Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Concely del Carmen MENDEZ ROJAS, Elmer Geovanni RODRIGUEZ ESCOBAR, Lidia Margarita LOPEZ ORELLANA, and Maribel SUAREZ GARCIA, on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs,

v.

Jeh JOHNSON, Secretary of the Department of Homeland Security, in his official capacity; Loretta E. LYNCH, Attorney General of the United States, in her official capacity; Thomas S. WINKOWSKI, Principal Deputy Assistant Secretary for U.S. Immigration and Customs Enforcement, in his official capacity; Leon RODRIGUEZ, Director of U.S. Citizenship and Immigration Services, in his official capacity; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection, in his official capacity; and Juan P. OSUNA, Director of the Executive Office for Immigration Review, in his official capacity,

Defendants.

Case No. 2:16-cv-01024-RSM

MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:
August 19, 2016

ORAL ARGUMENT REQUESTED

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I. MOTION AND PROPOSED CLASS DEFINITION

Plaintiffs are asylum seekers who challenge Defendants' failure to provide them, and the classes they move to represent, with notice of the statutory requirement that an asylum seeker must apply for asylum within one year of arrival in the United States (the one-year deadline), 8 U.S.C. § 1158(a)(2)(B), as well as Defendants' failure to provide a mechanism that ensures that an asylum seeker is able to comply with that deadline. Defendants' policies and practices infringe on Plaintiffs' and putative class members' statutory and regulatory rights to apply for asylum, often depriving them of those rights altogether, and also violate their right to due process under the Fifth Amendment to the United States Constitution.

Plaintiffs fled to the United States seeking refuge from the persecution they faced in their countries of origin. When they presented themselves to officers of Customs and Border Protection (CBP)—a component of the Department of Homeland Security (DHS)—at the border or encountered them shortly after crossing the border, all Plaintiffs informed DHS of their fear of return or their desire to seek refuge. Yet neither CBP nor other DHS Defendants provided any of them with notice of the statutory obligation to file an asylum application (Form I-589) within one year of their arrival. Moreover, both DHS Defendants and the Executive Office for Immigration Review (EOIR)—a component of the Department of Justice (DOJ)—failed to provide them with a guaranteed mechanism by which to submit their applications within the statutory period. In order for Plaintiffs to have a meaningful opportunity to apply for asylum, federal immigration and constitutional law necessitate both that the DHS Defendants provide Plaintiffs, and the classes they seek to represent, with notice of the one-year deadline and that all Defendants implement uniform procedural mechanisms for compliance with the deadline.

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The questions presented in this case—whether the DHS Defendants are obligated to provide Plaintiffs with notice of the one-year deadline when released from DHS custody, and whether the DHS and DOJ Defendants must provide a mechanism that ensures that Plaintiffs are able to apply for asylum in a timely manner—can and should be resolved on a class-wide basis. The proposed classes and subclasses, moreover, satisfy the requirements set forth in Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. Thus, Plaintiffs request that the Court certify the following classes and subclasses, with the following Plaintiffs as class and subclass representatives:[1]

> **CLASS A ("Credible Fear Class"):** All individuals who have been released or will be released from DHS custody after they have been found to have a credible fear of persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v) and did not receive notice from DHS of the one-year deadline to file an asylum application as set forth in 8 U.S.C. § 1158(a)(2)(B).
>
> **A.I.:** All individuals in Class A who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.
>
> **A.II.:** All individuals in Class A who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

Plaintiffs Elmer Geovanni Rodriguez Escobar and Concely del Carmen Mendez Rojas move to be appointed as representatives of Class A. Plaintiff Rodriguez moves to be appointed as representative of Subclass A.I., while Plaintiff Mendez moves to be appointed as representative of Subclass A.II.

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[1] For purposes of all four subclasses, an individual has "applied" for asylum when her application on Form I-589 is accepted, and not subsequently rejected, by either Defendant U.S. Citizenship and Immigration Services (USCIS) or Defendant EOIR. An application is rejected by USCIS where USCIS refuses to accept it or subsequently issues a rejection notice. An application is rejected by EOIR where EOIR refuses to accept it. Pursuant to current EOIR policy, an application is not "filed" if it is accepted for "lodging" purposes only. *See* Imm. Ct. Practice Manual 3.1(b)(iii)(A).

