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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; and LATINO NETWORK,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, 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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs move to certify two broad and distinct classes: a nationwide class encompassing all individuals in the United States who have filed or will file a petition to sponsor a noncitizen family member for an immigrant visa, and a worldwide class encompassing all foreign nationals who have applied or will apply for an immigrant visa. Membership in either class requires a showing that the foreign national is "unable to demonstrate to a consular officer's satisfaction" that she can satisfy the requirements of Presidential Proclamation 9945 (PP 9945). The fundamental flaw in certifying a class is that the challenged policy has not been applied to any of the named plaintiffs or any of the class members. This flaw renders the proposed class defective for multiple reasons.

Plaintiffs have not identified a single U.S. petitioner whose family member has been "unable to demonstrate to a consular officer's satisfaction" that she satisfies the requirements of PP 9945 because no consular officer has yet applied PP 9945 to an immigrant visa applicant. Plaintiffs speculate that they may not be able to satisfy the requirements of PP 9945 but are unable to point to any specific facts to support their speculation, and speculation does not make them a member of the classes as defined—those who are "unable to demonstrate" their eligibility for an immigrant visa "to a consular officer's satisfaction." Accordingly, Plaintiffs have not shown that any named Plaintiff is a member of either class that their lawyers propose to certify. Separately, this Court cannot certify a class where no plaintiff has been subject to the challenged policy—doing so would disregard core Article III limits on judicial authority. For this same reason, the named Plaintiffs' claims are not typical of those of the proposed classes, and they are inadequate class representatives.

The adequacy requirement is not met here because there are certain to be conflicts with members of the class and between the subclasses. With respect to the conflicts within the classes, the relief being sought is likely to limit insurance options available to the majority of class member who are willing to carry insurance. With respect to conflicts between class members, releasing new immigrants from the requirement to carry insurance upon their arrival could financially burden and harm their U.S. petitioner sponsors.

Plaintiffs' proposed classes also lack commonality because there are no common questions that are capable of generating "common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs frame their request for injunctive relief as dependent on the purported illegality of PP 9945 and its implementation. But the named Plaintiffs have diverse health issues and differing access to health insurance and a wide range of financial resources. Consular officers would determine eligibility under PP 9945 on a case-by-case basis based on the unique facts and circumstances of each applicant, as they do for all eligibility requirements. Therefore, class treatment is inappropriate in such circumstances. Plaintiffs also do not have a representative of their proposed worldwide class. None of their Plaintiffs are foreign nationals who have or may seek an immigrant visa. *See generally* ECF No. 1, Compl. Nor do Plaintiffs have a representative that is not seeking a family-based visa—a visa applicant without a family-member petitioner in the United States presents differing legal issues, and cannot be swept in to the class. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (granting stay of injunctions with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States).

Finally, Plaintiffs' proposed class is not appropriate for certification under Rule 23(b)(2) and is not ascertainable because Plaintiffs have not demonstrated reliable means of identifying the individuals who would receive the relief Plaintiffs seek. It is impossible to ascertain a class defined in this speculative way—where it is not based on an actual denial of a visa application by a consular officer but instead based on the speculation that there may be a denial in the future.

BACKGROUND

I. Procedural History

On October 4, 2019, the President signed PP 9945. *See* Presidential Proclamation 9945, Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, 84 Fed. Reg. 53991 (Oct. 9, 2019). The President issued PP 9945 to address the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare." *Id.* Hospitals and other healthcare providers "often administer care to the uninsured without any hope of receiving reimbursement from them," and these costs are passed on to the American people in the form of higher taxes, higher premiums, and higher fees for medical services. *Id.* Uncompensated care costs have exceeded $35 billion in each of the last 10 years, a burden that can drive hospitals into insolvency. *Id.* The uninsured also strain Federal and State government budgets through reliance on publicly funded programs, which are ultimately funded by taxpayers, and by using emergency rooms to seek remedies for a variety of non-emergency conditions. *Id.*

The challenges caused by uncompensated care are exacerbated by admitting to the United States thousands of immigrants annually who have not demonstrated any ability to pay for their healthcare costs. 84 Fed. Reg. 53991. Notably, "data show that lawful immigrants are about three

times more likely than United States citizens to lack health insurance." *Id*. Continuing to allow entry into the United States of "certain immigrants who lack health insurance or the demonstrated ability to pay for their healthcare" would be "detrimental to the interests of the United States," including protecting and addressing the challenges facing our healthcare system and protecting American taxpayers from the burden of uncompensated care. *Id*. To address these challenges while still continuing the United States' "long history of welcoming immigrants who come lawfully in search of brighter futures," President Trump issued PP 9945 and suspended, with various exceptions, entry into the United States of immigrants who cannot satisfy a consular officer at a visa interview that they (1) will be covered by approved health insurance, as set out in PP 9945, within 30 days of entering the United States, or (2) will have "the financial resources to pay for reasonably foreseeable medical costs." 84 Fed. Reg. 53991-92.

