THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-JCC

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOTE ON MOTION CALENDAR: MAY 12, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This lawsuit challenges a secret and unlawful government program, the Controlled Application Review and Resolution Program ("CARRP"), that targets Muslims seeking immigration benefits based on arbitrary, discriminatory, and illegal criteria. Plaintiffs have alleged facts that, if proven, demonstrate that CARRP is unconstitutional and *ultra vires*. Moreover, since Plaintiffs initiated this lawsuit, Defendant Donald Trump has issued two executive orders making clear his intentions to target Muslims through "extreme vetting." Portions of both executive orders have been enjoined after several courts concluded that they were likely motivated by animus against Muslims and immigrants from Muslim-majority countries. Thus, Plaintiffs have also alleged sufficient facts that, if proven, demonstrate that CARRP and/or any successor extreme vetting program resulting from these two orders unlawfully targets certain applicants for immigration benefits.

The Court should deny Defendants' motion to dismiss. At the outset, Plaintiffs emphasize two points. First, Defendants never contest or deny Plaintiffs' descriptions of CARRP or how the government applies it. Second, Defendants mischaracterize Plaintiffs' claims. This case is not about delays or slow-walking applications. This case is about an unlawful and secretive government program that discriminates against people based on their religion or national origin and prevents them from naturalizing and becoming lawful permanent residents. Simply adjudicating named Plaintiffs' applications does not provide redress for Plaintiffs' claims.

II. BACKGROUND

A. The CARRP Policy.

Defendant U.S. Citizenship and Immigration Services ("USCIS") created CARRP in April 2008, as an agency-wide policy to identify, process, and adjudicate certain immigration applications that allegedly raise "national security concerns." Second Amended Complaint ("SAC"), Dkt. 47 ¶ 55; Declaration of Jennie Pasquarella, Dkt. 27 ("Pasquarella Class Cert

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Decl."), Ex. A (4/11/2008 policy memorandum introducing CARRP). The criteria used to determine when an individual should be labeled a "national security concern" are vague and overbroad, and often turn on discriminatory factors such as religion and national origin. SAC ¶¶ 62-76. The criteria also include lawful activities such as traveling to Muslim-majority countries and donating to Muslim charities. These criteria are untethered from the specific statutory criteria Congress has authorized to determine when a person is eligible for immigration benefits. *Id.*; *see also id.* ¶¶ 35-51.

Even if an individual is statutorily eligible for the benefits sought, USCIS officers are instructed that they *cannot approve* the application so long as the application remains in CARRP. SAC ¶ 77; *see also* Pasquarella Class Cert Decl., Ex. A at 6-7 ("Officers are not authorized to approve applications" subject to CARRP); *id.*, Ex. B (7/26/2011 policy memorandum revising CARRP procedures) at 2 (an officer "is not authorized to approve applications or petitions" subject to CARRP). Officers are also instructed to find *any* reason to deny the application outright so that "time and resources" are not spent determining whether there was any basis for the national security concern in the first place. *Id.*, Ex. A at 5; *see also id.*, Ex. C (1/2012 CARRP training presentation) at 52-59, 68 (providing "tips" on how to find an applicant ineligible); SAC ¶ 84. CARRP essentially creates a presumption of guilt that becomes difficult, if not impossible, to rebut. Individuals subject to CARRP are never given notice of their applications' discriminatory treatment under the program, or an opportunity to challenge Defendants' decision to subject their application to extra-statutory criteria. As a result, Defendants use CARRP to delay and deny the immigration applications of thousands of individuals who are otherwise eligible for these benefits and pose no threat to the United States, simply because they are Muslim or from a Muslim-majority country.

B. Defendant Trump's Promise for More "Extreme" Vetting.

As a candidate for president, Defendant Trump campaigned on promises to impose a "total and complete shutdown" on Muslims coming to the United States. He and his associates

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consistently expressed disdain for Muslims. SAC, ¶¶ 98-101 (citation omitted). Both during the campaign and after his election and inauguration, Defendant Trump expressed his intention to establish a program of "extreme vetting" to achieve such a ban. *Id.* ¶¶ 102-05 (citation omitted).

As president, Defendant Trump began to implement his stated goal of keeping Muslims out of the United States and otherwise subjecting them to "extreme vetting" when he signed Executive Order 13769 on January 27, 2017. 82 Fed. Reg. 8977, 8978-79 § 4 ("First EO"). After a court enjoined portions of the First EO, Defendant Trump lashed out at the "so-called judge" who granted the temporary restraining order, calling the court's opinion "ridiculous" and predicting that it would be overturned.[1] The Ninth Circuit unanimously upheld the temporary restraining order. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). After the Ninth Circuit's decision, Defendant Trump promised to "go[] further" with a new executive action, and assured his supporters that "[e]xtreme vetting will be put in place," and that "it already is in place in many places,"—presumably in the form of CARRP or a related successor program. SAC ¶ 115 (citation omitted). Thereafter, Stephen Miller, Defendant Trump's Senior Advisor, confirmed that the new executive order would have "the same basic policy outcome for the country." SAC ¶ 117 (citation omitted).

Defendant Trump replaced the First EO with Executive Order 13780. 82 Fed. Reg. 13209, 13215 §§ 4-5 ("Second EO"). The Second EO mirrors the First EO's efforts to implement an anti-Muslim agenda through an "extreme vetting" program. Defendant Trump's press secretary confirmed that "the goal" for the Second EO "is obviously to maintain the way we did it the first time." SAC ¶ 118. The District of Hawaii enjoined portions of the Second EO. *Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 1011673, at *1 (D. Haw. Mar. 15, 2017), *appeal docketed*, No. 17-15589 (9th Cir.). In issuing its injunction, the court explained that several comments by Defendant Trump and his associates showed why the Second EO was

1 Donald Trump (@realDonaldTrump), Twitter (Feb. 4, 2017, 05:12 AM), https://twitter.com/realDonaldTrump/status/827867311054974976.

