Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Leobardo MORENO GALVEZ, et al.,

Plaintiffs,

v.

Kenneth T. Cuccinelli, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services, et al.,

Defendants.

Case No. 2:19-cv-00321-RSL

MOTION FOR SUMMARY JUDGMENT

Note on Motions Calendar:
June 12, 2020

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiffs and class members ("class members") are young immigrants who all are subject to state court proceedings where a Washington state court determined that they have been abandoned, abused or neglected by one or both of their parents. Based on that finding and the state court's decision to provide a guardian or determine the youth's custody, the youth then filed an application with Defendant United States Citizenship and Immigration Services (USCIS) to seek Special Immigrant Juvenile Status (SIJS), a form of humanitarian relief provided by Congress for abandoned and abused immigrant youth under the age of 21. However, in 2018, Defendants implemented a policy that deprives class members of this humanitarian relief: Defendants began denying SIJS applicants unless they could show that a state court had the power to return the youth to the custody of their parents. That requirement has no basis in the Immigration and Nationality Act (INA), and effectively bars youth aged 18 to 20 who are in state court proceedings from seeking SIJS, even though Congress has explicitly provided that such relief be available for youth up to 21 years of age.

In addition, Defendants also began delaying class members' applications far beyond the statutory deadline for adjudication. Unlike most other types of immigration applications, Congress imposed a 180-day deadline to adjudicate SIJS applications on USCIS, precisely because of the vulnerable situations that abandoned and abused youth face. Defendants' practices of delaying and denying these applications run expressly counter to the INA.

This Court has already preliminarily enjoined Defendants' policy and ordered that they comply with the statutory deadline. While Defendants are now complying with the preliminary injunction, nothing prevents them from re-implementing it absent a permanent injunction. Moreover, since the Court's injunction, Defendants have signaled that they intend to implement

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regulations that would render Congress's deadline meaningless. As a result, and as detailed below, this Court should permanently enjoin Defendants' illegal policy and practice of delaying and denying class members' applications and ensure that these critical protections Congress enacted remain available to SIJS applicants.

BACKGROUND

I. Procedural History

This class action challenges Defendants' policy of denying class members' applications and their practice of delaying SIJS applications as contrary to the INA and the Administrative Procedure Act (APA). On July 17, 2019, this Court certified the following class:

> All individuals who have been issued predicate Special Immigrant Juvenile Status ("SIJS") orders by Washington state courts after turning eighteen years old but prior to turning twenty-one years old and have submitted or will submit SIJS petitions to United States Citizenship and Immigration Services ("USCIS") prior to turning twenty-one years old.

Dkt. 41 at 1. On the same date, this Court also granted Plaintiffs' Motion for Preliminary Injunction, finding that "plaintiffs are likely to succeed on the merits of their claim that the new policy is 'not in accordance with law.'" Dkt. 42 at 9 (citing 5 U.S.C. § 706(2)(A)). Defendants initially appealed the order granting the motion for preliminary injunction on October 21, 2019, Dkt. 56, but moved to voluntarily dismissed the appeal on February 28, 2020. The appeal was then dismissed with prejudice on March 4, 2020. *See* Dkt. 60. Because this case centers almost exclusively on legal questions, Plaintiffs now move for summary judgment.

II. The SIJS Statute and Deference to State Courts

Under the current SIJS statute, an SIJS applicant must be (1) under 21 years of age at the time the petition is filed; (2) unmarried; (3) declared dependent on a state or juvenile court, or placed in the custody of a state agency or individual appointed by such a court; and (4) the

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subject of specific findings that (a) reunification with one or more parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law, and that (b) it is not in the child's best interest to return to his or her home country (SIJS findings). *See* 8 U.S.C. §§ 1101(b)(1), 1101(a)(27)(J), 1232(d)(6); Dkt. 42 at 3-4. Every SIJS petition submitted to USCIS must include a predicate state court order containing these findings (SIJS order).

Congress has expanded the scope of SIJS since it was first enacted. Under the original statute, Congress required youth to be eligible for "long-term foster care" to receive SIJS. Immigration Act of 1990, Pub. L. No. 101-649 § 153, 104 Stat. 4978, 5005-06. In 2008, Congress removed placement in foster care from the definition of a special immigrant juvenile and ensured that SIJS is available to all youth who have "been declared dependent on a juvenile court . . . or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court." 8 U.S.C. § 1101(a)(27)(J)(i); *see also* Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457 § 235(d)(1)(A), 122 Stat. 5044, 5079 (2008) (TVPRA); *see also* Dkt. 42 at 2-3.

And while the INA has long defined a child for purposes of SIJS to be "an unmarried person under twenty-one years of age." 8 U.S.C. § 1101(b)(1), the 2008 TVPRA amendments provided additional protections to ensure that all applicants under 21 remain eligible for SIJS status. Thus, consistent with the statutory definition, and pursuant to the TVPRA, USCIS may not deny an SIJS petition on the basis of age so long as the petitioner was under 21 at the time of filing. TVPRA § 235(d)(6), 122 Stat. at 5080. This is true regardless of the applicant's age when USCIS adjudicates the petition.

In determining whether an applicant meets the criteria noted above, the SIJS statute

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confers all fact-finding authority on the state court. *See* 8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (requiring state juvenile courts to make predicate SIJS findings). While the Department of Homeland Security (DHS) must provide consent for the SIJ classification, *see id* § 1101(a)(27)(J)(iii), under the current regulations, USCIS provides such consent once it determines there exists "a reasonable factual basis each of the determinations," *see* USCIS Policy Manual, vol. 6, pt J, ch. 2(D) (instructing adjudicators to "rel[y] on the expertise of the juvenile court in making child welfare decisions and . . . not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law").

