THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, MEHDI OSTADHASSAN, HANIN OMAR BENGEZI, MUSHTAQ ABED JIHAD, and SAJEEL MANZOOR, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JOHN F. KELLY, in his official capacity as Secretary of the U.S. Department of Homeland Security; LORI SCIALABBA, in her official capacity as Acting Director of the U.S. Citizenship and Immigration Services; MATTHEW D. EMRICH, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of the U.S. Citizenship and Immigration Services; DANIEL RENAUD, in his official capacity as Associate Director of the Field Operations Directorate of the U.S. Citizenship and Immigration Services,

Defendants.

No. 2:17-cv-00094-JCC

FIRST AMENDED MOTION FOR CLASS CERTIFICATION

NOTED FOR MAY 19, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs Abdiqafar Wagafe, Mehdi Ostadhassan, Hanin Omar Bengezi, Mushtaq Abed Jihad, and Sajeel Manzoor ("Plaintiffs") are five of thousands of individuals whose immigration applications have been delayed, or denied altogether, because of a secret and unlawful government vetting program that targets applicants who are Muslim or from certain Muslim-majority countries. In the wake of President Trump's First and Second Executive Orders 13769, 82 Fed. Reg. 8977, 8978-79 § 4 ("First EO"), and 13780, 82 Fed. Reg. 13209, 13215 §§ 4-5 ("Second EO"), both of which direct federal agencies to develop additional extreme vetting standards and procedures for all immigration benefits, this Court's review of Defendants' existing web of discriminatory and non-statutory vetting programs is especially critical.

Plaintiff Wagafe is a Muslim, Somali national who meets all statutory requirements to naturalize as a United States citizen. Despite his eligibility, and despite the statutory timeline prescribed by Congress, Mr. Wagafe waited more than three and a half years for a decision on his naturalization application. In an effort to moot Mr. Wagafe's individual claims and transfer this case to the District of North Dakota, just days after Plaintiffs had filed their original motion for class certification Defendant U.S. Citizenship and Immigration Services ("USCIS") finally scheduled an interview for Mr. Wagafe. Following the interview, USCIS approved Mr. Wagafe's application and he became a United States citizen on March 2, 2017.

Plaintiff Ostadhassan is a Muslim, Iranian national who meets all statutory requirements to adjust his status to that of a lawful permanent resident ("LPR"). Despite his eligibility, Mr. Ostadhassan waited over three years for a decision on his application. On April 5, 2017, USCIS issued a Notice of Intent to Deny his I-485 Application to Adjust Status.

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Plaintiff Bengezi is a Muslim, Libyan national and Canadian citizen who meets all statutory requirements to adjust her status to that of a LPR. Despite her eligibility, Ms. Bengezi has been waiting for over two years for a decision on her pending application.

Plaintiff Jihad is a Muslim, Iraqi national who meets all statutory requirements to naturalize as a United States citizen. Despite his eligibility, Mr. Jihad has been waiting over three and a half years for a decision on his pending naturalization application.

Plaintiff Manzoor is a Muslim, Pakistani national who meets all statutory requirements to naturalize as a United States citizen. Despite his eligibility, Mr. Manzoor has been waiting over one year for a decision on his pending naturalization application.

All Plaintiffs, and thousands of applicants like them, face such inordinate and unexplained delays because Defendant USCIS diverted their applications to an undisclosed and unauthorized program known as the Controlled Application Review and Resolution Program ("CARRP"). Congress did not enact or approve CARRP.

Through CARRP, the government surreptitiously blacklists thousands of applicants who are seeking immigration benefits, labeling them "national security threats." Such designations are often based on flimsy and unreliable factors. Once so designated, CARRP mandates immigration officials delay indefinitely, or outright deny, affected applications, even when the applicant is *statutorily eligible* to have his or her application granted. Relying on CARRP, immigration officials simply disregard governing statutory criteria for certain classes of applicants—most frequently applicants who are Muslim or are perceived to be Muslim—and instead adjudicate those applications pursuant to a process that applies heightened, generally insurmountable criteria to anyone caught in CARRP's dragnet. As Plaintiffs explain more fully in their Second Amended Complaint, CARRP and the manner in which it is being applied are illegal. Not only did USCIS not provide the required public notice and opportunity to

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comment before creating the program, but once in place, the program violates the Constitution, the Immigration and Nationality Act ("INA"), and the Administrative Procedure Act ("APA").

