IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA NANCY CASTRO, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL NO. 1:09-CV-208
	§	
MICHAEL T FREEMAN, *et al*,	§	
	§	
Defendants.	§	

ORDER

BE IT REMEMBERED, that on March 26, 2014, the Court **DENIES** Plaintiffs' Opposed Third Motion for Class Certification, Dkt. No. 227.

I. Factual and Procedural Background

The following is the background most relevant to the instant motion. Plaintiffs filed their Fifth Amended Class Action Complaint for Declaratory and Injunctive Relief on September 30, 2013. Dkt. No. 240. Prior to that date, on March 15, 2013, Plaintiffs filed their Opposed Third Motion for Class Certification. Dkt. No. 227. On December 12, 2013, Defendants filed an amended response to Plaintiffs' motion for class certification.[1] Dkt. No. 248. On December 30, 2013, Plaintiffs filed an amended reply to Defendants' response to the motion for class certification. Dkt. No. 251.

Plaintiffs' fifth amended complaint sets out seven causes of action, though only the first remains live.[2] The first cause of action alleges that the Secretary of State of the United States "improperly applies the 'preponderance of the evidence'

[1] In their reply to Defendants' response to Plaintiffs' motion for leave to file the fifth amended complaint, Plaintiffs indicated that the third motion for class certification was not mooted by the request for leave to amend. Dkt. No. 238 at 3. Plaintiffs therefore did not file an amended motion for class certification after they filed the fifth amended complaint.

[2] Plaintiffs repled causes of action two through seven to preserve appeal of the Court's dismissal of those claims. *See* Dkt. No. 240 at 27–31.

standard . . . in determining whether to revoke previously issued U.S. passports." Dkt. No. 240 at 27. More specifically, Plaintiffs allege that after September 7, 2003, the Department of State "stopped relying on the *oldest* 'public' document in adjudicating citizenship claims, unless the oldest public document shows Mexican nationality." *Id.* at 6. "Now, in cases of dual birth registration . . . [i]f the Mexican birth registration occurred prior to the U.S. birth registration, [the Department of State] generally takes it as conclusive of birth in Mexico, even ignoring evidence created before the Mexican registration . . . . However, the converse is not true: in most such cases, if the U.S. registration occurred first, [the Department of State] still requires more than one corroborating 'public' document, in the absence of which[] the passport application is almost always denied." *Id.* Plaintiffs allege that the Department of State makes findings regarding nationality that are inappropriate under the preponderance standard, "even den[ying] passport applications where there is *no* evidence of foreign birth." *Id.* at 7. Plaintiffs allege that these actions violate Plaintiffs' rights under the Fifth and Fourteenth Amendments and the Mandamus Act, and entitle Plaintiffs to declaratory relief. *Id.* at 27.

Plaintiffs move to certify two classes of plaintiffs as to this cause of action. Dkt. No. 227-2 at 9. The first class would consist of persons whose passports were revoked based on allegations of non-nationality (represented by Luis Montemayor and Ana Luisa Guerrero), and the second would consist of persons whose passports were revoked based on allegations of fraud related to non-nationality (represented by Laura Nancy Castro and Ervey Lorenzo Santos). Dkt. No. 240 at 24–25; Dkt. No. 227-2 at 9. Plaintiffs allege that the members of these classes were subjected to an improperly-applied preponderance of the evidence standard in violation of their rights. Dkt. No. 240 at 27.

II. Legal Standard

In order for a class to be certified for the purpose of pursuing a class action under the Federal Rules of Civil Procedure, the party seeking certification must

show that the class meets all four requirements set out under Rule 23(a), and at least one of the subsections of Rule 23(b). *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). "The party seeking certification bears the burden of demonstrating that the rule 23 requirements have been met." *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). "A district court must conduct a rigorous analysis of the [R]ule 23 prerequisites before certifying a class." *Perry*, 675 F.3d at 837.

