IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALYSE SANCHEZ, *et al.*, Plaintiffs-Petitioners, v. KEVIN MCALEENAN, *et al*., Defendants-Respondents.	Civil No. 8:19-cv-01728-GJH

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs-petitioners ("Plaintiffs") are U.S. citizens or their non-citizen spouses who are subject to an order of deportation, but who have sought to legalize their immigration status via a process that begins with an I-130 petition and ends with consular processing, which permits non-citizen relatives of U.S. citizens or legal permanent residents to obtain visas allowing them to reside in the U.S. with lawful immigration status. For non-citizen spouses with final orders of removal, the process is a five step process that begins with the filing of an I-130 Petition for Alien Relative, and ends with returning to the U.S. with a visa obtained at a U.S. consulate abroad, and the immigrating noncitizen receives a Green Card and becomes a legal permanent resident upon entry to the U.S. The first three steps of this process, known as the provisional waiver process, was codified in 2016, when the regulations were amended explicitly to allow non-citizen spouses of I-130 petitioners who were subject to an order of deportation to access a program so they may seek inadmissibility waivers while remaining in the U.S. with their families. This civil rights action challenges a policy or practice by immigration officials under the current administration who are unlawfully disregarding these regulations and detaining and deporting noncitizen I-130 applicants by using the provisional waiver program itself as a lure to trap noncitizens in order to arrest and deport them. Not only have the Defendants-Respondents' ("Defendants") actions prevented those they have actually detained or removed from being able to pursue provisional waivers, they have also scared away countless others from pursuing the provisional waiver process, out of fear that if they do so they too will be detained at their I-130 interview and removed. As this Court has already recognized, the Government's conduct has unlawfully rendered the provisional waiver program a nullity.

Class actions are designed to address, in a single proceeding, precisely this type of uniform and systemic violation of the law. Class certification is warranted because Defendants have acted on a class-wide basis to stymie Plaintiffs' pursuit of the provisional waiver process. Respondents have targeted the noncitizen Plaintiffs and class members for detention and removal, ignoring their pursuit of lawful status in accordance with the 2016 regulations. The class is thus bound together by these common questions: (i) whether the Defendants' use of the I-130 provisional waiver program to lure and trap noncitizen Plaintiffs and class members is lawful; and (ii) whether the Defendants' may lawfully disregard the 2016 regulations' purpose of maintaining family unity, and detain and remove people who seek to avail of the I-130/provisional waiver process. A judicial finding that defendant's actions do not comply with the law will apply equally to all members of the proposed class. This is an ideal case for class certification.

FACTUAL BACKGROUND

I. The Defendants' Unlawful Disregard of the Provisional Waiver Regulations

The noncitizen spouses of U.S. citizens are eligible to become lawful permanent residents of the United States despite previously having been ordered removed, but to do so, they need to leave the country in order to apply for an immigrant visa at a U.S. consulate abroad—a procedure known as consular processing. Departure from the United States can trigger several grounds of inadmissibility. 8 U.S.C. 1182(a). One of the most common applies to anyone who has left the U.S. after spending over a year here without authorization. 8 U.S.C. § 1182(a)(9)(B)(i)(II). Similarly, anyone who has been ordered removed is deemed "inadmissible." 8 U.S.C. § 1182(a)(9)(A). Both of these grounds of inadmissibility require that a person who has left the United States remain abroad for ten years prior to returning—unless the ground of inadmissibility is waived. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of inadmissibility for unlawful presence if separation from U.S.-citizen or LPR spouse or parent will cause that person extreme hardship); 8 U.S.C. § 1182(a)(9)(A)(iii) (waiver of inadmissibility for prior removal order if applicant obtains

consent to reapply for admission). But the process of applying for a waiver of inadmissibility is unpredictable and can require a wait of months or years, during which time a non-U.S. citizen spouse who has left the country must remain abroad, away from his or her family. *See* Am. Compl. ¶¶ 25–26.