PP 9945 has a wide range of exceptions. Because it applies to individuals who "seek[ ] to enter the United States pursuant to an immigrant visa," 84 Fed. Reg. 53992, § 2; *id.* at 53993, § 3, it does not apply to the overwhelming majority of noncitizens who seek to enter the United States on a nonimmigrant visa, including foreign students attending American schools, temporary agricultural workers, workers performing temporary or seasonal work, fiancés of U.S. citizens, business travelers, or tourists. The Proclamation also does not apply to asylees or refugees. 84 Fed. Reg. 53993, § 2. It also exempts most children, various other visa categories, and any intending immigrant "whose entry would further important United States law enforcement objectives, as determined by the Secretary of State or his designee based on a recommendation of the Attorney General or his designee," or "whose entry would be in the national interest, as determined by the Secretary of State or his designee on a case-by-case basis." *Id.* at 53992-93.

PP 9945 also sets out a range of possible healthcare plans visa applicants can use to satisfy its requirements. 84 Fed. Reg. 53992. An immigrant visa applicant does not have to establish coverage before the consular interview and does not necessarily have to establish that she will have coverage before entering the United States, only that she will be "covered by approved health insurance" within 30 days of entering the United States. Alternatively, the intending immigrant may meet the requirements of PP 9945 by satisfying a consular officer that she has "the financial resources to pay for reasonably foreseeable medical costs." 84 Fed. Reg. 53992. Thus, if PP 9945 were to take effect, consular officers would still be required to make individual, highly fact-specific determinations for each immigrant visa application before deciding (1) whether PP 9945 applies to that particular applicant, and (2) if so, whether the visa applicant can satisfy the requirements of PP 9945.

On October 30, 2019, Plaintiffs filed a Complaint challenging PP 9945, and two days later, on November 1, filed a Motion for Temporary Restraining Order seeking to enjoin implementation of PP 9945 before its effective date. *See* ECF Nos. 1, 7; 84 Fed. Reg. 53994 (setting an effective date of November 3, 2019). On November 2, 2019, before Defendants had an opportunity to respond to the motion, the court issued a Temporary Restraining Order halting implementation of the PP 9945. ECF No. 33. The court also granted Plaintiffs' Motion to Proceed Under Pseudonym, again without an opportunity for Defendants to respond to the motion. ECF No. 31.

On November 8, 2019, Plaintiffs filed a Motion for a Preliminary Injunction and a Motion for Class Certification on the same day. ECF Nos. 44, 46. Under Local Rule 7-1(e), Defendants' had 14 days to respond to the Motion for Class Certification. During that same 14-day period, the court ordered Defendants to respond to the Motion for Preliminary Injunction

within four business days of when it was filed. ECF No. 32. Plaintiffs filed a Motion to Compel Administrative Record, ECF No. 68, and the court granted Plaintiffs' request for expedited hearing, requiring Defendants to respond within two business days, ECF No. 76. The court subsequently granted the motion in part, ECF No. 83, and gave Defendants only a few days to compile and produce an administrative record. The court also set a hearing on the Motion for Preliminary Injunction for November 22, 2019, the same date that Defendants' response to the Motion for Class Certification is due. ECF No. 33.

Given these competing deadlines, as well as other issues such as Plaintiffs' refusal to share sufficient information about their anonymous Plaintiffs for Defendants to be able to fairly examine and respond to Plaintiffs' allegations in responding to their class certification motion, Defendants moved for a modest extension of the deadline to respond to the Motion for Class Certification. *See generally* ECF No. 87. On November 19, 2019, without waiting for a response from Plaintiffs, the court denied any extension of the briefing schedule. ECF No. 89.

II. Proposed Classes

Plaintiffs first seek to represent a nationwide class of individuals (which Plaintiffs call the U.S. Petitioner Subclass):

> Individuals in the United States who currently have an approved or pending petition to the United States government to sponsor a noncitizen family member for an immigrant visa, or who will soon file such a petition; and whose sponsored family member is subject to the Proclamation and unable to demonstrate to a consular officer's satisfaction that he or she "will be covered by approved health insurance" within 30 days after entry or will be able "to pay for reasonably foreseeable medical costs."

Plaintiffs also seek to represent a worldwide class of individuals (which Plaintiffs call the Visa Applicant Subclass):

> Individuals who are foreign nationals who (i) have applied for or will soon apply to the United States government for an immigrant visa; (ii) are otherwise eligible to be granted the visa; but (iii) are subject to the Proclamation and unable to

> demonstrate to the satisfaction of a consular officer 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."

III. Proposed Class Representatives

In their Complaint, Plaintiffs name seven individuals as proposed class representatives, along with one organizational Plaintiff that is not part of either proposed subclass. ECF No. 1, Compl., ¶¶ 14-21. Plaintiffs do not have a single representative of their worldwide class. In their motion for class certification, Plaintiffs "seek the appointment" of a Mexican citizen and immigrant visa applicant, Gabin Soriano Castellanos, "as a class representative." Mot. at 1 n.1. But they acknowledge that to add him as a named plaintiff would require amending their complaint, *id*., which they have not done. Plaintiffs' deadline to file an amended complaint has passed, *see* Fed. R. Civ. P. 15(a)(1)(A) (permitting amendment as a matter of course within 21 days of filing the complaint), and it would significantly prejudice Defendants to permit amendment after Defendants already were required to brief motions for a preliminary injunction and class certification on an expedited basis. Accordingly, Mr. Castellanos is not a named Plaintiff and thus cannot represent any class in this case.

