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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

AKHILESH R. VANGALA; I.S.A.; and KENNY M. CASTANEDA PENATE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES and U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendants.

No. 3:20-cv-08143

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiffs AKHILESH R. VANGALA, I.S.A., and KENNY M. CASTANEDA PENATE, on behalf of themselves and all others similarly situated hereby do, move this Court for class certification pursuant to Federal Rule of Civil Procedure 23 at a date and place to be determined.

This motion is based on the attached Memorandum of Points and Authorities, the pleadings, records and files in this action, and such other evidence and argument as may be presented at the time of hearing. A proposed order accompanies these filings.

Respectfully submitted,

s/ Trina Realmuto
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Dated: November 19, 2020

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I. INTRODUCTION AND PROPOSED CLASS DEFINITION

This putative class action challenges a new policy implemented by Defendant U.S Citizenship and Immigration Services (USCIS), a sub-component agency of Defendant U.S. Department of Homeland Security, to reject applications or petitions (hereinafter applications) for immigration benefits. The immigration benefits applications are primarily humanitarian benefits such as asylum, U and T visas, and Special Immigrant Juvenile status, and self-petitions filed by widows and victims of domestic violence. Pursuant to this new "rejection policy," USCIS now rejects (and will not issue a filing receipt for) these applications on the basis that the application is not complete because at least one response field to a question on the application was left blank (other than the signature of the applicant) or otherwise deemed to provide an inappropriate or incomplete response.

With the adoption of this new policy in 2019, USCIS abruptly, and without proper notice, reversed its longstanding policy and practice of accepting and processing applications where applicants did not provide responses to application fields when the question was inapplicable. The sudden and drastic change in practice the rejection policy caused has resulted in thousands of rejected applications. As a result, USCIS has forced applicants and their attorneys to re-file applications and suffer attendant harms caused by the delays. These harms include, but are not limited to, missing the one-year statutory deadline for filing for asylum, losing eligibility for lawful status, having to wait months longer for employment authorizations and other benefits, and incurring additional costs related to legal fees and filing expenses.

Plaintiffs bring this action on behalf of themselves and a proposed class to challenge Defendant USCIS's policy as violative of Administrative Procedure Act (APA). Specifically, the rejection policy abruptly departs from past agency policy and practice without justification or explanation; is unnecessary; was implemented without consideration of less onerous or

consequential remedies, without proper notice and comment rulemaking, and without publication in the Federal Register; is applied by USCIS adjudicators arbitrarily and inconsistently; and is contrary to controlling regulations dictating when applications may be rejected. The accompanying declarations of attorneys attest to the widespread, adverse impact of USCIS's new policy. In these declarations, attorney detail their experiences with rejections under the policy and give voice to the harm it has caused their clients.

This case presents questions of law that are appropriate for class treatment: whether USCIS's implementation of the "rejection" policy and/or the substance of the policy violates the APA. These questions can be resolved on a class-wide basis, making certification appropriate. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move this Court to certify the following class with named Plaintiffs as class representatives:

> All individuals who have filed or will file an application with USCIS that USCIS has rejected or will reject (or has not issued or will not issue a filing receipt for) pursuant to the rejection policy.
>
> The "rejection policy" refers to any and all policies of USCIS implemented in or after 2019 to reject (or not issue a filing receipt for) an application because at least one response field to a question on the application was left blank (other than the signature of the applicant) or otherwise deemed to provide an inappropriate or incomplete response.

Plaintiffs seek an Order from this Court that would (1) declare USCIS's policy to be in violation of the APA; (2) set aside the blank space rejection policy (and any other similar version of it); and (3) compel Defendants to deem applications filed as of the date USCIS initially received them—and not as of the date the agency later accepted the refiling of the previously-rejected application.

II. BACKGROUND

A. USCIS's Rejection Policy

In 2019, USCIS began to implement a new policy (or series of similar policies, which together are referred to here as a policy) under which USCIS rejects applications on the basis that the application contains at least one response field to a question that is left blank (other than the signature) or is otherwise deemed to provide an inappropriate or incomplete response. USCIS is applying this "rejection policy" to select applications and petitions that correspond to humanitarian benefits, including applications for asylum (Form I-589); petitions for U visas (Forms I-918, I-918, Supplement A, and I-918, Supplement B); petitions for T visas (Forms I-914, I-914, Supplement A, and I-914, Supplement B); self-petitions for widowers, victims of domestic violence, and special immigrant status (Form I-360); and petitions to remove conditions of permanent resident status (Form I-751). Complaint (Compl.) ¶¶ 56, 65, 69, 76, 79, 83. For example, USCIS rejects applications, based on the rejection policy (*or* misapplication of the rejection policy), where the application, inter alia:

a) leaves blank the applicant's middle name, the "current location" of deceased relatives, other names used, passport or travel document numbers, or certain family information—even where such information is nonexistent or irrelevant in the applicant's case. Compl. ¶¶ 3, 59, 113–14; Ex. A1, Declaration of Kyle A. Dandelet (Dandelet Decl.) ¶¶ 21–24, 37; Ex. A2, Declaration of Eric Hoshang Pavri (Pavri Decl.) ¶¶ 10–11 (application rejected because the applicant did not include their parents' or two siblings' "current location," even though the applicant checked the box indicating that they were deceased); Ex. A3, Declaration of Sharvari Dalal-Dheini (Dalal-Dheini Decl.) ¶¶ 12–13; Ex. A4, Declaration of Abby Sullivan Engen (Engen Decl.) ¶ 10; Ex. A5, Declaration of Joy Ziegeweid (Ziegeweid Decl.) ¶¶ 9–11; Ex. A6, Declaration of Sally M. Joyner (Joyner Decl.) ¶ 11; Ex. A7, Declaration of Esther Limb (Limb Decl.) ¶ 13; Ex. A8, Declaration of Maria Odom (Odom Decl.) ¶ 10.

b) uses terminology other than "N/A," such as "none" or "not applicable," even in cases where the form instructions explicitly permit such responses to denote inapplicability.[1]

[1] Even while USCIS rejected applications for not including "N/A," many of their online forms did not in fact permit applicants to type "n/a" or "none." *See, e.g.*, Dandelet Decl. ¶¶ 20,

Compl. ¶¶ 64, 73; Pavri Decl. ¶ 7; Dalal-Dheini Decl. ¶ 14; Joyner Decl. ¶ 10; Limb Decl. ¶ 13.

c) leaves a field blank in compliance with specific instructions on the form. For example, the Alert for U visa petitions—Form I-918—states that petitioners must fill out the fields for all questions. By contrast, the instructions for Form I-918, which are published in the Federal Register, explicitly direct crime victims and certifying law enforcement officials to leave certain fields blank when either they do not know the answer to a question or a question does not apply to the case. The Alert and instructions for petitions for T visas, Form I-914, are similarly in direct conflict. Yet, USCIS applies its policy to reject applications that comply with these forms. *See, e.g.*, Compl. ¶¶ 55, 63, 70–71, 75, 77–78, 81–82, 85; Dandelet Decl. ¶¶ 47–58 (application rejected three times even though the applicant wrote "Unclear" because he did not know the answer and provided a detailed explanation in an affidavit); Pavri Decl. ¶ 8 (applications have been rejected where the applicant wrote "N/A" in a field that should have been left blank, yet other applications have been rejected because the same field was left blank).

d) does not include a name written in a "native alphabet" even though the native alphabet was the same as that used in English. Compl. ¶ 59; Engen Decl. ¶ 10(c); Dalal-Dheini Decl. ¶¶ 12(d); Odom Decl. ¶ 10(d); or

e) is, in fact, complete (i.e., all inapplicable fields included "N/A" or "not applicable" or "none"). Compl. ¶¶ 7, 55, 74; Dandelet Decl. ¶¶ 42–46; Engen Decl. ¶¶ 11, 15; Dalal-Dheini Decl. ¶ 14; Joyner Decl. ¶ 9; Declaration of Lisa Koop (Koop Decl.) ¶ 10.

The new rejection policy is an abrupt departure from the agency's longstanding policy and practice for adjudicating applications. For at least twenty years prior to this new policy, USCIS did not reject an application simply because some questions were left unanswered, Instead, USCIS's practice was to only reject applications if a page was missing or if the application was missing a signature or filing fee. Compl. ¶¶ 4, 46–52; Dandelet Decl. ¶¶ 14–17, 47–49; Engen Decl. ¶ 6–7; Pavri Decl. ¶ 5; Joyner Decl. ¶¶ 5–6; Ziegeweid Decl. ¶¶ 5–6, 9; Limb Decl. ¶¶ 7–8; Odom Decl. ¶¶ 7–9; Koop Decl. ¶ 7. If the agency determined that additional information was required, it would issue a request for additional evidence, requesting that the applicant submit the missing information. Compl. ¶ 50. Regulations provide for this procedure,

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40; Engen Decl. ¶ 14; Ziegeweid Decl. ¶ 14; Joyner Decl. ¶ 12; Ex. A9, Declaration of Cecelia Friedman Levin (Levin Decl.) ¶ 10.

see 8 C.F.R. § 103.2(b)(8), which allow an applicant to retain their original filing date. Compl. ¶¶ 50, 90. Immigration attorneys relied on this longstanding policy and practice for accepting applications. Compl. ¶¶ 89–90; Dandelet Decl. ¶¶ 47–48; Pavri Decl. ¶¶ 5–6; Limb Decl. ¶ 9.

