THE HONORABLE RICHARD A. JONES

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-RAJ

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO RECONSIDER CLASS CERTIFICATION

NOTED ON MOTION CALENDAR: July 18, 2017

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INTRODUCTION

The Court should deny Defendants' motion to reconsider for three reasons. First, the motion simply recycles arguments the Court has already considered and rejected, and therefore falls well short of meeting the high threshold of "manifest error" under Local Rule 7(h).

Second, Defendants' commonality argument, once again, wrongly asserts that Plaintiffs' injuries are merely "abstract" and that there are no common causes for these injuries. As this Court already has concluded, commonality exists because Plaintiffs assert that the government has subjected all class members to an extra-statutory and illegal adjudication process (the Controlled Application Review and Resolution Program, or "CARRP")—which similarly situated applicants are not subjected to, and which carries the attendant harms of unreasonable delay and pretextual denials, obfuscation, and impairment of daily life. Moreover, Defendants' argument conflates two separate doctrines: commonality (common questions of law and fact among class members) and Article III standing (concrete injury-in-fact).

Third, Defendants' grievance with the class definition is not a reason to deny certification—if anything, it is a reason to expand the certified classes. Defendants criticize the definitions for being limited to persons whose applications have been pending for at least six months. While the six-month benchmark is a rational limitation, Plaintiffs are willing to amend the definitions to *all* persons who have been subjected to CARRP—regardless of how long their applications have been pending. And, of course, as this Court recognized, nationwide certification is necessary to effectively enjoin CARRP.

Accordingly, Plaintiffs respectfully request the Court deny Defendants' Motion to Reconsider Class Certification.

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ARGUMENT

A. Reconsideration is Strongly Disfavored

Local Rule 7(h) states that the Court should "ordinarily deny" a motion for reconsideration unless the moving party demonstrates "manifest error" in the Court's prior ruling or "new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." It follows that when a motion for reconsideration "merely rehashes the same arguments already made and rejected by the Court," it "may be denied for this reason alone." *Ledcor Indus. (USA) Inc. v. Virginia Sur. Co.*, No. 09-CV-01807 RSM, 2012 WL 223904, at *1 (W.D. Wash. Jan. 25, 2012); *see also Anderson v. Domino's Pizza, Inc.*, No. 11-CV-902 RBL, 2012 WL 2891804, at *1 (W.D. Wash. July 16, 2012) (noting reconsideration is an "extraordinary remedy" that "should not be granted . . . unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law") (quotations omitted).

Defendants fail to meet this stringent standard. Indeed, their standing and commonality arguments (Dkt. 73 at 1-4) mirror those made in their motion to dismiss (Dkt. 56 at 9-10), their reply in support of their motion to dismiss (Dkt. 61 at 2-4), and their opposition to Plaintiffs' motion for class certification (Dkt. 60 at 7-14). And their contentions related to Plaintiffs' class definitions both rehash old arguments (as to nationwide certification, *see* Dkt. 60 at 19 n.10) *and* improperly raise new evidence and arguments that easily could have been raised earlier (as to the six-month limitation). Reconsideration is simply not appropriate. Moreover, the Court's ruling was correct.

B. Plaintiffs Share Common Questions, Contentions, Answers, and Injury

A central prerequisite to class certification is a showing that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). As Defendants admit (Dkt. 60 at 6, 8) and the Court correctly held (Dkt. 69 at 24-26), the inquiry most determinative of commonality is whether consideration as a class will generate answers common to class members. *See Wal-*

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Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011). The Supreme Court expanded on this edict in *Dukes*, explaining that common answers are generated where the claims of each class member "depend upon a common contention" such that "determination of [their] truth or falsity will resolve an issue that is central to the validity of each . . . claim[] in one stroke." *Id.* Where this is true, Plaintiffs can be said to have suffered the "same injury" and commonality is established. *See id.* The Court properly and expressly considered these very factors in its order granting class certification. Dkt. 69 at 24-25 (citing cases that directly quote *Dukes* for both propositions).

