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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JANE DOE 1, et al.

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.

Defendants.

CASE NO. 5:18-cv-02349 HRL

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

ORAL ARGUMENT REQUESTED
Date: May 11, 2018*
Time: 10:00 a.m.
Place: Courtroom 2 (5th Floor)
**Motion to Shorten Time filed concurrently*

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, pursuant to the Motion to Shorten Time filed concurrently herewith, on May 11, 2018 at 10:00 a.m., or as soon thereafter as counsel may be heard, before the Honorable Judge Howard R. Lloyd of the United States District Court for the Northern District of California, San Jose Division, located at Courtroom 2, 280 South 1st Street, San Jose, California, 95113, Plaintiffs will and do hereby move pursuant to Federal Rule of Civil Procedure 56 for partial summary judgment against Defendants Department of Homeland Security, Secretary Kirstjen Nielsen, Director L. Francis Cissna, and Assistant Director Jennifer B. Higgins ("DHS Defendants" or "Defendants").

This Motion seeks a Declaration under 28 U.S.C. § 2201-02 that the Notices of Ineligibility are unlawful for failure to comply with 8 U.S.C. § 1157 (note), agency regulations and policy, and the Due Process Clause of the U.S. Constitution; an Order under 5 U.S.C. § 702 and 5 U.S.C. § 706(2) setting aside the Notices; and an Order under 5 U.S.C. § 706(1) and 28 U.S.C. § 1361 requiring Defendants to re-issue decisions within 30 days and that any new Notices of Ineligibility re-issued to Plaintiffs and class members comply with applicable law.

This Motion is based on this Notice of Motion; the attached Memorandum of Points and Authorities; the Declaration of Belinda S Lee, with exhibits (filed concurrently herewith); Jane Doe 1 [Dkt. 6], John Doe 2 [Dkt. 7], Jane Doe 3 [Dkt. 8], Jane Doe 4 [Dkt. 9], and Jane Doe 5 [Dkt. 10] (filed previously on April 18, 2018); the Declaration of Samuel Witten (filed concurrently herewith); the Declaration of Adam Bates (filed concurrently herewith); the Notice of Motion and Motion to Shorten Time (filed concurrently herewith); all papers and pleadings on file in this action; and upon all other arguments and evidence this Court may consider at or before the hearing on the Motion.

Dated: April 20, 2018

Respectfully submitted,

INTERNATIONAL REFUGEE ASSISTANCE PROJECT

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STATEMENT OF ISSUES TO BE DECIDED

1. Are the Notices of Ineligibility stating that Plaintiffs' refugee applications are denied "as a matter of discretion," with no other statement of the reason for the denial, unlawful because they violate the Lautenberg Amendment, the *Accardi* doctrine, and/or the Due Process Clause of the U.S. Constitution?
2. Should the Court set aside the Notices of Ineligibility and order equitable relief under 5 U.S.C. § 706(2) given that the Notices are unlawful because they violate the Lautenberg Amendment, the *Accardi* doctrine, and/or the Due Process Clause of the U.S. Constitution?
2. Should the Court compel Defendants under 5 U.S.C. § 706(1) to comply with relevant laws in re-issuing Notices of Ineligibility given that Defendants unlawfully withheld agency action required by the Lautenberg Amendment, the *Accardi* doctrine, and/or the Due Process Clause of the U.S. Constitution?
3. Should the Court enter a writ of mandamus under 28 U.S.C. § 1361 requiring Defendants to comply with relevant laws in re-issuing Notices of Ineligibility given that Plaintiffs have a clear and certain right to a remedy, Defendants' duty is nondiscretionary and ministerial, and there is no other adequate remedy available?

I. INTRODUCTION

Plaintiffs move for partial summary judgment against Department of Homeland Security ("DHS") Defendants,[1] and challenge the unprecedented mass denial of refugee status to approximately 87 Iranian Christians, Mandaeans, and other religious minorities the U.S. government had invited to Vienna in order to process their applications for refugee admission under the special protections in the Lautenberg Amendment.[2] The Lautenberg Amendment was passed in 1989, extended to Iranians in 2004, and re-authorized as recently as last month to

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[1] "DHS Defendants," or "Defendants" as used in this motion, refers to Defendants Department of Homeland Security, Secretary Kirstjen Nielsen, Director L. Francis Cissna, and Assistant Director Jennifer B. Higgins.

[2] "Plaintiffs" as used in this Motion refers to the named plaintiffs and the proposed class. The named plaintiffs have moved for class certification simultaneously with this Motion for Partial Summary Judgment.

facilitate refugee admission of certain vulnerable groups, including persecuted religious minorities. Its robust protections were designed to secure the admission of these designated groups and, in the rare case a refugee is denied, expressly requires that the denial "shall state, to the maximum extent feasible, the reason for the denial." 8 U.S.C. § 1157 (note) (emphasis added). In an extreme departure from the intent and successful history of the Lautenberg program for Iranians, Plaintiffs' and class members' applications were stalled for nearly a year as this Administration made successive attempts to ban refugees. In February 2018, Plaintiffs in Vienna were handed boilerplate forms stating that their refugee applications were denied "as a matter of discretion," with no other explanation or clarification as to why.

Among the Plaintiffs and class members now stuck in a Kafkaesque nightmare are a mother hoping to bring her daughter and grandson to live with her in San Jose, a son in West Chicago seeking to reunite with his mother and his disabled brother who desperately needs medical care, and a widowed woman stranded in Vienna with her elderly father and young son. The Plaintiffs in Vienna abandoned their homes in Iran on the understanding, based on past practice, that those invited to Austria in this program were nearly guaranteed to be admitted to the United States within a few months. Now their visas in Austria have expired and they are at risk of being deported back to Iran, where they are at an even greater risk of persecution for having sought refuge in the United States as religious minorities. Their denials stated that they have 90 days to submit a request for review ("RFR") of their denial, which must include "(1) a detailed account explaining how a significant error was made by the adjudicating officer or (2) new information that would merit a change in the determination." But without knowing the reason for the denial of their applications, they have no meaningful way to pursue the RFR process and thus will certainly lose their opportunity to reunite now with their U.S. families.

This Court should grant this Motion for Partial Summary Judgment and issue an order requiring DHS Defendants to set aside the unlawful Notices of Ineligibility and comply with the Lautenberg Amendment, the U.S. Constitution, and agency procedures in re-issuing any Notices.

