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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

S.A.; J.A.; A.B.; R.C., on behalf of himself and as Guardian Ad Litem for J.C., a minor child; M.C.; D.D.; G.E., on behalf of himself and as Guardian Ad Litem for B.E., a minor child; J.F. on behalf of himself and as Guardian Ad Litem for H.F. and A.F., minor children, on behalf of themselves and on behalf of a class of all similarly situated individuals, and CASA,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF STATE; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; MICHAEL R. POMPEO, in his official capacity as Secretary of State; L. FRANCIS CISSNA, in his official capacity as Director of U.S. Citizenship and Immigration Services; UNITED STATES OF AMERICA,

Defendants.

Case No. 18-CV-03539 LB

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: October 11, 2018
Time: 9:30 a.m.

The Honorable Laurel Beeler

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Defendants respectfully submit this reply memorandum in support of their motion to dismiss.

I. EACH OF THE COMPLAINT'S FIVE COUNTS FAILS TO STATE A CLAIM.

For the reasons set forth in defendants' opening brief and discussed further herein, each of the complaint's five counts should be dismissed.

A. Plaintiffs' Due Process Claim Fails.

Plaintiffs do not dispute that "[t]o assert a due process claim, a plaintiff must first show that he or she has an interest in liberty or property protected by the Constitution." *Regents of Univ. of California v. United States Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1310 (N.D. Cal. 2018). Instead, relying on cases outside the immigration context, plaintiffs argue that "the U.S.-based parent Plaintiffs' interest in the companionship of their children" is a constitutionally-protected interest sufficient to support their due process claims. (ECF 34 at 20.) This is not the case.

Termination of the CAM Parole Program is not a "family separation initiative[]," as plaintiffs assert. (*Id*.) The plaintiff-parents residing in the United States were ***already separated*** from their children. Many of the plaintiff-parents have been separated from their children for years. (*See, e.g.*, ECF 1 at ¶ 115 (Plaintiff J.F. "has lived and worked in the United States for two decades and has never had an opportunity to share a home with his wife and daughters."); ¶ 101 (Plaintiff "A.B. has not been able to live with his son since he left El Salvador when his son was a baby."); ¶ 108 (Plaintiff "D.D. has not lived with her daughter since her daughter was a baby.").) The separation status of the plaintiff families is important to the due process analysis because there is "no substantive due process obligation to reunite families or promote family integrity where the state is not responsible for the disruption of family integrity." *Bruker v. City of New York*, No. 93CIV3848, 2003 WL 256801, at *6 (S.D.N.Y. Feb. 4, 2003) ("To the extent plaintiff is alleging that defendants failed to intervene to reverse family disruption they did not cause, no substantive due process right has been violated."). None of the cases cited by plaintiffs stands for the proposition that a substantive due process interest in family integrity requires the admission of aliens to reunite already-separated families. *Cf. W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1132 (N.D. Ill. 2018) ("Nor do any of the cases cited by Plaintiffs stand for the proposition that the substantive due process to family integrity dictates *release* of the parents[.]").

"In the immigration context, courts have long recognized the power to expel or exclude aliens as

a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003). The Ninth Circuit has squarely held that "[s]ince discretionary [immigration] relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause." *Id.*; *see also Garcia-Mir v. Meese*, 788 F.2d 1446, 1450 (11th Cir. 1986) ("[E]xcludable aliens are largely outside the mantle of the Due Process Clause of the Fifth Amendment[.]"). The Ninth Circuit reached its due process conclusion in *Munoz* notwithstanding the fact that plaintiff Munoz had "resided in the United States virtually his entire life and his only family and friends live in the United States." *Id.* "Notwithstanding Munoz's unique circumstances," which included the same desire to live with his family that plaintiffs assert here, the Ninth Circuit held that "he has no substantive due process right to stay in the United States." *Id.* *Munoz* is binding and, unlike the non-immigration cases plaintiffs cite (ECF 34 at 20), applicable.