Defendants criticize the Court for relying on the Ninth Circuit's statement in *Hanlon v. Chrysler Corp.* that "shared legal issues with divergent factual predicates is sufficient" to show commonality, contending that *Dukes* overruled *Hanlon*'s proposition by requiring Plaintiffs to show the "same injury." Dkt. 73 at 3; *see Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). But class members in fact suffer the "same injury" under *Dukes* where (1) consideration as a class will generate common answers and (2) the claims depend on a "common contention" such that the validity of each claim will be determined in one stroke. *Hanlon* simply emphasizes the qualification inherent in Rule 23(a) itself—the rule requires common questions of law *or* fact, but not both. FED. R. CIV. P. 23(a)(2). Since *Dukes*, the Ninth Circuit has consistently advanced this view of commonality and continues to cite *Hanlon* for the proposition the Court did here—a clarification that the "common contention" required by *Dukes* can be based on shared legal issues with different factual predicates. *See, e.g.*, *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (finding commonality in class action against employer where common questions concerning employer's unofficial policy against reporting overtime and its impact on employees drove the answer to plaintiffs' claims); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041-42 (9th Cir. 2012) (finding commonality in class action against debt collector among individuals contacted via cellular telephone numbers obtained by "skip-tracing").

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Plaintiffs clearly meet this legal standard for commonality because there is a common contention running through all the class members' claims (that their immigration applications have been subjected to CARRP and that this program is illegal for several reasons) and consideration as a class will therefore generate common answers (CARRP violates the Constitution, the APA, and the INA and so the Court should enjoin Defendants from applying it to Plaintiffs' applications). Finally, because they all seek the same relief—adjudication of their immigration applications by legislatively-sanctioned criteria instead of CARRP—all of the class members' claims can be resolved together in one stroke, without delving into the facts particular to individual applications.

Defendants' contention that Plaintiffs must prove individualized ways that CARRP has harmed each class member misunderstands the basis for commonality that Plaintiffs asserted and this Court found. Because Plaintiffs "are not seeking damages, only injunctive relief against a policy that allegedly is applied to all members of the class indiscriminately[,] Plaintiffs may properly offer evidence and argument as to any number of potential consequences resulting from such a policy without the added requirement for each class member to show he or she has suffered, or will suffer, all of those consequences, or any particular subset of them." *Abadia-Peixoto v. U.S. Dep't of Homeland Sec.*, 277 F.R.D. 572, 577 (N.D. Cal. 2011); *cf. Dukes*, 564 U.S. at 349-60 (finding no commonality because, in absence of company-wide discrimination policy, resolution of claims would require proof of how each manager engaged in discriminatory decision-making in violation of Title VII). The facts particular to each individual class member's application will be relevant only *after* the conclusion of this litigation; if CARRP is enjoined, each class member's application will be adjudicated solely on its merits pursuant to the statutory criteria.

Defendants urge Plaintiffs must demonstrate some "glue holding the alleged reasons for delay together," and contend that some class members' "applications may take longer than six months to process" for reasons "entirely unrelated" to CARRP. Dkt. 73 at 3-4. Yet this

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contention does not negate that CARRP itself causes delay. Dkt. 47 ¶¶ 59, 61, 77, 91-97 (explaining how CARRP causes delay).

By definition, the classes are limited to applicants who have been subjected to CARRP. CARRP defines a process for classifying immigration benefit applicants as "national security concerns." Once an application is branded with the "national security concern" label, it is taken off the routine, congressionally-mandated adjudication track and is instead subjected to a special CARRP adjudication process. *See, e.g.*, Dkt. 49 at 4-6. During CARRP adjudication, if no reason to deny can be identified straightaway, the application is shuffled through a series of reviews designed to indefinitely delay the adjudication decision. *See* Dkt. 27-1, Ex. A at 17-18 ("Officers are not authorized to approve applications" subject to CARRP); *id.* Ex. B at 2 (an officer "is not authorized to approve applications or petitions" subject to CARRP); *id*. Ex. C at 9-10 (CARRP flow charts). Because class members' applications are all subjected to the extrastatutory hurdles imposed by CARRP, they all faced delays and additional obstacles that cannot be dismissed as simply routine delays that process entails. Instead, the class members experience delays directly tied to their subjection to CARRP adjudication.