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just as unlawful as the first. In addition to Mr. Miller's statements, the court highlighted Rudolph Giuliani's explanation: "When [Defendant Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" *Id.* at *5. The court also pointed out that Defendant Trump himself explained that his "Muslim ban" had simply been rebranded as "extreme vetting," because "[p]eople were so upset when I used the word Muslim." *Id.* at *13. Based on this "significant and unrebutted evidence of religious animus driving the promulgation of the [Second EO] and its related predecessor," the court concluded that "a reasonable, objective observer . . . would conclude that the [Second EO] was issued with a purpose to disfavor a particular religion." *Id.* at *11-13.

In response to this injunction, Defendant Trump's administration has continued to assail the judiciary. Most recently, the Attorney General expressed amazement "that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from what appears to be clearly his statutory and constitutional power."[2]

C. CARRP Has Delayed the Named Plaintiffs' Applications.

All named Plaintiffs are foreign nationals from Muslim-majority countries, and have applied for naturalization or adjustment of status. Despite meeting the statutory criteria to obtain the benefits they are seeking, Plaintiffs' applications have been subjected to CARRP. Seemingly prompted by the filing of this lawsuit, Defendants have moved quickly to adjudicate their applications in an attempt to avoid exposing CARRP and any other "extreme vetting" program to judicial scrutiny.

Plaintiffs Wagafe, Jihad, and Manzoor are all foreign nationals who applied for naturalization. They meet all the statutory requirements for citizenship. Plaintiff Wagafe waited more than three and a half years for a decision; but soon after Plaintiffs filed their original motion for class certification, USCIS scheduled an interview for him, and

[2] *Jeff Sessions dismisses Hawaii as 'an island in the Pacific'*, New York Times (Apr. 20, 2017), *available at* https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html.

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quickly approved his application, in a transparent effort to transfer this case to the District of North Dakota. Mr. Manzoor waited more than a year, and Mr. Jihad more than three and a half years, for decisions on their naturalization applications. But soon after being added as named Plaintiffs, Defendant USCIS scheduled interviews for both. Mr. Manzoor was interviewed on May 1, and his application was approved on the spot. Declaration of Jennifer Pasquarella in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Pasquarella MTD Decl.) ¶ 2. Mr. Jihad received an interview notification on April 13 and was interviewed on April 25. *Id.* ¶ 3.

Plaintiffs Ostadhassan and Bengezi are foreign nationals who meet all statutory requirements to adjust their status to that of a lawful permanent resident ("LPR"). Before this case was filed, Mr. Ostadhassan had waited over three years for a decision on his application. On April 5, 2017, after this case was filed, USCIS issued a Notice of Intent to Deny his I-485 Application to Adjust Status. Supplemental Pasquarella Declaration, Dkt. 53 ¶ 3. Ms. Bengezi waited over two years for a decision, but soon after being added as a named Plaintiff, she was notified that she had been scheduled for an interview on May 4, 2017. Pasquarella MTD Decl. ¶ 4. Both cases remain pending.

III. LEGAL STANDARD

Rule 12(b)(1) governs dismissals for lack of subject matter jurisdiction. *Cooper v. Providence Health Care Found.*, 17-5173 RJB, 2017 WL 1354817, at *1 (W.D. Wash. Apr. 13, 2017). A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the sufficiency of the complaint itself has been challenged, and in such a case, a plaintiff is entitled to the same safeguards that apply to a Rule 12(b)(6) motion: the court will accept the plaintiff's allegations as true, and draw reasonable inferences in the plaintiff's favor. *Id*. By contrast, a factual attack challenges the facts upon which subject matter jurisdiction depends. In such a case, the court may look beyond the complaint without converting the motion into one for summary judgment. *Wolfe v. Strankman*,

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392 F.3d 358, 362 (9th Cir. 2004).

Rule 12(b)(6) governs dismissals for failure to state a claim upon which relief can be granted. In considering such a motion, the Court "accepts all factual allegations in the complaint as true and construes them in the light most favorable to the non-moving party." *Premera Blue Cross v. Canon Sols. Am., Inc.*, C16-0411-JCC, 2017 WL 714216, at *1 (W.D. Wash. Feb. 23, 2017) (citation omitted).

IV. ARGUMENT

A. This Case Presents a Controversy Over Which the Court Has Jurisdiction.

Defendants argue that Plaintiffs lack standing to bring any of their claims because "Plaintiffs lack any interest in adjudication of their applications." Motion to Dismiss ("MTD"), Dkt. 56 at 10. Defendants predicate this argument on their misguided assertion that Plaintiffs' claims are "abstract disputes," insufficient to establish jurisdiction. *Id*. This argument misconstrues Plaintiffs' claims.

First, Plaintiffs obviously have a personal interest in the adjudication of their applications and have never suggested otherwise. Each Plaintiff has been waiting years for their immigration benefits, as their applications languish in an unlawful program whose existence the government still refuses to acknowledge. But this lawsuit is not about forcing a certain adjudication (i.e., approval or denial) on their applications; rather, as the Second Amended Complaint makes clear, this lawsuit seeks an order that Defendants "adjudicate Plaintiffs' and proposed class members' petitions, applications, or requests *based solely on the statutory criteria*." SAC at 51 (emphasis added). Plaintiffs *also* are asking this Court, among other things, to declare that CARRP or any successor policy is unlawful, and enjoin the government from applying such policies to the adjudication of their applications.[3] This declaratory and injunctive relief would benefit Plaintiffs and all class members by ensuring their applications are adjudicated in accordance with the

[3] Alternatively, Plaintiffs request an order compelling USCIS to provide applicants notice that the government has subjected their application to CARRP and an opportunity to challenge that decision.

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governing statute and regulations, instead of an illegal program.

