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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**PORTLAND DIVISION**

JOHN DOE #1; JUAN RAMON MORALES; JANE DOE #2; JANE DOE #3; IRIS ANGELINA CASTRO; BLAKE DOE; BRENDA VILLARRUEL; GABINO SORIANO CASTELLANOS; and LATINO NETWORK,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; KEVIN MCALEENAN, in his official capacity as Acting Secretary of the Department of Homeland Security; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of the Department of Health and Human Services; U.S. DEPARTMENT OF STATE; MICHAEL POMPEO, in his official capacity as Secretary of State; and UNITED STATES OF AMERICA,

Defendants.

Case No.: 3:19-cv-01743-SI

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

Plaintiffs' challenge to the implementation of an unlawful, broadly applicable presidential Proclamation is a quintessential use of the class action device. Defendants' Opposition to Plaintiffs' Motion for Class Certification (Dkt. 94, hereinafter "Opposition"), however, posits a theory they claim not only defeats class certification, but effectively voids Plaintiffs' claims altogether. Defendants' central contention is that the named Plaintiffs in this case lack standing to challenge the Proclamation because this Court enjoined it; in other words, because the Proclamation has not been implemented, "no one in the world" has been injured by it, leaving Plaintiffs with no claims to certify. Opposition at 17. Defendants further seek refuge in their own failure to develop clear procedures for implementing and applying the Proclamation, arguing this Court cannot certify a class because Plaintiffs cannot possibly predict how consular officers would evaluate each Plaintiff's visa application if the Proclamation went into effect.

Defendants' arguments prove too much. If Defendants were correct, it would be impossible to challenge any unlawful policy before its enactment, let alone certify a class in such cases. But such challenges are brought, and such classes certified, all the time. That is because individuals need not wait for an unlawful policy to go into effect and cause damage in order to allege justiciable harm; it is black letter law that *imminent* harm suffices to establish Article III standing.[1] The imminent harm sought to be redressed here is the threat posed by the Proclamation's dispositive barrier to entry based on insurance status and wealth—not a visa denial that has not yet occurred. The Proclamation's imminent harm is proven by Plaintiffs' sworn statements, it is common to all members of the putative class, and Plaintiffs seek injunctive relief that would address it in the same way for all class members in one fell swoop.

[1] *Nav N Go Kft. v. Mio Technology USA, Ltd.*, 2009 WL 10693414, *4 (D. Nev. June 11, 2009)

The supposed variation in the Proclamation's impact *after* its implementation—the thrust of the remaining arguments in the Opposition—is irrelevant where Plaintiffs seek to stop the unlawful policy from going into effect in the first place. The Opposition's other arguments are either derivative of these two or similarly specious. As explained below, Plaintiffs have satisfied the requirements of Rule 23 and this Court should certify the putative classes defined in the Complaint.

## ARGUMENT

### I. Named Plaintiffs Have Standing To Challenge The Proclamation.

Defendants' primary argument, which they deploy repeatedly throughout their Opposition, is not a Rule 23 argument at all. Rather, Defendants claim that named Plaintiffs lack Article III standing because "no plaintiff has been subject to the challenged policy." Opposition at 1. Indeed, Defendants argue that "no one in the world has yet been subject to PP 9945," *id.* at 17, because this Court enjoined it. As a result, according to Defendants, Plaintiffs and putative class members all "lack . . . any demonstrated injury from PP 9945,"[2] *id.* at 16.

This position has no basis in law or logic. The law does not require a "present injury" to confer standing, and it certainly does not require Plaintiffs to sit back and allow the Proclamation to inflict irreparable harm on themselves and thousands of others before seeking redress. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 640 (D. Ariz. 2016); *Nav N Go Kft.*, 2009 WL 10693414, at *4. It is well established that parties need not expose themselves to harm in order to challenge a policy as unlawful. *See Steffel*, 415 U.S. at 459 ("[I]t is not necessary that petitioner first expose himself to actual arrest

[2] Defendants could have raised these arguments in their Opposition to Plaintiffs' Motion for Preliminary Injunction. They did not. *See generally* Dkt. 84.

or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). Rather, "[a]s long as the injury is not merely conjectural or hypothetical, imminent injury satisfies the standing requirements." *Nav N Go Kft.*, 2009 WL 10693414, at *4 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see, e.g.*, *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 640 (D. Ariz. 2016) (rejecting defendants' argument that named plaintiff who was not presently detained lacked standing where allegations supported a finding that detainment and subjection to unlawful conduct was imminent); *see also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 949 (9th Cir. 2011) (en banc) ("It is well settled that a plaintiff need not await the consummation of threatened injury to obtain prospective relief." (quotation marks omitted)).