USCIS implemented the new policy without publishing it in the Federal Register and without engaging in notice and comment rulemaking. Compl. ¶¶ 61, 86–88. Instead, for each of the forms to which USCIS is now applying the policy, including the Forms I-589, I-918 and Supplements, I-914 and Supplements, I-360, and I-751, the only notice USCIS provided was a short "Alert" on its webpage or a similar statement buried on their webpage under the tab, "Where to File." Compl. ¶¶ 56–61, 65–66, 69, 76, 79–80, 83–84. The only way applicants and immigration attorneys learned of the policy was through rejected applications or from other attorneys whose clients' applications were rejected and the web postings confirming this new rejection policy. Compl. ¶ 87; Dandelet Decl. ¶¶ 18, 33–35; Engen Decl. ¶ 8; Ziegeweid Decl. ¶ 7; Limb Decl. ¶ 9; Odom Decl. ¶ 9; Levin Decl. ¶ 5; Koop Decl. ¶ 8. Moreover, USCIS has provided no basis, let alone a reasoned basis, for the new policy. Compl. ¶ 89.

As a result of the policy, USCIS has rejected thousands of applications, most of which are related to humanitarian immigration benefits. These rejections have had dire consequences. USCIS can take weeks if not more to reject an application. Compl. ¶ 14 (almost two months); *id.* ¶ 15 (one month); *id.* ¶ 93. The applicant or their attorney then must refile the application, a process which can be costly, time consuming, and expends limited nonprofit resources. *Id.* ¶ 93; Engen Decl. ¶ 17 (reporting constraints on nonprofits' ability to provide pro se assistance services due to USCIS's mass rejection of asylum applications); Joyner Decl. ¶ 14 (attesting that "[t]he delays, expense, and the additional work load . . . decreases [nonprofit organization's] capacity to serve our community's most vulnerable immigrant population"); Ziegeweld Decl. ¶ 10; Odom Decl. ¶ 11 ("The rejection of an application results in a delay of several weeks at minimum, and

longer in many cases. . . ."); Levin Decl. ¶ 8. The delays associated with rejections create additional and often irreparable harm. Some asylum seekers whose original applications were timely submitted have missed the statutory one-year application deadline after USCIS rejected their applications. Compl. ¶¶ 92, 94–95; Dandelet Decl. ¶¶ 27–30; Engen Decl. ¶ 18; Dalal-Dheini Decl. ¶ 15 (reporting that at least 25.6 percent of attorneys who responded to a survey indicated that the rejection policy caused their clients to miss the one-year deadline). Similarly, applicants or their family members have aged-out and lost eligibility to be included as derivatives for asylum, U visas, T visas, and self-petitions after USCIS rejected the original applications. Compl. ¶¶ 96, 98–99; Engen Decl. ¶ 11; Dalal-Dheini Decl. ¶ 15; Joyner Decl. ¶ 11; Odom Decl. ¶ 11; Levin Decl. ¶ 8; Koop Decl. ¶ 10. In addition, for U visa petitioners, the required law enforcement certificate, Form I-918, Supplement B, may have expired. These applicants then must obtain a new certificate signed by a law enforcement officer or judge, which is often a difficult and lengthy process. Compl. ¶ 100; Ziegeweld Decl. ¶¶ 10–11 (addressing three month delay in obtaining new law enforcement certification to replace expired certificate, and explaining that delays are exacerbated where applicants without access to printing and scanning technology must resort to back-and-forth mailing to obtain the requisite signatures); Limb Decl. ¶ 13 (explaining that obtaining a new law enforcement certification may take weeks or months due to internal backlogs); Joyner Decl. ¶¶ 9–10; Levin Decl. ¶ 8; Koop Decl. ¶¶ 10–11. Moreover, there are quotas on the number of U and T visas awarded each year. Compl. ¶ 101. Accordingly, an extensive queue exists for these visas, and a rejection under the policy could force crime and trafficking victims to wait additional months or years longer for a visa to become available. *Id.*; Ziegeweld Decl. ¶ 11 (nine additional months); Dandelet Decl. ¶¶ 59–62; Koop Decl. ¶ 11. Further, the rejections increase the time that applicants must wait to receive related benefits, like employment authorization, leaving them no means to support themselves or their families for

delayed periods. Compl. ¶ 97; Pavri Decl. ¶ 12 ("[B]ecause [client] cannot work, she and her 2-year-old daughter are surviving on food from our Catholic Charities food pantry, and have been relying on the charity of members of their church to stay temporarily in their homes and apartments . . . ."); Levin Decl. ¶ 8 (describing a mother of seven children who cannot apply for a driver's license until USCIS accepts Form I-918); Dandelet Decl. ¶¶ 32, 63–64; Engen Decl. ¶ 16; Ziegeweld Decl. ¶¶ 12–13; Limb Decl. ¶ 14; Odom Decl. ¶ 11.

