

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FAITH INTERNATIONAL
ADOPTIONS, et al,

Plaintiff,

v.

MICHAEL R. POMPEO, et al,

Defendant.

CASE NO. 2:18-cv-00731-RBL

ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION

INTRODUCTION

THIS MATTER is before the Court on Plaintiffs Faith International Adoptions, Amazing Grace Adoptions, and Adopt Abroad Incorporated’s (collectively “Faith”) motion for preliminary injunction. Dkt. #20. Since 2008, all three Plaintiffs have been accredited to help families navigate the legal and logistical requirements for international adoption. Plaintiffs have renewed their accreditation multiple times and applied in 2017 to do so again. However, the Council on Accreditation (COA), the entity tasked with processing accreditation applications, deferred its final decision past March 31, 2018, the expiration date of Plaintiffs’ most recent accreditation. When COA informed State of this, State instructed COA that it could not continue to process the applications after expiration and that Plaintiffs’ renewals would effectively be

1 refused. COA reluctantly complied with this directive, causing Plaintiffs to lose accreditation and
2 face the prospect of re-applying as new applicants, a process that could take over a year to
3 complete. Instead of taking this route, Plaintiffs now seek an injunction suspending the effect of
4 State's directive.

5 Faith argues that it is likely to succeed in its claims because State's directive was
6 unlawful on several grounds. First, Faith contends that State's directive COA constituted an
7 arbitrary and capricious shift in policy in violation of the Administrative Procedure Act. Second,
8 Faith also argues that the directive amounts to a substantive rule that required notice-and-
9 comment procedures, which State did not implement. Finally, Faith asserts that State's directive
10 violated the Intercountry Adoption Act (IAA) because State did not follow the required
11 procedures for cancelling, debarring, or refusing to renew an agency's accreditation.

12 Boiled down, State's response is that it did nothing at all. State contends that it was COA
13 that refused to renew Faith, and that State's directive was not a "final agency action" under the
14 APA because it merely served to clarify existing regulations. State also denies that it ever had
15 knowledge of COA's practice of deferring some renewal decisions past the date of expiration, so
16 there was no arbitrary and capricious policy change. Finally, State argues that its directive did
17 not violate the IAA because State's interpretation of the regulations merely tracked the plain text.

18 Faith also contends that it is likely to suffer irreparable harm if the Court does not grant
19 an injunction because, without accreditation, Faith will continue to lose money and may soon
20 face bankruptcy. Furthermore, Faith argues that the equities tip sharply in its favor and an
21 injunction would be in the public interest. State contests these assertions largely on the basis that
22 Faith declined the opportunity to re-apply as a new applicant and has not demonstrated that its
23 loss of accreditation has had an appreciable effect on adoptees or prospective families.

1 This is a time sensitive matter. At the end of the year, COA will cease to operate as an
2 accrediting entity, rendering it incapable of reaching a final decision on Plaintiffs' renewal
3 applications. Whether an injunction is granted or not, this case will soon become moot either
4 because COA will have finished processing the renewal applications or will lack sufficient time
5 to do so.

6 BACKGROUND

7 A. The Intercountry Adoption Act Regulatory Framework

8 The Hague Convention on Protection of Children and Cooperation in Respect of
9 Intercountry Adoption standardized adoptions between signatory nations. Congress passed the
10 Intercountry Adoption Act of 2000 to implement those standards domestically. 42 U.S.C. §§
11 14901-954. The IAA imposes requirements and grants authority to several different parties,
12 including the U.S. Department of State, private "accrediting entities" (AEs), and adoption
13 agencies themselves.

14 State has some direct obligations under the IAA. For example, State is required to
15 monitor the performance of AEs and may suspend or cancel an AE's designation for
16 noncompliance. § 14924(a). State is also charged with promulgating regulations prescribing rules
17 that AEs must follow when determining whether an agency should be accredited. *See* § 14923.
18 State may also suspend, cancel, or debar an adoption agency itself if it is substantially out of
19 compliance with applicable standards. § 14924(b) & (c).

20 However, the IAA also grants some authority to AEs. Once State has entered into an
21 agreement with an AE, the AE is charged with processing the accreditation of agencies,
22 overseeing their compliance, and taking adverse action when an agency is out of compliance.
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1 § 14922(a) & (b). An agency may appeal to have an adverse action set aside by the AE or
2 petition a U.S. District Court for such relief. § 14922(c).

3 Pursuant to its authority under § 14923, State has promulgated regulations governing the
4 activities of AEs and adoption agencies. *See* 22 C.F.R. § 96.63, which governs
5 renewal of an agency's accreditation, is the main focus of this case. The relevant portions read as
6 follows:

7 (a) The accrediting entity must advise accredited agencies and approved persons that it
8 monitors of the date by which they should seek renewal of their accreditation or approval
9 so that the renewal process can reasonably be completed prior to the expiration of the
10 agency's or person's current accreditation or approval. . . .

11 (b) . . .

12 (c) The accrediting entity must process the request for renewal in a timely fashion. Before
13 deciding whether to renew the accreditation or approval of an agency or person, the
14 accrediting entity may, in its discretion, advise the agency or person of any deficiencies
15 that may hinder or prevent its renewal and defer a decision to allow the agency or person
16 to correct the deficiencies. The accrediting entity must notify the accredited agency,
17 approved person, and the Secretary in writing when it renews or refuses to renew an
18 agency's or person's accreditation or approval.

19 (d) Sections 96.24, 96.25, and 96.26, which relate to evaluation procedures and to
20 requests for and use of information, and § 96.27, which relates to the substantive criteria
21 for evaluating applicants for accreditation or approval, other than § 96.27(e), will govern
22 determinations about whether to renew accreditation or approval. . . .

23 **B. Factual Background**

24 Faith International Adoptions, Amazing Grace Adoptions, and Adopt Abroad
Incorporated all received Hague accreditation in 2008. Motion, Dkt. #20, at 3. All three agencies
had their accreditation renewed at least once after that time, and were due to have their
accreditation expire on March 31, 2018. *Id.* at 3-4. All three also applied in 2017 to have their
accreditation renewed. *Id.* at 4.