In this case, if the Proclamation were to go into effect, it would require either the Plaintiffs or their family members (depending on each Plaintiff's status as a petitioner or applicant) to establish, to a consular officer's satisfaction, that they will be covered by "approved health insurance" within 30 days after entry or will be able "to pay for reasonably foreseeable medical costs." If they cannot make such a showing they will be deemed ineligible to enter the United States on an immigrant visa. Each Plaintiff has submitted a sworn statement evidencing that they or their family member will be unable to meet the Proclamation's requirements.[3] The Proclamation thus unquestionably imposes an actual, particularized, imminent injury on each of the named Plaintiffs, and it is not necessary that their application or petition actually be denied. *See Nav N Go Kft.*, 2009 WL 10693414, at *4 (noting that the threat of injury that is imminent

[3] *See* Declaration of John Doe #1 (Dkt. 55), ¶ 4; Declaration of Jane Doe #2 (Dkt. 49), ¶¶ 6-8; Declaration of Jane Doe #3 (Dkt. 47), ¶ 8; Declaration of Iris Angelina Castro (Dkt. 51), ¶ 7; Declaration of Blake Doe (Dkt. 66), ¶¶ 3, 6-7; Brenda Villarruel (Dkt. 60), ¶¶ 6-7, 9; Declaration of Gabino Soriano Castellanos (Dkt. 58), ¶8; Declaration of Carmen Rubio (Dkt. 59), ¶ 6.

and non-conjectural can support standing). As this Court pointed out in granting the Motion for Preliminary Injunction:

> The Proclamation is directed against a class of persons and would cause the same alleged harm to the entire putative class—being forced to meet the dispositive requirement of purchasing [an approved type of] health insurance or showing sufficient financial resources or face an inadmissibility determination.

Dkt. 95 at 45.

Defendants are also incorrect that Plaintiffs lack standing if they are "ineligible for a visa for any other reason." Opposition at 18. As an initial matter, the partial administrative record Defendants produced after Plaintiffs had filed their Motion for Class Certification ("Motion") proves that, contrary to Defendants' suggestion, the Proclamation's inquiry is not sequenced to follow or build on other eligibility-related inquiries; rather, it sits alongside those considerations as an independent, single-factor, dispositive test for eligibility that must be applied in every case. Specifically, Amendments to the Foreign Affairs Manual ("FAM"), 9 FAM 302.14-11 (U), introduce a new refusal code—"HC1"—for individuals who fail to satisfy the Proclamation's requirements, regardless of any other factor. Dkt. 91 at 8-10. According to the State Department, "HC1 refusal is distinct from the public charge ground of ineligibility," and consular officers [should] make determinations under the Proclamation "irrespective of whether or not an applicant is found ineligible under public charge." Applicants subject to the Proclamation and ineligible under the public charge must be refused under both HC1 and the public charge code. *Id.* at 18-19; *see also id.* at 86 (DOS Webinar making clear that consular officers "should adjudicate both" the Public Charge and PP 9945 grounds for refusal where applicable").

Plaintiffs' declarations make clear that they, like numerous other class members, will not be able to make such a showing. *See* Motion at 7-12.[4] Thus, the barrier posed by the Proclamation is complete and applies equally to all of them. Even if Plaintiffs or putative class members were to include some individuals who might *also* ultimately be denied an immigrant visa for some reason other than failure to satisfy the Proclamation's requirements,[5] certification is not improper. Indeed, it would not be improper even if certain named Plaintiffs or class members were not harmed by the Proclamation at all. *Inland Empire-Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408, at *8 (C.D. Cal. Feb. 26, 2018); *see also Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) ("[E]ven a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct," and recognizing that "an injurious course of conduct may sometimes fail to cause injury to certain class members").

