Honorable James L. Robart

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

Juweiya Abdiaziz ALI; A.F.A., a minor; Reema Khaled DAHMAN; G.E., a minor; Ahmed Mohammed Ahmed ALI; E.A., a minor; on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs,

v.

Donald TRUMP, President of the United States of America; U.S. DEPARTMENT OF STATE; Tom SHANNON, Acting Secretary of State; U.S. DEPARTMENT OF HOMELAND SECURITY; John F. KELLY, Secretary of Homeland Security; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Lori SCIALABBA, Acting Director of USCIS; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; Michael DEMPSEY, Acting Director of National Intelligence,

Defendants.

Case No. 2:17-cv-00135-JLR

MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:
February 24, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs and prospective class members are U.S. citizens and lawful permanent residents (LPRs) who have petitioned for immigrant visas for family members and employees, and nationals of seven predominantly Muslim countries who are the beneficiaries of those petitions. They seek to be reunited in the United States, but are currently barred from doing so by President Trump's January 27, 2017 Executive Order (EO). *See* Exec. Order No. 13769, 82 Fed. Reg. 20, 8977-8982 (Feb. 1, 2017). Section 3(c) of the EO prohibits entry of individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen with valid visas into the United States, and has been applied to suspend the immigrant visa processing for nationals of those countries for 90 days, with limited exceptions not relevant here. *See id.* at 8978; *see also* Dkt. 1 ¶¶45-46. Defendants' unlawful adherence to the EO, as evidenced by their continuing refusal to process and issue immigrant visas to Plaintiffs and proposed class members (hereafter, "Plaintiffs") or to honor existing immigrant visas issued to such individuals, and their decision to revoke properly issued visas en masse, violates their non-discrimination obligations under the Immigration and Nationality Act (INA). Defendants' policies and practices also violate Plaintiffs' rights under the equal protection component of the Due Process Clause of the Fifth Amendment, as well as their rights to family life and due process of law.

Plaintiffs have followed the rigorous immigrant visa process—in some cases, over the course of years. Many, including the named Plaintiffs, did so with the goal of reuniting with family members in the United States. However, the EO now bans those who are beneficiaries of immigrant visa petitions from entering the country and prevents further processing of visa applications, thereby blocking proposed class members from making otherwise lawful entries into the United States and depriving proposed class members, like the named Plaintiffs, who lawfully filed family-based petitions and applications of the right to live together as families.

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They suffer ongoing daily harm as they are separated from families and/or employment, and are unaware when, if ever, they will be permitted to enter the country.

Despite having a clear duty not to discriminate based on "nationality, place of birth, or place of residence" in issuing immigrant visas, 8 U.S.C. § 1152(a)(1), Defendants have created and followed nationality-based guidance that targets nationals of seven predominantly Muslim countries. In order to prevent ongoing and future harm to Plaintiffs, Defendants must immediately cease application of Section 3 of the EO, and resume processing, issuing and honoring immigrant visas in a manner that does not discriminate.

The questions presented in this case—whether Defendants have violated their statutory duty not to discriminate in the processing, issuance and honoring of immigrant visas, and whether such denial violates Plaintiffs' due process rights—can and should be resolved on a class-wide basis. The proposed class, moreover, satisfies the requirements set forth in Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs request that the Court certify the following class, with all the named Plaintiffs as class representatives:

> All nationals of countries designated by Section 3(c) of Executive Order # 13769 (currently Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen), who have applied for or will apply for an immigrant visa and the visa petitioners for those nationals, whose visa applications have been or will be suspended or denied, whose immigrant visas have been or will be revoked, or who have been or will be denied the ability to travel to the United States, on the basis of Executive Order # 13769.

As discussed above, Plaintiffs present common legal claims.

Plaintiffs seek declaratory and injunctive relief on behalf of this class, requiring the Court to declare that Section 3(c) of the EO is contrary to the INA and the Constitution, halt its application, and order Defendants to resume processing, issuing and honoring Plaintiffs' immigrant visas.

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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.