Rule 23(a) requires that a party seeking to certify a class demonstrate that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). These requirements are commonly referred to as the numerosity, commonality, typicality, and adequate representation requirements, respectively. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011). The party seeking certification must also demonstrate that one of the three subsections of Rule 23(b) is met. FED. R. CIV. P. 23(b). The relevant subsection in this case is Rule 23(b)(2), which allows for certification if "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." FED. R. CIV. P. 23(b). A class sought to be represented in a class action must be "adequately defined and clearly ascertainable." *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012).

III. Analysis

As previously stated, the only remaining claim in this case pertains to the Department of State's allegedly improper application of the preponderance of the evidence standard in revoking United States passports. Dkt. No. 240 at 26–27. Plaintiffs seek certification of two classes. Dkt. No. 227 at 2. The first proposed class would consist of individuals 1) who have received or will receive U.S. passports

based on their birth in the United States, 2) whose passports, on or after September 7, 2003, have been or will be revoked based on non-nationality, 3) where the passport was or will be revoked based solely on evidence provided by the party seeking revocation or gathered by the Department of State, and 4) whose claims of citizenship have not been finally adjudicated by a federal court. *Id.* at 2. The second proposed class would consist of individuals 1) who have received or will receive U.S. passports based on their birth in the United States, 2) whose passports, on or after September 7, 2003, have been or will be revoked based on fraud related to non-nationality, 3) where the passport was or will be revoked based solely on evidence provided by the party seeking revocation or gathered by the Department of State, and 4) whose claims of citizenship have not been finally adjudicated by a federal court. *Id.* at 3. Plaintiffs assert that these two proposed classes meet the requirements of class certification and that this case should therefore be certified to proceed as a class action.

Defendants first argue that the classes proposed by Plaintiffs are not ascertainable. Dkt. No. 248 at 6. First, Defendants argue that the fourth component of each class definition ("whose claims of citizenship have not been finally adjudicated by a federal court") "creates an artificial class of individuals who are harmed, by thwarting the statutory scheme [of 8 U.S.C. § 1503]." *Id.* at 7. Second, Defendants assert that Plaintiffs are unable to "ascertain who is a class member without reference to undefined criteria outside those contained in their proposed class definitions." *Id.* at 9. In reply, Plaintiffs argue that the existence of 8 U.S.C. § 1503 does not defeat class certification, because the class plaintiffs face an ongoing threat of passport revocation that cannot be remedied under § 1503 and because the systemic challenge in this case could not be addressed in an action under § 1503. Dkt. No. 251 at 12–16. Plaintiffs also assert that the classes are readily ascertainable and that the inconsistencies Defendants allege in the class definition are due to factors not relevant to the present litigation and therefore not included in Plaintiffs' statement of the class. *Id.* at 17–18.

With regard to Defendants' first argument, the mere fact that the § 1503 remedy exists does not mean that a class defined in part by not accessing that remedy is unascertainable. Indeed, the class definitions are specifically intended to identify persons who cannot access the § 1503 remedy or could not challenge the alleged violations in a § 1503 action, and yet are at risk of being affected by the alleged systemic failure to properly apply the preponderance of the evidence standard. In other words, the existence of § 1503 does not render the classes in question unascertainable, and Defendants cite no authority that would suggest a contrary conclusion. In a number of circumstances courts have allowed class action litigation regardless of the fact that a judicial remedy may be available to individual plaintiffs. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Ali v. Ashcroft*, 346 F.3d 873, 888 (9th Cir. 2003) (withdrawn on other grounds). Moreover, to the extent that Defendants are asserting that the first cause of action should be dismissed for lack of subject matter jurisdiction or for failure to state a claim, their arguments are better addressed in the context of their motion to dismiss. Dkt. No. 243.