Finally, Congress has also acted to protect the vulnerable youth for whom SIJS is intended by ensuring that USCIS "expeditious[ly] adjudicates SIJS applications." *See* 8 U.S.C. §1232(d)(2). Specifically, following the passage of the TVPRA amendments, USCIS must adjudicate all SIJS petitions within 180 days after the date of filing. TVPRA § 235(d)(2), 122 Stat. at 5080 (codified at 8 U.S.C. § 1232(d)(2)).

III. Washington State Law Framework

Washington state law expressly extends jurisdiction for Washington courts to make custody determinations for youth ages 18 to 20 in three different types of proceedings. As a result, in these proceedings, state courts may enter the findings necessary for SIJS applications. First, a juvenile court in Washington State may generally sentence a juvenile offender to be committed to a juvenile rehabilitation facility up until the juvenile's twenty-first birthday. RCW § 13.40.300(1). In such proceedings, a state court may continue to exercise jurisdiction over a juvenile offender and determine that juvenile's custody after the youth turns 18 "if prior to the juvenile's eighteenth birthday . . . [p]roceedings are pending seeking the adjudication of a juvenile offense and the court by written order setting forth its reasons extends jurisdiction of

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[the] juvenile court over the juvenile beyond his or her eighteenth birthday." RCW § 13.40.300(3)(a).

Second, the Vulnerable Youth Guardianship (VYG) statute, enacted by the state legislature in 2017, "grants the superior courts jurisdiction to make judicial determinations regarding the custody and care of . . . an unmarried person under twenty-one years of age." *Id.* § 13.90.901(1)(a). In VYG proceedings, the court determines placement with a suitable and responsible guardian pursuant to specific state law requirements *Id.* § 13.90.020(3)(c)-(e). A state court has the authority to determine the youth's custodial placement and issue SIJS findings until that youth turns 21, when the VYG automatically terminates. *Id.* § 13.90.060(1).

Finally, under the Extended Foster Care (EFC) program, Washington state courts maintain jurisdiction over continued dependency proceedings for youth who were declared legally dependent on the state before turning 18. *Id.* § 13.34.267(1). To participate in EFC, a youth must first be determined legally "dependent" before turning 18. *Id.* § 74.13.031(11)(b). Where a youth elects to participate in EFC upon turning 18, the dependency proceedings may continue until the youth turns 21. *Id.* During this time, the state court maintains jurisdiction over the youth's extended foster care services and thus may issue SIJS findings. *Id.* § 13.34.267.

IV. 2018 USCIS Policy on SIJS Orders Issued to 18- to 20-Year-Old Youth

In the summer of 2017, USCIS radically changed its adjudication practices for SIJ petitions submitted by youth who obtained predicate SIJS orders after turning 18 but before turning 21. Instead of adjudicating SIJS petitions within 180 days as the law requires, *see* 8 U.S.C. § 1232(d)(2), USCIS began holding, delaying the adjudication of, and ultimately denying, the SIJS petitions filed by youth 18 and older. Dkt. 9 ¶¶ 9-10; Dkt. 10 ¶¶ 11-13. In February 2018, Defendant DHS issued new guidance to USCIS stating that "in order for a court order to be valid for the purpose of establishing SIJ eligibility, the court must have competent jurisdiction

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to determine both whether a parent could regain custody and to order reunification, if warranted." Dkt. 4-2 at 1 (the "2018 Policy"). USCIS spokesperson Jonathan Withington publicly confirmed this position in April 2018, asserting that most state courts do not have power to enter SIJS findings for youth age 18 and older:

> Since most courts cannot place a child back in the custody of their parent once the child reaches the age of majority (as determined by state and in most instances that is age 18), those state courts do not have power and authority to make the reunification finding for purposes of SIJ eligibility.

Dkt. 4-1 at 9. USCIS incorporated the policy into its Consolidated Handbook of Adjudications Procedures (CHAP), which is distributed to USCIS employees. Dkt. 4-3 at 2-3.

Pursuant to that policy, USCIS categorically denied SIJS petitions filed by youth who obtained SIJS findings in Washington State after turning 18 but before turning 21. *See, e.g.*, Dkt. 42 at 7; Dkt. 4-7 ¶¶ 2-3; Dkt. 4-10 ¶¶ 2-3; Dkt. 9 ¶¶ 9-10; Dkt. 11 ¶ 11. Before its sudden imposition of this new requirement for SIJS petitions, USCIS and the Administrative Appeals Office (AAO) routinely accepted the jurisdiction of state courts to make SIJS findings for applicants who are 18- to 20-years-old. Dkt. 42 at 7 (describing USCIS policy change); *see also* Amy Taxin & Deepti Hajela, *Young Immigrants Seeking Refuge From Abuse Face Denials*, U.S. News (Jan. 2, 2019), https://bit.ly/2T8NAdJ (discussing policy shift from approving the "overwhelming majority" of SIJS petitions to sending "a flurry of denial notices" to petitioners age 18 and older). As detailed below, this policy led Defendants to delay and deny class members' SIJS applications.

