

Exhibit D

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the
United States, *et al.*,

Defendant.

No. 2:17-cv-00094-RAJ

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN OPPOSITION
TO DEFENDANTS' CROSS MOTION FOR
SUMMARY JUDGMENT**

NOTE FOR MOTION CALENDAR:
Friday, July 2, 2021

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

1	I.	INTRODUCTION	1
2	II.	PLAINTIFFS’ FACTS.....	2
3	III.	LEGAL BACKGROUND	4
4	A.	Statutory Eligibility Criteria and Judicial Review	4
5	B.	Plaintiffs’ Individual Claims Are Not Moot	5
6	IV.	ARGUMENT	6
7	A.	Plaintiffs Are Entitled to Summary Judgment on their APA Claims	6
8	1.	CARRP Constitutes Final Agency Action.....	6
9	2.	CARRP is Not a Matter Committed to Agency Discretion	10
10	3.	CARRP Violates the INA and Agency Regulations and is Therefore Contrary to Law	11
11	4.	CARRP Violates the APA Because it Unlawfully Withholds and Unreasonably Delays Adjudication of Class Members’ Applications.	21
12	5.	CARRP Violates the APA Because USCIS Failed to Engage in Required Notice and Comment Rulemaking.....	23
13	6.	CARRP is Arbitrary and Capricious in Violation of the APA	23
14	B.	CARRP Violates the Procedural Due Process Rights of the Naturalization Class	27
15	1.	The Naturalization Class Members’ Interests are Significant	28
16	2.	CARRP Entails a High Risk of Erroneous Deprivation	28
17	3.	Defendants’ Burden in Adopting Additional Safeguards is Low	29
18	4.	<i>Brown</i> Did Not ‘Narrowly Circumscribe’ Plaintiffs’ Due Process Rights	29
19	C.	CARRP Denies Class Members Equal Protection.....	31
20	1.	<i>Arlington Heights</i> Supplies the Relevant Standard.....	31
21	2.	The Undisputed Facts Establish that Discriminatory Intent was a Motivating Factor in CARRP’s Design and Implementation.....	31
22	3.	CARRP is Subject to Strict Scrutiny, and Even if CARRP is Subject to a More Lenient Standard, it Would Fail	35
23			
24			
25			
26			

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

D.	Defendants May Not Use the Law Enforcement Privilege as a Shield and a Sword	36
E.	Objections to Defendants’ Evidence	38
V.	CONCLUSION	40

TABLE OF AUTHORITIES

Page

1 **CASES**

2 *AADC v. Reno*,

3 70 F.3d 1045 (9th Cir. 1995)28, 30

4 *Al Otro Lado, Inc. v. McAleenan*,

5 394 F. Supp. 3d 1168 (S.D. Cal. 2019).....22

6 *Ali v. Mukasey*,

7 No. C07-1030, 2008 WL 682257 (W.D. Wash. Mar. 7, 2008)37

8 *Arce v. Douglas*,

9 793 F.3d 968 (9th Cir. 2015)32

10 *Army Corps of Engrs. v. Hawkes Co., Inc.*,

11 136 S. Ct. 1807 (2016).....10

12 *Ball v. Massanari*,

13 254 F.3d 817 (9th Cir. 2001)36

14 *Bennett v. Spear*,

15 520 U.S. 154 (1997).....7, 8

16 *Bittaker v. Woodford*,

17 331 F.3d 715 (9th Cir. 2003)37

18 *Broadgate Inc. v. USCIS*,

19 730 F. Supp. 2d 240 (D.D.C. 2010)9

20 *Brown v. Holder*,

21 763 F.3d 1141 (9th Cir. 2014)30, 31

22 *Chen v. Allstate Ins. Co.*,

23 819 F.3d 1136 (9th Cir. 2016)6

24 *Ching v. Mayorkas*,

25 725 F.3d 1149 (9th Cir. 2013)28

26 *Church of Scientology of Cal. v. United States*,

920 F.2d 1481 (9th Cir. 1990)15

City & Cnty. of San Francisco v. USCIS,

981 F.3d 742 (9th Cir. 2020)26

Columbia Riverkeeper v. U.S. Coast Guard,

761 F.3d 1084 (9th Cir. 2014)7

1 *Cook Cnty. v. Wolf*,
 2 461 F. Supp. 3d 779 (N.D. Ill. 2020)36

3 *Dep’t of Commerce v. New York*,
 4 139 S. Ct. 2551 (2019).....11, 19, 20

5 *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*,
 6 140 S. Ct. 1891 (2020).....10, 11, 24, 25

7 *Dolan v. Sentry Credit, Inc.*,
 8 No. C17-1632 RAJ, 2018 WL 6604212 (W.D. Wash. Dec. 17, 2018) (Jones,
 9 J.).....6

10 *E. Bay Sanctuary Covenant v. Garland*,
 11 994 F.3d 962 (9th Cir. 2020)24

12 *Eberle v. City of Anaheim*,
 13 901 F.2d 814 (9th Cir. 1990)6

14 *Elhady v. Kable*,
 15 993 F.3d 208 (4th Cir. 2021)34

16 *Encino Motorcars, LLC v. Navarro*,
 17 136 S. Ct. 2117 (2016).....25

18 *FCC v. Fox Television Stations, Inc.*,
 19 556 U.S. 502 (2009).....25

20 *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*,
 21 569 F. Supp. 2d 929 (N.D. Cal. 2008)12, 13

22 *Gill v. Dep’t of Justice*,
 23 913 F.3d 1179 (9th Cir. 2019)7, 8, 10

24 *Greene v. McElroy*,
 25 360 U.S. 474 (1959).....29

26 *Guiney v. Bonham*,
 261 F. 582 (9th Cir. 1919)19

Hamdi v. USCIS,
 No. EDCV 10-00894, 2012 WL13135302 (C.D. Cal. Aug. 29, 2012).....20

Heckler v. Chaney,
 470 U.S. 821 (1985).....11

1 *Hemp Indus. Ass’n v. Drug Enf’t Admin.*,
 2 333 F.3d 1082 (9th Cir. 2003)23

3 *Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd.*,
 4 340 F. Supp. 3d 934 (N.D. Cal. 2018)41

5 *Indus. Customers of Nw. Utilities v. Bonneville Power Admin.*,
 6 408 F.3d 638 (9th Cir. 2005)7, 9

7 *Jafarzadeh v. Duke*,
 8 270 F. Supp. 3d 296 (D.D.C. 2017)5

9 *Kaur v. Holder*,
 10 561 F.3d 957 (9th Cir. 2009)30

11 *Kungys v. U.S.*,
 12 485 U.S. 759 (1988).....4

13 *Lands Council v. Powell*,
 14 395 F.3d 1019 (9th Cir. 2005)26

15 *Laub v. Dep’t of Interior*,
 16 342 F.3d 1080 (9th Cir. 2003)9

17 *Lincoln v. Vigil*,
 18 508 U.S. 182 (1993).....5

19 *Lopez-Vasquez v. Holder*,
 20 706 F.3d 1072 (9th Cir. 2013)4

21 *Lujan v. National Wildlife Federation*,
 22 497 U.S. 871 (1990).....9, 10

23 *Luke v. Family Care and Urgent Med. Clinics*,
 24 323 F. App’x. 496 (9th Cir. 2009)39

25 *Maina v. Lynch*,
 26 5-cv-00113, 2016 WL 3476365 (S.D. Ind. Jun. 27, 2016)14

Mamigonian v. Biggs,
 710 F.3d 936 (9th Cir. 2013)5, 9

Mariscal v. Graco, Inc.,
 52 F. Supp. 3d 973 (N.D. Cal. 2014)12

Mathews v. Eldridge,
 424 U.S. 319 (1976).....27, 28, 30

1 *Matter of Chawathe,*
 2 25 I. & N. Dec. 369 (USCIS AAO 2010)4
 3 *Mattson v. Wolf,*
 4 826 F. App’x 603 (9th Cir. 2020)28
 5 *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,*
 6 463 U.S. 29 (1983).....26
 7 *Naiker v. USCIS,*
 8 352 F. Supp. 3d 1067 (W.D. Wash. 2018) (Jones, J.).....17
 9 *Nat’l Sec. Counselors v. C.I.A.,*
 10 931 F. Supp. 2d 77 (D.D.C. 2013)23
 11 *Nat’l Wildlife Fed’n v. Army Corps of Eng’rs,*
 12 384 F.3d 1163 (9th Cir. 2004)24
 13 *Nilsson v. City of Mesa,*
 14 503 F.3d 947 (9th Cir.2007)6
 15 *Nio v. Dep’t of Homeland Sec.,*
 16 385 F. Supp. 3d 44 (D.D.C. 2019)10
 17 *Nio v. United States Dep’t of Homeland Sec.,*
 18 323 F.R.D. 28 (D.D.C. 2017).....23
 19 *Occidental Eng’g Co. v. INS,*
 20 753 F.2d 766 (9th Cir. 1985)24
 21 *Ohio Forestry Ass’n, Inc. v. Sierra Club,*
 22 523 U.S. 726 (1998).....9
 23 *Or. Nat. Desert Ass’n v. U.S. Forest Serv.,*
 24 465 F.3d 977 (9th Cir. 2006)8
 25 *Parsons v. Ryan,*
 26 754 F.3d 657 (9th Cir. 2014)22
People v. Kinder Morgan Energy Partners, L.P.,
 159 F. Supp. 3d 1182 (S.D. Cal. 2016).....41
Perez Perez v. Wolf,
 943 F.3d 853 (9th Cir. 2019)11
Price v. INS,
 962 F.2d 836 (9th Cir. 1991)34

1 *Rajah v. Mukasey*,
 2 544 F.3d 427 (2d Cir. 2008).....34

3 *Ramos v. Wolf*,
 4 975 F.3d 872 (9th Cir. 2020)32

5 *Reno v. Bossier Par. Sch. Bd.*,
 6 520 U.S. 471 (1997).....32

7 *Roshandel v. Chertoff*,
 8 554 F. Supp. 2d 1194 (W.D. Wash. 2008).....23, 28

9 *Ruiz-Diaz v. United States*,
 10 703 F.3d 483 (9th Cir. 2012)37

11 *S.E.C. v. Jerry T. O’Brien, Inc.*,
 12 467 U.S. 735 (1984).....29

13 *Samma v. Dep’t of Def.*,
 14 486 F. Supp. 3d 240 (D.D.C. 2020)11

15 *San Luis & Delta-Mendota Water Auth. v. Locke*,
 16 776 F.3d 971 (9th Cir. 2014)25

17 *Singh v. Still*,
 18 470 F. Supp. 2d 1064 (N.D. Cal. 2007)37

19 *The Comm. Concerning Cmty. Improvement v. City of Modesto*,
 20 583 F.3d 690 (9th Cir. 2009)32

21 *Tiwari v. Mattis*,
 22 363 F. Supp. 3d 1154 (W.D. Wash. 2019).....31, 32, 33, 36

23 *Trump v. Hawaii*,
 24 138 S. Ct. 2392 (2018).....31

25 *U.S. v. Hovsepian*,
 26 422 F.3d 883 (9th Cir. 2005)5

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
 429 U.S. 252 (1977).....31, 32

Washington v. Davis,
 426 U.S. 229 (1976).....34

Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,
 259 F.3d 1101 (9th Cir. 2001)40

1	<i>Zerezghi v. USCIS,</i>	
2	955 F.3d 802 (9th Cir. 2020)	28, 29
3	<i>Zhu v. DHS,</i>	
4	No. 18-cv-00489, 2019 WL 4261167 (W.D. Wash. Sept. 9, 2019)	31
5	STATUTES	
6	5 U.S.C. § 555(b)	21
7	5 U.S.C. § 701(a)(2).....	10
8	5 U.S.C. § 706(1)	22
9	5 U.S.C. § 706(2)	22
10	5 U.S.C. § 706(2)(A), (C)	17
11	8 U.S.C. § 1101(f).....	4
12	8 U.S.C. § 1103(a)(1).....	12
13	8 U.S.C. § 1252(a)(2)(B)(ii)	5
14	8 U.S.C. § 1421(c)	29
15	Administrative Procedure Act, 5 U.S.C. § 706.....	passim
16	Immigration and Nationality Act	passim
17	OTHER AUTHORITIES	
18	8 C.F.R. § 103.2(b)(16).....	12, 17, 18, 21
19	8 C.F.R § 103.2(b)(16)(i)	17
20	8 C.F.R § 103.2(b)(16)(ii).....	17
21	8 C.F.R. § 103.2(b)(16)(iii).....	18
22	8 C.F.R § 103.2(b)(16)(iv)	18
23	8 C.F.R. § 103.2(b)(18).....	38
24	8 C.F.R. § 103.3(a)(1)(i)	12
25	8 C.F.R. § 316.10(a)(2).....	4
26		

1	First Amendment	34
2	Fifth Amendment	33
3	Fed. R. Civ. P. 26(a)(2)(D)(ii)	40
4	Fed. R. Civ. P. 26(e)	39
5	Fed. R. Civ. P. 37	40
6	Fed. R. Civ. P. 56(d)	39
7	<i>Pretextual</i> , CAMBRIDGE DICTIONARY, 8 https://dictionary.cambridge.org/us/dictionary/english/pretextual	19
9	Rule 23(a).....	22
10	Rule 23(b)(2).....	22

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13
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I. INTRODUCTION

1
2 The undisputed material facts demonstrate that Plaintiffs are entitled to summary
3 judgment. Defendants do not, and cannot, dispute that CARRP inserts a new standard that
4 USCIS invented into the process of adjudicating immigration benefits, and that CARRP governs
5 whether, when, and how applications can be approved. Defendants do not dispute that they
6 sought but failed to legislate CARRP and that they created the program without public notice and
7 comment. They do not dispute that CARRP bars USCIS officers from approving eligible
8 applications with “unresolved” national security concerns, and that those concerns do not
9 correspond to ineligibility grounds set forth in the Immigration and Nationality Act (“INA”).
10 Defendants do not dispute that USCIS never informs applicants that they have been referred to
11 CARRP or discloses the “concerns” that prompted referral. Defendants’ own statistics prove that
12 CARRP cases are delayed and denied at significantly higher rates than non-CARRP cases, and
13 that class members from Muslim-majority countries are referred to CARRP at *ten to twelve times*
14 the rate of applicants from other countries. And Defendants do not dispute that [REDACTED]
15 [REDACTED] for years despite their
16 eligibility for the benefits they sought.