1 For years, the sole entity providing accreditation services under the IAA was COA. *Id.* at
2 1. However, in August of 2017, State designated a second AE: the Intercountry Adoption
3 Accreditation and Maintenance Entity, Inc. (IAAME). *Id.* at 4. Shortly thereafter, COA
4 announced that it planned to withdraw, leaving IAAME as the only AE. *Id.* The parties organized
5 a transitional arrangement under which IAAME would handle all new applications in 2018, as
6 well as renewal applications for agencies “seeking renewal in 2019 or later.”¹ *Id.* COA, however,
7 would continue to process renewal applications filed before the start of 2018.² *Id.* By the end of
8 2018, COA will cease operations and IAAME will take over as the sole AE. *Id.*

9 Because the Plaintiffs applied for renewal in 2018, their applications were handled by
10 COA. *Id.* On March 28, 2018, COA emailed State to update it on the status of these applications.
11 Olson Decl., Dkt. #51, Ex. L, at 5-6. COA informed State that it had requested additional
12 information from the agencies and had deferred its final decision. *Id.* Consequently, COA would
13 likely not grant or refuse Plaintiffs’ renewals before the agencies’ current accreditation expired.
14 *Id.*

15 After being prodded for a reply, State responded to COA’s email on March 30 and
16 informed it that, “[a]fter March 31, COA may no longer continue to review or make any decision
17 in relation to [Faith’s] accreditation application.” *Id.* at 4. The email also stated that “any
18 corrective action would be moot as of the expiration date.” *Id.* COA responded with confusion
19 about State’s directive and concern for its clients, stating that COA had always continued
20 processing an agency’s renewal if a decision could not be reached before accreditation expired.

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23 ¹ U.S. Dep’t of State – Bureau of Consular Affairs, *Adoption Notice: FAQ: Newly Designated Accrediting Entity, IAAME*, (Aug. 25, 2017), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/faq-on-the-accrediting-entity-transition.html> (last visited Oct. 26, 2018).

24 ² *Id.*

1 *Id.* at 2. State replied by reiterating its decision and further explaining its interpretation of the
2 regulations:

3 We write to correct your mistaken impression that the Department is requiring a “different procedure.”

4 Where the ASP has a renewal application that is pending with the AE and the AE allows an ASP’s accreditation/approval
to expire, the AE’s decision to allow the expiration of accreditation/approval because the ASP was unable to
5 demonstrate substantial compliance prior to its expiration date constitutes a refusal to renew pursuant to 22 CFR Part
96.63(c) and 96.77(c). Under the Regulations and COA’s Policies and Procedures, which the Department approved, and
6 as you acknowledge below, at that point the ASP becomes a “new applicant” for accreditation. Under the transition
plan, COA no longer has jurisdiction to accept new applications, and therefore likewise lacks jurisdiction to “convert” the
ASP to a “new applicant”.

7 *Id.* at 1.

8 On April 2, State issued an Adoption Notice stating that Plaintiffs’ renewal applications
9 had been refused.³ Although COA complied with State’s directive, COA insists that it has
10 deferred renewals in a similar way in the past and that State was well aware of this practice and
11 never objected. Schmidt Decl., Dkt. #47, at 1-3, Exs. A & B. COA also states that it is willing to
12 finish processing Faith’s renewal if State allows it to, and estimates that this would take 45 to 60
13 days. *Id.* at 6.

14 In the meantime, Faith has been losing money since it became non-accredited and
15 bankruptcy may be on the horizon. Meske Decl., Dkt. #21, at 4; *see also* Kinley-Albers Decl.,
16 Dkt. #22, at 4-5; Kinton Decl., Dkt. # 23, at 4. Faith filed this action against COA and State on
17 May 18, 2018. Dkt. #1. However, after COA denied that it willingly refused Faith’s application,
18 Faith stipulated to COA’s dismissal from the case. Dkt. #48. This leaves State as the sole
19 defendant and potential subject of an injunction.

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23 ³ U.S. Dep’t of State – Bureau of Consular Affairs, *Adoption Notice: Accreditation Renewal Refusal for Amazing*
24 *Grace Adoptions, Adopt Abroad International, and Faith International Adoption, Inc.* (Apr. 2, 2018), <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/adoption-notice--accreditation-renewal-refusal-for-amazing-grace.html> (last visited Oct. 26, 2018).

DISCUSSION

A. Legal Standard

For a court to grant a preliminary injunction, the plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The last two factors merge if the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). When considering whether to grant this “extraordinary remedy, . . . courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences.” *Winter*, 555 U.S. at 24.

The Ninth Circuit applies a “sliding scale” approach to preliminary injunctions where “a stronger showing of one element may offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). For example, “a preliminary injunction could issue where the likelihood of success is such that ‘serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff’s] favor.’” *Id.* (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.2003)).

B. Likelihood of Success on the Merits/Serious Questions going to the Merits

1. Did the Directive Constitute a Final Agency Action?

State argues that it never took any discrete action that could be challenged under the APA. According to State, its emails to COA on March 30, 2018, did not announce any new policy. Instead, State’s position is that COA “bore the sole responsibility for applying the regulations” and refused Faith’s application pursuant to that authority. Dkt. #51, at 7. State’s

1 emails “merely clarified the regulatory rules for renewal” and “described the effect of [COA’s]
2 non-renewal under the regulations.” *Id.*

3 Faith does not view State’s actions in such benign terms. According to Faith, “the sole
4 action resulting in COA’s inability to complete its review . . . was the State Department’s act of
5 issuing its Directive.” Dkt. # 54, at 7. Faith points to COA’s own statement that it intended to
6 complete the review process and only terminated its review after receiving the directive from
7 State. *See* COA Response, Dkt #35, at 1; Schmidt Decl., Dkt. #47, at ¶5. As a result of this, Faith
8 became unable to perform Hague adoptions.

9 Under the APA, only a “final agency action for which there is no other adequate remedy
10 in a court” may trigger judicial review under the statute. 5 U.S.C. § 704. An “agency action
11 includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or
12 denial thereof, or failure to act.” 5 U.S.C. § 551(13). The Supreme Court has long taken a
13 “pragmatic approach” to finality. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807,
14 1815 (2016) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). In *Abbott*
15 *Laboratories*, for example, the Court found a final action where the regulations were “definitive”
16 statements of the Commission’s position that had a “direct and immediate . . . effect on the
17 [complaining parties’] day-to-day business,” and “immediate compliance with their terms were
18 expected.” 387 U.S. at 149 (1967); *see also* *Frozen Food Express v. United States*, 351 U.S. 40
19 (1956) (finding a final agency action where the Commission merely gave notice of its
20 interpretation of the statute and had not brought any action based on that interpretation).

21 In *Bennett v. Spear*, the Supreme Court “distilled from [its] precedents two conditions
22 that generally must be satisfied for agency action to be ‘final’ under the APA.” *Hawkes Co.*, 136
23 S. Ct. 1807, 1813 (2016). “First, the action must mark the consummation of the agency's

1 decisionmaking process—it must not be of a merely tentative or interlocutory nature. And
2 second, the action must be one by which rights or obligations have been determined, or from
3 which legal consequences will flow.” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78
4 (1997)).