## II. Plaintiffs Have Satisfied Rule 23(a)(3)'s Typicality Requirement.

Defendants' argument that Plaintiffs do not satisfy the "typicality" requirement of Rule 23(a)(3) is largely dependent on their assertion that Plaintiffs lack standing. Opposition at 16-19. For the reasons explained above, that assertion should be rejected.[6]

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[4] The Proclamation fails to make clear the standards Defendants will apply to determine whether a class member's health insurance is "approved," whether "medical costs" are "reasonably foreseeable," and whether the plaintiffs will be able to pay for such costs. Motion at 6-7. However, Defendants cannot defeat certification by hiding behind the fact that their own policies and decision-making processes are unintelligibly vague and opaque.

[5] Plaintiffs note that the proposed class definition is already limited to individuals with "approved or pending petitions," or in the case of foreign nationals, those who are already "otherwise eligible to be granted a visa." Motion at 1.

[6] The same is true of Defendants' position that the numerosity requirement has not been satisfied, which is entirely derivative of their flawed standing argument. *See* Opposition at 27. Moreover, Defendants admitted during argument on the Motion for Preliminary Injunction that the Proclamation would affect thousands of people. *See also* Dkt. 95, Opinion and Order at 4 (noting

Defendants' other typicality argument—that typicality is defeated by variations in Plaintiffs' underlying circumstances, including financial status, healthcare needs, immigrant visa category, and visa application stage—is also baseless. "[T]he typicality requirement is permissive and requires only that the representative's claims are reasonably coextensive with those of absent class members; they need not be substantially identical." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quotation marks omitted). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id*.

The Proclamation is unconstitutional and unlawful with respect to the entire putative class. And, as the Court has recognized and the materials Defendants have produced in this litigation make clear, that the Proclamation "makes the ability to pay for anticipated care needs a single, dispositive factor." Dkt. 95, Opinion and Order at 30; Motion at 6-7. As such, it operates identically on each Plaintiff, and on each putative class member. Plaintiffs' challenge to a single, broadly applied policy easily meets the typicality standard. *See Inland Empire-Immigrant Youth Collective*, 2018 WL 1061408, at *10 ("Even if the named Plaintiffs' individual cases contain some factual variations, that does not change the fact that all are challenging the legality of Defendants' DACA revocation practices under the APA and due process clause."); *see also Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) ("It does not matter that the named plaintiffs

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that family-based and diversity immigrant visas account for tens of thousands of immigrant visas granted each year); Dkt. 54, Declaration of Leighton Ku at ¶ 21 ("The State Department estimated that 450,500 people per year would be subject to the proclamation and would be asked about their insurance coverage. Unless these immigrants obtain another type of insurance coverage or have the undefined level of financial resources to cover their medical needs, these data suggest that roughly 293,000 visa applicants would be denied visas each year.") (internal citations omitted).

may have in the past suffered varying injuries or that they may currently have different health care needs; Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each other or to every class member.").

## III. Plaintiffs Have Satisfied Rule 23(a)(3)'s Commonality Requirement.

Defendants acknowledge that the focus of the commonality analysis is "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." Opposition at 19 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). They then proceed to ignore the numerous common answers that will without a doubt drive the resolution of this litigation, as well as the abundance of authority making clear that commonality exists where, as here, plaintiffs seek injunctive relief challenging a system-wide policy that affects all class members. Instead, Defendants offer a string of considerations more appropriate to a predominance analysis of a proposed Rule 23(b)(3) class—e.g., whether class members reside in different states, hail from countries with different healthcare systems, and make different healthcare decisions, Opposition at 20-22—than to a case seeking to enjoin a common policy. Plaintiffs here seek to certify a class under Rules 23(b)(2) and 23(b)(1)(A)—not Rule 23(b)(3)—and the individualized considerations Defendants argue do not defeat commonality.

Courts in the Ninth Circuit recognize that the "commonality requirement is construed less rigorously than the 'predominance' requirement of Rule 23(b)(3)." *Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 287 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)); *see also Munguia-Brown v. Equity Residential*, 2017 WL 4838822, at *4 (N.D. Cal. Oct. 23, 2017). This includes cases where, as here, plaintiffs seek injunctive relief and class-wide treatment under Rule 23(b)(2). *Rodriguez v. Gates*, 2002 WL 1162675, at *6 (C.D. Cal. May 30, 2002) ("The Ninth Circuit has held that the commonality requirement may be relaxed when the plaintiff seeks certification of a class for injunctive relief under Rule 23(b)(2)."