II. STATEMENT OF FACTS

A. Congress Passed the Lautenberg and Specter Amendments to Facilitate Refugee Admissions of Persecuted Religious Minorities

Recognizing the persecution of vulnerable groups abroad, especially religious minorities, Congress enacted the Lautenberg Amendment in 1989 to facilitate the refugee admission of certain persecuted categories of individuals, including Jews and Christians from the Former Soviet Union. Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1989). The Lautenberg Amendment achieves this goal by lowering the evidentiary burden for eligibility for refugee admissions, as it permits applicants in the specified groups to demonstrate a well-founded fear of persecution by establishing membership in the group, asserting a subjective fear of persecution, and asserting "a credible basis for concern about the possibility of such persecution." 8 U.S.C. § 1157 (note). In addition, in the rare event that a refugee application under the Amendment is denied, the Amendment explicitly requires that "each decision to deny an application for refugee status . . . shall be in writing and shall state, to the maximum extent feasible, the reason for the denial." *Id.*

In passing the Amendment, Senator Lautenberg and the Immigration Subcommittee made clear it was intended to secure the admission of persecuted religious minorities to the United States and to curtail the Attorney General's discretion.[3] As the following exchange illustrates, denials under the Lautenberg Amendment were to be "extremely limited" to "isolated case[s]":

> Mr. LAUTENBERG. Mr. President, under this amendment, a refugee applicant may choose to qualify for refugee status by demonstrating that he or she has been the victim one of several acts of mistreatment or prejudicial actions. I understand that the ranking member of the Immigration Subcommittee believes that the provision nonetheless reserves discretion to the Attorney General. Would he agree that any discretion which this allows the AG to deny cases is extremely limited in scope--that it is only for the isolated case which cannot now be foreseen--in which a conferral of refugee status, would not be appropriate, or otherwise not in the national interest?
>
> Mr. SIMPSON. Yes.

[3] The statutory reference to the Attorney General in the Refugee Act is now deemed to refer to the Secretary of Homeland Security. *See* 6 U.S.C. § 557; *Durable Mfg. Co. v. U.S. Dep't of Labor*, 578 F.3d 497, 499 n.1 (7th Cir. 2009).

Mr. LAUTENBERG. Is that the Chairman's view as well?

Mr. KENNEDY. Yes, it is.

Declaration of Belinda S Lee ("Lee Decl."), Ex. A.

In 2004, Congress passed the Specter Amendment, adding Iranian religious minorities to the categories of people eligible for the added protections of the Lautenberg Amendment. Pub. L. No. 108-199, § 213, 118 Stat. 3 (2004). Congress has consistently reauthorized the Lautenberg and Specter Amendments since then, including as recently as March 23, 2018 as part of the FY2018 Consolidated Appropriations Act. Pub. L. 115-141, §7034(k)(5), 103 Stat. 135 (2018). The U.S. Department of State recognizes that "Iran continues to enforce some of the world's harshest restrictions on religious freedom," and has allowed Iranian religious minorities to apply for refugee status under the Lautenberg Amendment. Lee Decl., Ex. B at 49, 54. In December 2016, for the 14th year in a row the U.S. Government cosponsored and supported a UN resolution on human rights in Iran, condemning "the Iranian government's poor human rights record, including its religious freedom violations and continued abuses targeting religious minorities." Lee Decl., Ex. C at 49.

The continued re-authorization of the Lautenberg and Specter Amendments reflects the dire reality for religious minorities in Iran, a country that is approximately 99% Muslim and proclaims Shi'a Islam to be its official religion. Lee Decl., Ex. C at 45. Iranian law prohibits Muslim citizens from changing or renouncing their religious beliefs and the penal code specifies the death sentence for proselytizing, attempts by non-Muslims to convert Muslims, and *sabb al-nabi* ("insulting the prophet"). *Id.*, Ex. D at 1.

The U.S. government has long recognized that Iran engages in particularly severe violations of religious freedom, as the U.S. Commission on International Religious Freedom has designated Iran as a "Country of Particular Concern" under the International Religious Freedom Act for 17 consecutive years. *Id.*, Ex. C. at 44 (recommending the reauthorization of the Lautenberg Amendment given continuing concerns). In 2017, the Commission found that in the preceding year "the government of Iran engaged in systematic, ongoing, and egregious violations of religious freedom, including prolonged detention, torture, and executions based primarily or

entirely upon the religion of the accused." *Id.* "Killings, arrests, and physical abuse of detainees have increased in recent years, including for religious minorities . . . who dissent or express views perceived as threatening the government's legitimacy." *Id.* at 45. Religious minority groups, even those that are officially recognized by the government,[4] face systematic harassment, intimidation, discrimination, arrests, and imprisonment. *Id.*; *see also id.*, Ex. D at 1.

B. Until the End of 2016, Nearly 100% of the Iranian Refugee Applicants Who Had Already Traveled to Vienna Were Admitted to the United States

Because the United States does not have an embassy in Iran, religious minorities in Iran who seek to apply for refugee status under the Lautenberg Amendment may do so through the Vienna-based Lautenberg Specter program ("Vienna Lautenberg-Specter").[5] The process begins with a U.S.-based person lawfully living in the United States (the "U.S. tie") submitting an application on behalf of the refugee applicant. Declaration of Samuel Witten ("Witten Decl.") at ¶ 7. The applications are then processed by HIAS, a non-profit agency that manages the Resettlement Support Center in Vienna, Austria, in a cooperative agreement with the U.S. Department of State. Witten Decl. at ¶ 9. Before the application can proceed, the U.S. tie must enter into a contract with HIAS agreeing to pay for all expenses associated with the application, including the $330 administrative fee per case, and living costs for the refugee applicants while they undergo processing in Austria. Jane Doe 1 Declaration ("Doe 1 Decl."), Ex. A [Dkt. 6]. With the contract, the U.S. tie deposits $3,000 per single applicant or $2,600 per applicant in cases with families of two or more, unless HIAS determines that unique circumstances such as health concerns warrant an additional deposit. *Id.*, Ex. A at 2.

Once HIAS receives the application and deposit, and the Lautenberg-Specter applicant passes initial screening, the Austrian government issues a visa to the refugee applicants so that they can travel to Austria to continue processing of their refugee applications under the Lautenberg Amendment. Witten Decl. ¶ 8. At this point, most refugee applicants sell their

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[4] The Iranian government recognizes Sabean-Mandaeans as Christians, although the group does not consider themselves to be Christian. *See* Lee Decl., Ex. D.