5 Applying the conditions from *Bennett* and the Court’s emphasis on pragmatism, State’s
6 March 30 emails to COA likely qualify as a final agency action. Regarding the first prong of
7 *Bennett*, the question is whether State’s “clarification” of its regulations constituted an
8 interpretive shift that was the final result of the agency’s decision-making process. Dkt. #51, at 7;
9 see *Frozen Food Express*, 351 U.S. 40, 43-44 (1956); *Encino Motorcars, LLC v. Navarro*, 136 S.
10 Ct. 2117, 2123 (2016) (finding a final rule arbitrary and capricious for its unexplained departure
11 from a prior interpretation). Faith presents some persuasive evidence that State’s interpretation
12 does amount to such a shift. In an April 11, 2016, email, COA provided a detailed explanation of
13 its accreditation renewal process to State’s Office of Children’s Issues. Schmidt Decl., Dkt. #47,
14 Ex. A. That email clearly describes COA’s practice of granting deferrals extending the review
15 process past an agency’s accreditation expiration date. *Id.* State responded to this email a day
16 later with a brief acknowledgement and thank you. *Id.* There is also a March 30, 2016, email
17 from State specifically recognizing that one adoption agency would experience a two week lapse
18 in accreditation before COA could make a final decision regarding renewal. *Id.*, Ex. B. These
19 communications indicate that State formerly interpreted its regulations to allow AEs to defer
20 decision on renewal past an agency’s accreditation.

21 State’s March 30, 2018, correspondence with COA mark a distinct change. In several
22 emails, State definitively asserts that 22 C.F.R. §§ 96.63(c) and 96.77(c) prohibit an accrediting
23 entity from processing renewals past the expiration of accreditation. See Olson Decl., Dkt. #51,
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1 Ex. L. Although State claims that this has always been its operative rule, State points to no
2 evidence of this interpretation prior to March 30, 2018, besides the regulations themselves.
3 Consequently, the only evidence of State’s previous position on this issue comes from COA’s
4 2016 emails. This casts doubt on State’s insistence that it had no knowledge of COA’s practice
5 of reviewing applications past expiration. While a change in administration may justify an
6 agency’s shift in policy, *see Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*,
7 545 U.S. 967, 981 (2005), it does not provide a disclaimer of all institutional knowledge.

8 Nor is it dispositive that State’s decision did not appear to follow a formal process. In
9 *Navajo Nation v. U.S. Dep’t of Interior*, the Ninth Circuit found the first prong of *Bennett*
10 satisfied where the Park Service issued an “informal opinion” via email and letter to the Navajo
11 Nation. 819 F.3d 1084, 1090 (9th Cir. 2016). The opinion stated that the agency was “required
12 by law to complete the NAGPRA process for cultural items excavated or removed from lands
13 within” the national monument. *Id.* Like State, the Park Service was merely “clarifying” the
14 applicable statutory requirements, but the Ninth Circuit had “no trouble concluding that the
15 decision . . . consummated the Park Service’s decisionmaking process as to the applicability of
16 NAGPRA.” *Id.* at 1091-92. The same reasoning likely applies here.

17 The second prong of *Bennett* also seems to weigh in Faith’s favor. If State’s March 30
18 emails do amount to an interpretive shift, they clearly have legal consequences for Faith. While
19 COA’s deferral gave Faith a right to a final decision on the merits of its application, State’s
20 directive converting COA’s deferral into a refusal robbed Faith of this right and forced them to
21 apply all over again. This, in turn, has prohibited Faith from legally carrying out adoptions for
22 the lengthy duration of the re-application process.

1 State’s argument that its interpretation did not have any legal consequences because it
2 was merely clarifying the existing law puts the cart before the horse. Regardless of whether State
3 believes its interpretation tracks the “plain text” of the regulation (Dkt. #51, at 19), the fact
4 remains that COA did not share this interpretation and State had not asserted it previously. COA
5 Response, Dkt. #46, at 3-4. To allow State to avoid review of its action by simply claiming that
6 its interpretation was correct would constitute an end-run around the judicial process, which
7 exists precisely to assess such claims.

8 *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, cited by State, does not
9 dictate a contrary result., 543 F.3d 586, 593 (9th Cir. 2008). In *Fairbanks*, the Ninth Circuit
10 concluded that the second prong of *Bennett* was not satisfied because the agency’s decision that
11 the plaintiff’s land fell within federal jurisdiction did not affect the federal statute’s underlying
12 requirements. *Id.* at 593-94. Here, in contrast, State’s interpretation of the IAA regulations
13 determines Faith’s right to a decision on the merits under those very regulations. Furthermore,
14 even if this was a jurisdictional question, the Court has held that an agency’s jurisdictional
15 determination can satisfy the second prong of *Bennett* because it “both narrows the field of
16 potential plaintiffs and limits the potential liability a landowner faces.” *Hawkes Co.*, 136 S.Ct. at
17 1814. The Court observed that this was in keeping with its “pragmatic approach” to finality. *Id.*
18 at 1815. The second prong of *Bennett* is thus likely satisfied here as well.

19 The APA also requires that a challenger has no other adequate remedy in court, and State
20 argues that this requirement is not met because the IAA provides specific procedures for judicial
21 review of adverse actions by AEs. 42 U.S.C. § 14922(c)(3). However, if State’s emails to COA
22 likely constitute a final agency action, it follows that Faith is not actually challenging an adverse
23 action by COA at all. Rather, Faith is challenging the directive by State that transformed COA’s
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1 deferral *into* an adverse action. Indeed, Faith and COA argue that a deferral cannot lawfully be
2 considered an adverse action because it does not meet any of the definitions in the IAA or its
3 implementing regulations. Motion, Dkt. #20, at 13; COA Response, Dkt. #46, at 6.

4 Consequently, Faith is likely to succeed on its claim that State’s directive to COA constitutes a
5 final agency action subject to review under the APA.

6 2. *Was State’s Directive Arbitrary and Capricious?*

7 Faith argues that State’s directive to COA was an arbitrary and capricious shift in policy.
8 *See* Dkt. #21, Ex. A, at 37-38. 22 C.F.R. § 96.63(c) grants accrediting entities “discretion” to
9 defer decisions in order to let agencies remedy deficient applications. According to Faith, State
10 had never previously rejected a COA deferral extending beyond the accreditation deadline, or re-
11 classified a deferral as a refusal. *See* Schmidt Decl., Dkt. #47, at 1-3, Exs. A & B. (2016 emails
12 between COA and State explaining COA’s deferral practice). Despite suddenly changing this
13 pattern, Faith contends that State provided little to no justification for the shift.

14 State responds that its directive to COA was merely a straightforward interpretation of its
15 regulations implementing the IAA. State asserts that 22 C.F.R. §§ 96.60 and 96.63(c) preclude
16 AEs from processing a renewal after an agency’s accreditation expires at the end of the four or
17 five year limit. State also denies that it ever had a policy of allowing COA to continue processing
18 renewal applications after accreditation had expired, or that it was ever aware of such a practice.