All of the named individual Plaintiffs are U.S. citizens who have petitioned for immediate family members, but not a single noncitizen family member actually has attended their scheduled immigrant visa interview or scheduled their immigrant visa interview. By their own admission, most of them have not even submitted all of the required documents to complete the immigrant visa application, a necessary step before proceeding to a formal visa application and adjudication. *See* 22 C.F.R. § 42.55(b). The summaries below are based on Plaintiffs' allegations, many of which Defendants have been unable to confirm. After repeated requests from Defendants and only three days before this filing deadline, Plaintiffs finally shared with Defendants the names of their pseudonymous plaintiffs. But Plaintiffs have continued to refuse

to share additional information, such as some of the names of their noncitizen beneficiaries and case filing numbers, which is necessary to confirm in government records some of their identities to assess their allegations. At this point Defendants have no way to confirm any of their allegations regarding their health, financial resources, or purported injury.

A. John Doe #1

John Doe #1 alleges that he is a U.S. citizen living in Oregon with his wife, a Mexican citizen, and their U.S.-citizen son. ECF No. 55, ¶¶ 1-2. Although John Doe #1 married his wife in 2003 and became a U.S. citizen in 2011, he did not file a petition to sponsor his wife for a visa until November 2016. ECF No. 55, ¶¶ 1, 5-6. That petition was approved in July 2017. ECF No. 55, ¶ 6. John Doe #1 alleges that his wife's application for a provisional unlawful presence waiver (Form I-601A) also has been approved. ECF No. 55, ¶¶ 7, 12.

John Doe #1's wife previously had an immigrant visa interview scheduled for November 6, 2019, in Ciudad Juarez, Mexico, but she did not attend that interview. ECF No. 55, ¶¶ 7, 14. Instead, according to John Doe #1, on November 1, 2019—before the TRO hearing where Plaintiffs insisted he needed immediate relief because of his upcoming interview—he and his wife "asked the Consulate to postpone the interview." ECF No. 55, ¶ 14. Now he and his wife "expect that [the interview] will be held within two to three months." ECF No. 55, ¶ 14.

John Doe #1 alleges that he and his wife "studied and researched all the approved health insurance plans" under PP 9945 and contends that "every plan was either not available to my wife and I" or was "unaffordable and would remain so due to my family's current financial situation." ECF No. 55, ¶ 9. John Doe #1 does not point to any specific health insurance plans they "studied and researched" but generally asserts that he and his wife are ineligible for Medicare, TRICARE and that they "cannot afford a short-term plan or visitor insurance." ECF

No. 55, ¶ 9. They do not identify the cost of any of these plans they researched or explained why they are not affordable. And by referring to only plans that cover both of them, they make no allegations regarding the affordability of plans that would cover John Doe #1's wife, which is all that is required by the Proclamation. John Doe #1 alleges that his current income is limited to Social Security disability benefits, ECF No. 55, ¶ 10, but does not say how much money that is, whether his wife has any identified existing medical conditions, whether his wife currently earns any money, or what other resources might be available to their family.

B. Juan Ramon Morales

Juan Ramon Morales alleges that he is a U.S. citizen born in New York and currently living in New York with his wife Vianca Morales (a Mexican citizen), his U.S.-citizen daughter, and his Lawful Permanent Resident stepdaughter. ECF No. 53, ¶ 2. Although Mr. Morales married his wife in 2013, he did not file a petition to sponsor her for a visa until January 2017. ECF No. 53, ¶¶ 1, 8, 11. That petition was approved in July 2017. ECF No. 53, ¶ 11. Almost a year later, Ms. Morales filed an application for a provisional unlawful presence waiver (Form I-601A), which was approved in April 2019. ECF No. 53, ¶¶ 11. Mr. Morales contends that he and his wife have "completed all other required steps of the Consular Process" but Ms. Morales does not have an immigrant visa interview scheduled. ECF No. 53, ¶ 12.

Mr. Morales alleges that his family's annual income is about $47,000. ECF No. 53, ¶ 2. Mr. Morales has health insurance through his employer but his wife does not currently have health insurance. ECF No. 53, ¶¶ 3, 5. Mr. Morales admits that his employer has told him that his wife could be added to his health insurance plan once she has a Social Security Number. ECF No. 53, ¶ 5. Mr. Morales believes it is "highly likely that we will not be able to afford the additional costs necessary" to add his wife to his employer-sponsored plan but does not explain

what those additional costs might be. ECF No. 53, ¶ 6. Mr. Morales states that his wife had significant health issues several years ago but admits that "she is currently in good health and is able to pay for all her current medications" yet for some reason does not believe that she could "show that she will be able to pay for all her future medical costs at the time of her immigrant visa interview." ECF No. 53, ¶ 14.

C. Jane Doe #2

Jane Doe #2 alleges that she is a U.S. citizen living in California with her two children. ECF No. 49, ¶¶ 1-2. Jane Doe #2's parents are citizens and residents of Nicaragua. ECF No. 49, ¶ 5. Jane Doe #2 filed petitions to sponsor her parents for visas in December 2018, and those petitions were approved in July 2019. ECF No. 49, ¶ 6. Jane Doe #2 admits that her parents have not yet filed any applications for immigrant visas, let alone have interviews scheduled, because they are still "working on the collection of information and documents" to submit to the National Visa Center. ECF No. 49, ¶ 8.