[5] This program is distinct from the original Lautenberg program, which applies to groups from Eurasia and the Baltics identified in the Lautenberg Amendment. *See* Lee Decl., Ex. B.

belongings in Iran and prepare to restart their lives in the United States. *See e.g.* Jane Doe 4 Declaration ("Doe 4 Decl.") at ¶12. Refugee applicants are responsible for paying for their own travel to Vienna. Doe 1 Decl., Ex. A [Dkt. 6].

Once in Austria, the refugee applicants meet with HIAS to facilitate the application process and are interviewed by officers from the U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security. Witten Decl. at ¶ 9. They also undergo medical screening, attend cultural orientation, and receive an assurance of sponsorship from a resettlement agency in the United States that agrees to assist with their resettlement. *Id.* The refugee applicants and the U.S. tie are responsible for all the expenses incurred while living in Vienna during this processing time. Doe 1 Decl., Ex. A [Dkt. 6].

Until the Fall of 2016, processing of refugee applications in Vienna took only a few months from arrival and nearly 100% of refugees eligible for the program were accepted for admission. Lee Decl., Exs. E-F; Witten Decl. at ¶ 11. Approximately 30,000 Iranians have resettled in the United States under the Lautenberg Amendment. Lee Decl., Ex. F.

C. Program Changes Caused Applications of Nearly 100 Iranian Refugee Applicants in Vienna to Stall and to Be Denied En Masse in February 2018

Toward the end of 2016, however, the applications of refugee applicants already being processed in Vienna began to stall. *See* Lee Decl., Ex. E. Then, in January 2017, the incoming Administration began its series of attempts to ban refugees through Executive Orders and policies: twice attempting to shut down the refugee program across the board and most recently in October 2017 attempting to suspend refugee processing for nationals of certain countries, including Iran.[6] Although these attempts were enjoined by the courts,[7] they caused significant

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[6] *See* Executive Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed Reg. 8977, Jan. 27, 2017; Executive Order 13780, Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed Reg. 13209, Mar. 9, 2017; Memorandum to the President, Oct. 23, 2017, https://www.state.gov/documents/organization/275306.pdf.

[7] *See Washington v. Trump*, 857 F.3d 1151 (9th Cir. 2017) (denying government's motion to stay injunction of first Executive Order pending appeal); *Hawai'i v. Trump*, 857 F.3d 741 (9th Cir. 2017) (affirming injunction of the second Executive Order), *vacated as moot*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017); *Doe v. Trump*, 288 F. Supp. 3d 1045 (W.D. Wash.

damage to all refugee programs. Lee Decl., Ex. G. Specifically as concerning Iranian refugees, Austria stopped issuing visas to Iranian applicants in the Vienna Lautenberg-Specter program after the first Executive Order for fear that they would not quickly travel to the United States as intended. Lee Decl., Ex. H. Refugee admissions of Iranians slowed from **1,061** in the first quarter of fiscal year 2017 (Oct-Dec 2016) to just **29** in the first quarter of fiscal year 2018 (Oct-Dec 2017) and then to just **2** in the most recent quarter of fiscal year 2018 (Jan-Mar. 2018). Lee Decl., Ex. I at 1, 12, 14.[8] In January 2018, the Administration announced further changes to the program that affect Iranian nationals, although little is known about the content of those changes. Lee Decl., Ex. J.

As a result of these and other undisclosed changes, and in a significant departure from the prior operation of the program, by February 2018, nearly 100 applicants in the Vienna Lautenberg-Specter program were marooned in Vienna with their applications pending and interviews completed. *Id.*, Ex. K. Then, on or about February 19, 2018, between 38 and 87 of the Plaintiffs in Vienna received identical Notices of Ineligibility from USCIS. *See id.*, Ex. E; Bates Decl. at ¶ 6. The Notices contained seven checkbox options for explaining the reasons for denying a refugee application. *See e.g.* Jane Doe 3 Declaration ("Doe 3 Decl."), Ex. A [Dkt. 9]. The first six checkboxes specified grounds for denial. *See id.* The Notices of Ineligibility issued to the Plaintiffs in Vienna did not check any of those options but checked the last option: "OTHER REASON(S)." *See e.g. id.* In the space provided under that check box, USCIS wrote in each of the denials:

> "After review of all the information concerning your case, including your testimony, supporting documentation, background checks, country conditions, and other available information, your application for refugee resettlement to the United States under INA § 207 has been denied as a matter of discretion."
>
> *See e.g. id.* (emphasis added).

The Notices of Ineligibility advised individuals of the availability of a request for review

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2017), *reconsideration denied*, 284 F. Supp. 3d 1182 (W.D. Wash. 2018) (enjoining the October refugee ban, which included Iranians).

[8] In 2018, refugees from European regions (likely those applying under the Lautenberg program for Eurasia and the Baltics), have been the only group keeping pace with the Administration's own historically low target for refugee admissions. Lee Decl., Ex. L.

("RFR") process. Specifically, it stated in relevant part:

> "USCIS may exercise its discretion to review a case upon timely receipt of a request for review from the principal applicant. The request must include one or both of the following: (1) a detailed account explaining how a significant error was made by the adjudicating officer or (2) new information that would merit a change in the determination. Please note that if you provide new information in your request for review, you must provide an explanation about why you did not provide this information at the interview. USCIS will only accept one request that is postmarked or received by USCIS or the RSC within 90 days from the date of this notice."
>
> *See e.g. id.*

D. Plaintiffs Face the Possibility of Deportation to Iran

The Plaintiffs in Vienna are now in dire circumstances. Even though the contract between the U.S. ties and HIAS specified that the submission of an RFR would toll the time the refugee applicants would be permitted to stay in Austria, Doe 1 Decl., Ex. A [Dkt. 6], in reality their Austrian visas have long expired, *see e.g.* Jane Doe 5 Declaration ("Doe 5 Decl.") at ¶ 16 [Dkt.10]. They are thus at risk of deportation to Iran, where they fear even greater risk of persecution for having sought refuge in the United States as persecuted religious minorities with the help of a Jewish organization, and for having overstayed their Austrian visas. *See e.g. id.* ¶ 15. Reports of Iranian authorities' practices towards failed asylees and those affiliated with the West confirm these fears. Lee Decl. Exs. M-O. Nina Shea, an international human rights expert who directs the Hudson Institute's Center for Religious Freedom, has opined that deportations of these Lautenberg refugee applicants, "during a human-rights crackdown in Iran no less, could be a death sentence for these persecuted Christians and other minorities." Lee Decl., Ex. P at 3.