19 Although an agency interpretation entitled to *Chevron* deference may nonetheless be
20 found arbitrary and capricious, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.
21 837, 844 (1984), deference may not be applied at all where the regulation is “procedurally
22 defective.”⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). A regulation may

23 _____
24 ⁴ The Court stated that a procedural challenge to a regulation may be foreclosed in some instances, such as where an agency failed to amend a rule in light of changed circumstances. *Encino*, 136 S.Ct. at 2125 (citing *Auer v. Robbins*,

1 be procedurally defective if the agency failed to “give adequate reasons for its decisions.” *Id.*
2 “That requirement is satisfied when the agency’s explanation is clear enough that its ‘path may
3 reasonably be discerned’ . . . [but it is not met when] the agency has failed to provide even that
4 minimal level of analysis.” *Id.* (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System,*
5 *Inc.*, 419 U.S. 281, 286 (1974)). When deciding if a regulation is procedurally defective, the
6 Supreme Court has considered whether the new regulation contradicts a “longstanding earlier
7 position” and whether there are “serious reliance issues at stake.” *Id.* at 2127.

8 In *Encino*, the Court held that the Department of Labor acted arbitrarily and capriciously
9 when it reversed a decades-old policy of exempting service advisors from FLSA requirements.
10 *Id.* at 2123. The original interpretation arose in a 1978 opinion letter and was followed by
11 amendments to the Department’s field manual. *Id.* However, when the Department finally got
12 around to notice-and-comment rulemaking, its final rule set forth the opposite interpretation of
13 the proposed rule with little explanation. *Id.* at 2123-24; *see also Gomez-Sanchez v. Sessions*,
14 892 F.3d 985, 995 (9th Cir. 2018) (holding that the Board of Immigration Appeals acted
15 arbitrarily and capriciously by “constrain[ing] the evidence that [judges] may consider when
16 making a particularly serious crime determination” when it had previously held that reliable
17 evidence should not be excluded).

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21 519 U.S. 452, 458–459 (1997). However, that is not the case here. The Ninth Circuit has also noted in dicta that the
22 “procedural defect” standard from *Encino* does not apply “where the agency is not offering a policy explanation but
23 is instead interpreting a binding regulation.” *Bahr v. U.S. Env’tl. Prot. Agency*, 836 F.3d 1218, 1229 (9th Cir. 2016)
24 (citing *Auer*, 519 U.S. at 461). The court did not elaborate on this statement in *Bahr* and it is unclear to the Court
why the procedural defect challenge would precede *Chevron* deference but not *Auer* deference. Fortunately, this
issue need not be addressed because State’s interpretation likely does not qualify for *Auer* deference because it
contradicts State’s past implicit interpretation and constitutes an “unfair surprise.” *See infra* pp. 20-21; *Christopher*,
567 U.S. at 156. Furthermore, State’s directive amounts to a new substantive rule and is not merely interpreting a
binding regulation. *See infra* pp. 16-17.

1 State's conduct here is likely not as egregious of a departure as *Encino* and *Gomez-*
2 *Sanchez*. Unlike those cases, where the agency had itself stated a contrary interpretation in the
3 past, State never explicitly announced a policy of allowing renewal processing to extend beyond
4 accreditation expiration. See *Encino*, 136 S.Ct. at 2123; *Gomez-Sanchez*, 892 F.3d at 995. This
5 both lowers the justifiable reliance by private parties and diminishes the explanation necessary to
6 support State's new position, since there is no competing logic from a past policy announcement.
7 In addition, State's interpretation was based on the text of its regulations and did not involve
8 fitting real-world facts into statutory definitions, as was the case in *Encino*. Consequently, State's
9 citations to 22 C.F.R. §§ 96.63(c) and 96.77(c) in its email to COA may be more satisfactory as
10 explanations than they would be in other situations.

11 Nonetheless, despite State's protestations to the contrary, its prior acknowledgements of
12 COA's practices must have been based on a different interpretation of its regulations than the
13 agency now presents. State's 2018 emails provide almost no textual justification for its new
14 interpretation, much less explain why the agency decided to depart from its former position.
15 Instead, State attempted to treat its interpretation as self-evident and consistent with past
16 procedures, but such a nonchalant dismissal does not satisfy the APA when an agency is actually
17 making a change. See *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 924 (D.C. Cir.
18 2017) (rejecting the Forest Service's attempt to "shrug off" its change in policy when that
19 argument "flatly defies the plain text of the official 1991 Forest Plan, repeated official agency
20 statements, and two decades of agency practice"). Furthermore, because State did not engage in
21 rulemaking, it was also impossible for COA, Faith, or any other private party to guess at the
22 interpretations State may rely on. See *Encino*, 136 S. Ct. at 2126-27 (explaining that the
23 Department relied on the interpretation from one of the comments in its final rule).

1 This case also involves significant reliance interests, which were a major focus of the
2 Court’s reasoning in *Encino*. *See id.* at 2126. While State’s new position may not “necessitate
3 systemic, significant changes” to AEs’ procedures on the same scale as the changes to dealers’
4 compensation plans in *Encino*, State issued its interpretation at such a time that COA was already
5 unable to salvage Plaintiffs’ applications. Consequently, COA’s good-faith reliance on State’s
6 former position has already had serious costs for the agencies that rely on COA. Faith has thus
7 shown that it is likely to succeed on its claim that State’s directive was arbitrary and capricious,
8 and has at least raised “serious questions” that go to the merits. *See Cottrell*, 632 F.3d at 1131.

9 3. *Did State Fail to Engage in Required Rulemaking?*

10 Under the APA, an agency must engage in notice-and-comment rulemaking when it
11 promulgates a new “substantive” rule. *Reno-Sparks Indian Colony v. U.S. E.P.A.*, 336 F.3d 899,
12 909 (9th Cir. 2003). Substantive rules are “those which effect a change in existing law or policy”
13 or “impos[e] general, extra-statutory obligations pursuant to authority properly delegated by the
14 legislature.” *Id.* (internal quotation marks omitted). Substantive rules “are of general, rather than
15 situational, application.” *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992).
16 However, the Ninth Circuit has made clear that “impact is not a basis for finding a rule not to be
17 interpretive.” *Chief Prob. Officers of California v. Shalala*, 118 F.3d 1327, 1335 (9th Cir. 1997).

18 “Interpretive rules, on the other hand, merely clarify or explain existing law or
19 regulations . . . [and] instruct as to what an agency thinks a statute or regulation means.” *Reno-*
20 *Sparks*, 336 F.3d at 909 (internal quotation marks omitted). “Because they generally clarify the
21 application of a law in a specific situation, they are used more for discretionary fine-tuning than
22 for general law making.” *Sullivan*, 962 F.2d at 886. Courts construe the interpretive rule
23 exception to notice-and-comment requirements narrowly. *Id.* Finally, “[a] time-honored principle
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1 of administrative law is that the label an agency puts on its actions is not necessarily conclusive.”
2 *San Diego Air Sports Ctr., Inc. v. F.A.A.*, 887 F.2d 966, 970 (9th Cir. 1989) (internal quotation
3 marks omitted).