V. Factual and Procedural Background of Plaintiffs' SIJS Petitions

a. Plaintiff Moreno Galvez

Plaintiff Leobardo Moreno Galvez is a 21-year-old citizen of Mexico. *See* Dkt. 5 ¶ 1. Growing up, Leobardo suffered severe physical abuse by his father. *Id.* ¶ 5. He was forced to

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drop out of school when he was 8 years old and began working at 12 years old. *Id.* ¶¶ 4, 6-9. When he turned 14, he came to the United States on his own. *Id.* ¶¶ 10-11. In 2016, Leobardo was placed in juvenile offender proceedings after being arrested for Minor in Possession as a 17-year-old. *Id.* ¶ 12. Pursuant to RCW § 13.40.300(3)(a), the Skagit County Superior Court adjudicating the offense extended its jurisdiction past Leobardo's 18th birthday. *Id.* On October 20, 2016, when Leobardo was 18 years old, the Skagit County Superior Court placed him in the custody of a state agency or department and entered SIJS findings. Dkt. 4-4 at 1-2.

On December 2, 2016, Leobardo submitted his Form I-360, Petition for Special Immigrant Juvenile Status to USCIS. Dkt. 4-7 at 2-3. Two years later, USCIS denied his I-360 pursuant to its new policy, claiming that "the evidence . . . does not establish that the state court had jurisdiction under state law to make a legal conclusion about returning you to your parent(s)' custody." Dkt. 4-7 at 2. After this Court's July 2019 order, Leobardo's I-360 was reopened and then approved on August 20, 2019. Second Maltese Decl. (Maltese Decl.) Exs. A-B.

b. Plaintiff Vicente Ramos

Plaintiff Jose Luis Vicente Ramos is a 21-year-old Guatemala citizen. *See* Dkt. 6 ¶ 1. While growing up, both parents physically abused Jose. *Id.* ¶ 2-3. As a result, Jose fled from his home when he was 17 years old and entered the United States as an unaccompanied child on July 3, 2016. *Id.* ¶¶ 6, 8. Jose was initially placed in a shelter for unaccompanied minors but later released to live with his cousin in Vancouver, Washington. *Id.* ¶ 8.

In February 2018, U.S. Immigration and Customs Enforcement (ICE) detained Jose and placed him in custody at the Northwest Detention Center. *Id.* ¶ 11. On June 1, 2018, the Pierce County Superior Court appointed his cousin as his guardian in VYG proceedings and entered SIJS findings. Dkt. 4-8 at 1-2. On June 11, 2018, Jose submitted his Form I-360, Petition for

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Special Immigrant Juvenile Status to USCIS. Dkt. 6 ¶ 10. On February 5, 2019, USCIS denied Jose's SIJS petition on the basis that "the evidence you submitted does not establish that the state court had jurisdiction under state law to make a legal conclusion about returning you to your parent(s)' custody." Dkt. 4-9 at 2; Dkt. 4-10 at 1-2.

After this Court's order in July 2019, Jose's I-360 was reopened and approved on August 19, 2019. Maltese Decl. Exs. C-D. In light of that decision, on September 25, 2019, Immigration and Customs Enforcement (ICE) released Jose pursuant to a parole request and on October 10, 2019, the Board of Immigration Appeals remanded Jose's case to the immigration court in light of the approval of SIJS. Maltese Decl. Exs. E-F. Since his release from immigration custody, he has returned to live with his guardian in Washington State, where he has been able to enroll in local community college classes to work towards his GED, as his high school education was disrupted when ICE detained him in February 2018. Maltese Decl. Ex. G.

c. Plaintiff Muñoz Olivera

Plaintiff Angel de Jesus Muñoz Olivera is a 21-year-old citizen of Mexico. *See* Dkt. 7 ¶¶ 1-2. When Angel was around 10 years old, his father, who was abusive to Angel's mother, abandoned the family. *Id.* ¶ 2. Angel's mother, in turn, would hit Angel with a belt, clothes hangers, and her cell phone. *Id.* ¶ 3. In August 2017, Angel's mother disappeared and was later discovered dead. *Id.* ¶ 4. Shortly after their mother's death, Angel and his younger brother fled to the United States, fearing for their lives. *Id.* ¶ 5.

Upon presenting themselves at the border on August 30, 2017, Angel was separated from his brother and detained for over three months. *Id.* ¶ 6. On November 3, 2017, the Pierce County Juvenile Court appointed Angel's relative as his guardian in VYG proceedings and entered SIJS findings. Dkt. 4-11 at 1-2. Angel then submitted his Form I-360, Petition for Special Immigrant

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Juvenile Status to USCIS in November 2017. Dkt. 7 ¶ 10. Following this Court's order on July 11, 2019, his I-360 was approved. Maltese Decl. Ex. H. His I-485 application to adjust his status to that of a lawful permanent resident was filed with USCIS on November 18, 2019 and remains pending. Maltese Decl. Ex. I. Angel continues to reside with his guardian, and with her support, graduated from high school last spring. Maltese Decl. Ex. J.

VI. USCIS Adoption of Administrative Appeals Office Decisions and Proposed Regulations

As this Court noted in its order granting preliminary injunctive relief, three other district courts have also enjoined Defendants' 2018 Policy. *See, e.g.*, *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019); *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D. Cal. 2018); *W.A.O. v. Cuccinelli*, No. 2:19-cv-11696, 2019 WL 3549898 (D.N.J. July 3, 2019).[1] Following the preliminary injunctions or summary judgment orders in each of these cases, USCIS adopted an Administrative Appeals Office (AAO) decision on October 15, 2019 that addressed the 2018 Policy. *See* Maltese Decl. Ex. K. The next day, on October 16, 2019, USCIS also reopened the comment period for previously proposed regulations that would create significant changes in the SIJS application process. *See* Special Immigrant Juvenile Visa Petitions, 84 Fed. Reg. 55250 (Oct. 16, 2019).