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> **CLASS B ("Other Entrants Class"):** All individuals who have been or will be detained upon entry; express a fear of return to their country of origin; are released or will be released from DHS custody without a credible fear determination; are issued a Notice to Appear (NTA); and did not receive notice from DHS of the one-year deadline to file an asylum application set forth in 8 U.S.C. § 1158(a)(2)(B).
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> **B.I.:** All individuals in Class B who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.
>
> **B.II.:** All individuals in Class B who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

Plaintiffs Maribel Suarez Garcia and Lidia Margarita Lopez Orellana move to be appointed as representatives of Class B. Plaintiff Lopez moves to be appointed as representative of Subclass B.I., while Plaintiff Suarez moves to be appointed as representative of Subclass B.II.[2]

Within each Class and Subclass, the relevant Plaintiffs and putative class members present common legal claims. The difference between the two Classes centers on the two different ways in which the DHS Defendants process asylum seekers upon entry. Class A consists of individuals whom DHS initially placed in "expedited removal" proceedings and who, as part of that process, passed an initial screening relative to their asylum claim (a "credible fear" screening). Because they demonstrated a credible fear of returning to their countries of origin, they were taken out of expedited removal proceedings. DHS subsequently released them from detention. Class B consists of individuals who, upon arrival into the United States, expressed to DHS a fear of returning to their countries of origin and whom DHS released into the country; DHS did not give them a credible fear screening but instead issued

[2] Due to an inadvertent scrivener's error, the proposed definitions of subclasses A.I., B.I., and B.II. differ from their definitions in the complaint, Dkt. 1, in that they substitute the word "yet" for "at all."

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them an NTA for removal proceedings under 8 U.S.C. § 1229a. Neither Class includes individuals who filed a timely application for asylum.

Moreover, each Class is divided into two Subclasses based on whether the individual is in removal proceedings. Those in Subclasses A.I. and B.I. face barriers to timely filing their asylum applications because the DHS Defendants have not implemented a uniform procedural mechanism to ensure that their asylum applications will be accepted and treated as timely filed. Those in Subclasses A.II. and B.II. face barriers to timely filing their asylum applications because the DOJ Defendants have not implemented uniform procedural mechanisms to ensure that their asylum applications will be treated as timely filed with the immigration court presiding over their removal proceedings.

Plaintiffs seek declaratory and injunctive relief on behalf of these classes, requiring the DHS Defendants to provide notice of the one-year deadline and all Defendants to establish and implement uniform procedural mechanisms that allow asylum applicants to comply with the deadline.

II. BACKGROUND

A. Plaintiffs' Legal Claims

Although the Court need not engage in "an in-depth examination of the underlying merits" at this stage, it may analyze the merits to the extent necessary to determine the propriety of class certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). For that reason, Plaintiffs provide a brief summary of their merits claims here. *See also* Dkt. 1.

Plaintiffs are asylum seekers who fled persecution in their countries of origin, and who expressed a fear of persecution or desire to apply for asylum to DHS officers upon their arrival in the United States. Class A Plaintiffs not only expressed a fear of persecution, but they were

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also found by Defendant U.S. Citizenship and Immigration Services (USCIS)—a component of DHS—to have a "credible fear of persecution" if deported to their country of origin, and were subsequently released from DHS custody to await an opportunity to pursue an asylum application in removal proceedings. Class B Plaintiffs similarly expressed a fear of persecution or desire to apply for asylum to DHS officers upon their arrival into the United States, and DHS released them into the country to await an opportunity to pursue an asylum application in removal proceedings. Significantly, the DHS Defendants failed to notify Plaintiffs and the putative class members they seek to represent that, under the Immigration and Nationality Act (INA), there is a one-year deadline for filing their asylum applications. *See* 8 U.S.C. § 1158(a)(2)(B). Nor were Plaintiffs provided with a guaranteed procedural mechanism to ensure that they could timely submit their applications, as, inter alia, EOIR only allows applicants to file asylum applications in open court and many such applicants do not receive a court date until *after* the one-year deadline. *See* Dkt. 1 ¶¶52-58. Plaintiffs contend that the DHS Defendants' failure to notify them of the one-year deadline and all Defendants' failure to create and implement uniform procedural mechanisms to timely submit their asylum applications violates the INA, governing regulations, and Plaintiffs' due process rights.

"It is undisputed that all [noncitizens] possess" a statutory "right" to apply for asylum. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990) (citing 8 U.S.C. § 1158(a) (1988); *Jean v. Nelson*, 727 F.2d 957, 982 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985); and *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038-39 (5th Cir. 1982)). This statutory right stems from the Refugee Act of 1980, "in which Congress sought to bring United States refugee law into conformity with the 1967 United Nations Protocol Relating to the Status of Refugees (UN Protocol)." *Orantes-Hernandez*, 919 F.2d at

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551; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987) (noting "[t]he Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum . . . mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980").

