DANIEL B. ASIMOW (SBN 165661)
daniel.asimow@arnoldporter.com
MATTHEW H. FINE (SBN 300808)
matthew.fine@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, California 94111
Telephone: 415.471.3100
Facsimile: 415.471.3400

JOHN A. FREEDMAN (appearance *pro hac vice*)
john.freedman@arnoldporter.com
GAELA K. GEHRING FLORES*
gaela.gehringflores@arnoldporter.com
DAVID J. WEINER (CA SBN 219753)
david.weiner@arnoldporter.com
DANA O. CAMPOS*
dana.campos@arnoldporter.com
MATEO MORRIS*
mateo.morris@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: 202.942.5000
Facsimile: 202.942.5999

LINDA EVARTS (appearance *pro hac vice*)
levarts@refugeerights.org
KATHRYN C. MEYER (appearance *pro hac vice*)
kmeyer@refugeerights.org
MARIKO HIROSE (appearance *pro hac vice*)
mhirose@refugeerights.org
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006
Telephone: 646.459.3057
Facsimile: 212.533.4598

PHILLIP A. GERACI*
phillip.geraci@arnoldporter.com
SUSAN S. HU*
susan.hu@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: 212.836.8000
Facsimile: 212.836.8689

Attorneys for Plaintiffs

**Pro Hac Vice* motion forthcoming

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

S.A.; *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; *et al.*,

Defendants.

Case No. 3:18-cv-03539-LB

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: October 11, 2018
Time: 9:30 a.m.
Dep't: Courtroom C (15th Floor)
Judge: Hon. Laurel Beeler

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

The central theme of Defendants' opposition to the preliminary injunction is the proposition that executive agencies can do whatever they want with immigration policy whenever a new President assumes office—without meaningful judicial review. But this is not the case: the Administrative Procedure Act and the Constitution exist to ensure that the federal government does not act arbitrarily or unconstitutionally. Here, this Administration terminated the Central American Minors ("CAM") Parole program in a secret, chaotic, and unprecedented manner, endangering thousands of children and prolonging their separation from their parents. Moreover, Defendants not only terminated the program prospectively but terminated it for the families who had already submitted applications and were waiting in the program pipeline, including those so far along in the process that they had conditional parole status. Defendants' arguments fail to acknowledge these issues or to provide any rational explanation for Defendants' conduct.

In opposing Plaintiffs' Motion, Defendants concede that the termination has and continues to irreparably harm Plaintiff families by prolonging their separation and keeping children in gravely dangerous situations.[1] Nor do Defendants dispute Plaintiffs' factual evidence. Notably, Defendants do not dispute that they secretly shut down the CAM Parole program soon after President Trump's inauguration: that the shutdown began in January;[2] that in February Defendants made a decision to "cease" all processing;[3] and that Defendants nonetheless continued to publicly represent that the program was operational and to solicit and accept thousands of dollars in fees from applicants until the program was finally publicly terminated in August.[4] Defendants do not dispute that because of the termination of the program, nearly 3,000 conditionally approved children and their family

[1] *Compare* Motion For Preliminary Injunction (ECF 24) ("Mot.") at 4, ln. 6 (identifying irreparable harmed as an issue to be decided), *with* Opposition to Motion For Preliminary Injunction (ECF 32) ("Opp."). at 2-3 (omitting irreparable harm from issues to be decided).

[2] *See* Declaration of D.D. (ECF 6-10) ¶ 16; Declaration of Linda B. Evarts In Support of Plaintiffs' Motion For Preliminary Injunction. (ECF 24-1) Exs. 1-5; Mot. at 7.

[3] Opp. at 11, ln. 21-23; Administrative Record (ECF 33) ("AR") Ex. 9 at AR000046; *see also* Declaration of Daniel B. Asimow In Support of Motion For Preliminary Injunction (ECF 25) ("Asimow Decl.") Ex. 26.

[4] AR Ex. 48 at AR000464 (USCIS website for conditionally approved applicants said there was "no planned end date for the CAM parole program"); *Id.*, Ex. 53 (April 26, 2017 Federal Register notice about expanded CAM program); *Id.*, Ex. 25 (Parole counseling script); *see* Mot. at 13-14.

members who had the right to travel to the United States,[5] and reasonably expected to travel "in a few months,"[6] never did so. They do not dispute that many of the expenses Plaintiffs incurred—fees for completed medical exams; travel and food expenses for the required trips to capital cities for each step of the process; interest on loans needed to pay thousands of dollars for plane tickets on a few days' notice; clothing, furniture, bedding, and luggage expenses incurred in anticipation of children's imminent travel—have never been and will never be reimbursed.[7]

Defendants further do not dispute Plaintiffs' evidence regarding the deteriorating country conditions in the Northern Triangle countries, even though the country conditions and the resulting humanitarian crisis at the border prompted the creation of the program. And, Defendants do not respond to the evidence presented that never before has a U.S. humanitarian program been summarily and retroactively terminated in this fashion. Nor do Defendants dispute the overwhelming evidence of anti-Latino animus by the President and its translation into policy. Instead, to oppose the preliminary injunction motion Defendants submit a sparse Administrative Record ("Record") that contains no facts or explanation for their conduct.