Jane Doe #2 asserts that the options available under the Proclamation "are either not available to my parents or are unaffordable due to my family's current financial situation." ECF No. 49, ¶ 10. She does not explain what plans she considered, the costs of those plans, or provide any details about her financial situation. She says only that "Medicare is not available to [her] parents" and claims that "none of [their] family members can add [their] parents onto an approved plan." ECF No. 49, ¶ 10. Jane Doe #2 does not mention the age, health, or finances of her parents.

D. Jane Doe #3

Jane Doe #3 alleges that she is a U.S. citizen born in California and currently living in California. ECF No. 47, ¶¶ 1-2. Jane Doe #3's husband is a citizen and resident of Germany.

ECF No. 47, ¶ 5. Jane Doe #3 filed a petition to sponsor her husband for a visa in July 2018, and it was approved in April 2019. ECF No. 47, ¶ 5. Jane Doe #3 admits that her husband does not have an immigrant visa interview scheduled because they are still "working to gather the documents required for consular processing." ECF No. 47, ¶ 9. She does not explain why they have not gathered those documents in the last seven months.

Jane Doe #3 contends that her husband is an architect who teaches architectural theory, is fluent in English and German, and "his employment prospects in Los Angeles are good." ECF No. 47, ¶¶ 5, 11. She also acknowledges that he "has already started looking at job postings in Los Angeles" and "would also contribute to our household financially." ECF No. 47, ¶ 19.

Jane Doe #3 also says that she lives near her grandmother, brother, and other immediate family, No. 47, ¶ 7, but she does not explain what financial resources they have or how they could support her and her husband. Jane Doe #3 says only that she does not work due to a disability. ECF No. 47, ¶ 3.

Jane Doe #3 says that they cannot afford health insurance because her husband has expensive treatments for multiple sclerosis. ECF No. 47, ¶ 12. Jane Doe #3 says that her husband previously has purchased "traveler's insurance" but asserts that it is their "understanding that he is not eligible for that insurance if he is moving to the United States." ECF No. 47, ¶ 13. She does not explain what that understanding is based on, nor does she provide the cost of traveler's insurance. She also mentions that Medicare and TRICARE insurance are not options for her husband but does not explain what other health insurance plans they researched or may be available to him or their costs. ECF No. 47, ¶ 13.

E. Iris Angelina Castro

Iris Angelina Castro alleges that she is a U.S. citizen living in Massachusetts with her U.S.-citizen son. ECF No. 51, ¶¶ 1-2. Ms. Castro married her husband, a citizen and resident of the Dominican Republic, in May 2018. ECF No. 51, ¶¶ 5-6. Several months later, she filed a petition to sponsor her husband for a visa, and the petition was approved in May 2019. ECF No. 51, ¶ 6. Ms. Castro admits that, although the "consulate in the Dominican Republic is pretty quick to schedule an interview once they have received all of the necessary documentation," her husband does not have an immigrant visa interview scheduled because he and Ms. Castro are still "in the process of filing all of the necessary documents with the NVC." ECF No. 51, ¶ 6. She does not explain why they have not filed the "necessary documents" in the past six months.

Ms. Castro contends that she cannot afford health insurance for her husband because she is not currently working, ECF No. 51, ¶¶ 10-11, but she does not say whether her husband currently works, whether he has any existing medical conditions, or whether *he* could afford health insurance or his healthcare costs. She also admits that her husband would "alleviate [her] current financial situation" because he "could work if he entered the United States with his green card." ECF No. 51, ¶ 12.

F. Blake Doe

Blake Doe alleges that he is a U.S. citizen living in Oregon with his wife. ECF No. 66, ¶¶ 1-2. Blake Doe's parents are citizens of Mexico currently living in Oregon. ECF No. 66, ¶ 4. Blake Doe filed petitions to sponsor his parents for visas in April 2017, and those petitions were approved in January 2018. ECF No. 66, ¶ 7. In June 2019, his parents received approval for their provisional unlawful presence waiver applications (Form I-601A). ECF No. 66, ¶ 7. Blake Doe contends that his parents "have submitted all the necessary documents and information to

proceed with the immigrant visa process" but his parents do not have immigrant visa interviews scheduled. ECF No. 66, ¶ 8.

Blake Doe asserts that the approved health insurance plans under the Proclamation are "either not available to my parents or are unaffordable due to my family's current financial situation." ECF No. 66, ¶ 10. He does not explain what plans he considered or their cost. Blake Doe also asserts that his mother does not have health insurance but she currently pays for her health treatments out of pocket. ECF No. 66, ¶ 11. He does not say why she could not simply explain to the consular officer that she would continue to do that and instead claims that "they cannot afford their foreseeable medical costs without insurance." ECF No. 66, ¶ 13. He admits that his father works but does not say how much money he earns or whether his father is in good health. ECF No. 66, ¶ 11.