The Refugee Act "expressly declared that its purpose was to enforce the 'historic policy of the United States to respond to urgent needs of the persons subject to persecution in their homelands,' and to provide 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" *Orantes-Hernandez*, 919 F.2d at 552. Prior to this, "there was no specific statutory basis for United States asylum policy with respect to [noncitizens] already in the country." *Id.* (quoting *Cardoza-Fonseca*, 480 U.S. at 433). Through § 201(b) of the Refugee Act, Congress first enacted the asylum statute, currently located at 8 U.S.C. § 1158(a), and directed the Attorney General to "establish a procedure for [a noncitizen] physically present in the United States or at a land border or port of entry . . . to apply for asylum . . . ." *Id.*; *see also* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102 (1980). "Congressional intent was to create a 'uniform procedure' for consideration of asylum claims which would include an opportunity for [noncitizens] to have asylum applications 'considered outside a deportation and/or exclusion hearing setting.'" *Orantes-Hernandez*, 919 F.2d at 552 (citation omitted).

In *Orantes-Hernandez*, the Ninth Circuit affirmed a class-wide affirmative injunction on behalf of Salvadoran asylum seekers who, as Plaintiffs do here, challenged the government's interference with their right to apply for asylum. In affirming the injunction on other grounds, the Ninth Circuit noted that other circuits had agreed that it would be unlawful "if [noncitizens] who indicated they feared persecution if returned home were not advised of

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the right to seek asylum." 919 F.2d at 556-57 (citing *Jean*, 727 F.2d at 981-83 & n.35). "[I]f [immigration] officials were refusing to inform [noncitizens] of their right to seek asylum even if they did indicate that they feared persecution if returned to their home countries . . . this would constitute a clear violation of the Refugee Act, and remedial action would be justified . . . ." *Id.* at 557 (quoting *Jean*, 727 F.2d at 983 n.35).

Plaintiffs and putative class members possess the statutory right to apply for asylum recognized by all courts, including the Supreme Court in *Cardoza-Fonseca* and the Ninth Circuit in *Orantes-Hernandez*. They indicated to the DHS Defendants that they feared persecution in their countries of origin. Indeed, for those within Class A, DHS already has determined that they possess a credible fear of persecution. Nonetheless, DHS failed to inform them of the one-year deadline, and the DHS and DOJ Defendants have failed to provide them with a guaranteed procedural mechanism to timely apply for asylum. As a result, Defendants deprived Plaintiffs and putative class members of their statutory right to apply for asylum.

In addition, this lack of notice and lack of a uniform procedural mechanism violate Plaintiffs' due process rights. It is well-settled that the Due Process Clause of the Fifth Amendment protects citizens and noncitizens physically present in the United States. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Because Plaintiffs have a statutory right to apply for asylum, they are entitled to due process in the pursuit of that right. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (stating that due process requires compliance with fair procedures prior to any deprivation of an individual's protected liberty or property interest). In this case, due process requires Defendants to notify Plaintiffs of the one-year deadline. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any

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proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). Due process also requires that Defendants provide a procedural mechanism that ensures that Plaintiffs are able to timely file their asylum application. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

B. Named Plaintiffs' Factual Backgrounds

Plaintiff Rodriguez is a 37-year-old asylum seeker from Honduras. Mr. Rodriguez entered the United States in July 2014 and established a credible fear of persecution in an interview with USCIS. Subsequently, DHS released him from custody with an NTA, the charging document in removal proceedings, but did not inform him of the one-year deadline. DHS has not placed Mr. Rodriguez in removal proceedings yet. He only learned of the deadline when he sought counsel for his immigration case. His attempts to comply with the one-year deadline have been unsuccessful, however, as both USCIS and EOIR have rejected his asylum application—USCIS rejected it on the assumption that Mr. Rodriguez was in removal proceedings, so the application had to be filed with EOIR; EOIR rejected the application Mr. Rodriguez attempted to lodge because he is not actually in removal proceedings. As a result, he has been unable to file, or even lodge, his asylum application. *See* Dkt. 1 ¶¶60-66.

Plaintiff Mendez is a 30-year-old asylum seeker from the Dominican Republic. Ms. Mendez entered the United States in September 2013 and established a credible fear of persecution in an interview with USCIS. Subsequently, DHS released her from custody with an NTA, but did not inform her of the one-year deadline. She only learned of the deadline when she sought counsel for her immigration case—*after* one year had already passed. As she had not yet been placed in removal proceedings, Ms. Mendez attempted to file an asylum

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application with USCIS, but USCIS rejected it on the assumption that she already was in removal proceedings. Only after this rejection—and more than one year after she entered the country—did DHS file the NTA with the immigration court, allowing Ms. Mendez to finally lodge her asylum application with the San Antonio Immigration Court. Her first immigration court hearing will be in August 2016. *See* Dkt. 1 ¶¶67-74.