17 Faced with these undisputed material facts, Defendants pursued obfuscation and
18 misdirection. Defendants improperly suggest that evidence they withheld as “privileged” would
19 show that CARRP is something other than what the record now shows, while also seeking to rely
20 on inadmissible evidence and self-serving agency declarations. They strain to recast CARRP as a
21 program that affects relatively few applicants, but their own data shows that CARRP has
22 impacted tens of thousands of applicants since its inception. Defendants fail to grapple with
23 controlling authority, rely on inapposite cases, and suggest USCIS possesses powers and
24 discretion it does not. They effectively concede, by failing to address, Plaintiffs’ claims that
25 CARRP violates the INA and agency regulations, and that it unlawfully withholds and
26 unreasonably delays adjudication of class members’ applications. And Defendants fail to raise a

1 genuine dispute sufficient to avoid summary judgment on Plaintiffs' other claims.

2 **II. PLAINTIFFS' FACTS¹**

3 The undisputed facts demonstrate that [REDACTED]
 4 [REDACTED]. Defendants do not dispute that (1) [REDACTED]
 5 [REDACTED]
 6 [REDACTED]² (2) in over three years USCIS never found any ineligibility
 7 grounds despite [REDACTED] one year after Mr. Wagafe filed; and (3) USCIS
 8 stopped working on his application from October 2015 until the filing of this lawsuit. Plfs' Mot.
 9 at 17-18; Defs' Mot. at 25. Defendants offer no evidence [REDACTED] reason for
 10 the delay. Defs' Mot. at 25.

11 Defendants do not dispute that [REDACTED] Muslim from Iran working in the energy sector
 12 with U.S. government contracts [REDACTED] **Plaintiff Ostadhassan** [REDACTED] or that
 13 only one month after Mr. Ostadhassan refused to meet voluntarily with the FBI, [REDACTED]
 14 [REDACTED] Plfs' Mot. at 19; Defs' Mot. at 25-26. Critically, there is no
 15 dispute that USCIS found him statutorily eligible for adjustment [REDACTED] denied his application
 16 [REDACTED]
 17 including by questioning the legality of his marriage, or that the denial decision did not meet the
 18 legal standard for false testimony and discretionary denials. Plfs' Mot. at 21; Defs' Mot. at 25-
 19 26. Defendants assert that Mr. Ostadhassan left the country "without first securing any lawful
 20 means of return," Defs' Mot. at 26, but neglect to mention that Defendants issued him a denial
 21 notice informing him he must leave. **Ex. 85** at DEF-00422120.0005.

22 Defendants admit that [REDACTED] **Plaintiff Bengezi** [REDACTED]
 23

24 ¹ Plaintiffs' exhibits 1-100 are attached to the March 25, 2021 Declaration of Jennifer Pasquarella at Dkt.
 25 472. Exhibits 101-113 are attached to the June 11, 2021 Second Declaration of Jennifer Pasquarella filed
 contemporaneously with this motion.

26 ² "[I]n the majority of cases [a [REDACTED]] should be thought of as an innocent party by default,"
 because most [REDACTED] are to witness and bystander names. **Ex. 38** (Danik Rep.) at 22; **Ex. 96** at 1.
 According to former DHS Secretary Michael Chertoff, "the vast majority of [hits on reference files] are benign
 mentions." **Ex. 71** (Chertoff Statement).

1 [REDACTED] Defs’ Mot. at 26. [REDACTED]
 2 [REDACTED]
 3 [REDACTED].” **Ex. 82** at DEF-00419977.0583;
 4 Plfs’ Mot. at 22; Defs’ Mot. at 26. Defendants suddenly reversed course within days of Ms.
 5 Bengezi joining this lawsuit, determining that they could approve the application [REDACTED]
 6 [REDACTED] Plfs’
 7 Mot. at 22. Notably, Ms. Bengezi was shortly thereafter [REDACTED]
 8 applied for naturalization in March of 2020, [REDACTED]. Third
 9 Pasquarella Decl. ¶2, filed concurrently.

10 Defendants do not dispute the facts that [REDACTED]
 11 [REDACTED] **Plaintiff Abraham**’s application for five years, immeasurably harming him and
 12 his family. Plfs’ Mot. at 23-25; Defs’ Mot. at 26. [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED].³

18 Finally, Defendants do not dispute that [REDACTED] **Plaintiff Manzoor** [REDACTED]
 19 [REDACTED] his national origin (Pakistan), [REDACTED]
 20 [REDACTED] Their own documents demonstrate
 21 that [REDACTED]
 22 [REDACTED] it to be swiftly approved on the “merits.” Plfs’
 23 Mot. at 25.

26 _____
³ Defendants also do not dispute that [REDACTED]
 [REDACTED]. Plfs’ Mot at 24-25.

III. LEGAL BACKGROUND

A. Statutory Eligibility Criteria and Judicial Review

Defendants mischaracterize basic immigration law. They claim applicants for adjustment of status must prove admissibility “clearly and beyond a doubt,” Defs’ Mot. at 29, but that is the standard to contest a charge of inadmissibility in immigration court. *See Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1074 n.1 (9th Cir. 2013). The standard to prove eligibility for adjustment of status before the agency is preponderance of the evidence. *See Matter of Chawathe*, 25 I. & N. Dec. 369, 375 (USCIS AAO 2010); *see id.* at 369 (preponderance standard met if claim is “probably true,” even if there is “some doubt”).

Regarding naturalization, Defendants portray the “good moral character” standard as open-ended. It is not. Applicants are *presumed* to possess “good moral character” *unless*, during the five years preceding the application date, they meet an enumerated category under 8 U.S.C. § 1101(f) for *lacking* good moral character. *See* 8 C.F.R. § 316.10(a)(2); **Ex. 89** (Ragland Rep.) ¶37. And even then, USCIS must be able to prove they lack good moral character by probative evidence—a far cry from the unproven allegations and “concerns” driving CARRP. Plfs’ Mot. at 31-32 & n.16 (citing cases).⁴ Moreover, Congress has repeatedly rejected adding *allegations* of terrorist activity to the statutory definition of lack of good moral character. *See, e.g.*, S. 2192, 115th Cong. § 1622 (2017); S. 1757, 115th Cong. § 622 (2017); H.R. 1148, 114th Cong. § 202 (2016). Contrary to their suggestion, Defs’ Mot. at 31, Defendants may only “consider events” outside the five-year statutory period “insofar as it bears on [an applicant’s] *present* moral character” during the statutory period. *U.S. v. Hovsepian*, 422 F.3d 883, 886 (9th Cir. 2005)

Defendants observe that, in certain circumstances, adjustment and naturalization applicants may seek mandamus for lengthy delays and judicial review for denials of their

⁴ Defendants emphasize that “good moral character” excludes those who give “false testimony for the purpose of obtaining” an immigration benefit, Defs’ Mot. at 31, but fail to mention that a finding of false testimony “will be relatively rare” because it requires proving an applicant made a false oral statement “with the subjective intent of obtaining immigration or naturalization benefits,” as opposed to misrepresentations made for any other reason and concealments. *Kungys v. U.S.*, 485 U.S. 759, 780 (1988).

1 applications. Defs' Mot. at 30, 32. But the availability of judicial intervention does not obviate
2 Defendants' obligation to follow the law and adjudicate applications based on the statutory
3 criteria. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (“[A]n agency is not free simply to disregard
4 statutory responsibilities.”). Moreover, judicial review is “*expressly precluded* by 8 U.S.C. §
5 1252(a)(2)(B)(ii)” when USCIS denies adjustment applications as a matter of discretion.
6 *Mamigonian v. Biggs*, 710 F.3d 936, 943 (9th Cir. 2013). Indeed, USCIS frequently denies
7 CARRP applicants' adjustment of status as a matter of discretion and refuses to initiate removal
8 proceedings (against its own policy) to avoid judicial review, as [REDACTED]
9 [REDACTED]. See **Ex. 89** (Ragland Rep.) ¶¶141, 132-133, 97-100, 139. And even where judicial review is
10 available, very few applicants have the resources to resort to the courts. *Id.* ¶112; **Ex. 9** (Arastu
11 Rep.) ¶¶102, 106.

12 **B. Plaintiffs' Individual Claims Are Not Moot**

13 Defendants incorrectly claim that this Court “recognized” that Plaintiffs' individual
14 claims were moot. This is incorrect. The Court only “recognized” that Defendants *argued* their
15 individual claims were moot, but held their claims were not. Dkt. 69 at 29-30, 13 (holding
16 voluntary cessation does not moot Plaintiffs claims).

17 Moreover, Plaintiff Mehdi Ostadhassan's individual claim for relief is not moot. At the
18 time of filing, he sought an order requiring Defendants to adjudicate his application in
19 accordance with the law, [REDACTED]. Dkt. 47 at 51. Although Defendants adjudicated Mr.
20 Ostadhassan's application, [REDACTED] he remains entitled to the
21 relief he sought. See *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 304 (D.D.C. 2017) (declining to
22 find plaintiffs' claims moot after USCIS adjudicated their applications because they challenged
23 the legality of CARRP, not just the delay in adjudication). Mr. Ostadhassan is entitled to
24 individual relief requiring Defendants to readjudicate his application lawfully [REDACTED]
25 [REDACTED]. See *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1138 (9th Cir. 2016) (“a claim
26 becomes moot when a plaintiff *actually receives* complete relief on that claim”).

IV. ARGUMENT

As a threshold matter, Defendants do not move for summary judgment on *all* of Plaintiffs' claims, despite their passing reference to doing so. Defs' Mot. at 39. Their brief only addresses *some* claims: Claims Four (procedural due process), Six (equal protection), Eight (Administrative Procedure Act ("APA"), 5 U.S.C. § 706), and Nine (APA, *id.* § 553). They do not address Plaintiffs' Claim Eight contrary-to-law arguments except in a footnote (thus conceding it), nor Claims Five (substantive due process), Seven (INA and regulations), or Ten (Uniform Rule of Naturalization). Dkt. 47. Consequently, they are precluded from doing so on reply. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). Defendants also rely heavily on self-serving, conclusory agency declarations unsupported by (and often contradicted by) documentary evidence. *See, e.g.*, Dkt. 522 (Webb Decl.) (making previously undisclosed claims about processing times without citing any evidence); Dkt. 520 (Renaud Decl.) (citing no evidence); Dkt. 524 (Atkinson Decl.) (same). But a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir.2007). The Court should disregard such evidence, as well as the inadmissible evidence Plaintiffs move to strike below. *Infra* Part IV.E; *see Dolan v. Sentry Credit, Inc.*, No. C17-1632 RAJ, 2018 WL 6604212, at *3 (W.D. Wash. Dec. 17, 2018) (Jones, J.).

A. Plaintiffs Are Entitled to Summary Judgment on their APA Claims

Defendants' opposition to Plaintiffs' APA claims hinges on the argument that CARRP does not constitute final agency action. Defs' Mot. 55-58. That is plainly wrong, as this Court has already held. Dkt. 69 at 19. Plaintiffs are entitled to summary judgment on their APA contrary to law, notice and comment, unreasonable delay, and arbitrary and capricious claims.

1. CARRP Constitutes Final Agency Action

a. CARRP is Final Agency Action as a Matter of Law

Agency action is final if it (1) "mark[s] the consummation of the agency's decision-

1 making process,” and (2) is “one by which rights or obligations have been determined, or from
2 which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (cleaned up).
3 Courts interpret finality in a “pragmatic and flexible manner.” *Gill v. Dep’t of Justice*, 913 F.3d
4 1179, 1184 (9th Cir. 2019). The Court previously found that, assuming Plaintiffs’ facts as true:

5 The first [*Bennett*] prong is met because CARRP is an active program implemented by
6 the agency and represents the culmination of USCIS’s decision making process. The
7 implementation of CARRP affects the thousands of applicants whose qualified
8 applications are allegedly indefinitely delayed or denied without explanation. The second
9 prong is met because this results in distinct legal consequences.