Thousands of individuals, including Plaintiffs, have had their applications for naturalization or adjustment of status halted, delayed, or denied by CARRP. A class action lawsuit is appropriate to challenge CARRP and any other successor "extreme vetting" program that the Executive branch may seek to implement pursuant to Sections 4 and 5 of the Second EO or through other extra-statutory means. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs Wagafe, Jihad, and Manzoor respectfully request that the Court certify the following class, and appoint them as class representatives:

> A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

Similarly, Plaintiffs Ostadhassan and Bengezi request that the Court, pursuant to Rules 23(a) and 23(b)(2), certify the following class and appoint them as class representatives:

> A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

Undersigned counsel are experienced in both class action and immigration matters, and Plaintiffs request that they be appointed as class counsel for both classes.[1]

[1] Plaintiffs filed an amended complaint on February 1, 2017, to assert additional claims and an additional class ("Muslim Ban Class"), relating to the effect of Section 3(c) of the First EO. Dkt. 17. On April 4, 2017, Plaintiffs filed a Second Amended Complaint, which preserves the assertion of this Muslim Ban Class relating to the effect of Section 2(c) of the Second EO. Dkt. 47. Plaintiffs do not seek certification of this additional class at this time because, after the filing of the First Amended Complaint, the Acting Director of USCIS issued a memorandum indicating that Section 3(c) of the First EO would no longer operate to stop the processing of immigration benefits for those already in the United States. *See generally* Notice Regarding Related Cases (Dkt. 22). And, in any event, Section 3(c) of the First EO and the corresponding Section 2(c) of the Second EO have since been more broadly enjoined. Temporary

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II. BACKGROUND

Although the Court need not engage in "an in-depth examination of the underlying merits" at this stage, it may analyze the merits to the extent necessary to determine the propriety of class certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011). For that reason, Plaintiffs provide a brief discussion of their claims relating to CARRP here. The claims are further described in the Second Amended Complaint (Dkt. 47).

A. The CARRP Policy

USCIS created CARRP in April 2008. Declaration of Jennie Pasquarella, Dkt. 27 ("Pasquarella Decl."), Ex. A (4/11/2008 policy memorandum introducing CARRP). Ostensibly, it is an agency-wide program for processing immigration applications that allegedly may implicate "national security concerns." *Id*. But the criteria used to determine whether a particular applicant implicates national security are vague and overbroad. They often turn on an applicant's national origin or otherwise lawful activities (such as living or traveling in areas of known terrorist activity), thereby ensnaring thousands of individuals who pose no threat to the United States. Worse still, CARRP's criteria for what constitutes a "national security concern" are untethered from the *statutory* criteria, including statutory criteria that are expressly security-related, that Congress enacted to determine whether a person is eligible for the immigration status he or she seeks.

Any immigration application that falls within CARRP's broad scope is immediately, and without any notice to the applicant, taken off the "routine adjudication" track and placed on a CARRP adjudication track, where it is subject to distinct procedures and criteria not authorized

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Restraining Order, *Washington v. Trump*, No. 2:17-cv-00141-JLR, ECF 52, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency motion to stay denied* 847 F.3d 1151 (9th Cir. 2017); Order Granting Motion for Temporary Restraining Order, *Hawaii et al. v. Trump*, No. 17-00050 DKW-KSC, ECF 219 (D. Haw. Mar. 15, 2017); Order Granting Motion to Convert Temporary Restraining Order to a Preliminary Injunction, *Hawaii et al. v. Trump*, No. 17-00050 DKW-DSC, ECF 270 (D. Haw. Mar. 29, 2017). Plaintiffs reserve the right to seek certification of the additional class if circumstances change again.

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by statute. An application will languish in CARRP indefinitely unless and until the alleged national security concern no longer is present. Indeed, even if an individual otherwise meets all the statutory criteria of eligibility for the benefits he or she seeks, USCIS officers are instructed that they *cannot approve* the application so long as the "national security concern" remains. *See* Pasquarella Decl., Ex. A at ("Officers are not authorized to approve applications" subject to CARRP); *id.*, Ex. B (7/26/2011 policy memorandum revising CARRP procedures) at 2 (an officer "is not authorized to approve applications or petitions" subject to CARRP).

Once an application is saddled with the "national security concern" tag, the next step in the CARRP process is called an "Eligibility Assessment." But far from trying to determine eligibility during the Eligibility Assessment process, the officer is encouraged to find *any* reason to deny the application outright so that "time and resources" are not spent determining whether there was any basis for the national security concern in the first place. Pasquarella Decl., Ex. A at 5; *see also id.*, Ex. C (1/2012 CARRP training presentation) at 52-59, 68 (providing "tips" on how to find an applicant ineligible). CARRP essentially creates a presumption of guilt that becomes difficult, if not impossible, to rebut.

