The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-JCC

DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST AMENDED MOTION FOR CLASS CERTIFICATION

NOTED ON MOTION CALENDAR:
May 19, 2017

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Defendants respectfully request that the Court deny Plaintiffs' motion for class certification as they have failed to demonstrate class certification is appropriate in this case pursuant to Federal Rule of Civil Procedure 23.

I. INTRODUCTION

The named plaintiffs—Messrs. Abdiqafar Wagafe, Mehdi Ostadhassan, Mushtaq Abed Jihad, and Sajeel Manzoor, and Ms. Hanin Omar Bengezi—seek certification of two classes under Federal Rule of Civil Procedure 23, and ask the Court to appoint some of each of them as representatives for each of the two proposed classes. Plaintiffs' First Amended Motion for Class Certification ("Pls.' Amend. Class Cert. Mot.") (ECF No. 49) at 3. The Court should deny Plaintiffs' motion for class certification because: (a) their claims fail to meet the requirement of commonality under Rule 23(a)(2); (b) their claims, and the defenses thereto, are not typical of the claims and defenses of the proposed class, as required by Rule 23(a)(3); (c) Plaintiffs are not adequate representatives of the proposed class; and (d) Plaintiffs have failed to demonstrate Defendants have acted or refused to act on grounds generally applicable to the class. Finally, even if the Court were to certify some class, the Court should exercise its discretion not to certify a nationwide class in this case.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. PROCEDURAL HISTORY

On January 23, 2017, Plaintiffs filed a putative class action challenging the United States Citizenship and Immigration Services' ("USCIS") Controlled Application Review and Resolution Program ("CARRP"). ECF No. 1. Before serving that complaint, however, Plaintiffs amended the complaint on February 1, 2017. Amended Complaint ("Amend. Compl."), ECF No. 17. The Amended Complaint again challenged CARRP, but added challenges to sections 3(c)

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and 4 of Executive Order ("E.O.") 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017). *Id.* On February 9, 2017, Plaintiffs filed a Motion for Class Certification (ECF No. 26).

On March 6, 2017, the President issued E.O. 13780, which revoked E.O. 13769 effective March 16, 2017. E.O. 13780, § 13, 82 Fed. Reg. 13209, 13218 (Mar. 9, 2017). On April 4, 2017, Plaintiffs filed a Second Amended Complaint ("SAC") (ECF No. 47), which added three new named plaintiffs (Hanin Omar Bengezi, Mushtaq Abed Jihad, and Sajeel Manzoor), as well as adding allegations concerning E.O. 13780. A few days later, on April 10, 2017, Plaintiffs filed their First Amended Motion for Class Certification ("Pls.' Amend. Class Cert. Mot.") (ECF No. 49). In that motion, Plaintiffs ask the Court to certify two classes:

> 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;

and

> 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.

Pls.' Amend. Class Cert. Mot. at 3. Plaintiffs also asked the Court to appoint Messrs. Wagafe, Jihad, and Manzoor as representatives for the first class, and Mr. Ostadhassan and Ms. Bengezi as representatives for the second class.

B. THE NAMED PLAINTIFFS

1. ABDIQAFAR WAGAFE

Mr. Wagafe alleges he is a native and citizen of Somalia. SAC at ¶ 142. He was admitted to the United States as a refugee on May 24, 2007, and applied to adjust his status to lawful permanent resident on May 28, 2008. *Id*. at ¶¶ 144, 148. His adjustment-of-status application was approved on November 3, 2008, retroactive to the date of his refugee admission. *Id*. at ¶ 149. On

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July 3, 2012, Mr. Wagafe applied to be naturalized as a United States citizen. He was interviewed in connection with this naturalization application on October 29, 2012, but lacked a sufficient command of English to understand and respond to the interviewing immigration officer's questions. *Id*. at ¶ 150. USCIS interviewed Mr. Wagafe a second time on January 3, 2013, at which time he failed the English language portions of the naturalization test. *Id.* Accordingly, USCIS denied his naturalization application on January 9, 2013. *Id.*