The Ninth Circuit's decision in *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004), is also on-point and binding. In *Kwai Fun Wong*, the Ninth Circuit held that there is simply "no substantive liberty or property interest . . . in temporary parole status." *Id.* at 968. The Ninth Circuit's decisions "foreclose any argument that plaintiffs have a protected interest in . . . advance parole[.]" *Regents of Univ. of California*, 298 F. Supp. at 1310; *see also Tefel v. Reno*, 180 F.3d 1286, 1301 (11th Cir. 1999) ("[A]warding and then revoking discretionary [parole] relief does not offend due process."). The plaintiff-parents' desire to reunite with their children does not create a derivative, constitutionally-protected interest in the alien-children entering the country, that otherwise does not exist. "[C]ourts faced with similar challenges by minor [U.S. citizen-]children to a parent's deportation" have rejected such constitutional challenges." *Kruer ex rel. S.K. v. Gonzales*, No. CIV.A. 05-120-DLB, 2005 WL 1529987, at *5 (E.D. Ky. June 28, 2005). The constitutional interests of a citizen-minor challenging his or her parent's deportation are even stronger than the interests at issue here, as the deportation separates an otherwise intact family.

The lack of a cognizable constitutionally-protected interest requires dismissal of all plaintiffs' due process claims. The procedural due process claims fail for the additional reason that "procedural due process only applies to individualized deprivations, not policy-based deprivations for an entire

class." *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 776 (D. Md. 2018); *see also Tefel*, 180 F.3d at 1301 ("group of aliens did not suffer a constitutional violation by receiving and then losing parole without any process"). Plaintiffs cite no cases to the contrary. Accordingly, plaintiffs' due process claims should be dismissed.

B. Plaintiffs' Equal Protection Claim Fails.

Plaintiffs' equal protection analysis virtually ignores the governing Supreme Court decision: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). (*See* ECF 34 at 22-24.) The *Hawaii* plaintiffs advanced the equivalent discrimination theory that plaintiffs advance here—specifically, allegations of "a series of statements by the President and his advisers casting doubt on the official objective of the [decision]." *Id.* at 2417. (*Compare, e.g.*, ECF 34 at 22 (Plaintiffs challenge termination of the CAM Parole Program "against a backdrop of unrelenting invective from the President" and "the President's history of racial slurs directed towards Latinos and particularly Central Americans.") The *Hawaii* Court held that such allegations were insufficient to give rise to a constitutional discrimination where "the Government's stated objective" "can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420.

The fact that the "exclusion of foreign nationals" was at issue in *Hawaii*, as it is here, was important to the Court's analysis: The "Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments and largely immune from judicial control." *Id.* at 2418. Thus, the Court limited its review to "whether the Executive gave a facially legitimate and bona fide reason for its action." "[W]hen the Executive exercises this delegated power [to exclude aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion nor test it by balancing its justification against the asserted constitutional interests of U.S. citizens." *Id.* at 2419. Plaintiffs offer no compelling explanation as to why *Hawaii* does not require dismissal of their equal protection claims.[1]

The government has proffered a "facially legitimate and bona fide reason" for the decision to

[1] Plaintiffs' reliance on *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), a housing discrimination case, is unwarranted. The Supreme Court's decision in *Hawaii* makes it clear that a more circumscribed review is called for when the decision in

terminate the CAM Parole Program—the view that only Congress, and not the Executive, should create immigration programs applicable to pre-designated categories of aliens. (ECF 33-2, 33-5, 33-6, 33-9.) The plain language of section 212(d)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5)(A), which establishes the Secretary's discretionary authority to grant temporary parole "only on a case-by-case basis," "strongly counsel[s] in favor of using the parole authority sparingly and only in individual cases[.]" (ECF 33-5.)