(citing *Walters v. Reno*, 145 F.3d 1032, 1045-48 (9th Cir. 1998)). Accordingly, courts have recognized that in civil rights suits seeking injunctive relief, where the "lawsuit challenges a system-wide practice or policy that affects all of the putative class members, … individual factual differences among class members pose no obstacle to commonality." *Parsons*, 754 F.3d at 682; *see also, e.g.*, *Hernandez v. Lynch*, 2016 WL 7116611, at *19 (C.D. Cal. Nov. 10, 2016) (granting certification in response to a challenge to U.S. immigration officials' policies and practices surrounding bond requirements for detainees, even though the outcome of individual bond cases would depend on the facts of each case).

In challenging the Proclamation under the APA and Constitution, Plaintiffs ask this Court to determine whether the new obstacles to issuance of immigrant visa applications are lawful. The answers to these questions "are the 'glue' that holds together the putative class and the putative subclass; either each of the [challenged] policies and practices is unlawful as to every [class member] or it is not." *Parsons*, 754 F.3d at 678. If the Court determines that the Proclamation and/or its implementation are unlawful, whether under the Constitution or the APA, Defendants cannot enforce it and both the U.S. Petitioner and Visa Applicant Subclasses are relieved of the harm of which they complain. *See, e.g.*, *Sweet v. DeVos*, 2019 WL 5595171, at *7-8 (N.D. Cal. Oct. 30, 2019) (granting certification of injunctive class of students from for-profit colleges who challenged department policy of "inaction" in failing to adjudicate their applications for loan forgiveness, but not the outcome of any individual's application).

Defendants distort the commonality analysis in asserting that Plaintiffs' circumstances are too varied to satisfy this requirement. Opposition at 20 (referring to the way the Proclamation might apply "in different ways to different individuals," the various states in which Plaintiffs live, and whether putative class members have researched "every health insurance plan available

in every single state, district, and territory …," among other potential differences). But this is not a Rule 23(b)(3) class, and the Court need not delve into Plaintiffs' individualized circumstances to make individualized damages determinations. Plaintiffs seek to enjoin an unlawful and broadly applicable policy, and differences in the way that policy might impact different Plaintiffs (if implemented) are irrelevant. *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 969 (9th Cir. 2019) ("The district court properly grounded its commonality determination in the constitutionality of statewide policies and practices, which is a 'common question of law or fact' that can be litigated in 'one stroke.'" (quoting *Dukes*, 564 U.S. at 350)); *Parsons,* 754 F.3d at 678 (assessing the lawfulness of policies relating to the provision of healthcare services to inmates did not "require [the court] to determine the effect of those policies and practices upon any individual class member … or to undertake any other kind of individualized determination). Plaintiffs have easily satisfied the commonality inquiry relevant to their claims.

## IV. Plaintiffs Have Satisfied Rule 23(a)(4)'s Adequacy Requirement.

Contrary to Defendants' assertions, both of the subclasses Plaintiffs seek to certify have at least one adequate representative. The Visa Applicant Subclass is represented by Gabino Soriano Castellanos.[7] Each of the remaining individual named Plaintiffs is a member and

[7] As promised in Plaintiffs' Motion (at 1 n.1), Plaintiffs have filed their First Amended Class Action Complaint (Dkt. 100) to formally add Mr. Castellanos as a named Plaintiff and proposed class representative. Defendants suffer no unfair prejudice as a result of his addition. Mr. Castellanos' declaration was filed with the Court on the same day Plaintiffs moved for Class Certification, *see* Dkt. 58, and the allegations concerning him in the proposed amendment are materially indistinguishable from his description in Plaintiffs' Motion. *Compare* Motion at 11, *with* Dkt. 100, ¶ 21. Moreover, Defendants' repeated assertions that that Plaintiffs' deadline to amend as a matter of course has passed, *e.g.*, Opposition at 7, 26, are simply incorrect. Defendants entirely ignore Federal Rule of Civil Procedure 15(a)(1)(B), which allows amendment as a matter of course of a pleading to which a responsive pleading is required—like a complaint—up to and until "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Because Defendants have

proposed representative of the U.S. Petitioner Subclass.[8] Setting aside their standing arguments, which are addressed in detail above, Defendants assert that these proposed class representatives are inadequate because of purported inter- and intra-class conflicts and because of a supposed lack of information about their identities. *E.g.*, Opposition at 2, 24-26. Defendants also challenge the adequacy of proposed class counsel. *Id.* at 27. These arguments are meritless.