10 Dkt. 69 at 19. The undisputed facts now in the record fully support this conclusion.

11 The *Bennett* “consummation” prong requires that agency action “not be of a merely
12 tentative or interlocutory nature.” 520 U.S. at 178. Finality may result, for example, from a
13 “guidance document” that “reflect[s] a settled agency position.” *Columbia Riverkeeper v. U.S.*
14 *Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014). Courts also assess “whether the [action]
15 amounts to a definitive statement of the agency’s position,” and “whether immediate compliance
16 is expected.” *Indus. Customers of Nw. Utilities v. Bonneville Power Admin.*, 408 F.3d 638, 646
17 (9th Cir. 2005).

18 Defendants’ own documents indisputably demonstrate consummation: CARRP is
19 “USCIS policy” established by the Deputy Director’s directive that set an “effective date,”
20 rescinded prior policy guidance, and “provide[s] direction to identify and process cases
21 containing NS concerns.” **Ex. 13** at CAR 1-3. Related operational guidance directs “all Field
22 Offices” to comply. CARRP plainly is neither tentative nor interlocutory; it is a formal program
23 in effect since 2008. *See* Dkt. 74 (Answer) ¶55. And CARRP’s policy directives are “definitive
24 statements” with which “immediate compliance is expected.” *Indus. Customers*, 408 F.3d at 646.

25 Courts assessing *Bennett*’s second prong “focus on the practical and legal effects of the
26 agency action.” *Gill*, 913 F.3d at 1184. Agency action “by which rights *or* obligations have been
determined, *or* from which legal consequences will flow” is enough. *Or. Nat. Desert Ass’n v.*
U.S. Forest Serv., 465 F.3d 977, 987 (9th Cir. 2006) (quoting *Bennett*, 520 U.S. at 178). CARRP

1 is *designed* to have serious legal effects and consequences, and it does. CARRP policy and
2 operational guidance “apply to all applications and petitions that convey an immigrant or non-
3 immigrant status in which an officer identifies a NS concern.” **Ex. 29** at CAR 13. The undisputed
4 facts establish that CARRP: (1) requires officers to process and adjudicate class members’
5 applications subject to CARRP procedures, rather than the usual process; (2) subjects class
6 members to that process without their knowledge or consent; (3) restricts USCIS officers’ ability
7 to approve applications where there is an unresolved NS concern (Dkt. 74 ¶10); and (4) urges
8 officers to find pretextual reasons to deny eligible applicants with unresolved NS concerns. This
9 results in applications taking far longer to process, and being denied at higher rates, than other
10 applications. Plfs’ Mot. at 16-17. The second *Bennett* prong is met even if some applications
11 subjected to CARRP are ultimately approved or adjudicated after lesser delays. *See Gill*, 913
12 F.3d at 1185 (agency action final even if certain effects were not guaranteed in all instances).

13 Defendants strain to recast CARRP as “simply an internal USCIS process” applied
14 “before applications reach the same adjudicative juncture” as other applications. Defs’ Mot. at
15 58. But the test is “the actual effects of the action,” not “an agency’s characterization.” *Gill*, 913
16 F.3d at 1184. Defendants ignore their own admissions, *see* Dkt. 74 (Answer) ¶10, and the plain
17 words of the CARRP policies in the administrative record, calling CARRP a process “for vetting
18 *and adjudicating* cases with national security concerns.” **Ex. 101** at CAR 8 (emphasis added).
19 And this adjudication is *not* the same as in other cases: CARRP cases are taken out of the normal
20 adjudicative process and subjected to different rules that USCIS simply made up. Indeed, the
21 administrative record indisputably shows that officers “are not authorized to approve
22 applications with remaining KST NS concerns,” or “remaining Non-KST NS concerns without
23 supervisory approval and concurrence from the local management.” Defs’ Mot. at 58.

24 All Defendants can muster in light of this overwhelming evidence are two cases
25 regarding *Bennett’s* second prong, neither of which undermine this conclusion. *Mamigonian*, 710
26 F.3d at 941-42, merely held there was no jurisdiction over the petitioner’s APA claim because

1 USCIS had not yet made a determination on her application when she filed suit. That does not
 2 speak to USCIS’s action here in establishing an extra-statutory adjudication process and
 3 subjecting class members to it. Similarly, in *Broadgate Inc. v. USCIS*, 730 F. Supp. 2d 240, 246
 4 (D.D.C. 2010), the court held that an “advisory” non-binding memorandum that interpreted a
 5 formal regulation was not final agency action. In contrast, CARRP binds officers and field
 6 offices, and imposes clear, immediate, and substantial consequences. CARRP “directly affect[s]”
 7 class members and satisfies *Bennett’s* second prong. *Indus. Customers*, 408 F.3d at 646.

8 **b. Defendants’ Argument that Plaintiffs’ APA Claims Amount to an**
 9 **Unreviewable “Programmatic Challenge” is Meritless**

10 Defendants remarkably argue that CARRP is beyond judicial review entirely. Defs’ Mot.
 11 at 56-57. They claim *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), “foreclose[s]
 12 review of USCIS policies like CARRP.” *Id.* at 56. But the Court in *Lujan* acknowledged that
 13 agency action can be final and challengeable at a broad, programmatic level: “If there is in fact
 14 some specific order or regulation, applying some particular measure across the board to all
 15 individual classification terminations and withdrawal revocations, and if that order or regulation
 16 is final, . . . it can of course be challenged under the APA by a person adversely affected.” *Id.*
 17 n.2.⁵ That language comfortably encompasses programs such as CARRP, and in the time since
 18 *Lujan*, courts have repeatedly found challenges to agency action at the programmatic level
 19 reviewable under the APA. *See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140
 20 S. Ct. 1891, 1913 (2020) (challenge to rescission of DACA program); *Gill*, 913 F.3d at 1182
 21 (reviewing national Suspicious Activity Reporting initiative); *Nio v. Dep’t of Homeland Sec.*,
 22 385 F. Supp. 3d 44 (D.D.C. 2019) (reviewing military naturalization policy).

23 *Lujan* did not carve out an expansive exception to the APA for “programmatic
 24 challenges,” as Defendants suggest. Rather, *Lujan* simply acknowledged that inchoate agency

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 26 ⁵ The Supreme Court and Ninth Circuit have interpreted *Lujan* as primarily addressing ripeness. *See Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998); *Laub v. Dep’t of Interior*, 342 F.3d 1080, 1088 (9th Cir. 2003). Viewed through that lens, *Lujan* remains easily distinguishable, as the class members are currently subject to CARRP and its consequences, as described above, and their claims are plainly ripe.

1 phenomena that are not the consummation of agency decision making are not subject to
2 challenge under the APA. 497 U.S. at 891. Moreover, CARRP, is a binding policy delineated
3 through directives that specify “concrete action” and impose clear consequences on applicants; it
4 is not “constantly changing.” *Id.* at 890-91. As Defendants admit and the administrative record
5 demonstrates, CARRP’s foundational 2008 documents still govern the program. *See* Dkt. 74
6 ¶¶10, 55; **Ex. 13; Ex. 29; Ex. 101; Ex. 102**. And the fact that CARRP is “subject to change as
7 USCIS management sees fit,” Defs’ Mot. at 56, does not alter the result. *See Army Corps of*
8 *Engrs. v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (possibility of revision “is a common
9 characteristic of agency action, and does not make an otherwise definitive decision nonfinal”).

10 Finally, Defendants’ argument that “judicial review exists for each application that may
11 be subject to CARRP either on the basis of delay or denial,” Defs’ Mot. at 57, is false, as the law
12 precludes judicial review for some applicants, *see supra* Part III.A, and ignores that the Court
13 certified this case as a class action, finding “Defendants appear to be engaging in a strategy of
14 picking off named Plaintiffs to insulate CARRP from meaningful judicial review.” Dkt. 69 at 29.

15 **2. CARRP is Not a Matter Committed to Agency Discretion**

16 Defendants further argue that CARRP is unreviewable under the APA because it “is
17 committed to agency discretion by law.” Defs’ Mot. at 59. Once again, Defendants are incorrect.
18 The APA embodies a “basic presumption of judicial review,” and while the presumption may be
19 rebutted if action is “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), that
20 exception should be read “quite narrowly.” *Regents*, 140 S. Ct. at 1905.

21 CARRP does not fall within this narrow exception. Defendants identify no law that
22 commits the formulation of eligibility criteria to USCIS’s discretion. To the contrary, as
23 Plaintiffs show in detail, the INA sets eligibility criteria and procedures for adjudicating
24 applications. *See infra* Part IV.A(3). In an analogous context—U Visa processing—the Ninth
25 Circuit observed that “statutes prescribe eligibility criteria, application procedures, and
26 agency duties, all of which guide the Secretary’s determination whether to grant or deny”

1 applications, and it held the exception did not apply because those “determinations are thus not
2 ‘wholly discretionary.’” *Perez Perez v. Wolf*, 943 F.3d 853, 867 (9th Cir. 2019). *See also Samma*
3 *v. Dep’t of Def.*, 486 F. Supp. 3d 240, 261 (D.D.C. 2020) (DOD policy for military naturalization
4 not committed to agency discretion).

5 Defendants’ reliance on *Heckler v. Chaney* is unavailing. In that case, the Supreme Court
6 emphasized that the discretion exception is “very narrow” and arises only in “rare
7 instances” when “there is no law to apply.” 470 U.S. 821, 830 (1985) (quoting *Citizens to Pres.*
8 *Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). And *Heckler* was about exercising discretion
9 in *not taking action*. *Id.* That is not the case here. Rather than a decision *not* to exercise authority,
10 CARRP is a policy delineating *how* USCIS exercises authority with respect to tens of thousands
11 of applicants. And even if USCIS has some discretion in certain types of adjustment applications
12 (unlike naturalization applications), that discretion is strongly circumscribed by applicable law.
13 *See* Plfs’ Mot. at 28; *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (revision of
14 census questionnaire not committed to agency discretion where Census Act conferred “broad”
15 but not “unbounded” authority). Indeed, the Supreme Court rejected the argument Defendants
16 advance here when it invalidated DHS’s rescission of the DACA program, even though that
17 program more directly raised the selective enforcement considerations at play in *Heckler*. *See*
18 *Regents*, 140 S. Ct. at 1906-07.

19 **3. CARRP Violates the INA and Agency Regulations and is Therefore Contrary** 20 **to Law**

21 CARRP inserts an agency-invented standard into the adjudication of immigration benefits
22 and governs whether, when, and how applications can be approved, all without disclosing any
23 information to the applicant. It imposes extra-statutory criteria not just for vetting but, critically,
24 as barriers to the final adjudication and approval of benefits. CARRP is thus contrary to law
25 under the APA because it violates both the INA and agency regulations. *See* Plfs’ Mot. at 26-33.

26 Defendants do not substantively respond to Plaintiffs’ motion on this claim, only
mentioning it in a three-sentence footnote in which they assert without discussion that Plaintiffs’

1 *ultra vires* claim is refuted by Defendants’ “broad authority to inquire and to develop
 2 procedures.” Defs’ Mot. at 63 n.11. “A footnote is the wrong place for substantive arguments on
 3 the merits of a motion.” *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, 569 F.
 4 Supp. 2d 929, 935 n.1 (N.D. Cal. 2008). Defendants thus concede this claim as a matter of law.
 5 See *Mariscal v. Graco, Inc.*, 52 F. Supp. 3d 973, 984 (N.D. Cal. 2014). In any event, 8 U.S.C. §
 6 1103(a)(1) “charge[s]” USCIS with administration and enforcement of immigration laws but
 7 does not permit the agency to *exceed* that authority, as it does in CARRP, by making its own set
 8 of rules that override the legal standards governing naturalization and adjustment of status.⁶
 9 Plaintiffs are entitled to summary judgment on their contrary-to-law claim.

10 **a. Plaintiffs Have Shown That CARRP Violates the INA**

11 Beyond Defendants’ failure to contest this claim, the following undisputed material facts,
 12 taken on their own and together, provide an ample foundation for summary judgment: (1)
 13 CARRP impeded for years the favorable adjudication of Plaintiffs’ applications despite their
 14 proven eligibility; (2) CARRP’s rules are legislative, as USCIS sought but failed to legislate the
 15 same rules; (3) CARRP bars adjudicators from approving eligible applications with unresolved
 16 NS concerns; as a result, (4) USCIS denies and delays applicants with unresolved NS concerns at
 17 exceptionally high rates; even though, (5) NS concerns are not synonymous with grounds of
 18 ineligibility. These undisputed facts prove that CARRP imposes extra-statutory criteria to the
 19 approval of class members’ applications in violation of the INA.

20 First, the facts related to the adjudication of Plaintiffs’ applications demonstrate that
 21 despite the agency’s own findings that Plaintiffs were eligible for the requested benefits, [REDACTED]
 22 [REDACTED] years of delay, and, in Plaintiff
 23 Ostadhassan’s case, denial.

24 Second, there is no dispute that Congress rejected USCIS’s proposed legislation to enact

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 26 ⁶ Defendants’ footnote also claims that Plaintiffs’ regulatory claim is wrong because 8 C.F.R. §
 103.3(a)(1)(i) “does not abrogate the administrative law principle that an agency need not state all its reasons for a
 decision so long as the stated reasons are lawful.” But Plaintiffs did not move for summary judgment on that
 regulation—they did not even mention it. Plfs’ Mot. 32-33 (arguing CARRP violates 8 C.F.R. § 103.2(b)(16)).