This reason is facially neutral. The rescission of the CAM Parole Program did not single out nationals of El Salvador, Guatemala and Honduras for less favorable parole consideration than nationals of other countries. Instead, it put them on the same footing as nationals of other countries. Now, all aliens may apply for parole by filing USCIS Form I-131, Application for Travel Document. (ECF 33-1, 33-6.) The reason also bona fide. It reflects a reasonable construction of the statute, and a reasonable policy determination that parole should be exercised "sparingly." *See Texas v. United States*, No. 1:18-CV-00068, 2018 WL 4178970, at *41 (S.D. Tex. Aug. 31, 2018) (endorsing a similarly narrow reading of 8 U.S.C. § 1182(d)(5)(A), albeit regarding parole for individuals already present in the U.S. seeking to depart and be paroled back into the U.S.).[2]

Plaintiffs assert that, notwithstanding the government's submission of an administrative record setting forth the reason for termination of the CAM Parole Program, "any justification is a fact issue that cannot be resolved on a motion to dismiss." (ECF 34 at 23.) That is not the approach that courts have taken in adjudicating similar claims. The district court in *Casa De Maryland*, for example, considered the administrative record in connection with the government's motion to dismiss. 284 F. Supp. 3d at 768.[3] Specifically, in finding the plaintiffs' "equal protection claims to lack merit," the *Casa De Maryland* court confined its review to the justifications set forth in the administrative record. *Id.* at 774-

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question concerns the "exclusion of foreign nationals," a "a matter within the core of executive responsibility." 138 S. Ct. at 2418.

[2] The government does not ground its decision to terminate the CAM Parole Program in a conclusion of illegality. Instead, the Acting Secretary concluded that, in light of the INA's statutory language it was more appropriate to use the parole authority only "sparingly" and in "individual cases." (ECF 33-2, 33-5, 33-6, 33-9.)

[3] The *Casa De Maryland* court did allow that the decision could be grounded in summary judgment principles as well. 284 F. Supp. 3d at 763.

75. Notably, the *Hawaii* decision establishes that a court's "limited" review of Executive action regarding the exclusion of foreign nationals should be made on the basis of the "Government's stated objective." *Id.* at 2420.

In any event, Executive Order 13767 (ECF 33-2); Secretary Kelly's February 17, 2017 memo (ECF 33-5); printouts from USCIS's website, https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-parole-applicants (ECF 33-6); and the Central American Minors (CAM) Parole Communications Plan and Materials (ECF 33-7) are public records. They are thus subject to judicial notice, and defendants respectfully request that the Court take such notice of them. *See In re Am. Apparel, Inc. S'holder Litig.*, 855 F. Supp. 2d 1043, 1061 (C.D. Cal. 2012) ("[T]he SEC Investor Bulletin is a proper subject of judicial notice, as it is a government publication and matter of public record."). Judicially-noticeable documents may be considered by a district court in the context of a motion to dismiss, without converting the motion into one for summary judgment. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Moreover, plaintiffs' Complaint references both Executive Order 13767 and Secretary Kelly's February 17, 2017 memo (ECF 1 at ¶¶ 62-63.) *See Parrino v. FHP, Inc.*, 146 F.3d 699, 705 (9th Cir. 1998) ("A district court ruling on a motion to dismiss may consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.").

The government has articulated a "facially legitimate and bona fide reason" for termination of the CAM Parole Program. Accordingly, after the Supreme Court's decision in *Trump v. Hawaii*, plaintiffs' equal protection claims cannot survive and should be dismissed.

C. Plaintiffs' Equitable Estoppel Claim Fails.

"[E]quitable estoppel is not a cause of action but a judicial doctrine that bars the assertion of a claim or defense." *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551, 554 n.1 (6th Cir. 2009); *see also Virginia Power Energy Mktg., Inc. v. EQT Energy, LLC*, No. 3:11CV630, 2012 WL 2905110, at *10 (E.D. Va. July 16, 2012) ("[T]he doctrine [of equitable estoppel] is usually asserted as a 'shield' rather than a 'sword.'"). Plaintiffs' affirmative cause of action for equitable estoppel should thus be dismissed.