Second, simply adjudicating the named Plaintiffs' applications does not resolve the core issue in this case: whether CARRP and any successor "extreme vetting" program is lawful. To the contrary, that Defendants moved so quickly on the named Plaintiffs' applications illustrates the arbitrariness of the decision to apply CARRP in the first place. Defendants placed Plaintiffs' applications on hold for years by subjecting them to CARRP, only to then turn around and quickly adjudicate them after this lawsuit was filed. For example, Mr. Wagafe's naturalization application has now been approved, SAC ¶ 24, while Mr. Ostadhassan recently received notice that the government intends to deny his application for adjustment of status, MTD at 8-9. And now all three of the recently-added Plaintiffs—Ms. Bengezi, Mr. Jihad, and Mr. Manzoor—have either had their applications approved, or been scheduled for interviews within the past two weeks. Pasquarella MTD Decl. ¶¶ 2-4. The sudden action on Plaintiffs' long lingering applications is presumably part of an effort to avoid a ruling on the merits of CARRP.[4] As Plaintiffs explained in their motion for class certification, this is the same approach Defendants have employed in other cases challenging CARRP. Dkt. 49 at 19-20.

B. Plaintiffs Have Standing.

1. The Scialabba Memo regarding the first (withdrawn) Executive Order does not moot Plaintiffs' current claims. (Claims 1, 2, 3, 5, 6)

Plaintiffs have suffered an injury-in-fact with respect to their first, second, third, fifth, and sixth claims to the extent that they challenge the suspension of adjudication of adjustment and naturalization applications. Defendants' contrary assertion, that all such applications were not previously suspended under the First EO, is inapposite with respect to the Second EO, for which they make no such parallel assertion. MTD at 12 (stating *only* that USCIS has not

[4] Defendants' recent actions also show why the Court should grant the motion for class certification, and deny this motion to dismiss. *See Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 909 (N.D. Cal. 2014) (defendant's "calculated strategy that includes picking off named Plaintiffs" did not moot class action claims); *Ramirez v. Trans Union, LLC*, No. 3:12-CV-00632 (JSC), 2013 WL 3752591, at *2 (N.D. Cal. July 17, 2013) (class certification appropriate where plaintiff's claims would "evade review" if the defendant were able to "pick off" each subsequent lead plaintiff).

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suspended processing or adjudication of Plaintiffs' benefit applications, not that USCIS has not suspended processing or adjudication of *some or all* applications from putative members of the Muslim Ban class).

Defendants' argument is based entirely on a single memorandum issued by the *former acting* director of USCIS, Lori Scialabba ("the Scialabba Memo") (MTD Ex. A). The Scialabba Memo (issued a day after Plaintiffs filed their First Amended Complaint adding allegations about the First EO's impact on adjudication of benefits) rescinded prior directives stating that the First EO applied to pending applications, changing course to instruct that Section 3(c) of the First EO would not affect the applications of those already in the United States. Since the Scialabba Memo, that provision has been enjoined.[5] The First EO has been replaced by the Second EO, and the corresponding Section 2(c) of the Second EO was also enjoined.[6] Given these injunctions, and the Scialabba Memo, Plaintiffs did not seek to certify the Muslim Ban Class "at this time," but expressly "reserve[d] the right to seek certification of the additional class if circumstances change again." Plaintiffs' Amended Motion for Class Certification, Dkt. 49 at 3 n.1. At no point have Plaintiffs asserted that these claims are moot, or that the Scialabba Memo resolved these claims.[7] The Scialabba Memo only applies to the since-rescinded *First* EO; it does not apply to CARRP, any successor "extreme vetting" program, or even the Second EO.[8]

The Ninth Circuit's decision in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), which Defendants cite for their argument that Plaintiffs lack standing, is instructive. In that case, the government argued that a policy memorandum issued during the litigation, which proscribed the

[5] *Washington v. Trump*, No. 2:17-cv-00141-JLR, ECF 52, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay denied* 847 F.3d 1151 (9th Cir. Feb. 9, 2017).

[6] *Hawai'i v. Trump*, No. 17-00050 DKW-KSC, ECF 219, 2017 WL 1011673, at *1 (D. Haw. Mar. 15, 2017) (TRO), and ECF 270, 2017 WL 1167383, at *1 (D. Haw. Mar. 29, 2017) (preliminary injunction).

[7] The statement Defendants quote—and mischaracterize—from Plaintiffs' Notice of Related Cases simply acknowledges the fact that if Defendants adhere to the positions in the Scialabba Memo, then the claims related to Section 3(c) of the First EO "*may* become moot." Dkt. 22. But Plaintiffs filed that document on February 7, 2017, well before the President issued his Second EO on March 6, 2017, which rescinded the first.

[8] Notably, the Second EO, on its face, purports to apply to "[a]ll Immigration Programs," *see* 82 FR 13209, 13215, with no exceptions provided for adjudication of adjustment of status or naturalization applications.

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conduct at issue in the complaint, meant that the plaintiff lacked standing. *Id*. at 1243. The Ninth Circuit disagreed, explaining that "[s]tanding is examined at 'the commencement of the litigation.'" *Id*. (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000)). The memorandum at issue in *White* had only been in place for a month when that lawsuit was commenced, and it was temporary. *Id*. The Ninth Circuit therefore concluded that the plaintiff had standing, notwithstanding the government's policy directive. Instead, the question was whether the policy rendered the claims moot. *Id*. Similarly, here the Scialabba Memo was issued *after* the litigation commenced (and only two months before the Second Amended Complaint), and has already been rendered obsolete by the Second EO. As in *White*, Plaintiffs have standing, and the only question is whether these changed circumstances render Plaintiffs' claims moot.

With respect to mootness, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Otherwise the defendant would be "'free to return to his old ways.'" *Id*. Consequently, the standard for proving that a case has been mooted by a defendant's voluntary conduct is "stringent": "if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur," then a case "*might* become moot." *Id*. (quoting *U. S. v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)) (emphasis added). The party asserting mootness has the "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again. *Id*. But a policy that, "by its terms was not permanent," will not moot an otherwise valid claim. *Id*. at 190. Notably, in *White*, the Ninth Circuit reasoned that the policy directive in that case did moot the plaintiff's claims because it "represent[ed] a permanent change . . . not a temporary policy," and because "since its implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiffs." 227 F.3d at 1243.