Plaintiffs have established their entitlement to a preliminary injunction in light of this evidentiary record. On the APA claims, Defendants' chaotic, unprecedented termination of the CAM Parole program and mass rescission were likely unlawful because, as the Record confirms, Defendants failed to provide the basic explanation for their actions required by the APA, failed to consider the relevant factors, and enacted impermissibly retroactive policy. Their admitted secret "ceas[ing]" of the program was also likely unlawful because it was, by definition, *sub silentio*, and because it violated the statutory notice requirement and Defendants' own regulation and policies. On the constitutional claims, Defendants' termination and mass rescission violated Plaintiff parents'

[5] *See* Opp. at 3, ln. 10-11 ("Conditional parole authorization permits the applicant to travel to the United States."); 8 C.F.R. §212.5(f) (non-citizen "shall be issued an appropriate document authorizing travel" when "parole is authorized" for person who will travel without a visa).

[6] AR, Ex. 25 at AR000141 (IOM parole script telling conditionally approved applicants: "Please be patient, final travel may take a few months!"); *Id.*, Ex 37 at AR000337-38 (by protocol, IOM parole script was read to conditionally approved applicants on the date they were informed of conditional parole decision); *see* Mot. at 16, ln. 9-15.

[7] *See* Mot. at 11-12; *see also* AR Ex. 46 at AR00454 ("If you have already completed a medical exam . . . , you will not receive a refund of the medical exam expense."); Declaration of R.C. (ECF 6-11) ¶ 15 (describing loans needed to pay nearly $4,000 for children's plane tickets).

basic rights to due process; and the connection between this policy and President Trump's undisputed anti-Latino animus speaks for itself in the absence of any legitimate explanation. As for the equitable estoppel claim, Defendants concede that if the claim can be made affirmatively—it can—and Defendants engaged in affirmative misconduct, Plaintiffs are likely to succeed. Plaintiffs are entitled to the preliminary injunction that they seek so that Defendants will resume parole processing during the pendency of the litigation and give Plaintiffs the opportunity to escape the dangers that they face daily and to reunite with their families in the United States.

ARGUMENT

I. DEFENDANTS' ARGUMENTS FAIL IN TOTO BECAUSE THEY FAIL TO ADDRESS THE APPROPRIATE STANDARD.

In opposing Plaintiffs' motion, Defendants incorrectly argue that Plaintiffs must satisfy a heightened standard for preliminary relief because they are seeking a mandatory injunction. *See* Opp. at 7-9. To the contrary, Plaintiffs seek a prohibitory injunction requiring Defendants to reinstate the status quo *ante litem—i.e.*, "the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). The "last uncontested status" between the parties in this case was when Defendants were processing applications in the CAM Parole program and nearly 3,000 CAM applicants had conditional parole status. Ninth Circuit precedent dictates that the mere fact that some months have passed since Defendants' unlawful acts does not change the meaning of "last uncontested status" and turn a prohibitory injunction into a mandatory one. *See, e.g.*, *id.* (rejecting argument that infringing conduct preceding case filing was status quo *ante litem* because such an interpretation "would lead to absurd situations, in which plaintiffs could never bring suit once infringing conduct had begun").

The cases Defendants cite for dicta that a preliminary prohibitory injunction cannot seek ultimate relief, Opp. at 5-8, are inapposite because that is not what Plaintiffs seek. The remedy requested would simply ensure continued processing of Plaintiffs' applications—the status quo *ante litem*—by enjoining Defendants' termination and rescission policy during the pendency of the case. This is well within this Court's power under the APA and equitable powers. *See* 5 U.S.C. §705 ("[T]he reviewing court . . . may preserve status or rights pending conclusion of the review

proceedings."); *see generally Valona v. U.S. Parole Comm'n*, 165 F.3d 508, 511 (7th Cir. 1998) (granting parolee immediate termination of parole supervision as "interim relief" under Section 705, subject to possible parole supervision reinstatement). And, the Ninth Circuit has held that even an injunction that results in ultimate relief does not turn a prohibitory injunction into a mandatory one. *See, e.g.*, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (remanding for entry of prohibitory injunction even where it may result in the award of ultimate relief to plaintiffs).