As to Defendants' second argument, the Court finds that Plaintiffs' proposed class definitions describe a sufficiently ascertainable class regardless of the alleged inconsistency at this stage. Defendants' argument is based on the fact that Plaintiffs excluded 32 individuals from their proposed first class who, based on their passport revocation letters, appear to fit the class definition. Dkt. No. 248 at 8. However, Plaintiffs explain that these individuals were excluded because they either held diplomatic status at the time of their United States births or had final convictions related to identity theft. Dkt. No. 251 at 18. At this stage in the proceedings, though the proposed class must be specifically ascertainable, "the identity of individual class members need not be ascertained." MANUAL FOR COMPLEX LITIGATION (FOURTH), § 21.222 (2004); *see John v. National Sec. Fire and Cas. Co.*, 501 F.3d 443 (5th Cir. 2007) (citing *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)). Therefore, Plaintiffs' exclusion of certain individuals at this

stage does not make the class unascertainable.[3] Both proposed classes in this case are defined by four specific parameters, which together adequately define two specifically ascertainable groups of people. Dkt. No. 227 at 2–3. Having concluded that the classes in question are sufficiently ascertainable, the Court will address the requirements of Rule 23(a).

A. Commonality

The first issue Defendants raise as to commonality is what legal issues are properly included within the live cause of action in this case, and therefore what issues are properly considered for the purposes of commonality. Dkt. No. 248 at 10–14. The remaining claim as stated in Plaintiffs' live complaint alleges that the Department of State improperly applies the preponderance of the evidence standard in revoking previously-issued United States passports by failing to consider all available evidence and giving improper weight to certain evidence. Dkt. No. 240 at 6–7, 27. In Plaintiffs' motion for class certification, however, they argue that the Department of State "is misapplying the preponderance of the evidence standard by (1) erroneously shifting the burden of proving loss of nationality . . . to the U.S. passport holder; and (2) . . . manipulating the burden of proof by . . . failing to consider all the evidence, including evidence the passport holder might submit and by denying U.S. passport holders notice and an opportunity to respond before revocation. Dkt. No. 227-2 at 12.

With regard to the first point, Defendants argue that Plaintiffs do not correctly frame the issue of burden-shifting, and that in any event that legal issue is not properly part of the live cause of action. Dkt. No. 248 at 10–13. As to the second point, Defendants argue that Plaintiffs are attempting to revive their previously-

[3] The Court notes that a class is not ascertainable and may not be certified if the definition requires consideration of the merits of each case before determining membership in the class. *In re Vioxx Products Liability Litigation*, No. MDL1657, 2008 WL 4681368 (E.D. La. Oct. 21, 2008) (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974)). In this case, the class definition may not incorporate a judgment on the merits of the class plaintiffs' claims to a passport by virtue of birth in the United States. Though Plaintiffs state that they do not object to revising the class definition to exclude individuals who held diplomatic status at the time of their United States births or had final convictions related to identity theft, it seems possible that such a revision would incorporate a judgment on the merits of those plaintiffs' passport revocations. The Court therefore declines to consider such a revision.

dismissed due process claims by asserting that failure to provide notice and an opportunity for a hearing constitutes a misapplication of the preponderance standard. *Id.* at 13–14. Plaintiffs reply that Defendants have mischaracterized Plaintiffs' claims, and that the burden-shifting and due process issues Defendants challenge are necessarily encompassed by the live claim regarding misapplication of the preponderance standard. Dkt. No. 251 at 6–7.

By incorporating due process arguments into their argument in the motion for class certification, Plaintiffs have confused the instant issue. Dkt. No. 227-2 at 12 ("by denying U.S. passport holder notice and an opportunity to respond"); *id.* at 13 ("due process requires"); *id.* at 15–17. Plaintiffs may not revive their previously-dismissed due process claims by subsuming those issues into the live preponderance-of-the-evidence claim. *See* Dkt. No. 240 at 27–30. Because a claim that Plaintiffs were denied notice and an opportunity for a hearing is properly characterized as a procedural due process claim, and Plaintiffs' due process claims were previously dismissed, that aspect of the motion for class certification must be disregarded.[4]

