Local 1000*, 567 U.S.  
16 298, 307 (2012) (“The voluntary cessation of challenged conduct does not ordinarily render a  
17 case moot because a dismissal for mootness would permit a resumption of the challenged  
18 conduct as soon as the case is dismissed.”). The case may nevertheless be moot, however, if the  
19 record shows (1) “with assurance that there is no reasonable expectation” that the alleged  
violation can recur, and (2) “interim relief or events have completely and irrevocably eradicated  
the effects of the alleged violation.” *Brandau*, 578 F.3d at 1068 (quoting *Smith v. Univ. of*  
*Wash., Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000)). “The ‘heavy burden of persuading’ the  
court that the challenged conduct cannot reasonably be expected to start up again lies with the  
party asserting mootness.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528  
U.S. 167 (2000) (quoting *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199,  
203 (1968) (alterations omitted)).

20 <sup>20</sup> This exception to mootness “applies where ‘(1) the challenged action is in its duration  
21 too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable  
22 expectation that the same complaining party will be subject to the same action again.” *Fed.*  
*Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v.*  
*Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks and brackets omitted)).

1 Plaintiffs also argue in their responses and in their discovery motion that they are entitled  
2 to jurisdictional discovery prior to court considering Defendants’ mootness argument.  
3 (JFS MTD Resp. at 17-18; Doe MTD Resp. at 22; *see generally* 2d MFD.)

4 The court addresses the last issue—Plaintiffs’ demand for jurisdictional  
5 discovery—first. The court does so because if such discovery is warranted, the court  
6 should defer considering the substance of Defendants’ motion and Plaintiffs’ responses  
7 thereto until such time as that discovery is complete.<sup>21</sup> Plaintiffs assert that evidence they  
8 have uncovered so far “raise[s] serious concerns about Defendants’ compliance with th[e]  
9 [c]ourt’s injunction.” (2d MFD at 2-3.) This evidence includes two emails from a DOS  
10 Congressional Liaison indicating that the refugee applications, about which two separate  
11 Congressional offices had inquired, although “approved,” had not been processed due to  
12 the suspensions directed by the Agency Memo. (*See* 5/4/18 Mohamed Decl. ¶¶ 3-4, Ex.  
13 A; 5/3/18 Doe 1 Decl. ¶ 3, Ex. A); *see supra* § II.F.1. Neither email, sent in January and  
14 April, 2018, respectively, refers to the court’s preliminary injunction barring enforcement  
15 of these provisions of the Agency Memo. (*See id.*) Although the DOS Congressional  
16 Liaison had been informed about the October 24, 2017, Agency Memo, he was  
17 apparently not informed about the December 23, 2017, preliminary injunction. In

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20 <sup>21</sup> Defendants argue that “[a]ny consideration of discovery should . . . be deferred until  
21 after this [c]ourt adjudicates whether this case is moot and whether the [c]ourt has jurisdiction.  
22 (Def. 2d MFD Resp. at 2.) Defendants’ assertion places the proverbial cart before the horse. If  
21 Defendants were correct, jurisdictional discovery would never be warranted. The Ninth Circuit’s  
22 decision in *Laub* forestalls that conclusion. *See* 342 F.3d at 1093 (ruling that a district court  
should ordinarily grant discovery where relevant jurisdictional facts “are controverted or where a  
more satisfactory showing of the facts is necessary.”).

1 response, the Acting Director of the Admissions Office of PRM of the DOS attests that  
2 the requirements of the December 23, 2017, preliminary injunction were sent promptly to  
3 PRM's implementing partners. (5/4/18 Gauger Decl. ¶ 5.) However, at a minimum, the  
4 emails from the DOS Congressional Liaison raise concerns about the scope and  
5 effectiveness of that communication.