4 In keeping with this, couching a substantive rule in an interpretive context does not
5 automatically make it an interpretive rule. For example, in *Linoz v. Heckler*, the Ninth Circuit
6 ruled that the Secretary of Health and Human Services’ interpretation of a Medicare provision
7 was substantive. 800 F.2d 871, 877 (9th Cir. 1986). The Medicare Carrier’s Manual covered
8 ambulance services from a hospital which “lacks appropriate facilities” to “the nearest institution
9 having appropriate facilities,” but the Secretary informally added a section providing that
10 transportation “solely to avail a patient of the service of ... a physician in a specific speciality’
11 did not make the hospital where that physician was located the ‘nearest hospital with appropriate
12 facilities.’” *Id.* The court held that the interpretation “carved out a per se exception to the rule”
13 and “withdrew coverage previously provided.” *Id.* at 877. As a result, the new manual section
14 was a substantive rule. *Id.*

15 The reasoning from *Linoz* is also appropriate in this case. Like the provision in *Linoz*,
16 which interpreted the phrase “nearest hospital with appropriate facilities” in the Carrier’s
17 Manual, State’s directive interprets selected language from 22 C.F.R. §§ 96.7(a)(6), 96.60, and
18 96.63(c). *See id.* at 876. Also similar to *Linoz*, State’s directive changed the general regulatory
19 structure by adding expiration of accreditation as a never-before-applied basis for refusing
20 renewal. This change withdrew COA’s ability to defer decisions past the expiration of
21 accreditation and rendered Faith unable to complete the renewal process.

22 State insists that its directive merely clarified the regulations, but this position is not very
23 persuasive. As discussed *supra*, the prior practices of both COA and State relied on a different
24

1 interpretation of the relevant regulations, suggesting that State’s new interpretation was not a
2 mere clarification. Indeed, as discussed *infra*, State’s interpretation is not an obvious description
3 of the regulations’ plain text. Faith is thus likely to succeed on its claim that State’s directive was
4 a substantive rule requiring notice-and-comment procedures.

5 4. *Did State Violate the IAA or its Implementing Regulations?*

6 Faith argues that the IAA only allows State to take two direct actions with respect to an
7 agency’s accreditation: “suspension/cancellation” and “debarment.” 42 U.S.C. § 14924(b) & (c).
8 Because State’s directive had the effect of terminating Faith’s accreditation, Faith contends that
9 it must be viewed either as a cancellation or debarment. Therefore, since State did not follow the
10 required procedures for either action, State’s directive violated the IAA. *See id.* Alternatively, if
11 the directive is considered a “refusal to renew,” Faith argues that State still violated the IAA and
12 its implementing regulations because the authority to refuse renewal is expressly granted to AEs.
13 *See* 42 U.S.C. § 14922(b)(3). State’s directive thus commandeered the COA’s role and also
14 failed to satisfy the requirements for an AE to issue a refusal. *See id.*; *see also* 22 C.F.R. § 96,
15 Subpart F (describing accreditation compliance standards); COA State Department-Approved
16 Handbook, Dkt. #51, Ex. A, at IX(C)(2)(a).

17 According to State, the IAA’s regulatory framework was properly promulgated under 42
18 U.S.C. § 14923(a)(1), which empowers the State Department to “prescribe the standards and
19 procedures to be used by accrediting entities for the accreditation of agencies.” State’s directive
20 merely describes the regulations’ plain text, which states that only an “accredited agency or
21 approved person may seek renewal.” 22 C.F.R. § 96.63(b). Step one of *Chevron* is therefore
22 satisfied and the question of agency deference need not even be addressed. *See* 467 U.S. at 842-
23 43.

1 While State is correct that this case involves an agency’s interpretation of laws it
2 administers, the law at issue is not a statute but a regulation. *See* Dkt. #51, Ex. L, at 2 (March 30,
3 2018, email from State to COA explaining 22 C.F.R. §§ 96.63(c) and 96.77(c)); Opp’n, Dkt. #51,
4 at 11-13 (providing State’s interpretation of the IAA regulations). The IAA implicitly grants
5 State authority to interpret its regulations when it “monitor[s] the performance by each
6 accrediting entity of its duties under . . . the [IAA’s] implementing regulations.” 42 U.S.C.
7 §14924(a). State’s directive is therefore entitled to the deferential standard first identified in
8 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and applied more recently in
9 *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See Lezama-Garcia v. Holder*, 666 F.3d 518, 525
10 (9th Cir. 2011) (distinguishing between the application of *Seminole Rock* deference when an
11 agency is interpreting its own regulation and *Chevron* deference when an agency is interpreting a
12 statute it administers). This framework for review does not mean that Faith must relinquish its
13 arguments that State violated the IAA by issuing its directive. Such a violation would make
14 State’s interpretation “inconsistent with the regulation” and thus would not receive controlling
15 weight. *Auer*, 519 U.S. at 461.

16 Although State argues in its brief that its regulations “mirror” the IAA, State’s
17 interpretation rests on language that is unique to the regulations. *See* Opp’n, Dkt. #51, at 12.
18 Specifically, State relies on language from 22. C.F.R. §§ 96.60, 96.63(a) & (c), and 96.7(a)(6)
19 that elaborates on the IAA’s more general requirements for the accreditation process. *Id.* at 11-
20 13; *see* 42 U.S.C. § 14923. Indeed, the statute does not even mention AEs’ power to defer
21 decisions. Consequently, this is not a situation where the Court should apply *Chevron* and reject
22 *Seminole Rock* deference because the regulatory language merely parrots the statute. *See*
23 *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006).

1 5. *Is State's Directive a Permissible Interpretation of IAA Regulations?*

2 Where an agency promulgates a regulation filling in a gap in a statute it enforces, “[s]uch
3 legislative regulations are given controlling weight unless they are arbitrary, capricious, or
4 manifestly contrary to the statute.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.
5 837, 844 (1984). However, the court must “give substantial deference to an agency’s
6 interpretation of its own regulations.” *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 638 F.3d 1183,
7 1192 (9th Cir. 2011) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The
8 court “must defer to the [agency’s] interpretation unless an alternative reading is compelled by
9 the regulation’s plain language or by other indications of the [agency’s] intent at the time of the
10 regulation’s promulgation.” *Id.* (quoting *Shalala*, 512 U.S. at 512). “Indicia of inadequate
11 consideration include conflicts between the agency’s current and previous interpretations; signs
12 that the agency’s interpretation amounts to no more than a convenient litigating position; or an
13 appearance that the agency’s interpretation is no more than a post hoc rationalization advanced
14 by an agency seeking to defend past agency action against attack.” *Price v. Stevedoring Servs. of*
15 *Am., Inc.*, 697 F.3d 820, 830 n. 4 (9th Cir.2012) (en banc) (internal quotation marks omitted).