The named Plaintiffs are two U.S. citizens, one LPR, and three nationals of predominantly Muslim countries who seek to be reunited and live as families in the United States. Like thousands before them, they have diligently pursued the lengthy and demanding immigrant visa process, which entails, inter alia, filing immigrant visa petitions and immigrant visa applications, paying hundreds, if not thousands, of dollars in filing and related fees, undergoing security screenings and medical examinations, and attending an interview before a consular officer. However, the unlawful and discriminatory executive order issued by President Trump on January 27, 2017, has shattered their lives and their prospects for being reunited in the United States, and well as the lives and reunification prospects of the scores of similarly situated families and individuals they seek to represent through this action.

The Immigration and Nationality Act of 1965 enshrined the principle of nondiscrimination into the immigration laws, providing that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This bedrock of nondiscrimination was enacted to root out the discriminatory national origin quota system—in place between 1924 and 1965—that restricted immigration on the basis of national origin. *See Li v. Renaud*, 654 F.3d 376, 377 (2d Cir. 2011) (summarizing

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the history of the national origin quota system). Under that system, immigration from countries outside Northern and Western Europe was highly restricted, and immigration from Asia and Africa was essentially nonexistent.

By the civil rights era, this system was openly under attack by members of Congress as deeply flawed and racist. *See, e.g.*, *Immigration and Nationality Act: Hearing on H.R. 7919 before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 88th Cong. 208 (1964) (testimony of Rep. Harold Ryan) ("It is unfair—it is unjust—it is pure discrimination for us to stamp a 'second best' rating on any individual because of his birthplace."); *id.* (testimony of Rep. William Barrett) ("It is perhaps unnecessary for me to reiterate the well-known fact that the national origins quota system . . . is based upon an infamous lie."). Thus, "[i]n 1965, concerned about discrimination on the basis of 'race, sex, nationality, place of birth, or place of residence,' Congress repealed the national origins quota system." *Li*, 654 F.3d at 377; *see also* S. REP. 89-748, 1965 U.S.C.C.A.N. 3328, 3329 (1965) (noting that the "primary objective" of the 1965 Act was "the abolishment of the national origins quota system"). In his signing statement, President Lyndon B. Johnson wrote that the 1965 Act "abolished" the national origin system, which "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." L.B.J. on Immigration, Remarks (Oct. 3, 1965), *available at* http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration.

Section 3(c) of the EO directly violates 8 U.S.C. § 1152(a)(1)(A) by *requiring* discrimination in the issuance of immigrant visas "because of the person's race, sex, nationality, place of birth, or place of residence." The only circuit court to have analyzed § 1152(a)(1)(A) found that the statute was unambiguous and that national origin discrimination is impermissible. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*,

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45 F.3d 469 (D.C. Cir. 1995), *abrogated on other grounds, Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349 (D.C. Cir. 1997). Faced with a State Department policy that required Vietnamese nationals to return to Vietnam for visa processing, the court unequivocally rejected the government's attempts to evade the nondiscrimination guarantee in the statute:

> Appellants assert this statute compels this court to invalidate any attempt to draw a distinction based on nationality in the issuance of visas. In contrast, appellees urge us to adopt the position that so long as they possess a rational basis for making the distinction, they are not in violation of the statute. . . . We agree with appellants' interpretation of the statute. Congress could hardly have chosen more explicit language. . . . We cannot rewrite a statutory provision which by its own terms provides no exceptions or qualifications. . . . Congress has unambiguously directed that no nationality-based discrimination shall occur.

Id. at 473; *see also Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980) ("8 U.S.C. § 1152(a)(1)(A) manifested Congressional recognition that the maturing attitudes of our nation made discrimination on [the listed] bases improper. In the face of such a decision by Congress, INS [the former Immigration and Naturalization Service] has no authority to discriminate on the basis of national origin or race . . . ."). Therefore, Section 3 of the EO is unlawful on its face, as Congress barred national-origin discrimination in the issuance of immigrant visas. *See* 8 U.S.C. § 1152(a)(1)(A).

Defendants' discriminatory actions also violate Plaintiffs' right to equal protection under the Due Process Clause of the Fifth Amendment. The Ninth Circuit has affirmed that noncitizens, including those not admitted to the United States, "com[e] within the ambit of the equal protection component of the Due Process Clause." *Kwai Fun Wong v. United States*, 373 F.3d 952, 974 (9th Cir. 2004). "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 371, (1971); *see Oyama v. California*, 332 U.S. 633, 640 (1948)

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(holding that the government must demonstrate "compelling justification" to defeat an equal protection challenge to a decision "based solely on . . . country of origin"); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (national origin discrimination must be reviewed under strict scrutiny).