Mr. Wagafe submitted a second naturalization application ten months later, on November 8, 2013. *Id.* at ¶ 152. USCIS interviewed him in connection with his second naturalization application on February 22, 2017, and approved his application. *Id*. at ¶ 154. Mr. Wagafe took the oath of citizenship as a U.S. citizen on March 2, 2017. *Id.*

2. MEHDI OSTADHASSAN

Mr. Ostadhassan alleges he is a national of Iran. SAC at ¶. 162. He was originally admitted to the United States in 2009, on a student visa. *Id*. at ¶ 163. He married Ms. Baily Bubach, a United States citizen, in January 2014. *Id*. at ¶ 164. In February 2014, Ms. Bubach, submitted a Form I-130, Petition for Alien Relative ("Form I-130"), to USCIS on Mr. Ostadhassan's behalf, in order to have him classified as her "immediate relative." *Id*. at ¶ 165. Contemporaneously, Mr. Ostadhassan submitted a Form I-485, Application to Adjust Status or Register Permanent Residence ("Form I-485"). *Id.*

USCIS interviewed Mr. Ostadhassan and his wife on his application and her petition on September 24, 2015. *Id.* at ¶ 168. Subsequently, on December 4, 2015, USCIS sent Ms. Bubach a Request for Evidence ("RFE"), seeking documentation that Mr. Ostadhassan's previous marriage had been terminated. Declaration of Leslie Tritten ("Tritten Decl."), attached as Exhibit ("Exh.") A, at ¶ 5.d.

That same day, USCIS also sent an RFE to Mr. Ostadhassan asking him to provide a new medical examination (Form I-693, Report of Medical Examination and Vaccination Record). *Id*.

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at ¶ 5.e. Mr. Ostadhassan provided the requested information on January 4, 2016. *Id.* at ¶ 5.f. Ms. Bubach responded to the RFE directed to her on January 11, 2016, but USCIS determined that her response was insufficient. As a result, on May 3, 2016, USCIS issued a Notice of Intent to Deny ("NOID") the Form I-130 petition due to the lack of adequate evidence that Mr. Ostadhassan's prior marriage had been terminated. *Id*. at ¶ 5.g. Subsequent to issuance of the NOID, Ms. Bubach provided the necessary divorce documentation on May 20, 2016. On March 24, 2017, USCIS approved Ms. Bubach's I-130 petition. *Id*. at ¶ 5.i. On April 5, 2017, USCIS issued Mr. Ostadhassan a Notice of Intent to Deny regarding his adjustment of status application. *Id*. at ¶ 5.j. He was given until May 8, 2017, to respond to the NOID. *Id*.

3. HANIN OMAR BENGEZI

Ms. Bengezi alleges she is a national of Libya and a citizen of Canada. SAC at ¶ 176. She entered the United States on a fiancée visa on December 21, 2014, and married her U.S. citizen husband on January 23, 2015. *Id*. at ¶ 186. On February 5, 2015, Ms. Bengezi applied to adjust her status to lawful permanent resident. *Id.* at ¶ 187. USCIS approved Ms. Bengezi's I-485 application on May 9, 2017. Exh. B (USCIS Letter to Hanin Omar Bengezi dated May 9, 2017).

4. MUSHTAQ ABED JIHAD

Mr. Jihad alleges that he is a national of Iraq. SAC at ¶ 199. He entered the United States in 2008 as a refugee. *Id*. at ¶ 203. In July 2013, he applied to naturalize. *Id*. at ¶ 206. On April 25, 2017, USCIS interviewed Mr. Jihad, pursuant to 8 U.S.C. § 1446, in connection with his naturalization application. Exh. C (Form N-652). On May 9, 2017, USCIS approved Mr. Jihad's naturalization application and scheduled him to take the oath of citizenship on May 30, 2017. Exh. D (Form N-445) at 1.

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5. SAJEEL MANZOOR

Mr. Manzoor alleges he is a Pakistani national. SAC at ¶ 220. He originally entered the United States on a student visa in August 2001. *Id.* at ¶ 221. He alleges he later obtained an H-1B visa in 2003, SAC at ¶ 222, and that his H-1B visa was temporarily administratively revoked while he was investigated by Immigration and Customs Enforcement's Compliance Enforcement Unit. SAC at ¶ 224. Then, in 2007, Mr. Manzoor filed to adjust his status to lawful permanent resident, in connection with a business petition on his behalf. SAC at ¶ 220. USCIS approved Mr. Manzoor's adjustment-of-status application in September 2008. *Id.* at ¶ 227. On November 30, 2015, Mr. Manzoor applied to naturalize. *Id.* at ¶ 228. On May 1, 2017, USCIS approved his naturalization application, and he took the oath of citizenship that same day. Exh. E (Naturalization Certificate).