With regard to the burden-shifting issue, the main disagreement between the parties at this point is whether the Plaintiffs' claim that the Department of State misapplies the preponderance of the evidence standard encompasses both the burden of production and the burden of persuasion. Defendants correctly point out that nowhere in the live complaint do Plaintiffs indicate that their live cause of action incorporates the allegedly shifting burden of production. *See* Dkt. No. 240 at 6–7. It is also quite clear that Defendants have not unfairly mischaracterized Plaintiffs' claim as Plaintiffs stated it in the live complaint. *See* Dkt. No. 240; Dkt. No. 248 at 10–14; Dkt. No. 251 at 6. Moreover, it is not apparent that in this context, the burden of production is a meaningful issue such that it should be

[4] To the extent that it does not approach a procedural due process statement, Plaintiffs' assertion that failure to consider all available evidence substantively violates the preponderance standard *may* be properly part of the live cause of action. However, at this stage the Court merely considers it in the context of Plaintiffs' broader claim that the preponderance of the evidence standard is systemically misapplied, without deciding whether it is properly included in this case of action or whether it is in fact a due process claim.

included in the live cause of action.[5] *See* Dkt. No. 248 at 10–11. However, because at this stage of the proceeding the Court cannot address the substantive scope of the live claim, not least because the issue has not been fully briefed, and because the inclusion of this issue does not affect the Court's ultimate conclusion, the Court will consider this issue within the context of Plaintiffs' assertion that the preponderance of the evidence standard is systemically misapplied.[6]

Having clarified, to some degree, the scope of the legal issues in the instant action, the Court now turns to the question of whether the commonality requirement of Rule 23(a)(2) is met in this case. Rule 23(a)(2) states that for a class to be certified, there must be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Plaintiffs argue that the legal issue common to the class in this case is whether the Department of State improperly applies the preponderance of the evidence standard in adjudicating passport revocations. Dkt. No. 227-2 at 24. Plaintiffs also assert that there are common factual questions, essentially restating the facts that define the classes themselves. *Id.* Defendants argue that resolution of the common issues of law posited by Plaintiffs would not resolve any question that is central to the validity of each class member's claim, and that the issues at stake are not suitable for classwide resolution. Dkt. No. 248 at 15. Specifically, Defendants assert that "even if the Court ordered [the Department of State] to apply a different burden, or consider different evidence, this would not affect [the Department's] weighing of the available evidence for any individual class member." *Id.* at 17. Plaintiffs reply that the only questions common to the class are legal

[5] Defendants state that "the term 'burden' as used in this context does not have the same meaning as it might in an adversarial proceeding." However, Defendants cite no authority to that effect.

[6] A court must "look beyond the pleadings to understand the claims . . . relevant facts, and applicable substantive law in order to make a meaningful determination of whether this question satisfies commonality." *Perry*, 675 F.3d at 841 (internal quotations and citations omitted). On the basis of that mandate, the Court here considers the proposed common issue(s) with a certain degree of breadth. The Court notes that the theories advanced in Plaintiffs' live complaint with regard to the first cause of action differ from the theories advanced in Plaintiffs' motion for class certification, and acknowledges that this inconsistency would need to be clarified before addressing the merits of Plaintiffs' claims. However, it best serves the advancement of this case on the merits that the common issues be construed somewhat generously for the purpose of resolving the long-standing issue of class certification.

questions that do not require any individualized analysis, and that certification is therefore appropriate regardless of the fact that "there are factual variations in individual cases." Dkt. No. 227-2 at 23; Dkt. No. 251.

It is no longer true, as Plaintiffs posit, that the commonality requirement is met when there is an issue common to the class whose resolution will affect a significant number of class members. *Perry*, 675 F.3d at 839–40 (citing *James v. City of Dallas*, 254 F.3d 551 (5th Cir. 2001); *Forbush v. J.C. Penney Co.*, Inc., 994 F.2d 1101 (5th Cir. 1993)). "After Wal-Mart, Rule 23(a)(2)'s commonality requirement demands more than the presentation of questions that are common to the class because 'any competently crafted class complaint literally raises common questions.'" *Perry*, 675 F.3d at 840 (citing *Wal-Mart*, 131 S.Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009))). Though it is not necessary for all legal and factual issues at issue in the litigation to be common to the class, a plaintiff must show that there is at least one common issue that is "capable of classwide resolution." *Wal-Mart*, 131 S.Ct. at 2551. An issue is capable of classwide resolution if "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S.Ct. at 2551.