G. Brenda Villarruel

Brenda Villarruel alleges that she is a U.S. citizen living in Illinois with her U.S.-citizen parents and U.S.-citizen son. ECF No. 60, ¶¶ 1-2. Ms. Villarruel married Gabino Soriano Castellanos, a Mexican citizen, in 2016. ECF No. 60, ¶ 6. Ms. Villarruel filed a petition to sponsor Mr. Castellanos for a visa in July 2016, and it was approved in September 2016. ECF No. 60, ¶ 7. Mr. Castellanos then attended an immigrant visa interview in Ciudad Juarez, Mexico, in March 2018—well before the issuance of the Proclamation—and his visa was refused. ECF No. 60, ¶ 8. Mr. Castellanos then applied for a waiver of inadmissibility grounds, and that waiver was approved in August 2019. ECF No. 60, ¶ 8. He had another immigrant visa interview scheduled for November 5, 2019, but he did not attend that interview. ECF No. 60, ¶¶ 8-9. Instead, Ms. Villarruel and Mr. Castellanos requested that the interview be postponed. ECF No. 60, ¶¶ 9-10. In fact, on October 30, 2019—three days before the TRO hearing where

Plaintiffs insisted that they needed immediate relief because of their upcoming interviews—Mr. Castellanos "was told via phone that he could cancel his interview or reschedule his interview" but that there were no available future interview dates. ECF No. 60, ¶ 10. Despite that, Mr. Castellanos apparently chose to not attend his scheduled interview with the benefit of the TRO, and instead they "are hoping that he will be able to reschedule his interview in the next few months." ECF No. 60, ¶ 10.

Ms. Villarruel alleges that she and Mr. Castellanos researched "all the approved health insurance plans" and that "[e]very approved plan is either not available to my husband and I or unaffordable and would remain so due to our family's current financial situation." ECF No. 60, ¶ 9. She does not explain what plans they researched or why they cannot afford the plans that they acknowledge are available, or healthcare for Mr. Castellanos. And by referring to only plans that cover both of them, they make no allegations regarding the availability and affordability of plans that would cover Mr. Castellanos, which is all that is required by the Proclamation.
Ms. Villarruel asserts that Mr. Castellanos is a highly sought after tattoo artist with about 100 customers waiting for his return so that he can do their tattoos. ECF No. 60, ¶ 10. She does not explain why this would not provide them with sufficient income to afford his reasonably foreseeable medical costs.

ARGUMENT

I. Legal Standard

"Plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.,* 134 S. Ct. 2398, 2412 (2014); *see also Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). Under Rule 23, a district court may certify a class only if: "(1) the

class is so numerous that joinder of all members is impracticable; (2) there are questions of law and 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); *see Comcast Corp. v. Behrend,* 569 U.S. 27, 33 (2013) (plaintiffs must present "evidentiary proof" sufficient to withstand a "rigorous analysis" of the Rule 23 requirements). Plaintiffs also must establish the implicit requirement of ascertainability, *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 15-2633, 2019 WL 3410382, at *9 (D. Or. July 29, 2019) (Simon, J.), and demonstrate that the class action falls within one of the types specified in Rule 23(b), *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

In this case, Plaintiffs seek certification under Rule 23(b)(2) and Rule 23(b)(1)(A). To maintain a class action under Rule 23(b)(2), Plaintiffs must show that Defendants have "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)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart,* 564 U.S. at 360. Plaintiffs alternatively seek certification under Rule 23(b)(1)(A), which requires Plaintiffs to show that "prosecuting separate actions . . . would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct" for Defendants. Fed. R. Civ. P. 23(b)(1)(A).

II. Plaintiffs do not satisfy the requirements of Rule 23.

Even if Plaintiffs here could demonstrate standing, they have not shown that their proposed classes satisfy the requirements of typicality, commonality, ascertainability, or numerosity, nor have they shown that their proposed class representatives or proposed class counsel are adequate.

A. Plaintiffs lack standing and thus have not identified anyone whose claims are typical of those of the putative classes.

The typicality requirement of Rule 23(a)(3) serves to protect the due process rights of absent class members who will be bound by the judgment. *See Hanlon Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). The requirements of typicality and commonality "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 564 U.S. at 350. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Wolin*, 617 F.3d at 1175.

The lack of any demonstrated injury from PP 9945 or its implementation is fatal to a finding of typicality. A purported class representative must establish standing to be deemed a proper representative of the class. *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532-33 (9th Cir. 2019). And to have standing, a plaintiff must have a "personal interest . . . at the commencement of the litigation." *Updike v. Clackamas Cty.*, No. 15-723, 2015 WL 7722410, at *7 (D. Or. Nov. 30, 2015) (Simon, J.) (quoting *Friends of the Earth,*

Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 170 (2000)). "The personal interest must satisfy three elements throughout litigation: (1) an injury in fact, i.e., an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) a causal connection between the injury-in-fact and the defendant's challenged behavior; and (3) likelihood that the injury-in-fact will be redressed by a favorable ruling." *Id.*

Plaintiffs assert that their claims are typical of the proposed classes because "the unlawful barrier imposed on the Plaintiffs . . . will be imposed equally on every class member who has sponsored or will apply for an immigrant visa." Mot. at 24. But Plaintiffs admit that their "underlying circumstances" are wildly different "in terms of financial status, current or future healthcare needs, applicable immigrant visa category, and stage of the immigrant visa application." *Id.* These diverse underlying circumstances alone show that Plaintiffs have no idea who will or will not be denied entry solely because of PP 9945.[1]

Plaintiffs have not shown that any of them has been or could be subject to PP 9945, nor that they could not satisfy its requirements, and thus they have not shown that any named Plaintiff is a member of the class that their lawyers propose to certify. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) ("Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief."). Unlike this case, where no one in the world has yet been subject to PP 9945, all of the examples Plaintiffs cite to support their argument for class certification involve classes that were certified *after* the

