THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; *et al.*,

Defendants.

No. 2:17-cv-00094-JCC

PLAINTIFFS' REPLY IN SUPPORT OF FIRST AMENDED MOTION FOR CLASS CERTIFICATION

NOTED ON MOTION CALENDAR: MAY 19, 2017

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I. INTRODUCTION

Defendants' response to Plaintiffs' amended motion for class certification hinges on the false premise that this case challenges routine delays in the processing of immigration applications. It does not. This case challenges application of a secret and illegal government program—the Controlled Application Review and Resolution Program, or CARRP—that targets Muslims who have applied for naturalization and adjustment of status and uses extra-statutory, arbitrary, and discriminatory criteria for the adjudication of those applications. When the government subjects a naturalization or adjustment application to CARRP, adjudication of that application is necessarily delayed. Such delay is merely a byproduct of CARRP. At issue in this case is whether CARRP is lawful. It is not.

Defendants do not contest CARRP's existence or that Defendants have subjected named Plaintiffs' applications to it. Defendants also do not contest the numerosity of Plaintiffs' classes, acknowledging the *thousands* of people affected by this unlawful program. *See* Plaintiffs' First Amended Motion for Class Certification, Dkt. 49 at 12-13 (detailing the thousands of applicants affected). And as Defendants' actions have made clear, a class action is the only way CARRP will ever be exposed to judicial scrutiny. As has happened in the instant case with respect to *all but one* named Plaintiff, whenever individual plaintiffs have tried to challenge CARRP, Defendants have systematically attempted to evade judicial review by suddenly adjudicating those plaintiffs' long-delayed applications, while the extra-statutory program itself remains unaddressed. Far from mooting any claim, Defendants' decision to adjudicate Plaintiffs' individual applications simply shows why the Court should grant Plaintiffs' class certification motion.

The classes Plaintiffs seek to certify are easily ascertainable, as the proposed members are those applicants who have been subjected to CARRP or a successor iteration of CARRP.

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The five named Plaintiffs' claims, interests, and injuries are directly aligned with the classes they seek to represent, satisfying the commonality, typicality and adequacy requirements of Rule 23.[1]

II. ARGUMENT AND AUTHORITIES

A. Plaintiffs Have Standing

Defendants allege that Plaintiffs lack standing, recycling many of the arguments from their motion to dismiss. *Compare* Defendants' Response to Plaintiffs' First Amended Motion for Class Certification, Dkt. 60 at 7-8 *with* Defendants' Motion to Dismiss, Dkt. 56 at 9-14. Plaintiffs have already explained why those arguments are unavailing, and incorporate those explanations by reference here. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss, Dkt. 58 at 6-13. But for purposes of this motion, two points bear emphasis.

First, Defendants erroneously claim that Plaintiffs have "disclaimed any interest in obtaining decisions on their pending applications" and therefore lack standing to challenge CARRP. Dkt. 60 at 7-8. Plaintiffs have never disclaimed a personal interest in the adjudication of their applications. Plaintiffs' prayer for relief makes clear they seek an order that Defendants "adjudicate Plaintiffs' and proposed class members' petitions, applications, or requests based solely on the statutory criteria." Second Amended Complaint, Dkt. 47 at 51. Plaintiffs are not asking *the Court itself* to pass judgment on or adjudicate the qualifications of any particular named Plaintiff's application; instead, Plaintiffs ask that the Court order *USCIS* to adjudicate class members' applications "based solely on the statutory criteria"—in other words, without the imposition of CARRP. Subjecting Plaintiffs' applications to CARRP has caused substantial harm, including harm related to Plaintiffs' employment, family mobility, travel, and emotional well-being. *See, e.g.*, *id.* ¶¶161, 175, 198, 219, 235. Plaintiffs easily satisfy the requirements for Article III standing (injury-in-fact, causation, and redressability) under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).

[1] Defendants do not challenge numerosity or Plaintiffs' qualification under Rule 23(b)(2).

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Second, Plaintiffs' constitutional and statutory challenges to CARRP—and their standing to pursue such challenges—extend to any future iterations that Defendants implement under the authority of Executive Order 13780, Defendant Trump's second executive order on immigration. 82 Fed. Reg. 13209 (Mar. 9, 2017) ("Second EO"). Were this not true, the forward-looking injunctive and declaratory relief Plaintiffs seek would be meaningless; Defendants could re-name or make minor tweaks to the CARRP policy and evade compliance with the Court's mandate.