1 CARRP-like rules *eleven times*. Plfs’ Mot. at 2-3; **Ex. 103** (relevant sections of the proposed
 2 legislation). Defendants do not dispute the accounts of DOJ and DHS Inspectors General that
 3 USCIS sought to legislate CARRP because it did not have authority to withhold approvals and
 4 deny applicants based on security check concerns that were “unresolved” to DHS’s satisfaction,
 5 because the law *required* them to approve eligible applicants. Plfs’ Mot. at 3; **Ex. 5** at 41281
 6 (DHS report); **Ex. 4** at 11 & n.14 (DOJ report). Defendants do not dispute that CARRP enacts
 7 the same rules and achieves the same outcomes USCIS sought in the failed amendments, and
 8 thus displaces the very statutory rules it once knew it needed to amend.

9 Third, CARRP indisputably bars adjudicators from approving *eligible* applicants with an
 10 unresolved national security concern, unless they have permission from the highest levels of
 11 USCIS. Defs’ Mot. at 14 (“Where the NS concern is unresolved, but the applicant is eligible, the
 12 ISO and his/her supervisor will recommend the application for approval and the benefit will
 13 issue *if the Field Office Director or Senior Leadership Review Board concur.*”) (emphasis
 14 added); Plfs’ Mot. at 7.⁷ This plainly violates USCIS’s mandatory duty to adjudicate and approve
 15 eligible applicants. Plfs’ Mot. at 28, 33. Defendants offer no rejoinder.

16 Moreover, Defendants do not dispute that the process to obtain senior-level consent is
 17 onerous—so onerous, it has rarely been invoked [REDACTED]. Plfs’ Mot. at 7. Nor do
 18 they dispute that the default is that USCIS [REDACTED], even though that is
 19 not grounds for ineligibility. *Id.* at 7, 9-10, 31.

20 Given its bars to approval, CARRP teaches officers to find ways to deny *eligible*
 21 applicants due to [REDACTED]. Defendants admit they instruct officers to find
 22 pretextual bases to deny applicants with [REDACTED], Defs’ Mot. at 14, and they do
 23 not refute the clear directives in CARRP trainings to deny eligible applicants wherever possible.
 24 Plfs’ Mot. at 6, 15; *see, e.g., Ex. 105* at CAR 1275 (where applicant is eligible the “purpose” is
 25

26

⁷ USCIS does not require this senior-level concurrence to approve any immigration benefits in any other
 context. *See Ex. 104* (USCIS Dep. 132:22-133:12).

1 to “resolve the concern, or deny the case”); **Ex. 16** at DEF-00116759.0146 (same).⁸ Defendants
 2 rely on the self-serving declaration of one USCIS official who claims that the instruction is to
 3 only deny ineligible applicants, but the document he cites actually underscores CARRP’s default
 4 focus on delay and denial of *eligible* applicants. Defs’ Mot. at 20. The document cited—which is
 5 from an inadmissible 2020 training module, *see infra* Part IV.E—states that, if an applicant is
 6 eligible, but the NS concern is unresolved, either: (1) get a senior leader to sign off on approval,
 7 or (2) go back and do more vetting “to look for potential ineligibility.” Defs’ Ex. 14 at DEF-
 8 00432008. The admissible version of the same training slide more plainly states option (2) as
 9 “we have to find a way to not have to approve.” Hyatt Decl. ¶5, Ex. B at 9 (comparing slides),
 10 filed concurrently; **Ex. 19** at DEF-0090968.0014 (explaining that the purpose of ‘going back’ to
 11 do more vetting on an eligible application is towards “the specific end of not approving an NS
 12 concern”). The record is clear that CARRP at its core is about officers “not approving” eligible
 13 applicants if they can possibly help it, and that is contrary to law.

14 Defendants also make no effort to contest that CARRP entails a search for
 15 inconsistencies and mistakes, however trivial, to find bases to deny. Plfs’ Mot. at 5-6.⁹ They
 16 resort to speculating that officers do not actually follow this aspect of the CARRP trainings.¹⁰
 17 Defs’ Mot. at 14-15. But agencies are presumed to follow their own policies. *See, e.g., Church of*

18
 19 ⁸ *See, e.g., Ex. 105* at 1291 (“we know that we would like to not approve them because they are an
 20 unresolved NS concern”); **Ex. 16** at DEF-00116759.0162 (same); **Ex. 105** at CAR 1273 (“The challenge comes
 when the individual seems eligible, but. . . we’re probably not going to be able to resolve the concern”).

21 ⁹ Underlying CARRP’s training is USCIS’s “common belief” that “[i]f you look hard enough, you can find
 22 evidence of fraud and/or ineligibility in almost any case.” **Ex. 21** at DEF-00068350.0011. That is because, as one
 23 USCIS adjudicator put it, “[i]t is common for an applicant to make ‘a lot’ of mistakes when filling out a
 24 [naturalization application],” such that ten mistakes (incl. on travel, addresses, work history, etc) is “about average.”
Maina v. Lynch, 5-cv-00113, 2016 WL 3476365, *2 (S.D. Ind. Jun. 27, 2016). A hallmark of CARRP denials is
 seizing on these to-be-expected mistakes and using them as bases to deny. For example, USCIS used the alleged
 failure of ██████████ to file a change of address form as the stated reason to deny them permanent
 residency in the exercise of discretion, ignoring, unlawfully, all the positive factors meriting approval. **Ex. 89**
 (Ragland Rep.) ¶¶92-96.

25 ¹⁰ Defendants cite two depositions as support, which themselves refute the point. Defs’ Mot. at 15. The two
 26 asylum officers deposed just explained that some of the trivial mistakes and inconsistencies that CARRP training
 urged officers to use for denial were not applicable in *asylum* cases and so they never used them. *See* Defs’ Ex. 16
 (Averill Dep. 267:11-22) (“minor misstatements, omissions, and mistakes” on an application were not statutory
 “grounds for a negative credibility determination” in asylum referrals); Defs’ Ex. 17 (Costello Dep. 246:17-247:2).

1 *Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990).

2 Fourth, the fact that applicants with unresolved NS concerns are denied and delayed at
3 exponentially higher rates than other applicants is irrefutable proof of CARRP's extra-statutory
4 rules. There is no dispute that only 7.5% of applicants not subject to CARRP are denied, whereas
5 [REDACTED] are denied. Plfs' Mot. at 17. Delay for
6 CARRP applications is also far longer than "routine" applicants, many dragging on for years
7 because of CARRP's barriers to approval. *Id.* For example, in a seven-year period, Defendants
8 adjudicated only [REDACTED]
9 [REDACTED]. **Ex. 32** (Mar. 2021 Kruskol
10 Rep.) Exs. BM, BN; *see* Plfs' Mot. at 17. Rather than grapple with these important facts,
11 Defendants repeatedly cite approval rates for *all* applicants processed through CARRP, including
12 those whose concerns were "resolved." Defs' Mot. at 1, 23-25. But applications with "resolved"
13 concerns are released to "routine" processing where they are not subject to CARRP's extra-
14 statutory bars, so those numbers are inapposite. Plfs' Mot. at 6. Still, even including "resolved"
15 concern cases, Defendants' statistics further prove that CARRP cases are denied and delayed at
16 significantly higher rates than non-CARRP cases. *See* Defs' Mot. at 24 (comparing [REDACTED] non-
17 CARRP adjustment cases filed in FY2013 that were approved to only [REDACTED] of such CARRP
18 cases that were approved).

19 Fifth, these rules and outcomes could only be lawful if an unresolved NS concern was the
20 same as ineligibility, but it is not. As Defendants admit, NS concerns in CARRP are not
21 coextensive with eligibility criteria for naturalization and adjustment of status. Defs' Mot. at 17-
22 18 (NS concerns "not dispositive of eligibility"); Plfs' Mot. at 8, 29 (citing Defs' admissions).
23 Defendants claim instead that the significance of being flagged as an NS concern is only that it
24 requires a "certain process, not an adjudicative result." Defs' Mot. at 17. But as Plaintiffs have
25 demonstrated, being labeled an unresolved NS concern in CARRP is highly determinative of the
26 adjudicative result.

1 Rather than dispute the material facts, Defendants take aim at tangential issues that
 2 contradict their own agency admissions. For example, Defendants claim they do not treat
 3 [REDACTED], but USCIS confirmed the
 4 opposite, as does the very document Defendants cite and misquote. **Ex. 8** (USCIS Dep.) 172:21-
 5 173:2 (“[REDACTED]
 6 [REDACTED]”); Defs’ Mot. at 9 (misquoting Defs’ Ex. 5 at DEF-431327, which confirms
 7 [REDACTED] *see also* **Ex. 39** at DEF-00429588
 8 (“[REDACTED]”), 609
 9 [REDACTED]
 10 [REDACTED]”). The undisputed fact that USCIS treats applicants
 11 with [REDACTED]
 12 [REDACTED] is further evidence that CARRP violates the INA.

13 Defendants also claim that, with respect to non-KSTs, only applicants with an
 14 “articulable link”—itself an invented CARRP term—are subject to CARRP. Defs’ Mot. at 6-7.
 15 This is wrong. CARRP policy permits referrals to CARRP based on one or more “indicators” of
 16 a concern, even where no “articulable link” is present. Plfs’ Mot. at 9; *see* **Ex. 8** (USCIS Dep)
 17 231:8-232:18. This fact about CARRP is so basic the officer certification test asks: “A case with
 18 indicators of a connection to an area of national security concern cannot be handled in CARRP
 19 until an articulable link is established?” Answer: “False.” **Ex. 106** at DEF-0093119, DEF-
 20 0093116. Defendants’ track this distinction by labeling those with “articulable links” as
 21 [REDACTED] concerns and those with just “indicators” as [REDACTED] Plfs’ Mot. at 8-9. It is
 22 undisputed that [REDACTED] of non-KST cases in CARRP are [REDACTED] Plfs’ Mot. at 9; *see also*
 23 Johansen-Mendez Rep. ¶¶38-39 (concerns were rarely “confirmed” with an “articulable link”).¹¹

24
 25 ¹¹ Defendants further fault Plaintiffs for not acknowledging that officers are instructed to look for
 26 “indicators” within the “totality of the circumstances,” but never explain why that matters since it is not directed at
 eligibility for the immigration benefit. There is no dispute that the indicators reflect a litany of immutable traits that
 are not reflective of statutory ineligibility. *See* **Ex. 35** at CAR 86; Plfs’ Mot. at 8-15. Defendants attempt to
 rationalize labeling people “concerns” based on their lawful relationships and associations because they could or
 would have reasonably known about the suspected person’s NS activities. Defs’ Mot. at 10. But a person’s

1 In sum, by applying a standard to the adjudication of immigration benefits not
 2 authorized—indeed, rejected—by Congress, and by using a standard that significantly impedes
 3 the approval of eligible applicants, CARRP is “not in accordance with law” and is “in excess of
 4 statutory authority” under the APA. 5 U.S.C. § 706(2)(A), (C).

5 **b. CARRP Violates 8 C.F.R. § 103.2(b)(16) and the APA**

6 Defendants also fail to directly address Plaintiffs’ regulatory claim while simultaneously
 7 admitting the facts proving it. There is no dispute that USCIS considers information it does not
 8 disclose to deny CARRP cases, and it does not permit applicants to inspect and rebut any of that
 9 information. This practice violates 8 C.F.R. § 103.2(b)(16).

10 The regulations are clear. They provide that “[i]f the decision will be adverse to the
 11 applicant or petitioner and is based on derogatory information *considered* by [USCIS] and of
 12 which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an
 13 opportunity to rebut the information.” 8 C.F.R § 103.2(b)(16)(i) (emphasis added). Accordingly,
 14 USCIS must disclose any “derogatory information” USCIS has “considered” in denying an
 15 application. Additionally, USCIS’s “determination of statutory eligibility” must “be based only
 16 on information contained in the record of proceeding which is *disclosed* to the applicant or
 17 petitioner.” 8 C.F.R § 103.2(b)(16)(ii) (emphasis added); *see also Naiker v. USCIS*, 352 F. Supp.
 18 3d 1067, 1078 (W.D. Wash. 2018) (Jones, J.). This requirement is relaxed only where the
 19 information is classified, in which case USCIS must “give[] [the applicant] notice of the general
 20 nature of the information and an opportunity to offer opposing evidence.” 8 C.F.R §
 21 103.2(b)(16)(iv). Only where a decision turns on the exercise of discretion, and where the
 22 information is classified, may the agency withhold information from the record and from the
 23 applicant as otherwise required by the regulation. 8 C.F.R. § 103.2(b)(16)(iii).

24 Defendants admit they deny applicants for undisclosed reasons: “[i]n many CARRP cases

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 knowledge of someone else’s bad acts is not a lawful basis to deny immigration benefits, nor does it make them
 guilty of any wrongdoing.

1 where vetting is complete and the NS concern is still unresolved, USCIS is aware of information
2 that makes an applicant ineligible for a benefit, but cannot disclose that information to the
3 applicant because it might compromise United States government interests. Thus, USCIS trains
4 its officers to explore alternative options to reach the same result without disclosing such
5 information.” Defs’ Mot. at 14; *see also id.* at 19. In other words, in direct violation of §
6 103.2(b)(16), USCIS does not tell applicants about the unresolved NS concern creating the true
7 reason for denial. *Id.* at 14, 19; *see also* Plfs’ Mot. at 5-7 (citing evidence). The regulation
8 already addresses Defendants’ purported concerns because it protects *classified* information; it
9 does not, however, give USCIS permission to exempt itself just because it decides the
10 information is sensitive or “might compromise” government interests. Defs’ Mot. at 14.