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not answered or otherwise filed a responsive pleading, amendment as a matter of course is permitted under Rule 15(a)(1)(B). *See Am. Realty Inv'rs, Inc. v. Prime Income Asset Mgmt., LLC*, 2013 WL 5663069, at *5 (D. Nev. Oct. 15, 2013) ("A complaint is a pleading to which a responsive pleading is required. Therefore, under Rule 15(a)(1)(B), a party has an absolute right to amend its complaint at any time from the moment the complaint is filed until 21 days after the earlier of the filing of a responsive pleading or a motion under Rule 12(b), (e), or (f)." (quoting *Villery v. Dist. of Columbia*, 277 F.R.D. 218, 219 (D.D.C. 2011))); *President & Fellows of Harvard Coll. v. Elmore*, 2015 WL 10819161, at *2 (D.N.M. Nov. 9, 2015).

[8] While not necessary to certify the class, named Plaintiff Latino Network is likewise an adequate class representative for both subclasses. Defendants' assertion that Latino Network lacks standing (Opposition at 17 n.1) is incorrect. Its core mission is to support the successful integration of immigrants into the community, a purpose which was frustrated when it had to divert time and resources to address the Proclamation's fallout within the community it serves. *See* Motion at 11-12. That is sufficient to establish organizational standing. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (An organization "can demonstrate organizational standing by showing that the challenged practices have perceptibly impaired their ability to provide the services they were formed to provide" (quotation marks and alternations omitted)). Also contrary to Defendants' assertions (Opposition at 17 n.1), that Latino Network is an entity (rather than a natural person) does not preclude it from serving as a class representative. *See Int'l Woodworkers of Am., AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268-69 (4th Cir. 1981) ("We agree with Justice (then Circuit Judge) Blackmun that the status of an organization to proceed as a class representative should not be defeated solely because the organization is 'not itself, technically, an individual member of a class.'" (quoting *Smith v. Bd. of Educ.*, 365 F.2d 770, 777 (8th Cir. 1966))); *United States v. City of New York*, 258 F.R.D. 47, 63 (E.D.N.Y. 2009) (holding that "the organization will adequately represent the interests of the class as a whole").

### A. Defendants' Purported Inter- And Intra-Class Conflicts Are Baseless And Speculative.

Defendants argue that inter- and intra-class conflicts exist because some putative class members might benefit from Defendants' unlawful conduct. Opposition at 2, 24-25. At best, Defendants' allegations are the sort of speculative, hypothetical, and unsupported assertions of class conflicts that courts routinely reject. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) ("We do not 'favor denial of class certification on the basis of speculative conflicts.'" (quoting *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir.2003)); *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 810 (9th Cir. 2010) ("What a district court may not do is to assume, *arguendo,* that problems will arise, and decline to certify the class on the basis of a mere potentiality that may or may not be realized."); 1 Newberg on Class Actions § 3:58 (5th ed.) ("Conflicts that are merely speculative or hypothetical will not affect the adequacy inquiry.").

To begin with, Defendants argue that the Proclamation will benefit certain class members by expanding insurance options and that certain class members will oppose an injunction as a result. *See* Opposition at 2, 24-25. These speculations strain credulity. Defendants effectively hypothesize that the Proclamation's restrictions are so draconian that they will inspire enterprising Americans to engineer around them, and that the very parties harmed by those restrictions might one day come to appreciate the ingenious products devised by third parties as a result. And since the Proclamation has been enjoined (and the only relief Plaintiffs seek is continuation of that injunction), Defendants' argument presupposes that there will be class members with the prescience to foresee these complex market dynamics right now—before they come about. This defies common sense.