The thousands of persons labeled as national security concerns based on CARRP's broad and vague criteria receive no notice of that determination, much less an opportunity to disprove it. As a result, their applications are effectively denied through indefinite delay. At no point are applicants told about the decision to subject their applications to CARRP, even though the decision to do so is often dispositive. Nor are applicants ever given the opportunity to contest the government's labeling of them as a national security threat.

Congress did not enact CARRP, nor did USCIS promulgate it as a proposed rule with the notice-and-comment procedures that the APA mandates. *See* 5 U.S.C. §§ 553(b)-(c). On the contrary, USCIS takes steps to deliberately keep the existence of CARRP a secret. The program was only discovered through litigation challenging a denial of naturalization in *Hamdi v. USCIS*, No. EDCV 10-894 VAP (DTBx), 2012 WL 632397 (C.D. Cal. Feb. 25, 2012), and then revealed

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in greater detail through the government's response to Freedom of Information Act ("FOIA") requests and litigation to compel responses to those requests. *See ACLU of Southern California v. USCIS*, No. CV 13-861 (D.D.C. filed June 7, 2013).

B. Plaintiffs' Legal Claims

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

CARRP also violates the APA. First, because CARRP is a final agency action that "neither focuses on nor relates to a [non-citizen's] fitness to" obtain the immigration status subject to its terms, *Judulang v. Holder*, 565 U.S. 42, 55 (2011), it is arbitrary and capricious under 5 U.S.C. § 706(2)(A). Second, CARRP violates the APA's requirement that administrative agencies provide a notice-and-comment period prior to implementing a substantive agency rule. 5 U.S.C. § 553(b), (c). CARRP is fairly characterized as a substantive rule, and therefore is subject to the APA's notice-and-comment rulemaking procedures, because it imposes extra-statutory eligibility criteria that effectively alter applicants' ability to naturalize or obtain legal permanent residency. *See United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010).

Finally, CARRP violates several constitutional provisions. Under the Uniform Rule of Naturalization Clause, the Constitution expressly assigns to Congress, not the Executive branch,

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the authority to establish the rules of naturalization. *See* U.S. Const. art. I, § 8, cl. 4. Congress set forth those rules in the INA. By imposing additional, non-statutory, substantive criteria that must be met prior to granting a naturalization application, CARRP violates the Uniform Rule of Naturalization Clause. CARRP also violates the Due Process Clause of the Fifth Amendment. Plaintiffs and putative class members have a constitutionally protected interest in having their naturalization and adjustment of status applications adjudicated in accordance with the law. *See, e.g.*, *Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014) ("[Plaintiff] had [a constitutionally] protected interest in being able to apply for citizenship" under the Due Process Clause). CARRP violates the Due Process Clause because the government never provides naturalization and adjustment applicants notice of their classification under CARRP, a meaningful explanation of the reason for such classification, nor any process by which they can challenge their classification.

In sum, CARRP cannot survive judicial scrutiny.

C. President Trump's Promise for More "Extreme" Vetting

President Trump campaigned on promises to impose a "total and complete ban" on Muslims coming to the United States. He and his associates consistently expressed disdain for Muslims. *See* Second Amended Complaint, Dkt. 47, ¶¶ 98-101. Both during the campaign and after his election and inauguration, President Trump expressed his intention to establish a program of "extreme vetting" to achieve such a ban. *See id.* ¶¶ 102-05.

President Trump began to implement his stated goal of keeping Muslims out of the United States and otherwise subjecting them to "extreme vetting" when he signed the First EO on January 27, 2017. After the First EO was enjoined, President Trump replaced it with a Second EO, which mirrors the First EO's efforts to implement his anti-Muslim agenda.[2] To the extent any "extreme vetting" policy developed pursuant to the Second EO expands or continues

[2] The Second EO has also been enjoined. *Internat'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361-TDC (D. Md.), appeal pending *Internat'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir.); *Hawaii, et al. v. Trump*, No. 1:17-cv-50-KSC (D. Haw.), appeal pending *Hawaii, et al. v. Trump*, No. 17-15589 (9th Cir.).

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CARRP, it will suffer from the same legal deficiencies as CARRP itself. And to the extent the policy targets Muslims, CARRP and any successor program also would violate the guarantee of equal protection under the Due Process Clause of the Fifth Amendment.