In a Kafkaesque twist, although RFR process is the one remaining hope currently available to these Plaintiffs for reuniting with their families in the United States, the very nature of the denials has foreclosed that avenue of relief. Despite representing that the RFR process is the only way to review the denials, USCIS has made it impossible for Plaintiffs to challenge the reasons for which they were denied because they have not been told what those reasons were. Although USCIS has stated that RFRs are commonly approved in favor of applicants, Lee Decl., Ex. Q at 11, some Plaintiffs have already had their RFRs denied for failing to provide "any new information or an allegation of error" in the denial, *see e.g.* Doe 3 Decl. at ¶ 16, Ex. B [Dkt. 8].

Jane Doe 1, a U.S. citizen living in San Jose, is among the Plaintiffs whose lives have been devastated by the mass denials. She has become sleepless and depressed since her diabetic daughter (Plaintiff Jane Doe 3) and young grandson's application was denied. Doe 1 Decl. at ¶¶ 1-2, 8-10 [Dkt. 6]. The rest of Doe 1 and Doe 3's nuclear family, including Doe 1's husband and her four other children, all escaped religious persecution in Iran for their Mandaean beliefs and successfully resettled to the United States through the Vienna Lautenberg-Specter program. *Id.* at ¶ 10. Doe 1 paid thousands of dollars to sponsor her daughter's application with the hope that she could secure their religious liberty and help raise her grandson in the United States. *Id.* at ¶ 5, 7. Doe 3 and her son traveled to Vienna in the fall of 2016 and were interviewed twice by Defendant DHS, only to receive Notices of Ineligibility in February that denied them refugee status "as a matter of discretion." Doe 3 Decl. at ¶ 9-10, 12-15 [Dkt. 8]. The stress of Doe 3's denial has had physical and mental consequences for Doe 1 and her family: it has exacerbated Doe 3 and her father's diabetic ailments, led Doe 1's daughter in the U.S. to take anxiety medication, and has left Doe 1 with fluctuating blood pressure and depression. Doe 1 Decl. at ¶ 9 [Dkt. 6].

Similarly, John Doe 2, a U.S. citizen living in West Chicago, paid thousands of dollars in order to ensure safety and religious freedom for his mother, Jane Doe 4, and humane medical care in the United States for his disabled youngest brother who is dependent on his mother for assistance. John Doe 2 Declaration ("Doe 2 Decl.") at ¶ 1, 4 [Dkt. 7]; Doe 4 Declaration ("Doe 4 Decl." at ¶ 5-6 [Dkt. 9]. Based on his own experience and that of his siblings, Doe 2 believed that the Vienna Lautenberg-Specter program would allow his mother and brother to escape religious discrimination against Mandaeans in Iran and reunite with family in the United States after a brief stay in Vienna. Doe 2 Decl. at ¶ 5 [Dkt. 7]. Doe 4 and her youngest son traveled to Vienna in the fall of 2016 and remain stranded there with Doe 4's oldest son, who separately applied for the Lautenberg-Specter program. Doe 2 Decl. at ¶ 9 [Dkt. 7], Doe 4 Decl. at ¶¶ 9, 12 [Dkt. 9]. In Vienna, Doe 4 was interviewed by Defendant DHS, underwent two rounds of medical checks, and was scheduled to attend a cultural orientation in preparation for resettlement to the United States. Doe 4 Decl. at ¶¶ 13-16 [Dkt. 9]. Doe 2 was shocked when Doe 4 and her

sons received identical Notices of Ineligibility in February that denied them refugee status "as a matter of discretion." *Id*. at ¶¶ 18, 21. Doe 4 and her two adult sons are now living in a small one room apartment, struggling to pay for rent and diapers for her youngest son, and have been told they may need to move to a refugee camp soon. *Id*. at ¶ 22.

Jane Doe 5 is also stranded in Vienna with her elderly father and disabled son after receiving Notices of Ineligibility in February. Doe 5 Declaration ("Doe 5 Decl.") at ¶¶ 1, 11 [Dkt. 10]. In Iran, Doe 5 faced systemic discrimination as a Christian of Armenian ethnic descent, which increased after she was widowed and left without meaningful male protection. *Id*. at ¶¶ 2, 4. Doe 5's sister-in-law paid thousands of dollars, including double the average deposit for Doe 5's father and son's medical costs, to ensure that Doe 5 could safely reunite with her in-laws in the United States. *Id*. at ¶ 5, 7. Doe 5 traveled to Vienna in February 2017 and was interviewed by Defendant DHS about a week after she arrived. *Id*. at ¶¶ 9-10. In April 2017, Doe 5's father was approved for resettlement in the United States, but he was an invaluable part of the family and did not want to travel without Doe 5 and her son. *Id*. at ¶ 12. Doe 5, her father, and her son then received identical denial letters that denied them refugee status "as a matter of discretion" and effectively revoked Doe 5's father's previous approval. *Id*. at ¶ 11-12.

III. PROCEDURAL HISTORY

On April 18, 2018, Plaintiffs filed this case on behalf of themselves and those similarly situated and, concurrently herewith, have moved to certify a class defined as:

> All Iranian refugees who (1) applied for refugee admission to the United States under the Lautenberg Amendment, whether as a principal applicant or derivative relatives; (2) traveled to Vienna, Austria, for processing; and (3) received denials from the United States government in or after February 2018 with the sole explanation that their application was denied "as a matter of discretion," and their U.S.-based Close Family Members who served as their U.S. ties.

Plaintiffs now move for partial summary judgment on Claims 1-5 against the DHS Defendants who are responsible for issuing the Notices of Ineligibility which Plaintiffs argue are unlawful. The resolution of this motion in Plaintiffs' favor will leave for resolution only Claim 6

and related declaratory relief, which is brought against DHS Defendants and the Department of State for the undisclosed program changes that resulted in the mass denials.

IV. ARGUMENT

Summary judgment is appropriate where, as here, there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact or the absence of evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986) (quoting Fed. R. Civ. P. 56(c)). Where the moving party makes such a showing, the burden shifts to the nonmoving party to identify specific facts demonstrating the existence of genuine issues for trial. *Id*. at 324. This burden is significant. The nonmoving party must show more than the existence of a mere scintilla of evidence, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and must show more than some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party must present evidence from which a jury could reasonably render a verdict in its favor. *Anderson*, 477 U.S. at 252.