Therefore, this Court should apply strict scrutiny to Section 3(c) of the EO, which discriminates on the basis of both national origin and religion. Plaintiffs need not show that animus against a protected class "was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)). Although the EO does not explicitly mention Muslims, President Trump's animus towards Muslims is well-documented. *See, e.g.*, Theodor Schleifer, *Donald Trump: "I think Islam hates us,"* CNN (Mar. 10, 2016); Dkt. 1 ¶48 (noting then-candidate Trump's call for a "total and complete shutdown of Muslims entering the United States"); Vaugh Hillyard, *Trump's plan for a Muslim database draws comparison to Nazi Germany*, MSNBC (Nov. 20, 2015) ("I would certainly implement [a Muslim registry]. Absolutely."). Moreover, advisors to the President have confirmed the EO was intended to ban on Muslims. Dkt. 1 ¶49 (noting the statement of Rudolph Giuliani that President-Elect Trump asked him to write a "legal" ban on Muslims). *Cf.* EO § 5(b), 82 Fed. Reg. 20 at 8979 (directing that executive agencies administering the U.S. Refugee Admissions Program "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality"); *id.* § 5(e) (expressly noting that such claims are "in the national interest" and should be considered when making exceptions to the refugee ban); Dkt. 1 ¶50. No compelling government interest is served by such discriminatory motives.

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Even if this Court finds that strict scrutiny does not apply, this Court must review the decision under rational basis review. *See, e.g. Ram v. I.N.S.*, 243 F.3d 510, 517 (9th Cir. 2001) (evaluating whether "'[l]ine-drawing' decisions made by . . . the President in the context of immigration and naturalization . . . are rationally related to a legitimate government purpose"). "[S]uch review is more searching when a classification adversely affects unpopular groups," such as, in this case, Muslims and individuals from the seven affected countries. *See Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011). The EO is not rationally related to a legitimate purpose. To the extent it purports to relate to national security concerns, it is fatally over inclusive. Between 1975 and 2015, there were no terrorism-related deaths in the United States caused by individuals from the seven affected countries. Alex Nowsrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO INSTITUTE (Jan. 26, 2017), *available at* https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons. The EO's blanket ban on immigration in the name of "those who engage in acts of bigotry or hatred" or "do not intend to harm Americans and . . . have no ties to terrorism," EO § 1, 82 Fed. Reg. 20 at 8977, is so overinclusive as to be incoherent, and does not bear any rational relationship to its stated goals.

In addition, Defendants' unlawful actions violate the constitutionally protected liberty interest in family life for those U.S. citizen and LPR Plaintiffs who filed immigrant visa petitions on behalf of their close family members. "[T]he foremost policy underlying the granting of [immigrant] visas under our immigration laws [is] the reunification of families." *Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977); *see Kaliski v. Dist. Dir. of Immigration & Naturalization Serv.*, 620 F.2d 214, 217 (9th Cir. 1980) (the "humane purpose" of the INA is to "reunite families"). The Ninth Circuit has confirmed that a U.S. citizen or LPR spouse has the right to

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bring a due process challenge to the denial of a family member's visa. *See, e.g.*, *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause"). Here, Plaintiffs have endured a rigorous immigrant visa process, including extensive security screening, which has already separated Plaintiff family members for significant periods. The EO, which includes provisions that would extend the unlawful visa processing and issuance ban under certain circumstances, will prolong the separation of these families, perhaps indefinitely. *See* EO § 3(e), 82 Fed. Reg. 20 at 8978 (permitting indefinite extension if the Secretary determines that an affected country does not share sufficient data with the United States). Due process requires a different result.

B. Named Plaintiffs' Factual Backgrounds

Plaintiffs Juweiya Abdiaziz Ali and her son A.F.A.