The law in the Ninth Circuit is not otherwise, particularly with respect to claims against the

United States government. Even in *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989), upon which plaintiffs rely (ECF 34 at 24), Mr. Watkins suit is best understood as an APA or mandamus claiming, seeking judicial review of the Army's refusal to reenlist him. The court used estoppel to bar the Army from relying on its anti-homosexual reenlistment regulation as a defense to reenlistment. *Id*. at 711. This is consistent with how the Ninth Circuit has subsequently explained equitable estoppel. In *United States v. Hatcher*, for example, the Ninth Circuit described *Watkins* as a suit in which "the plaintiff relied on equitable estoppel to prevent the Army from discharging him." 922 F.2d 1402, 1410 (9th Cir. 1991). Mr. Watkins did "not use estoppel as the basis for a suit against the government for payment of money." *Id.* The Ninth Circuit offered a similar view of the equitable estoppel in *Estate of Amaro v. City of Oakland*. "[E]quitable estoppel applies when a plaintiff who knows of his cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit." 653 F.3d 808, 814 (9th Cir. 2011). These Ninth Circuit decisions are not compatible with the idea that equitable estoppel can be used as a catch-all cause of action against the government, as plaintiffs attempt to do here.

Recognition of equitable estoppel as an affirmative cause of action against the government would also be inconsistent with the Supreme Court's teachings in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). "In *Richmond*, the Court decided litigants may not use the doctrine of estoppel *offensively*" to support a claim for damages. *Hatcher*, 922 F.2d at 1410 (emphasis in original). Notably, the Supreme Court "has reversed every finding of estoppel [against the government] that [it] ha[s] reviewed." *Richmond*, 496 U.S. at 422. The caselaw is clear that "equitable estoppel against the government is disfavored and is rarely successful." *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000).

Plaintiffs identify no waiver of sovereign immunity for invoking equitable estoppel as an affirmative cause of action against the government here. (ECF 34 at 24-26.) "It is a bedrock principle of American law that, as Sovereign, the United States is immune from suit unless Congress has expressly waived that immunity." *Anderson v. Duncan*, 20 F. Supp. 3d 42, 63 (D.D.C. 2013). Moreover, "waivers of sovereign immunity cannot be implied." *Offield v. Holder*, No. 12-CV-03053-JST, 2014 WL 1892433, at *18 (N.D. Cal. May 12, 2014). They must be "unequivocally expressed [by Congress] in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). No such waiver exists with

respect to an affirmative equitable estoppel cause of action.[4] For these reasons, and the reasons set forth in defendants' opening brief, plaintiffs' equitable estoppel claims should be dismissed.

D. Plaintiffs' "Arbitrary & Capricious" APA Claim Fails.

Plaintiffs allege that the decision to terminate the CAM Parole Program was "arbitrary and capricious" under the APA. The Administrative Record herein shows otherwise.[5] Plaintiffs do not dispute that "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nor do plaintiffs dispute that the relevant inquiry is whether the decision was made with "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* Under this standard, plaintiffs' "arbitrary and capricious" APA claim should be dismissed.

As an initial matter, the court need not and should not accept plaintiffs' legal conclusion that there was a "secret shutdown of the CAM Parole Program in January and February" 2017 that amounted to "final agency action under 5 U.S.C. § 704." (ECF 34 at 14.) *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). The decision to terminate the CAM Parole Program was effective August 16, 2017, as the Federal Register notice referenced in plaintiffs' complaint makes clear, and made shortly before that date. (ECF 1 at ¶ 64.) *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *opinion amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001) (In ruling on a motion to dismiss, the "court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit."). It was not until August 16, 2017 that the agency had "completed its decisionmaking process." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

President Trump issued Executive Order 13767 on January 25, 2017, instructing the DHS Secretary to ensure that parole authority was exercised "only on a case-by-case basis in accordance with

[4] Contrary to plaintiffs assertions, defendants can and do contest many other aspects of plaintiffs' equitable estoppel claim. (ECF 34 at 25.) However, defendants recognize that this is a motion to dismiss.

[5] As set forth above, plaintiffs' objection to consideration of the Administrative Record is unfounded. (ECF 34 at 13 n.2.)

the plain language of the statute." (ECF 33-2 at AR000006.) Secretary Kelly then issued a February 20, 2017 implementing memorandum, instructing DHS to undertake a review of its various parole policies. (ECF 33-5 at AR000030). As instructed, DHS thereafter "conducted a careful review of the Central American Minors (CAM) Parole program." (ECF 33-9 at AR000046.) "While the CAM program was under review, USCIS ceased considering or offering parole or further processing individuals who had been conditionally approved for parole under the program." (*Id.*) But, there was not final agency action for APA purposes until August 16, 2017, when Acting Secretary Duke published the notice announcing termination the program. (ECF 33-1.) *See Ass'n of Admin. Law Judges v. U.S. Office of Pers. Mgmt.*, 640 F. Supp. 2d 66, 73 (D.D.C. 2009) ("Much of what an agency does is in anticipation of agency action. Agencies prepare proposals, conduct studies, meet with members of Congress and interested groups, and engage in a wide variety of activities that comprise the common business of managing government programs[,]" but do not amount to final agency action.).