11 The regulation unambiguously applies where there is an adverse decision “based on
12 derogatory information *considered* by the Service”; there is no exception for information USCIS
13 unilaterally claims it can withhold. Yet Defendants try to nullify the rule by claiming they can
14 fail to disclose the real reason for denial. They confusingly claim they need not provide notice if
15 the information is “not legally relevant to the basis for [the] decision,” even though it “happens
16 to inform USCIS’s decision,” Defs’ Mot. at 36, while elsewhere suggesting that such information
17 is legally relevant, indeed that it “makes an applicant ineligible for a benefit.” Defs’ Mot. at 14;
18 *see also id.* at 19. Either way, derogatory information that “inform[s] USCIS’ decision” is
19 relevant when the agency acknowledges *that information* causes it to deny applications that
20 would otherwise be approved. Defs’ Mot. at 36-37. What Defendants dismiss as “tangential
21 considerations” are centrally relevant under the rule because they form the true basis for why the
22 agency withholds and denies applications. *Id.* at 37, 14.

23 Defendants further claim that principles of administrative law somehow relieve them of
24 their regulatory obligations but cite no authority for that proposition. Defs’ Mot. at 37; *see also*
25 *id.* at 63 n.11 (citing a different regulation). Instead, they claim *Department of Commerce v. New*
26 *York*, 139 S. Ct. 2551 (2019) authorizes their pretextual denial practices. But the issue discussed

1 there is whether an agency's *administrative record* must contain the actual reasons for its
 2 adoption of a policy to enable judicial review under an APA arbitrary and capricious claim. *Id.* at
 3 2573-76. The case says nothing about whether, under an APA contrary to law claim, an agency
 4 may deny an individual a benefit without providing the true basis for the decision, and when a
 5 governing regulation requires it to. Moreover, *Department of Commerce* stands for exactly the
 6 opposite of what Defendants claim. Defs' Mot. at 37, 50-51. While the Supreme Court noted that
 7 agencies need not state all the reasons for a decision, it held they cannot hide the *true* reasons for
 8 their decisions by offering pretextual explanations in their place.¹² 139 S. Ct. at 2575-76
 9 (describing "a significant mismatch between the [agency's] decision and the rationale [it]
 10 provided" and setting the policy aside). As the Court explained, "[t]he reasoned explanation
 11 requirement of administrative law . . . is meant to ensure that agencies offer genuine
 12 justifications for important decisions, reasons that can be scrutinized by courts and the interested
 13 public. Accepting contrived reasons would defeat the purpose of the enterprise." *Id.* at 2575-
 14 76.¹³

15 Here, the record is clear: USCIS teaches officers to do exactly what the Supreme Court
 16 has prohibited. It instructs officers to "build a separate evidentiary basis" for denial that does not
 17 reveal—indeed, is entirely dissimilar from—the true reason for denial: the unresolved NS
 18 concern. **Ex. 16** at DEF-00116759.0161; *see id.* at .0162 (teaching officers "a parallel
 19 construction to build a new path from the starting point (our person) to the ending point (we need
 20 to deny them)."); Defs' Mot. at 14; Plfs' Mot. at 5-7. As a result, the stated reasons are
 21 necessarily incongruent with the real reasons for the denial, and thus are unlawful. *Dep't of*
 22 *Commerce*, 139 S. Ct. at 2575 (describing pretextual reasons as "incongruent," "contrived,"
 23

24 ¹² Defendants take issue with the word "pretext," Defs' Mot. at 49, but Plaintiffs use the word as it is
 25 commonly understood: "a pretended reason for doing something that is used to hide the real reason." *Pretextual*,
 CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/pretextual>.

26 ¹³ Defendants also rely on a decision from over a hundred years ago, *Guiney v. Bonham*, 261 F. 582 (9th
 Cir. 1919), but not only did that decision predate the regulation at issue here, the petitioner in that case *was* provided
 notice and an opportunity to respond to the charges levied against him, even if he did not see all the evidence. There
 was no allegation of a pretextual denial.

1 “mismatched,” and “disconnected” from the “genuine” reasons for a decision). For example, in
 2 *Hamdi v. USCIS*, No. EDCV 10-00894, 2012 WL13135302 (C.D. Cal. Aug. 29, 2012), USCIS
 3 subjected the applicant to CARRP because of a donation to a charity that later was accused of
 4 financing terrorism. His donation was neither unlawful nor a basis to deny him naturalization,
 5 but, as the district court found, “USCIS could not dispel the shadow of guilt those donations cast
 6 on Hamdi” and “looked for other reasons to deny him United States citizenship.” *Id.* at *13. The
 7 adjudicator testified that, although the NS concern did not make Hamdi ineligible, under
 8 CARRP, until the concern “is resolved, he won’t get approved.” **Ex. 107** (Osuna Dep.) at 171:4-
 9 172:11. At each stage, from administrative proceedings to trial, the agency layered on new
 10 pretextual reasons—eight in total—for denial. *Hamdi*, 2012 WL 13135302 at *5-12. The Court
 11 held that none of these pretextual bases had a “reasonable basis in fact and law” and admonished
 12 the agency for using “gossamer evidence” to render Hamdi’s burden to demonstrate his
 13 eligibility for citizenship “impossible to carry.” *Id.* at *13. This is exactly what USCIS did to
 14 [REDACTED] (and many other class members subjected to pretextual denials).¹⁴ Each
 15 time he rebutted the agency’s pretextual reasons, it offered new spurious ones that were both
 16 factually wrong and failed to satisfy the legal standard for denial. Plfs’ Mot. at 20-21; **Ex. 89**
 17 (Ragland Rep.) ¶¶141, 143, 49; **Ex. 88** (Bajoghli Rep.) ¶20. And because USCIS denied his
 18 application in the exercise of discretion, he could not appeal or seek judicial review. *See supra*
 19 Part III.A.

20 In sum, Defendants concede—indeed, they insist—that they can completely hide the
 21 basis for their actions, causing applicants years of unnecessary delay and unlawful denials
 22 without an opportunity to address USCIS’s “concerns” and move forward. These undisputed
 23 facts make clear that CARRP violates 8 C.F.R. §103.2(b)(16).

24
 25
 26 ¹⁴ Plaintiffs’ experts offer many other examples of CARRP pretextual denials that lack “reasonable basis in law and fact.” *Hamdi*, 2012 WL 13135302 at *13. *See, e.g.*, **Ex. 89** (Ragland Rep.) ¶¶74-100 (adjustment denials for [REDACTED] based on failure to file a change of address form); **Ex. 76** (Gairson Rep.) ¶¶204-216, 241-253; **Ex. 108** (Johansen-Mendez Rep.) ¶¶66-82; **Ex. 9** (Arastu Rep.) ¶¶93-100; *see also id.* ¶¶68-91.

1 **4. CARRP Violates the APA Because it Unlawfully Withholds and**
 2 **Unreasonably Delays Adjudication of Class Members' Applications**

3 Defendants have a mandatory and non-discretionary duty to act on naturalization and
 4 adjustment-of-status applications without unreasonable delay—an obligation that derives from
 5 both immigration law and the APA's mandate that agencies conclude matters presented to them
 6 “within a reasonable time.” 5 U.S.C. § 555(b); *see* Plfs' Mot. at 33. CARRP violates this clear
 7 mandate. One inevitable—and indeed, intended—result of CARRP's extra-statutory obstacles to
 8 the approval of eligible applicants is delay. When an application cannot be approved due to
 9 CARRP, and it cannot be denied because the applicant is eligible, USCIS simply sits on it, as it
 10 did with all five Plaintiffs. *See* Plfs' Mot. at 16-26; *supra* Part II. It is undisputed that
 11 adjudications of CARRP cases take 250% longer than non-CARRP cases, with hundreds of
 12 current class members stretching over five years of delay.¹⁵ Plfs' Mot. at 16, 33-34. And there is
 13 no dispute that USCIS swiftly adjudicated 6,000 undeniably delayed CARRP cases in response
 14 to Plaintiffs' lawsuit.¹⁶ Plfs' Mot. at 34; **Ex. 2** 121:20-126:6. These systemic delays are
 15 unreasonable as a matter of law. *See* Plfs' Mot. at 33-35.

16 Defendants' arguments to the contrary are unavailing. They first argue that the APA
 17 “provides no mechanism” for relief from these delays. Defs' Mot. at 64 (citing 5 U.S.C. §

18 _____
 19 ¹⁵ Defendants attempt to minimize the magnitude of the delays resulting from CARRP, but even their
 20 cherry-picked statistics show that applicants subjected to CARRP suffer far longer delays than applicants not
 21 subjected to CARRP. *See* Defs' Mot. at 24. Among adjustment applications filed in FY 2013, applications subject to
 22 CARRP were about *three times* more likely to remain adjudicated by the end of the following fiscal year (10.9
 23 percent versus 36.3 percent). *See id.* For naturalization applications filed in FY 2013, applications subject to CARRP
 24 were *17 times* more likely to remain adjudicated by the end of the following fiscal year (1.6 percent versus 27.3
 25 percent). *See id.* For other years, the discrepancy is even larger. For adjustment applications filed in FY 2016,
 26 applications subject to CARRP were *five times* more likely to remain adjudicated by the end of the following fiscal
 year (15.1 percent versus 77.9 percent). Def. Ex. 11 at 57. For naturalization applications filed in FY 2016,
 applications subject to CARRP were *14 times* more likely to remain adjudicated by the end of the following fiscal
 year. (5.3 percent versus 76.3 percent). *Id.* at 58.

¹⁶ Defendants' witness Daniel Renaud quibbles only that he does not know the age of those 6,000 cases; he
 could have accessed that information, but he did not. Dkt. 520 (Renaud Decl.) ¶¶20-21. Plaintiffs' expert, a former
 USCIS adjudicator, worked on this national review to “clear out the backlog in CARRP cases” and was instructed to
 go through “stacks of neglected CARRP files” that had been “untouched and unworked for years.” **Ex. 108**
 (Johansen-Mendez Rep.) ¶20. Moreover, statistically, many of those applications had to be old because, between
 2017 and 2019, far more CARRP applications were adjudicated than were received. **Ex. 57** (July 2020 Kruskol
 Rep.) at Exs. AF, AG, AJ, AK.

1 706(1); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). Second, they argue that
 2 “class-wide resolution of this claim is not possible” because “whether USCIS has acted
 3 unreasonably in any individual case requires a case-by-case determination taking into account
 4 the reasons for the ‘delay.’” Defs’ Mot. at 66. Both arguments miss the point. Plaintiffs do not
 5 challenge the government’s failure to act in any individual case; rather, Plaintiffs challenge the
 6 systemic delays resulting from the CARRP policy as whole. CARRP *policy* is reviewable as a
 7 final agency action that the Court can and should “hold unlawful and set aside,” while
 8 compelling the agency to act on applications it has “unlawfully withheld and unreasonably
 9 delayed” due to CARRP. *See* 5 U.S.C. § 706(2); 5 U.S.C. § 706(1); *see also Al Otro Lado, Inc. v.*
 10 *McAleenan*, 394 F. Supp. 3d 1168, 1196 (S.D. Cal. 2019).

11 This Court already found this claim amenable to class treatment, Dkt. 69 at 25, and for
 12 good reason.¹⁷ Nothing has changed since that ruling, nor have Defendants moved to decertify
 13 the classes. The certified classes present a common question under Rule 23(a)—whether the
 14 delays inherent in CARRP processing are unreasonable—that “can be determined in one stroke.”
 15 *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014). The classes also seek uniform injunctive and
 16 declaratory relief from practices that affect all class members under Rule 23(b)(2). Rather than
 17 focus on the circumstances of each class member, Rule 23(b)(2) “focuses on the *defendant* and
 18 questions whether the *defendant* has a policy that affects everyone in the proposed class in a
 19 similar fashion.” 2 William B. Rubenstein, *Newberg on Class Actions* § 4:28 (5th ed. 2019)
 20 (emphasis added). As this Court has done, “courts routinely certify classes in unreasonable-delay
 21 cases where a common issue exists regarding the legality of the government’s policies and
 22 practices that serve as the reason for delay.” *Nio v. United States Dep’t of Homeland Sec.*, 323
 23 F.R.D. 28, 30, 32 n.2 (D.D.C. 2017) (citing cases) (challenging policy resulting in naturalization
 24 delays); *see also, e.g., Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (same).

25
 26 ¹⁷ Rejecting the government’s argument that Plaintiffs’ claims require a “fact-intensive, individualized inquiry into the causes of the delay in each case,” the Court held that “Plaintiffs’ claim is that CARRP is an unlawful program,” and “[a] byproduct of CARRP’s alleged unlawful program is unreasonable delays.” Dkt. 69 at 25.