First, in the AAO decision, USCIS stated that the agency would not require evidence that a state court had the authority to place a petitioner in the custody of a parent in order to make a qualifying determination regarding parental reunification for purposes of SIJ classification. *See Matter of D-Y-S-C-,* Adopted Decision 2019-02 at 6 n.4 (AAO Oct. 11, 2019), Maltese Decl. Ex.

[1] Class counsel's understanding is that the California *J.L.* litigation reached a settlement agreement. *See* Maltese Decl. Ex. L. However, the agreement in that case lasts only until one year after Defendants in that case adjudicate class members' SIJS petitions. *See id* at 15. As for the *R.F.M.* litigation in New York, the district court granted summary judgment in the plaintiffs' favor. *R.F.M.*, 365 F. Supp. 3d at 383. Counsel's understanding is that the *W.A.O.* litigation in New Jersey remains pending after the court there entered a preliminary injunction.

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K at 6. In doing so, the agency cited to this Court's decision and that of the three other courts that have enjoined its 2018 Policy. *See id.*

Second, the proposed regulations purport to interpret 8 U.S.C. § 1232(d)(2), the provision providing the "expeditious" adjudication timeline for SIJS applications. Under the proposal, which was initially issued in 2011, *see* Special Immigrant Juvenile Petitions 76 Fed. Reg. 54978 (Sept. 6, 2011), the 180-day timeframe would "start over" when USCIS issues a request for "initial evidence."[2] 76 Fed. Reg. at 54983. USCIS also proposes interpreting § 1232(d)(2) to "stop as of the date USCIS sends" a "request for additional evidence." *Id.* As of the date of this filing, USCIS had not issued final regulations implementing the proposal.

ARGUMENT

Summary judgment must be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1152 (9th Cir. 2012). Here, the material factual issues are not in dispute: Plaintiffs are young immigrants who received predicate SIJS orders from Washington state courts and filed SIJ applications with USCIS. However, in 2018, USCIS adopted a new policy that specified that for a state court to be one of "competent jurisdiction" to make the necessary SIJ findings, the court must have the power "to order reunification, if warranted" with a parent. USCIS subsequently denied two of Plaintiff's SIJ applications on this basis.[3] The only issue before this Court is whether the agency's policy violates federal law. For the reasons below, class members are entitled to a

[2] SIJS applications require an applicant to submit supporting documents with the application, meaning that the request for an "initial evidence" is generally a request for "more evidence." *See* 8 C.F.R. § 204.11(d).

[3] USCIS had not adjudicated Plaintiff Muñoz Olivera's SIJ application, which the agency received on November 15, 2017, at the time of this Court's July 17, 2019 Order Granting Plaintiffs' Motion for Preliminary Injunction. Dkt. 42 at 7.

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summary judgment order setting aside Defendants 2018 Policy under the APA for violating the INA and failing to adhere to the APA's procedural requirements.

Class members also seek permanent injunctive relief that would require Defendants to comply with the INA's timeline for SIJS adjudications. To receive permanent injunctive relief, "the party seeking [such] relief [must] demonstrate[] that: (1) it is likely to suffer irreparable injury that cannot be redressed by an award of damages; (2) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (3) that the public interest would not be disserved by a permanent injunction." *City & Cty. Of San Francisco v. Trump*, 897 F.3d 12 1225, 1243 (9th Cir. 2018) (internal quotation marks omitted). As detailed below, class members can show that Defendants have violated the INA's statutory timeline and that they also satisfy the other criteria for a permanent injunction. Accordingly, this Court should issue a final judgment setting aside Defendants' 2018 policy and order Defendants to comply with the INA's deadline for SIJS applications.

I. USCIS' Requirement Regarding Youth Over the Age of 18 Violates Federal Law.

As this Court and all other courts to address the issue have found, Defendants' policy violates the plain language of the SIJS statute and thus violates the APA. The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788 (1992). A court "shall" set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), if that action is "in excess of statutory . . . authority," *id.* § 706(2)(C), or was reached "without observance of procedure required by law," *id.* § 706(2)(D). Here, as this Court has already preliminarily determined, Dkt. 42 at 8-13, Defendants' 2018 Policy must be "set aside" for each of these reasons, because the new policy

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(1) violates the INA, (2) was imposed without explanation, and (3) was issued without the required notice and comment rulemaking and without publication in the Federal Register. *Id.* § 706(2)(A). As with formal rulemaking, final agency action achieved through an informal process is subject to review under section 706 of the APA. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (noting that "arbitrary and capricious" review is available for agency interpretive rules that do not proceed through notice and comment rulemaking).

a. USCIS's new requirement contravenes the INA and APA.

First, USCIS's 2018 Policy is unlawful because it imposes an eligibility requirement for SIJS that does not exist anywhere in the law and which is inconsistent with the INA. *See, e.g.*, Dkt. 42 at 9 ("There is no textual authority for the new requirement in the statute."). As a result, the new requirement is "not in accordance with law," 5 U.S.C. § 706(2)(A) and is "in excess of [the agency's] statutory . . . authority," *id.* § 706(2)(C); *see also Nw. Enviro. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008). This Court's order granting preliminary injunctive relief is consistent with three other federal courts that have also held that Defendants' new requirement is inconsistent with the INA's text and thus violates the APA's requirements. *See W.A.O. v. Cuccinelli*, 2019 WL 3549898 at *1; *R.F.M. v. Nielsen*, 365 F. Supp. at 377-78 ; *J.L. v. Cissna*, 341 F. Supp. 3d at 1058-62.