Plaintiff Lopez is a 37-year-old asylum seeker from Guatemala. In February 2014, she arrived at a Texas port of entry with two of her children and told the inspecting officers that she was afraid to return to Guatemala. DHS served Ms. Lopez and her children with NTAs and released them from custody with the requirement that they check in with DHS on a regular basis. DHS did not inform her of the one-year deadline. Ms. Lopez checked in with DHS on four occasions between March 2014 and September 2015, yet at no point did DHS inform her of the one-year deadline. In October 2015, she was issued a notice of hearing for November 2015 in the San Antonio Immigration Court. Ms. Lopez did not learn of the one-year deadline until she consulted an immigration attorney in December 2015. She lodged her asylum application with the court in January 2016, nearly two years after she arrived in the United States. The immigration judge subsequently terminated her removal proceedings, and she filed an asylum application affirmatively with USCIS in February 2016. USCIS has not yet scheduled an interview regarding her asylum application. *See* Dkt. 1 ¶¶75-81.

Plaintiff Suarez is a 29-year-old asylum seeker from Mexico. She and her five young children arrived at a California port of entry in November 2013. Upon her arrival, Ms. Suarez informed DHS that she was afraid to return to Mexico and that she was seeking asylum in the United States. She provided DHS with a sworn statement regarding her fear of returning to Mexico. Shortly afterwards, DHS released her and her children from custody with NTAs, and

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paroled them into the country to await a removal hearing. At no point did DHS inform Ms. Suarez of the one-year deadline. She first learned of this requirement more than a year later, when she sought counsel. She then promptly lodged her application with the San Francisco Immigration Court. Ms. Suarez is scheduled for an individual hearing in May 2017. *See* Dkt. 1 ¶¶82-87.

III. THE COURT SHOULD CERTIFY THE CLASSES.

The statutory, regulatory, and constitutional violations Plaintiffs assert have tremendous adverse consequences. The DHS Defendants' failure to advise of the one-year deadline and all Defendants' failure to create a meaningful process that ensures that Plaintiffs and putative class members are able to timely apply for asylum, has or will result in Plaintiffs and putative class members effectively being denied the right to apply for asylum—a critical protection. Plaintiffs thus seek certification of the aforementioned classes and subclasses under Rule 23(b)(2), to enjoin Defendants' unlawful policies.

Courts in the Ninth Circuit routinely certify classes challenging the adequacy of policies and procedures under the immigration laws. *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370-72 (C.D. Cal. 1982) (certifying provisional nationwide class of Salvadoran asylum seekers challenging certain Immigration and Naturalization Service (INS) policies and procedures including, inter alia, its failure to advise them of their right to apply for asylum); *Walters v. Reno*, 1996 WL 897662, at *5-8 (W.D. Wash. 1996), *aff'd*, 145 F.3d 1032, 1045-47 (9th Cir. 1998), *cert. denied*, *Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) (reversing district court order denying class certification for class of immigration detainees subject to prolonged detention); *Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014) (certifying class and ordering declaratory relief for immigration

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detainees held in immigration custody without bond hearings); *A.B.T. v. U.S. Citizenship and Immigration Services*, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving settlement amending practices by EOIR and USCIS that precluded asylum applicants from receiving employment authorization); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying district-wide class of delayed naturalization cases); *Gonzales v. U.S. Dept. of Homeland Sec.*, 239 F.R.D. 620, 627-29 (W.D. Wash. 2006) (certifying Ninth Circuit wide class challenging USCIS policy contradicting binding precedent), *preliminary injunction vacated*, 508 F.3d 1227 (9th Cir. 2007) (establishing new rule and vacating preliminary injunction but no challenge made to class certification); *Ali v. Ashcroft*, 213 F.R.D. 390, 408-11 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886-89 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government).[3]

Certification of such classes under Rule 23(b)(2) is unsurprising. The rule was intended to "facilitate the bringing of class actions in the civil-rights area," 7AA WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1775, at 71 (3d ed. 2005), especially those—like the present case—seeking declaratory or injunctive relief. What is more, class actions in the immigration arena often involve claims on behalf of class members who would not have the ability to present their claims absent class treatment. This rationale applies with particular

[3] *See also Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding district court had jurisdiction to grant injunctive relief in certified class action challenging unlawful immigration directives issued by EOIR); *Gete v. INS*, 121 F.3d 1285, 1299-1300 (9th Cir. 1997) (vacating denial of class certification in challenge to notice and standards in INS vehicle forfeiture procedure); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd on other grounds*, 219 F.3d 1087 (9th Cir. 2000) (en banc) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Santillan v. Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *8-12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status).