D. CARRP Has Delayed Named Plaintiffs' Applications.

Plaintiff Wagafe is a 32-year-old Somali national who is a lawful permanent resident of the United States, currently residing in SeaTac, Washington. Second Amended Complaint, Dkt. 47 ¶¶ 142, 149. After fleeing Somalia, Mr. Wagafe lived as a refugee in Kenya and Ethiopia before coming to the United States as a refugee in 2007. *Id.* ¶¶ 143-44. Mr. Wagafe filed an application for naturalization on November 8, 2013, and satisfied all the statutory requirements for naturalization. *Id.* ¶¶ 152, 156-57. USCIS scheduled him for a naturalization interview on February 25, 2014, but then abruptly cancelled it on January 29, 2014, without explanation. *Id.* ¶ 152. Mr. Wagafe had not heard from USCIS, other than a response to his attorney's inquiry in July 2015 instructing his attorney to have patience. *Id.* ¶ 153. It was only because his attorney filed a FOIA request concerning his case that Mr. Wagafe discovered that USCIS had "shelved" his pending application, relying on CARRP. A document in his "Alien file" obtained through that request indicates that his case was handled by a CARRP officer, without revealing the reasons why. Pasquarella Decl., Exs. D (cover page indicating CARRP); E (mentions file was reviewed "by prior CARRP officer").

Following the filing of this lawsuit, Defendant USCIS suddenly adjudicated Mr. Wagafe's application, in what appears to have been an attempt to moot Mr. Wagafe's individual claims and lend support to Defendants' motion to transfer venue to North Dakota. Five days after Plaintiffs filed their original motion for class certification in this case, a USCIS officer informed Mr. Wagafe's immigration attorney that an interview had been scheduled on his naturalization application. Second Amended Complaint, Dkt. 47 ¶ 154. Recognizing Mr. Wagafe met all statutory requirements for naturalization, Defendant USCIS approved his

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application immediately following his interview, and Mr. Wagafe became a United States citizen on March 2, 2017. *Id.*

Plaintiff Ostadhassan is a 33-year-old national of Iran who resides in Grand Forks, North Dakota. *Id.* ¶ 162. Mr. Ostadhassan moved to the United States in 2009 on a student visa to study at the University of North Dakota. *Id.* ¶ 163. He earned his Ph.D. degree in Petroleum Engineering. After graduation, Mr. Ostadhassan was hired immediately by the University of North Dakota as an Assistant Professor. *Id.* In 2014, he married a U.S. citizen. *Id.* ¶ 164. Mr. Ostadhassan and his wife had their first child in July 2016. *Id.* In February 2014, Mr. Ostadhassan applied to adjust his immigration status to that of a lawful permanent resident based upon his marriage. *Id.* ¶ 165. USCIS initially scheduled Mr. Ostadhassan for an interview on May 19, 2014, but abruptly canceled the interview when Mr. Ostadhassan arrived at the appointed time and place. *Id.* ¶ 167. After some delay, USCIS finally interviewed Mr. Ostadhassan more than 16 months later, on September 24, 2015. At the interview, the USCIS officer told Mr. Ostadhassan that the government was not ready to make a decision. *Id.* ¶¶ 168-69. On March 24, 2017, USCIS approved the immigrant visa petition that Mr. Ostadhassan's wife had filed on his behalf over three years earlier. *See* Supplemental Pasquarella Declaration ¶ 2. And on April 5, 2017, USCIS issued a Notice of Intent to Deny Mr. Ostadhassan's Form I-485 Application to Adjust Status, indicating that though Mr. Ostadhassan satisfies all statutory criteria, USCIS intends to deny his application "as a matter of discretion." *Id.* ¶ 3 & Ex. A at 4.

As USCIS acknowledges, Mr. Ostadhassan is statutorily eligible to adjust his immigration status. On information and belief, his application was delayed for over three years because the government subjected the application to CARRP. This is likely true because Mr. Ostadhassan has resided in and traveled through what the government considers "areas of known terrorist activity" (Iran), has donated to Islamic charities, and is involved in his local Muslim community in North Dakota. Such circumstances typically cause an application to be subjected to CARRP. *See* Second Amended Complaint, Dkt. 47, ¶¶ 170-74.

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Plaintiff Bengezi is a thirty-two-year-old national of Libya who resides in Redmond, Washington. *Id.* ¶ 176. Ms. Bengezi immigrated to Canada with her family in 1995 and became a Canadian citizen in 2012. *Id.* ¶¶ 178-79. After becoming engaged to a U.S. citizen, Ms. Bengezi entered the country on a K-1 Fiancée visa and, after getting married, filed for an application to adjust her status on February 5, 2015. *Id.* ¶¶ 181-87. Though Ms. Bengezi meets all statutory requirements to adjust her immigration status, USCIS has not scheduled an interview on her application. *Id.* ¶¶ 188, 191-92. On information and belief, Defendant USCIS has applied CARRP or its successor "extreme vetting" program to her application, which has indefinitely delayed the adjudication process. *Id.* ¶ 196. When Ms. Bengezi flies, she is unable to check in for her flight online and she is routinely subjected to additional security screening measures due to her "Secondary Security Screening Selection." *Id.* ¶ 193. These additional security measures are a common indication that an individual's application is subject to CARRP.