Not surprisingly, Defendants offer no support for their notion that the Proclamation may in fact help those it harms.[9] Defendants rely on conclusory assertions of "likely" benefits to new immigrants and "almost certain" conflicting interests. Opposition at 24-25. Such assertions do not suffice. As the Ninth Circuit has held, class certification is appropriate where the party opposing class certification "produced no evidence that class members actually possess opposing views regarding the pursuit of the punitive remedy." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("Without some evidence of an actual conflict, the district court did not abuse its discretion by granting class certification."); *see also, e.g.*, *Amaro v. Gerawan Farming, Inc*., 2016 WL 3924400, at *17 (E.D. Cal. May 20, 2016) (certifying a class: "[a]lthough defendants allege that a conflict of interest exists, defendants have failed to provide any evidence that such is the case").[10]

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[9] Indeed, the only specific form of health insurance that Defendants assert will be incentivized by the Proclamation is short-term limited duration insurance (or, "STLDI"). *See* Opposition at 25. But Defendants provide no evidence that access to such plans will be expanded by implementation of the Proclamation or that such expansion would be beneficial to putative class members. To the contrary, the evidence in the record indicates that such plans have myriad limitations and deficiencies, and that individuals enrolled in those plans "are likely to face significant uncompensated health care costs if they have an unexpected health event." Declaration of Dania Palanker (Dkt. 57), ¶¶ 20-30.

[10] Even if Defendants had provided some evidence of actual intra-class conflict in this regard, a "difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification," and no "purported conflict" has been identified that "is so serious and irreconcilable as to defeat certification as a matter of law." *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 348 (N.D. Cal. 2008) (quotation marks omitted); *see also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 596 (N.D. Cal. 2015); *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 221, 233 (D. Kan. 2010) (finding the class representatives adequate in a Rule 23(b)(2) class action despite the fact that some class members might oppose the requested injunctive relief because the injunction need only benefit the class as a whole and because "[c]lass actions are not forbidden in every case in which class members may disagree"); 1 Newberg on Class Actions § 3:65 (5th ed.) ("As a general rule, disapproval of the action by some class members will not preclude a class action on the ground of inadequate representation."). Moreover, that some putative class members may

Defendants' other imagined conflict is equally speculative and even more far-fetched. Specifically, Defendants assert that members of the U.S. Petitioner Subclass could be financially burdened by their family members who are members of the Visa Applicant Subclass in the event they are allowed to enter the country without qualifying health insurance and then go on to incur significant medical costs, thus creating conflict between certain members of these subclasses. Opposition at 2, 25. But the individuals in the U.S. Petitioner Subclass *chose* to sponsor their family members who are part of the Visa Applicant Subclass. *See* Motion at 7-12. It makes no sense that an individual who has chosen to sponsor a family member and reunify their family would in fact want the Proclamation to go into effect and bar that family member from obtaining a visa.

At bottom, Plaintiffs have not identified any credible inter- or intra-class conflict, much less provided evidence of the sort of "fundamental" conflict that would warrant the denial of class certification. *Online DVD-Rental*, 779 F.3d at 942.

**B. Named Plaintiffs Will Continue To Vigorously Prosecute This Action.**

Defendants' argument that the named Plaintiffs will not vigorously prosecute this action is similarly baseless. First, Defendants assert that the individual named Plaintiffs are inadequate because they have been "unwilling to share information with Defendants." Opposition at 7-8, 26. That is simply incorrect. Each and every named Plaintiff and proposed class representative has filed a sworn declaration with the Court in support of class certification. *See* Dkts. 47, 49, 51, 53,

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glean some tangential benefit from Defendants' unlawful conduct would not undermine adequacy. *See Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 781 (9th Cir. 1986) ("If the state plan is found to violate [the applicable law], it will be invalidated notwithstanding the fact that there may be some who would prefer that it remain in operation"); *Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 338 (N.D.N.Y. 2011) ("Adequacy is not undermined where the opposed class members' position requires continuation of an allegedly unlawful practice").

55, 58-60, 66. Further, prior to Defendants filing their Opposition, proposed class counsel shared additional information requested by Defendants regarding the individual named Plaintiffs. Class counsel has not withheld any requested information. Indeed, Defendants have been provided with the names of all petitioners and beneficiaries as well as their petition receipt number, date their petition was approved, or both. *See generally* Declaration of Nadia Dahab in Support of Motion for Reply to Motion for Class Certification.[11]

Second, Defendants claim the named Plaintiffs are not adequate because they have proceeded under pseudonyms pursuant to the Court's order. Dkt. 31, Opposition at 26. Defendants acknowledge, however, they have received the real names of all pseudonymous named Plaintiffs. Opposition at 7. In any event, there is nothing improper or unusual about Courts certifying classes in the immigration context where some or all of the named Plaintiffs are proceeding under pseudonyms. *See, e.g.*, *Ms. J.P. v. Jefferson B. Sessions, et al.*, Case No. LA CV18-06081, Dkt. 251 (C.D. Cal. Nov. 5, 2019); *Ms. L. v. U.S Immigration & Customs Enf't ("ICE")*, 330 F.R.D. 284, 292-93 (S.D. Cal. 2019); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 325 (D.D.C. 2018) (provisionally certifying class of asylum seekers where "the Court has permitted certain named Plaintiffs to proceed under pseudonyms").