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force to civil rights suits like this one, where, absent class certification, there likely will be no opportunity to resolve the legal claim at issue. Putative class members are recent immigrants to this country who have fled danger, many of whom do not understand English and have little to no understanding of U.S. immigration or constitutional law. A large percentage of these asylum seekers are indigent and many are unrepresented, and thus lack the legal counsel necessary to even contemplate, much less raise, the type of claim brought here. Finally, the core issues here, like the class actions cited above, involve questions of law, rather than questions of fact, and are thereby well suited for resolution on a class-wide basis. *See, e.g.*, *Unthaksinkun v. Porter*, No. C11-0588JLR, 2011 WL 4502050, at *15 (W.D. Wash. Sept. 28, 2011) (concluding that since all class members were subject to the same notice process, its ruling as to the legal sufficiency of the process "would apply equally to all class members").

In reviewing whether to certify a nationwide class, courts consider whether (1) there are similar cases currently pending in other jurisdictions, and (2) the plaintiffs are challenging a nationwide policy or practice. *See, e.g.*, *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 589 (C.D. Cal. 2012); *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011). There are no other similar cases currently pending in other jurisdictions. And as noted above, nationwide classes challenging immigration policies and practices are regularly certified given that immigration policy is based on uniform, federal law. Further, nationwide certification is required in this case in order to effectuate Congress's intent to "create a 'uniform procedure' for consideration of asylum claims." *Orantes-Hernandez*, 919 F.2d at 552 (citation omitted).

Moreover, this issue can only be addressed on a nationwide level. It would be unworkable to limit the scope of certification to anything other than a nationwide class. The putative classes consist of individuals released by DHS after presenting themselves at the

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border or being apprehended near the border. Upon release, they travel to all parts of the country to reunite with family members or other supportive community members. Thus, any challenge to Defendants' practices and policies relating to a failure to provide notice and procedural mechanisms to the individuals they release necessarily must apply to the entire nation. Certification that is not nationwide in scope would result in Defendants continuing to give defective notice and inadequate application procedures to affected noncitizens by virtue of their location—an arbitrary and unjust result. *See Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (finding certification of a nationwide class particularly fitting because "anything less that [sic] a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in").

A. This Action Satisfies the Class Certification Requirements of Rule 23(a).

A class "may be divided into subclasses that are each treated as a class." Fed. R. Civ. P. 23(c)(5). Each subclass "must independently meet the requirements of Rule 23." *Buus v. WAMU Pension Plan*, 251 F.R.D. 578, 581 (W.D. Wash. 2008) (citing Rule 23(c)(5) and *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981)). Here, the classes and the subclasses meet the requirements of Rule 23.

1. The Proposed Class Members Are so Numerous That Joinder Is Impracticable.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). No fixed number of class members is required. *Perez-Funez v. District Director, Immigration & Naturalization Service*, 611 F.

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Supp. 990, 995 (C.D. Cal. 1984). Courts generally find this requirement is satisfied even when relatively few class members are involved.[4]

The proposed classes are numerous. According to statistics for Fiscal Year 2016 from the Asylum Division of Defendant USCIS, thousands of noncitizens express a fear of persecution to the DHS Defendants upon their arrival into the United States each month.[5] During that same year, the Asylum Division determined that 36,324 individuals who were originally detained and placed in expedited removal proceedings had a "credible fear" of persecution if returned to their home countries.[6] Upon information and belief, the vast majority, if not all, of these 36,324 individuals are putative Class A members; as such, joinder of all such members would be entirely unreasonable, if not virtually impossible. Consequently, Defendant USCIS's own data make clear that putative Class A is far too numerous to make joinder practicable.

In addition, the supporting declarations filed by several immigration attorneys from across the country further demonstrate that both Class A and Class B membership is too numerous for joinder. *See* Declaration of Genevra W. Alberti ¶¶3-6 (Missouri legal services attorney noting, inter alia, that she currently represents more than 30 asylum seekers who were released by DHS with an NTA after expressing fear at the border and not given notice of the one-year deadline); Declaration of Yuk Man Maggie Cheng ¶¶5, 8, 12-15 (Seattle legal

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[4] *See, e.g.*, *Arkansas Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (finding 17 class members sufficient); *McCluskey v. Trs. Of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class with 27 known members); *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (class membership of 48); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (41-46 class members).

[5] *See* Asylum Division, USCIS, "Credible Fear Workload Report Summary: FY 2016 Total Caseload," at 1 *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/CredibleFearReasonableFearStatisticsNationalityReports.pdf (last visited Jul. 7, 2016).