USCIS's decisions denying SIJS applications based on this policy are inconsistent with the express language of the INA, which defines "children"—and thus those eligible for SIJS—as unmarried individuals who have not yet reached their 21st birthday. *See* 8 U.S.C. § 1101(b)(1). Indeed, Congress reaffirmed that youth ages 18 to 20 are eligible to receive SIJS by including age-out protections in the TVPRA of 2008 so that DHS may not deny SIJS on the basis of age if the child is under 21 years old on the date she files a SIJS petition. *See* TVPRA § 235(d)(6), 122

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Stat. at 5080. Nevertheless, USCIS's spokesperson explicitly acknowledged that the new requirement would prevent most children over 18 from receiving SIJS. Dkt. 4-1.

Neither the SIJS statute nor any regulation indicate a state court must have authority to order the reunification of a child and her parent to be recognized as a court with authority to make SIJS findings. Indeed, requiring such authority would be contrary to Congress's express mandate that DHS provide protection for those children who a state court concludes *cannot* be reunited with family members. 8 U.S.C. § 1101(a)(27)(J)(i). Similarly, the regulatory definition of "juvenile court" makes no reference whatsoever to reunifying a petitioner with his or her parents, providing only that a juvenile court is one with "jurisdiction under State law to make judicial determinations about the care and custody of juveniles." 8 C.F.R. § 204.11(a). As this Court noted in its order granting Plaintiffs' preliminary injunction

> USCIS does not explain, and the Court cannot reasonably discern, why the state court would have to have the capacity to compel reunification in order to determine whether reunification is a viable option. The SIJ statute is not concerned with actual custody orders. If the state court were to find that reunification is viable, SIJ status is simply unavailable: the statute does not require the juvenile court to actually make a particular placement."

Dkt. 42 at 9 n.3.

Washington's state courts satisfy the requirements of the SIJS statute. These courts have jurisdiction over the custody and care of 18- to 20-year-old youth in judicial proceedings governed by RCW § 13.40.300 (juvenile offender), RCW § 13.90.010 *et seq.* (Vulnerable Youth Guardianship) and RCW § 13.34.267 (Extended Foster Care). Indeed, this Court has already found that the state courts adjudicating the named plaintiffs' cases had jurisdiction to make SIJS findings. Dkt. 42 at 10 ("The Washington courts that placed Moreno Galvez in state custody and appointed guardians for Vicente Ramos and Muñoz Olivera had jurisdiction under state law to determine their care and custody and, pursuant to the plain language of the governing statute and

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regulations, had jurisdiction to make the required SIJ findings.").

Moreover, Defendants' 2018 Policy is inconsistent with the INA because it defies Congress' expansion of SIJS eligibility beyond youth in foster care. As the denials issued to Plaintiffs Moreno Galvez and Vicente Ramos demonstrate, USCIS relies on an outdated regulation to support the position that a state court can make SIJS findings only if it has the authority to "reunify [the youth] with one or both parents." *See, e.g.*, Dkt. 4-7 at 2 (citing to 8 C.F.R. § 204.11(a)'s "definitions of juvenile court and eligible for long-term foster care"); Dkt. 4-10 at 2 (same); *J.L.*, 341 F. Supp. at 1059-60. To justify this requirement, USCIS cites 8 C.F.R. § 204.11(a)'s definition of "[e]ligible for long-term foster care," which requires a "determination . . . that family reunification is no longer a viable option." But as this Court explained, a court need not have the capacity to order reunification in order to determine that reunification is no longer a viable option. Dkt. 42 at 9 n.3. Moreover, the regulation's reference to foster care is no longer applicable because the TVPRA eliminated the requirement that a child be found eligible for long-term foster care to be eligible for SIJS.[4] *See supra* p. 3; *J.L.*, 341 F. Supp. 3d at 1059 ("The TVPRA expressly removed all references to long-term foster care from the SIJ statute.").

USCIS nevertheless determined that the court "must also have the power to compel reunification if warranted," *J.L.*, 341 F. Supp. 3d at 1059, relying on obsolete regulatory language defining "[e]ligible for long-term foster care," 8 C.F.R. § 204.11(a). But "USCIS's reliance on language that has been explicitly removed by Congress casts significant doubt on the validity of its interpretation." *J.L.*, 341 F. Supp. 3d at 1060. Indeed, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone*

[4] USCIS has acknowledged the SIJS regulations are outdated and inconsistent with the SIJS statute. *See* USCIS Ombudsman, Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications (Dec. 11, 2015), https://bit.ly/2Tq2Kud (recommending USCIS "[i]ssue final SIJ regulations that fully incorporate all statutory amendments.").

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v. INS, 514 U.S. 386, 397 (1995). Here, Congress decided not to make foster care the touchstone of SIJS eligibility, but instead determined to expand this humanitarian relief for any petitioner where the state court determines that "reunification with 1 or both of the immigrant's parents is not viable." 8 U.S.C. § 1101(a)(27)(J)(i). The agency's policy is directly counter to Congress's effort to expand SIJS beyond foster care youth and to allow SIJS findings to be made in a wider range of custodial and dependency proceedings, such as the state court proceedings at issue here.

In short, the plain language and purpose of the SIJS statute defeat Defendants' argument. The SIJS statute requires only that a state court determine reunification with one parent is not viable. 8 U.S.C. § 1101(a)(27)(J)(i). Thus, USCIS's 2018 Policy violates the SIJS statute by refusing to (1) accept the state court's finding that it has the authority to determine the care and custody of the youth, and (2) defer to the state court's determination that a child cannot reunify with at least one of the child's parents. Indeed, as this Court has already stated, "the imposition of the 'reunification' requirement is inconsistent with the SIJS statute's plain language, exceeded the agency's authority, and is unreasonable." Dkt. 42 at 12.