**C. Proposed Class Counsel Have More Than Demonstrated Their Adequacy.**

Defendants mount an odd challenge to the qualifications of a group of demonstrably experienced putative class counsel (including lawyers from the American Immigration Lawyers' Association) to handle this immigration class action. Defendants complain that, rather than

[11] Tellingly, Defendants have not cited a single case suggesting that purported deficiencies along these lines would merit denial of class certification. *See* Opposition at 26. The only case they cite in the relevant discussion is *Chamber of Commerce v. E.P.A.*, 642 F.3d 192, 199 (D.C. Cir. 2011)—the cited page and language from which address inapposite issues pertaining to organizational standing.

providing resumes with counsel's qualifications, Plaintiffs evidenced their counsel's adequacy by identifying their experience in numerous prior cases in which they have been appointed class counsel (including civil rights and immigration cases). Opposition at 27.[12] But it is hornbook law that "[t]he fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action." 1 Newberg on Class Actions § 3:72 (5th ed.). Defendants also incorrectly claim that Plaintiffs merely "claim alliance with organizations who may be qualified" based on their experience in prior actions. (Opposition at 27.) To the contrary, those actions were handled by teams including the attorneys who have appeared for the putative class in this case. *See* Motion at 26. In short, Defendants' argument is baseless, and proposed class counsel readily satisfy the adequacy requirement. *See Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) ("Adequate representation is usually presumed in the absence of contrary evidence."); 1 Newberg on Class Actions § 3:72 (5th ed.) ("Members of the bar in good standing typically deemed qualified and competent to represent a class absent evidence to the contrary").

## V. Ascertainability Is Not A Prerequisite To Rule 23(b)(2) Certification, And In Any Event The Proposed Class Here Is Ascertainable.

Defendants argue that the proposed subclasses fail to meet the "implicit requirement of ascertainability" because they are "impossible to identify without significant, individualized factual inquiry." Opposition at 15, 23. This argument is incorrect for two reasons. First, Defendants ignore that ascertainability is not required for class certification in the Ninth Circuit.

[12] Defendants misconstrue *Murphy v. Precision Castparts Corp.*, 2018 WL 3151426, at *4 (D. Or. June 6, 2018), in attempting to suggest a rule that class counsel can be deemed adequate "*only* after" their resumes have been reviewed. (Opposition at 27 (emphasis added).) The court in that case simply reviewed class counsel's resumes in finding adequacy; it nowhere came close to suggesting such evidence was required.

*Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017) (recognizing that the court had not adopted an ascertainability requirement); *Bee, Denning, Inc. v. Capital Alliance Grp.*, 2016 WL 3952153, at *5 (S.D. Cal. July 20, 2016) ("[A]scertainability should not be required when determining whether to certify a class in the 23(b)(2) context."). The cases Defendants cite—all from the Rule 23(b)(3) context[13]—are also particularly inapposite. *See In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015) (distinguishing (b)(2) actions from (b)(3) actions in finding that ascertainability was not required under the former); *Inland Empire-Immigrant Youth Collective*, 2018 WL 1061408, at *12 (same).

In addition to misapplying the law, Defendants wrongly suggest that the proposed class requires the identification of individuals who plan to file petitions or applications for immigrant visas at some point in the future. Opposition at 23. The class definition includes those who "will soon" file such petitions and applications to recognize that people will continue to seek immigrant visas and to make clear that such individuals are intended to also be members of the class. This not uncommon in the context of Rule 23(b)(2) classes. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1118, 1124 (9th Cir. 2010) ("The inclusion of future class members in a class is not itself unusual or objectionable") (collecting cases). Indeed, as Defendants and their counsel are aware, courts in this Circuit have recently certified several classes defined to account for future class members.