6 Further, although the court does not impugn the testimony of the Acting Director,  
7 the declaration nevertheless contains hearsay within hearsay. *See United States v.*  
8 *Pena-Gutierrez*, 222 F.3d 1080, 1087-88 (9th Cir. 2000) (noting that an alien's statement  
9 to an immigration officer was hearsay-within-hearsay when the statement was contained  
10 in the immigration officer's report); *see also Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d  
11 1041, 1045 (9th Cir. 1999) (stating that for hearsay-within-hearsay to be admissible,  
12 "each layer of hearsay must satisfy an exception to the hearsay rule"). For example, the  
13 Acting Director states that she "reviewed the emails" and "confirmed with the [DOS]  
14 Congressional Liaison that these responses were not reviewed by anyone else prior to  
15 being sent . . . to Congress." (*Id.* ¶ 3.) She further attests that the "representations in the  
16 emails . . . are incorrect and the result of an inadvertent error by the [DOS] Congressional  
17 Liaison." (*Id.* ¶ 6.) The court is puzzled why Defendants did not provide a declaration  
18 from the Congressional Liaison himself to explain the sources of his information and the  
19 apparent error in his emails, rather than rely on inadmissible hearsay testimony. *See Fed.*  
20 *R. Evid.* 802. Defendants' reliance on hearsay testimony is even more puzzling because  
21 the Acting Director's declaration indicates that she contacted the DOS Congressional  
22 Liaison and therefore presumably could have obtained his declaration.

1 In addition to the emails, Plaintiffs also produce statistical evidence that the  
2 admission of SAO refugees actually declined following the preliminary injunction. *See*  
3 *supra* § II.F.2. Defendants do not dispute those statistics, but rather attribute them to the  
4 effects of the Agency Memo prior to the preliminary injunction and the government’s  
5 enhanced screening and vetting protocols. (*See generally* Def. 2d MFD Resp. at 5-6.)  
6 Although the court might expect that the processing and admission of FTJ and SAO  
7 refugees would not reach the levels that existed prior to the issuance of the Agency  
8 Memo on October 24, 2017, the further drop of SAO refugee admissions following the  
9 preliminary injunction deserves further inquiry.

10 Finally, although not singularly dispositive, the court notes Defendants’ failure to  
11 fully comply with certain injunctions concerning EO1—including the preliminary  
12 injunction this court issued in *Washington v. Trump*.<sup>22</sup> *See supra* § II.F.3. The court will  
13 not ignore that failure in evaluating Plaintiffs’ evidence. Thus, considering all this  
14 evidence, the court concludes that Plaintiffs meet their burden of demonstrating that facts  
15 bearing on the court’s jurisdiction are controverted and a more satisfactory showing of  
16 facts is necessary. *See Laub*, 342 F.3d at 1093.

17 In *Laub*, the Ninth Circuit found the district court improperly denied jurisdictional  
18 discovery when the plaintiffs supported their request with documents suggesting their  
19 claim was “arguable.” *See* 342 F.3d at 1092-93. There, the plaintiffs requested discovery  
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22 <sup>22</sup> *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*1 (W.D. Wash.  
Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017).



1 after the government asserted that its land and water acquisitions were independent of a  
2 government water management program and thus not subject to an injunction. *See id.* at  
3 1083, 1092-93. The Ninth Circuit found that “public documents offered by [the]  
4 [p]laintiffs suggest[ed] that there [wa]s at least an arguable claim that the federal  
5 government play[ed] a significant enough role in the [water management] program” to  
6 render the government’s actions subject to federal requirements. *Id.* at 1093. Though  
7 noting that the offered documents might “be insufficient in themselves to establish  
8 jurisdiction,” the court found that granting the plaintiffs’ request for discovery “would  
9 create a ‘reasonable probability’ that the outcome of the factual motion to dismiss would  
10 be different.” *Id.* (quoting *Martel v. Cty. of L.A.*, 56 F.3d 933, 995 (9th Cir. 1995) (en  
11 banc)). Thus, the Ninth Circuit held that the district court erred in denying jurisdictional  
12 discovery “[b]ecause additional discovery would be useful to establish federal subject  
13 matter jurisdiction, and because the extent of federal involvement in the challenged  
14 transactions [wa]s contested.” *Id.*

15 Here, jurisdictional discovery is appropriate because additional facts regarding  
16 Defendants’ efforts to implement the preliminary injunction and their efforts to restore  
17 the status quo following its imposition would be useful to the court’s consideration of  
18 mootness. (*See* 1/9/18 Order at 6 (“Defendants are required to restore the status quo prior  
19 to the issuance of the Agency Memo with respect to the processing of applications from  
20 FTJ refugees and refugees from SAO countries.”).) Plaintiffs have demonstrated a bona  
21 fide factual dispute concerning the existence and effectiveness of Defendants’ steps to  
22 discontinue the enjoined aspects of the Agency Memo. Until that factual dispute is

1 resolved, dismissing on mootness grounds would be inappropriate. As in *Laub*, although  
2 the evidence proffered by Plaintiffs at this point might “be insufficient in [itself] to  
3 establish jurisdiction,” it is sufficient to establish at least a “reasonable probability” that  
4 jurisdictional discovery could alter the outcome of the mootness question. *See* 342 F.3d  
5 at 1093.