C. Plaintiffs Have Suffered a Concrete Injury Sufficient to Confer Standing

Defendants attempt to revive their argument that the injury Plaintiffs allege is too "abstract" to confer standing, and that the Court therefore lacks jurisdiction. Dkt. 73 at 1-3. To the contrary, CARRP has concretely injured all class members by applying an entirely distinct, and secret, set of adjudicatory standards to their adjustment of status and naturalization applications that are not applied to similarly situated applicants.

At the outset, Defendants recycle this argument from their motion to dismiss, directly lifting text and legal citation, and this fact is reason enough to reject it. *Compare* Dkt. 56 at 10 (citing *Lance v. Coffman*, *Allen v. Wright*, and *Novak v. United States* for the proposition that "abstract disputes—even those alleging the government has acted unlawfully—are insufficient to establish jurisdiction"), *with* Dkt. 73 at 2 (same). A motion to dismiss is the proper place to raise

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standing, and the Court considered and denied Defendants' motion to dismiss on this ground. Dkt. 69 at 10-11. Defendants have not moved to reconsider the Court's decision denying their motion to dismiss and should not be permitted to revive this argument in the context of reconsideration of class certification.

In any event, Defendants' argument fails on the merits because the injury Plaintiffs have suffered is anything but abstract. Discrimination—here, the uneven treatment of immigration applications via CARRP—is itself a concrete and particularized injury. *See, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (recognizing stigmatization from gender discrimination constitutes injury-in-fact). Plaintiffs are legally in the United States and have applied to adjust their status to that of a lawful permanent resident or a naturalized U.S. citizen. Instead of being adjudicated according to the criteria for adjustment of status and naturalization established by Congress, Plaintiffs—unbeknownst to them and to the American people—have been placed in an extrastatutory program imposing additional obstacles designed to result in either indefinite delays or pretextual denials. Their placement in this program was made without their knowledge and, upon information and belief, was based on arbitrary factors that discriminate against Muslims and nationals of Muslim-majority countries. Plaintiffs state a concrete injury because their immigration benefit applications have been subjected to this illegal program that discriminates on the basis of race, religion, and national origin.

Defendants argue that enjoining CARRP would be equivalent to "issu[ing] an advisory opinion" because, without proof that CARRP is the cause for the delay experienced by each and every plaintiff, class members can only establish "abstract harm." Dkt. 73 at 2. This is incorrect.

First, Plaintiffs do allege that CARRP is the reason for the delay experienced by each of the named Plaintiffs and all of the accompanying class members. As explained above, Plaintiffs contend the delay they have experienced is caused by CARRP separate from the other reasons an application may be delayed. Dkt. 47 ¶¶ 160-61, 173, 175, 196, 198, 217, 219, 234, 235 (alleging CARRP has caused delay in adjudication of each named Plaintiff).

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Second, the concrete injury experienced by each class member goes beyond delay—the fact that their applications are being adjudicated subject to different, more stringent, and more opaque standards than those authorized by Congress establishes a concrete injury sufficient to confer standing. And though CARRP causes delay in many cases, for many the program also causes pretextual denial, underscoring that the injury stems from application of CARRP and not any one resultant harm.