Plaintiff Jihad is a forty-four-year-old Iraqi national who resides in Renton, Washington. *Id.* ¶ 199. In August 2008, Mr. Jihad and his family were admitted to the United States as refugees and settled in the Tri-Cities area of Washington. *Id.* ¶ 203-04. After becoming a lawful permanent resident, Mr. Jihad filed his application for naturalization on July 1, 2013. *Id.* ¶¶ 205-06. Soon after completing his biometrics appointment, two FBI agents visited Mr. Jihad and questioned him extensively about his background. *Id.* ¶ 209. Though Mr. Jihad satisfies all statutory criteria for naturalization, his application has been pending for over three and a half years. On information and belief, Defendant USCIS has subjected Mr. Jihad's application to CARRP or an "extreme vetting" successor program, which explains the FBI's interrogation and the extreme delay Mr. Jihad has experienced. *Id* ¶ 217.

Plaintiff Manzoor is a forty-year-old Pakistani national and lawful permanent resident who resides in Newcastle, Washington. *Id*. ¶ 220. After coming to the United States on a student visa, Mr. Manzoor was granted lawful permanent resident status in September 2010 based on a business petition. *Id.*¶¶ 221, 226-27. He subsequently filed his application for

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naturalization on November 30, 2015. *Id.*¶ 228. Though Mr. Manzoor is statutorily eligible to naturalize as a United States citizen, USCIS has not adjudicated his application for over three years. This unexplained delay indicates that USCIS has subjected Mr. Manzoor's application to CARRP or its successor "extreme vetting" program. *Id.* ¶¶ 233-34.

III. ARGUMENT

Under Civil Rule 23, a lawsuit may proceed as a class action if 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, 397 (2010) (citing Fed. R. Civ. P. 23(b)). By its terms, "this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id*.

Plaintiffs meet all four of the Rule 23(a) requirements, and satisfy Rule 23(b) because "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Consistent with numerous Ninth Circuit authorities involving certification of class actions on behalf of noncitizens who challenge immigration policies and practices, class certification is warranted here.[3]

[3] *See, e.g.*, *Mendez Rojas, et al. v. Johnson, et al.*, 2:16-cv-1024-RSM, ECF 37 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures); *A.B.T. v. U.S. Citizenship and Immigration Services*, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving settlement amending practices by the Executive Office for Immigration Review and USCIS that precluded asylum applicants from receiving employment authorization); *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 delays in receiving documentation of their status); *Ali v. Ashcroft*, 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd on other grounds*, 219 F.3d 1087 (9th Cir. 2000) (en banc) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Walters v. Reno*, No. C94–1204C, 1996 WL 897662, at *5-8 (W.D. Wash. 1996), *aff'd*, 145 F.3d 1032, 1045-47 (9th Cir. 1998), *cert. denied*, *Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases). *See also Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying districtwide class of delayed naturalization cases); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district court's denial of class certification in

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Plaintiffs do not request that this Court adjudicate their individual immigration applications, nor do they seek money damages. Plaintiffs request only that this Court determine that CARRP or any successor policy is unlawful, and enjoin Defendants from applying such policy to the processing and adjudication of Plaintiffs' and other class members' applications for citizenship and adjustment of immigration status applications. Alternatively, and at a minimum, Plaintiffs request an order compelling USCIS to provide applicants notice that the government has decided to subject their application to CARRP and an opportunity to challenge that decision.

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

1. The Proposed Class Members Are So Numerous That Joinder Is Impracticable.

This case easily meets the numerosity requirement. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." While no specific number of class members is required, *Perez-Funez v. District Director, Immigration & Naturalization Service*, 611 F. Supp. 990, 995 (C.D. Cal. 1984), courts have recognized that "where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied," *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008) (internal quotation marks and citations omitted). Additionally, where the class includes "unnamed and unknown future members," joinder is impractical, "and the numerosity requirement is therefore met, regardless of class size." *Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (internal quotation marks and citation omitted).

Here, the numbers of naturalization and adjustment of status applications subject to CARRP are more than sufficient for class certification purposes. As of March 2009, for those applications pending for six months or longer, the government was applying CARRP to at least

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case challenging inadequate notice and standards in Immigration and Naturalization Service vehicle forfeiture procedure).