6 Defendants argue that the Government is “presume[d] . . . [to] have properly  
7 discharged [its] official duties . . . in the absence of clear evidence to the contrary.”  
8 *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). (*See* Def. 2d MFD Resp. at 3.)  
9 “Nevertheless, . . . the presumption is not conclusive and can be rebutted.” *Hirsch v.*  
10 *Clark*, No. NC 83-0097A, 1984 WL 6209, at \*2 (D. Utah Aug. 29, 1984). There is scant  
11 case authority describing the type of “clear evidence” necessary to rebut the presumption.  
12 Here, the court concludes that the emails and statistical evidence Plaintiffs submit is  
13 sufficient to rebut the presumption. *See, e.g., McDonough v. Anola Cty.*, 799 F.3d 931,  
14 948 (8th Cir. 2015) (ruling that, whatever weight the presumption that public officers  
15 have properly discharged their official duties might have at the motion to dismiss phase,  
16 drivers who claimed that government employees had improperly accessed their personal  
17 information sufficiently rebutted the presumption by alleging high volumes and  
18 suspicious timing of accesses and by pointing to the legislative auditor’s report finding  
19 that at least half of law enforcement officers in Minnesota were misusing personal  
20 information in the database). The court concludes only that there is a factual dispute  
21 about which Plaintiffs are entitled to make further inquiry—not that Defendants failed to  
22 properly discharge their duties.

1 Defendants also argue that they have provided ample discovery to Plaintiffs  
2 concerning their compliance with the preliminary injunction, including (1) Defendants'  
3 notices of compliance filed with the court (1/19/18 Notice; 1/31/18 Notice); *see supra*  
4 § II.D, (2) a partially redacted copy of the Nielsen Memo, *see supra* § II.E, and (3) a  
5 declaration from the Associate Director of RAIO at USCIS attesting that the FTJ  
6 implementation period concluded as of February 1, 2018 (*see* 5/14/18 Higgins Decl.).  
7 (*See* Def. MTD Reply at 14.) As JFS Plaintiffs point out, however, with the exception of  
8 some limited information concerning circuit rides, Defendants have provided only  
9 minimal information about the specific actions they took to implement the SAO and FTJ  
10 suspensions before they were enjoined and the specific actions they took after the  
11 preliminary injunction to return the processing of FTJ and SAO refugee applications to  
12 the status quo that existed prior to the Agency Memo. (*See* JFS MTD Resp. at 4.)  
13 Similarly, although Defendants issued guidance to those government offices involved in  
14 USRAP to apprise them of the preliminary injunction, Defendants have not produced  
15 copies of that guidance. Moreover, the record reflects that Defendants' guidance was  
16 issued prior to January 9, 2018—that is, at a time when Defendants “d[id] not understand  
17 the preliminary injunction to require affirmative action to undo any of the steps that were  
18 taken to implement the [Agency Memo] prior to” the preliminary injunction. (*See* MFS  
19 at 4.) In any event, the court “cannot rely on [Defendants’] statement[s] alone” in  
20 determining mootness. *See Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982)  
21 (quoting *Concentrated Phosphate*, 393 U.S. at 203) (holding that the defendants’  
22 statement that they would not engage in future violations, standing alone, ‘cannot suffice

1 to satisfy the heavy burden of persuasion’ resting on those claiming mootness”). In this  
2 instance, permitting Plaintiffs to engage in limited jurisdictional discovery is warranted.

3 For the foregoing reasons, the court concludes that jurisdictional discovery is  
4 appropriate.<sup>23</sup> Accordingly, the court denies without prejudice Defendants’ motion to  
5 dismiss to allow Plaintiffs the opportunity to conduct limited jurisdictional discovery on  
6 the issue of mootness. *See, e.g., Nino v. United States*, No. 12-cv-0469-WQH-BGS, 2015  
7 WL 5032644, at \*2 (S.D. Cal. Aug. 25, 2015) (denying a motion to dismiss for lack of  
8 subject matter jurisdiction after “grant[ing] the parties ninety days of jurisdictional  
9 discovery in order to address factual issues relevant to jurisdiction”); *Guerrero v. United*  
10 *States*, No. CV-12-00370-TUC-RCC, 2012 WL 12842348, at \*4 (D. Ariz. Dec. 19, 2012)  
11 (denying defendant’s motion to dismiss plaintiff’s claim for lack of subject matter  
12 jurisdiction to allow plaintiff “limited . . . discovery on [a] specific jurisdictional issue”).