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The Scialabba Memo is nothing like the "permanent change" in *White*. It is a non-binding, impermanent, and inapplicable policy statement from a *former acting* director. Although Defendants highlight that Ms. Scialabba "is clearly in the chain of command," MTD at 11 n.7, what they fail to acknowledge is that the Scialabba Memo was "in direct contradiction to the earlier DHS guidance,"[9] and its issuance made her "number one on the list of eight Obama holdover bureaucrats identified by Breitbart News that President Trump 'can fire or remove at Homeland Security.'"[10] In fact, shortly after issuing her memorandum, Ms. Scialabba resigned and has been replaced by James McCament. Defendant Trump, moreover, is unquestionably the key principal in the chain of command. In short, the Scialabba Memo provides no reason to dismiss any of Plaintiffs' claims.

Even if the Scialabba Memo were relevant, Plaintiffs have alleged sufficient facts to establish an injury-in-fact. In Claims 1 and 2, Plaintiffs have alleged that Defendants "*will* interpret the Second EO to authorize the suspension" of immigration applications involving Plaintiffs and the Muslim Ban Class, SAC ¶¶ 251, 257 (emphasis added), and that such an interpretation will be an abuse of discretion and violate federal statutes (the Administrative Procedure Act ("APA") and the Immigration and Nationality Act ("INA")) and the Constitution, *id*. ¶¶ 253, 259. Claim 3, which is based on the Establishment Clause of the First Amendment, has nothing to do with the Scialabba Memo; that claim alleges that the "Second EO is intended to target a specific religious faith—Islam," because Defendants are "not pursuing a course of neutrality with regard to different religious faiths." SAC ¶ 261. In light of Defendant Trump's continued promises to target Muslims, and his disdain for the rulings blocking his orders, these allegations are not unreasonable or frivolous.

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[9] *DHS walks back Immigration directives as Muslim Ban chaos continues*, THE INTERCEPT (Feb. 3, 2017), *available at* https://theintercept.com/2017/02/03/dhs-walks-back-immigration-directives-as-muslim-ban-chaos-continues/ (last accessed: Apr. 22, 2017).

[10] *Acting director of USCIS Lori Scialabba resigns at Homeland Security*, BREITBART (Mar. 8, 2017), *available at* http://www.breitbart.com/big-government/2017/03/08/acting-director-uscis-lori-scialabba-resigns-homeland-security/ (last visited: Apr. 22, 2017).

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Claims 5 and 6 are based on the Due Process Clause. Claim 5 alleges that Defendants' "unauthorized and indefinite suspension of the adjudication of Plaintiffs' and the Proposed Classes' applications . . . violates their right to substantive due process" because "Plaintiffs cannot be denied immigration benefits for which they are statutorily eligible, and to which they are entitled by law." SAC ¶ 266. And Claim 6 alleges that Defendants' indefinite suspension of applications, under both CARRP and the Second EO, discriminates on the basis of "country of origin," and is "substantially motived by animus toward—and has a disparate effect on—Muslims" in violation of the Equal Protection Clause. *Id.* ¶¶ 268-69. Even assuming, for the sake of argument, that the Scialabba Memo cabined this interpretation of the Second EO, Plaintiffs have alleged more than sufficient facts to establish that Defendants are using and will use CARRP to delay and deny immigration applications indefinitely and unlawfully, even when the applicant meets all the statutory criteria, based on religious and national origin discrimination. That is more than enough to establish a violation of substantive due process[11] and equal protection.[12]

2. Plaintiffs have standing to assert a violation of the Uniform Rule of Naturalization Clause. (Claim 10)

Under the Uniform Rule of Naturalization Clause, the Constitution expressly assigns to Congress, not the Executive branch, the authority to establish the rules of naturalization. *See* U.S. Const. art. I, § 8, cl. 4. Congress set forth those rules in the INA. *See generally* 8 U.S.C. §§ 1421-1458; 8 C.F.R. §§ 316.1-316.14. By imposing additional, non-statutory, substantive criteria that Plaintiffs must meet prior to Defendants granting their naturalization applications, CARRP violates the Naturalization Clause. According to Defendants, Plaintiffs have no

[11] *See Tutun v. U.S.*, 270 U.S. 568, 578 (1926) ("The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate."); *see also Rojas v. Johnson*, C16-1024RSM, 2017 WL 1153856, at *2 (W.D. Wash. Mar. 28, 2017) (denying motion to dismiss because "[i]f Plaintiffs' allegations are true, they have lost the statutory right to apply for asylum and must now depend on the discretion of an adjudicator to apply").

[12] *See e.g.*, *Francis v. I.N.S.*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

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standing to make this claim because the Naturalization Clause confers no private right of action, and because the only injured party would be Congress, not Plaintiffs. These arguments find no support in law or logic.

First, several courts have expressly considered private litigants' claims premised on an underlying violation of the Naturalization Clause. *See, e.g.*, *Nemetz v. I.N.S.*, 647 F.2d 432, 435 (4th Cir. 1981) (discussing a private litigant's challenge of a state law under the Uniform Rule of Naturalization, and reasoning that such policies violate the clause "when the resulting inconsistencies undermine a uniform rule of naturalization"); *Petition of Lee Wee*, 143 F. Supp. 736, 738 (S.D. Cal. 1956) (discussing private litigant's claim that a federal statute violated the Uniform Rule of Naturalization).[13]

Second, none of the authority on which Defendants rely supports their argument. Defendants cite *Flores v. Baldwin Park*, No. CV 14-9290-MWF, 2015 WL 756877, at *1 (C.D. Cal. 2015), but that case concerned a remand to state court, and the issue was whether federal law completely preempted the plaintiff's state law claims. *Id*. at *3-4. Defendants' reliance on *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004), is equally unavailing. *Cazarez-Gutierrez* simply discussed the need for uniformity without regard to the nuances of state law (specifically in the sentencing context). Nowhere in that decision did the court even imply that individuals cannot sue if the Executive Branch's actions violate the Naturalization Clause.