Defendants argue that because the named Plaintiffs' applications were pending before the Second EO went into effect, they lack standing to challenge any "extreme vetting" program implemented pursuant to Section 5 of the Second EO. Again, however, Plaintiffs seek class certification based on challenges to CARRP—as it existed, exists, and will exist in the future, including changes made to the program pursuant to Section 5 of the Second EO. Dkt. 49 at 3-11. Because Plaintiffs have alleged, and Defendants do not dispute, that their applications have been processed under CARRP, they have standing to challenge that program and any future iteration thereof.

B. Commonality is Satisfied

Common questions of law and fact pervade this lawsuit, which will result in class-wide answers regarding whether CARRP violates the Constitution, the Immigration and Nationality Act (INA), and the Administrative Procedure Act (APA). Defendants' commonality argument cannot succeed because it is based on their misconception that this suit challenges the delay experienced by individual Plaintiffs in the adjudication of their naturalization and adjustment applications.

Significantly, this suit actually challenges USCIS's decision to implement and apply CARRP to Plaintiffs and class members because the program violates the Constitution, the INA, and the APA. In other words, the focus is on the legality of CARRP as a policy, not simply the harmful delays experienced by individual Plaintiffs as a result of CARRP. Plaintiffs agree with Defendants that the guiding commonality inquiry is whether consideration as a class action will

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generate answers common to class members. Dkt. 60 at 8, *quoting Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2001). Because the adjudication of Plaintiffs' statutory and constitutional claims regarding the legality of CARRP will generate answers common to the entire class and will permit resolution of the entire litigation, commonality is established. *See Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 652-53 (W.D. Wash. 2011).

Defendants brainstorm the myriad factors that could possibly cause delay on a given application, Dkt. 60 at 10-11, and ask the Court to take them at their word that CARRP is not the primary factor in the delay Plaintiffs have experienced. This argument is inapposite. As an initial matter, Plaintiffs are entitled to full discovery into the implementation of CARRP; Defendants' speculation does not create any authority. Moreover, the delay caused by CARRP is not the focus of the challenge, but rather, one of the harmful consequences. The specific facts of each class member's individual circumstances are relevant only as a means of illustrating how CARRP is applied, revealing the pretense and technicalities USCIS uses to delay and deny otherwise qualified applicants. Far from defeating commonality, the use of such techniques on all these applications collectively demonstrates the all-encompassing nature of CARRP in action. Indeed, despite the differences in their individual cases, the fact that the applications of Plaintiffs Wagafe, Bengezi, Jihad, and Manzoor were *all* approved shortly after the filing of this litigation strongly suggests that what was delaying their case was, in fact, CARRP.

The bottom line is this: the common feature linking all proposed class members is that USCIS has subjected, is subjecting, or will subject their applications to an illegal program. An injunction blocking Defendants from applying that program is precisely the type of "declaratory relief [that] is available *to the class as a whole*," which demonstrates 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

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none of them." *Dukes*, 564 U.S. at 361 (emphasis added). Plaintiffs easily establish commonality.[2]

C. Named Plaintiffs' Claims are Typical

Typicality ensures that class representatives' personal grievances give them sufficient incentive to vigorously litigate on behalf of absent class members. NEWBERG ON CLASS ACTIONS §§ 3:28-3:29 (5th ed.) ("A plaintiff with typical claims will pursue his or her own self-interest in the litigation and, in so doing, will advance the interests of the class members, which are aligned with those of the representative."). Plaintiffs meet the typicality requirement because their claims arise from the same event or course of conduct that gives rise to the claims of all the other class members; specifically, USCIS has subjected each member's application to CARRP. In fact, Defendants do not ever dispute that all five named Plaintiffs have been labeled national security concerns, subjected to CARRP, and exposed to extensive and unwarranted delays without notice or opportunity to challenge that classification. Accordingly, they share the same vested interest in challenging the legality of CARRP as do other similarly-situated applicants whose applications have been or will be subjected to CARRP.