Here, there are only two material facts: (1) Plaintiffs and class members are refugee applicants in the Vienna Lautenberg-Specter program and close family members of the refugee applicants who served as their U.S. ties, and (2) Plaintiffs received Notices of Ineligibility stating that their applications were denied "as a matter of discretion," with no other reason for the denial. *See* Doe 1 Decl., Ex. A [Dkt. 6]; Doe 2 Decl., Ex. A [Dkt. 7]; Doe 3 Decl., Ex. A [Dkt. 8]; Doe 4 Decl., Ex. A [Dkt. 9]; Doe 5 Decl., Ex. A [Dkt. 10]. Neither can be disputed. Plaintiffs have met their burden of demonstrating that they are entitled to relief under the Lautenberg Amendment, the Administrative Procedure Act ("APA"), the Mandamus Act, applicable agency procedures, and the Due Process Clause, and this Motion should be granted.

A. The Court Should Declare that the Notices of Ineligibility are Unlawful

Declaratory judgment is appropriate here because there is an "actual case or controversy"

between the parties. *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 122-23 (9th Cir. 1998). Defendants seek to rely on the Notices of Ineligibility, and those Notices have harmed Plaintiffs in concrete ways. Plaintiffs who served as U.S. ties have suffered economic loss: they spent thousands of dollars to support their family members through the Vienna Lautenberg-Specter process, only for the applications to be denied for no discernible reason. *See* Doe 1 Decl. at ¶ 5 [Dkt. 6]; Doe 2 Decl. ¶¶ 6, 7, 11 [Dkt. 7]; *see also Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000) (holding that economic loss is a cognizable injury where plaintiff expended his own money to obtain a permit "only to be denied at the last minute"). Plaintiffs in Vienna have been damaged by the lost opportunity to pursue a fair RFR process that will give them a genuine opportunity to find refuge in the United States. *See Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (lost opportunity of immigrant visa is cognizable Article III injury); *Nat'l Venture Capital Ass'n v. Duke*, No. 17–1912, 2017 WL 5990122, at *4 (D.D.C. Dec. 1, 2017) (same for foreign parties' loss of opportunity to obtain parole status). Moreover, without a fair opportunity at an RFR, Plaintiffs' separation from family members will be further prolonged—an injury that courts in this Circuit have recognized time and again in the past year. *See, e.g.*, *Hawai'i*, 859 F.3d at 763; *Washington*, 847 F.3d at 1159; *Doe v. Trump*, 2017 WL 6551491, at *8 (W.D. Wash. Dec. 23, 2017).

The Court should thus resolve this controversy and find the Notices of Ineligibility issued to Plaintiffs to be unlawful. The Court may reach this conclusion for any one of the following three independent reasons: (1) for violating the Lautenberg Amendment; (2) for violating the *Accardi* doctrine; and (3) for violating the Due Process Clause of the U.S. Constitution.

1. <u>The Notices Violate the Lautenberg Amendment</u>

The Notices issued here failed to comply with the Lautenberg Amendment's explicit requirement that "each decision to deny an application for refugee status . . . shall be in writing and shall state, to the maximum extent feasible, the reason for the denial." 8 U.S.C. § 1157 (note). A statement that refugee status is being denied as a "matter of discretion" is tantamount to providing no reason at all. It leaves Plaintiffs with no idea what factors the Defendants considered in exercising the discretion negatively; whether the denials were security-related,

eligibility-related, or otherwise; or even whether they received individual consideration of their applications.

Moreover, the Notices fail the "maximum extent feasible" requirement as measured against the plain language of the statute, DHS's own regulations and policies, and agency practice. *First*, the denials here simply do not conform to the plain requirement of the statute. The Supreme Court has interpreted "to the extent feasible" to mean "capable of being done, executed, or effected." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (internal citations omitted). And the standard "to the maximum extent feasible" is "a strict one and demands strict compliance." *Se. Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1310 (9th Cir. 1983); *see also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976) (stating that a similar phrase "to the fullest extent possible," when used by Congress, is "neither accidental nor hyperbolic," but "a deliberate command that the duty [the statute] imposes upon the agencies . . . not be shunted aside in the bureaucratic shuffle"). Here, it is certainly feasible to explain the exercise of discretion more maximally than was done here: USCIS's own internal guidance has mandated that "[a]bsent any negative factors, [the USCIS officer] will always exercise discretion positively" and that when exercising discretion negatively the officer must "provide a complete analysis of [the] reasoning, specifying the positive and negative factors . . . considered." Lee Decl., Ex. R at 14. It is feasible to produce Plaintiffs' applicant file, which contains interview notes as well as the "written decision" that "contain[s] a complete analysis of the factors considered in exercising discretion, with a specific and cogent explanation of why [the officer] exercised discretion negatively." *Id.* at 21.

Second, the Notices fail the "maximum extent feasible" requirement because they even fall below the floor for disclosure of information mandated by DHS's own regulations and policies applicable to immigration benefits generally—and "maximum extent feasible" must mean more than the floor. Although DHS has not published regulations regarding the Lautenberg Amendment in particular, its regulation governing the rights of benefits applicants to inspect evidence requires that, unless certain exceptions apply, an applicant "be permitted to inspect the record of proceeding which constitutes the basis for the decision." 8 C.F.R. §

103.2(b)(16).[9] Under that regulation, if an adverse decision is based on derogatory information unknown to the applicant, USCIS must advise the applicant of this fact and "offer[] an opportunity to rebut the information" unless the information is classified. *Id.* 103.2(b)(16)(i). Although the regulation allows USCIS to rely on classified information not available to the applicant when exercising discretion negatively, in order to do so USCIS must acquire certain levels of authorization, *id.* § 103.2(b)(16)(iii), and state in the decision "that the information is material to the decision," *id.* § 103.2(b)(16)(iv). The Notices do not state that the mass denials were based on any classified information, or even that they are security-related. Doe 3 Decl., Ex. A [Dkt. 8].

Similarly, the Notices fail to comply with the USCIS's Adjudicators' Field Manual ("AFM"), which "details USCIS policies and procedures for adjudicating applications and petitions." Lee Decl., Ex. S. Section 10.7 of the AFM, titled "Preparing Denial Orders," explains that a denial must include "[a] description of the evidence in the case in question" and "[i]f the applicant or petition cannot reasonably be presumed to be already aware of the evidence, he or she must be given an opportunity to rebut the evidence before a decision is made." *Id.* at AFM 10.7(b)(3). The decision should also include "[a] discussion of how the evidence in the case fails to meet the criteria for obtaining the benefit," and a discussion of each of the bases on which the application is denied. *Id.* at AFM 10.7(b)(4); *see also* Lee Decl., Ex. T (Memorandum from Robert C. Divine, Acting Deputy Director of USCIS (May 3, 2006), noting importance of AFM 10.7 in setting forth requirements of proper denial orders even in cases of discretionary denials and stating that "[t]he rationale [for a denial] *should be set forth so that the customer*, any administrative reviewer (AAO, BIA, IJ), *and the federal courts* can understand it and appreciate its logic") (emphasis added). The Notices fail these requirements as well.