Third, Defendants' assertion that the only party injured by CARRP's violation of the Naturalization Clause would be Congress, not Plaintiffs, is erroneous. Plaintiffs' injury is cognizable under the framework outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992) (invasion of a protected interest, causal connection between Defendants' conduct and Plaintiffs' injury, and redressability). By its terms, CARRP adds non-statutory and substantive requirements before certain applicants may obtain citizenship, directly injuring those applicants

[13] *See also Graham v. Richardson*, 403 U.S. 365, 382 (1971) (noting that a federal law granting wide discretion to the States "to adopt divergent laws on the subject of citizenship requirements . . . would appear to contravene [the] explicit constitutional requirement of uniformity" arising out of the Uniform Naturalization Clause).

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who would otherwise have a statutory right to naturalization under the uniform rule Congress has established pursuant to the Naturalization Clause.[14] Contrary to Defendants' assertions, using an illegal and *ultra vires* program to delay and deny immigration applications, in violation of the Naturalization Clause, necessarily injures the people whose applications are being affected.[15]

C. Plaintiffs Have Alleged Sufficient Facts Concerning Claims of Additional "Extreme Vetting" to Give Rise to a Claim for Relief in the Event CARRP Is Supplanted by New Procedures.

In Section IV.C of the Motion, Defendants seek dismissal of claims concerning "extreme vetting" procedures that supplement or supplant CARRP that have been or will be established pursuant to the Second EO or the President's Memorandum of March 6, 2017, arguing that the Complaint fails to state sufficient facts to support any such claims. Defendants misconstrue the Complaint's allegations about such additional "extreme vetting" procedures. Plaintiffs included allegations about additional or future "extreme vetting" measures to avoid an argument that the allegations about CARRP are moot because CARRP has been replaced or supplemented by new "extreme vetting" procedures under the current Administration. Plaintiffs have sufficiently alleged that the President's proclamations demonstrate an intent to impose vetting procedures even more "extreme" than CARRP. Thus, even more Muslims or people from majority-Muslim countries will have their applications for immigration benefits unfairly singled out and blocked indefinitely.

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[14] *See Marcantonio v. U.S.*, 185 F.2d 934, 935-37 (4th Cir. 1950) (in light of the Naturalization Clause, "[i]t is not permissible" for a district court "to add to the [naturalization] statute a condition which it does not contain," or "a test which Congress has not seen fit to impose"); *see also Ex parte Fillibertie*, 62 F. Supp. 744, 747 (E.D.S.C. 1945) ("[W]hen Congress prescribes the requirements for naturalization, it is beyond the power of any court *or the authority of any administrative agency* to extend or to constrict the requirements so established.") (emphasis added).

[15] Even if Congress is injured, that does not mean *others* cannot be injured, too. The Naturalization Clause empowers Congress to prescribe a uniform rule of naturalization, but as Justice John Marshall observed long ago, "the exercise of this power exhausts it, so far as respects the individual." *Osborn v. Bank of U.S.*, 22 U.S. 738, 827 (1824); *see also Schneider v. Rusk*, 377 U.S. 163, 166 (1964) (quoting *Osborn*). In other words, once Congress "establishes such uniform rule, those who come within its provisions are entitled to the benefit thereof as a matter of right, not as a matter of grace . . . ." *Schwab v. Coleman*, 145 F.2d 672, 676 (4th Cir. 1944).

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D. Plaintiffs Have Alleged Sufficient Facts to Establish that CARRP Violates Plaintiffs' Procedural Due Process Rights. (Claim 4)[16]

Subjecting Plaintiffs' and class members' applications to CARRP and other "extreme vetting" programs—without providing notice or an opportunity to challenge these arbitrary decisions—violates the procedural due process component of the Fifth Amendment. Procedural due process claims "'hinge[] on proof of two elements: (1) a protect[ed] liberty or property interest . . . and (2) a denial of adequate procedural protections.'" *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 716 (9th Cir. 2011) (quoting *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)) (some alteration in original). Given CARRP's clandestine nature—particularly the complete lack of notice when it applies to an applicant—the second element is not at issue. The question is whether Plaintiffs have asserted a protected liberty or property interest in having their naturalization and adjustment of status applications adjudicated lawfully.

With respect to naturalization, courts have recognized that applicants have a property interest in seeing their applications adjudicated lawfully. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . that support claims of entitlement to those benefits." *Id.* at 577. The Ninth Circuit has squarely held that an applicant for naturalization has a protected interest in being able to apply for United States citizenship. *Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013) (finding a constitutionally protected interest in nondiscretionary immigration applications).

[16] Defendants have not sought dismissal of Plaintiffs' claims based on violations of substantive due process (Claim 5) or the Equal Protection Clause (Claim 6), except for Defendants' arguments about standing or lack of a "case or controversy," which are addressed above.

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Here, USCIS does not have discretion to deny naturalization to a statutorily eligible applicant; rather, "USCIS *shall* grant the application if the applicant has complied with all requirements for naturalization." 8 C.F.R. § 335.3(a) (emphasis added).[17] In fact, the U.S. Supreme Court, nearly one hundred years ago, explained:

> The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, Sec. 8, cl. 4. The opportunity having been conferred by the Naturalization Act, *there is a statutory right* in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, *to receive the certificate.*

Tutun v. U.S., 270 U.S. 568, 578 (1926) (emphases added).[18]

Those seeking adjustment of status also have a protected interest in having USCIS adjudicate their applications lawfully. Although whether to permit an applicant to adjust status is discretionary, the government "does not have pure or unfettered discretion" because "the decision of whether to adjust status is guided by legal standards." *Abbasfar v. Chertoff*, No. C07-1155 PVT, 2007 WL 2409538, at *4 (N.D. Cal. Aug. 21, 2007).[19] Even when an application is discretionary, an agency is required to follow articulated legal principles. *Bonilla v. Lynch*, 840 F.3d 575, 584 (9th Cir. 2016). In fact, the "first step in adjudicating a petition for

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[17] Defendants' citation to *Fedorenko v. U.S.*, 449 U.S. 490 (1981), omitted a critical portion of the quotation from *United States v. Ginsberg*. The complete quote reads: "No alien has the slightest right to naturalization ***unless all statutory requirements are complied with***." *Id*. at 506 (quoting *Ginsberg*, 243 U.S. 472, 474-75 (1917)) (emphasis added).