At bottom, Defendants are wrong that it is somehow too late for Plaintiffs to seek a prohibitory injunction because some months have passed since the termination. Ninth Circuit precedent is clear that "courts are loath to withhold relief solely because of delay." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017) (internal quotation marks omitted) (affirming preliminary injunction after plaintiffs delayed nearly a year to bring suit); *see Arc of Cal. v. Douglas*, 757 F.3d 975, 990-91 (9th Cir. 2014) (holding that plaintiffs could show irreparable harm even where they brought suit two years after first challenged action). The out-of-circuit district court cases cited are inapposite because they involved no irreparable harm and no reason for delay in filing. *See Republican Party of Penn. v. Cortes*, 218 F. Supp. 3d 396, 404-05 (E.D. Pa. 2016) (no irreparable harm and unreasonable delay); *AARP v. EEOC*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (no irreparable harm and no explanation for delay).

Here, the delay was warranted because (i) Defendants terminated CAM Parole without any advance notice and Plaintiffs had no choice but to challenge it after-the-fact, and (ii) after termination, several Plaintiffs relied in good faith on Defendants' promise to review the denials of their refugee claims. *See* Mot. at 8-9. Plaintiffs did not begin receiving decisions on these reviews until June 13, 2018, and every Plaintiff to receive a decision has been denied. *See id.* Moreover, there is no dispute that Plaintiffs continue to suffer irreparable harm.

In short, Defendants are wrong about the preliminary injunction standard that applies,[8] and do

[8] Even if this Court were to apply the mandatory injunction standard, Plaintiffs meet it: "extreme or very serious damage will result that is not capable of compensation in damages" in light of the undisputed irreparable harm Plaintiffs face, and "the merits of the case are not doubtful." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2007) (internal quotation marks omitted) (affirming preliminary injunction and reasoning that "[m]andatory injunctions are most likely to be appropriate when the status quo . . . is exactly what will inflict the irreparable injury").

not address Plaintiffs' arguments under the *Winter* test or the Ninth Circuit's "sliding scale" approach. *See id*. at 9-22. This case meets these standards. The Court can and should grant Plaintiffs' preliminary injunction.[9]

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR APA CLAIMS.

A. The Administrative Record Does Not Support The CAM Termination.

Defendants do not dispute Plaintiffs' factual proffer in the preliminary injunction motion; they instead rely on the Record produced concurrently with their opposition brief. The Record cannot support the termination. As an initial matter, 23 of the 62 documents in the Record post-date Acting Secretary Duke's decision to terminate CAM Parole, and thus should not be considered by the Court as they cannot provide the factual basis or rationale for the decision. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 689 (9th Cir. 2007) (holding that agency "could not have relied on" document in the administrative record that was drafted after the decision). Although Defendants contend that they "ceased" processing CAM applications in February in order to conduct a "careful review" of the program, Opp. at 11, ln. 19-23, none of the documents in the Record reflects the reason(s) for secretly "ceasing" the program during the review when thousands of people were relying on the program. And, there is no evidence in the Record that any review occurred. No factual findings. No studies considered. No analyses of program operations and outcomes. Nothing.[10]

The only documents in the Record that Defendants claim, and can claim, speak to the reasoning for termination of the CAM Parole program are President Trump's January 25, 2017 Executive Order ("the Order"), AR Ex. 2, and then-Secretary Kelly's February 17, 2017 implementing Memorandum ("the Kelly Memo"), AR Ex. 5. Neither document mentions the CAM

[9] As discussed in more detail in the opposition to Defendants' motion to dismiss, none of the Defendants' justiciability arguments has merit. Defendants do not dispute that at least one Plaintiff has standing to assert every claim, thereby satisfying Article III's case-or-controversy requirement. *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 52 n.2 (2006). Defendants apparently do not dispute—nor could they—that this Court may review Plaintiffs' APA challenges. *See* Opp. at 10, ln. 18-19 (arguing only that 8 U.S.C. §1252(a)(2)(B)(ii) bars "judicial review of *individual* parole determinations") (emphasis added).

[10] When the post-decision documents are excluded, the remaining documents are public statements of executive policy, press talking points and public guidance, template forms that CAM applicants submitted or received, program announcements from the Department of State to its contractors, IOM staff manuals, and a memo from USCIS to CBP describing the CAM program's creation.

program. President Trump's Order, which the Kelly Memo purports to implement, only addressed parole for non-citizens in immigration detention in the United States, *see* AR Ex. 2 §11—not the type of parole at issue in CAM. Both the Order and the Kelly Memo focused on ending illegal immigration and securing the southern border, *id.* §§1-2; AR Ex. 5, whereas the CAM Parole program created a legal pathway specifically designed to prevent dangerous border crossings.