Immigration advocates repeatedly raised concerns about the rejection policy and its impact on vulnerable noncitizens with USCIS, to no avail. Levin Decl. ¶¶ 6–11 (detailing repeated emails to USCIS and DHS which included case examples and requests to remedy the problems caused by the policy); *id*. ¶ 14 (describing an August 2020 coalition letter to USCIS from 146 national and local organizations from more than 30 states calling for a rescission of the policy which remains unanswered); Dalal-Dheini Decl. ¶ 8 (same). Moreover, numerous attorneys asked USCIS to treat the original submission date as the application filing date when they resubmitted their clients' applications, to no avail. Compl. ¶ 116; Dandelet Decl. ¶¶ 25–26, 58; Levin Decl. ¶¶ 7, 9 (describing USCIS's failure to grant this request in the 30 case examples she submitted to the agency); Koop Decl. ¶ 10.

Plaintiffs and prospective class members challenge this policy as unlawful under the APA and seek injunctive and declaratory relief. Plaintiffs raise five causes of action: (1) the rejection policy violates the APA, 5 U.S.C. § 706, as an arbitrary and capricious final agency action because USCIS failed to provide any reasoned explanation for adopting it; (2) the rejection policy violates the APA, 5 U.S.C. § 706, as an arbitrary and capricious final agency action because the policy is ambiguous and thus causes inconsistent agency practice; (3) the rejection policy violates the APA, 5 U.S.C. § 553 because it is a legislative rule that USCIS implemented without notice and comment rulemaking; (4) the rejection policy violates the APA, 5 U.S.C. § 5252(a)(1),

because USCIS failed to provide notice of the policy in the Federal Register; and (5) the rejection policy violates the APA, 5 U.S.C. § 706, as it violates agency regulations that govern the adjudication of applications, and more specifically, agency regulations that limit the bases on which USCIS may reject an application. *See* 8 C.F.R. § 103.2(a)(7)(ii).

B. Named Plaintiffs' Factual Backgrounds

1. Plaintiff Akhilesh R. Vangala

Plaintiff Akhilesh R. Vangala (Mr. Vangala), a noncitizen from India, was the victim of an armed assault and robbery while attending college on a student visa. Compl. ¶¶ 14, 102–03. He helped report the crime to the police. *Id.* ¶¶ 14, 103. Subsequently, on April 1, 2020, Mr. Vangala submitted to USCIS Form I-918, a petition for a U visa, as well as a certification on Form I-918, Supplement B, from the police department. *Id.* ¶ 104. Mr. Vangala's attorney filled out every field on Form I-918, including the inapplicable ones. *Id.* ¶¶ 14, 105.

Almost two months later, on May 27, 2020, USCIS rejected Mr. Vangala's petition under its rejection policy. *Id.* ¶¶ 14. However, the rejection notice was originally sent to the wrong address and thus not delivered to Mr. Vangala's attorney until June 29, 2020. *Id.* ¶¶ 14, 106. Mr. Vangala resubmitted the same petition to USCIS on July 1, 2020. *Id.* ¶ 107. The wrongful rejection of Mr. Vangala's U visa petition places him many months later in the queue for adjudication of U visas, thus delaying his relief for months or longer. *Id.* ¶ 108.

2. Plaintiff I.S.A.

Plaintiff I.S.A. (Ms. S.A.) is a noncitizen from Guatemala who has lived in the United States for more than 15 years. Compl. ¶¶ 15, 109. Ms. S.A. has two sons, J.W.L.S. (J.W.) and J.A.L.S. (J.A.), who also live in the United States. *Id.* ¶¶ 110. In 2019, Ms. S.A. survived a violent crime in California and sought assistance from law enforcement. *Id.* ¶¶ 110.

On December 28, 2019, Ms. S.A. submitted to USCIS a U visa petition, Form I-918,

along with a Form I-918, Supplement B certification executed by the local police, and two derivative petitions for her sons using Form I-918, Supplement A. *Id.* ¶¶ 15, 110. At the time of filing, J.W. and J.A. were both under the age of 21 and were thus eligible to be derivatives on Ms. S.A.'s petition. *Id.* ¶¶ 110.

Ms. S.A. left blank answer fields on her and her son's forms which did not apply to them, such as the fields for "middle name" and "other names used" on her form. *Id.* ¶ 113. She also left blank the "Alien Registration Number" and "USCIS Online Account Number" fields because she did not know or did not have the information at the time. *Id*. When Ms. S.A. submitted her petition, USCIS had not yet posted its alert regarding USCIS's rejection policy on the U visa webpage. *Id.* ¶ 111.