Defendants incorrectly assert that the named Plaintiffs are not typical of the classes they seek to represent because they claim to be fully eligible for the immigration benefits they seek, whereas many of the proposed class members may not be statutorily eligible. Dkt. 60 at 14-15 (suggesting that Plaintiffs contend CARRP "unlawfully casts the net too widely in its definition of a national security concern" and that many class members are "actually inadmissible or removable" under the INA). However, all proposed class members who apply for naturalization

[2] Defendants allege the Court is "bound to the class definitions provided in the complaint." Dkt. 60 at 13 n.3. In fact, this circuit has not decisively determined the extent to which a court is strictly bound by the class definition contained in the complaint. *Grodzitsky v. Am. Honda Motor Co. Inc.*, No. 2:12–cv01142–SVW–PLAx, 2014 WL 718431, at *4 (C.D.Cal. Feb. 19, 2014). At the very least, the Ninth Circuit recognizes the "broad discretion" afforded to courts "to revisit [class] certification throughout the legal proceedings before the court," which includes, "[w]here appropriate," the discretion to "redefine the class." *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001).

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or adjustment of status submit their applications believing they are eligible for the benefit. USCIS screens all such applications for national security concerns, applying the grounds of inadmissibility or removability. Plaintiffs contend that in addition to these statutory grounds that all applicants must satisfy, proposed class members are subjected to CARRP's ultra vires adjudication process. Under CARRP, USCIS uses *additional extra-statutory* criteria that discriminate based on national origin. Dkt. 47 ¶ 76. And once an applicant is labeled a national security concern, USCIS takes the application off the routine adjudication track and places it on a special CARRP adjudication track where it is governed by CARRP-specific procedures that aim to find any excuse to deny the application or alternatively, where no reason for denial can be identified, impose an indefinite delay. *Id.* ¶¶ 61, 77. The injuries Plaintiffs have experienced, as well as the basis for Plaintiffs' challenge, all stem from USCIS' utilization of these extra-statutory criteria instead of the statutory criteria established by Congress.

In other words, whether any particular Plaintiff is in fact statutorily eligible for the benefits they seek is not determinative of Plaintiffs' claims and therefore is not determinative of typicality. *See* FED. R. CIV. P. 23(a) (typicality asks whether *claims* of class representatives are similar to *claims* of the class). As Plaintiffs' prayers for relief make clear, they are not seeking a specific adjudication (either a decision to grant or deny) of their applications; Plaintiffs merely ask that adjudication occur "based solely on the statutory criteria" and not pursuant to CARRP or any successor extreme vetting program. Dkt. 47 at 51. Accordingly, the statutory eligibility of individual Plaintiffs is immaterial to the issue facing the Court—whether CARRP as an overarching program violates the Constitution, the INA, and the APA. The relevant factual prerequisite for typicality, therefore, is the application of CARRP to a Plaintiff's application—a fact that all Plaintiffs share and have equal motivation to challenge. Because Defendants never contest that all five named Plaintiffs are indeed subject to CARRP, the named Plaintiffs' claims are typical of the classes they seek to represent.

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D. Named Plaintiffs Are Adequate Class Representatives

The five named Plaintiffs are adequate class representatives under Rule 23(a)(4) because there is no tension between their interests and those of the absent class members they seek to represent. All class members are applicants for naturalization or adjustment of status who USCIS has placed on the CARRP adjudication track. USCIS has discriminated against all class members based on their national origin and applied extra-statutory criteria to the adjudication process without notifying Plaintiffs or affording them an opportunity to challenge the classification. The class members' interests are therefore aligned in challenging CARRP under the Constitution, the INA, and the APA.

Remarkably, Defendants assert that the named Plaintiffs are inadequate representatives because there may be unnamed class members who would prefer to let the USCIS adjudication process "run its course," creating a conflict of interest. Dkt. 60 at 16. Defendants assume that some putative class members prefer to sit idly by while their immigration applications are subjected to additional hurdles imposed by this extra-statutory and discriminatory program. This assumption is patently illogical. USCIS does not provide applicants notice that they have been flagged as national security concerns or that their applications are accordingly being subjected to CARRP. And the only evidence Defendants cite for their argument is the fact that these unnamed class members did not bring lawsuits in their own names. *Id*. Were this an adequate argument, no class would ever be certified as the existence of numerous unnamed and unidentified plaintiffs without the knowledge, capacity, financial means, or forethought to bring individual claims is the hallmark of class action litigation, especially in the immigration context. *See* Dkt. 49 at 11 n.3 (compiling Ninth Circuit cases certifying nationwide or districtwide classes in the immigration context).