Plaintiff Juweiya Abdiaziz Ali is a 23-year-old U.S. citizen who resides in Washington State. Ms. Ali was born in Somalia and came to the United States as a child. She derived U.S. citizenship on August 31, 2010 when her mother became a U.S. citizen. On August 12, 2016, Ms. Ali filed a family-based immigrant visa petition (Form I-130) for her son, Plaintiff A.F.A., with USCIS, along with the requisite fee. A.F.A. is a 6-year-old citizen and resident of Somalia, where he lives with his grandmother. On December 21, 2016, USCIS approved the immediate relative I-130 petition Ms. Ali filed on behalf of A.F.A., and his case was subsequently transferred to the National Visa Center ("NVC") for the processing of an IR-2 immigrant visa for an unmarried, minor child of a U.S. citizen. On January 17, 2017, the NVC processed Ms. Ali's payment of the requisite filing fees for the immigrant visa application and the affidavit of support. On January 20, 2017, Ms. Ali electronically submitted A.F.A.'s immigrant visa application (Form DS-260) and mailed all supporting documents. Ms. Ali and A.F.A. are

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currently waiting for the U.S. Embassy in Nairobi, Kenya to schedule an immigrant visa interview. But pursuant to Section 3(c) of the EO, Defendants have suspended the processing of A.F.A.'s immigrant visa interview for 90 days from the date of the order—i.e., until April 27, 2017. Pursuant to Section 3(e) of the EO, there is a significant risk that the process will be further suspended, preventing him from entering the United States to join his mother, Ms. Ali.

Plaintiffs Reema Khaled Dahman and her son G.E.

Plaintiff Reema Khaled Dahman is a 40-year-old LPR who lives in Washington State. She is a Syrian citizen who became an LPR on September 18, 2012. On October 19, 2015, Ms. Dahman filed a family-based immigrant visa petition on behalf of her son, Plaintiff G.E., with USCIS, along with the requisite filing fee. G.E. is a 16-year-old citizen and resident of Syria, where he lives with his elderly grandmother. Plaintiff G.E. and his mother have not seen each other since 2012. On June 1, 2016, USCIS approved the I-130 petition Ms. Dahman filed on behalf of G.E. USCIS subsequently transferred his case to the NVC for the processing of an F2 immigrant visa, for a minor child of an LPR. On September 22, 2016, the NVC processed Ms. Dahaman's payment of the requisite filing fees for the immigrant visa application and affidavit of support. On December 2, 2016, Ms. Dahman electronically submitted G.E.'s immigrant visa application and e-mailed the NVC all civil documents and her Affidavit of Support (Form I-864). Ms. Dahman and G.E. are currently waiting for the U.S. Embassy in Amman, Jordan to schedule an immigrant visa interview. The U.S. Embassy in Amman has announced the suspension of processing of immigrant visas of Syrian nationals pursuant to Section 3(c) of the EO. *See* https://jo.usembassy.gov/special-information-for-syrian-applicants/ (last visited Jan. 30, 2017). Scheduling of G.E.'s immigrant visa interview is thus suspended for 90 days from the date of the EO. Pursuant to Section 3(e) of the EO, there is a there is a significant risk that the process will

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be further suspended, preventing him from entering the United States and further prolonging his separation from his mother.

Plaintiff Ahmed Mohammed Ahmed Ali and his daughter E.A.

Plaintiff Ahmed Mohammed Ahmed Ali is a 38-year-old U.S. citizen who resides in California. Mr. Ali was born in Yemen and became a naturalized U.S. citizen on July 19, 2010. On April 25, 2011, Mr. Ali filed a family-based immigrant visa petition for his daughter, Plaintiff E.A., with USCIS, along with the requisite filing fee. Plaintiff E.A. is a 12-year-old citizen and resident of Yemen, where she had been living with her grandparents. On June 10, 2013, USCIS approved the immediate relative I-130 petition for E.A. On July 15, 2013, the NVC processed Mr. Ali's payment of the requisite filing fees for the immigrant visa application and affidavit of support. On August 11, 2014, Mr. Ali electronically submitted E.A.'s Immigrant Visa Electronic Application. The next day, he e-mailed all civil documents and his Affidavit of Support to the NVC. The NVC then forwarded the case to the U.S. Embassy in Djibouti, Djibouti for further processing and to schedule an interview. On January 22, 2017, E.A. appeared with her father at the U.S. Embassy in Djibouti for her interview. E.A. traveled for about 20 hours from Yemen to Djibouti. E.A. and Mr. Ali were notified that the immigrant visa was approved. E.A.'s immigrant visa was issued on January 25, 2017, and Mr. Ali and E.A. were able to pick up the physical passport with the immigrant visa on January 26, 2017. In preparation for their trip, Mr. Ali purchased their airplane tickets for $2,032.96. On January 26, 2017, E.A. paid an additional $220 immigrant fee that USCIS required after she received her visa. *See* https://www.uscis.gov/file-online/uscis-immigrant-fee (last visited Jan. 30, 2017). On January 28, 2017, Mr. Ali and E.A. sought to board a flight from Djibouti to the United States on Ethiopian Airlines. While at the airport, Mr. Ali was told by airline officials that his daughter