Significantly, Class members' challenge to Defendants' policy to deny applications is not moot.[5] As the Supreme Court has explained, "[i]t is well settled that a 'defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). This principle ensures that "a resumption of the challenged conduct" does not recur "as soon as the case is dismissed." *Knox v. Service Emps. Intern. Union*, 567 U.S. 298, 307 (2012). As the Ninth

[5] Any party claiming mootness "bears a heavy burden" to demonstrate dismissal is appropriate. *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (internal quotation marks omitted). This is especially true here, where Defendants ceased enforcing their policy only due to a court order, *see Matter of D-Y-S-C-* at 6 n.4, Maltese Decl. Ex. K at 6.

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Circuit has noted, this is similarly true where a party was preliminarily enjoined from engaging in such conduct. *See FTC v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (voluntary cessation pursuant to a preliminary injunction did not render case moot). Thus, Defendants' current compliance with court orders does not render the case moot.

b. USCIS's new requirement is arbitrary and capricious.

Second, USCIS's new policy is arbitrary and capricious because Defendants failed to give "adequate reasons for [the agency's] decision[]" to depart from past practice and impose a new SIJS eligibility requirement. *Encino Motorcars, LLC v. Navarro*, *LLC*, 136 S. Ct. 2117, 2125 (2016). This "reasoned explanation" requirement, Dkt. 42 at 12, is particularly important where a prior policy "has engendered serious reliance interests that must be taken into account." *Mortg. Bankers Ass'n*, 575 U.S. at 106 (citation omitted). Indeed, reversing an existing policy requires a "more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Here, no such reasoned agency explanation exists for the agency's reversal of its prior policy. To the contrary, all Defendants ever offered to defend the policy was a single sentence explanation to one media outlet. Dkt. 4-1. In fact, despite raising this argument at the preliminary injunction stage, Defendants could not even then articulate a reasoned explanation to support the policy. As the Court noted, "USCIS has not responded to this argument [regarding the need for a reasoned explanation], and the record reveals no evidence that the agency 'examine[d] the relevant data' or 'articulate[d] a satisfactory explanation for its action.'" Dkt. 42 at 12 (alterations in original) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). As such, USCIS's new policy is arbitrary and capricious "because the agency failed to provide a reasoned explanation." *Id*. at 12-13.

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c. USCIS adopted the new requirement without notice and comment rulemaking, and without adequate notice.

Additionally, a court must also invalidate agency action if the agency does not follow the procedures required by law. 5 U.S.C. § 706(2)(D). Here, USCIS failed to follow two key procedural requirements in enacting its new policy. First, USCIS was required to follow notice and comment rulemaking. Where an agency issues a rule that has the "force of law," the agency must use the notice and comment rulemaking process provided at 5 U.S.C. § 553 to enact the new rule. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (citation omitted). Such "[l]egislative rules . . . create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Id.* Here, "[b]ecause the new policy creates a binding norm and compels agency adjudicators to withhold consent to SIJ status whenever the state court lacked the power to order reunification, it has substantive effect and is subject to the notice and comment rulemaking process." Dkt. 42 at 13 (*citing Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009)). Thus, the agency's failure to follow the notice and comment process is a violation of the APA's procedural requirement.

Second, even if USCIS's new requirement were simply a "general statement of policy" or an "interpretative rule" that does not require notice and comment rulemaking, 5 U.S.C. § 553(b)(3)(A), the APA provides that an agency must publish such a statement or rule of "general applicability" in the Federal Register to provide notice to affected parties, *id.* § 552(a)(1)(D). Violation of this notice requirement is a basis for setting aside agency action where the affected individuals lacked adequate and timely notice and suffered prejudice. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974) (overturning the Bureau of Indian Affairs' denial of benefits for failure to provide notice that benefits were no longer available to those who lived off reservations); *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (affirming grant of summary

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judgment rendering unenforceable the Secretary of Agriculture's decision to include rent subsidies as "income" for food stamp purposes when he failed to provide notice). Thus, regardless of how the 2018 Policy is classified, Defendants have failed to follow the procedural requirements of the APA and an order permanently setting aside the policy is warranted.

II. The Court Should Issue a Permanent Injunction Requiring Defendants to Adjudicate Class Members' Applications Within 180 Days of an Application's Initial Filing Date.

In addition to setting aside Defendants' 2018 Policy, a permanent injunction is appropriate with respect to the statutorily mandated timeline for SIJS applications. Under 8 U.S.C. § 1232(d)(2), Congress made clear that USCIS "shall" adjudicate SIJS applications "not later than 180 days after the date on which the application is filed." As an initial matter, there is no dispute that Defendants regularly violate this statutory mandate. *See* Dkt. 42 at 13 ("USCIS has failed to adjudicate plaintiffs' SIJ petitions within the 180-day statutory deadline."); *see id.* at 8 ("As of September 24, 2018, the National Benefits Center had a backlog of 32,518 SIJ petitions, with 23,589 of them pending for more than 180 days."). Indeed, Defendants submitted a declaration to this Court acknowledging that most SIJS applications from Washington State have been pending for more than 150 days, Dkt. 46 ¶ 15, and have offered only legal arguments addressing why they believe they should not be required to comply with the statute. Dkt. 25 at 34-37. Moreover, at least two declarants also noted that prior to this Court's injunction mandating compliance with the statute, Defendants regularly disregarded the 180-day deadline for adjudication. *See* Dkt. 9 ¶ 11; Dkt. 10 ¶¶ 11-13.