Prior to 2013, the unpredictability of this process and long wait time outside the country deterred many noncitizen spouses from leaving the U.S. to become permanent residents. In 2013, USCIS addressed this problem by promulgating regulations that made it possible for the spouses of U.S. citizens who had been present in the U.S. without authorization to apply for a waiver of inadmissibility for unlawful presence prior to leaving the U.S. to consular process. This application is known as a "stateside" waiver. In 2016, the agency expanded the stateside waiver process to make it available to noncitizens with final orders of removal. The purpose of these amendments to federal regulations was to encourage people who would otherwise be reluctant to pursue lawful status outside the U.S. to do so and to promote family unity during the process. By permitting noncitizens to obtain waivers in the U.S. prior to departing, the regulations reduced the time that noncitizen spouses would have to spend outside the U.S. and separated from their families from months or years to a few weeks and reduced "the financial and emotional impact on the U.S. citizen and his or her family due to the [noncitizen] immediate relative's absence from the United States." 77 Fed. Reg. at 19907; *see also* 81 Fed. Reg. at 50245-46. This would "encourage individuals to take affirmative steps" to obtain lawful status that they might not otherwise take, 77 Fed. Reg. at 19902-01, including an estimated 100,000 people who, like some of the plaintiffs in this case, became eligible for the provisional waiver process only after it was expanded in 2016. 81 Fed. Reg. at 50244. *See* Am. Compl. ¶¶ 27–29.

Obtaining a provisional waiver involves a three-step process. First, an undocumented immigrant's U.S. citizen spouse must obtain an approved I-130 petition, which often requires that the immigrant and his or her spouse attend an interview to confirm they are in a bona fide

relationship. Second, once the I-130 is approved, the noncitizen spouse files a Form I-212. Third, once a Form I-212 is conditionally approved, the noncitizen applies for a provisional unlawful presence waiver using Form I-601A. *See id.* ¶¶ 31–34.

Plaintiffs-Petitioners' claims arise from the unlawful practice of Defendants who have disregarded the 2016 regulations and adopted a policy and practice of detaining and seeking to remove individuals availing themselves of the I-130 legalization process before they have had an opportunity to apply for the provisional waiver process. Egregiously, Defendants are using the provisional waiver program as a lure to arrest, detain, and remove immigrants from the country, and prevent them from completing the provisional waiver process. When citizens and their noncitizen spouses appear at a federal immigration office in Baltimore, Maryland for an interview about their marriage and family life in connection with their I-130 application, Immigration and Customs Enforcement ("ICE") agents have detained or sought to remove the noncitizen spouse, ostensibly because that spouse is subject to a final order of removal. *See id.* ¶¶ 38–87.

Defendants thus defeat the provisional waiver process' express purpose, which is to protect United States citizens and their spouses from the extended and potentially indefinite family separation that would occur if their spouses had to leave the U.S. for the duration of their efforts to regularize their status. Defendants have deliberately ignored regulations specifically designed to protect family unity and have cruelly twisted those regulations to use as an unlawful bait-and-switch to deceive the very people the regulations were designed to protect. Law-abiding noncitizens and their U.S. citizen families are being lured to expend significant time, money, and effort to apply for support under these family unity regulations, which DHS has no intention of honoring. As this Court has previously recognized, the Defendants have "taken a rule that was promulgated for one purpose and used it for the opposite purpose," and in doing so, have rendered the provisional waiver program a nullity. *Lin v. Nielsen*, 377 F. Supp. 3d 556, 564 (D. Md. 2019). The court also recognized that, if left unchecked, Defendants' unlawful tactics will have the effect

of scaring away anyone from pursuing a provisional waiver or attending an I-130 interview, out of fear that doing so will subject them to immediate arrest and removal. *See* Ex. 1, Excerpts from March 15, 2019 hearing, at 34 ("But does it also then frustrate the entire process generally if everybody -- and the more of these cases happen, we start to see that -- if everybody at some point is under the understanding, oh, you can't go in for these interviews because they're going to step you back and deport you? Doesn't it render the entire process a nullity? Like, why would anybody show up if that's the understanding of what the Government is doing?").[1] The policy is unlawful under the due process and equal protection guarantees of the U.S. Constitution, the Immigration and Nationality Act and its regulations, and the Administrative Procedure Act.