USCIS rejected Ms. S.A.'s petition on January 30, 2020, under its rejection policy, citing the blank fields. *Id.* ¶ 114–15. Ms. S.A. refiled her Forms I-918 and I-918, Supplement A two weeks later, and requested that USCIS honor the original date that USCIS received the application. *Id.* ¶¶ 116. USCIS accepted her refiled application as complete but declined her request as to the filing date, instead noting her refiling date as the date of filing. *Id.* ¶¶ 116–17. By that time, J.W.'s 21st birthday had passed, and he thus had aged out of eligibility to be a derivative on Ms. S.A.'s petition. *Id.* ¶¶ 15, 114, 117.

3. Plaintiff Kenny M. Castaneda Panete

Plaintiff Kenny M. Castaneda Panete (Ms. Castaneda) is a noncitizen from El Salvador who fled persecution in her country along with her two minor children to seek asylum in the United States. Compl. ¶¶ 16, 118. They entered the United States on July 9, 2019. *Id.* ¶¶ 118.

On July 9, 2020—within one year of entering the United States—Ms. Castaneda filed Form I-589 to request asylum. *Id.* ¶¶ 16, 118. She also included her two minor daughters as derivatives on the I-589 application. *Id.* ¶ 119.

Ms. Castaneda's attorney answered "Not Applicable" to several fields in the asylum application that were not relevant to Ms. Castaneda's eligibility for asylum or that did not apply to her, such as fields related to the applicant's spouse, since Ms. Castaneda does not have one. *Id.* ¶ 120. Ms. Castaneda's attorney included her passport number in the application, but left blank the field requesting a travel document number, because Ms. Castaneda does not have one. *Id.* ¶ 121.

USCIS rejected Ms. Castaneda's application on July 14, 2020, pursuant to its rejection policy, citing the single field left blank for travel document number. *Id.* ¶ 122. Ms. Castaneda's attorney again mailed her Form I-589 on August 4, 2020, and requested that USCIS honor the original date that USCIS received the application. *Id.* ¶ 123. USCIS accepted her refiled application as complete but declined her request as to the filing date, instead noting her refiling date as the date of filing. *Id.* ¶ 124. USCIS's rejection notice and subsequent refusal to honor the original receipt date caused Ms. Castaneda to miss the one-year filing deadline for asylum applicants set forth in 8 U.S.C. § 1158(a)(2)(B), and will bar her and her daughters from seeking asylum unless they qualify for an exception. *Id.* ¶¶ 16, 125–26.

III. THE COURT SHOULD CERTIFY THE CLASS

Under Federal Rule of Civil Procedure 23, Plaintiffs are entitled to class certification where "two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Plaintiffs' proposed class satisfies Rule 23(a) and (b)(2).

Courts in the Ninth Circuit, including this Court, routinely certify class actions challenging immigration policies and practices that have broad, categorical effect. *See, e.g.*,

Alfaro Garcia v. Johnson, No. 14-CV-01775-YGR, 2014 WL 6657591, at *16 (N.D. Cal. Nov. 21, 2014) (certifying nationwide class in case challenging government's failure to provide timely reasonable fear interviews); *Santillan v. Ashcroft*, No. C 04-2686, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging USCIS's delays in issuing documentation of their status); *Inland Empire—Immigration Youth Collective v. Nielsen*, No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408, at *14 (C.D. Cal. Feb. 26, 2018) (certifying nationwide class of Deferred Action for Childhood Arrivals recipients whose benefits were terminated without notice or cause); *Doe v. Trump*, No. 3:19-cv-1743-SI, 2020 WL 1689727, at *17 (D. Or. Apr. 7, 2020) (certifying class of individuals with approved or pending immigration petitions and a subclass of visa applicants challenging a presidential proclamation on healthcare insurance); *Rosario v. USCIS*, No. C15-0813JLR, 2017 WL 3034447, at *12 (W.D. Wash. July 18, 2017) (certifying nationwide class of initial asylum applicants challenging USCIS's delayed adjudication of employment authorization applications); *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *16 (W.D. Wash. June 21, 2017) (certifying two nationwide classes of immigrants challenging legality of a government program applied to certain immigration benefits applications); *Mendez Rojas v. Johnson*, No. C16-1024RSM, 2017 WL 1397749, at *7 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures).

These cases demonstrate the propriety of Rule 23(b)(2) certification in actions challenging immigration policies. Indeed, "subdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions." Charles Alan Wright & Arthur R. Miller, 7AA Federal Practice and Procedure § 1775 (3d ed. 2020). Claims brought under Rule 23(b)(2) often involve issues affecting noncitizens who would not have the ability to present their claims absent class treatment. Additionally, the core issues in

these types of cases generally present pure questions of law, rather than disparate questions of fact. As a result, they are well suited for resolution on a class-wide basis.