16 Deference may also be inappropriate where the agency’s interpretation constitutes an
17 “unfair surprise.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).
18 “[W]here . . . an agency’s announcement of its interpretation is preceded by a very lengthy
19 period of conspicuous inaction, the potential for unfair surprise is acute.” *Id.* at 158. This rule
20 exists to discourage agencies from promulgating “vague and open-ended regulations that they
21 can later interpret as they see fit,” as well as to ensure that parties do not have to “divine the
22 agency’s interpretations in advance or else be held liable.” *Id.* at 158-59.

1 If the court finds that *Seminole Rock* deference does not apply, the agency’s interpretation
2 receives “a measure of deference proportional to the ‘thoroughness evident in its consideration,
3 the validity of its reasoning, its consistency with earlier and later pronouncements, and all those
4 factors which give it power to persuade.’” *Id.* at 159 (quoting *Skidmore v. Swift & Co.*, 323 U.S.
5 134, 140 (1944)); *see also Indep. Training & Apprenticeship Program v. California Dep’t of*
6 *Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) (applying *Skidmore* deference if *Seminole*
7 *Rock* deference is inappropriate). If the agency’s interpretation is unpersuasive, the court must
8 employ “traditional tools of interpretation” to resolve the relevant question itself. *Id.* at 161.

9 Here, it is likely that *Seminole Rock* deference is inappropriate both because State’s
10 current position contradicts its past implicit interpretation and constitutes an “unfair surprise.”
11 Although State’s March 30, 2018, emails to COA vaguely refer to 22 C.F.R. §§ 96.63(c) and
12 97.77(c), State had for years acquiesced to COA’s practice of processing applications past the
13 expiration of accreditation, and even acknowledged that practice itself. *See Decl. of Schmidt*,
14 *Dkt. #47*, at 1-3 (identifying eight cases since 2012 in which COA processed renewals past
15 expiration and “communicated with the State Department about the status of the applications”),
16 *Ex. B* (email from State summarizing a situation in which an agency’s accreditation would lapse
17 before it received renewal). In doing so, State implicitly embraced a different interpretation of its
18 regulations than it now espouses; any other conclusion would involve State standing by while
19 COA repeatedly violated its regulations.

20 This case presents a situation similar to *Christopher*, where an agency’s sudden departure
21 from an unspoken policy of inaction prejudiced private parties. *See* 567 U.S. at 157. In
22 *Christopher*, the pharmaceutical industry had no time to change its practice of classifying
23 pharmaceutical detailers as exempt employees, thus exposing companies to sudden liability. *Id.*

1 Here, COA had no time to alter its procedures to ensure that all applications were fully processed
2 before expiration, thus exposing Faith to sudden refusal of its application. This case does differ
3 from *Christopher* in the sense that the private party best positioned to change its practice (COA)
4 is different from the party prejudiced by the action (Faith). However, COA and Faith were both
5 caught off guard by State’s interpretation, so it makes little difference how the negative effects
6 are distributed. Consequently, *Seminole Rock* deference is likely inappropriate. *Id.* at 159.

7 Applying *Skidmore* deference, Faith has at least raised serious questions regarding the
8 persuasiveness of State’s interpretation. State first relies on 22 C.F.R. § 96.7(a)(6), which states
9 that accrediting entities are responsible for “[d]etermining whether accredited agencies and
10 approved persons are eligible for renewal of their accreditation or approval *on a cycle consistent*
11 *with § 96.60.*” (emphasis added). Section 96.60, in turn, requires that accreditation shall last for a
12 period of four years, and may be extended for “no more than one year . . . [i]n order to stagger
13 the renewal requests from agencies . . . and to prevent the renewal requests from coming due at
14 the same time.” State also contends that § 96.63(c)’s statement that “[t]he accrediting entity must
15 notify the *accredited* agency . . . in writing when it renews or refuses to renew an agency’s or
16 person’s accreditation” implicitly requires that renewal cannot be granted after accreditation
17 expires. § 96.63(c) (emphasis added).

18 However, as Faith argues, none of the provisions cited by State speak to whether an AE
19 can continue *processing* a renewal application after accreditation expires. Section 96.63(c) likely
20 provides the strongest support for State’s position, but even this is indirect support at best. The
21 sentence quoted by State mainly concerns notice procedures when an AE grants renewal; it only
22 incidentally mentions that an “accredited agency” is among the parties to be notified. The use of
23 “accredited agency” in this context was likely not intended to identify an essential requirement
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1 for receiving renewal, but rather to describe a relevant party and differentiate them from agencies
2 applying for the first time. Indeed, § 96.63(c) does not contain language that would indicate an
3 exclusive list of who can receive renewal.

4 While § 96.7(a)(6) states that renewal applications must be handled consistent with
5 § 96.60(b), that subsection does not say anything about when an AE may or may not continue
6 processing an application. Rather, § 96.60(b) establishes that an agency's accreditation may only
7 be extended to a total period of five years.⁵ COA's procedures do not violate this requirement
8 because, when an application is still being processed after accreditation expires, the agency's
9 accreditation lapses until a final decision is reached. *See* Dkt. #47, Ex. A, at 3 (2016 email from
10 COA to State explaining, "COA has confirmed with the Department that the regulations do not
11 provide COA with the authority to extend an ASP's expiration if they have not completed the
12 renewal process . . .").

13 Section 96.63(c)'s statement that an AE "must process the request for renewal in a timely
14 fashion" likewise does not dictate State's interpretation. "Timely" is defined by the Merriam-
15 Webster Dictionary as "coming early or at the right time,"⁶ and by the Oxford English
16 Dictionary as "Occurring, done, or made at a fitting, suitable, or favourable time; opportune,
17 well-timed, seasonable."⁷ Timely completion of a task thus involves obtaining a positive
18 outcome, but this only implies a strict deadline if one has been established elsewhere. Here, that
19

20 ⁵ Section 96.7(a)(6)'s language regarding considering renewal consistent with the overall accreditation cycle does
21 suggest that AEs should not wait until an agency's accreditation is about to expire to begin the renewal process.
22 However, the agency's lapse in accreditation at the five-year mark serves as a natural bulwark against this. Unless
23 an agency wants to spend a lengthy period of time without the ability to conduct adoptions, it has an incentive to
24 apply for renewal long before expiration.

⁶ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/timely> (last visited Oct. 25, 2018).

⁷ Oxford English Dictionary, <http://www.oed.com/view/Entry/202120?rskey=mB4C4l&result=1&isAdvanced=false#eid> (last visited Oct. 25, 2018).