B. **The CAM Termination Is Likely Arbitrary And Capricious.**

Defendants assert that Plaintiffs' APA claims should fail because courts "hardly ever strike[] down" an immigration policy, Opp. at 1, but this is not true. Immigration policies are not exempt from the APA, and courts invalidate them when they are, as here, arbitrary and capricious. *See, e.g.*, *Regents of the Univ. of California v. DHS*, 279 F. Supp. 3d 1011, 1037-46 (N.D. Cal. 2018) (enjoining DACA rescission on the basis that it was likely arbitrary and capricious); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1077-80 (N.D. Cal. 2005) (invalidating policy of not issuing temporary status documentation to non-citizens as arbitrary and capricious); *see also City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1099-1100 (C.D. Cal. 2018) (invalidating DOJ policy rewarding cooperation with federal immigration enforcement as arbitrary and capricious).[11]

In opposing the preliminary injunction motion, Defendants claim that they terminated CAM Parole because "parole authority should be exercised individually, on a case-by-case basis, and not through the creation of immigration programs applicable to pre-designated categories of aliens." Opp. at 9, ln. 7-9. This is susceptible to two interpretations, neither of which meets the basic requirement of rationality in agency decision-making for a decision that both terminated the program prospectively and mass rescinded conditional parole status of thousands of applicants.

To the extent the Secretary's decision was based on a view that the Administration no longer wanted to have a program considering parole applications on a categorical basis from Central America, there is no explanation or factual basis for this in the Record, let alone "a satisfactory explanation . . . including a rational connection between the facts found and the choice made"

[11] Defendants appear to argue that APA claims regarding immigration policy should be subject to the "bona fide and facially legitimate reason" standard rather than arbitrary and capricious review, *see* Opp. at 1, ln. 1-19, but the Ninth Circuit has explained that they are the same. *See Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Tablada v. Thomas*, 533 F.3d 800, 805 (9th Cir. 2008).

(*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983) (internal quotation marks omitted)), or the "more detailed justification" required where a prior policy has "engendered serious reliance interests" (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). Nothing in the Record reflects that the Secretary considered the country conditions in Central America resulting in a continuing humanitarian crisis at the U.S. border, although it is undisputedly "an important aspect of the problem" that she was required to consider. *State Farm*, 463 U.S. at 42-43. *See* Opp. at 10, ln. 10-16 (arguing that she considered the issue but citing AR Exs. 9, 33, which are documents dated *after* the decision).

Nor is there evidence in the Record that the Secretary considered Plaintiffs' reliance interests in the program—another "important aspect of the problem"—and this gap in the Record renders arbitrary and capricious the decision to terminate CAM Parole as to individuals who submitted CAM applications and were already in the pipeline, including those so far along in the process as to have conditionally approved status. *See Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (the court "may not infer an agency's reasoning from mere silence") (internal quotation marks omitted). Indeed, the Record reflects that the Secretary conceived of "terminating the Parole program" as a single decision, not as two separate decisions with distinct consequences—one terminating the program for prospective applicants and another terminating it for those in the pipeline. *See, e.g.*, AR Ex. 9 at AR000045 (the Secretary "decided to rescind the program"); *id.*, Ex. 46 at AR000454 ("USCIS is terminating the . . . program," and "[a]s such, . . . is rescinding your conditional approval[.]"). Defendants assert that the Secretary must have considered the reliance interests of those in the pipeline because she did not revoke parole for persons already in the United States, *see* Opp. at 12, ln. 13-17, but that consideration is nowhere documented in the Record. Defendants similarly assert that the Secretary must have considered reliance interests because she refunded fees for certain application expenses (i.e., uncompleted doctor's visits and flights), *see id*. at 12, ln. 17-20, but again, that consideration is nowhere in the Record. Moreover, nothing in the Record shows that the Secretary considered the full extent of Plaintiffs' reliance: the expenses they incurred that were not reimbursed, the risks that they took to pursue their applications, and the sacrifices they made in foregoing other opportunities because of their pending

applications. *See, e.g.*, R.C. Decl. (ECF 6-11) ¶¶ 11, 13-14, 17 (describing unreimbursed expenses for completed medical examinations, travel to each CAM appointment, and supplies purchased in anticipation of children's imminent arrival); Yungk Decl. (ECF 24-4) ¶¶ 16, 54-56 (describing risks and opportunity costs of applying for CAM Parole).

Alternatively, to the extent Defendants are claiming that the Secretary's decision was based on a legal conclusion that a program that *considers* parole applications on a categorical basis is incompatible with 8 U.S.C. §1182(d)(5)(f), that is incorrect as a matter of law.[12] The Ninth Circuit has specifically rejected the argument that this statute precludes categorical consideration of applications so long as parole is granted on a case-by-case basis. *See Walters v. Reno*, 145 F.3d 1032, 1050-51 (9th Cir. 1998) (affirming preliminary injunction that required Attorney General to parole into the United States deported class members who met certain criteria). This is consistent with the plain language of Section 1182(d)(5)(f), which limits the Secretary's discretion with respect to parole *determinations*, but not the *consideration* of parole applications. And it is consistent with how successive administrations have interpreted the statute since the statute was amended to its current form in 1996. *See* Pub. L. No. 104-208, 110 Stat. 3009 §602(a) (1996). Indeed, after the statute was amended, the Executive reported to Congress that parole admissions were "increas[ing]," the use of parole was "likely to remain relatively high by historical standards," and overseas parole "programs" were being used to bring tens of thousands of people to the United States[13]—but Congress never saw fit to amend Section 1182(d)(5)(f). For more than 20 years since the statute's amendment, successive administrations have used categorical parole programs.[14] *See*