II. Plaintiffs and the Proposed Class

Plaintiffs are married couples—each comprising one U.S. citizen and one noncitizen with a final order of removal—whose lives have been unlawfully and unconstitutionally upended by this this cruel and deceitful practice. Two of the noncitizen Plaintiffs—Elmer Sanchez and Jean Claude Nana—were detained by ICE during or immediately following their I-130 interviews. *See* Am. Compl. ¶¶ 39–63; Ex. 2; Ex. 3. In a related case, *Lin v. Nielsen*, Plaintiff Wanrong Lin was also arrested at his I-130 interview and detained. *See* Lin, 377 F. Supp. 3d at 561. Other non-citizen Plaintiffs—Misael Rodriguez Peña, Jose Carlos Aldana Martinez, and Mwiti Murithi— either did not attend their I-130 interview or are fearful to attend their scheduled I-130 interview, out of concern that they too will similarly be detained. *See* Am. Compl. ¶¶ 64–87.

Many other American citizens—both in Maryland and elsewhere—have also had their noncitizen spouses suddenly taken from them under this practice. Counsel for Plaintiffs is aware of individuals in Maryland other than named Plaintiffs who were arrested by ICE at their I-130

[1] All exhibits referenced herein are attached to this Memorandum and are described in the Affirmation of Nathaniel S. Berry, dated August 12, 2019, filed concurrently with this Memorandum.

interviews, or who are fearful of attending their I-130 interviews because of Defendants' unlawful conduct.[2]

On behalf of themselves and all others similarly situated, Plaintiffs seek declaratory and injunctive relief preserving their ability to remain with their families while availing themselves of the 2016 provisional waiver regulations. Without this Court's intervention, Defendants will continue systematically targeting the very individuals that the provisional waiver regulations were meant to protect, at great cost to them and their U.S. citizen spouses. Plaintiffs now seek to certify a class defined as:

Any U.S. citizen and his or her noncitizen spouse who:

(1) has a final order of removal and has not departed the U.S. under that order;

(2) is the beneficiary of a pending or approved I-130, Petition for Alien Relative, filed by the U.S. citizen spouse;

(3) is not "ineligible" for a provisional waiver under 8 C.F.R. § 212.7(e)(4)(i) or (vi); and

(4) is within the jurisdiction of Baltimore ICE-ERO field office (*i.e.*, the state of Maryland).

The class described above meets each of the class certification criteria set forth in the Federal Rules of Civil Procedure. Indeed, in *Calderon Jimenez v. Nielsen*, No. 18-10225-MLW

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[2] Other, similar, lawsuits have revealed that this unlawful practice by Defendants is not limited to Maryland. Across the nation, ICE is detaining and attempting to remove individuals without regard to the fact that they are in the process of seeking provisional waivers and is using the I-130 interview as a lure to trap and detain provisional waiver applicants. *See, e.g.*, *De Jesus Martinez v. Nielsen*, 341 F. Supp. 3d 400 (D.N.J. 2018) (involving the government's arrest of an individual at his I-130 interview who was seeking a provisional waiver); *Jimenez v. Nielsen*, 334 F. Supp. 3d 370 (D. Mass. 2018) (same); *Calderon v. Sessions*, 330 F. Supp. 3d 944 (S.D.N.Y. 2018) (involving the arrest of an undocumented immigrant who was in the process of pursuing consular processing and a provisional waiver). Media accounts have also documented other instances in which ICE is detaining noncitizens at their I-130 interviews, before the non-citizens have had an opportunity to avail themselves of the provisional waiver process. *See, e.g.*, Sonia Moghe and Samira Said, *Arrests at immigration marriage interviews pop up in Florida*, CNN (Oct. 3, 2018), *available at* www.cnn.com/2018/10/03/politics/undocumented-immigrants-arrests-marriage-interview/index.html.