In *Ms. L. v. U.S. Immigration & Customs Enforcement*, 331 F.R.D. 529 (S.D. Cal. 2018), for example, the court certified a class of adults who "(1) have been, are, *or will be* detained in

[13] *See In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 2019 WL 3410382, at *11-12 (D. Or. July 29, 2019) (Simon, J.) (assessing ascertainability in the context of a 23(b)(3) class); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (same); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014) (same).

immigration custody by [DHS], and (2) have a minor child who is *or will be* separated from them by DHS." *Id.* at 541 (emphasis added). The *Ms. L.* court rejected the defendants' argument that individual inquiries would be necessary to determine who falls within the class definition, finding that the "problem" defendants had posed was "easily resolved" because individuals would "become[] a member of the class when they are held in immigration detention without their children." *Id*. Similarly, in *Inland Empire-Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018), the court certified a class that included those who "*will have* their DACA terminated without notice or process, despite continuing to be eligible, if Defendants' policies and practices are not enjoined." *Id.* at *7-8 (recognizing that other courts in this Circuit have also certified classes to include future members).[14] Like the classes certified in these cases, the proposed class here does not require a party to "know who plans to file a petition to application at some point in the future." Rather, the class is defined to reflect a recognition that additional members are expected to fall within the class definition after the certification date.

The Court should also reject Defendants' argument that the proposed class is unascertainable because eligibility under the immigration laws and the Proclamation cannot be determined until after an interview by the consular officer. Opposition at 23-24. The Proclamation makes it clear that individuals unable to demonstrate to the satisfaction of a

[14] *See also Ms. J.P. v. Jefferson B. Sessions, et al.*, Case No. LA CV18-06081, Dkt. 251 (C.D. Cal. Nov. 5, 2019) (granting certification to a class of adult parents who "were, are, or will be detained in immigration custody by [DHS]" and who have a minor child who "has been, is, or will be separated from them by DHS …." (emphasis added)); *Unknown Parties*, 163 F. Supp. 3d at 640 (rejecting as "unfounded" defendants' argument that plaintiffs failed to satisfy typicality because he was not confined at a CBP facility at the time plaintiffs filed their complaint, noting that the class definition included "all individuals 'who are now or in the future will be detained for one or more nights at a CBP facility … within the Border Patrol's Tucson Sector.'"); *Jaegal v. County of Alameda*, 2012 WL 161235, at *3 (N.D. Cal. Jan. 17, 2012) (certifying class to include detainees who "have been, … are, or will be held in Defendants' custody ….").

consular officer that they "will be covered by approved health insurance" within 30 days or able "to pay for reasonably foreseeable medical costs" will be denied visas. As explained above, the Defendants' own records show this is a single-factor, dispositive inquiry, and Plaintiffs' declarations made clear that they will not be able to make the requisite showing. *See* Section I, *supra*; *see also* Dkt. 95, Opinion and Order at 30 (rejecting suggestion that the Proclamation "create[s] and additional factor" and recognizing that "supplants § 1182(a)(4)B)" by "mak[ing] the ability to pay for anticipated care needs a single, dispositive factor . . . ."). The fact that individual class members might be not be deemed "otherwise eligible" under the immigration laws or ineligible pursuant to the Proclamation until after Defendants execute the unlawful policy does not change the outcome of that analysis. "Identification of individual class members is not required; to the contrary, the fact that class members are difficult or impossible to identify individually supports class certification under Rule 23(b)(2)." *Civil Rights Education and Enforcement Center v. RLJ Lodging Trust*, 2016 WL 314400, at *5 (N.D. Cal. Jan 25, 2016). Furthermore, the fact that this "manual process may be slow and burdensome cannot defeat the ascertainability requirement." *Al Otro Lado, Inc. v. McAleenan*, 2019 WL 6134601, at *15 (S.D. Cal. Nov. 19, 2019) (quoting *In re Vitamin C Antitrust Litig.*, 270 F.R.D. 90, 116 (E.D.N.Y. 2012)).

Accordingly, even if ascertainability were a requirement to certifying a Rule 23(b)(2) class, Plaintiffs satisfy that standard.

## CONCLUSION

For the foregoing reasons and those explained in Plaintiffs' Motion, Plaintiffs respectfully request that the Court grant their motion and enter an order certifying the proposed class under Rule 23(b)(2) and/or Rule 23(b)(1)(A); appointing Plaintiffs as class representatives;

and appointing the Plaintiffs' counsel from the American Immigration Lawyers Association, Innovation Law Lab, Justice Action Center, and Sidley Austin LLP as class counsel.

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