[18] *See also I.N.S. v. Pangilinan*, 486 U.S. 875, 884 (1988) (noting that there is no discretion to deny naturalization if an applicant is otherwise qualified); *Schwab*, 145 F.2d at 676–77 (4th Cir. 1944) ("Congress is given power by the Constitution to establish an uniform Rule of Naturalization. . . . And when it establishes such uniform rule, those who come within its provisions are *entitled to the benefit thereof as a matter of right*, not as a matter of grace from the naturalization court.") (emphasis added) (internal citation and quotation marks omitted)); *United States v. Shanahan*, 232 F. 169, 171 (E.D. Pa. 1916) ("It is, of course, true that, outside of the acts of Congress, admission to citizenship, like the admission of aliens to our shores, is not a right, but a privilege. . . . When an applicant has met all the requirements of the law, *the privilege accorded him ripens into a right.* It is his legal right to submit his petition and proofs to the court as the constituted tribunal to pass upon them. If certain facts appear to the satisfaction of the court, *he is entitled to citizenship*.") (emphases added).

[19] *See also Yu v. Brown*, 36 F. Supp. 2d 922, 931 (D.N.M. 1999) (noting that the government "has a non-discretionary, mandatory duty to act on Plaintiffs' [adjustment of status] applications").

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adjustment of status is the *nondiscretionary determination* of statutory eligibility . . . ." *Hernandez v. Ashcroft*, 345 F.3d 824, 845 (9th Cir. 2003). In making these determinations, the government "has no discretion to make a decision that is contrary to law." *Id*. at 846.[20]

Taken together, those seeking naturalization and adjustment of status have a protected interest in having their applications adjudicated in accordance with the law. The Due Process Clause prohibits Defendants from infringing on these interests unless they first provide an applicant with notice they have subjected the applicant to CARRP and afford the applicant an opportunity to challenge it. *See Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 569 (9th Cir. 1989) (noting "that a party is entitled to adequate notice and a fair hearing before a final deprivation of a property interest"). Here, it is undisputed that because of CARRP's secretive nature, an applicant has no notice about the applicability of CARRP and no opportunity to challenge the classification. This lack of notice also violates federal law.[21]

Rather than address the merits of Plaintiffs' procedural due process claim, Defendants argue that applicants do not have a "constitutionally protected liberty or property interest in the pace of adjudication of their benefit applications." MTD at 15. That is a strawman argument. This case is not about modest delays in applications. It is about an extra-statutory policy unlawfully blocking the favorable adjudication of applications of persons statutorily entitled to the immigration benefits for which they applied based on discriminatory and illegal criteria. It is about unlawfully labeling individuals "national security threats" without telling them, and without giving them an opportunity to respond. It is about discriminating against people on the basis of religion and national origin. Plaintiffs have alleged sufficient facts to establish that they have a protected interest in seeing their applications adjudicated in accordance with the law.

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[20] *See also Mejia v. Ashcroft*, 298 F.3d 873, 878 (9th Cir.2002) ("The BIA does not have the discretion to misapply the law."); *Iturribarria v. I.N.S.*, 321 F.3d 889, 895 (9th Cir. 2003) (same).

[21] Moreover, 8 C.F.R. § 103.2(b)(16)(i), titled "Inspection of Evidence," provides that if an immigration benefit decision:

[W]ill be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered.

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E. Plaintiffs Have Alleged a Plausible Claim Under the INA. (Claim 7)

The INA sets forth the exclusive statutory and regulatory criteria governing applications for naturalization and adjustment of status. *See* 8 U.S.C. § 1427 and 8 C.F.R. §§ 316.2 and 335.3 (criteria for naturalization); 8 U.S.C. §§ 1255 and 1159, and 8 C.F.R. §§ 245.1 and 209.1 (criteria for adjustment of status). Federal regulations provide that if an applicant has complied with all requirements for naturalization, USCIS "*shall* grant the application." 8 C.F.R. § 335.3(a) (emphasis added). But under CARRP, even when applicants meet all the criteria, USCIS will delay or deny their applications based on criteria unrelated to the statute. By imposing additional requirements and unauthorized impediments for naturalization and adjustment of status, CARRP violates the INA.

Nevertheless, according to Defendants, Plaintiffs' Seventh Claim should be dismissed because the INA sections establishing criteria to naturalize and adjust status do not "create[] a private right of action." MTD at 17. This argument has no merit and is based on a misapplication of law. Because Plaintiffs challenge *agency action* that violates statutory provisions, Plaintiffs' cause of action to enforce the INA is established by Section 10(a) of the APA. The analysis in which Defendants engage to determine whether a private right of action exists in the INA itself is inapposite.

Typically, whether a private cause of action should be implied is governed by a four-factor analysis outlined in *Cort v. Ash*, 422 U.S. 66 (1975). Relying on the *Cort* test, Defendants argue that Plaintiffs' INA claim necessarily fails. Plaintiffs, however, "do not seek damages for specific acts of discrimination against themselves," but rather ask only that the Court review the legality of CARRP against requirements dictated by Congress in the INA. "Review of this sort is an ordinary element of administrative enforcement schemes, absent clear indication to the contrary." *Legal Aid Soc'y of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979).