Contrary to plaintiffs' arguments (ECF 34 at 16), the Administrative Record—"the basis from which the Court must make its judicial review"—does set forth a satisfactory explanation for the termination decision. *Casa De Maryland*, 284 F. Supp. 3d at 774. The agency decided to terminate the CAM Parole Program in response to the review mandated by the President's Executive Order 13767 and Secretary Kelly's February 17, 2017 memo. (*See, e.g.*, ECF 33-6 at AR00036.) In the new administration's view, the parole authority should be exercised only "sparingly" and "only in individual cases." (ECF 33-5 at AR000030.) The CAM Parole Program, in contrast, created a classwide parole program for "certain aliens in pre-designated categories" and thus "create[d an] immigration program[] not established by Congress." (*Id.*) Under the CAM Program, "significant public benefit" for parole was considered established for pre-designated categories of aliens, if the alien met the pre-established criteria for the program. (AR Exs. 41 at AR000442, 44.) CAM Program statistics corroborated the new administration's view of the program's breadth. As of November 15, 2016, "[m]ore than 1335 individuals ha[d] arrived in the United States via the [CAM Parole and Refugee] program." (ECF 33-17 at AR000103.) The agency reasonably viewed this as at odds with "sparing" and "individual" exercise of the parole authority.[6]

[6] Defendants do not argue, and the Administrative Record does not reflect, a conclusion that the

The agency need not provide a lengthy explanation for its decision. Nothing more than a "brief statement" of the agency's reasons is required. *Tourus Records, Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("[T]he core requirement is that the agency explain why it chose to do what it did."); *see also Casa De Maryland*, 284 F. Supp. 3d at 772 (rejecting, in DACA context, argument that a short "Administrative Record [wa]s 'insufficient' to make a decision of such magnitude"); *Hawaii v. Trump*, 138 S. Ct. at 2421 (rejecting argument that decision was not well thought out because the "final DHS report was a mere 17 pages"). "In reviewing the agency's decision" under the arbitrary-and-capricious standard, the court "must uphold even 'a decision of less than ideal clarity' so long as 'the agency's path may reasonably be discerned.'" *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1087 (9th Cir. 2014) (en banc) (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 513-14 (2009)).

Plaintiffs argue that "a total elimination of parole is not consistent with a directive [to] exercise discretion 'sparingly.'" (ECF 34 at 16.) But, termination of the CAM Parole Program did not "total[ly] eliminat[e]" parole. Parole consideration "independent of the CAM program" remained and remains available "by filing USCIS Form I-131, Application for Travel Document." (ECF 33-1 at AR000002.)

Contrary to plaintiffs' claims (ECF 34 at 16.), the Administrative Record does "discuss the reasons for the creation of the CAM Parole program." The Record notes, for example, that:

> The CAM Parole program was implemented as part of an integrated strategy to address factors contributing to increases in migration from Central American to the United States. However, as indicated by the President's Executive Order, DHS is pursuing a new strategy to secure the U.S. southern border.

(ECF 33-6 at AR000036.) The Administrative Record also makes it clear that the agency did consider the "reliance interests" of those impacted. The Secretary could have terminated parole for those already in the country, but chose not to. (ECF 33-1 at AR00002 ("Although DHS is terminating the CAM Parole Program, individuals who have been paroled into the United States under the CAM Parole

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CAM Parole Program was illegal. (ECF 34 at 16 n.1.) Rather, the agency concluded that there was a tension between the INA's language, suggesting that the parole authority should be exercised on an individual, case-by-case only, and the CAM Parole Program, which "automatically considered" categories of aliens from Guatemala, Honduras, and El Salvador who had been denied refugee status for parole. (ECF 33-6 at AR000036.) The agency determined that a more constrained approach, under which the parole authority was exercised only "sparingly" was a better policy choice, and more in keeping with the statutory framework. (ECF 33-5 at AR000030.)