(D. Mass. 2018) ("*Calderon Jimenez*"), involving substantially similar claims, the court certified a substantively identical class under Rule 23. *See* Ex. 4, May 17, 2019 Order in *Calderon Jimenez*, at ¶ 2.[3]

LEGAL STANDARD

A district court may certify a class when plaintiffs meet their burden to show that all of the requirements of Federal Rule of Civil Procedure 23(a) are met, including: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition to meeting the Rule 23(a) prerequisites, the party seeking class certification must also satisfy one of three categories described in Rule 23(b). *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997); *Smith v. B & O R. Co.*, 473 F. Supp. 572, 580 (D. Md. 1979). Plaintiffs here seek certification pursuant to Rule 23(b)(2). Certification is appropriate under Rule 23(b)(2) where the defendant has "acted on grounds generally applicable to the class, thereby making appropriate final injunctive

[3] In *Calderon Jimenez*, the court certified a narrower class for the petitioners' due process claim, limiting the class for that claim to persons who are the beneficiaries of *approved I-130 and conditionally approved I-212* petitions. *See id.* However, the court need not narrow the class for the due process claim in this case. Plaintiffs are challenging the government's use of the I-130 interview and provisional waiver program to lure and arrest immigrants at the I-130 application stage. A viable due process claim exists for the entire class in this case. *See Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 796 (9th Cir. 2004) (finding that the use of the adjustment of status procedure to surprise applicants with arrest and deportation raises fundamental due process concerns); *Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151, 1164 (D. Colo. 2003) (finding that the government's use of a pending application for adjustment of status as a "ruse for requiring Petitioner to appear voluntarily at the INS offices" in order to effect an easy arrest "evokes a Kafka-esque approach to the rounding up and deportation of illegal immigrants chilling in its imperviousness to principles of due process").

relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

ARGUMENT

I. The Proposed Class Meets the Requirements of Rule 23(a)

A. The Class Is So Numerous as to Render Joinder Impracticable

Rule 23 requires plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While courts have identified no bright line number of class members that satisfies this criterion, "[g]enerally, fewer than 20 [individuals] will not satisfy numerosity although more than 40 will." *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 360–61 (D. Md. 2004). Rather than focusing on a specific number, the inquiry should be directed to the question whether joinder of all potential plaintiffs would be impracticable. *See Hewlett*, 185 F.R.D. at 215. The numerosity requirement is also relaxed where, as here, Plaintiffs seek only injunctive or declaratory relief. *See Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975) ("Where the only relief sought for the class is injunctive and declaratory in nature, even speculative and conclusory representations as to the size of the class suffice…) (internal quotations omitted); *Doe v. Heckler*, 576 F. Supp. 463, 467 (D. Md. 1983) (*quoting Charleston Area Med. Ctr.*).[4]

Plaintiffs' numerosity burden is easily satisfied here; there are numerous putative members in the class. Four local immigration attorneys have affirmed that the fact pattern identified in this case is a common one. *See* Exs. 8–11. Just these four attorneys, plus the undersigned counsel in this case, can attest to representing over fifty members in the putative class. See *id.*; Berry Aff. ¶ 3.

[4] *Accord Inmates of Northumberland Cty. Prison v. Reish*, 2009 WL 8670860, at *14 (M.D. Pa. Mar. 17, 2009) ("The numerosity requirement has been relaxed in cases such as that at bar, where injunctive and declaratory relief is sought.").

Additionally, as of December 31, 2018, USCIS had 7,860 pending I-130 applications filed by U.S. citizens on behalf of their immediate family members in Maryland.[5] Even if only one percent of these were filed by and on behalf of putative class members, the numerosity requirement would be readily satisfied.