[12] Such a reading is also not grounded in President Trump's Order or the Kelly Memo, neither of which suggest that the statute prohibits consideration of parole applications in pre-designated categories. *See* AR Ex. 2 §11(d); AR Ex. 5 at AR000030.

[13] *See* Supp. Decl. of Daniel B. Asimow In Support of Reply to Defendants' Opposition to Motion For Preliminary In-junction ("Asimow Reply Decl."), Ex. A (Triennial Comprehensive Report on Immigration (FY 1995-1997)) at 25-28, *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/tri3fullreport.pdf; *see also id.* Ex. B (Report to Congress: Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act Fiscal Years 1998-1999) at 13-17 (describing how tens of thousands of people entered the United States through "overseas parole programs" for Cuba, the former Soviet Union, Vietnam, Cambodia, and Laos).

[14] *See id.* Ex. C (Congressional Research Service, *Cuban Migration to the United States: Policy and Trends* (June 2, 2009)), *available at* https://fas.org/sgp/crs/row/R40566.pdf (describing parole granted to tens of thousands of Cubans in the late 1990s).

Yungk Decl. ECF 24-4) ¶¶ 25, 29 (describing use of categorical parole programs from 1990s to the present).

And critically, Defendants do not argue—nor could they based on the Record—that CAM parole *determinations* were made on a categorical basis. *See* Opp. at 2, ln. 2-4; *id.* at 4, ln. 20-21; *id.* at 9, ln. 7-9; *id.* at 16, ln. 16-18 (challenging consideration of parole for pre-designated categories). Rather, they concede that while the program considered all applicants who met the program criteria, parole *determinations* were made case-by-case. *See id.* at 4. The Record confirms each CAM applicant was individually interviewed by an IOM and a USCIS officer, and in order for conditional parole to be granted, USCIS had to satisfy itself that the child (a) had a parent lawfully in the United States who committed to financially support the child, (b) faced a reasonable possibility of harm in their home country and subjectively feared being harmed, and (c) any derogatory information did not outweigh the public benefit to granting parole. AR Ex. 26; Ex. 27; Ex. 28 at AR000155; Ex. 34 at AR000218; Ex. 36 at AR000308-09; Ex. 37 at AR000337-38, AR000346, AR000349, AR000358-62; Ex. 39 at AR000380; Ex. 48; Ex. 49 at AR000469. In other words, parole depended upon an individualized determination.

C. **The Mass Rescission Of Conditional Parole Is Likely Unlawful.**

As Plaintiffs argued at length in their motion, Defendants did not have the authority to retroactively rescind prior conditional parole determinations. *See* Mot. at 12-13. Defendants do not respond to this argument, and this alone is a sufficient ground to grant Plaintiffs' motion for preliminary injunction of the *en masse* rescission of conditional parole.

D. **The Secret Termination Is Likely Unlawful.**

Defendants do not seriously dispute Plaintiffs' likelihood of success on their claim that the secret termination of the CAM Parole program—which they concede occurred—was unlawful for each of three independently sufficient reasons. ***First***, by definition, Defendants' "*sub silentio*" program shutdown—that disregarded rules on the books—violated the APA's requirement that an agency display awareness that it is changing its position. *Fox*, 556 U.S. at 515-16; *see* Mot. at 14.

Second, Defendants do not respond to Plaintiffs' argument that the secret shutdown violated the contemporary notice requirement of 5 U.S.C. §552(a)(1)(D), except to the extent they argue that

notice and comment rulemaking under 5 U.S.C. §553(b) was not required. *See* Opp. at 11, ln. 9-15. But Section 552's *contemporaneous* notice requirement is distinct from Section 553's *advance* notice and comment rulemaking requirement, and it applies to a broader category of rules which includes "statements of general policy or interpretations of general applicability formulated and adopted by the agency." *See* Mot. at 14 (quoting 5 U.S.C. §552(a)(1)(D)). Defendants' citation to a notice and comment case, Opp. at 11, ln. 12-15, is thus inapposite. Because Defendants concede that Plaintiff children with conditional parole would have traveled to the United States but for the secret termination, and that all Plaintiffs continued to expend time and money and risk their safety because they lacked notice of the termination, Plaintiffs are likely to succeed on their Section 552 claim. The cases cited in Plaintiffs' moving papers—prohibiting the Government from taking adverse action based on secret rules and guidelines and requiring application of public rules and guidelines—stand unrebutted.