Furthermore, where the alleged common issue is "a somewhat amorphous claim of systemic or widespread misconduct on the part of the defendant . . . the district court should be particularly precise" in finding that the resolution of the common question will "'resolve an issue that is central to the validity'" of each individual class member's claims. *Perry*, 675 F.3d at 844 (citing *Wal-Mart*, 131 S.Ct. at 2551). In other words, "mere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement." *Id.* (citing *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (2010)).

Here, Plaintiffs have not shown that there is an issue common to the class that is capable of classwide resolution. *Wal-Mart*, 131 S.Ct. at 2551. More specifically, Plaintiffs have not shown that resolving the question of whether the Department of State misapplies the preponderance of the evidence standard will

resolve a question that is central to the validity of each of the class plaintiffs' claims—that is, their nationality and corresponding entitlement to a United States passport. Even if the court found that the Department of State systematically misapplies the preponderance of the evidence standard to passport revocations,[7] the individual class members would be no closer to having their passports reissued than they were before the resolution of the class claim. Each individual's entitlement to a passport would still need to be adjudicated, whether by the Department of State or by a federal court in an action under 8 U.S.C. § 1503.

Though Plaintiffs' class complaint does "literally raise[] common questions", the proposed common question does not have the capacity "to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 131 S.Ct. at 2551 (quoting Nagareda, *supra* page 9 at 131–32). Plaintiffs do not clearly articulate a theory of how their proposed common question meets the Rule 23(a)(2) standard as stated in *Wal-Mart*, instead merely asserting that the question is "relevant to all class members."[8] *See* Dkt. Nos. 227-2, 251. Further, merely alleging a systemic violation to which all class members have been subjected is not sufficient to meet the commonality requirement. *Perry*, 675 F.3d at 844; *but see* Dkt. No. 227-2 at 24 (citing *James*, 254 F.3d 551). Plaintiffs have therefore not "affirmatively demonstrate[d] [their] compliance" with Rule 23(a)(2). *Wal-Mart*, 131 S.Ct. at 2551.

Because the Court finds that Plaintiffs have not met the commonality requirement of Rule 23(a)(2), it need not address the remaining requirements of Rule 23(a) and Rule 23(b). Accordingly, the Court **DENIES** Plaintiffs' Opposed Third Motion for Class Certification. The parties are **ORDERED** to file a joint

[7] This is true whether the misapplication occurred by shifting the burden of proof, by failing to consider all available evidence, or by making substantively incorrect preponderance determinations. The Court reiterates that it considered all appropriate alternative framings of Plaintiffs' proposed common legal issue. Regardless of how the question is framed, the answer does not resolve an issue central to the validity of the class members' claims.

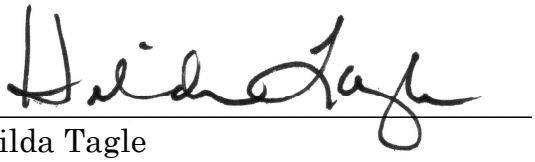
[8] Indeed, it is not clear that Plaintiffs were relying on the correct standard in their discussion, as they cited several pre-*Wal-Mart* decisions with no discussion of *Wal-Mart* or its progeny and without indicating that those cases had been superseded.

status report in light of this order, informing the Court of what issues remain live in this case and proposing new deadlines by April 25, 2014.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiffs' Opposed Third Motion for Class Certification and **ORDERS** the parties to file a joint status report by April 25, 2014.

SIGNED this 26th day of March, 2014.



Hilda Tagle
Senior United States District Judge