Moreover, new class members will come into the class because U.S. citizens continue to file I-130 applications for noncitizen spouses who are subject to final orders of removal. *See Rancourt v. Concannon*, 207 F.R.D. 14, 15 (D. Me. 2002) ("since this is an action for declaratory and injunctive relief against a government policy, the Court may also consider persons who might be injured in the future in the class"). The addition of "unforeseen members" to the class at "indeterminate points in the future" makes joinder impracticable. *See Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014); *see also R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 368 (S.D.N.Y. 2019) (finding joinder impracticable for certain immigrants applying for legal status certain in part because "[n]ew members regularly and continuously join the proposed class as their SIJ status petitions are adjudicated").

Beyond numbers, the composition of the class also makes joinder impracticable. Class members are spread across Maryland, may be unrepresented, and do not know one another. The relief sought is injunctive or declaratory in nature and does not involve money damages. Joinder is thus impracticable due to the difficulty of identifying and locating individual class members, inefficiencies in pursuing claims in an individual capacity, and the lack of financial resources to bring such claims. *See Hewlett*, 185 F.R.D. at 216 (finding that the (i) difficulty in identifying

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[5] *See Number of Form I-130, Petitioner for Alien Relative, by Category, Case Status, and USCIS Field Office or Service Center Location October 1 – December 31, 2018*, USCIS (Apr. 18, 2019), accessible at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I130_performancedata_fy2019_qtr1.pdf.

potential plaintiffs; (ii) likely geographic dispersion of the plaintiffs; and (iii) small size of individual claims all indicate that joinder is impracticable); *R.F.M.*, 365 F. Supp. 3d at, 368 (finding joinder impracticable in part because "it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits") (internal quotations omitted). Additionally, the government's unlawful practice of arresting non-citizens at their I-130 interviews has likely scared away numerous individuals from seeking consular processing, making the identification or joinder of those individuals impossible. *See Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981) (finding that numerosity requirement was met for class that included future applicants and applicants that have been deterred from applying because the "joinder of unknown individuals is certainly impracticable"); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding that numerosity was satisfied where "the class includes future and deterred job applicants, which of necessity cannot be identified").

B. There Are Questions Common to the Class

This case presents "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).

> Rule 23(a)(2) requires the individual's claims and the class claims to have common questions of law or fact. Rule 23(a) is relatively easy to satisfy, and very few cases have been dismissed for failing to meet this requirement. The inquiry is not whether common questions of law or fact predominate, but only whether such questions exist. Minor differences in the underlying facts of individual class members' cases do not defeat a showing of commonality where there are common questions of law.

Hewlett, 185 F.R.D. at 216 (citations omitted). "Thus, the commonality requirement is not a high bar, and individual factual differences will not preclude certification..." *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525, 533 (D. Md. 2011). "A showing that class members share a single common issue of law or fact is sufficient to satisfy the commonality prong." *Robinson v. Fountainhead Title Grp. Corp.*, 252 F.R.D. 275, 287 (D. Md. 2008).

Plaintiffs seek adjudication of two core legal questions which are common to all putative class members. They are:

1. Is the Defendants' arrest, detention, and removal (or attempted removal) of noncitizen class members without consideration of their efforts to pursue legal status through the I-130 and provisional waiver process contrary to law (specifically, the INA, APA, or U.S. Constitution)?

2. Is the Defendants' policy or practice of arresting or detaining noncitizens at those persons' I-130 interviews contrary to law (specifically, the INA, APA, or U.S. Constitution)?

These questions may be and should be answered on a class-wide basis.

C. The Plaintiffs' Claims Are Typical of the Class

"Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Hewlett*, 185 F.R.D. at 217. Plaintiffs' claims "may differ factually and still be 'typical' of the claims of class members" if the claims "arise from the same practices and patterns that allegedly give rise to the claims of other proposed class members." *Bullock v. Bd. of Educ. of Montgomery Cty.*, 210 F.R.D. 556, 560 (D. Md. 2002); *Buchanan v. Consol. Stores Corp.*, 217 F.R.D. 178, 188 (D. Md. 2003).