Moreover, history has shown that bringing individual lawsuits is not an effective way to challenge CARRP—every time a plaintiff has done so Defendants have rushed to adjudicate his or her application, mooting those claims and dismissing the case. *Arapi v. USCIS*, No. 16-cv-

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00692 JLR (E.D. Mo. 2016); *Muhanna v. USCIS*, No. 14-cv-05995 (C.D. Cal. July 31, 2014). Finally, the proposed classes are limited to those with applications subject to CARRP, and thus all class members are known to USCIS.

Defendants also argue that the difference in delay times between the named and unnamed Plaintiffs renders the named Plaintiffs inadequate representatives. Dkt. 60 at 17. But, as Plaintiffs have frequently repeated, this lawsuit is not about whether a certain length of delay is unreasonable or unlawful. It is instead about the root *cause* of the delays experienced by Plaintiffs—adjudication under CARRP. Whether a specific application has been delayed for 6 months or 6 years is immaterial; what matters is that the applicant has been labeled a national security concern based on extra-statutory and unpublished criteria, given no notice of the differential treatment nor an opportunity to challenge the classification, and subjected to delay without any explanation. *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (class of prisoners with health problems of varying severity); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) (class of individuals detained for varying lengths of time under various statutes).

And contrary to Defendants' assertions (Dkt. 60 at 18), the named Plaintiffs' incentives to vigorously litigate the claims of unnamed class members have not been diminished by the fact that their individual claims have now been adjudicated. Their incentive to litigate stems from the harm they have suffered—harm such as the stress and anxiety from discrimination and treatment as a national security concern, the inability to travel freely or sponsor family members, and the confusion caused by USCIS's refusal to provide an explanation for the delay they experienced. *See, e.g.*, Dkt. 47 ¶¶161, 175, 198, 219, 235. If anything, the fact that their applications have been quickly adjudicated after years of unexplained delay gives them *more* incentive to vigorously litigate their claims; that Defendants are capable of suddenly fast tracking applications strongly suggests that the named Plaintiffs have been subject to baseless and discriminatory delay all along.

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And, in any event, where claims are inherently transitory or where Defendants attempt to pick off named plaintiffs, the class certification analysis "relates back" to the time the complaint was filed. *E.g.*, *Rivera v. Holder*, 307 F.R.D. 539, 548 (W.D. Wash. 2015) (granting class certification and reasoning that "[a]lthough plaintiff's class certification motion was ultimately noted for consideration well after plaintiff's release [mooting out the individual claim], the Court finds that the relation back doctrine applies"); *see also Blankenship v. Sec'y of HEW*, 587 F.2d 329, 333 (6th Cir. 1978) (affirming district court's certification of class after named plaintiffs' claims had been mooted, reasoning that "refusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses," and class certification therefore relates back to the date of filing the complaint); *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977) (Defendants should not be able to "avoid judicial scrutiny of [their] procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification").

E. The Court Should Certify Nationwide Classes

Finally, certification should be nationwide. Plaintiffs bring a broad-based challenge to a federal program that is illegally and consistently applied on a nationwide basis. If CARRP is illegal as to Plaintiffs living in Washington state, it is just as illegal as to Plaintiffs living in Washington D.C. Where Plaintiffs challenge federal government policies that impact individuals around the country, a nationwide class is appropriate. *See Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) ("This challenge is directed at a specific, discrete INS policy that affects citizens nationwide. The claims of individual plaintiffs do not turn on the facts of their cases. The court, therefore, concludes that this suit is particularly suitable for nationwide class certification."); *see also, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (affirming a nationwide class, reasoning that "[n]othing in Rule 23…limits the geographical scope of a class action," and noting that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class");

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Mendez Rojas v. Johnson, No. 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).

As Defendants have proven over and over again, individual challenges to CARRP do not result in judicial determinations regarding the lawfulness of the program because Defendants ultimately moot out the individuals' claims by suddenly adjudicating applications that have languished, due to CARRP, for years. This illicit program has been allowed to continue because it is constantly evading review. Accordingly, Defendants are not able to point to any cases percolating in any of the Courts of Appeals or even a significant possibility of other district courts weighing in with determinations on the merits of the challenge presented. Given the compelling need for a uniform interpretation of our federal immigration laws and the absence of cases percolating in other circuits addressing these important issues, the Court should certify the two nationwide classes Plaintiffs request.

III. CONCLUSION

The Court should grant Plaintiffs' motion to certify their Naturalization and Adjustment of Status classes.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF FIRST AMENDED 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 19th day of May, 2017, at Seattle, Washington.

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