III. THE LEGAL STANDARD FOR CLASS CERTIFICATION

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. ---, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, Plaintiffs "must affirmatively demonstrate [their] compliance" with Federal Rule of Civil Procedure 23. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Federal Rule of Civil Procedure 23(a) sets out four requirements for class certification. Those requirements are:

(1) The class is so numerous that joinder is impractical ("numerosity");

(2) There are questions of law or fact common to the class ("commonality");

(3) The claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and

(4) The named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation").

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Fed. R. Civ. P. 23(a). The Supreme Court has repeatedly held that "[i]t is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" that makes a case appropriate as a class action. *Dukes*, 564 U.S. at 350 (emphasis in original).

In addition to the requirements of Rule 23(a), a proposed class must also qualify under Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). In this case, Plaintiffs seek certification under subsection (b)(2) of Rule 23, which permits class certification where "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." *Id.* "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.'" *Dukes*, 564 U.S. at 360.

The party seeking class certification bears the burden of demonstrating it has satisfied all four Rule 23(a) prerequisites and that the class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Zinser*, 253 F.3d at 1186. The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982).

Consequently, the Court must conduct a rigorous analysis to determine whether the requirements of Rule 23 have been met; if the court is not fully satisfied, the class cannot be certified. *Falcon*, 457 U.S. at 161. Even when all of Rule 23's requirements are met, the district court retains "broad discretion" to determine whether a class *should* be certified. *Zinser*, 253 F.3d at 1186.

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IV. ARGUMENT

Plaintiffs have failed to demonstrate they meet the requirements of commonality, typicality, and adequacy of representation under subsection (a) of Rule 23. Nor have they demonstrated that final injunctive relief, or corresponding declaratory relief, is appropriate respecting the class as a whole, as required by subsection (b)(2) of Rule 23. As well, none of the named Plaintiffs, nor any of the putative class members, have standing to challenge either CARRP or the "extreme vetting" procedures concerning which they have failed to allege any facts demonstrating they have been injured. Consequently, the Court should deny their motion for class certification.

A. THE NAMED PLAINTIFFS, AND ALL MEMBERS OF THE PROPOSED CLASSES, LACK STANDING TO CHALLENGE BOTH CARRP AND SECTION 5 OF EXECUTIVE ORDER 13780

As an initial matter, as explained in Defendant's motion to dismiss ("Defs.' MTD") (ECF No. 56), the named plaintiffs, and all proposed class members, lack standing to challenge (a) CARRP, because they have disclaimed any interest in obtaining decisions on their pending applications, and (b) "extreme vetting," as they have failed to allege sufficient facts to establish they have been injured in fact by the application to them of section 5 of E.O. 13780. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Defs.' MTD at 9-10, 13-14.

The Ninth Circuit explained, "[a] named plaintiff cannot represent a class alleging [ ] claims that the named plaintiff does not have standing to raise." *Hawkins v. Comparet–Cassani*, 251 F.3d 1230, 1238 (9th Cir.2001) (citation omitted). Nor may a class be certified that would include members who lack standing. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)) ("[N]o class may be certified that contains members lacking Article III standing."). Here, none of the Plaintiffs has alleged being subjected to any treatment under section 5 of E.O. 13780, much less alleged sufficient facts to give rise to a redressable injury that this Court would have jurisdiction

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to resolve. And Plaintiffs have disclaimed any interest in obtaining an order directing USCIS to render decisions on their pending applications. Consequently, because the two classes defined by Plaintiffs, which they seek to have this Court certify, would contain class members over whose claims this Court lacks jurisdiction, the Court should deny Plaintiffs' motion to certify the two proposed classes.