Plaintiffs in this case are typical of the class. Both the plaintiffs and putative class members are subject to the same arrest, detention, and removal practices and seek the same remedies. Every U.S. citizen Plaintiff and class member has begun the process of seeking legalization of the noncitizen spouse's immigration status by filing an I-130 and every noncitizen spouse is threatened with being unable to pursue a Green Card through the provisional waiver process because of Defendants' unlawful practices. *See Bullock*, 201 F.R.D. at 560 (explaining that a particular class member's claims "may differ factually and still be 'typical' of the claims of class members if it arises from the same event or practice or course of conduct that gives rise to the claims of other

class members, and if his or her claims are based on the same legal theory") (citation and quotation marks omitted); *Hewlett*, 185 F.R.D. at 217 (finding the typicality criteria was met when plaintiffs alleged that they were denied "any hair service" because of their race). The Defendants' conduct is characterized by "practices and patterns that . . . give rise to the claims" of all proposed class members. *See Bullock*, 201 F.R.D. at 560. The injunctive relief requested in this case "is compatible with the relief that could be sought by the unnamed class members." *Hewlett*, 185 F.R.D. at 217.[6]

D. Plaintiffs and Their Counsel Are Adequate Representatives

Under FRCP 23(a)(4), class representatives are in a position to fairly and adequately protect the interests of the class where (1) "the representative[s'] claims are sufficiently interrelated to and not antagonistic with the class's" and (2) "class counsel are qualified, experienced, and generally able to conduct the proposed litigation." *Hewlett*, 185 F.R.D. at 218.

Plaintiffs have no conflicts with the class they seek to represent. Plaintiffs and the putative class members share an identical interest in preventing the government from unlawfully detaining or removing noncitizen spouses without considering their efforts to pursue (or to prevent them

[6] The putative class' claims relate to the Defendants' practices and procedures and will not require the Court to review each enforcement decision to determine whether it was unlawful. Plaintiffs' claims do not hinge on the merits of their I-130 or provisional waiver applications or on ICE's individual removal determinations. Rather, Plaintiffs merely seek the opportunity to participate in the application process provided by the 2016 regulations. Because Plaintiffs are challenging the same practice without regard to the outcome of their own efforts to legalize their status, they "can fairly and adequately pursue the interests of the absent class members without being sidetracked by [their] own particular concerns." *In re Credit Suisse-AOL Sec. Litig*., 253 F.R.D. 17, 23 (D. Mass. 2008); *see also Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification" where the class raised a due process challenge to government's procedures.").

from pursuing) the I-130 legalization process and a provisional waiver. Their interests are perfectly aligned with the absent members of the putative class.

With respect to their counsel, the proposed class is represented by attorneys from the American Civil Liberties Union of Maryland and Venable LLP. Collectively, Plaintiffs' counsel have considerable experience in the areas of immigration law and constitutional law, complex federal civil rights litigation, class action litigation, and/or habeas corpus actions, including class actions involving the rights of noncitizens. Counsel have already devoted significant resources to and vigorously pursued Plaintiffs' present claims before this Court, including successfully obtaining the return of Mr. Lin from China and obtaining a temporary restraining order and preliminary injunction enjoining his detention or removal during the pendency of this action. For the same reasons, Plaintiffs' counsel also satisfy Rule 23(g)'s requirements for the appointment of class counsel. Given the serious harm inflicted as a direct result of Defendants' unlawful practices, the proposed class representatives and counsel alike are motivated to continue to zealously pursue this action. Plaintiffs and their counsel have demonstrated that they will adequately represent the interests of the class.

II. The Proposed Class Meets the Requirements of Rule 23(b)

Certification is appropriate under Fed. R. Civ. P. 23(b)(2) so that class-wide injunctive and declaratory relief may be ordered. In this case, 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). Because the Court can provide injunctive or declaratory relief to the members of the class without engaging in a case-by-case analysis of the individual circumstances of each class member, certification is appropriate. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) ("The key to the (b)(2)

class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"). Certification under Rule 23(b)(2) is appropriate where the "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Rule 23(b)(2) Advisory Committee Notes (1966 Rule Amendment).