[6] *Id.*

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services attorney remarking, inter alia, that in a five-month time span, the asylum unit of NWIRP's Seattle office interviewed "at least 21 asylum seekers who were not informed by DHS of the one-year deadline upon their release from custody," including eight such individuals who had been released without a credible fear interview); Declaration of Ilana Greenstein ¶¶3-15 (Massachusetts attorney recounting, inter alia, that in her 18 years of experience, she has "never had a client who has received a written or oral advisal of the one-year deadline" from DHS); Declaration of Jennifer Rotman ¶¶5-6, 8, 10-13 (Oregon attorney observing that, of "dozens" of asylum-seeking clients who have expressed fear at the border, she is not aware of any who were informed of the one-year deadline, and detailing difficulties with filing asylum applications stemming from jurisdictional issues); Declaration of Patricia Freshwater ¶¶5-17 (Texas attorney describing, inter alia, her representation of at least a dozen individuals who have been released from DHS custody without being told of the one-year deadline, despite passing a credible fear interview or expressing a fear of return, and the challenges she has faced in filing her clients' asylum applications in a timely manner); Declaration of Elise Harriger ¶¶6-13 (Texas legal services attorney who serves several hundred asylum seekers annually declaring that "DHS does not tell asylum seekers about the deadline" despite having multiple interactions with them, and relating obstacles to filing individuals' asylum applications); Declaration of Vanessa Allyn ¶¶2-15 (Maryland-licensed legal services attorney describing asylum seekers' overwhelming lack of awareness of one-year deadline and the veritable "Gordian knot" that often results from complications associated with filing asylum applications in a timely manner).[7] *Cf. Ali*, 213 F.R.D. at 408 (noting that "the Court does not need to know the exact size of the putative class, 'so long as general knowledge and common

[7] These declarations will be filed concurrently herewith.

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sense indicate that it is large'" (quoting *Perez-Funez*, 611 F. Supp. at 995)); Newberg on Class Actions § 3:13 (noting that "it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members").

Numerosity is not a close question here; however, even were it so, the Court should certify the class. *See Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998) ("[W]here the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1)."). Defendants are in possession of the precise number of proposed class members, but Plaintiffs have demonstrated that the number of current and future class members, and the numerous reasons why it would be impractical to join them, make class certification appropriate as the classes are "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

2. The Classes Present Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. "'[A]ll questions of fact and law need not be common'" to satisfy the commonality requirement, however. *Ellis*, 657 F.3d at 981 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). One shared legal issue can suffice. *See, e.g., Rodriguez*, 591 F.3d at 1122 ("[T]he commonality requirements asks [sic] us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). To establish the existence of a common question of law, the putative class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the

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validity of each one of the claims in one stroke." *Id.* Thus, "[w]hat matters to class certification . . . is not the raising of common 'questions' . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quotation marks and citation omitted).

Challenges to the adequacy of a uniform notice given to a group of people are routinely certified as class actions, since the sufficiency of notice is a question common to the entire class, as is the answer. *See, e.g.*, *Walters*, 145 F.3d at 1046 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Unthaksinkun*, 2011 WL 4502050 at *12 (certifying class challenging legality of notice of termination of health benefits after finding, inter alia, that commonality existed where "[a]ll class members were offered the same [notice] process," because any finding that "this process was insufficient" would mean the process "was insufficient as to all class members"); *Buus*, 251 F.R.D. at 584 (certifying subclasses asserting unlawful notice after concluding, inter alia, that commonality existed because "[t]he members of each proposed subclass presumably received identical notices").

The commonality standard is more liberal in civil rights suits "challeng[ing] a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005). "[C]lass suits for injunctive or declaratory relief," like this case, "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1763 at 226.

In the instant case, the proposed Class and Subclass members allege common harms: a violation of their statutory right to apply for asylum, which necessarily includes notice of the

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statutory deadline to file the application, and a meaningful opportunity to comply with that deadline. Their entitlement to these rights is based on a common core of facts. All members of Class A and Class B are individuals who expressed a fear of persecution or desire to apply for asylum and were released from DHS custody to await removal proceedings. All were released from such custody *after* DHS became aware of their fear of persecution in their home countries. These facts entitle *all* of them to the opportunity to apply for asylum. *See Orantes-Hernandez,* 919 F.2d at 553 ("It is undisputed that all [noncitizens] possess . . . a right [to apply for asylum] under the [Refugee] Act."). They also are entitled to *notice* of the statutory deadline for doing so. *See id.* at 556 ("[N]otice should be given to those [noncitizens] who indicate that they fear persecution if they were to be returned home.").