[1] The organizational plaintiff, Latino Network, cannot be a class representative because it is neither an individual in the United States nor an individual who is a foreign national. In any event, Latino Network lacks standing. It falls in the category of "manufactur[ing] the injury by incurring litigation costs or simply choosing to spend money fixing a problem that would not otherwise affect the organization[,]" which it cannot do. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1296 (S.D. Cal. 2018).

government had actually taken some action with respect to the plaintiffs. *See* Mot. at 14-15 (citing *Ms. L. v. U.S Immigration & Customs Enf't*, 330 F.R.D. 284 (S.D. Cal. 2019); *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *1 (W.D. Wash. June 21, 2017)). Plaintiffs have no way to establish that a class member would be "unable to demonstrate to a consular officer's satisfaction" that she does not have an approved health insurance plan or resources to afford reasonably foreseeable healthcare costs *before* that person has been interviewed by a consular officer. None of the named Plaintiffs or their family members have been interviewed by a consular officer. Moreover, Plaintiffs' proposed class includes numerous individuals who have not yet filed petitions to sponsor family members or applications for immigrant visas, and thus have no reasonable way of determining what their injury might be. In order to establish any injury, Plaintiffs must show that they would be granted a visa but for the Proclamation, a showing they cannot possibly make prior to the consular interview. If a plaintiff is ineligible for a visa for any other reason, her alleged injury—potential denial of a visa—would not be redressed by enjoining PP 9945.

Moreover, a person with a "pending" visa petition by definition cannot have a beneficiary who is subject to PP 9945. Generally, before a noncitizen may apply for an immigrant visa, she must be the beneficiary of a petition from a prospective employer or a family member who is a U.S. citizen or lawful permanent resident. *See* 8 U.S.C. §§ 1153(f), 1154(a), (b). The petition must be submitted to and adjudicated by U.S. Citizenship and Immigration Services, which forwards approved petitions to the National Visa Center (NVC). The intending immigrant must then complete NVC processing, after which the application is forwarded to a U.S. embassy or consulate and an in-person interview before a consular officer is scheduled. *See* 8 U.S.C. § 1202(a), (e); 22 C.F.R. § 42.62. If a foreign national is not the beneficiary of an approved visa

petition, then she cannot apply for an immigrant visa and thus is not subject to PP 9945. A proposed class definition cannot include individuals who could not have suffered any injury as a result of the alleged unlawful conduct. *See Fox-Quamme v. Health Net Health Plan of Oregon, Inc.*, No. 3:15-CV-01248-BR, 2017 WL 1034202, at *6 (D. Or. Mar. 9, 2017).

B. The proposed classes lack commonality.

Plaintiffs have failed to demonstrate that their proposed classes are entitled to common relief on each count on which certification is sought. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). To satisfy Rule 23(a)'s commonality requirement, the proposed class members must "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs cannot satisfy their burden by merely alleging that all of the proposed class members have "suffered a violation of the same provision of law" or raise some "common questions." *Id*. The commonality "language is easy to misread, since any competently crafted class complaint literally raises common 'questions.'" *Id*. Further, for certification under Rule 23(b)(2), Plaintiffs must show that "relief is available to the class as a whole" and that the challenged conduct "can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360.

Plaintiffs argue that they satisfy the commonality requirement because their claims "raise numerous common issues of fact." Mot. at 20. But the mere existence of common questions does not meet the commonality requirement. Rather, the Supreme Court has emphasized that "[i]t is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. At the very least, there are no common answers with respect to the worldwide class, which includes individuals seeking diversity-based and employment-based

immigrant visas who do not have family member petitioners in the United States. As the Supreme Court has held, an unadmitted and nonresident alien has no right of entry into the United States, and has no cause of action to press in furtherance of his or her claim for admission. *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Thus, there is a clear distinction in the answers with respect to the putative class members who are U.S. petitioners sponsoring noncitizen family members, and the putative class members who are foreign nationals that have no sponsoring U.S. petitioner. *See* Mot. at 1.

Furthermore, the nationwide subclass does not have common answers. Commonality cannot be established where there is wide factual variation requiring individual adjudications of each class member's claims. *See Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 663–64 (N.D. Cal. 1976). In this case, Plaintiffs broadly challenge PP 9945 and its implementation as violating the INA, the APA, and the Constitution. But a facial attack on an alleged policy without evidence of a class of persons experiencing the same harm falls short of proving commonality. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed conformance with Rule 23(a) remains . . . indispensable.").

Here, the named Plaintiffs are U.S. citizens who have filed petitions to sponsor their noncitizen spouses or parents for immigrant visas. But this is where their similarities end. Plaintiffs bring a slew of constitutional and statutory claims challenging the "implementation of the Proclamation" but there will be no application of PP 9945 to the Plaintiffs unless and until an immigrant visa applicant attends her interview and, if it applies to her, is required to demonstrate that she satisfies the requirements of PP 9945. Plaintiffs' claims are based on facts that are entirely separate and distinct from each other or are the result of their own decisions rather than the requirements of PP 9945. Each Plaintiff's eligibility for an immigrant visa, apart from

PP 9945, would have to be determined individually, and then each Plaintiff's ability to satisfy the requirements of PP 9945 would have to be determined individually. Given the wide factual variance of the known Plaintiffs, the unknown status of other potential class members, and its effect on determining whether PP 9945 violates an individual's right, Plaintiffs fail to meet their burden of showing that "final injunctive relief or corresponding declaratory relief [would be appropriate] with respect to the class as a whole."