Section 10(a) of the APA establishes a clear cause of action for plaintiffs who challenge administrative action that directly violates a federal statute. That provision states that any

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"person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Because that provision creates a cause of action, and therefore grants statutory standing to plaintiffs challenging administrative action just as if the substantive statute itself had conferred the right, the *Cort* analysis does not apply. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176–77 (9th Cir. 2004) ("[T]he end result is the same whether the underlying statute grants standing directly or whether the APA provides the gloss that grants standing. In both cases, the plaintiff can bring suit to challenge the administrative action in question. In the first case, the substantive statute grants statutory standing directly to the plaintiff. In the second case, the substantive statute is enforced through Section 10(a) of the APA.").[22]

Whether Section 10(a) of the APA applies to a given suit depends on whether the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (discussing prudential standing in reference to the zone of interests test). But in keeping with "Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable,'" the zone of interests test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (citation omitted). Accordingly, courts do not require the substantive statute to have a stated congressional purpose aligning with the would-be plaintiff. *Id.* Moreover, that the Supreme Court used the word "arguably" in its test "indicate[s] that the benefit of any doubt goes to the plaintiff." *Id.* In other words, a plaintiff will have a right of review under Section 10(a) unless their "interests are so marginally related to or inconsistent with the purposes implicit in

[22] *See also Hernandez-Avalos v. I.N.S.*, 50 F.3d 842, 846 (10th Cir. 1995) ("[A] plaintiff who lacks a private right of action under the underlying statute can bring suit under the APA to enforce the statute."); *Oregon Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 851 (9th Cir. 1987) ("[A]n implied right of action under a violated statute is not a necessary predicate to a right of action under the APA.").

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the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (citation omitted). Plaintiffs easily meet the "zone of interests" test because their grievance falls squarely within the confines of the exclusive criteria for naturalization and adjustment of status outlined in the INA. Having met these statutory requirements, Plaintiffs are entitled to have their applications for adjustment of status and naturalization adjudicated pursuant to the law.

Defendants assert that Congress enacted the requirements for naturalization and adjustment of status to "protect the interests of the People of the United States," and not for the especial benefit of Plaintiffs, implying that applicants seeking immigration benefits do not fall within the zone of interests of the INA. MTD at 18-19. Even assuming it is true that Congress did not enact these qualifications for the primary benefit of the individuals applying for naturalization and adjustment of status, it is at least arguable that individuals who apply for immigration benefits are within the zone of interests of the statute outlining the requirements for attaining those benefits. *See Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 636 (6th Cir. 2013) (finding applicant for employment visa was within zone of interests of INA provision setting out visa qualifications, reasoning "it is arguable, to say the least, that a qualified alien who wants an employment visa is within that provision's zone of interests").

In sum, because Plaintiffs' grievances fall within the zone of interests of the statutory provisions they seek to enforce, they have stated a cause of action under Section 10(a) of the APA and have statutory standing to bring this claim. Plaintiffs' Claim 7 should not be dismissed.

F. Plaintiffs Have Alleged Sufficient Facts to Establish that CARRP Violates the APA.

Plaintiffs' Eighth and Ninth Claims allege that CARRP violates the APA on two grounds. First, CARRP constitutes final agency action that is arbitrary and capricious (Claim 8). 5 U.S.C. § 706. Second, when it implemented CARRP, USCIS ignored the notice and comment procedures the APA requires of substantive or legislative rules (Claim 9). 5 U.S.C. § 553. Defendants seriously mischaracterize Plaintiffs' APA claims as only challenging the delay

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experienced by each individual Plaintiff, arguing that the delays do not constitute final agency action subject to notice and comment rulemaking and arbitrary and capriciousness analysis. But, as discussed above, these delays are merely the symptom of the core dispute in this case: Defendants' application of a secretive program that imposes extra-statutory eligibility criteria on the decisions about whether Plaintiffs can become U.S. citizens or permanent residents. Defendants minimize Plaintiffs' claims as merely an expression of impatience in an attempt to obscure the actual constitutional and statutory injuries that flow from having their applications blocked based on impermissible substantive criteria.

Despite Defendants' efforts to separate Plaintiffs' two APA claims, the analysis is in fact intertwined. If a rule is properly assessed as substantive or legislative, it qualifies as final agency action requiring notice and comment and subject to review under the arbitrary and capriciousness standard. Accordingly, because CARRP is a substantive or legislative agency rule that carries the force of law, its implementation by USCIS represents a final agency action, and as such cannot be arbitrary or capricious and must comply with notice and comment procedures. Because Plaintiffs have pled sufficient facts to support these allegations (and will seek discovery to further confirm them), their claims should not be dismissed.

1. CARRP qualifies as a substantive agency rule. (Claim 9)

CARRP violates the APA's requirement that administrative agencies provide a notice-and-comment period prior to implementing a substantive agency rule. 5 U.S.C. § 553(b), (c). Section 4 of the APA outlines the notice and comment process that is required for "legislative rules" that have the "force and effect of law." 5 U.S.C. § 553. Where an agency implements a new policy without complying with these notice and comment requirements, the resulting regulation is invalid. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). The APA, however, exempts so-called "interpretive rules" from its notice and comment framework. Thus, whether CARRP violates the APA's notice-and-comment dictates depends on whether CARRP is correctly classified as a substantive rule, or is instead an interpretive rule.

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Generally speaking, "substantive rules are rules that create law," and, as a practical matter, typically "implement existing law, imposing general, extrastatutory obligations pursuant to authority properly delegated by Congress." *S. Cal. Edison Co. v. F.E.R.C.*, 770 F.2d 779, 783 (9th Cir. 1985). The "critical feature of interpretive rules," on the other hand, "is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted). CARRP is fairly characterized as a substantive rule, and therefore is subject to the APA's notice-and-comment rulemaking procedures, because it imposes extra-statutory eligibility criteria that effectively alter applicants' ability to naturalize or obtain legal permanent residency.

Nevertheless, relying on *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), Defendants argue that CARRP is an interpretive rule. Specifically, Defendants contend that there is an adequate legislative basis for CARRP and that CARRP does not effectively amend any prior legislative or substantive rules.[23] Defendants' analysis fails on both prongs.