A. The Proposed Class Satisfies the Class Certification Requirements of Rule 23(a)

1. The proposed class is numerous that joinder is impracticable.

Rule 23(a)(1) requires the class be "so numerous that joinder of all members is impracticable." "[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (citation omitted). Determining numerosity "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). No fixed number of class members is required. *Perez-Funez v. Dist. Dir., INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) ("There is no magic number for determining when too many parties make joinder impracticable. Courts have certified classes with as few as thirteen members and have denied certification of classes with over three hundred members."). "Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such situation . . . ." William B. Rubenstein, 1 Newberg on Class Actions § 3:11 (5th ed. 2020) (internal footnote omitted).

Courts have found impracticability of joinder even when relatively few class members are involved. *See, e.g.*, *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 605–06 (N.D. Cal. 2014) (noting that courts routinely find numerosity "when the class comprises 40 or more members"); *Arkansas Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765–66 (8th Cir. 1971) (finding 17 class members sufficient); *McCluskey v. Trustees of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674–76 (W.D. Wash. 2010) (certifying class with 27 known members);

Rivera v. Holder, 307 F.R.D. 539, 550 (W.D. Wash. 2015) (certifying class consisting of 40 known class members and unknown future members).

Plaintiffs estimate that there are thousands of class members. Significantly, litigation under the Freedom of Information Act has revealed that, by July 2020, USCIS had rejected nearly 12,000 U visa petitions alone based on the rejection policy. Compl. ¶ 6; Dandelet Decl. ¶ 76. As such, there can be no meaningful dispute that joinder is impractical in this case. Notably, Defendants are uniquely positioned to ascertain the number of class members. *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (noting that the government is "uniquely positioned to ascertain class membership").

Moreover, Plaintiffs have identified at least 365 individuals who satisfy the class definition. *See* Dalal-Dheini Decl. ¶¶ 11–13 (208 potential class members); Ziegeweid Decl. ¶ 8 (7 potential class members); Joyner Decl. ¶ 8 (10 potential class members); Limb Decl. ¶ 12 (5 potential class members); Engen Decl. ¶ 9 (30 to 50 potential class members); Pavri Decl. ¶ 9 (20 potential class members); Odom Decl. ¶ 10, 12 (5 potential class members); Levin Decl. ¶¶ 7, 12 (30 potential class members, and reporting that at a webinar, 65 attendees indicated that that they had received a rejection due to blank spaces); Koop Decl. ¶ 9 (50 potential class members) *see also* Compl. ¶ 72 (stating that the rejection rate for Form I-918 was at 99.6 percent on January 13, 2020, and that as of July 2020, 37.4 percent of applications are still being rejected).

Joinder is also inherently impracticable because the proposed class includes unnamed, unknown future class members who will be subjected to USCIS's policy. *See Jordan v. Cnty. of L.A.*, 669 F.2d 1311, 1320 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)) (explaining that joinder is "inherently impracticable" when unknown future class members are involved); *Ali v. Ashcroft*, 213 F.R.D. 390, 408-09 (W.D. Wash. 2003) ("[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is

impracticable and the numerosity requirement is therefore met, regardless of class size." (citation and internal quotation marks omitted)), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005); *Rivera*, 307 F.R.D. at 550 (finding joinder impractical due, in part, to "the inclusion of future class members"); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured.").

Moreover, where, as here, Plaintiffs seek injunctive and declaratory relief, "the numerosity requirement is relaxed and plaintiffs may rely on . . . reasonable inference[s] arising from plaintiffs' other evidence that the number of unknown and future members of [the] proposed subclass . . . is sufficient to make joinder impracticable." *Arnott v. USCIS*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (alterations in original) (quoting *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004)).

Thus, the proposed class satisfies the numerosity criterion of Rule 23(a)(1).

2. The proposed class presents common questions of law and fact.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." A single common question, standing alone, is enough to satisfy the commonality requirement. *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) ("Plaintiffs need not show . . . that every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class satisfies the commonality requirement." (internal quotation marks omitted)); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement asks us to look only for some shared legal issue or a common core of facts."); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) ("[C]ommonality only requires a single significant question of law or fact.").

Commonality exists if class members "have suffered the same injury," which means that their claims must "depend upon a common contention." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). That common contention must be "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* at 350. Therefore, the focus of class certification is "not the raising of common 'questions' . . . but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive resolution of the litigation." *Id.* (citation omitted).