B. NAMED PLAINTIFFS CANNOT SATISFY THE COMMONALITY AND TYPICALITY REQUIREMENTS FOR CLASS CERTIFICATION

To obtain class certification, Plaintiffs must demonstrate the proposed class members are entitled to common relief. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). As the Supreme Court has said, "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (emphasis in original). In other words, the commonality element requires the court to consider whether the putative class members' claims "can be productively litigated at once." *Id.*

This commonality requirement is likewise present in Rule 23(b)(2). For certification under Rule 23(b)(2), Plaintiffs must show that "declaratory relief is available *to the class as a whole*" and that the challenged 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*." *Dukes*, 564 U.S. at 361 (emphasis added). Therefore, Plaintiffs have the burden of demonstrating that the factual differences within their proposed classes are unlikely to bear on an individual's entitlement to relief. *See In re Google AdWords Litig.*, No. 5:08-cv-3369, 2012 WL 28068 at *15-16 (N.D. Cal. Jan. 5, 2012) ("The question of which advertisers among the hundreds of thousands of proposed class members are even entitled to restitution would require individual inquiries."). If the factual differences have the likelihood of changing the outcome of the legal issue, then class certification may not be appropriate. *Cf. Yamasaki*, 442 U.S. at 701.

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The typicality requirement ensures that the interests of the named plaintiffs align with the interests of the class. *Hanon v. Dataproducts*, 976 F.2d 497, 508 (9th Cir. 1992). The test to be applied "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Id.*

The Supreme Court has noted that Rule 23(a)'s requirements of commonality, typicality, and adequacy of representation tend to overlap. *See Dukes*, 564 U.S. at 349 n.5 (noting that the commonality, typicality, and adequacy of representation requirements "serve as guideposts for determining . . . 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").

1. NAMED PLAINTIFFS CANNOT ESTABLISH COMMONALITY BECAUSE IT IS IMPOSSIBLE TO DETERMINE WHETHER ADJUDICATION OF ANY INDIVIDUAL'S ADJUSTMENT-OF-STATUS OR NATURALIZATION APPLICATION HAS BEEN UNREASONABLY DELAYED, OR DELAYED DUE TO CARRP OR "EXTREME VETTING," WITHOUT EVALUATING THE SPECIFIC FACTS PERTINENT TO THAT INDIVIDUAL

At the heart of this case is the allegation that USCIS has unreasonably delayed adjudicating adjustment-of-status and naturalization applications. Plaintiffs, however, ignore the variety of reasons that the adjudication of applications may be delayed, and instead allege that CARRP is the cause of those unreasonable delays anytime a case being handled under CARRP is pending longer than six months. But cases alleging that a government agency has unreasonably delayed action require a fact-intensive, individualized inquiry into the causes of the delay in each case to determine entitlement to relief. Based on Plaintiffs' characterization of CARRP, that would particularly be so in those cases where *every* case presents a unique set of facts influencing whether inter-agency coordination and investigation is required prior to adjudicating

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an application, and if so, the complexity and scope any such coordination and investigation. *See Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1071 (N.D. Cal. 2014).

The proposed classes here include adjustment-of-status and naturalization applicants whose applications may be affected by countless scenarios impacting how long it takes to adjudicate each application. Such "dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 131 S.Ct. at 2551 (citation omitted).

Although Plaintiffs attempt to classify all adjudication delays as caused by CARRP, even the named plaintiffs' cases demonstrate the complexity and factual differences in any adjudication, completely apart from CARRP. One of the named adjustment-of-status applicants, Mr. Ostadhassan, provides an illustrative example. Although the instructions for the Form I-130 clearly instruct applicants to submit documentation that any prior marriages were legally terminated, Mr. Ostadhassan's wife took nearly six months to provide USCIS with evidence about the termination of her husband's previous marriage, which evidence was necessary to adjudicate her Form I-130, and by extension Mr. Ostadhassan's adjustment-of-status application.[1] Exhibit A at ¶ 5. In the course of those six months, Mr. Ostadhassan and his wife failed adequately to respond to an RFE, which then required USCIS to issue a NOID before finally receiving the required documents.

