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

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER CLASS CERTIFICATION

HON. RICHARD A. JONES

NOTED ON MOTION CALENDAR: July 18, 2017

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
Ben Franklin Station, P.O. Box 868
Washington, DC 20044
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The Court should grant Defendants' Motion to Reconsider Class Certification (Dkt. 73) because the Court committed manifest error in certifying two nationwide classes that may contain members lacking Article III standing. *See* L.R. 7(h). Further, Plaintiffs' Response to Defendants' Motion to Reconsider Class Certification (Dkt. 75), presents no viable basis to avoid this conclusion, confuses individual facts pertinent to remedies with those pertinent to jurisdiction, and inaccurately describes case law.

A. Defendants Have Properly Asserted Manifest Error under Local Rule 7(h)[1]

Defendants are now directly responding to the Court's analysis, *see* Dkt. 73 at 2, which is the appropriate means of raising arguments of manifest error. Indeed, Defendants could not have challenged the basis for the Court's decision before it issued.

Furthermore, to the extent that Plaintiffs suggest Defendants should have previously raised an argument that the six-month cut-off in the class definitions was inappropriate, Defendants did so. (Dkt. 60 at 10-11). The Court did not address that concern. Lack of meaningful analysis weighs in favor of reconsideration. *Cf. Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000). Moreover, to the extent Plaintiffs contend "[a] motion to dismiss is the proper place to raise standing, and . . . . Defendants have not moved to reconsider the Court's decision denying their motion to dismiss . . ." (Dkt. 75 at 5-6), Plaintiffs miss the point. Defendants are not challenging the Court's ruling on standing to bring this action. Rather, Defendants challenge the standing of some class members in the context of commonality and class certification based on the *definition* of the certified classes.[2]

B. The Only "Common Injury" Plaintiffs Allege Is Not Legally Cognizable

Plaintiffs suggest that a "common injury" for Rule 23(a) purposes under *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), may be identified where "(1) consideration as

[1] Defendants maintain that they met their obligations to confer with opposing counsel concerning the instant motion for the reasons explained in the email correspondence attached to Plaintiff's response. (*See* Dkt. 76, Ex. A.)

[2] In any event, because standing is jurisdictional, the Court is "obliged to raise it *sua sponte*," *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005), regardless of whether and when a party raises it. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2004).

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a class will generate common answers and (2) the claims depend upon a 'common contention' such that the validity of each claim will be determined in one stroke." (Dkt. 75 at 3). But the "claim" in question must still be legally cognizable as to each class member. *See Soseeah v. Sentry Ins.*, 808 F.3d 800, 809 (8th Cir. 2015) (analyzing "whether the certified class of plaintiffs suffered a common *and legally cognizable* injury") (emphasis added); *Rivera v. Holder*, 307 F.R.D. 539, 549 & n.5 (W.D. Wash. 2015) (noting the "trend in this Circuit after *Mazza* to scrutinize the standing of absent class members" and finding "it necessary to exclude [from the class definition] those groups who clearly lack standing to seek relief.");[3] *Burdick v. Union Sec. Ins. Co.*, 2009 WL 4978873, *3-*4 (C.D. Cal. Dec. 9, 2009). Otherwise, the common answer generated by class treatment is nothing more than an advisory opinion as to those class members who lack a cognizable injury. That result would conflict with the Supreme Court's admonition that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *see also* Fed. R. Civ. P. 82 (federal rules do not extend the jurisdiction of district courts).

Plaintiffs have failed to establish that all class members will have legally cognizable claims because some applications filed by class members may take longer than six months to adjudicate for reasons unrelated to CARRP, notwithstanding that they are subject to CARRP. It is black-letter law that Article III standing demands "an injury in fact that is concrete and particularized . . . fairly traceable to the challenged action of the defendant." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). But Plaintiffs claim only that "their immigration applications have been subjected to CARRP and that this program is illegal." (Dkt. 73 at 4). That is not an injury-in-fact. An allegation that

[3] Plaintiffs suggested Defendants' reliance on *Mazza* was misplaced, and represented to the Court that another judge in this district "has recognized [that] *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)." (Dkt. 75 at 7 n.1). This is inaccurate. *Rivera* went on to note the "trend in this Circuit after *Mazza* to scrutinize the standing of absent class members," 307 F.R.D. at 549, and ultimately concluded that "while district courts in this Circuit are divided on this issue, the Court finds it necessary to exclude those groups who clearly lack standing to seek relief [from the class definition]," *id.* at 549 n.5. Thus, contrary to Plaintiffs' suggestion, *Rivera* supports rather than undermines Defendants' position.

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the government acted illegally is not a concrete injury absent a showing that some actual harm befell Plaintiffs *as a result of that allegedly illegal action*. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be '*de facto*'; that is, it must actually exist."); *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013); *Powers v. Ohio*, 499 U.S. 400, 410 (1991). An allegation of illegality in the air is not enough.[4] *E.g.*, *Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (*per curiam*); *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). CARRP is lawful. But even if this Court were to find otherwise, Plaintiffs would also be required to establish that CARRP is the proximate cause of delay beyond six months in adjudicating *every* class member's application.[5] Notably, Plaintiffs have not even asserted a plausible allegation of such proximate relationship. Accordingly, some class members will undoubtedly have no cognizable claim that CARRP, and not some other fact or issue, delayed adjudication of their applications—they would not have been adjudicated any faster had they not been subject to CARRP. As in *Soseeah*, where some class members have no cognizable claim at all, "there is simply no common injury among the general certified class that would satisfy the requirements of Fed. R. Civ. P. 23(a)(2)."[6] *Soseeah*, 808 F.3d at 811; *Rivera*, 307 F.R.D. at 549 & n.5; *Burdick*, 2009 WL 4978873 at *3-*4; *see also Mazza v. Am.*