Third, the Notices also fall short of the information that other applicants for immigration

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[9] 8 C.F.R. § 103.2(b)(16) applies to refugee applicants. The regulatory section is titled "Submission and Adjudication of Benefit Requests," and refugee applications are defined as benefit requests under the regulations. *See* 8 C.F.R. § 207.1 (explaining that refugee processing begins with the submission of an "application . . . in accordance with the form instructions, as defined in 8 C.F.R. 1.2"); *id.* § 1.2 (defining "application" to mean "benefit request" and "form instruction" to be "instructions on how to complete and where to file a benefit request").

benefits—those not covered by the Lautenberg Amendment's heightened protections—routinely receive as a matter of practice, including even where security interests are implicated. Courts in this circuit, for example, have enforced the visa applicant's right to know "the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available" under 22 C.F.R. § 42.81(b). *See, e.g.*, *Golkar v. Kerry*, 570 F. App'x 657, 659 (9th Cir. 2014), *amended on reh'g in part*, 615 F. App'x 408 (9th Cir. 2015); *Atiffi v. Kerry*, No. CIV. S-12-3001 LKK/DAN, 2013 WL 5954818, at *7 (E.D. Cal. Nov. 6, 2013). And even in cases where courts have rejected Due Process challenges to visa denials on the basis that the government had set forth a "facially legitimate and bona fide reason" for the denials, the reason given by the government in those cases was more detailed than the Notices that Plaintiffs received in this case. *See Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J. concurring in the judgment) (denying Due Process challenge because the government had specified inadmissibility based on engagement in terrorist activities); *Kleindienst v. Mandel*, 408 U.S. 753, 759, 769 (1972) (same where the visa applicant had received a letter from the Attorney General explaining the basis for the negative exercise of discretion on a visa waiver).

Fourth, and finally, DHS has issued Notices of Ineligibility to other refugee applicants on forms that specify whether a discretionary denial is security-related or otherwise, and if otherwise, requires additional explanation. *See* Bates Decl., Ex. A. Here, DHS treated the Lautenberg-Specter refugee applicants worse than other refugee applicants by refusing to give even this level of basic information.

Given that other applicants for immigration benefits, including other refugees, are told more about the basis of their denials than Plaintiffs were as a matter of policy and practice, the statement that Plaintiffs' applications are denied "as a matter of discretion" cannot satisfy the Lautenberg Amendment's explicit, heightened requirement that the denials state the reason "to the maximum extent feasible." The Lautenberg Amendment affords applicants *more* protection than simply receiving a boilerplate form stating that their applications are denied "as a matter of discretion."

2. The Notices Violate the *Accardi* Doctrine

In addition to violating the Lautenberg Amendment, the Notices of Ineligibility are unlawful for the independent reason that they violate DHS's regulations and policies. It has long been established that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *see also U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954) ("Regulations with the force and effect of law supplement the bare bones of" federal statutes); *U.S. v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1135 (9th Cir. 1982) ("[A]n agency can create a duty to the public which no statute has expressly created.") The Ninth Circuit has held that an agency's own procedures are binding upon it when they "(1) prescribe substantive rules-*not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice-and, (2) conform to certain procedural requirements." *Eclectus Parrots*, 685 F.2d at 1136. These requirements will be satisfied where the rule "is legislative in nature, affecting individual rights and obligations" and was "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id.*

As noted above, the DHS promulgated regulations require that an applicant for immigration benefits, including refugee status, must "be permitted to inspect the record of proceeding which constitutes the basis for the decision," except in certain situations that are inapplicable here. 8 C.F.R. § 103.2(b)(16). Those regulations meet both parts of the test established in *Eclectus Parrots*. With respect to part (1), the rules are clearly substantive, and not merely interpretive, as they directly provide individuals with a right to inspect the record of proceeding. *See Ghafoori v. Napolitano*, 713 F. Supp. 2d 871, 878, 881 (N.D. Cal. 2010) (granting summary judgment to plaintiff by finding they had a right to inspect the record of proceeding under 8 C.F.R. § 103.2(b)(16)). With respect to part (2), the rules are binding as they were published in the Code of Federal Regulations. *See e.g. Vargas v. U.S. Parole Comm'n*, 865 F.2d 191, 193-194 (9th Cir. 1988) (finding regulations published in the Code of Federal Regulations bound the agency—"[t]he Commission is bound to follow its own regulations, and

these regulations have the force of law.").

In this action, the DHS's withholding of the "record of proceeding which constitutes the basis for the decision" from Plaintiffs is a clear violation of these regulations, as well as the instructions in the AFM expounding on the regulations. This withholding of information is harmful to Plaintiffs as it deprives them of the ability to pursue an RFR. *See Ghafoori*, 713 F. Supp. 2d at 878 (holding that, to the extent finding of prejudice was necessary to issue a remedy, it was satisfied by the deprivation of Plaintiffs' ability to make a meaningful rebuttal to the denial of a Refugee/Asylee Relative Petition). Without the ability to inspect the record, it is simply impossible for Plaintiffs to provide "(1) a detailed account explaining how a significant error was made by the adjudicating officer or (2) new information that would merit a change in the determination." *See e.g.* Doe 3 Decl., Ex. A.

3. The Notices Violate Due Process

The Notices of Ineligibility also violate the Due Process rights of Doe 1, a U.S. citizen mother seeking to reunite with her daughter, and Doe 2, a U.S. citizen son seeking to reunite with his mother. The Court may review this Due Process claim in the context of a denial of an immigration benefit if the government fails, as here, to set forth "a facially legitimate and bona fide reason" for the denial. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (identifying Justice Kennedy's concurrence in *Din* as the controlling opinion). As explained above, the statement that the refugee applications were denied "as a matter of discretion" falls far short of providing even the basic level of explanation that the U.S. plaintiffs received in other Due Process challenges. *See Din*, 135 S. Ct. at 2139; *Mandel*, 408 U.S. at 759. It falls comparatively below what the Ninth Circuit required for the government to clear the "facially legitimate and bona fide" bar in the context of visa denials. *Cardenas*, 826 F.3d at 1172 (internal quotation marks omitted) (holding that clearing the bar requires citation to "a valid statute of inadmissibility" and either a citation to "an admissibility statute that specifies discrete factual predicates the consular officer must find to exist before denying a visa" or "a fact in the record that provides at least a facial connection to the statutory ground of inadmissibility"). Although once the government has made a showing of

a "facially legitimate and bona fide reason" for the denial the burden normally shifts to the plaintiff to make an affirmative showing of bad faith, *Cardenas*, 826 F.3d at 1172, Defendants have failed to meet their threshold burden here given their failure to set forth any reason at all, let alone a facially legitimate and bona fide reason.