Whether these alleged harms exist implicates common factual questions:

i. Whether the DHS Defendants have a policy or practice of failing to advise asylum seekers found to have a credible fear of persecution of the one-year deadline;

ii. Whether the DHS Defendants have a policy or practice of failing to advise asylum seekers of the one-year deadline when it releases them from custody after they have expressed a fear of persecution;

iii. Whether the DHS Defendants have a policy or practice of failing to provide asylum seekers who are not in removal proceedings and are released from custody with a meaningful mechanism to comply with the one-year deadline;

iv. Whether the DHS and DOJ Defendants have a policy or practice of failing to provide asylum seekers who are in removal proceedings and are released from custody with a meaningful mechanism to comply with the one-year deadline.

All of the putative members within each subclass make the same legal claims—that the immigration laws and the Constitution require two things with respect to the right to apply for asylum: notice of the one-year deadline and the provision of a meaningful opportunity to comply with the deadline. These legal questions are common to *all* members of each subclass. The shared common facts within each subclass will ensure that the answers as to the legality of

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these challenged policies and practices will be the same for all who fall within each subclass, and will thus "'drive the resolution of the litigation.'" *Ellis*, 657 F.3d at 981 (quoting *Wal-Mart*, 131 S. Ct. at 2551). Should Plaintiffs prevail with respect to any of the subclasses, *all* who fall within the subclass will benefit; they all will be entitled to such notice and/or an application mechanism. The subclasses are therefore sufficiently common.

Factual variations as to, for example, the manner in which individual class members were treated by DHS or EOIR, or as to the merits of the asylum claims of individual members, are insufficient to defeat commonality where a uniform policy exists that treats all such members in the same way. In a similar action challenging the adequacy of notice provided by the immigration authorities to certain noncitizens at risk of removal—a failure that also resulted in the noncitizens' loss of the chance to argue the merits of their defenses in a removal hearing—the district court announced,

> [E]ven though the individual factual circumstances may vary among class members, the commonality requirement is satisfied in a suit such as this where it is alleged that the defendants have acted in a uniform manner with respect to the class. The existence of a policy of providing information not reasonably calculated to apprise non-[E]nglish speakers of their rights would, if such a policy exists, affect all members of the proposed class.

Walters, 1996 WL 897662 at *6 (citations omitted). The Ninth Circuit affirmed the district court's finding of commonality, remarking that, as in this case, "[w]hat makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice." *Walters*, 145 F.3d at 1046.[8]

[8] Moreover, even if *some* class members happened by chance to be told of the one-year deadline, this is not enough to defeat commonality where the DHS Defendants have *no* policy or practice of providing such notice (and Defendants have not established or implemented a mechanism for timely filing). *See Walters*, 145 F.3d at 1045-46.

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Plaintiffs are not asking this Court to determine whether they or any putative class member should be granted asylum; they are simply requesting that this Court review whether Defendants are required to institute policies and practices providing appropriate notice along with a meaningful opportunity to submit their applications pursuant to the law. As such, the questions presented apply equally to all class members regardless of other factual differences.

In sum, the questions of law presented here are particularly well-suited to resolution on a class-wide basis, as "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 654 (W.D. Wash. 2011); *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact).[9] Because all putative Class and Subclass members allege the same injuries and raise the same set of common questions, and because the remedy as to future class members will be the same for all main class members, and the remedy for those who already have been released by DHS will be Subclass-specific, *see* Section III.A.3, *infra*, this Court should find the commonality requirement satisfied here.

3. The Claims of the Named Plaintiffs Are Typical of the Claims of the Members of the Proposed Classes and Subclasses.

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . of the class." To establish typicality, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (citation omitted). Factual differences among class members do not defeat typicality in a case dealing with a uniform policy or

[9] As such, resolution on a class-wide basis also serves a purpose behind the commonality doctrine: practical and efficient case management. *Rodriguez*, 591 F.3d at 1122.

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practice, provided that "the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Armstrong*, 275 F.3d at 869; *see also Unthaksinkun*, 2011 WL 4502050 at *13 (same); *La Duke*, 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims.") (citation omitted).

Here, the claims of the Plaintiffs are typical of the claims of their putative class members. Each proposed Class A Plaintiff, just like each Class A member, is an asylum seeker who was found to possess a credible fear of persecution and was released from DHS custody after that determination, yet was not given notice by DHS of the one-year deadline or access to a uniform mechanism that ensures the opportunity to timely apply. Both class representatives and class members are thus victims of the "same, injurious course of conduct": their actual or feared injury—missing their window to apply for asylum—stems from the DHS Defendants' failure to notify them of the one-year deadline to apply for asylum and all Defendants' failure to create and implement a uniform mechanism for compliance. Similarly, every Class B Plaintiff, along with every class B member, was in DHS custody and expressed a fear of persecution; they were released from custody without notice of the one-year deadline or access to a uniform mechanism in which to timely apply for asylum. Those Plaintiffs, too, are typical of the class members they seek to represent: both have been injured by the DHS Defendants' failure to afford them adequate notice and all Defendants' failure to create and implement a

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uniform mechanism for compliance.