Similar issues to the one presented in Mr. Ostadhassan's case are likely to occur in the cases of other proposed class members because the adjudication of every adjustment-of-status and naturalization application is highly factual and individualized. For example, if an adjustment-of-status or naturalization applicant fails to submit required initial evidence, USCIS "may request that the missing initial evidence be submitted within a specified period of time as

[1] The existence of an approved Form I-130 is a pre-requisite to adjudication of a Form I-485, where the basis for adjustment of status is marriage to a U.S. citizen. 8 C.F.R. § 204.1(a)(1).

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determined by USCIS." 8 C.F.R. § 103.2(b)(8)(ii). Even if the applicant submits the correct initial evidence, USCIS may determine that some additional evidence is needed to make an eligibility determination, and send an RFE to the applicant, with instructions that the applicant respond in writing and submit additional evidence within a specified period of time, no longer than 12 weeks. 8 C.F.R. § 103.2(b)(8)(iii)-(iv). Finally, USCIS may issue a NOID, notifying the applicant of deficiencies in the filing, and providing a final opportunity to cure those deficiencies. *Id.* Applicants may have up to 30 days to respond to a NOID. *Id.* A benefit adjudication also necessarily takes longer if the applicant reschedules an interview or biometrics appointment. 8 C.F.R. § 103.2(b)(9). Applicants may also make various filing errors, such as submitting an application to the wrong office, which may delay the processing time.

Furthermore, Plaintiffs make no distinction in either their Second Amended Complaint or their motion between adjustment-of-status applications that are family-based, employment-based, based on a grant of asylum, based on admission as a refugee, based on an approved "T" or "U" visa, or sought under special legislation such as the Haitian Refugee Immigrant Fairness Act, the Indochinese Adjustment Act, or the Nicaraguan and Central American Relief Act. For adjustment-of-status applications, the basis for adjustment or the circumstances of the individual can have an impact on the path for adjudication. For instance, some adjustment-of-status applicants may receive a waiver of the interview portion of the adjudication, while others are generally not eligible for a waiver. 8 C.F.R. § 245.6; USCIS Policy Manual, vol. 7, ch. 5, "Interview Guidelines" (available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter5.html) (last visited May 9, 2017).

Similarly, Plaintiffs take no account for the fact that naturalization applications and adjustment-of-status applications are processed at approximately 90 locations across the country, including both local Field Offices and five regional Service Centers, some of which are specialized, and some of which have a higher volume of work than others. Both the claimed

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basis on which an applicant seeks to adjust status and the specific location at which it is processed will affect the overall processing time. For example, (employment based) adjustment-of-status applications currently pending before the California Service Center are subject to a processing time of over two years, compared to under three months at the Helena Field Office in Montana and nearly a year at the Christiansted Field Office in the U.S. Virgin Islands for adjustment-of-status applications. USCIS Processing Time Information (available at https://egov.uscis.gov/cris/processTimesDisplayInit.do) (last visited May 9, 2017).

Further, as Plaintiffs describe it, an application is included in CARRP only upon an initial determination that the application raises a "national security concern," which, Plaintiffs allege, only "arises when an individual or organization has been determined to have an articulable link . . . to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act."[2] USCIS, of course, has the responsibility to determine an applicants' eligibility for a given benefit, which includes an assessment of whether an applicant raises a "national security concern" that would affect eligibility. 8 U.S.C. §§ 1182(a)(3)(A), (B), (F), and 1227(a)(4)(A) or (B). For naturalization applicants, USCIS is required to thoroughly investigate the background of every applicant for citizenship in order to determine whether that applicant is eligible to be naturalized. *See* 8 U.S.C. § 1446(a), (b); *see also* 8 C.F.R. § 335.1. These reviews must be completed before any benefit is approved. Consequently, any analysis of the reasonableness of the delay in adjudicating any particular application would necessarily have to include a determination of the extent to which the delay is attributable to CARRP, as opposed to the many possible issues that may present in a particular case and lead to slower processing time (such as, lack of evidence that a prior marriage had been terminated).

[2] These sections of the INA establish grounds of inadmissibility and removability for terrorism and national security related reasons.