Here, Plaintiffs and proposed class members challenge the legality of an agency-wide policy that has or will adversely impact them all: USCIS's rejection policy, under which class members' applications for immigration benefits have been rejected. The Ninth Circuit recently affirmed that "commonality is satisfied" in precisely these kinds of suits. *Gonzalez v. U.S. Immigration. & Customs Enf't*, 975 F.3d 788, 808 (9th Cir. 2020) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)) ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."). Moreover, "class suits for injunctive or declaratory relief," like the instant case, "by their very nature often present common questions satisfying Rule 23(a)(2)." Charles A. Wright & Arthur R. Miller, 7AA *Federal Practice and Procedure* § 1763 (3d ed. 2020).

Common questions of fact and law underlie class members' challenge to the USCIS's rejection policy. By definition, and pursuant to its rejection policy, USCIS has rejected or will reject the applications or petitions for immigration benefits filed by proposed class members. Although the policy reverses USCIS's longstanding practice in accepting applications for immigration relief, USCIS implemented it without providing proper notice and an opportunity for the public to comment, and without offering any reasoned explanation for its adoption. This

common core of facts gives rise to the proposed class members' shared legal claim that this new USCIS policy violates the APA. Specifically, Plaintiffs and proposed class members raise the following common questions of law:

- Whether the rejection policy violates the APA, 5 U.S.C. § 706(2)(A), as a final agency action that is arbitrary and capricious where USCIS's policy represents a significant departure from past policies and practice and USCIS failed to provide any reasoned explanation;
- Whether the rejection policy violates the APA, 5 U.S.C. § 706(2)(A), as a final agency action that is arbitrary and capricious where the policy is ambiguous and thus causes inconsistent and unpredictable agency practice;
- Whether the rejection policy constitutes a legislative rule that requires notice and comment rulemaking, and, thus, whether USCIS violated the APA, 5 U.S.C. § 553, because it implemented the policy without providing a notice and comment period;
- Whether the rejection policy is a rule, statement of policy, or interpretation that requires public notice through publication in the Federal Register, and, thus, whether USCIS violated the APA, 5 U.S.C. § 552(a)(1), because it failed to provide notice of the USCIS's rejection policy in the Federal Register; and
- Whether the rejection policy violates agency regulations that govern the adjudication of applications limiting the bases on which USCIS may reject an application, namely 8 C.F.R. §§ 103.2(a)(1), (7)(ii).

The determination of the "truth or falsity" of these questions will decide the legality of the USCIS's rejection policy, and therefore will resolve this litigation "in one stroke." *Wal-Mart*, 564 U.S. at 350. That there may be minor factual differences among the proposed class members—for instance, the types of applications that were rejected or the specific questions left unanswered that triggered the rejection—does not diminish the commonality among them. As the Ninth Circuit recently explained, "[a]ll questions of fact and law need not be common to satisfy the [commonality requirement]. The existence of shared legal issues with divergent factual predicates is sufficient[.]" *Gonzalez*, 975 F.3d at 807 (second and third alterations in original) (quoting *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012)); *see also*

Parsons, 754 F.3d at 679–80 & n.23 (finding a violation of the law that injured plaintiffs and class members established commonality, notwithstanding individual variations in the harm experienced). Here, the commonality requirement is satisfied because all proposed class members have had or will have their applications rejected pursuant to the same policy and because all proposed class members challenge it as unlawful under the APA.

In sum, the validity of USCIS's rejection policy is the "glue that holds the class together." *Gonzalez*, 975 F.3d at 808 (internal quotation marks omitted). Should Plaintiffs prevail in their challenge to the policy, all proposed class members will benefit from a judgment from this Court permanently enjoining USCIS from rejecting immigration benefits applications based on USCIS's rejection policy. Similarly, for applications that have already been rejected under the policy, a judgment would ensure that USCIS must apply the date the application was originally submitted as the filing date. A classwide proceeding in this case would thus "generate common *answers* apt to drive the resolution of the litigation," *Wal-Mart*, 564 U.S. at 350 (citation omitted). Accordingly, the commonality requirement is met.

3. Plaintiffs' claims are typical of the claims of the members of the proposed class.

Under Rule 23(a)(3), the claims of the class representatives must be "typical of the claims . . . of the class." The typicality requirement is met where the class representatives and class members suffer similar injury caused by the same course of conduct. *Gonzalez*, 975 F.3d at 809; *Parsons*, 754 F.3d at 685 (finding typicality requirement met where class representatives "allege the same or similar injury as the rest of the putative class; they allege that this injury is a result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims" (internal quotation marks and alterations omitted)). The class representatives' claims need only be "reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847

F.3d 1108, 1116 (9th Cir. 2017) (citation omitted). Meeting this requirement usually follows from the presence of common questions of law. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). As with commonality, factual differences among class members do not defeat typicality in a case such as this challenging the legality of a uniform policy. *See, e.g.*, *Gonzalez*, 975 F.3d at 807 (explaining that the typicality "inquiry focuses on the *nature of the claim* . . . of the class representatives, and not . . . the specific facts from which it arose" (citation omitted)); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011) ("Differing factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality.").