Similarly, each Subclass A.I. Plaintiff and Subclass A.I. member, as well as each Subclass B.I. Plaintiff and Subclass B.I. member, has been injured by DHS's failure to provide a guaranteed, uniform mechanism for them to timely file an asylum application, and all share the need for such a mechanism to exist outside the removal proceedings context.

Additionally, each Subclass A.II. Plaintiff and Subclass A.II. member, as well as each Subclass B.II. Plaintiff and Subclass B.II. member, has been injured by Defendants' failure to provide a uniform mechanism for them to timely file an asylum application within the context of pending removal proceedings. They share a need for a common remedy.

Because the Plaintiffs and the proposed classes and subclasses raise common legal claims and are united in their interest and injury, the element of typicality is met.

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Classes, and Counsel Are Qualified to Litigate this Action.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citations omitted).

a. *Named Plaintiffs*

Plaintiffs each seek relief on behalf of their respective Subclass as a whole and have no interest antagonistic to those of other Subclass members; they will thus fairly and adequately protect the interests of the Subclass they seek to represent. Their mutual goal is to declare Defendants' challenged policies and practices unlawful and to obtain declaratory and injunctive relief that would not only cure this illegality but remedy the damage to all Subclass members. They thus seek a remedy for the same injuries, and all share an interest in having a meaningful

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opportunity to apply for asylum. Thus, the interests of the representatives and of the class members are aligned.

b. *Counsel*

Plaintiffs' counsel are adequate. Counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same field of law. *See Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979). Plaintiffs are represented by attorneys from the Northwest Immigrant Rights Project, Dobrin & Han PC, the National Immigration Project of the National Lawyers Guild, and the American Immigration Council. Counsel have a demonstrated commitment to protecting the rights and interests of noncitizens and, among them, have considerable experience in handling complex and class action litigation in the immigration field. *See* Declaration of Matt Adams; Declaration of Vicky Dobrin; Declaration of Hilary Han; Declaration of Mary Kenney; and Declaration of Trina Realmuto.[10] These attorneys have represented numerous classes of immigrants in actions that successfully obtained class relief. Plaintiffs' counsel will zealously represent both named and absent class members.

B. This Action Also Satisfies the Requirements of Rule 23(b)(2).

Federal Rule of Civil Procedure 23(b)(2), under which Plaintiffs seek certification, requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class." It also "requires 'that the primary relief sought is declaratory or injunctive.'" *Rodriguez*, 591 F.3d at 1125 (citation omitted). "The rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive

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relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Id.* This suit satisfies the requirements of Rule 23(b)(2), as Defendants have a nationwide policy of inaction that is injurious to the rights and interests of the Plaintiffs and putative class members.

Despite being aware of the notice defects and the lack of mechanism to apply for asylum, the DHS Defendants have failed to provide Plaintiffs and putative class members with adequate notice of the one-year deadline, and all Defendants have refused to provide a mechanism for Plaintiffs and putative class members to comply with that deadline. *See, e.g.*, Cheng Decl. ¶11; Allyn Decl. ¶8. "The only appropriate remedy, if these allegations are established, is declaratory judgment and final injunctive relief." *Walters*, 1996 WL 897662 at *7. Defendants' actions in this case violate Plaintiffs' and proposed class members' statutory, regulatory, and constitutional right to apply for asylum and demonstrate that Defendants have acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Rodriguez*, 591 F.3d at 1126 (finding that class of noncitizens detained during immigration proceedings met Rule 23(b)(2) criteria because "all class members' [sic] seek the exact same relief as a matter of statutory or, in the alternative, constitutional right"); *see also Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (Rule 23(b)(2) "requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole"). Hence, the requirements of Rule 23(b)(2) are met.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant this Motion and enter the attached proposed certification order.

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Dated this 21st day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glenda M. Aldana Madrid, hereby certify that on July 21, 2016, I electronically filed the foregoing motion, proposed order, corporate disclosure statement, and supporting declarations with the Clerk of the Court using the CM/ECF system. In addition, I sent a copy of these documents by U.S. first class mail, postage prepaid, to each of the following:

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Executed in Seattle, Washington, on July 21, 2016.

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