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Since there are many possible issues that may be the ultimate reason for a delay, even in a case subject to CARRP, many of the proposed class members would not have standing to challenge CARRP because they would be unable to show that the policy had harmed them, either because CARRP had no effect on the pace of adjudication or because they preferred a pending application to a denial. And, of course, "no class may be certified that contains members lacking Article III standing." *Mazza*, 666 F.3d at 594. Nevertheless, the classes Plaintiffs ask this Court to certify almost certainly include within them persons who lack standing. Because the proposed classes lack commonality even on the question of standing, the Court should deny Plaintiffs' motion for that reason alone.[3]

Further, because of the need for individualized determinations of both the reasonableness of any given delay and the extent to which CARRP has contributed to that delay, a classwide proceeding would not generate "common *answers* apt to drive the resolution of the litigation" in this case. *Dukes*, 564 U.S. at 350 (emphasis in original). This fact is, perhaps, most obvious when one considers that it would be both unjust and unwise to "[o]rder Defendants to adjudicate the petitions, applications or requests of Plaintiffs and members of the proposed classes," SAC at Prayer for Relief ¶ 5, within an arbitrary amount of time, without a particularized determination of (a) the reasons why a particular application has not been adjudicated, whether related to CARRP or not, (b) the need for additional investigation and consultation in each individual case to determine whether the applicant is eligible for or deserving of the benefit sought, and (c)

[3] The Court is bound to the class definitions provided in the complaint and, absent an amended complaint, will not consider certification beyond it. *Costelo v. Chertoff*, 258 F.R.D. 600, 604–05 (C.D. Cal. 2009).

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whether the length of time to adjudicate the application is reasonable, given (a) and (b).[4] *See Metcalf v. Edelman*, 64 F.R.D. 407, 409 (N.D. Ill. 1974). Consequently, Plaintiffs cannot establish the requisite commonality.[5] *See, e.g.*, *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 663-64 (N.D. Cal. 1976) (commonality cannot be established where wide factual variation requires individual adjudications of each class member's claims); *Metcalf*, 64 F.R.D. at 409-10 (finding no issue of fact common to the class members where varying circumstances surrounded the denial of the individual shelter exceptions). Furthermore, because the legality of the pace of adjudication turns on individualized reasons—some of which have nothing to do with CARRP—Defendants' conduct cannot "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 (internal quotation omitted).

2. NAMED PLAINTIFFS' CLAIMS ARE NOT TYPICAL OF THE CLAIMS OF CLASS MEMBERS GENERALLY, AND THEY ARE NOT ADEQUATE CLASS REPRESENTATIVES

While the commonality analysis looks at the relationship among the class members, the typicality analysis looks at the relationship between the proposed class representative and the rest of the class. NEWBERG ON CLASS ACTIONS § 3:26 (5th ed.). A named plaintiff's claim meets the typicality requirement if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory. The test generally is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have

[4] Putting Plaintiffs concerns about CARRP to one side, Defendants presume Plaintiffs are not contending that USCIS should ignore terrorism or national security concerns in adjudicating adjustment-of-status and naturalization applications.

[5] The reasonableness of the pace of adjudication could still be contested on an individual basis under the APA. *See* 5 U.S.C. §§ 555(b) & 706(1).

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been injured by the same course of conduct. *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985).

Here, the named plaintiffs' claims are not typical of the claims of the proposed classes generally. First, the named plaintiffs allege they are fully eligible for the immigration benefits they seek. The same cannot be said of all persons in the classes they seek to represent. As Plaintiffs allege, CARRP only applies when USCIS has an "articulable link" to a ground of inadmissibility or removability under INA sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B).[6] While Plaintiffs allege CARRP unlawfully casts the net too widely in its definition of a national security concern, it cannot be doubted that within the proposed classes, there are many who are (or at least appear to be prior to investigation) actually inadmissible or removable under the INA, and therefore not, in fact, eligible for the immigration benefits they seek.[7]

Consequently, the Court should conclude that the named plaintiffs' claims are not typical of the class claims generally, and deny their class certification motion for that reason.

C. THE NAMED PLAINTIFFS ARE NOT ADEQUATE CLASS REPRESENTATIVES

The named plaintiffs are not adequate class representatives. The adequacy requirement serves to protect the due process rights of absent class members who will be bound by the judgment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (internal quotation

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[6] These sections of the INA are codified at 8 U.S.C. §§ 1182 and 1227, respectively.