Given this clear statutory violation, a permanent injunction is appropriate. As the Ninth Circuit has explained, district courts may issue an injunction to cure an agency's refusal to abide by a deadline where that "injunction is necessary to effectuate the congressional purpose behind the statute." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002). In

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Badgley, the Ninth Circuit affirmed a district court's injunction mandating that the U.S. Fish and Wildlife Service comply with a twelve-month statutory deadline in the Endangered Species Act for determining whether to list a species as endangered. *Id.* at 1170, 1176-77. At least one district court in the Western District of Washington has similarly applied this principle to require USCIS to comply with a federal *regulation*. *See Gonzalez Rosario v. USCIS*, 365 F. Supp.3d 1156 (W.D. Wash. 2018). And of course, this Court relied solely on the statutory deadline to mandate preliminary relief early in this case. Dkt. 42 at 13-14.

An injunction is especially appropriate here because Congress's purpose is clear. Section 1232(d)(2) is not discretionary, as the statute's text demonstrates. The Supreme Court has repeatedly observed that Congress's use of "shall" imposes a "discretionless obligation[]," *Lopez v. Davis*, 531 U.S. 230, 241 (2001), noting that "shall" will "generally indicate[] a command that admits of no discretion on the part of the person instructed to carry out the directive," *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007) (quoting *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)). Here, Congress also made its purpose clear by entitling the subsection (d)(2) "Expeditious Adjudication." By naming the subsection in this way, Congress further underscored the need for USCIS to prioritize and adjudicate SIJS applications quickly. *See Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)).

USCIS's proposed regulation, which would provide the agency with many more months, if not years, to adjudicate applications—defies these principles and is a transparent attempt to render Congress's mandate meaningless. As noted above, the proposed rule purports to allow USCIS to restart the adjudication timeline by issuing a request for evidence (RFE), and then

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again pauses the deadline when the agency issues additional RFEs. Case law makes clear that an an agency is not empowered to undermine a statutory deadline in this way. First, as noted above, the statute here imposes an unambiguous, mandatory duty on the agency that eliminates agency discretion to extend or bypass that deadline. Second, when faced with a clear statutory deadline, courts do not tolerate agency efforts to "circumvent the stringent time limits" established by Congress. *Cont'l Airlines, Inc. v. U.S. Dep't of Transp.*, 856 F.2d 209, 216 (D.C. Cir. 1988); *Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002) (holding that EPA violated law and was without authority to extend deadline where the "plain terms of the Act preclude an extension of the sort the EPA granted here"). Similarly, the Supreme Court has observed that where Congress sets "precise deadlines" for agency action, "practical difficulties . . . do not justify departure from the Act's plain text." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014). As a result, the statute and Congress's intent is clear: USCIS must adjudicate SIJS applications within 180 days of their filing. And because it is clear, a permanent injunction is appropriate. *Badgley*, 309 F.3d at 1176-77.

However, relief is also appropriate even if this Court were to apply instead the factors from *Telecommunications Research & Action Center v. F.C.C.* (*TRAC*), 750 F.2d 70 (D.C. Cir. 1984). *See also In re Pesticide Action Network N. Am. v. EPA*, 798 F.3d 809, 813 (9th Cir. 2015) (applying test from *TRAC*) While class members emphasize that applying this test is not appropriate here, since "Congress has specifically provided a deadline for performance," they can nevertheless demonstrate that an injunction is appropriate even under the six *TRAC* factors. *Badgley*, 309 F.3d at 1176 n.11.

Under *TRAC* and the Ninth Circuit's decisions applying that case, courts must first assess "the time agencies take to make decisions," which is "governed by a rule of reason." Where

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"Congress has provided a timetable[,] . . . th[e] statutory scheme may supply content for this rule of reason." *In re Pesticide Action Network*, 798 F.3d at 813. Of course, here that factor strongly supports requiring the agency to adjudicate applications within 180 days. As described above, Congress has imposed a mandatory, 180-deadline, thus "supply[ing]" the rule of reason that governs Defendants' conduct. *Id.* Moreover, even if Congress has not mandated it, the 180-day deadline is a perfectly reasonable one, as "a reasonable time for agency action is typically counted in weeks or months, not years." *In re A Community Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)).

The next *TRAC* factor asks whether a case involves "economic regulation" or "human health and welfare," noting that delays are less tolerable in the latter category. *In re Pesticide Action Network*, 798 F.3d at 813. Here, this factor also strongly favors requiring Defendants to respect the statutory deadline, as the entire purpose of SIJS is to provide abandoned, abused, and neglected youth with a pathway to lawful status and stability in the United States. *See supra* pp. 2-4. Similarly, courts must next consider "the effect of expediting delayed action on agency activities of a higher or competing priority." *In re Pesticide Action Network*, 798 F.3d at 813. This factor also favors Plaintiffs. Congress's decision to set a deadline indicates that Congress considers SIJS applications to be a high priority, as many other forms of immigration benefits do not contain specific deadlines. Moreover, the same pressing "human health and welfare" concerns associated with SIJS adjudications further demonstrate why expeditious adjudication of such applications is especially appropriate—as Congress has recognized. *See* Dkt. 42 at 14-15 (explaining that SIJS protects vulnerable youth from removal, helps them to gain stability through relationships and support systems, and obtain other benefits).