Because of Defendants' failure to set forth a "facially legitimate and bona fide reason" for the denials, the Court may review the challenge under the Due Process Clause, which "imposes constraints on governmental decisions which deprive individuals of 'liberty' . . . interests" within the meaning of the Due Process Clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause." *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (internal quotation marks omitted). The Ninth Circuit has recognized that both parents and children have the liberty interest in the companionship and society of each other. *See Lemire v. Ca. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013).

Given the liberty interest involved for Doe 1 and 2, Due Process requires more to satisfy its core protection—the opportunity "to rebut evidence offered by the agency if that evidence is relevant." *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1076 (9th Cir. 2015) (internal quotation marks omitted). Under *Mathews v. Eldridge*, courts must balance three factors in evaluating the process due: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. Here, all three factors of the Due Process balancing analysis favor Plaintiffs: the interest in family reunification and the resettlement of persecuted individuals is weighty, *Hawai'i*, 859 F.3d at 784 (recognizing the interest in "uniting families and supporting humanitarian efforts in refugee resettlement"); the comparative risk of erroneous deprivation of that interest is great if the refugee applicants do not have an opportunity to rebut reasons for the denials, *see ASSE International*, 803 F.3d at 1076;

and the government interest in not providing additional information is low given existing statutory and regulatory requirements and the ease with which additional information could be provided. Due Process requires at minimum that USCIS comply with the process set out in the Lautenberg Amendment and applicable regulations. *See Din*, 135 S. Ct. at 2141 (assessing the government's process in light of statutory requirements).

B. The Court Should Set Aside the Unlawful Notices and Order Equitable Relief Under APA § 706(2)

Because the Notices of Ineligibility are unlawful, as explained above, *see supra* Part I, the Court should set them aside and enter relief requiring that, should Defendants choose to re-issue Notices of Ineligibility, the revised Notices must comply with the law and grant Plaintiffs 90 days from the date of the revised Notices to submit an RFR. Three sources in combination grant the Court the authority to order this relief: APA § 702, APA § 706(2), and the Court's own equitable powers.

First, APA § 702 gives the Court the authority to review challenges brought by "[a] person . . . aggrieved by agency action." 5 U.S.C. § 702. A person is aggrieved by agency action where their interest falls "arguably within the zone of interests to be protected or regulated by the statute." *Bennett v. Spear*, 520 U.S. 154, 175 (1997); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (describing the zone-of-interests test as "not especially demanding"). Here, Plaintiffs in Vienna are squarely within the zone of interests of the Refugee Act, and more specifically the Lautenberg and Specter Amendments, as those Amendments exist to facilitate the admission of persecuted Iranian religious minorities to the United States as refugees. *See* 8 U.S.C. § 1157 (note); *compare also, e.g.*, *Patel v. USCIS*, 732 F.3d 633, 636-38 (6th Cir. 2013) (finding foreign national was within the zone of interest and had APA standing to challenge denial of employment visa); *Stenographic Machs., Inc. v. Reg'l Adm'r for Emp't. and Training*, 577 F.2d 521, 528 (7th Cir. 1978) (finding foreign nationals "who are arguably entitled to enter or remain in the United States on the basis of [] standards" set forth in the statute at issue were within the zone of interest of the statute and thus had APA standing). U.S.-based close family members here also fall within the zone of interests of the

Refugee Act, as the Ninth Circuit has recognized that the principle of family integrity is embedded within immigration laws. *Hawai'i*, 878 F.3d at 681-82 (finding U.S.-based family of a foreign national abroad fell within the zone of interest of the INA because the statute "implemented the underlying intention of our immigration laws regarding the preservation of the family unit") (*citing LAVAS v. Dep't of State*, 45 F.3d 469, 471-72 (D.C. Cir. 1995)); *Kaliski v. Dist. Dir. of Immigration & Naturalization Serv.*, 620 F.2d 214, 217 (9th Cir. 1980) (noting the INA's "humane purpose . . . to reunite families").

Second, under APA § 706(2), upon review of the APA claim the Court has the authority to set aside final agency actions that are, as here, unlawful in that they are "arbitrary, capricious, an abuse of discretion, or not in accordance with law," *id.* § 706(2)(A), "in excess of statutory . . . authority, or limitations, or short of statutory right," *id.* (C), or "without observance of procedure required by law," *id.* (D). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) ("In all cases agency action must be set aside if the action [is unlawful under APA § 706(2)]"). The Notices are final agency actions because they mark the "consummation" of the agency's decision-making process and determine "rights or obligations." *Bennett*, 520 U.S. at 178 (internal quotation marks); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (noting that the requirements are interpreted "in a pragmatic and flexible manner").

Finally, beyond setting aside final agency actions, this Court has broad equitable powers in an APA case to order "mandatory affirmative relief if such relief is necessary to accomplish complete justice." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680–81, 91 (9th Cir. 2007) (setting aside the agency decision to transfer a contract to another entity and ordering, under the court's equitable powers, that the agency continue to fund its existing contractual arrangement) (internal quotation marks omitted); *see also Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1242 (D.C. Cir. 2017) (holding that the court's equitable and remedial powers are broad, especially where federal law is at issue and public interest is involved). "When federal statutes are violated, the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the

congressional purpose behind the statute." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176–78 (9th Cir. 2002). The equitable relief requested by the Plaintiffs here is necessary to remedy the violation and to give Plaintiffs a meaningful opportunity to rebut any information that Defendants relied on in denying applications and thus enhance Plaintiffs' chances of a successful RFR—a result contemplated by the Lautenberg Amendment. Witten Decl. at ¶ 10; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795-96 (9th Cir.2005) (affirming injunction under the Endangered Species Act after holding that it is consistent with congressional purpose); *Badgley*, 309 F.3d at 1176–78 (same and ordering the completion of agency actions within a specific time frame). The Court should order the requested relief, which is consistent in scope with the type of equitable remedies entered by courts in this circuit in immigration matters raising procedural improprieties. *See e.g.*, *Singh v. Clinton*, 618 F.3d 1085, 1093 (9th Cir. 2010) (directing the district court to set aside decision to terminate a visa registration where the termination did not comply with statutory notice requirements); *see also Ghafoori*, 713 F. Supp. 2d at 878 (effectively vacating denial of the I-730 petition for failure to comply with regulatory procedure and ordering re-consideration of the I-730 petition under lawful procedural requirements, including the opportunity to inspect evidence against the applicant); *Amidi v. Chertoff*, No. 07cv710 (AJB), 2008 WL 2662599, at *3-5 (S.D. Cal. Mar. 17, 2008) (vacating the termination of visa registration for failure to comply with procedural requirements and granting plaintiff the benefit of the visa priority date that the applicant would have had if the registration had not been unlawfully terminated).