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was not permitted to board the flight, pursuant to Section 3(c) of the EO. Mr. Ali and E.A. are currently stranded in Djibouti, uncertain as to what to do. Pursuant to Section 3(c) of the EO, Defendants have not permitted E.A. to enter the United States, along with her U.S. citizen father, to join her U.S. citizen mother and her two U.S. citizen sisters. The U.S. Embassy in Djibouti has announced the suspension of processing of immigrant visas of Yemeni nationals pursuant to Section 3(c) of the EO. *See* https://dj.usembassy.gov/urgent-notice-per-u-s-presidential-executive-order-signed-january-27-2017/ (last visited Jan. 30, 2017).

III. THE COURT SHOULD CERTIFY THE CLASS.

The statutory and constitutional violations Plaintiffs assert have tremendous adverse consequences. Defendants' unilateral and discriminatory halt to immigrant visa processing for nationals of certain countries has prevented Plaintiffs from being reunited with their family members, perhaps indefinitely. Plaintiffs seek certification of the aforementioned class under Rule 23(b)(2), to enjoin Defendants' unlawful policies and practices.

Courts in the Ninth Circuit routinely certify classes challenging the adequacy of policies and procedures under the immigration laws. *See, e.g.*, *Costelo v. Chertoff*, 258 F.R.D. 600 (C.D. Cal. 2009) (certifying class of "[p]arents who have filed an immigrant visa petition who face separation from their children as a result of the Defendants [sic] failure to act"), *aff'd Cuellar de Osorio v. Mayorkas*, 656 F.3d 954 (9th Cir. 2011) *rev'd on other grounds*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, (2014); *Hootkins v. Chertoff*, No. CV 07-5696, 2009 WL 57031 (C.D. Cal. Jan. 6, 2009) (certifying circuit-wide class of "[a]ll beneficiaries of immediate relative petitions whose petitioning relatives died prior to beneficiaries' adjudication and approval of lawful permanent resident status"); *Tenrec, Inc. v. United States Citizenship & Immigrations Servs.*, No. 3:16-CV-995-SI, 2016 WL 5346095 (D. Or. Sept. 22, 2016) (denying motion to

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dismiss in class action challenging H-1B nonimmigrant visa lottery); *see also Mendez Rojas, et al. v. Johnson, et al.*, 2:16-cv-1024-RSM, ECF No. 37 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures); *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 the Executive Office for Immigration Review and United States Citizenship and Immigration Services 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 circuit-wide class challenging USCIS policy contradicting binding precedent), *preliminary injunction vacated*, 508 F.3d 1227 (9th Cir. 2007) (establishing new rule but no challenge made to class certification); *Santillan v. Ashcroft*, No. C 04–2686, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding district court had jurisdiction to grant injunctive relief in certified circuit-wide class action challenging unlawful immigration directives issued by EOIR); *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); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district court's denial of class certification in case challenging inadequate notice and standards in INS vehicle forfeiture procedure); *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*,

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Reno v. Walters, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases).