13 In their original motion for discovery, Plaintiffs sought “document requests . . .  
14 limited to the following categories of documents:

- 15 • Documents relating to the implementation of the Agency  
16 Memo as it relates to follow-to-join refugees and refugees who are  
17 nationals of (and stateless persons who last habitually resided in) the  
SAO countries;

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18 <sup>23</sup> Plaintiffs also ask the court to compel Defendants to produce the redacted phrase from  
19 the Nielsen Memo. (*See* 1st MFD at 5.) Defendants assert that the phrase is protected under the  
20 law enforcement privilege. (*See id.*) “[T]he U.S. Supreme Court and the Ninth Circuit have yet  
21 to recognize or reject a ‘law enforcement privilege.’” *Shah v. Dep’t of Justice*, 714 F. App’x  
22 657, 659 (9th Cir. 2017). The issue is not sufficiently briefed by the parties for the court to rule  
on the issue—either with respect to Plaintiffs’ need for the material or the basis for Defendants’  
invocation of the privilege. Accordingly, the court denies Plaintiffs’ request to compel  
production of the redacted phrase without prejudice to raising the issue again if warranted after  
Plaintiffs complete the discovery in this order.

- 1 • Documents relating to actions taken by Defendants to comply with  
2 this Court’s preliminary injunction dated December 23, 2017 and  
order denying Defendants’ motion for stay pending appeal (ECF No.  
3 106);
- 4 • Documents relating to actions taken by Defendants as a result of the  
end of the 90-day review for SAO countries and as a result of the  
5 implementation of the additional vetting procedures for follow-to-join  
refugees; and
- 6 • Policy documents and data relating to the processing of refugee  
applications and admission of refugees to the United States from  
October 23, 2017 to the date of production.

7 (1st MTD at 4-5.) The court specifically limits Plaintiffs to requesting document within  
8 these four categories. The court further cautions Plaintiffs to narrowly craft their requests  
9 so that the requests are “proportional to the needs of the case” in which discovery is  
10 limited to issues pertaining to mootness. *See* Fed. R. Civ. P. 26(b)(1) (listing factors for  
11 determining proportionality). Plaintiffs also raise the possibility of “additional discovery,  
12 such as depositions,” if appropriate after the production of documents. (1st MFD at 6.)  
13 The court declines to foreclose this possibility, but again cautions Plaintiffs that any such  
14 request must be narrowly tailored and proportional in light of the limited purpose of the  
15 authorized discovery.

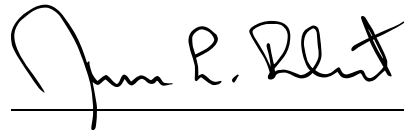
16 The court grants Plaintiffs 90 days in which to conduct their jurisdictional  
17 discovery on mootness. The parties must file any related discovery motions within 60  
18 days of the filing date of this order—30 days prior to the jurisdictional discovery cutoff.  
19 Although the court is available to resolve intractable disputes, the court encourages the  
20 parties to work cooperatively to implement this order and to expeditiously complete the  
21 discovery authorized herein. If, however, discovery disputes arise that require court  
22 intervention, the court requires the parties to utilize the procedures set forth in Local Rule

1 LCR7(i) before resorting to formal motions practice. *See* Local Rules W.D. Wash. LCR  
2 7(i). After Plaintiffs have conducted limited jurisdictional discovery on mootness,  
3 Defendants may renew their motion to dismiss.

4 **IV. CONCLUSION**

5 For the reasons stated herein, the court DENIES without prejudice Defendants'  
6 motion to dismiss and dissolve the preliminary injunction (Dkt. # 145) and GRANTS  
7 Plaintiffs' motion to reinstate their motion for limited discovery (Dkt. # 131) and their  
8 underlying motion for discovery (Dkt. # 121).

9 Dated this 27th day of July, 2018.

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13 JAMES L. ROBART  
United States District Judge