1 **5. CARRP Violates the APA Because USCIS Failed to Engage in Required**
 2 **Notice and Comment Rulemaking**

3 There is no dispute that USCIS failed to engage in notice and comment rulemaking. **Ex. 7**
 4 (RFAs) No. 3. The only question is whether CARRP is a legislative rule—one that imposes
 5 “extrastatutory obligations” or “effect[s] a change in existing law”—or is an interpretive rule that
 6 “merely explains, but does not add to” existing law. *Hemp Indus. Ass’n v. Drug Enf’t Admin.*,
 7 333 F.3d 1082, 1087 (9th Cir. 2003). CARRP is plainly a legislative rule, as it imposes extra-
 8 statutory eligibility criteria, encouraging officers to deny or withhold approvals of eligible
 9 applicants. *Supra* Part IV.A(3)(a). It is hardly a mere tool for agency “efficiency” and vetting
 10 standardization. Defs’ Mot. at 64. “[T]he court need not accept the agency characterization at
 11 face value,” *Hemp Indus.*, 333 F.3d at 1087, and Defendants’ characterization is far off base. If
 12 CARRP were just an efficiency tool, it would not bar approval of eligible applicants absent
 13 senior-level approval or instruct officers to find ways to deny applicants with unresolved
 14 concerns. Nor would the agency have sought to legislate CARRP eleven times. *See supra*
 15 IV.A(3)(a). Defendants also claim that rules are only substantive if imposed by “outside parties.”
 16 Defs’ Mot. at 64. That is wrong. The two cases they cite are not APA challenges and are
 17 irrelevant. *Id.* The standard is plain: rules are procedural only if “they do not ‘change the
 18 *substantive standards* by which the [agency] evaluates’ applications.” *Nat’l Sec. Counselors v.*
 19 *C.I.A.*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013) (quoting *JEM Broad. Co. v. F.C.C.*, 22 F.3d 320,
 20 327 (D.C. Cir. 1994). Here, Defendants changed the “substantive standard” and violated the
 21 APA when they adopted CARRP in secret and without public engagement.

22 **6. CARRP is Arbitrary and Capricious in Violation of the APA**

23 As a threshold matter, Defendants claim the standard of review on summary judgment of
 24 an APA arbitrary and capricious claim is “somewhat modified because the agency, not the Court,
 25 is the finder of fact and the evidence considered by the Court is confined to what is contained in
 26 the administrative record,” limiting review here to only “whether the agency could reasonably
 have found the facts as it did.” Defs’ Mot. at 38 (citing *Occidental Eng’g Co. v. INS*, 753 F.2d

1 766, 770 (9th Cir. 1985)). That standard is not applicable here. *Occidental* involved district-court
2 review of an administrative proceeding in which the agency found facts and rendered a decision
3 regarding an individual petitioner. 753 F.2d at 767-68. Here, Plaintiffs challenge the
4 implementation of CARRP, for which USCIS conducted no proceedings and found no facts.

5 The APA supplies the standard of review: Agency action must be set aside if it is
6 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Nat’l*
7 *Wildlife Fed’n v. Army Corps of Eng’rs*, 384 F.3d 1163, 1170 (9th Cir. 2004) (quoting APA).

8 **a. The Undisputed Facts Demonstrate that CARRP is Arbitrary and**
9 **Capricious**

10 Defendants emphasize that Plaintiffs’ arbitrary-and-capricious claim must be adjudicated
11 solely based on the administrative record, Defs’ Mot. at 60-61, but that record is of no help to
12 Defendants. It lacks any (1) reasoned explanation for CARRP’s adoption and implementation;
13 (2) evaluation of alternatives; (3) analysis of CARRP’s harms against its purported benefits; and
14 (4) data, research, evidence, or agency findings. USCIS considered nothing—not benefits or
15 downsides of the policy, nor evidence supporting or undermining it. The administrative record
16 contains only CARRP policies and training documents and presents CARRP as a *fait accompli*,
17 devoid of the “reasoned analysis” or “reasoned decisionmaking” that is “the touchstone of
18 arbitrary and capricious review.” *Regents*, 140 S. Ct. at 1913; see *E. Bay Sanctuary Covenant v.*
19 *Garland*, 994 F.3d 962, 980-81 (9th Cir. 2020) (amended op.). Any of these omissions alone
20 would be sufficient to render CARRP arbitrary and capricious. *Regents*, 140 S. Ct. at 1913
21 (DHS’s failure to consider available policy alternatives “alone renders [its] decision arbitrary and
22 capricious”). Taken together, there can be no doubt.

23 Defendants point to isolated phrases scattered in the administrative record, from which
24 they infer CARRP’s “purpose” and “rationale.” Defs’ Mot. at 61-62. According to Defendants,
25 that purpose is “to efficiently process cases with NS issues and mitigate potential risks to
26 national security.” *Id.* at 62 (citing CAR 8). But even if these fragments could be considered a
coherent statement of CARRP’s purpose, such conclusory statements do not supply the reasoned

1 analysis the APA requires. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27
 2 (2016) (noting the agency “offered barely any explanation” for rule change and holding that
 3 “conclusory statements do not suffice to explain its decision”). Isolated references to efficiency,
 4 consistency, or national security do not explain how CARRP would facilitate such concepts,
 5 assess whether it would improve on the status quo ante, analyze potential alternatives, parse
 6 relevant data, or otherwise demonstrate that CARRP was “founded on a reasoned evaluation of
 7 the relevant factors.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th
 8 Cir. 2014). Additionally, in implementing CARRP—a sweeping policy change, *see Ex. 13* at
 9 CAR00002-3 (rescinding prior policies and procedures)—USCIS impermissibly departed *sub*
 10 *silentio* from prior policy without “show[ing] that there are good reasons for the new policy.”
 11 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

12 Defendants’ assertion that CARRP has a “rational basis” is both ironic and inapposite.
 13 Defs’ Mot. at 61. That assertion, which immediately follows Defendants’ insistence that APA
 14 review be limited to the administrative record, relies heavily on extra-record evidence. *See id.* at
 15 54. Plaintiffs recognize that courts may consider extra-record evidence in limited circumstances,
 16 *see* Plfs’ Mot. at 38 n.20, but Defendants’ proffered evidence of CARRP’s “rational basis” does
 17 not fall within any of those exceptions, and Defendants make no attempt to argue that it does.
 18 USCIS’s claim here is simply the kind of “*post hoc* rationalization[] for agency action” the
 19 Supreme Court has long held impermissible. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*
 20 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

21 **b. USCIS’s Failure to Consider Important Factors Underscores that**
 22 **CARRP is Arbitrary and Capricious**

23 Because the administrative record self-evidently lacks what the APA requires, the Court
 24 need look no further to conclude that CARRP is arbitrary and capricious. The Ninth Circuit,
 25 however, has identified narrow but “widely accepted” exceptions to the general rule that APA
 26 review is limited to the administrative record, including to “determine whether the agency has
 considered all relevant factors and has explained its decision.” *Lands Council v. Powell*, 395

1 F.3d 1019, 1030 (9th Cir. 2005). Plaintiffs have adduced undisputed evidence that further
2 demonstrates that USCIS ignored key factors relevant to CARRP’s adoption. Defendants’
3 attempt to dismiss such evidence wholesale is unavailing.

4 First, USCIS failed to consider the costs and consequences that CARRP would impose on
5 applicants. *See* Plfs’ Mot. at 37-39. Defendants argue that such consequences “all tie back to the
6 issue of delay” and that because the administrative record references efficiency, USCIS must
7 have considered unnecessary delay as a factor. Defs’ Mot. at 63. That is unwarranted
8 supposition. Agencies cannot ignore the effects a policy will have on those subject to it. *City &*
9 *Cnty. of San Francisco v. USCIS*, 981 F.3d 742, 759 (9th Cir. 2020). Not only was it foreseeable
10 that CARRP would cause delay, increased likelihood of denial, confusion, and stigmatization,
11 among other harms, but it is also clear that USCIS could have but did not consider those harms
12 against any purported benefits when it adopted CARRP, as the agency did with previous
13 policies.¹⁸ Defendants do not dispute that USCIS considered no information other than the INA
14 and “on-the-job” experience of USCIS staff in adopting CARRP. **Ex. 8** (USCIS Dep.) 34:4-
15 35:16, 42:13-43:3. The isolated reference to efficiency in the administrative record does not
16 address CARRP’s harms, explicitly or implicitly. **Ex. 13** at CAR 3.

17 Second, USCIS failed to consider whether CARRP would yield any meaningful benefit.
18 *See* Plfs’ Mot. at 39-40. Defendants do not argue otherwise, nor do they dispute that USCIS had
19 available to it evidence that measures like CARRP did not, and would not, yield national security
20 benefits. *See, e.g., Ex. 71* (Chertoff) at 3 (“If you’re going to do something bad, you’re still here
21 legally” whether or not you get a green card). Yet the administrative record is silent as to
22 whether or how CARRP would contribute to national security, and it is undisputed that USCIS
23 conducted no studies, drafted no reports, and consulted no one outside USCIS in formulating
24 CARRP. **Ex. 8** (USCIS Dep.) 32:10-35:16, 42:13-43:3; **Ex. 109** (Burbank Rep.) (CARRP does
25 not “advance public safety” and “lacks a valid security-based rationale”).
26

¹⁸ *See, e.g., Ex. 71* (Chertoff) at 2 (policy change balanced risk of harm against benefit to applicants).

1 Third, USCIS failed to consider research or evidence as to how frequently CARRP would
 2 cause applicants to be misidentified as NS concerns and denied critical benefits to which they are
 3 entitled. *See* Plfs’ Mot. at 40-43. Defendants do not address this failure, and the undisputed
 4 evidence demonstrates that USCIS could have consulted information on the unreliability of the
 5 “indicators” it relies on for CARRP referrals—but did not. *See, e.g., Ex. 8* (USCIS Dep.) 162:20-
 6 22 (USCIS has made no effort to research or study the reliability of the Watchlist); **Ex. 92** at 1,
 7 19-20 (2006 study detailing pervasive problems with the Watchlist); **Ex. 95** at 10 (2008 DOJ
 8 Audit identifying weaknesses and poor quality control in Watchlist procedures); **Ex. 96** at 33-34
 9 (2008 DOJ Audit raising reliability concerns with TECS and FBI Name Check databases).

10 Thus, the administrative record on its face and additional undisputed evidence
 11 demonstrate that USCIS failed to consider important factors relevant to whether CARRP is fair,
 12 necessary, or effective. The implementation of CARRP was therefore arbitrary and capricious.

13 **B. CARRP Violates the Procedural Due Process Rights of the Naturalization Class**

14 Plaintiffs have raised a quintessential procedural due process claim under *Mathews v.*
 15 *Eldridge*, 424 U.S. 319 (1976). “[I]t is an ‘immutable’ principle of due process ‘that where
 16 governmental action seriously injures an individual, and the reasonableness of the action depends
 17 on fact findings, the evidence used to prove the Government’s case must be disclosed to the
 18 individual so that he has an opportunity to show that it is untrue.’” *Zerezghi v. USCIS*, 955 F.3d
 19 802, 813 (9th Cir. 2020) (citation omitted). *See also Mattson v. Wolf*, 826 F. App’x 603 (9th Cir.
 20 2020) (same). As discussed above, Defendants provide class members no notice and opportunity
 21 to respond to their allegations of NS concerns. Plfs’ Mot. at 44; Defs’ Mot. at 70.

22 Defendants contend that no court has “assessed the adequacy of administrative
 23 naturalization procedures under *Mathews*.” Defs’ Mot. at 67. But the Ninth Circuit routinely
 24 assesses the adequacy of immigration procedures under *Mathews*. *See Zerezghi*, 955 F.3d at 810;
 25 *Ching v. Mayorkas*, 725 F.3d 1149, 1159 (9th Cir. 2013); *AADC v. Reno*, 70 F.3d 1045, 1061
 26 (9th Cir. 1995). CARRP’s treatment of naturalization is subject to standard *Mathews* review.

1 **1. The Naturalization Class Members' Interests are Significant**

2 Defendants agree that class members have an interest in “the lawful adjudication of
3 [their] naturalization applications.” Defs’ Mot. at 68. They only argue that this interest does not
4 extend to the “timely” adjudication of their applications. *Id.* This Court has already rejected that
5 argument. Dkt. 69 at 17 (recognizing that “[p]lace of the adjudication is a byproduct” of
6 Plaintiffs’ “allegation that an extra-statutory policy based on discriminatory and illegal criteria is
7 blocking the fair adjudication of immigration benefits”). Class members “have a right to a
8 *prompt* adjudication of their naturalization application[s],” as unlawful delays and denials
9 prevent them from obtaining significant benefits of citizenship for months or years, including the
10 rights to “vote or serve on juries,” “travel abroad without fear of being denied re-entry into the
11 United States,” obtain “jobs for which they are qualified,” obtain social security benefits, and
12 petition for relatives abroad. *Roshandel*, 554 F. Supp. 2d at 1201; Plfs’ Mot. at 44-45.

13 **2. CARRP Entails a High Risk of Erroneous Deprivation**

14 Defendants do not dispute that CARRP entails a high risk of erroneous deprivation
15 caused by its sweeping use of “indicators” to form a concern, its broad and imprecise “articulable
16 link” standard, its use of the over-inclusive Watchlist for automatic referral to CARRP, and its
17 complete lack of notice or any meaningful opportunity to respond to CARRP designations. Pl.
18 Mot. at 45-47. Instead, Defendants incorrectly argue that CARRP “is only a pre-decisional
19 process” that “do[es] not implicate the Due Process Clause.” Defs’ Mot. at 69. But even a “pre-
20 decisional process” violates the Due Process Clause where it causes cognizable harm—as
21 CARRP plainly does. *See Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Zerezghi*, 955 F.3d at
22 809. And CARRP, moreover, is not solely an “administrative investigation [that] adjudicates no
23 legal rights.” *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984); *see* Defs’ Mot. at 69.
24 Instead, it indisputably has a significant substantive effect on the adjudication of class members’
25 applications, leading to harmful delays and unlawful denials.