1 is not the case. Section 96.63(a) states, “The accrediting entity must advise accredited agencies
2 . . . of the date by which they should seek renewal of their accreditation . . . so that the renewal
3 process can reasonably be completed prior to the expiration of the agency’s or person’s current
4 accreditation.” However, this is intended to ensure that AEs help agencies avoid a period of non-
5 accreditation; it does not mandate a date by which AEs must finish processing. Consequently, the
6 word “timely” should be read to require AEs to process applications expeditiously to avoid a
7 period of non-accreditation. It does not limit AEs’ discretion to defer decisions when necessary.
8 *See* § 96.63(c).

9 Even if the word 96.63(a) and (c) do mandate a deadline for processing applications, this
10 by no means suggests that AEs must abruptly refuse to renew an agency’s accreditation. The
11 section on adverse actions makes no reference to accreditation expiration as a possible basis for
12 refusal. *See* 22 C.F.R. § 96.63(d). In contrast, § 96.10(a) requires that State “will suspend or
13 cancel the designation of an [AE] if . . . it is substantially out of compliance with . . . the
14 regulations implementing the IAA.” Section 96.10(b) also lists timely processing as one of the
15 “performance criteria” for designation as an AE. Given that § 96.63 describes timely processing
16 as the AE’s duty, both the plain text and common sense dictate that the AE should suffer any
17 consequences for tardiness.

18 In addition to having little textual support, State’s interpretation conflicts with several
19 aspects of the IAA’s overall scheme. The IAA, its implementing regulations, and the COA
20 handbook give AEs the authority to refuse renewal and limit the grounds upon which they may
21 do so. *See* 42 U.S.C. § 14922(b)(3) (stating that AEs have a duty to refuse renewal “for
22 noncompliance with applicable requirements”); 22 C.F.R. § 96.63(d) (identifying four sub-
23 sections related to evaluation procedures and substantive criteria that will “govern
24

1 | determinations” about renewal); COA State Department-Approved Handbook, Dkt. #51, Ex. A,
2 | at IX(C)(2)(a) (tracking § 96.63(d) by providing four reasons that an AE may refuse to renew an
3 | application). No authority identifies accreditation expiration as a reason for refusal, and while it
4 | is possible that an agency may be in non-compliance at the date of expiration, this also may not
5 | be the case.⁸ The AE’s slow processing could just as easily explain the delay past expiration,⁹ but
6 | to issue a refusal for this reason would contradict the IAA’s indication that a refusal be based on
7 | the *agency’s* noncompliance. *See* 42 U.S.C. § 14922(b)(3). Hemming AEs in with a strict time
8 | limit would thus inevitably lead to AEs being both unable to grant a renewal but also unable to
9 | refuse for an acceptable reason.¹⁰

10 | State’s interpretation also causes tension with the provisions of the IAA governing review
11 | of adverse actions. The IAA provides that an agency subject to an adverse action may attempt to
12 | get the decision set aside by the AE or a federal court. 42 U.S.C. § 14922(c)(1) & (3). However,
13 | if the AE is not permitted to continue processing the application but also lacks sufficient
14 | information to grant a renewal (as is likely the case if the AE deferred the decision), the refusal
15 |

16 | ⁸ Indeed, Amazing Grace Adoptions was not scheduled to have its site visit until after its accreditation expired on
17 | March 31, 2018. Dkt. #51, Ex. L, at 2 (March 28, 2018, email from COA to State describing several agencies that
18 | would probably not receive a renewal decision before their accreditation expired). As a result, there was likely no
19 | way for COA to refuse their renewal on substantive grounds before the accreditation expiration date.

18 | ⁹ In this case, the Plaintiffs expressed frustration with COA over its inability to process their applications before
19 | expiration. *See* Meske Decl., Dkt. #21, Ex. A, at 65-66; Kinley Alberes Decl., Dkt. #22, Ex. A, at 16 (accusing COA
20 | of negligently dragging on the process of renewing Adopt Abroad Incorporated’s accreditation).

20 | ¹⁰ State attempts to force its interpretation into harmony with the substantive requirements for refusal by phrasing its
21 | position in such a way that fault appears to necessarily lie with the agency seeking renewal past expiration.
22 | According to State, “the AE’s decision to allow expiration of accreditation/approval because the ASP was unable to
23 | demonstrate substantial compliance prior to its expiration date constitutes a refusal to renew.” Dkt. #51, Ex. L, at 2.
24 | However, if an agency was always automatically out of compliance on the date of expiration, this would defy the
reasoning behind the deferral provision in the IAA regulations. *See* 22 C.F.R. 96.63(c). That subsection
contemplates that there may be situations where an agency has not provided sufficient documentation to prove
compliance by the scheduled decision date, but may nonetheless not conclusively be in *non-compliance* on that date.
In terms of the substantive reasons underlying an AE’s choice to defer, it makes no difference whether the final
decision is pushed back past the expiration date or not. In both cases, the AE has judged that neither renewal nor
approval are yet warranted under its governing law and procedures.

1 | effectively cannot be set aside. Again, State's interpretation appears inconsistent with the IAA's
2 | assumption that refusals should be issued for substantive reasons determined by the AE, not
3 | procedural reasons dictated by State.

4 | Finally, in addition to conflicting with the overall scheme of the IAA, State's
5 | interpretation is simply illogical. It make no sense to require AEs and agencies to start all over
6 | from square one when they are mere weeks away from completing the renewal process. The
7 | Court can identify no good reason why the drafters of the IAA or its regulations would have
8 | intended such an unnecessary waste of resources. It certainly does not benefit the children whose
9 | adoptions have apparently been frustrated by State's directive. *See* Tutterrow Decl., Dkt. # 24;
10 | Garrett Decl., Dkt. #25.

11 | State's interpretation is unpersuasive and the traditional tools of interpretation indicate
12 | that processing a renewal past the date the expiration of accreditation does not require the AE to
13 | refuse the application. *See Skidmore*, 323 U.S. at 140; *Christopher*, 567 U.S. at 161. As a result,
14 | the IAA does not permit State to informally instruct COA to implement this novel basis for
15 | refusal. *See* 42 U.S.C. §14924(a). In short, Faith is likely to succeed on its claim that State's
16 | directive constituted an impermissible interpretation of IAA regulations. *See Cottrell*, 632 F.3d at
17 | 1131.

18 | **C. Irreparable Harm**

19 | Faith argues that it is likely to continue to suffer irreparable harm if the injunction is not
20 | granted. *See Winter*, 555 U.S. at 20. According to Faith, its continued inability to conduct
21 | adoptions, the money lost as a result, and the black mark of a "refusal" in its background will
22 | severely affect Faith's organizational mission. In Fact, Faith argues that the delay caused by
23 | applying all over again to IAAME will likely result in bankruptcy for the organization.