Certification of such classes is consistent with Rule 23(b)(2). 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. This rationale applies with particular force to civil rights suits like this one, where, absent class certification, there likely will be no opportunity to resolve the legal claims at issue. Proposed class members will have no opportunity to challenge the suspension, denial or revocation of their immigrant visas, as the EO has been applied to halt processing entirely. Moreover, 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). Many lawsuits have emerged challenging different elements of the EO, including another lawsuit filed on behalf of the state of Washington. *State of Washington v. Trump, et al.*, No. 2:17-cv-0141-JLR (W.D. Wash.). There are also other suits challenging different aspects of the EO. *See, e.g., Wagafe, et al. v. Trump, et al.*, 2:17-cv-0094-JCC (W.D. Wash.) (challenging application of the

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EO to persons residing in the U.S. applying for immigration benefits). However, this case focuses exclusively on those who were approved, or are in the process of applying for, immigrant visas abroad (as opposed to those seeking to enter on nonimmigrant visas, and those seeking to enter as refugees). Nor does it include habeas claims for persons who were detained upon arriving to the United States after the EO was issued. There are no other classes certified that have address the issues presented. 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 eliminate national origin discrimination in the issuance of immigrant visas.

Moreover, it would be unworkable to limit the scope of certification to anything but a nationwide class. The proposed class consists of individuals residing throughout the United States and in countries around the world. Thus, any challenge to Defendants' discriminatory and unlawful suspension of immigrant visa processing must apply to the entire nation. Certification that is more limited in scope would result in Defendants treating affected individuals differently by virtue of their location—an arbitrary and unjust result. *See Gorbach*, 181 F.R.D. at 644 (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).

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

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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. Supp. 990, 995 (C.D. Cal. 1984). Courts generally find this requirement is satisfied even when relatively few class members are involved. *See, e.g.*, *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982) (class of 39 sufficient), *vacated on other grounds*, 459 U.S. 810 (1982); *Ark. Educ. Ass'n v. Board Of Educ. Of Portland, Ark. School Dist.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (class of 17 sufficient); *McCluskey v. Trs. Of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (class of 27 sufficient).

The proposed class is numerous. According to Defendant State Department's own statistics, 31,804 immigrant visas were issued to immigrants from the seven countries included in the EO in FY 2016 (7,727 from Iran, 3,660 from Iraq, 383 from Libya, 1,797 from Somalia, 2,606 from Sudan, 2,633 from Syria, and 12,998 from Yemen).[1] The majority of these visas were the result of family-based immigrant petitions, demonstrate that there are thousands of U.S. citizens and LPR visa petitioners affected by the EO.[2] Indeed, over the last decade, more than 500,000 nationals of the affected countries have been granted LPR status.[3] Moreover, five days after the EO was issued, Defendant DHS reported having prevented 940 individuals, many of whom are immigrant visa holders, like Petitioner E.A., from boarding flights to the United

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[1] U.S. STATE DEP'T, *Immigrant Visas Issued (by Foreign State of Chargeability or Place of Birth): Fiscal Year 2016* (2016), *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableIII.pdf (last visited Feb. 1, 2017).

[2] *Id.*

[3] Marcelo Rochabrun, *Trump Order Will Block 500,000 Legal U.S. Residents From Returning to America From Trips Abroad*, PROPUBLIC.ORG (Jan. 28, 2017), *available at* https://www.propublica.org/article/trump-executive-order-could-block-legal-residents-from-returning-to-america (last visited Feb. 1, 2017).

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States.[4] Therefore, at the very least, the proposed class encompasses thousands of U.S. citizens, LPRs and their family members, as well as other beneficiaries of immigrant visa petitions. *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 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; but 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 would make their joinder impracticable, thus making class certificate appropriate.

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.").

[4] CUSTOMS AND BORDER PROTECTION, *Protecting the Nation from Foreign Terrorist Entry into the United States*, *available at* https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states (last visited Feb. 1, 2017).

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"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 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).

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 members allege common harms: the unlawful and discriminatory suspension of immigrant visa processing, revocation of previously granted visas, and refusal to honor facially valid visas. For many class members, this harm is compounded by an interference with their right to live as families in the United States. For others, it is also accompanied by an interference with their employment prospects and future livelihood.

These harms, moreover, are rooted in a common core of facts: the EO and Defendants' implementation of it. All class members have petitioned for, or are beneficiaries of, an immigrant visa petition filed for an individual from one of the seven affected countries. Further,

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all of the putative members make the same legal claims—that the EO violates the INA, which prevents nationality-based discrimination in the issuance of immigrant visas, as well as their constitutionally protected rights to due process and equal protection. *See* Dkt. 1 ¶¶106-118.