Finally, the cases Defendants cite in support of their argument are inapposite. Defendants rely on several cases that address citizen suits alleging generalized grievances, which are different in kind from the injury experienced by Plaintiffs. *See Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (voters challenged procedure used to draw electoral districts); *Allen v. Wright*, 468 U.S. 737, 739-40 (1984) (parents challenged IRS's decision to permit racially discriminatory private schools to maintain their tax-exempt status). But *see Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) (plaintiffs stated a pecuniary injury and damages as a result of purchasing domestic ocean cargo shipping services, and therefore established an injury-in-fact). The Ninth Circuit routinely distinguishes between the type of concrete injury at issue here and the kind of generalized non-cognizable injuries at issue in *Coffman* and *Wright*. *E.g.*, *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408, 418 (9th Cir. 1980) (holding plaintiff had "specific and concrete" injury conferring standing, rather than a "generalized grievance," where he challenged the INA's provision of veto power to Congress over deportation decisions).[1]

[1] Additionally, Defendants' reliance on *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), is misplaced. As this Court has recognized, *Mazza* conflicts with en banc Ninth Circuit precedent holding "standing is satisfied if at least one named plaintiff meets the requirements." *Rivera v. Holder*, 307 F.R.D. 539, 549 n.5 (W.D. Wash. 2015) (*quoting Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir.2007)). And to the extent *Mazza* is good law, its holding concerns only class actions seeking damages under Rule 23(b)(3) where common issues of law and fact must "predominate," and not those seeking injunctive relief under Rule 23(b)(2) where injunctive relief must merely be "appropriate respecting the class as a whole." *Compare* FED. R. CIV. P. 23(b)(3), *with* FED. R. CIV. P. 23(b)(2); *see Mazza*, 666 F.3d at 586, 594-95. Because Plaintiffs seek only injunctive relief under Rule 23(b)(2), it is not necessary to prove that each and every class member has standing—the concrete injury of one named Plaintiff is enough.

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D. The Court's Class Definitions Are Proper

1. The Six-Month Benchmark Is Rational

The Court has certified two classes pursuant to Rules 23(a) and 23(b)(2). Dkt. 69 at 8. The classes encompass individuals (1) who have or will have an application for naturalization (the first class) or adjustment of status (the second class) 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. Id.* (emphasis added). According to Defendants, the six-month benchmark is irrational because the six-month adjudicatory period is not mandatory. Defendants' logic is flawed. It is *not* true that precatory language "has no legal significance," even if that language does not necessarily give rise to "individual rights" or "enforceable law." Dkt. 73 at 5. On the contrary, courts regularly rely on precatory language to construe statutes. *See Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225, 228-29 (1996) (finding that provision containing "sense of Congress" language showed "continuing purpose of Congress" already established in another law); *State Highway Comm'n of Missouri v. Volpe*, 479 F.2d 1099, 1116 (8th Cir. 1973) (finding that "sense of Congress" provision "can be useful in resolving ambiguities in statutory construction"). The disputed precatory language is likewise informative here. It sets forth a congressional policy determination—that immigration benefits should be processed not later than 180 days after the initial application filing. 8 U.S.C. § 1571(b). That determination is relevant to identifying a class of individuals whose immigration applications have been delayed for improper purposes. Plaintiffs' reliance on Congress' "sense" is therefore reasonable.

Defendants further contend that the six-month benchmark is irrational because the benchmark *standing alone* does not distinguish delays caused by CARRP from delays caused by application backlog. Dkt. 73 at 5.[2] This argument ignores that the six-month benchmark

[2] Defendants have submitted new evidence suggesting that the average wait times for naturalization and adjustment of status applications exceed six months. *See* Dkt. 73, Ex. A. Because Defendants submit "new facts . . . which could . . . have been brought to [the Court's] attention earlier with reasonable diligence," the Court should

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constitutes but one element of a three-element definition. By design, that definition only encompasses naturalization and adjustment-of-status applicants (element 1) whose applications have *both* been delayed (element 3) *and* subject to CARRP or a successor "extreme vetting" program (element 2). Applicants *not* subject to CARRP or an "extreme vetting" program do not fall into either class. Thus, even if the six-month benchmark "does no work" in separating CARRP from non-CARRP delays as Defendants contend, *id.* at 5, that benchmark coupled with element (2) of the class definitions does precisely that work.