1 State responds with several arguments. First, State contends that Faith’s delay of one and
2 a half months before suing and another month before filing this motion suggests that there is no
3 “urgent” need. Dkt. #51, at 25. Second, State argues that Faith’s harm is self-inflicted because, if
4 Faith had filed immediately as a new applicant to IAAME, it would be “four months closer” to
5 re-accreditation right now. *Id.*

6 There is no harm more irreparable than going out of existence, and Faith has shown that
7 this is a likely outcome if COA is not permitted to finish processing its renewal. Faith has
8 estimated that it stands to lose hundreds of thousands in revenue annually because it is losing
9 fees faster than overhead costs are decreasing, which will lead it to “strongly consider
10 bankruptcy in the near future.” Meske Decl., Dkt. #21, at 4; *see also* Kinley-Albers Decl., Dkt.
11 #22, at 4-5; Kinton Decl., Dkt. # 23, at 4. State does not challenge these assertions.

12 Instead, State contends that these losses are self-inflicted, but this argument is unavailing.
13 When Faith moved for an injunction, IAAME’s website indicated that it had not yet “be[gun] to
14 accredit and approve agencies and person [sic].” *See* Harvard Law School Amicus Brief, Dkt.
15 #32-1, at 4. State contests this, asserting that IAAME began accepting new applications on
16 March 1, 2018, has accepted a total of 11 applications to date, and plans to finish processing
17 renewals for agencies with accreditation expiring in 2019 early in that year. Olson Decl., Dkt.
18 #51, at 8, 19. However, even if IAAME is working on this “shorter schedule” than COA,
19 Plaintiffs’ three additional applications would presumably start at the back of the line and delay
20 IAAME’s overall schedule. In addition, given that COA took between nine and eighteen months
21 to process new and renewal applicants, it is hard to believe that a brand-new entity with no
22 experience will be able to greatly improve on the timetable. *See id.* at 11.

1 State's argument that Faith's delay in filing suit implies a lack of urgency is also
2 unpersuasive. Faith delayed for only 48 days, whereas the plaintiff in *Lydo Enterprises, Inc. v.*
3 *City of Las Vegas*, cited by State, delayed for five years. 745 F.2d 1211, 1213 (9th Cir. 1984).
4 These situations are hardly comparable. Indeed, State's delay in responding to Faith's motion
5 takes much of the blame for the lengthy period since Faith filed. *See* Dkt. #28. Consequently,
6 Faith is likely to suffer irreparable injury if the injunction is not granted.

7 **D. The Balance of Equities and the Public Interest**

8 The final factors in the preliminary injunction analysis require considering the effects of
9 an injunction on both parties and the public. *Winter*, 555 U.S. at 24. When the government is a
10 party, these factors merge because the government represents the public interest. *Nken v. Holder*,
11 556 U.S. 418, 435 (2009). Faith argues that the equities tip sharply in its favor because an
12 injunction would disproportionately benefit both Faith and the public, while State's interest in
13 enforcing its directive is negligible. According to Faith, its inability to continue facilitating
14 adoptions will diminish the resources available to prospective parents and increase the waiting
15 line for adoptions. Further, Faith asserts that the refusal to renew its accreditation has already had
16 consequences for families, who have had their cases put on hold for administrative review. *See*
17 Tutterrow Decl., Dkt. # 24, at 3; Garrett Decl., Dkt. #25, at 3-4. Faith hopes renewing its
18 accreditation may help these families complete their adoptions.

19 In opposition, State argues that its directive is in the public interest because it protects
20 children and families by minimizing fraud and other misconduct during the adoption process.
21 The IAA regulations are designed to ensure that AEs are "thorough and meticulous" when
22 reviewing renewals, and State contends that an injunction would amount to "relax[ing]" these
23 regulations by giving additional time to agencies that had failed to demonstrate compliance. Dkt.
24

1 #51, at 29-30. This, in turn, would “encourage [agencies] to take less seriously their compliance
2 obligations.” *Id.* at 30.

3 State’s position is quite unconvincing. As previously discussed, an agency’s accreditation
4 expiring before renewal may well be the result of delays by the AE and says little about whether
5 or not the agency is actually compliant. Indeed, all three Plaintiffs in this case had been
6 accredited since 2008 and had never been refused renewal. *See* Meske Decl., Dkt. #21, at 3;
7 Kinley-Albers Decl., Dkt. #22, at 3; Kinton Decl., Dkt. #23, at 2-3. Furthermore, allowing AEs
8 the necessary time to process renewals prevents hasty decisions, thus *lowering* the risk of agency
9 misconduct. State’s argument that agencies are scoffing at compliance standards because AEs
10 sometimes defer renewal decisions is both unsupported and unintuitive.

11 State is correct that the exact impact of Faith’s loss of accreditation on adoptees and
12 prospective families is unclear. *See* Tutterrow Decl., Dkt. # 24, at 3; Garrett Decl., Dkt. #25, at 3-
13 4. One family previously served by Faith indicate that their case was delayed for uncertain
14 reasons after Faith lost its accreditation (Garrett Decl., Dkt. #25, at 4) and another family asserts
15 that officials told them their case was delayed partly because Faith’s accreditation had lapsed.
16 Tutterrow Decl., Dkt. #24, at 3. There is no guarantee that renewing Faith’s accreditation would
17 resolve these situations. However, it seems likely that letting Plaintiffs resume operations could
18 only improve the situation of adoptee families that may have come under scrutiny. Further,
19 reinstating Faith’s accreditation would allow Plaintiffs to avoid bankruptcy, ensuring that the
20 expertise, resources, and connections they have built up over decades would not be wasted.

21 While it is true that the public has an interest in the government enforcing its laws, that
22 interest is only served if the government acts properly and justly. *See Nken*, 556 U.S. at 436
23 (distinguishing wrongful removal of aliens from proper removal orders). Here, it is far from clear
24

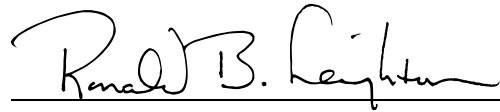
1 that State acted in such a way. Indeed, Faith has shown that State likely acted unlawfully in
2 several respects by issuing its directive. As a result, the balance of equities tips sharply in favor
3 of granting the injunction, as does the public interest.

4 **CONCLUSION**

5 Faith has demonstrated that it is likely to succeed on the merits of its claims and has also
6 raised serious questions that go to the merits. Faith has also shown that it stands to suffer
7 irreparable harm if an injunction is not granted, that the balance of equities tips sharply in its
8 favor, and that an injunction is in the public interest. Consequently, Faith's motion is GRANTED
9 and the Court enjoins and suspends the effect of State's directive to COA ordering it to stop
10 processing Plaintiffs' renewal applications and treat them as refused.

11 IT IS SO ORDERED.

12 Dated this 30th day of October, 2018.

13 

14 Ronald B. Leighton
15 United States District Judge