program will maintain parole until the expiration of that period of parole[.]").) Additionally, in recognition of the interests of the individuals whose conditional parole authorizations were being rescinded, USCIS extended the deadlines associated with their refugee cases. (ECF 33-6 at AR000037 ("If you were conditionally-approved for parole but did not submit a Request for Review of your denied refugee case because you intended to travel to the United States with parole, you may file a Request for Review even though it is past the 90-day window for filing.").)

On this topic, it bears repeating that plaintiffs have no cognizable reliance interest in the continuation of the CAM Parole Program. "[A] person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a protected right if that belief is not mutually held by the government." *Regents of Univ. of California*, 298 F. Supp. 3d at 1311. That is especially so to the extent that the purported reliance interest is tantamount to an inadmissible alien's interest in discretionary parole into the United States, as such aliens have no cognizable interest in or right to entry into or continued residence in the United States. *Cf.*, *e.g.*, *Hawaii*, 138 S. Ct. at 2419 (2018) ("foreign nationals seeking admission have no constitutional right to entry"); *Mendez-Garcia v. Lynch*, 840 F.3d 655, 665 (9th Cir. 2016) (holding that denial of discretionary immigration relief "cannot violate a substantive interest protected by the Due Process clause"). Moreover, an "agency's past practice of generally granting a government benefit is also insufficient to establish a legal entitlement." *Id.*; *see also Garcia-Mir*, 788 F.2d at 1451-52 ("[T]he mere fact that a wholly and expressly discretionary state privilege has been granted generously in the past does not prove the existence of a constitutional entitlement.") (change in parole policy vis-à-vis Cubans).

Plaintiffs lament that "[t]he bare bones Federal Register notice fails to provide any explanation for Defendants' action, much less a satisfactory one" is a red herring. (ECF 34 at 17.) There was no requirement that DHS even provide notice of the program's termination in the Federal Register. Like DACA, the CAM Parole Program was instituted without notice and comment procedures and could be terminated accordingly. *See Regents of Univ. of California*, 298 F. Supp. 3d at 1309 ("This order rejects plaintiffs' contention that the rescission could only be done through notice and comment. For the same reasons that the promulgation of DACA needed no notice and comment, its rescission needed no notice and comment."); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 273 (E.D.N.Y. 2018) ("Plaintiffs' view

that Defendants must use notice and comment to stop what started without notice and comment is not only counterintuitive, but also at odds with the general principle that the procedures needed to repeal or amend a rule as the same ones that were used to make the rule in the first place."). By comparison, the Supreme Court in *Lincoln v. Vigil* rejected an APA challenge to the Department of Health and Human Services' brief statement to its service providers that is was terminating a discretionary health program. The Court held, *inter alia*, that "even assuming that [the] statement terminating the [p]rogram would qualify as a 'rule' within the meaning of the APA, it would be exempt from notice-and-comment requirements of § 553" because it constituted a "general statement[] of policy," that is, a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." 508 U.S. 182, 195-98 (1993). Moreover, although an agency must "set forth its reasons" for a decision, nothing requires that those reasons be set forth in any particular place, and certainly not in the Federal Register. *See Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016) (relying on a declaration setting forth the agency's reasons for its decision, even though the reasons were not provided in the email conveying the decision). After the decision was made to terminate the CAM Parole Program, individuals who had been conditionally approved for parole were notified of the rescission by letter. (ECF 33-42; 33-46.)

The Administrative Record here sets forth a satisfactory explanation for the agency's decision to terminate the CAM Parole Program. (ECF 33-2, 33-5, 33-6, 33-9.) Plaintiffs' "arbitrary and capricious" APA claims fail accordingly and should be dismissed.