A court should "also take into account the nature and extent of the interest prejudiced by

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the delay." *In re Pesticide Action Network*, 798 F.3d at 813. For "human health and welfare" reasons, this factor again supports Plaintiffs. As this case demonstrates, USCIS's failure to timely adjudicate applications can prolong an individual's detention or result in their removal—some of the most serious interests that courts recognize. *See, e.g.*, Dkt. 6 ¶¶ 11-13; Dkt. 11 ¶¶ 11-14; *see also Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss of all that makes life worth living." (internal quotation marks omitted)); *Rodriguez v. Marin*, 909 F.3d 252, 256-57 (9th Cir. 2018) (discussing the importance of freedom from civil detention). Indeed, as this Court stated in granting a preliminary injunction, SIJS "benefits provide relief from or make less likely removal from the United States and the loss of the relationships and support systems these vulnerable youth have cobbled together in this country: the loss of these benefits constitutes irreparable harm." Dkt. 42 at 15; *see also id.* (acknowledging that "continuing civil detention" is a serious harm). Defendants' delays threaten these important interests, and as result, this factor further favors Plaintiffs. *See In re A Community Voice*, 878 F.3d at 787 (relief appropriate where "there is a clear threat to human welfare").

Finally, the last *TRAC* factor notes that a "court need not find any impropriety lurking behind agency lassitude" to grant relief. At a minimum, this factor is neutral. But here, the agency delay is in part attributable to the 2018 Policy, which USCIS invented out of whole cloth without going through the appropriate rulemaking procedures or providing notice to the public. *See supra* pp. 5-6. While this agency action may not rise to the level of bad faith, "[t]here is no textual authority for the [agency's] new requirement in the statute", Dkt. 42 at 9, and the policy was a transparent effort to limit SIJS eligibility to youths under the age of 18. *Independence Min. Co. v. Babbitt*, 105 F.3d 502, 510 (9th Cir. 1997) (agency impropriety supports finding of unreasonable agency delay). Again, if anything, this factor also favors Plaintiffs. Thus, even if

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the *TRAC* factors were applicable, they strongly weigh in favor of Plaintiffs. But as this Court found in issuing preliminary injunctive relief and given Congress' expressly mandated timeline, "Congress prioritized the adjudication of SIJ petitions, requiring that requests for special immigrant status filed by vulnerable youth be adjudicated within 180 days." Dkt. 42 at 14.

III. The Other Permanent Injunction Factors Also Favor Class Members.

Finally, the other factors for granting a permanent injunction also favor class members. For the same reasons that applied at the preliminary injunction stage, a permanent injunction with respect to the statutory timeline is appropriate here. USCIS's practice of adjudicating the vast majority of SIJS applications long after the statutory deadlines is one for which there is "no adequate legal remedy, such as an award of damages." *Ariz. Dream Act. Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). As one court in this district has noted, "the Ninth Circuit has at least implicitly rejected the notion that delay is not irreparable harm." *Doe v. Trump*, 288 F. Supp. 3d 1045, 1082 (W.D. Wash. 2017) (citing *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017), *opinion vacated on procedural grounds by* 138 S. Ct. 377 (2017)).

Moreover, the agency's delay in this case produces other forms of irreparable harm. As with Plaintiff Jose Vicente Ramos, delays in adjudication can prolong detention, an unquestionable form of irreparable harm. *See* Dkt. 42 at 15. Similarly, delays in adjudication can result in an individual's removal, and as a result, the deportation of an abandoned, abused, or neglected youth—precisely the sort of irreparable harm Congress sought to avoid by creating SIJS. *See, e.g.*, *Osorio-Martinez v. U.S. Att'y Gen.*, 893 F.3d 153, 171 (3rd Cir. 2018) ("Congress . . . afforded these [noncitizens] a host of procedural rights designed to sustain their relationship to the United States and to ensure they would not be stripped of SIJ protections without due process."); *id.* at 179 (finding irreparable harm if children with SIJS were removed

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in light of state court's determination that "it would not be in the child's best interest to be returned to his or her country of origin") *Joshua M v. Barr*, --- F. Supp. 3d ---, 2020 WL 836606 (E.D. Va. 2020) (staying removal of petitioner who USCIS had granted SIJS); *Padilla Lopez v. Wolf*, No. 2:19-cv-020003, Dkt. 8 (W.D. Wash. Dec. 9, 2019) (granting temporary restraining order preventing removal of 18-year-old Honduran noncitizen who had recently obtained SIJS).

Class members will be denied other benefits available through SIJS because of the delay in adjudication of their applications. *See, e.g.*, 42 U.S.C. § 18001(d)(1) (specifying only lawfully present individuals are eligible for coverage under the Affordable Care Act). The delay in class members' ability to obtain these benefits also constitutes irreparable harm. *See, e.g.*, *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (finding irreparable injury when enforcement of rule "may deny [class members] needed medical care").

Finally, the balance of hardships and public interest favor class members. First, this is true because as the Court noted before, Dkt. 42 at 16, "it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir 2013) (alteration in original) (citation omitted); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (noting the government "cannot suffer harm from an injunction that merely ends an unlawful practice"). Second there is "a public interest in preventing [noncitizens] from being wrongfully removed," as is threatened here. *Nken v. Holder*, 556 U.S. 418, 436 (2009).

CONCLUSION

For all the foregoing reasons, class members respectfully ask the Court to set aside Defendants' policy and permanently enjoin Defendants from violating the deadline set forth in the INA for adjudicating their applications.

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DATED this 1st day of May, 2020.

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s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 1st day of May, 2020.

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