Here, named Plaintiffs' claims are typical of those of the proposed class members because they suffer the same injuries wrought by USCIS's same course of conduct: rejections of applications for immigration benefits based on USCIS's unlawful rejection policy. In all cases, rejections based on the new policy harmed Plaintiffs and class members by requiring time and cost to refile the application. In many cases the rejections caused Plaintiffs and class members' or their relatives to lose eligibility for immigration status or caused delays in their ability to obtain lawful status and work authorization. That the harms named Plaintiffs suffered may not be identical to that of all proposed class members does not diminish typicality: the injuries are the same in kind, arising from the same application of USCIS's unlawful rejection policy. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1033 (9th Cir. 2020) (finding typicality even though the class representative's injury was more severe than the injury class members suffered because the claim "still arose from the same . . . practice or course of conduct that [gave] rise to the claims of other class members" (second alteration in original) (internal quotation marks omitted)); *see also Gonzalez*, 975 F.3d at 807 (explaining that the focus of the typicality inquiry is on the nature of the class representatives' claims, rather than the specific facts from which those claims arose).

In sum, Plaintiffs and the proposed class members are united in their interest and injury caused by USCIS's uniform conduct. Plaintiffs therefore satisfy the typicality requirement.

4. Plaintiffs will adequately protect the interests of the proposed class, and counsel are qualified to litigate this action

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (internal quotation marks omitted). "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985 (internal quotation marks omitted); *accord Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018).

Here, named Plaintiffs each seek the same relief for themselves and the respective class as a whole and have no interest antagonistic to other members of the class. They will thus fairly, adequately and vigorously protect the interests of the class they seek to represent. Their mutual goal is to challenge USCIS's unlawful policy and to obtain declaratory and injunctive relief that would not only cure this illegality but remedy the injury they and all current and future proposed class members have suffered or will suffer—the unlawful rejection of immigration benefit applications. Finally, they all share an interest in ensuring that USCIS stops unlawfully rejecting applications pursuant to its policy and that it deems applications previously rejected under the policy filed as of the date of the initial receipt. In short, because Plaintiffs do not seek any different relief from that sought for class members, there is no potential conflict between them

and members of the proposed class. Accordingly, Plaintiffs are adequate representatives of the proposed class.

Plaintiffs' counsel also are qualified to represent the class. Counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same field of law. *See, e.g.*, *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223–24 (N.D. Ill. 1985). Plaintiffs are represented by attorneys from the Northwest Immigrant Rights Project, National Immigration Litigation Alliance, and the Van Der Hout law firm, who all have extensive experience in handling complex and class action litigation in the immigration field. *See* Ex. B1, Declaration of Matt Adams; Ex. B2, Declaration of Mary Kenney; Ex. B3, Declaration of Trina Realmuto; Ex. B4, Declaration of Zachary Nightingale. Counsel have represented numerous classes of noncitizens in actions that successfully obtained class relief and will zealously represent named and proposed class members.

B. The Proposed Class Satisfies Federal Rule of Civil Procedure 23(b)(2).

Plaintiffs additionally satisfy Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) "unquestionably [is] satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688. The rule "does not require an examination of the viability or bases of the class members' claims for relief . . . and does not require a finding that all members of the class have suffered identical injuries." *Id*. (citing *Rodriguez*, 591 F.3d at 1125). Rather "[i]t is sufficient" that "class members complain of a pattern or practice that is

generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047. "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (internal quotation marks omitted); *see also Zinser v. Accufix Resxearch Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) ("Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.").

Here, Plaintiffs and putative class members all have had or will have had their immigration benefits applications rejected pursuant to the USCIS's rejection policy. Moreover, Plaintiffs seek precisely the same declaratory and injunctive relief for all: a declaration that USCIS's rejection of immigration benefits applications pursuant to the rejection policy violates the APA; an injunction enjoining USCIS from rejecting any immigration benefits application based on the rejection policy (or a similar version of it) going forward; and an order compelling USCIS to reissue receipt notices with the date on which the application was initially filed (not the date it was re-submitted) to all Plaintiffs and class members whose application was or will be rejected because of USCIS's policy. *See* Compl. at 30 (Prayer for Relief).

Therefore, the declaratory and injunctive relief sought by Plaintiffs will apply to the proposed class as a whole and certification under Rule 23(b)(2) is warranted.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion, certify the proposed class, and issue the accompanying proposed order.

Respectfully submitted,

s/ Trina Realmuto

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