[7] Further, Mr. Ostadhassan's claims in particular are atypical of the class he seeks to represent (disqualifying him as an adequate representative of the class). As noted above, some significant period of the delay in his case is attributable to his and his wife's failure to provide USCIS with adequate evidence at various stages of his adjudication process—which is in no way attributable to CARRP. *See Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001) (that named plaintiff "was neither a typical nor adequate class representative and was subject to unique defenses" was "independently sufficient to support the denial of class certification").

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marks omitted). A determination of legal adequacy is based on two inquiries: (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. *Id.* at 1021. *See also Denney*, 443 F.3d at 268 ("proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.").

In bringing this lawsuit, the named plaintiffs ask the Court to order USCIS to render a final decision on their immigration benefit applications. SAC at Prayer for Relief, ¶ 5. Many in the proposed classes, however, aware their applications have been pending for a time without decision, are apparently content to allow the USCIS adjudication process to run its course, not having brought suits in their own names. Nor is there reason to doubt that some prospective class members might prefer to allow their applications to remain pending, continuing to live and work in the United States in their current status, rather than risk having USCIS determine they are inadmissible or removable and be placed in removal proceedings. Plaintiffs have presented no evidence, or reason to think, that their own calculations of the risks and benefits of seeking to compel decisions on their benefit applications are typical of the proposed class members at large.[8]

Further, no named plaintiff is an adequate representative of the proposed classes, as they all claim to be fully eligible for the benefits they seek. If true, then their interests are at odds with those proposed class members who are, in fact, ineligible for benefits on terrorism and national

[8] Despite the fact they ask the Court to order Defendants to adjudicate their applications in the Second Amended Complaint, SAC at Prayer for Relief, ¶ 5, in their motion for class certification, the named plaintiffs assert they "do not request that this Court adjudicate their individual immigration applications." Pls.' Amend. Class Cert. Mot. (ECF No. 49) at 12. In that case, the named plaintiffs' claims are not typical of those class members who do desire to have their applications adjudicated, and the named plaintiffs are still not adequate class representatives.

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security related grounds, or whose applications reasonably merit further investigation and potential coordination with law enforcement and intelligence agencies in order to permit USCIS to make an informed decision.

Additionally, the named plaintiffs are not adequate class representatives because the time they have been waiting for decisions on their applications is not representative of class members writ large. Named plaintiffs allege they have been waiting between approximately one and a half and four years for decisions on their applications, yet they seek to represent classes that include persons whose immigration benefit applications have been pending for as little as six months, as well as much longer than four years. Given that the reasonableness of any given adjudication delay is a function of both the reasons for the delay and the length of the delay, named Plaintiffs' personal interests in receiving decisions on their applications after between one and a half and four years is potentially at odds with applicants who have experienced much shorter and much longer waits. Indeed, many courts have held that delays of four years or less are not unreasonable. *Islam*, 32 F. Supp. 3d at 1071 (collecting cases).

Plaintiffs have chosen six months as the time beyond which the Court should presume adjudication to be unreasonably delayed in certifying the proposed classes because, they allege, "Congress has directed USCIS to process immigration benefit applications, including for adjustment of status, within 180 days." SAC at ¶ 51 (citing 8 U.S.C. § 1571(b)). Section 1571, however, merely expresses the "sense of Congress." Such "'sense of the Congress' provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law." *Orkin v. Taylor*, 487 F.3d 734, 740 (9th Cir. 2007). That Congress recognized that the time reasonably necessary to conduct an appropriate background investigation would vary from case to case is reinforced by the fact Congress did not include any mandatory deadline for the completion of such background investigations in the INA. Consequently, the Court cannot conclude, based on section 1571(b), that any delay beyond six

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months is presumptively unreasonable. Rather, the Court would have to make such determinations on a case-by-case basis. And it is apparent that individuals who have been waiting between one and a half and four years for decisions on their immigration benefit applications are not similarly situated to those who have been waiting only six months, or those who have been waiting even longer than four years. Indeed, average processing time for I-485 applications filed at the St. Paul Field Office is currently over a year, and the average processing time at the Seattle Field Office is currently approximately ten months for I-485 applications and nine months for N-400 naturalization applications. *See* USCIS Processing Time Information (*available at* https://egov.uscis.gov/cris/processingTimesDisplay.do (last visited May 5, 2017).[9]