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1,437 applications for adjustment of immigration status, and at least 1,065 applications for naturalization. Pasquarella Decl., Ex. F (monthly case load report). Between July 1 and September 30, 2013—the most recent time period for which Plaintiffs have reliable data—USCIS reported 2,644 pending applications subjected to CARRP. *Id*., Ex. G (quarterly workload report). USCIS data shows that applications for naturalization and adjustment of immigration status make up the majority of all applications now pending before USCIS subject to CARRP. *Id*., Ex. F. Based on this data, and as a matter of "general knowledge and common sense," the number of members in each proposed class makes joinder of each individual member impracticable. Class certification is also appropriate here given the unknown future class members to whose immigration applications Defendant will apply CARRP. *See Ali*, 213 F.R.D. at 408-09.

Plaintiffs have met the numerosity requirement.

2. This Case Presents Questions of Law and Fact Common to the Members of the Classes.

Rule 23(a) also requires that the case present "questions of law or fact common to the class." Plaintiffs "need not show, however, 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." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quoting *Dukes*, 564 U.S. at 350 (2011)); *see also Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (noting that "commonality only requires a single significant question of law or fact").

Plaintiffs raise multiple questions common to the classes, including but not limited to:

- Whether CARRP violates the INA by creating additional, non-statutory, substantive criteria that must be met prior to a grant of a naturalization or adjustment of status application (both Classes);
- Whether CARRP violates the APA, 5 U.S.C. § 706, as a final agency action that is arbitrary and capricious, contrary to constitutional law, and in excess of statutory authority (both Classes);

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- Whether CARRP constitutes a substantive rule and, as a result, is unenforceable because Defendants violated the mandatory requirements for rulemaking under APA, 5 U.S.C. § 553, as they promulgated CARRP without providing a notice-and-comment period prior to implementation (both Classes);

- Whether CARRP violates the Uniform Rule of Naturalization, Article I, Section 8, Clause 4 of the Constitution by establishing criteria for naturalization that were never authorized by Congress (Extreme Vetting Naturalization Class);

- Whether CARRP is unconstitutional because Defendants failed to provide Plaintiffs notice of their classification under CARRP and a meaningful explanation of the reason for such classification, as well as a process by which Plaintiffs can challenge their classification, resulting in a violation of the Due Process Clause of the Fifth Amendment to the Constitution (both Classes);

- Whether CARRP discriminates against Plaintiffs on the basis of their country of origin, and without sufficient justification, and therefore violates the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution (both Classes);

- Whether the application of CARRP to Plaintiffs' applications for naturalization and adjustment of status—benefits to which they are statutorily eligible and to which they are legally entitled—constitutes arbitrary denial in violation of Plaintiffs' right to substantive due process under the Fifth Amendment to the Constitution (both Classes).

Defendants may argue that Plaintiffs cannot satisfy commonality because each application subject to CARRP hinges on the particular facts and circumstances unique to each applicant. But this argument would misconstrue and misapply the commonality requirement. As the Ninth Circuit recently observed, "[t]o assess whether the putative class members share a common question, the answer to which 'will resolve an issue that is central to the validity of each one of the [class members's] claims,' [the court] must identify the elements of the class members' case-in-chief." *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014) (quoting *Dukes*, 564 U.S. at 350). Here, the gravamen of Plaintiffs' Second Amended Complaint is not focused on how CARRP was specifically applied to any given individual seeking immigration benefits, but rather how USCIS's overall decision to implement CARRP and its subsequent application to Plaintiffs and others similarly situated violates federal

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statutory and constitutional law. Because each class member's statutory and constitutional claims can be resolved in one stroke, "a classwide proceeding" will "generate common answers apt to drive the resolution of the litigation." *See Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 652-53 (W.D. Wash. 2011). Plaintiffs have met their burden to demonstrate commonality because "the court must decide only once whether the application [of CARRP] . . . does or does not violate" the law. *See id*. at 654. Should Plaintiffs prevail, all proposed class members will benefit the same way: either from an order enjoining the government from applying CARRP to their applications, or from an order directing the government to allow affected applicants an opportunity to respond to CARRP-related allegations.

3. The Claims of the Named Plaintiffs Are Typical of the Claims of the Members of the Proposed Classes.

Typicality is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of the typicality requirement is to ensure that the interests of the named representatives align with the interests of the class as a whole. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Claims of the proposed class representatives are considered "typical" if they are "reasonably coextensive with those of the absent class members." *Parsons*, 754 F.3d at 685 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). In this way, commonality and typicality "tend to merge" because both "serve as guideposts for determining whether, under the particular circumstances presented by the case, maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5.