E. Plaintiffs' "*Accardi*" APA Claim Fails.

Plaintiffs bring a second APA cause of action that they label "*Accardi*." (ECF 1 at 41.) Plaintiffs' Opposition clarifies that this "*Accardi*" APA claim is premised on defendants alleged failure to follow "their own duly promulgated regulation requir[ing] them to issue an appropriate document authorizing travel to individuals conditionally approved for parole." (ECF 34 at 18 (internal alterations omitted).) But, that is not what 8 C.F.R. § 212.5(f) requires. Section 212.5(f) provides:

> (f) Advance authorization. When parole *is authorized* for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel.

(Emphasis added.) *Conditional* approval is not the same thing as final authorization. Plaintiffs reading of the regulation ignores this difference. The parole authorizations for plaintiffs here were never complete because the rescission occurred prior to final authorization. The government gave notice to the individuals that they were conditionally approved for parole pending further steps (security checks, medical exams, etc.) and then gave notice that the program was terminated, and that their conditional approvals were rescinded, prior to final authorization. In these circumstance, § 212.5(f) did not require issuance of travel documents. Those individuals who had their parole authorizations *finalized* prior to the program's termination *were* issued travel documents and allowed to travel to the U.S. to seek parole at a port of entry.

In any event, *Accardi* does not apply to this situation. The *Accardi* Court "emphasize[d] that [it was] not . . . reviewing and reversing the manner in which discretion was exercised. . . . Rather, [it] object[ed] to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations" requiring that step. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). In this case, and as applied to § 212.5(f), *Accardi* would only require issuance of documents evidencing parole approval *if* there was *final approval*, not for *conditional* approval. The discretionary decision to move from conditional approval to final approval is not a procedural step that the agency has codified. As the *Accardi* Court cautioned, "the process of the Court seems adapted only to the determination of legal rights, and [not] the task of reviewing a discretionary and purely executive function. . . . We would leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it." *Id*. at 271. In this case, the Court should leave the discretionary responsibility for parole squarely on the Secretary of Homeland Security, where Congress has put it. Plaintiffs' *Accardi* cause of action should be dismissed.

II. THIS COURT LACKS JURISDICTION TO ENJOIN THE PRESIDENT, AND THE CLAIMS AGAINST THE PRESIDENT MUST BE DISMISSED.

Plaintiffs argue that, because their suit is one for injunctive relief, not money damages, their claims against President Trump should be permitted to proceed. (ECF 34 at 28-29.) This is not the law.

"[I]n general this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992). "The apparently

unbroken historical tradition supports the view, which [is] implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested—viz., the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary." *Id.* at 827 (Scalia, J., concurring in part and concurring in the judgment). "With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (internal citations omitted). Granting injunctive relief against a sitting President would be "extraordinary," and plaintiffs' request to do so should "raise[] judicial eyebrows." *Franklin*, 505 U.S. at 802; *see also Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (holding that courts do not have authority to enjoin the President in the performance of his official duties, and noting that the rationale for this limitation is "painfully obvious").

Of significance, plaintiffs do not argue that conduct they challenge falls outside the President's official duties, nor could they. *See Hawaii*, 138 S. Ct. at 2408 ("[T]he President [has] broad discretion to suspend the entry of aliens into the United States."). Nor do plaintiffs argue that the injunctive relief they seek would be "purely ministerial." (ECF 34 at 28-29.) Plaintiffs fail to cite the entire passage of the Supreme Court's decision in *Franklin*, upon which they rely. (ECF 34 at 28.) The full passage reads: "We have left open the question whether the President might be subject to a judicial injunction ***requiring the performance of a purely 'ministerial' duty***[.]" *Franklin*, 505 U.S. at 802 (emphasis added). Any order enjoining President Trump to reinstate the CAM Parole Program would clearly require him to perform more than a ministerial duty.

There is no plausible basis for keeping the President, against whom this Court cannot grant relief, in this case until some later date. This same issue recently arose in *Doe 2 v. Trump*, 319 F. Supp. 3d 539 (D.D.C. 2018), and the court dismissed the President from the litigation. "It makes little sense to retain a party in a case from whom no relief will be granted under ordinary circumstances, and especially little sense when retaining that party risks unnecessary constitutional confrontations. . . . [W]here no relief is available from the President himself, the Court can review the policy at issue without the President as a party, and Plaintiffs can obtain all of the relief that they seek from other Defendants—there is no sound reason for risking constitutional confrontations by retaining the President

as a Defendant." *Id.* at 542-43.