Third, Defendants misconstrue Plaintiffs' claim that the secret shutdown was arbitrary and capricious under *Accardi*. The question is not whether Defendants have the authority to amend their regulations or internal guidance. The question is whether, under binding Ninth Circuit authority, Defendants must follow their public regulatory and sub-regulatory policy until they officially change such policy. *See* Mot. at 15, ln. 11-15 (collecting Ninth Circuit cases).[15] Defendants do not dispute that their own regulation requires them to "issue[ ] an appropriate document authorizing travel" to conditionally approved applicants. 8 C.F.R. §212.5(f); *see* Opp. at

[15] The cases Defendants cite are inapposite. *See, .e.g., Perez v. Mortg. Bankers Ass'n*,—U.S. —, 135 S. Ct. 1199, 1206 (2015) (concerning the inapplicability of notice-and-comment rulemaking to changes to interpretive rules); *Walker v. Reno*, 925 F. Supp. 124, 131 (N.D.N.Y. 1995) (*Accardi* does not apply to rules which "ha[ve] been given no substantive effect by [the agency]"). Although *Hall v. EEOC*, 456 F. Supp. 695, 703 (N.D. Cal. 1978), posits that the *Accardi* claim brought there must be coterminous with a constitutional due process claim, Plaintiffs bring this claim under the *Accardi* theory holding that agencies must follow their own procedures "even where the internal procedures are possibly more rigorous than otherwise would be required." *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (collecting cases) (internal quotation marks omitted); *but see James v. Parole Comm'n*, 159 F.3d 1200, 1205-06 (9th Cir. 1998) (holding that an interpretive procedural rule intended only for internal use did not create due process right and citing cases holding that such rules cannot be enforced). Moreover, in the due process context, courts have held that individuals are entitled to have their applications considered under an agency's promised procedures. *See, e.g., Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 283-84 (E.D.N.Y. 2018) (holding that plaintiffs stated a procedural due process claim in having their DACA renewal requests considered where USCIS told them in letter that it "will adjudicate" requests received by certain date).

3, ln. 9-16 ("Conditional parole authorization permits the applicant to travel to the United States," and thus, DHS or DOS "will issue travel documents to enable the applicant to travel to a U.S. port-of-entry[.]"). Nor do Defendants dispute that between January and August 2017, they publicly represented that CAM Parole remained available—in fact, the Record confirms that they did. *See* AR Ex. 48 at AR000464. Because Defendants ignored their own regulation and sub-regulatory policy, Plaintiffs are likely to succeed on claim based on Defendants' *Accardi* violation.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR DUE PROCESS CLAIM.

In opposing Plaintiffs' Procedural Due Process claims, Defendants mischaracterize the protected interest underlying Plaintiffs' claims as the "continuation of the CAM Parole Program," Opp. at 13-14. They rely heavily on *Regents*, in which plaintiffs challenging the rescission of DACA argued that they had a protected interest in discretionary relief itself or in its renewal, in part based on their serious reliance interests.[16] *See id.* (citing *Regents of the Univ. of Cal. v. DHS*, 298 F. Supp. 3d 1304, 1310-11 (N.D. Cal. 2018)). But here, unlike in *Regents* or other similar cases Defendants cite, Plaintiff U.S.-based parents do not claim to have a protected property interest in discretionary relief; rather, they have a fundamental liberty interest in the companionship of their children, from whom they are separated indefinitely as a result of Defendants' policy. *See Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011) ("A parent has a fundamental liberty interest in companionship with his or her child.") (citation and internal quotation marks omitted). The Supreme Court has assumed that even in the context of discretionary immigration decisions, the Executive cannot deprive a person in the United States of their fundamental liberty interest in the companionship of an immediate family member without a bona fide and facially legitimate reason. *Kerry v. Din*, — U.S. —, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring) (in case challenging visa denial, assuming that wife had protected liberty interest in companionship of her husband)[17]; *see Cardenas v. United States*, 826 F.3d 1164, 1171-72 (9th Cir. 2016) (same); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (U.S.-based person challenging denial

[16] Defendants also cite two out-of-circuit cases relating to inadmissible foreign nationals, *id.*, but here, only U.S.-based parents assert the due process claim. Mot. at 19.

[17] Justice Kennedy's opinion is controlling. *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016).

of visa to immediate family is "entitled" under due process to judicial inquiry into reason).