First, CARRP does not rest on "an adequate legislative basis." Defendants point to 8 U.S.C. §§ 1446(a), 1255, and 1357(b) as envisioning the creation of a program like CARRP—one that is simply "a process to ensure USCIS is considering all relevant information relating to cases with possible national security concerns." MTD at 22. CARRP, however, is not merely an extension of USCIS's authority to adjudicate applications for naturalization and adjustment of status, nor is it simply part of the background check authorized by Section 1446(a), application of eligibility criteria outlined in Section 1255, or cabined within the power of immigration officers to administer oaths and generally take and consider evidence as intended by Section 1357(b). Instead, CARRP creates a separate substantive regime for immigration application processing and adjudication. SAC ¶ 95. Moreover, CARRP discriminates against applicants

[23] Defendants argue, and Plaintiffs agree, that the second *American Mining* factor—whether the agency has invoked its legislative authority—is not relevant here.

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from Muslim-majority countries, using arbitrary indicators like travel patterns, financial transfers, certain types of employment, training, or government affiliations, and the identities of the applicant's family and friends to label a person a national security concern subject to CARRP. *Id.* ¶ 74. And once labeled a national security concern, CARRP policy "forbids USCIS adjudications officers from granting the requested benefit in the absence of supervisory approval and concurrence from a senior level USCIS official." *Id.* ¶ 92.

There is no predicate for these discriminatory actions within the existing statutory framework. Indeed, CARRP is completely untethered from the qualifications for naturalization and adjustment of status outlined in the INA and implementing regulations. *See* 8 U.S.C. §§ 1159, 1255, 1427; 8 C.F.R. §§ 209.1, 245.1, 316.2, 335.3. Accordingly, USCIS is acting outside any "adequate legislative basis" by implementing CARRP. For the same reasons, CARRP is in fact inconsistent with these predecessor rules, which have the force of law, satisfying the third factor of the *American Mining* test. Thus, Defendants' legal argument is flawed; CARRP qualifies as a substantive agency rule that should have been passed pursuant to the notice and comment procedures of the APA.

Moreover, even if *American Mining*'s test applies,[24] in light of the program's secrecy a motion to dismiss is not the proper vehicle for determining whether CARRP is in fact a substantive agency rule. This is precisely why Plaintiffs require discovery—to determine how CARRP was created, why it was created, and how it is being and will be implemented. At this early stage, based on the facts currently ascertainable and as alleged in Plaintiffs' Second Amended Complaint, Plaintiffs have pled a plausible set of facts to pass muster under Rule 12(b)(6).

2. CARRP qualifies as a final agency action. (Claim 8)

Plaintiffs' second APA claim alleges that CARRP is a final agency action that "neither

[24] As the Supreme Court recently recognized, the question is the subject of heated debate in scholarly circles. *See Perez*, 135 S. Ct. at 1204.

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focuses on nor relates to a [non-citizen's] fitness to" obtain the immigration status subject to its terms, *Judulang v. Holder*, 565 U.S. 42, 55 (2011), and further that it is arbitrary and capricious under 5 U.S.C. § 706(2)(A).

Defendants do not dispute Plaintiffs' substantive contention that CARRP is arbitrary and capricious; instead, Defendants focus their challenge on the prerequisite finality determination. As an initial matter, Defendants misapply their finality inquiry. Plaintiffs allege that CARRP as a policy is arbitrary and capricious, and it is therefore CARRP as a policy that must be final agency action, not any one applicant's adjudication thereunder. SAC ¶ 280. Defendants misconstrue Plaintiffs' argument, citing irrelevant considerations such as the fact that Plaintiffs' class definitions do not include applications in which Defendants reached a final decision and implying that Plaintiffs believe individual, in-progress adjudications under CARRP constitute final agency action. This is incorrect.

With regard to the overall CARRP policy, Plaintiffs have sufficiently pled the requirements of final agency action. As Defendants correctly outline, final agency action must meet two requirements: (1) it must represent the "consummation of the agency's decision-making process," and (2) the action "must be one by which rights or obligations have been determined or legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citations omitted). USCIS initiated CARRP in 2008 and the program has been in operation, responsible for delaying and denying thousands of immigration applications, since that time. *See* SAC ¶¶ 55-97. Accordingly, CARRP represents the culmination of USCIS's decision-making process because it is an active program. Defendants never contest or deny Plaintiffs' descriptions of CARRP or how it is being applied. And CARRP plainly affects the determination of "rights or obligations" and results in distinct "legal consequences" for the thousands of applicants who are indefinitely delayed or denied immigration benefits for which they qualify without explanation. Thus, the CARRP program as a whole qualifies as final agency action.

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This conclusion will be irrefutable if CARRP is deemed a substantive agency rule subject to notice and comment rulemaking procedures (as Plaintiffs argue it should be). "In litigation over guidance documents, the finality inquiry is often framed as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). Substantive agency rules automatically qualify as final agency actions subject to arbitrary and capriciousness analysis. *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 244 (D.D.C. 2010) ("If the Memorandum is a legislative rule, then it is final agency action under the APA subject to judicial review, and it is subject to notice and comment rulemaking under § 553."); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807 (D.C. Cir. 2006) ("If the 1998 policy guidelines constitute a de facto rule, as appellants claim, then they would clearly meet Bennett's test for final agency action and § 553 of the APA would require the agency to afford notice of a proposed rulemaking and an opportunity for public comment prior to promulgating the rule."); *see also* 33 FED. PRAC. & PROC. JUDICIAL REVIEW § 8334 (1st ed.) ("Where agency action is a rule, arbitrariness standard is particularly appropriate."). Accordingly, the success of Plaintiffs' Claim 9, which alleges CARRP is a substantive rule, would ensure CARRP is also considered final agency action under Claim 8. As explained above, Plaintiffs will seek discovery to reveal the specifics of CARRP's creation and implementation. In the meantime, Defendants have failed to demonstrate as a matter of law that CARRP is *not* final agency action, as they must do to dismiss Claim 9 under Rule 12(b)(6).

V. CONCLUSION

Defendants' motion to dismiss should be denied.

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DATED: May 8, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 8th day of May, 2017, at Seattle, Washington.

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