The six-month benchmark reflects Plaintiffs' recognition that Congress anticipated processing naturalization and adjustment-of-status applications might reasonably take six months. Nonetheless, Plaintiffs are amenable to striking the six-month benchmark and expanding the scope of the class definition to encompass all individuals whose applications have been subject to CARRP or a successor "extreme vetting" program. Plaintiffs have consistently recognized the Court's authority to shape the class definitions as appropriate. *See* Dkt. 63 at 5 n.2.[3]

2. The Court Properly Certified Nationwide Classes

Defendants expressly recognize the Court is "entitled to exercise its discretion in defining classes." Dkt. 73 at 5; *see also* Dkt. 60 at 19. That discretion applies to crafting class definitions. *Johnson v. Shalala*, 2 F.3d 918 (9th Cir. 1993) (reviewing district court's class definition order for an abuse of discretion); *see also Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001) (courts may exercise discretion to modify class definitions). Defendants do not—because they cannot—explain how the Court abused its discretion in certifying nationwide

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deny Defendants' motion for reconsideration. *See* LCR 7(h). In any event, this evidence demonstrates that, absent CARRP, applications being adjudicated now were filed in 2016. In contrast, named Plaintiffs' applications were filed in 2013 (Wagafe & Jihad), 2014 (Ostadhassan), and 2015 (Bengezi & Manzoor).

[3] Defendants' counsel certified that they "thoroughly discussed the substance" of the motion with Plaintiffs' counsel and that good faith discussions to resolve the issues were unsuccessful. Dkt. 73 at 6. This is not accurate. Plaintiffs' counsel pointed this out and initiated a substantive discussion on the motion after its filing, in particular on the class definitions. Defendants' counsel did not accept the invitation to discuss Plaintiffs' proposed modifications and Defendants have not suggested their own class definitions. *See* Declaration of Nicholas P. Gellert, filed herewith, and Exhibit A thereto.

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Naturalization and Adjustment Classes. On the contrary, the Court's decision fits comfortably within a long tradition of nationwide class certification in immigration cases.[4] Certification on a nationwide basis is precedented because it is necessary: USCIS, a federal agency, applies CARRP to applicants residing across the nation. *See, e.g.*, Dkt. 27-1, Ex. A (addressing CARRP memorandum to all USCIS field leadership and outlining a centralized process for reviewing all immigration benefit applications posing national security concerns); Dkt. 74 ¶ 243 (Defendants admit "[i]ndividuals whose applications are being handled under CARRP may reside in various locations around the country"). If CARRP in fact violates the Constitution, the APA, and/or the INA as Plaintiffs believe, the program is equally illegal as applied to applicants in every state.

Finally, Defendants' repeated contention that the Court may not rely on the Uniform Rule of Naturalization to certify the classes misses the mark. *See* Dkt. 73 at 5; Dkt. 60 at 19. The Court was well within its authority to certify nationwide classes notwithstanding the Rule. To be sure, however, the Court's decision does accord with the Rule, which provides Congress with "broad, undoubted power over the subject of immigration and the status of aliens." *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). Defendants fail to explain why this "broad, undoubted power" is at odds with nationwide treatment of adjustment-of-status issues.

CONCLUSION

Defendants' Motion to Reconsider Class Certification should be denied.

[4] *See, e.g.*, *Mendez Rojas, et al. v. Johnson, et al.*, 2:16-cv-01024-RSM, Dkt. 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 & Immigration Servs.*, No. C11-2108 RAJ, 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 MHP, 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) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings), *aff'd on other grounds*, 219 F.3d 1087 (9th Cir. 2000) (en banc); *Walters v. Reno*, No. C94-1204C, 1996 WL 897662, at *5-8 (W.D. Wash. Mar. 13, 1996) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases), *aff'd*, 145 F.3d 1032, 1045-47 (9th Cir. 1998), *cert. denied*, *Reno v. Walters*, 526 U.S. 1003 (1999).

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CERTIFICATE OF SERVICE

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

DATED this 13th day of July, 2017, at Seattle, Washington.

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