Defendants also argue that due process protections "do[ ] not attach to programmatic policy changes." Opp. at 15 (citing *Casa de Md. v. DHS*, 284 F. Supp. 3d 758, 776 (D. Md. 2018)), but they are mistaken for two reasons. First, even where broad policies are concerned, the Executive cannot simply issue wholly arbitrary or irrational rules or act outside of the normal manner prescribed by law. Mot. at 20, ln. 6-13. For the same reasons that Defendants' action is arbitrary and capricious, *see supra*, Defendants' decision to terminate CAM Parole violates due process. Second, Plaintiffs challenge not only general policy changes but Defendants' decision to vacate case-by-case findings of eligibility for conditional parole in a single, across-the-board decision, without notice and the opportunity to be heard. *See id.* at 19-20; *Mathews v. Eldridge*, 424 U.S. 319, 332-49 (1976) (using three-part test to determine whether broadly applicable regulations and procedures resulting in termination of individual's benefits absent hearing violated due process).

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR EQUAL PROTECTION CLAIM.

Far from precluding Plaintiffs' equal protection claim as Defendants contend, *Trump v. Hawaii*, — U.S. —, 138 S. Ct. 2392, 2420 (2018), demonstrates that it is appropriate to consider extrinsic evidence, including President Trump's statements, to evaluate discriminatory purpose and unconstitutional animus. Moreover, the "bona fide and facially legitimate reason standard" found satisfied in that case is plainly not met here. In *Hawaii*, a 5-4 majority of the Court found that the Administration had sufficiently carried its burden to justify the third iteration of the travel ban: the challenged action was supported by a national security rationale and was adopted following a worldwide review of security and vetting procedures that involved the identification of specific deficiencies, tailoring of restrictions based on those findings, and explanation of its reasoning. *See id*. at 2404-06, 2420-22. In this case, Defendants have never articulated a national security rationale, nor is there evidence that any review of any sort ever occurred, much less that there were findings made.

With respect to Plaintiffs' extrinsic evidence, Defendants do not dispute that the termination of CAM Parole and the mass rescission exclusively affected Latinos, whom President Trump has targeted with vitriol since his days as a candidate and whom the Trump Administration has singled

out for disfavored treatment. *See* Mot. at 17-18. Defendants, in arguing that their policy simply put CAM applicants "on the same footing as nationals of other countries," Opp. at 16, ln. 12, ignore the reality that for CAM applicants who lived in some of the most dangerous nations for young people on earth and had already invested time, energy, money, and risked their personal safety in reliance on the program, the termination and rescission made them significantly worse off than others whose investments were not rendered worthless. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ."). Defendants do not dispute Plaintiffs' evidence that the CAM Parole termination and mass rescission of conditional parole represented a sharp departure from this country's normal process of phasing out humanitarian programs, and that the phase-outs of other (non-Latino) parole/refugee programs have been orderly and afforded pending applicants the right to be considered; nor do they dispute that the conditions motivating the creation of the program are still present, and indeed, have worsened. *See* Mot. at 18. The unrebutted record speaks for itself.

V. IN THE ALTERNATIVE, PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR EQUITABLE ESTOPPEL CLAIM.

Contrary to Defendants' arguments, Opp. at 17-18, Ninth Circuit precedent is clear that equitable estoppel is an affirmative cause of action. In an *en banc* decision that Defendants cite but the facts of which they fail to consider, the Ninth Circuit relied on the merits of the plaintiff's affirmative equitable estoppel claim to affirm a district court's order enjoining the U.S. Army from refusing to reenlist the plaintiff. *See Watkins v. U.S. Army*, 875 F.2d 699, 705-11 (9th Cir. 1989) (en banc). Contrary to non-binding authority that Defendants cite, Opp. at 17-18, the Ninth Circuit has repeatedly considered affirmative equitable estoppel claims, in a series of cases that Defendants ignore. *See, e.g.*, *Peter-Palican v. Gov't of the N. Mariana Islands*, 695 F.3d 918, 920 (9th Cir. 2012) (remanding case for consideration of plaintiff's affirmative equitable estoppel claim); *Elim Church of God v. Harris*, 722 F.3d 1137, 1143-44 (9th Cir. 2013) (considering merits of plaintiff's affirmative equitable estoppel claim); *see Wenger v. Monroe*, 282 F.3d 1068, 1076-77 (9th Cir. 2002) ("A claim for equitable estoppel lies only where the party to be estopped has engaged in conduct that causes justifiable reliance by the party asserting the claim.").

With respect to the merits of the claim, Defendants dispute only the affirmative misconduct element. Opp. at 18-19. Equitable estoppel applies precisely where, as here, the government engaged in a "deliberate lie" or "pattern of false promises" and thereby induced plaintiffs' reasonable reliance to their detriment. *See* Mot. at 20-21. As discussed, *supra*, Defendants do not dispute that for seven months they: (1) publicly misrepresented that the CAM Parole program remained available and had "no planned end date." AR Ex. 48 at AR000464; and (2) continued to solicit and accept payments, *see* Mot. at 21—when in reality they had "ceased" all processing. Opp. at 11, ln. 21-23. Nor do Defendants dispute that Plaintiffs—in reliance on Defendants' misrepresentations—(1) paid program fees and incurred related expenses (most of which was never reimbursed), *id.* at 22; and (2) put themselves at greater risk by participating in the program.[18] *See* Yungk Decl. (ECF 24-4) ¶¶ 16, 54-56. Plaintiffs' equitable estoppel claim is likely to succeed. *See Galvez v. Howerton*, 503 F. Supp. 35, 38-40 (C.D. Cal. 1980) (holding that INS engaged in affirmative misconduct with its improper rejections of applications and processing delays, and it was estopped from denying plaintiffs permanent resident status).