For example, PP 9945 has a range of exceptions that might apply, and various provisions apply in different ways to different individuals. E.g., 84 Fed. Reg. 53992, § 2(iv) ("substantial burden" test); § 2(viii) ("case-by-case" determination of whether applicant's entry would be in the national interest). Thus Plaintiffs cannot claim common application of PP 9945 that would permit common relief.

Furthermore, the named Plaintiffs live in several different states—California, Illinois, Massachusetts, New York, and Oregon—all of which have different laws and options for health insurance plans. They seek to represent individuals who live in *every single state, district, and territory in the United States*, which means representing people subject to over 50 legal schemes and numerous health insurance options. They also seek to represent individuals who do not even have an approved or pending petition to sponsor a noncitizen family member but who will "soon" file a petition.

Moreover, the Plaintiffs' noncitizen spouses and parents live in several different countries—Mexico, Germany, Nicaragua, and the Dominican Republic—all of which have different laws and options for health insurance plans. The proposed worldwide class of individuals could live in any one of nearly 200 different countries with any of their own country's health insurance plans potentially available to them. The named Plaintiffs have widely

different financial resources, and their noncitizen spouses and parents have vastly different healthcare needs.

Plaintiffs have not asserted that they have researched every health insurance plan available in every single state, district, and territory in the United States, or in every single country in the world, and that there are no options available to any of them—nor could they make such an assertion. Quite to the contrary—some of the proposed class representatives admit that their family members could afford to either purchase insurance or pay for their reasonably foreseeable medical costs associated with identified medical conditions. Others have not explored health plans for the actual visa applicant, as opposed to other types of plans that cover additional persons.

C. The proposed classes are not ascertainable.

For similar reasons, Plaintiffs' proposed classes fail to meet the implicit requirement of Rule 23 that the classes be ascertainable through objective, rather than subjective, criteria. *See Ott v. Mortg. Inv'rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1064 (D. Or. 2014). "Class members must be identifiable through 'a manageable process that does not require much, if any, individual factual inquiry.'" *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 15-2633, 2019 WL 3410382, at *11 (D. Or. July 29, 2019) (Simon, J.) (internal citations omitted). The decision in *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011), is instructive. In *Xavier*, the plaintiff moved to certify a class of smokers who were more than fifty years old and had at least a twenty-pack-year smoking history. *Id.* at 1078. The court denied the motion, holding that the class members could not be ascertained in a reliable manner. *Id.* at 1089. Specifically, "[t]here [was] no reliable way in which smokers themselves could document their long-term smoking histories." *Id.* The court declined to rely on affidavits to

determine class membership, reasoning that the procedure could invite fraudulent or inaccurate claims. *Id*. at 1090-91; *see also Astiana v. Ben & Jerry's Homemade, Inc*., No. C 10-4387 PJH, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014) (proposed class did not satisfy the ascertainability requirement because identifying class members would require the court to determine which consumers bought which version of a particular product, and plaintiff had not identified any objective way to make that determination).

Here, Plaintiffs' proposed classes are impossible to identify without significant, individualized factual inquiry. First, the proposed nationwide class includes people who may "soon" file a petition on behalf of a noncitizen beneficiary, and the proposed worldwide class includes people who may "soon" file an immigrant visa application. There is no way for either party to know who plans to file a petition or application at some point in the future, let alone which of those petitions and applications would be approved.

Second, the proposed worldwide class includes people who are "otherwise eligible" for an immigrant visa. But Plaintiffs do not explain what this means or how that could be determined without a final decision from a consular officer on their immigrant visa application. Even experienced immigration attorneys cannot predict with certainty that an applicant will be issued an immigrant visa. *See, e.g.*, ECF No. 48, Kuck Decl., ¶ 2 (explaining that he has represented noncitizen clients who had obtained a provisional waiver of their unlawful presence—which should be granted only if that is the only ground of inadmissibility—but then were denied immigrant visas at their interviews on grounds of alien smuggling, public charge, or prior immigration misrepresentations). Even if Defendants could guess whether a person would otherwise be eligible for entry but for the PP 9945, such an inquiry would amount to an improper

"investigat[ion] of the merits of individual claims to determine class membership." *See Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 973 (S.D. Cal. 2016).

Third, membership in either proposed class requires that a foreign national visa applicant is "unable to demonstrate to the satisfaction of a consular officer" that she can satisfy the requirements of PP 9945. But consular officers would determine eligibility under PP 9945 on a case-by-case basis *at the consular interview*. The consular officer would have to issue a refusal based on PP 9945 and only *then* would a person be able to say that PP 9945 had any effect on their immigrant visa application.

D. The proposed class representatives and class counsel are not adequate.

The individual named Plaintiffs are not adequate representatives of their proposed classes. The "adequacy requirement is based on principles of constitutional due process, and a court cannot bind absent class members if class representation is inadequate." *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 15-2633, 2019 WL 3410382, at *11 (D. Or. July 29, 2019) (Simon, J.). A determination of legal adequacy is based on two inquiries: (1) "the representative must appear able to vigorously prosecute the interests of the class through qualified counsel," and (2) "the named representative must not have antagonistic or conflicting interests with the unnamed members of the class." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) (quoting *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)).