Plaintiffs' claims are typical of the proposed classes to be certified because they proceed under the same legal theories, seek the same relief, and have suffered the same injuries. Like each proposed class member, Plaintiffs have filed immigration applications (for naturalization and adjustment of immigration status, respectively) that the government has unlawfully subjected

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to review under CARRP. Despite meeting all the statutory requirements to receive the immigration benefits they seek, all five named Plaintiffs have been injured by the delay and failure to adjudicate their immigration applications based on CARRP. Because Plaintiffs have suffered the same statutory and constitutional injuries as the proposed class members, their claims are typical of the classes which they propose to represent. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (upholding typicality where plaintiffs "raise[d] similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings").

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Classes, and Counsel Are Qualified to Litigate this Action.

Rule 23(a)(4) requires that "[t]he 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.'" *Rodriguez*, 591 F.3d at 1125 (citing *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)).

a. Named Plaintiffs

The named Plaintiffs will fairly and adequately protect the interests of the respective classes because they seek relief on behalf of the classes and have no individual interest that could be considered antagonistic to other class members. *See* Declaration of Mehdi Ostadhassan (Dkt. 29); Declaration of Abdiqafar Wagafe (Dkt. 28); Declaration of Hanin Omar Bengezi; Declaration of Mushtaq Abed Jihad; Declaration of Sajeel Manzoor. Their shared goal is to have the Court declare CARRP unlawful and issue injunctive relief preventing CARRP from being applied to their immigration applications. Plaintiffs do not seek money damages. The interests of the named Plaintiffs therefore coincide precisely with those of the class members.

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b. Counsel

Plaintiffs' counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984), *amended on rehearing*, 763 F.2d 1091, 1098 (9th Cir. 1985). Plaintiffs are represented by attorneys with the ACLU of Washington Foundation, the ACLU Foundation of Southern California, the ACLU Foundation, the Law Offices of Stacy Tolchin, the National Immigration Project of the National Lawyers Guild, the Northwest Immigrant Rights Project, and the Perkins Coie law firm. Class counsel are able and experienced in protecting the interests of noncitizens and have considerable experience in handling complex and class action litigation, including in the area of immigration law. *See* Dkts. 27, 30-34 (Pasquarella Decl.; Declaration of Lee Gelernt; Declaration of Matt Adams; Declaration of Stacy Tolchin; Declaration of Trina Realmuto; Declaration of Harry Schneider). As detailed in their declarations, class counsel have the experience and ability to vigorously and effectively represent both named and absent class members.

B. This Action Satisfies the Requirements of Rule 23(b)(2).

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the requirements of Rule 23(b). Certification under Rule 23(b)(2) requires that Defendants "ha[ve] 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." Fed. R. Civ. P. 23(b)(2). The underlying premise of subsection (b)(2) is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (citation omitted). In other words, (b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*

Here, Plaintiffs are asking the Court to declare CARRP unlawful and unenforceable and to enjoin the government from subjecting Plaintiffs' and proposed class members' immigration

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applications to CARRP. This relief would benefit Plaintiffs as well as all members of the proposed classes in identical fashion. In other words, no individual class member would be entitled to a *different* injunction or declaratory judgment. Accordingly, Plaintiffs have met the requirements of Rule 23(b)(2), because they "seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *See Parsons*, 754 F.3d at 688 (citation omitted); *see also Walters*, 145 F.3d at 1047 (holding that certification under Rule 23(b)(2) was proper where plaintiffs challenged INS practices in document fraud proceedings); *Rodriguez*, 591 F.3d at 1125-26 (holding that certification under Rule 23(b)(2) was proper in challenge to defendants' policy of failing to provide bond hearings to immigration detainees).

Given the nature of Plaintiffs' claims implicating CARRP, class certification should be nationwide. Certification that is not nationwide in scope would result in Defendants continuing to apply an unlawful policy to noncitizens applying for naturalization simply by virtue of their geographic location, which would undermine the constitutional imperative of "a *uniform* Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4 (emphasis added). Such piecemeal relief would lead to arbitrary and unjust results. *See Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (holding certification of a nationwide class was particularly fitting because "anything less [than] a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in"). Moreover, it would be equally arbitrary and unjust to certify anything short of a nationwide class for adjustment of status applicants, who, regardless of geographic location, are all subjected to Defendants' unlawful policy.

Because Defendants have subjected the members of both classes to the same statutory and constitutional violations, and because class members seek uniform relief, certification is proper under Rule 23(b)(2).

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C. Class Certification Is Also Warranted to Prevent Defendants from Avoiding Adjudication of the Legality of CARRP.