26 Defendants further suggest that the probative value of additional procedural safeguards is

1 low because class members “have multiple opportunities to respond to USCIS’ stated grounds
2 for denying naturalization.” Defs’ Mot. at 69. But Defendants miss the point. As they admit,
3 Defs’ Mot. at 19, the *actual* reason that Plaintiffs’ applications are denied is the underlying
4 unresolved NS concern, which Defendants refuse to disclose to class members and to which they
5 cannot respond. *See supra* Part IV.A(3).

6 Defendants are also wrong that CARRP complies with due process simply because “de
7 novo district court review for denied [naturalization] applications exists under 8 U.S.C. §
8 1421(c).” Defs’ Mot. at 69. Defendants cite no case that holds that the availability of post-hoc
9 federal court review satisfies essential due process requirements of *pre-deprivation* notice and
10 opportunity-to-respond. Process is due before the operative decision is made and harms ensue.

11 **3. Defendants’ Burden in Adopting Additional Safeguards is Low**

12 Finally, Defendants argue that their burden in adopting additional safeguards is high
13 because CARRP “concerns assessing the extent to which NS concerns affect applicants’
14 statutory eligibility for naturalization . . . as well as avoiding interference with other law
15 enforcement investigations.” Defs’ Mot. at 70. But even taking those arguments at face value, the
16 Ninth Circuit consistently has held such “concerns” do not overcome the due process
17 requirement that the government provide noncitizens with undisclosed derogatory information,
18 even if it is classified or from third agencies or confidential sources. *See, e.g., Kaur v. Holder*,
19 561 F.3d 957, 962 (9th Cir. 2009) (must disclose “alleged terrorist activities,” lists of “targeted
20 victims,” and “locations and approximate dates for these alleged activities”); *AADC*, 70 F.3d at
21 1069 (Government’s interest in “protecting its confidential sources involved in the investigation
22 of terrorist organizations” does not outweigh “lack the procedural safeguards that form the core
23 of constitutional due process”).

24 **4. *Brown* Did Not ‘Narrowly Circumscribe’ Plaintiffs’ Due Process Rights**

25 Recognizing the weakness of their argument under *Mathews*, Defendants ask this Court
26 to look to *Brown v. Holder*, 763 F.3d 1141 (9th Cir. 2014) for due process guidance, but they

1 read *Brown* too narrowly. The petitioner in *Brown* had substantively failed to meet the
 2 citizenship requirements but claimed governmental misconduct caused the denial. In this context,
 3 the court held the petitioner could prove a violation of fundamental due process principles only if
 4 the government “arbitrarily and intentionally obstructed his application” or was “motivated by
 5 animus or malicious intent.” *Id.* at 1150. *Brown* does not hold or remotely suggest that this
 6 standard applies to the systemic pre-adjudication procedural due process questions raised here.

7 Here, unlike in *Brown*, Plaintiffs are not petitioning after denial of relief for which they
 8 are not statutorily eligible. They instead challenge Defendants’ failure to disclose, and allow
 9 response to, the imposition of *additional* requirements and vague “concerns” *beyond that* which
 10 the INA mandates while the citizenship determination is pending. *See* Dkt. 69 at 17 (due process
 11 claim “centers on [Plaintiffs’] allegation that an extra-statutory policy ... is blocking the fair
 12 adjudication of immigration benefits of which they are statutorily eligible”). Moreover, unlike
 13 *Brown*, Plaintiffs seek not a grant of citizenship but a constitutional process.¹⁹

14 Finally, Defendants are wrong that Plaintiffs have failed to show a “systemic” due
 15 process violation because “[t]he three individual Plaintiffs who allege claims regarding
 16 naturalization ... have all been naturalized.” Defs’ Mot. at 67. This ignores the irreparable harm
 17 CARRP causes to the Naturalization Class, not only through denial of applications, but also via
 18 unreasonable delays, which unlawfully prevent those eligible from enjoying the many benefits of
 19 citizenship. *See* Plfs. Mot. at 16-25. Therefore, even if *Brown*’s general due process standard did
 20 apply here, Plaintiffs have shown “that CARRP systemically interferes with naturalization
 21 applications intentionally or with deliberate indifference.” Defs’ Mot. at 67.²⁰

22
 23
 24
 25 ¹⁹ *Zhu v. DHS* is similarly inapposite both because of the plaintiff’s failure to satisfy the statutory
 26 requirements for naturalization and his failure to “allege a denial of adequate procedural protections.” No. 18-cv-
 00489, 2019 WL 4261167, at *4 (W.D. Wash. Sept. 9, 2019).

²⁰ Even if it were required, Plaintiffs have also demonstrated “that CARRP unlawfully discriminates or is
 motivated by animus” in violation of the Equal Protection Clause. Defs’ Mot. at 67-68; *see* Pl Mot. at 48-50.

1 **C. CARRP Denies Class Members Equal Protection**

2 **1. *Arlington Heights* Supplies the Relevant Standard**

3 Where, as here, a plaintiff challenges a facially neutral law or policy on equal-protection
4 grounds, the court must decide whether the evidence, including circumstantial evidence, shows
5 that intent to discriminate was “a motivating factor” behind the law or policy. *Vill. of Arlington*
6 *Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also, e.g., Tiwari v. Mattis*,
7 363 F. Supp. 3d 1154, 1167 (W.D. Wash. 2019). If the court concludes, based on this multifactor
8 inquiry, that intent to discriminate based on a suspect characteristic motivated the challenged law
9 or policy, strict scrutiny applies. *Id.*

10 Defendants appear to mostly agree that *Arlington Heights* governs the equal protection
11 claim here. *See* Defs’ Mot. at 39–51, 53–55. To the extent they suggest that CARRP is subject to
12 the different standard articulated in *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018), they are
13 wrong. Defs’ Mot. at 52–53. The Ninth Circuit has rejected that argument in cases involving
14 immigration benefits for U.S. residents. *Ramos v. Wolf*, 975 F.3d 872, 896 (9th Cir. 2020).
15 Defendants’ claim that “*Ramos* does not apply” because the present case involves “national
16 security concerns” misunderstands the holding. Defs’ Mot. at 53 n.7. As in *Ramos*, this case
17 involves the administration of a statute to “foreign nationals who have lawfully resided in the
18 United States for some time,” not a presidential executive order governing admission into the
19 country, to which the courts have accorded greater deference. *Ramos*, 975 F.3d at 896.²¹

20 **2. The Undisputed Facts Establish that Discriminatory Intent was a Motivating**
21 **Factor in CARRP’s Design and Implementation**

22 The undisputed facts establish that discrimination based on national origin, religion, or
23 both were motivating factors in CARRP’s design and implementation. At a minimum, Plaintiffs

24 _____
25 ²¹ Defendants similarly attempt to deflect all the evidence of discrimination inherent in CARRP by asking
26 this Court to “presume” they are not violating class members’ constitutional rights. Defs’ Mot. 45, 48. Plaintiffs are
unaware of, and Defendants do not cite, any case applying a “presumption of regularity” to agency action in the
context of an equal-protection challenge. If such a presumption applied here in the way Defendants posit, no agency
action could serve as circumstantial evidence of discriminatory intent and *Arlington Heights* would be a nullity.

1 raise a genuine dispute as to whether CARRP's design and implementation are driven, at least in
2 part, by discriminatory intent. *See Arce v. Douglas*, 793 F.3d 968, 977-78 (9th Cir. 2015).

3 **a. Gross disparate impact.** There is no dispute that USCIS refers class members from
4 Muslim-majority countries to CARRP at ten to twelve times the rate of applicants from other
5 countries. Plfs' Mot. 48-49; *see also id.* at 12 (most applicants in CARRP are from Muslim-
6 majority countries). This "gross disparity" is enough alone to establish that discriminatory intent
7 was a motivating factor in CARRP's design and implementation. *The Comm. Concerning Cmty.*
8 *Improvement v. City of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009). At a minimum, this gross
9 disparate impact is strong evidence of discriminatory intent. *Reno v. Bossier Par. Sch. Bd.*, 520
10 U.S. 471, 489 (1997) (whether a challenged government action "bears more heavily" on a
11 suspect class is "[t]he important starting point"); *accord Tiwari*, 363 F. Supp. 3d at 1167.

12 Defendants' attempts to rationalize CARRP's undisputed disparate impact as
13 nondiscriminatory fail. First, Defendants claim that CARRP's disparate impact is simply
14 reflective of the purportedly higher rate of terrorist events in majority Muslim countries. Defs'
15 Mot. 44. Their sole support for this assertion is the regression analysis of their statistical expert,
16 Dr. Siskin, which is unreliable and inadmissible because it relies on fundamentally unsound data
17 and assumptions. Dkt. 463 at 6-12; Dkt. 503 at 3-6. Even if admissible, it deserves no weight.

18 Second, Defendants argue that CARRP's disparate impact is constitutionally insignificant
19 because only a "minute fraction" of people who apply for benefits are subject to CARRP. Defs'
20 Mot. 43. But a government program that discriminates based on a suspect class cannot evade
21 equal-protection scrutiny merely because "the discrimination is not complete." *Tiwari*, 363 F.
22 Supp. 3d at 1164. Moreover, CARRP affects thousands of people who are entitled to the
23 protections of the Fifth Amendment.

24 Third, Defendants argue that, in CARRP, applicants from Muslim-majority countries are
25 approved at approximately the same rate, within approximately the same time, as applicants from
26 other countries. Defs' Mot. 44. But again, Plaintiffs are not required to show that CARRP harms

1 applicants from Muslim-majority countries at every possible juncture; it is sufficient that
2 CARRP is harmful to *everyone* subjected to it, and that applicants from Muslim-majority
3 countries are placed in CARRP at a vastly disproportionate rate.

4 Fourth, Defendants argue that CARRP's disparate impact does not evince discriminatory
5 intent because most referrals to CARRP are based on third-agency information. Defs' Mot. 44-
6 45. But USCIS alone decides whether the third-agency information warrants CARRP treatment.
7 *See* Dkt. 463 at 4-6; *see also* Defs' Mot. 29-37.

8 **b. [REDACTED] discrimination.** Tellingly, Defendants do not dispute that for years
9 USCIS treated nationality from [REDACTED]
10 [REDACTED]. Plfs' Mot. at 49. This by itself is evidence that
11 CARRP was designed to have a discriminatory impact. Defendants respond instead that no court
12 has held unconstitutional USCIS's focus on [REDACTED]. Defs' Mot. at 46. But the
13 fact that USCIS considered [REDACTED] nationalities to be indicators of NS concerns was revealed for the
14 first time in this case—and still is not publicly known. National origin targeting is further baked
15 into CARRP guidance that still governs today because it treats 'reside[nce] in' or 'travel through'
16 'areas of known terrorist activity' as NS concern indicators. Plfs' Mot. at 11, 49.

17 **c. Historical context.** Defendants do not dispute that CARRP emerged from the same
18 historical milieu as other post-9/11 programs, like NSEERS, that targeted Muslims for enhanced
19 scrutiny by federal immigration officials. Plfs' Mot. 49. They argue only that two post-9/11
20 programs were upheld in federal court. Defs' Mot. at 46. But *Elhady v. Kable*, 993 F.3d 208, 228
21 (4th Cir. 2021), analyzed procedural due process, not equal protection. And in *Rajah v. Mukasey*,
22 544 F.3d 427, 439 (2d Cir. 2008), the court never applied strict scrutiny, and thus rejected the
23 plaintiffs' selective-enforcement defense to deportation. Neither case speaks to the relevant point
24 here that the government's post-9/11 immigration programs targeted Muslims.

25 **d. [REDACTED]**
26 [REDACTED]. Plfs' Mot. at 12, 49-50; *see also id.* at 19

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]. *Price v. INS*, 962 F.2d 836,

5 843-44 (9th Cir. 1991). [REDACTED]

6 [REDACTED]

7 [REDACTED] of CARRP applicants, who are mostly

8 from majority-Muslim countries,²² [REDACTED]

9 [REDACTED]. Defendants’ attempts to minimize and isolate each fact misses the point: the question

10 is whether “an invidious discriminatory purpose” is inferable from “the *totality* of the relevant

11 facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976) (emphasis added). Here, it clearly is.

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]. *Cf. Ex. 9* (Arastu Rep.) Ex. C at 1118-20

19 [REDACTED] **Ex. 108**

20 (Johansen-Mendez Rep.) ¶84 [REDACTED]

21 [REDACTED]; *id.* ¶86 [REDACTED]

22 [REDACTED]

23 [REDACTED]. Defendants’ own witness, Nadia Daud, a

24 USCIS adjudicator, described at her deposition [REDACTED]

25 [REDACTED].

26 _____
²² Nearly 70% of the naturalization applicant USCIS subjects to CARRP are from Muslim-majority countries, even though they make up only 17% of the general applicant pool. Plfs’ Mot at 12.