[4] Plaintiffs' analogy to *Heckler v. Matthews*, 465 U.S. 728 (1984), which held that public stigmatization flowing from illegal gender discrimination can constitute a concrete injury, is inapposite. In that case it was the stigmatization, not the abstract illegality, which constituted the concrete harm. In any event, it is hardly evident how Plaintiffs believe *public* stigmatization will flow from a program that Plaintiffs themselves describe as a "secretive policy," (Dkt. 1 ¶1), that "was unknown to the public . . . until it was discovered in litigation" (Dkt. 47 ¶59).

[5] As Plaintiffs point out, they have alleged CARRP is the cause of delay generally (Dkt. 75 at 6) but to the extent any class member has other supervening causes of delay, CARRP is no longer the proximate cause of the delay and thus no longer constitutes a concrete injury. As to Plaintiffs' claim that "for many the program also causes pretextual denial" (Dkt. 75 at 7), no named plaintiff and neither of the classes encompass anyone whose application has been denied. Although Plaintiffs have repeatedly made unsupported references to pretextual denials (collected at Dkt. 56 at 9 n.6.), they are simply not at issue in this case.

[6] Plaintiffs reliance on *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980) (*see* Dkt. 75 at 7) is misplaced as well. In that case the plaintiff had standing to challenge a statutory scheme because if he prevailed it would have resulted in "the cancellation of his deportation order." *INS v. Chadha*, 462 U.S. 919, 936 (1983). Individuals whose applications are subject to CARRP but which are delayed for other reasons are not similarly harmed, and judicial resolution of CARRP's lawfulness will not in and of itself redress the delay they are experiencing.

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Honda Motor Co., 666 F.3d 581, 594 (9th Cir. 2012); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).

C. Plaintiffs Conflate Differing Factual Predicates for Commonality with a Complete Lack of Concrete Injury

Plaintiffs observe that differing factual predicates do not preclude class treatment. (Dkt. 75 at 4). That is a correct, but irrelevant point. The relevant question is whether all class members have established that they have a common, legally cognizable, injury. *Soseeah*, 808 F.3d at 809. As explained above, they have not. Plaintiffs then go on to suggest that "[t]he facts particular to each individual class member's application will be relevant only after the conclusion of this litigation." (Dkt. 75 at 4.) This inverts the proper order of jurisdiction and merits. The Court should not certify a class now, proceed to the merits, and only after liability is determined, decide which class members actually had standing to begin with. There is no question whether individual plaintiff class members will have different factual predicates – it is plain that they do, and that they may have non-CARRP causes for delay. The problem arises in those cases subject to CARRP where CARRP is not the proverbial long stick. Those individuals' cases would not be adjudicated any faster even if their applications were not subject to CARRP. Accordingly, CARRP causes them no concrete injury and, as explained above, they lack standing and their inclusion in the class definitions preclude commonality.

D. Plaintiffs Construction of the Class Definitions Deny the Possibility That Factors Other Than CARRP Cause Delay in CARRP Cases

The parties agree that 8 U.S.C. § 1571(b) "sets forth a congressional policy determination" (Dkt. 73 at 8) and that it does not constitute enforceable law. Nevertheless, it has no bearing on this matter. While that congressional policy might be relevant in another context, such as determining whether a particular delay is *unreasonable* under 5 U.S.C. § 555(b), it is not relevant to identifying a class of individuals whose applications have been delayed for *unlawful* reasons. Indeed, it does not even identify a class of individuals whose applications have been delayed beyond current processing times for *any* reason. (*See* Dkt. 73-1).

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Plaintiffs respond that "even if the six-month benchmark 'does no work' in separating CARRP from non-CARRP delays . . . that benchmark coupled with element (2) of the class definitions [and subject to CARRP or an 'extreme vetting' program] does precisely that work." Not so. The class definition would identify those with applications pending longer than six months and who were subject to CARRP. They do not separate those applications not adjudicated within six months because of CARRP from those that were not adjudicated within six months *for other reasons*, despite also being subject to CARRP. As explained above, merely having an application processed pursuant to CARRP cannot constitute a concrete injury unless CARRP is the proximate cause of unlawful delay in adjudication.

E. The Uniform Rule Clause Provides No Basis for Nationwide Classes

As Defendants previously explained, the uniformity required by Article I, § 8, cl. 4 is not uniformity with respect to persons. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 190 (1902). Accordingly, it provides no basis to certify a nationwide class to ensure that all applications are processed in the same manner. Moreover, the Uniform Rule Clause simply does not support an adjustment-of-status class at all, nationwide or otherwise.

Indeed, nationwide certification is especially imprudent in a situation like the one at hand, involving relatively novel issues, which would benefit from development in other courts which could explore and develop the legal question(s) presented. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (noting that nationwide class actions are disfavored because they "may have a detrimental effect by foreclosing adjudication by a number of different courts and judges"); *United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question. . .").

CONCLUSION

The Court should grant Plaintiff's Motion to Reconsider Class Certification.

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Dated: July 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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