Certification of the proposed classes is also appropriate to prevent Defendants from attempting to evade judicial review by adjudicating Plaintiffs' individual applications. As the Supreme Court has acknowledged, "some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (citation omitted). In such cases, the named plaintiff's claims are "capable of repetition, yet evading review." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). Because of this, a class action may be the only way for meaningful review. *See id*. at 1090 (where the class representative's claims are transitory, "mooting the putative class representative's claims will not necessarily moot the class action" even if "the district court has not yet addressed the class certification issue").

Class certification is especially appropriate here because challenges to CARRP historically have proven to be the very sort of transitory claims that are "capable of repetition, yet evading review." Indeed, Plaintiffs expect that discovery will confirm that, in the past, Defendants have engaged in a deliberate strategy of mooting the claims of applicants adversely impacted by CARRP before a ruling on the merits could be obtained. In *Muhanna v. USCIS*, No. 14-cv-05995 (C.D. Cal. July 31, 2014), five individual plaintiffs filed suit challenging the delay to their naturalization applications caused by CARRP.[4] Within months of the commencement of that lawsuit, USCIS adjudicated the naturalization applications of all five plaintiffs, each of whom had been waiting years for a decision, and the lawsuit was voluntarily dismissed as moot. *Muhanna*, No. 14-cv-05995, Dkt. 51 (entered Dec. 23, 2014); *see also* Pasquarella Decl., ¶ 4. In *Arapi v USCIS*, No. 16-cv-00692 JLR (E.D. Mo. 2016), twenty individual plaintiffs filed suit asserting causes of action relating to application of CARRP to their pending naturalization

[4] Plaintiffs in *Muhanna* were represented by some of the same attorneys representing Plaintiffs here.

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applications. Once again, promptly after their suit was commenced, USCIS moved to adjudicate the applications of all twenty plaintiffs. Nineteen of the plaintiffs voluntarily dismissed their claims at that point, and USCIS moved to dismiss the remaining plaintiff's claims as moot. *Arapi*, No. 16-cv-00692 JLR, Dkt. 22 (filed Dec. 19, 2016).

Defendants already have deployed this strategy in this case, in an attempt to moot the individual claims of a named Plaintiff and transfer venue from this Court to North Dakota. When Plaintiffs initiated this lawsuit in January 2017, named Plaintiff Abdiqafar Wagafe had been waiting over three and a half years with no explanation for a decision on his application to naturalize as a U.S. citizen. Second Amended Complaint, Dkt. 47 ¶¶ 152-53. Just five days after Plaintiffs filed their initial Motion for Class Certification, Defendant USCIS suddenly scheduled Plaintiff Wagafe for an interview on his naturalization application. *Id.* ¶ 154. Following his interview, which occurred on February 22, 2017, Mr. Wagafe's application was immediately approved and he became a U.S. citizen on March 2, 2017. *Id*. Defendants filed their Motion to Transfer Venue on the same day, contending that because Plaintiff Wagafe no longer had an active individual-capacity claim, and he was the only named Plaintiff who resided in the forum, the interests of justice favored transfer.[5] Dkt. 39 at 5-8.

As Defendants have a practice of attempting to evade judicial review of CARRP challenges by adjudicating individual Plaintiffs' claims and then seeking dismissal on mootness grounds, class certification is necessary to ensure judicial review of these important claims. *See Pitts*, 653 F.3d at 1090–91 (holding defendant's "unaccepted offer of judgment did not moot Pitts's case because his claim is transitory in nature and may otherwise evade review," thereby "avoid[ing] the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved"); *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 909 (N.D. Cal. 2014) (holding that the defendant's attempt to refund the plaintiff's money did not moot the class

[5] Plaintiffs have since filed a Second Amended Complaint (Dkt. 47), which adds three named Plaintiffs—all of whom reside in King County, Washington.

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action claims because the bank's behavior was evidence of a "calculated strategy that includes picking off named Plaintiffs"); *Ramirez v. Trans Union, LLC*, No. 3:12-CV-00632 (JSC), 2013 WL 3752591, at *2 (N.D. Cal. July 17, 2013) (holding that Rule 68 Offer of Judgment to the named plaintiff did not moot the class action because the plaintiff's claims would "evade review" if the defendant were able to "pick off" each subsequent lead plaintiff).

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Class Certification and enter an order certifying the proposed classes under Rules 23(a) and 23(b)(2), appoint Plaintiffs as class representatives for the respective classes, and appoint Plaintiffs' counsel as class counsel for both classes.

DATED: April 10, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing MOTION FOR CLASS CERTIFICATION via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 10th day of April, 2017, at Seattle, Washington.

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