C. In the Alternative, the Court Should Compel Issuance of Lawful Notices under APA § 706(1)

As an alternative to relying on APA § 706(2), the Court could compel re-issuance of lawful Notices of Ineligibility under 5 U.S.C. § 706(1). Where an action is reviewable under APA § 702 as established above, APA § 706(1) grants the Court authority to "compel agency action unlawfully withheld." The Court may compel such action where, as here, "plaintiff asserts that an agency failed to take *discrete* agency action that it is *required* to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original); *Vietnam Veterans of*

Am. v. Central Intelligence Agency, 811 F.3d 1068, 1078-79 (9th Cir. 2015) (holding that § 706(1) permits a challenge against failure to perform a specific action, so long as it is not about general deficiencies in compliance).

For the same reasons discussed above, Plaintiffs satisfy the requirement of alleging discrete agency action that Defendants were required to take; specifically, issuing denials that "*shall* state, to the maximum extent feasible, the reason for the denial." 8 U.S.C. § 1157 (note) (emphasis added). The "mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (construing the term "shall" to impose "discretionless obligations"). Moreover, the Supreme Court has held specifically that Congress's use of the term "feasible" does not confer wide-ranging discretion on the agencies. *Overton Park*, 401 U.S. at 410-11 (holding that statutory language, including the term "feasible" does not commit the decision to agency discretion); *see also Fund for Animals v. Babbitt*, 903 F. Supp. 96, 107 (D.D.C. 1995) (holding that the phrase "to the maximum extent practicable" "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible"). While Defendants may have some discretion in how to issue these notices, they still have the duty to perform the action. *See Vietnam Veterans*, 811 F.3d at 1079. Here, the language of the Lautenberg Amendment, its legislative history, and its regulatory context all confirm that the obligation was intended to cabin agency discretion. *See supra*.

Because Plaintiffs have asserted a discrete agency action that Defendants are required to take, the Court should issue an order under § 706(1) compelling Defendants to comply with the laws in re-issuing Notices and to re-instate the 90-day period for filing RFRs. *See Vietnam Veterans*, 811 F.3d at 1081 (recognizing that § 706(1) "requires a court to compel agency action when . . . there is a specific, unequivocal command that the agency must act"). An order under § 706(1) is appropriate so long as it does not amount to "programmatic oversight or judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Vietnam Veterans*, 811 F.3d at 1080. In *Vietnam Veterans*, for example, the Ninth Circuit affirmed an injunction compelling the Army to fulfill its duty to warn volunteers of the

risk of participating in experiments and to provide medical care, without specifying in detail how it should discharge those duties. *Id.* at 1079-80. In other immigration cases, courts have ordered narrow remedies that compel agencies to take actions similar to what Plaintiffs seek here: an explanation for the denial and an opportunity for re-consideration based on the explanation. *See also, e.g.*, *Golkar*, 570 F. App'x at 657, 660 (instructing district court to require the statement and re-instate the year-long period for reconsideration because the government officer had failed to take the mandatory action of stating the ground for a visa denial); *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 932-34 (N.D. Cal. 2014) (requiring agency to give applicant an opportunity to apply for a waiver where the agency had unlawfully failed in its duty to advise of the right to apply for a waiver); *Atiffi*, 2013 WL 5954818, at *7 (requiring agency to state the ground for visa denial where it had failed to do so). The Court should issue the remedy requested here.

D. In the Alternative, the Court Should Enter A Writ Of Mandamus Ordering Issuance of Lawful Notices

As further alternative, the Court should issue a writ of mandamus under 28 U.S.C. § 1361 to "compel an officer or employee of the United States to or any agency thereof to perform a duty owed to plaintiff." Mandamus "is available to compel a federal official to perform a duty" where: "(1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997) (requiring a consulate to make a decision on a visa application). This analysis is the same as the analysis under APA § 706(1) where, as here, the relief sought is the same. *Independence Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (adopting the same analysis to mandamus as to an APA claim).

Here, the first two factors are easily satisfied. As described above, Plaintiffs' claim to a reason for the denial is "clear and certain" and Defendants' duty to Plaintiffs is "nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt." *Patel*, 134 F.3d at 931; *see supra* at 11-16. Courts have held that defendants owe a duty to plaintiffs where, as here, *see supra* at 19, the plaintiffs fall within the "zone of interests" of the underlying statute.

See Soler v. Scott, 942 F.2d 597, 605 (9th Cir. 1991), *cert. granted, judgment vacated sub nom. Sivley v. Soler*, 506 U.S. 969, 113 S. Ct. 454 (1992).

The final prong of the mandamus inquiry is that "no other adequate remedy is available." *Patel*, 134 F.3d at 931. To the extent a remedy is unavailable through another of Plaintiffs' claims, Plaintiffs are entitled to a mandamus remedy compelling Defendants to comply with the law in re-issuing Notices of Ineligibility.

IV. CONCLUSION

For all the reasons stated above, the Court should grant Plaintiffs' Motion for Partial Summary Judgment, declare the Notices of Ineligibility unlawful, set the Notices of Ineligibility aside, and order Defendants to re-issue decisions and for any re-issued Notices to comply with the requirements of the Lautenberg Amendment and applicable regulations.

Dated: April 20, 2018

Respectfully submitted,

INTERNATIONAL REFUGEE ASSISTANCE PROJECT

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ATTESTATION OF CONCURRENCE IN THE FILING

Pursuant to Civil Local Rule 5-1(i)(3), I declare that concurrence has been obtained from the signatory to file this document with the Court.

/s/ Belinda S Lee
Belinda S Lee