Plaintiffs here have failed to identify any proposed class representative that will fairly protect the interests of the class. It is almost certain given the breadth of the class and the relief being sought that there are conflicting interests among putative class members. Given the large number of visa applicants Plaintiffs claim will be subject to the requirements of the

proclamation, it is necessarily the case that many—if not the majority—of class members will want to or plan to carry health insurance upon arriving in the United States. Both PP 9945 and Plaintiffs, *see* ECF No. 54, Ku Decl.¶ 17, address the 20% to 30% of new immigrants who do not have health insurance, but that means a significant number of new immigrants do have health insurance. PP 9945 is likely to help those new immigrants who would like to have health insurance by making more products—and more affordable products—available to this group of intending immigrants. For example, the State amicus have asserted that some states do not permit short-term insurance for the full period required by PP 9945. But PP 9945 will encourage states to make qualifying insurance available to immigrants and, in turn, increase the insurance options for class members who are willing to carry qualifying insurance. More importantly, basic market economics also tells us that PP 9945 will encourage insurers to make qualifying products available, and that is certain to make more options—and more affordable options—available to intending immigrants who are willing to or want to carry health insurance.

There also are certain to be conflicts between the two proposed subclasses of U.S. petitioners and foreign nationals abroad. Plaintiffs assert that the interests are aligned, but that is sure to not be the case in many circumstances. Requiring intending immigrants to carry health insurance serves an important purpose—reducing the chance that an unexpected health costs will impose significant costs on the new immigrant. Those costs could very well cause harm or liability for the U.S.-based petitioner. *See Schy v. Susquehanna Corp*., 419 F.2d 1112, 1116-17 (7th Cir. 1970) (named plaintiffs' claims found to be in conflict with potential class members where vast majority of stockholders approved of preferred stock distribution being challenged); *Spano v. Boeing Co.,* 633 F.3d 574, 587 (7th Cir. 2011) (class too broad where potential class members may be actually harmed by relief sought).

Furthermore, there is no adequate representative of the proposed worldwide class because there is no representative at all. As explained above, the new class representative that Plaintiffs attempt to add in their motion for class certification is not a plaintiff in this lawsuit unless Plaintiffs amend their complaint, which they have not done and now cannot do without seeking court approval. *See* Fed. R. Civ. P. 15(a)(2). And the U.S. citizen Plaintiffs plainly cannot represent the worldwide class, because they are not foreign nationals applying for immigrant visas. *See Blake v. City of Grants Pass*, No. 18-1823, 2019 WL 3717800, at *5 (D. Or. Aug. 7, 2019) ("Implicit in this standard is the requirement that a proposed named plaintiff must herself be a member of the class she seeks to represent.").

The U.S. citizen Plaintiffs fare no better in their attempt to demonstrate their adequacy to represent the nationwide class. Several of them—again, all U.S. citizens—have refused to proceed under their real names based only on a vague "fear" of "retaliation," and some of them have refused to provide the full names of their beneficiaries and their case numbers. They cannot meet their burden to demonstrate that they will vigorously prosecute this action if they are unwilling to share information with Defendants, let alone allow their names on the public docket. And the Court cannot merely take Plaintiffs at their word, given their evidentiary burden. *Chamber of Comm. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("not enough to aver that unidentified members have been injured"). The Plaintiffs' declarations are speculative and have significant gaps in explaining why class members cannot afford health insurance or healthcare. Moreover, at least one of the proposed class representatives appears to have no awareness of a potential class action and says nothing about his desire or ability to serve as a class representative. *See* ECF Nos. 17, 28, 55, John Doe #1 Decls.

Proposed class counsel have not demonstrated their adequacy either. Plaintiffs' counsel assert generally that attorneys from their organizations have "significant experience in immigrants' rights issues and numerous class actions—including civil rights cases." Mot. at 26. But they have not included résumés or declarations explaining the qualifications of the specific proposed class counsel in this case. *See Murphy v. Precision Castparts Corp.*, No. 16-521, 2018 WL 3151426, at *4 (D. Or. June 6, 2018), *report and recommendation adopted*, 2018 WL 3150675 (D. Or. June 27, 2018) (deeming proposed class counsel adequate only after reviewing their résumés). The Court should require the attorneys who wish to represent the proposed classes here to explain their specific qualifications, not just claim alliance with organizations who may be qualified, before binding individuals across the country and the world to their representation.

E. Plaintiffs have not demonstrated that their proposed classes meet the numerosity requirement.

This district uses a "rough rule of thumb" that 40 class members is sufficient to meet the numerosity requirement. *See Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 590 (D. Or. 2013). Plaintiffs here have alleged that each of their classes is comprised of hundreds of thousands, or potentially millions, of individuals. Mot. at 16-18. But out of their seven proposed class representatives, as explained above, none is part of their proposed class. At this point, because no one has been subject to application of PP 9945, there is no way of knowing how many people will be "unable to demonstrate to a consular officer's satisfaction" that they satisfy the requirements of PP 9945. Accordingly, Plaintiffs have failed to demonstrate that at least 40 individuals would be part of their proposed classes.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for class certification. If the Court does certify a class, the Court must limit the proposed class, at most, to U.S. citizens or lawful permanent residents who have approved petitions to sponsor noncitizen family members for immigrant visas.

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