Rule 23(b)(2) is satisfied here because Defendants have acted on grounds generally applicable to the class both in creating the provisional waiver process and then in unlawfully undermining that process. First, in 2016, DHS made the Plaintiffs and class members eligible for the provisional waiver process. Second, less than one year later, DHS began all but eliminating the benefits of these regulations—for the very class it created—through a practice of taking enforcement actions against putative class members without considering their pursuit of legal status through the I-130 and provisional waiver process. That interference with the regulations impacted every member of the purported class, who all stand to benefit from the regulations. Although not all class members have been detained or faced imminent removal, all of them are attempting to participate in a legal process and yet must live in fear of detention or removal without consideration of their pursuit of lawful status or stateside waiver (or even because of that pursuit). Plaintiffs do not ask the Court to make any individualized determinations of Plaintiff or the class members' eligibility for an I-130 visa or a provisional waiver. Rather, Plaintiffs seek a single class-wide injunction and declaratory judgment that will benefit each Plaintiff and class member by stopping Defendants' systematic interference with the I-130 and provisional waiver regulations, thereby safeguarding the regulations' core purpose of promoting family unity. Should the

Plaintiffs gain the relief they seek, each member of the putative class will be entitled to uniform relief: the end of the unlawful practices or policies by the Defendants that are meant to prevent or intimidate them from obtaining lawful status. *See Miller v. Baltimore Gas & Elec. Co.*, 202 F.R.D. 195, 198 (D. Md. 2001) ("Certification is appropriate . . . when injunctive or declaratory relief is sought on behalf of a class of similarly situated plaintiffs."). The Court should therefore certify the proposed class under Fed. R. Civ. P. 23(b)(2).

III. Alternatively, the Court Should Certify the Case as a Representative Habeas Action

In the alternative to certification under Rule 23, Plaintiffs seek certification of this case as a representative habeas action. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (finding in habeas action "compelling justification for allowing a multi-party proceeding similar to the class action authorized by [Rule 23]"). As articulated in *Sero*, a representative habeas action is justified where: (1) the challenge brought by the class is "applicable on behalf of the entire class, uncluttered by subsidiary issues"; (2) "more than a few [class members] would otherwise never receive the relief here sought on their behalf" given difficulty or inability of individual members of the class to bring individual suits; and (3) the representative action would promote judicial economy by avoiding "considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue." *Id.* at 1126.

Each of the conditions described in *Sero* is present in this case. First, as described *supra*, Plaintiffs' challenge to the Defendants' conduct applies equally to all members of the proposed class, such that class-wide injunctive or declaratory relief would provide a remedy to the entire class. Second, class members are unlikely to have the resources necessary to file timely habeas corpus petitions on their own and will not likely receive the relief sought in the absence of a class

proceeding. Third, the concerns regarding judicial economy present in *Sero* are equally applicable in this case, as the requested relief would eliminate the need for class members to proceed with individual suits. Accordingly, the proposed class can alternatively be certified as a representative habeas action.

CONCLUSION

For the foregoing reasons, the Court should certify this action as a class action and appoint the undersigned as class counsel pursuant to Rule 23, or, in the alternative, certify this action as a representative habeas proceeding on behalf of the U.S. citizen and noncitizen spouses described herein.

Dated: August 13, 2019
Baltimore, MD

Respectfully Submitted,

/s/

Nicholas T. Steiner, Esq. (Bar No. 19670)
David Rocah, Esq. (Bar No. 27315)
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND FOUNDATION
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Telephone: (410) 889-8550
steiner@aclu-md.org
rocah@aclu-md.org

Maria E. Rodriguez, Esq. (Bar No. 24463)
Nathaniel S. Berry, Esq. (Bar No. 29278)
VENABLE LLP
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
Telephone: (410) 244-7400
Facsimile: (410) 244-7742
merodriguez@venable.com
nsberry@venable.com

Counsel for Plaintiffs