VI. THE BALANCE OF THE EQUITIES TIP SHARPLY IN PLAINTIFFS' FAVOR, AND PLAINTIFFS PROPERLY SEEK THE ONLY REMEDY THAT WILL ADDRESS THE IRREPARABLE HARM.

Defendants' arguments about the balance of equities boil down to a single claim: that an injunction would "interfere with the executive branch's ability to enforce the U.S. immigration laws," and thereby "constitute[] an irreparable injury." Opp. at 20-21. But, Defendants have no legitimate interest in violating the Constitution, *see United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring), or federal law, *see Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013), and the public interest favors "curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided court*, — U.S. —, 136 S. Ct. 2271, 2272 (2016). Defendants do not dispute that Plaintiffs seek relief consistent with Defendants' own statements. *See* Mot. at 25, ln. 11-18 (Defendant Secretaries seeking to disincentivize Central American children from making dangerous trip to U.S. Border and

[18] That some fees for unused medical exams and flights were eventually refunded to Plaintiffs, *see* Opp. at 19, ln. 23-25, does not address the evidence related to fees and other costs that were not refunded or the unquantifiable harm Plaintiffs incurred by increasing the risk they face. *See supra*.

seeking to protect children). And Defendants concede that Plaintiffs suffer irreparable harm every day, *see supra*, thus tipping the balance of equities and public interest in Plaintiffs' favor. *See id.*

With respect to the proper remedy, Defendants' argument that "an injunction in a putative class action applies only to the named plaintiffs," Opp. at 24, ln. 18-19, is inapposite in an APA case, and in any event, mispresents Ninth Circuit precedent. Vacatur is the presumptive remedy for a violation of the APA, and whether an agency action should be preliminarily enjoined under the APA depends on the equitable balancing of the preliminary injunction test, *see All. for the Wild Rockies v. U.S. Forest Serv.*, 899 F.3d 970, 987 (9th Cir. 2018) (vacating agency project upon finding that agency had "not overcome the presumption of vacatur"). None of Defendants' cases, Opp. at 24, involved injunctions in the APA context.

Moreover, when considering the appropriate scope of relief for preliminary injunctions of immigration law or policy, courts have repeatedly concluded that relief must be uniform and cannot be geographically limited: "the Constitution requires 'a uniform Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and uniformly'; and the Supreme Court has described immigration policy as 'a comprehensive and unified system.'" *Texas v. United States*, 809 F.3d at 187-88 (affirming a nationwide preliminary injunction of immigration policy) (emphases in original); *see, e.g.*, *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (declining to stay nationwide preliminary injunction of parts of travel ban executive order); *Regents*, 279 F. Supp. 3d at 1049 (enjoining policy to rescind DACA on nationwide basis); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018) (same, and noting "[b]ecause the decision to rescind the DACA program had a 'systemwide impact,' the court will preliminarily impose a 'systemwide remedy.'"). This uniformity is particularly important where, as here, Plaintiff parents and organizational Plaintiffs' clients reside in different parts of the country, and Defendant agencies involved in application processing are located throughout the United States. *See Regents*, 279 F. Supp. 3d at 1049. Plaintiffs are entitled to the preliminary injunction they seek to remedy the harm they face every day because of Defendants' conduct.[19]

[19] Although Plaintiffs oppose Defendants' attempt to dismiss the President, *see* Opp. at 23-24, they will not seek the preliminary injunction against the President.

DATED: September 17, 2018.

Respectfully submitted,

/s/ *Daniel B. Asimow*

DANIEL B. ASIMOW
MATTHEW H. FINE
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, California 94111

JOHN A. FREEDMAN (appearance *pro hac vice*)
DAVID J. WEINER
GAELA K. GEHRING FLORES*
DANA O. CAMPOS*
MATEO MORRIS*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

PHILLIP A. GERACI*
SUSAN S. HU*
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710

**Pro Hac Vice* motion forthcoming

/s/ *Linda Evarts*

LINDA EVARTS (appearance *pro hac vice*)
KATHRYN C. MEYER (appearance *pro hac vice*)
MARIKO HIROSE (appearance *pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006

Attorneys for Plaintiffs

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/ *Daniel B. Asimow*
DANIEL B. ASIMOW