1 **Ex. 108** (Daud Dep) at 36:8-49:22. She testified that [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED], *id.* at 39:25-40:17, [REDACTED]
 5 [REDACTED]
 6 [REDACTED], *id.* at 40:23-42:19. [REDACTED]
 7 [REDACTED] Defs’ Mot. at 48, [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]. Chia Decl. ¶¶4-5, filed concurrently.²³ [REDACTED]
 11 [REDACTED]. Plfs’ Mot. at 10.²⁴

12 **e. Pretextual denials.** Defendants strain to apply the Supreme Court’s decision in
 13 *Department of Commerce* to Plaintiffs’ equal protection claim, Defs’ Mot. at 49-51, but, as
 14 shown above, that case neither authorizes Defendants’ practice of withholding the true reasons
 15 for their decisions while offering unrelated reasons in their place, nor is it relevant to an equal
 16 protection challenge. *Cook Cnty. v. Wolf*, 461 F. Supp. 3d 779, 794-95 (N.D. Ill. 2020)
 17 (*Department of Commerce* is an APA case and its “rationale is a mismatch for an equal
 18 protection challenge”). Further, Prof. Nermeen Arastu’s report is admissible, for all the reasons
 19 Plaintiffs have already elaborated in prior briefing. Dkt. 499 at 10-12.

20 **3. CARRP is Subject to Strict Scrutiny, and Even if CARRP is Subject to a**
 21 **More Lenient Standard, it Would Fail**

22 Because the totality of the evidence shows intentional discrimination based on national
 23 origin, religion, or both was a motivating factor in CARRP’s design and implementation,

24 _____
 25 ²³ In any event, [REDACTED], **Ex. 104** (USCIS Dep.) 95:3-99:6, and
 there is no evidence that [REDACTED]. **Ex.**
 26 **110** (Daud Dep.) 31:12-32:5; **Ex. 111** (Negrut-Calinescu Dep.) 38:9-39:1; **Ex. 112** (Costello Dep.) 257:12-258:8.

²⁴ Moreover, Defendants’ attempts to rationalize [REDACTED]
 [REDACTED]. Defs’ Mot at 48.

1 CARRP is subject to strict scrutiny. *See Tiwari*, 363 F. Supp. 3d at 1166-67; *see also Ball v.*
2 *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). It cannot survive strict scrutiny because it is not
3 precisely tailored to serve a compelling government interest. *See* Plfs’ Mot. 50.

4 Defendants concede that they are not entitled to summary judgment if CARRP is subject
5 to strict scrutiny. Defs’ Mot. 54-55. They claim that strict scrutiny does not apply because the
6 federal government may “draw distinctions among non-citizens along protected lines subject
7 only to rational basis review.” Defs’ Mot. 54-55. Defendants cite no support for that proposition
8 and rely entirely on Ninth Circuit law applying rational-basis review to an immigration
9 regulation that “[did] *not* target any religious group.” *Ruiz-Diaz v. United States*, 703 F.3d 483,
10 486 (9th Cir. 2012) (emphasis added). CARRP, by contrast, does involve invidious targeting.

11 Regardless, CARRP would fail even under rational-basis review. Withholding
12 adjudication of U.S. residents’ applications for immigration benefits for prolonged periods
13 because of an extra-statutory NS concern bears no rational relation to national security
14 interests—as this Court has previously made clear. *Ali v. Mukasey*, No. C07-1030, 2008 WL
15 682257, at *4 (W.D. Wash. Mar. 7, 2008); *see also* Plfs’ Mot. 35, 50. Defendants fail to
16 meaningfully engage with *Ali* and the closely related *Singh v. Still*, 470 F. Supp. 2d 1064, 1070-
17 71 (N.D. Cal. 2007). *See* Plfs’ Mot. at 35. And while Defendants assert that CARRP withstands
18 rational-basis review because Congress sought to enhance “national security removal grounds in
19 response to 9/11,” Defs’ Mot. at 53, they fail to mention that Congress repeatedly rejected
20 proposals to expand the INA to authorize CARRP-like vetting. Plfs’ Mot. at 3. There is neither
21 Congressional authorization nor a rational basis for CARRP.

22 **D. Defendants May Not Use the Law Enforcement Privilege as a Shield and a Sword**

23 During discovery, Defendants used the law enforcement privilege as a shield to avoid
24 disclosure of a range of relevant evidence. Now, they improperly seek to use that privilege as a
25 sword to defeat and win summary judgment. A party “may not abuse the privilege by asserting
26 claims the opposing party cannot adequately dispute unless it has access to the privileged

1 materials.” *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (referring to the sword-
2 shield rule as “the fairness principle”). A holder of the privilege has a choice: “If you want to
3 litigate this claim, then you must waive your privilege to the extent necessary to give your
4 opponent a fair opportunity to defend against it.” *Id.* at 720. Here, Defendants defend CARRP by
5 seeking to rely on the very categories of information they withheld from Plaintiffs as privileged.

6 In discovery, Defendants withheld all information that touched on third-agency security
7 checks and information, and cooperation and communication with USCIS. Third Pasquarella
8 Decl. ¶3, filed concurrently. They also withheld information on why and how USCIS concluded
9 Plaintiffs and other class members were NS concerns, and how CARRP caused long delays, and
10 in some cases, pretextual denials in their cases. *Id.* ¶4.

11 Defendants now seek to weaponize the withheld information, making broad yet vague
12 claims that USCIS’s NS concern designations are legitimate, and not discriminatory or
13 misconstrued, because they rely primarily on law enforcement information. Undisputed evidence
14 in the record on CARRP and its implementation roundly refutes these claims, demonstrating they
15 are based on profiling, inferences, and unsubstantiated suspicions that have no bearing on
16 eligibility. Plfs’ Mot. at 8-15, 40-43. Defendants’ protests to the contrary may not be credited
17 because Defendants withheld the information that would allow Plaintiffs to test their assertions.
18 Similarly, Defendants claim that 8 C.F.R. § 103.2(b)(18) authorizes them to withhold
19 adjudication of CARRP cases, including at the request of third agencies, Defs’ Mot. at 35, but
20 Defendants withheld all information that would permit Plaintiffs to test whether delays under
21 CARRP were based on proper invocation of this regulation, including in Plaintiffs’ own cases.
22 Third Pasquarella Decl. ¶5. Moreover, Defendants repeatedly claim that CARRP is just a process
23 that does not dictate adjudicative results or lead to unreasonable delay in individual cases, Defs’
24 Mot. at 17, but they withhold the very evidence in individual cases that would demonstrate how
25 CARRP’s rules lead to pretextual denials and years of inaction. Third Pasquarella Decl. ¶4.

26 Defendants also withheld evidence about how USCIS impermissibly allows law

1 enforcement agencies to influence its adjudication process. For example, USCIS permits law
2 enforcement agencies to request that a benefit be denied or to “object” to the approval of a
3 benefit, *see* Defs’ Mot. at 13; Plfs’ Mot. at 22-23, **Ex. 113** (FOIA doc) at 269-70, and claim they
4 “heavily rel[y]” on the “feedback” of law enforcement in adjudicative decisions, Defs’ Mot. at
5 13, yet they withheld all evidence of this “feedback” and how it influences their decision-making
6 and violates the INA. Third Pasquarella Decl. ¶6. In Plaintiff Ostadhassan’s case, the evidence
7 suggests the FBI influenced USCIS not to grant his application after he refused to voluntarily
8 talk with the FBI. Plfs’ Mot. at 19. If that was the basis for Defendants’ denial, it would be
9 unlawful and further prove [REDACTED]

10 [REDACTED]
11 [REDACTED] Third Pasquarella Decl. ¶7.

12 Plaintiffs have proved their claims based on the undisputed evidence presented in this
13 motion. The Court should not credit Defendants’ characterizations of categories of evidence they
14 withheld from Plaintiffs. If the Court is to consider such evidence, it would have to defer or deny
15 Defendants’ summary judgment motion, deem Defendants to have waived privilege, and permit
16 Plaintiffs discovery into those matters. *See* Fed. R. Civ. P. 56(d) (when facts unavailable to
17 nonmovant a court may “defer considering the motion or deny it” to allow time for discovery).

18 **E. Objections to Defendants’ Evidence**

19 Plaintiffs move to strike two categories of evidence submitted by Defendants that are
20 inadmissible. First, Defendants’ exhibits 4, 5, 14, and 19 are inadmissible under Federal Rule of
21 Civil Procedure 26(e). These exhibits contain an “updated” version of the CARRP training
22 modules that Defendants transparently sanitized in response to Plaintiffs’ challenges and
23 disclosed one year after the close of discovery. Hyatt Decl. ¶3. Rule 26(e) permits
24 supplementation of a disclosure “if the party learns that in some material respect the disclosure ...
25 is incomplete or incorrect, and if the additional or corrective information has not otherwise been
26 made known to the other parties during the discovery process or in writing.” *Luke v. Family Care*

1 *and Urgent Med. Clinics*, 323 F. App'x. 496, 500 (9th Cir. 2009). It does not permit a party
2 “who wishes to revise her disclosures in light of her opponent's challenges to the analysis and
3 conclusions therein” to add “them to her advantage after the court’s deadline for doing so has
4 passed.” *Id.*

5 Fact discovery closed on November 29, 2019, and Plaintiffs took Defendants’ 30(b)(6)
6 deposition on September 3, 2020. Hyatt Decl. ¶2. At the 30(b)(6) deposition, USCIS confirmed
7 that the 2017 version of the training modules was still the operative version, **Ex. 104** (USCIS
8 Dep.) 24:21-25:4, and that the 2017 version in the administrative record appeared accurate. *Id.* at
9 75:2-6; *see also id.* at 70:19-71:18, 73:15-74:7 (confirming 2017 modules used for basic CARRP
10 training). When asked if there had been any updates to the 2017 training slides, USCIS answered
11 definitively: “No.” *Id.* 75:8-11. Yet on November 9, 2020, Defendants disclosed to Plaintiffs a
12 supposed “updated” version of the training modules dated September 2020. Hyatt Decl. ¶2. In
13 this “updated” version, Defendants scrubbed the language that demonstrates USCIS teaches
14 officers to deny eligible applicants based on unresolved NS concerns, and adds self-serving
15 statements aimed at defeating Plaintiffs’ claims. For example, Defendants changed the 2017
16 training instruction to “Resolve the [NS] concern, or deny the case,” to read “Resolve the
17 concern and/or adjudicate the case.” Hyatt Decl. ¶4, Ex. A at 4 (comparing slides); *see Ex. 16* at
18 DEF-00116759.0146; Defs’ Ex. 19 at DEF-00431935. And although the “update” does not
19 change the NS indicators which instruct officers to consider national origin and religion, *see*
20 Plfs’ Mot. at 11-12, they added the statement: “Please note that protected characteristics, such as
21 national origin or religion, ARE NOT indicators of NS Concerns” to the 2020 training manuals.
22 Hyatt Decl. ¶6, Ex. C at 15 (comparing slides). This directive does not appear anywhere in the
23 pre-2020 training modules. *See, e.g., Ex. 6* (2017 version); **Ex. 64** (2015 version). Defendants
24 made many more semantic changes like these clearly for no other purpose than to alter the
25 evidence and avoid Plaintiffs’ claims. To aid the Court’s review, Plaintiffs provide hereto side-
26 by-side demonstratives to help identify the changes Defendants made. Hyatt Decl. ¶¶4-7, Exs. A-

1 D.

2 Because Defendants' disclosure was untimely and made only to "revise" the evidence in
3 light of Plaintiffs' claims, the Court should strike Defendants' exhibits 4, 5, 14, and 19 under
4 Federal Rule of Civil Procedure 37, and the agency testimony that relies on these exhibits,
5 because Defendants cannot prove that its untimely disclosure was substantially justified or
6 harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001).
7 Even if they are not stricken, they should be given no weight, as it is undisputed that Defendants
8 do not retrain officers based on updates to their training modules, **Ex. 8** (USCIS Dep.) 75:21-
9 77:9, and Defendants have not conducted the CARRP in-person training that uses these modules
10 during the Covid-19 pandemic. **Ex. 8** (USCIS Dep.) 71:5-14.

11 Second, Plaintiffs move to strike Defendants' submission of the rebuttal report of Kelli
12 Ann Burriesci. Pursuant to Federal Rule of Civil Procedure 26(a)(2)(D)(ii), Defendants only
13 disclosed Ms. Burriesci as a rebuttal witness to Plaintiffs' law enforcement experts. Here, they
14 do not offer her testimony to rebut or contradict any evidence proffered by Plaintiffs' experts, but
15 instead as new, affirmative evidence in support of their case-in-chief. Defs' Mot. at 8, 9, 54. This
16 is improper, and her report should be stricken. *See People v. Kinder Morgan Energy Partners,*
17 *L.P.*, 159 F. Supp. 3d 1182, 1991-93 (S.D. Cal. 2016) (excluding rebuttal expert testimony
18 offered to support case-in-chief at summary judgment); *Huawei Techs., Co, Ltd v. Samsung*
19 *Elecs. Co, Ltd.*, 340 F. Supp. 3d 934, 995 (N.D. Cal. 2018) (same).

20 V. CONCLUSION

21 For the foregoing reasons, the Court should grant Plaintiffs' motion for summary
22 judgment on behalf of Plaintiff Mehdi Ostadhassan and the certified classes.

Respectfully submitted,

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