Factual variations as to, for example, the manner in which the EO affects specific named Plaintiffs are insufficient to defeat commonality. This case turns on the existence of a uniform policy, set forth in Section 3(c) of the EO, which applies equally to all class members regardless of any factual differences. Courts have affirmed that such factual questions are well-suited to resolution on a classwide basis. *See, e.g.*, *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014) (reversing denial of class certification motion because movants had "identified a single, well-enunciated, uniform policy" that was allegedly responsible for the harms suffered by the class).

In sum, the questions of law presented here are particularly well-suited to resolution on a classwide 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).[5] Because all proposed class members raise the same set of common questions, all of which can be remedied in a single stroke by addressing the legal claims presented, this Court should find the commonality requirement satisfied here.

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

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3. The Claims of the Named Plaintiffs Are Typical of the Claims of the Members of the Proposed Class.

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 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 named Plaintiffs are typical of the claims of the proposed class members. Like the named Plaintiffs, each proposed class member has diligently pursued the immigrant visa process but been prevented from completing it due to the EO. Class representatives include individuals affected by the EO at various stages of the immigrant process before entering the United States, all of whom challenge the legality of the EO under the INA and the Due Process Clause. Because the named Plaintiffs and proposed class members raise common legal claims and are united in their interest and injury, the element of typicality is met.

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4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class Members, 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*

The named Plaintiffs each seek relief on behalf of the class as a whole and have no interest antagonistic to those of other class members; they will thus fairly and adequately protect the interests of the class members they seek to represent. Their mutual goal is to declare Defendants' challenged EO unlawful and to obtain declaratory and injunctive relief that would not only cure this illegality but remedy the ongoing harm to all class members. They thus seek a remedy for the same injuries, which could be addressed by halting the application and enforcement of the EO. 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, 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

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and have considerable experience in handling complex and class action litigation in the immigration field. *See* Declaration of Matt Adams; Declaration of Melissa Crow; Declaration of Mary Kenney; Declaration of Trina Realmuto.[6] 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 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 that is injurious to the rights and interests of the named Plaintiffs and proposed class members.

Defendants' unlawful and discriminatory EO has prevented the named Plaintiffs and proposed class members from completing the immigrant visa process, preventing many from immediately joining petitioners in the United States. *See, e.g.*, Dkt. 1 ¶¶60-62, 73-76, 89-92. **"**The only appropriate remedy, if these allegations are established, is declaratory judgment and final injunctive relief." *Walter*, 1996 WL 897662 at *7. Defendants' actions in this case violate Plaintiffs' statutory and constitutional rights. By its very language, the EO applies across the board to all Plaintiffs—Defendants have thus unquestionably acted "on grounds generally

[6] These declarations will be filed concurrently herewith.

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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 enclosed proposed certification order.

Dated this 2nd day of February, 2017.

Respectfully submitted,

s/Matt Adams
Matt Adams, WSBA No. 28287

s/*Glenda Aldana*
Glenda M. Aldana Madrid, WSBA No. 46987

s/Maria Lucia Chavez
Maria Lucia Chavez, WSBA No. 43826
application for admission pending

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s/Trina Realmuto
Trina Realmuto, *pro hac vice admission forthcoming*

s/Mary Kenney
Mary Kenney, *pro hac vice admission forthcoming*

s/Aaron Reichlin-Melnick
Aaron Reichlin-Melnick, *pro hac vice admission forthcoming*

s/Melissa Crow
Melissa Crow, *pro hac vice admission forthcoming*
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s/Kristin Macleod-Ball
Kristin Macleod-Ball, *pro hac vice admission forthcoming*

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CERTIFICATE OF SERVICE

I, Matt Adams, hereby certify that on February 2, 2017, I arranged for electronic filing of the foregoing motion, proposed order, corporate disclosure statement, and supporting declarations with the Clerk of the Court using the CM/ECF system as well as the mailing of these documents by U.S. first class mail, postage prepaid, to each of the following:

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Office of General Counsel
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John F. KELLY, Secretary of Homeland Security
Office of the General Counsel
United States Department of Homeland Security
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Executed in Seattle, Washington, on February 2, 2017.

s/ Matt Adams
Matt Adams, WSBA No. 28287

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