Further, as discussed above, the facts contributing to delay in Mr. Ostadhassan's case make him an unsuitable representative of the class of all adjustment-of-status applicants subject to CARRP who have not received a decision after six months. Likewise, Messrs. Wagafe, Manzoor, and Jihad are not adequate representatives of the class they seek to represent. All three have now had their naturalization applications approved, and Messrs. Wagafe and Manzoor have been naturalized. Their individual claims are, therefore, moot. Likewise, Ms. Bengezi's adjustment-of-status application has been approved, mooting her individual claims. While Plaintiffs have argued (in their Amended Motion for Class Certification, ECF No. 49, at 19) that the mootness of Mr. Wagafe's individual claims do not moot the entire action, the fact that his own claims (and those of Messrs. Manzoor and Jihad, and Ms. Bengezi) are moot certainly is relevant to whether he (or Messrs. Manzoor and Jihad, and Ms. Bengezi) would be an adequate class representative, with incentive to vigorously litigate the claims of the absent class members.

[9] The processing times that USCIS posts do not include in the calculations cases in which an RFE or NOID has been issued. Thus, actual processing times for cases subject to unique delays may be longer than that publicly posted. USCIS Ombudsman, ANNUAL REPORT 2016 (Jun. 29, 2016), at 32, (available at https://www.dhs.gov/sites/default/files/publications/CISOMB%20Annual%20Report%202016.pdf) (last visited May 5, 2017).

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D. THE COURT SHOULD NOT CERTIFY A NATIONWIDE CLASS

Finally, as noted above, even where the requirements of Rule 23 are met, the certification of a class action is ultimately within the Court's discretion. In this case, the Court should exercise its discretion not to certify a nation-wide class, but rather limit any class to those within the Court's jurisdiction.

As the United States Supreme Court has observed,

> [N]ationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges . . . . It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.

Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

Numerous individual plaintiffs have brought, and continue to bring, lawsuits in courts throughout the country challenging delays in the processing of their individual immigration benefit applications, and raising challenges in the context of their particular cases to the use of CARRP. As a matter of comity, and in recognition of the benefit of allowing different courts in different jurisdictions to adjudicate these claims in a variety of factual contexts, this Court should decline to certify a nationwide class.[10] Further, based on the differences in the processing times

[10] In arguing for the appropriateness of a nationwide class here, Plaintiffs cite Article I, § 8, cl. 3 of the U.S. Constitution (Uniform Rule of Naturalization clause). Plaintiffs' reliance on this provision is misplaced. This clause is a grant of power to Congress, not a restriction on the Executive's execution of the laws. The purpose of the Uniform Rule of Naturalization clause was to ensure the national Congress had the authority to make naturalization rules for the entire country, remedying the patchwork of individual state laws that had existed under the Articles of Confederation. *See Korab v. Fink*, 797 F.3d 572, 580-81 (9th Cir. 2014) (citing The Federalist, No. 42 (James Madison)). The Clause in no way speaks to the propriety of permitting various

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of adjustment-of-status and naturalization applications around the country, and different factors which may affect processing times in different locations, nationwide certification would be particularly inappropriate in this case.

V. CONCLUSION

For the foregoing reasons, Plaintiffs do not meet the criteria for class certification under Rule 23, and Defendants respectfully submit that this Court should deny Plaintiffs' motion for class certification.

DATED this 10th day of May, 2017.

Respectfully submitted,

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courts, within their respective areas of jurisdiction, to reach varying judgments about the Executive's execution of a uniform national law, and a nationwide class is no more necessary or appropriate here than in any case alleging the Executive is violating a law applicable throughout the country.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a trial attorney in the Civil Division of the United States Department of Justice and is a person of such age and discretion as to be competent to serve papers. It is further certified that on May 10, 2017, I electronically filed the foregoing Defendants' Response to Plaintiffs' First Amended Motion for Class Certification with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record herein.

Dated May 10, 2017.

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