Plaintiffs' reliance on *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), is misplaced. (ECF 34 at 29.) Unlike the immigration policy decision at issue here, the conduct challenged in *Knight* was the blocking of Twitter users. The *Knight* court expressly noted that "any injunction would not direct the President to execute the laws in a certain way, nor would it mandate that he pursue any substantive policy ends." 302 F. Supp. 3d at 578. Such would not be the case with respect to the injunctive relief plaintiffs seek—an order requiring reinstatement of the CAM Parole Program. The Massachusetts district court case, *Centro Presente v. DHS*, No. 18-10340, 2018 WL 3543535, at *1 (D. Mass. July 23, 2018), upon which plaintiffs also rely (ECF 34 at 28), is inconsistent with the Supreme Court's decision in *Franklin* and other precedent.

Judicial refusal to subject the President to an injunction does not "suggest[] that Presidential action is unreviewable." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). "Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive[.]" *Id.* That is precisely what plaintiffs are doing here, having also named the Secretary of the Department of Homeland Security and the Director of USCIS as defendants, among others. "Plaintiffs will be able to enforce their legal rights and obtain all relief sought in this case without the President as a party." *Doe 2*, 319 F. Supp. 3d at 543-44. President Trump should be dismissed.

III. THE CLAIMS OF THE ALIEN PAROLE APPLICANTS AND CASA SHOULD BE DISMISSED.

Regardless of citizenship and place of residence, an individual who lacks a legally protected interest cannot establish the "injury in fact" requirement for standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The foreign CAM Parole applicants have no legally protected interest in parole, which plaintiffs do not contest in their Opposition. Rather, plaintiffs cite to a few cases in which courts have found Article III standing even though the parties were located abroad. None of the cases cited by plaintiffs changes the outcome here, as those cases do not address a non-resident alien's standing to challenge the availability of a discretionary immigration benefit, let alone an alleged entitlement to entry into the United States. *See Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (right of a Philippine

national to bring a human rights abuse claim against the estate of Ferdinand Marcos under the Alien Tort Claims Act); *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984) (Colombian plaintiff had standing to bring tort claim based on actions taken by United States law enforcement officials); *Silva v. Bell*, 605 F.2d 978, 984 (7th Cir. 1979) (without discussing whether they had a legally protected interest, court permitted non-resident aliens to remain class members as a matter of judicial economy). (ECF 34 at 26-27.)

In arguing that the foreign parole applicants have standing to challenge the termination of the CAM Parole Program, plaintiffs misstate the issue before the court in *Doe v. Nielsen*, Case No. 18-CV-0239 BLF (N.D. Cal. July 10, 2018). In *Doe v. Nielsen*, the Court made abundantly clear that the sole issue before it was whether the content of certain Notices of Ineligibility for asylum complied with the Lautenberg and Specter Amendments to the Refugee Act. (July 10, 2018 Order at 1, 22-24.) The Court acknowledged that plaintiffs could not challenge denial of refugee status.

Plaintiffs fail to cite any analogous cases endorsing the ability of a legal aid organization, like CASA, to pursue direct relief on its own behalf. Even in *Northwest Immigrant Rights Project v. United States Citizenship & Immigration Services*, 325 F.R.D. 671, 688 (W.D. Wash. 2016), cited by plaintiffs, the court held that although "the zone of interests inquiry is not demanding, the [] Organizational Plaintiffs' interests are unarguably so marginally related to the purposes implicit in the regulation that it cannot reasonably be assumed that Congress and the regulators intended to permit the suit." (Internal alterations omitted) (dismissing organization's APA claims). Because CASA is not within the zone of interests protected by the INA, CASA should not be permitted to proceed with this suit on its own behalf.

CONCLUSION

For the foregoing reasons, the complaint's due process, equal protection, APA, and equitable estoppel claims should be dismissed. All claims against President Trump should also be dismissed. The claims of the alien parole applicants and CASA should also be dismissed.

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Respectfully submitted,

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