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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PARS EQUALITY CENTER, *et al.*,

Plaintiffs,

v.

MIKE POMPEO, *et al.*,

Defendants.

and

FARANGIS EMAMI, *et al.*,

Plaintiffs,

v.

KIRSTJEN NIELSEN, *et al.*,

Defendants.

CASE NOS. 18-cv-7818-JD
18-cv-1587-JD

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

The Court should deny Plaintiffs' motion for class certification for failure to satisfy the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2). First, this motion for class certification comes very late with respect to the procedure of this case and as to all other matters before federal courts challenging the sufficiency of Presidential Proclamation 9645 and its waiver program. A class certification in this context would be unduly prejudicial to the government and therefore would be improper at this time.

The substantive motion for class certification should also be denied because Plaintiffs fail to demonstrate the adequacy of their putative class representatives: they make no attempt to show that the remaining named Plaintiffs still have active claims or even identify specific class representatives.

Next, class certification fails commonality and typicality because Plaintiffs' definition is overbroad and encompasses disparate class members who hold distinct legal postures as to whom different legal theories apply. The putative class contains named Plaintiffs who have mooted out of these matters, as well as those who have already reapplied and received final decision that did not result in a subsequent visa issuance, such that a Court order crafting yet another opportunity to apply will not necessarily afford any relief.

As Plaintiffs seek an injunctive remedy, they fail to show that the court can apply uniform relief to the entirety of the class. The legally appropriate remedy diverges along the lines of visa categories: applicants for immigrant visas (including diversity visas), and nonimmigrant visas, are subject to widely varying eligibility criteria. The putative class also splinters along lines of nationality, as those class members who are nationals of state sponsors of international terrorism are automatically subject to higher levels of initial burden of proof and additional national security vetting procedures. The relief proposed—court-ordered reconsideration of the prior visa refusals—is barred by the limits of the Administrative Procedure Act ("APA") and consular nonreviewability. Accordingly, Defendants oppose class certification.

BACKGROUND

I. PROCEDURAL HISTORY

On September 24, 2017, the President issued Presidential Proclamation 9645 ("P.P. 9645"), suspending the entry of nationals of several identified countries into the United States and directing the Secretary of State ("Secretary") to adopt guidance "addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants." *See* 82 Fed. Reg. 45161 §§ 2, 3 (Sept. 24, 2017). The Department promulgated internal guidance and also provided public information on the waiver process. *See* ECF No. 42 at 2.[1] Between December 8, 2017, and January 20, 2021, consular officers issued 24,750 immigrant and nonimmigrant visas pursuant to P.P. 9645 waivers. *See* U.S. Dep't of State Bureau of Consular Affairs, Presidential Proclamation 9645.[2] Over the period that P.P. 9645 was in effect, for individuals from Iran, Libya, North Korea, Somalia, Syria and Yemen, the Department had found that a total of 28,202 nonimmigrant visas and a total of 13,071 immigrant visas were ineligible for waivers of their visa application refusals.[3]

In related cases filed in 2018, Plaintiffs brought claims challenging the State Department's implementation of the waiver provisions of P.P. 9645. *See Emami* 2d Am. Compl., ECF No. 81-1; *Pars* Compl., ECF No. 1. The *Emami* and *Pars* Plaintiffs raised similar claims, including claims under the APA, 5 U.S.C. § 706(2)(A)-(D) and an *Accardi* claim.

On February 4, 2019, the Court granted in part and denied in part Defendants' first motion to dismiss the *Emami* complaint, explaining that Plaintiffs' claim for relief before the court was whether the Department did in fact implement the waiver provisions in accordance with its own guidance. ECF No. 74. Specifically, the Court allowed Plaintiffs' claims to proceed in a limited way, as a challenge under *Accardi*. ECF No. 74 at 15. The Court dismissed the *Emami* Plaintiffs' constitutional and mandamus claims. ECF No. 74 at 18. On June 5, 2020, the Court granted in part

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[1] Except where noted otherwise, all citations to the record reference the docket from *Emami v. Nielsen,* Docket No. 18-cv-1587-JD (N.D. Cal).

[2] *Available at* https://travel.state.gov/content/dam/visas/presidentialproclamation/PP-9645_Montly-Public-Reporting-January%202021.pdf (last visited July 5, 2023).

[3] *Id.*

and denied in part Defendants' second motion to dismiss and denied Defendants' motion for summary judgment. ECF No. 152. The Court allowed the APA claims to proceed—including the *Accardi* claim and newly pled claims relating to whether State Department waiver guidance was arbitrary or capricious and complied with rulemaking requirements. ECF No. 152 at 5-6, 7, 9. "The gravamen of the complaints is that the government created guidance for waivers which it has systematically ignored to deny the vast majority of waiver applications." ECF No. 152 at 1-2.

On January 20, 2021, the President issued Presidential Proclamation 10141 ("P.P. 10141"), revoking P.P. 9645 and directing the Secretary of State to instruct all embassies and consulates, consistent with applicable law and visa processing procedures, to resume visa processing in a manner consistent with that revocation. *See* 86 Fed. Reg. 7005, Rescission of Presidential Proclamations 9645 and 9983. P.P. 10141 set out very specific directives to the State Department to address those visa applicants who had been subject to P.P. 9645 and its waiver process. Most relevant here, P.P. 10141 directed the Secretary to provide the President with a "proposal to ensure that individuals whose immigrant visa applications were denied" on the basis of the Proclamations "may have their applications reconsidered," including "whether to reopen immigrant visa applications" and "whether it is necessary to charge an additional fee to process those visa applications." *Id*. Separate from this direction for immigrant visa applications, P.P. 10141 directed the report include a "plan to ensure that visa applicants are not prejudiced as a result of the previous denial due to" the prior Proclamations, "if they choose to re-apply for a visa." *Id*. P.P. 10141 thus specified that immigrant visa applications could potentially be reopened or reconsidered without a fee, but that nonimmigrant visa applicants would need to reapply and ensured they would not be prejudiced by the prior refusals. P.P. 10141 did not contemplate consideration of fee exceptions for nonimmigrant visa applicants. Importantly, P.P. 10141 or its implementation has never been challenged in this suit.

Pursuant to P.P. 10141, and following rulemaking procedures, the State Department published a new regulation to exempt immigrant visa applicants from the requirement to pay new application fees for those immigrant visas which were refused under Proclamations 9645 and 9983 more than one year prior to rescission. *See* Final Rule, 87 Fed. Reg. 2703 (Jan. 19, 2022); *see also*

22 C.F.R. §§ 22.1, 42.71. Those refused within a year could seek reopening, also without needing to pay a new fee.

On August 1, 2022, the Court granted Plaintiffs' motion for summary judgment on their APA claim under 5 U.S.C. § 706(2)(A) and instructed the parties to propose a plan for implementing the Court's summary judgment order. ECF No. 208 at 3-4. At that time, five plaintiffs remained who had nonimmigrant visas refused under P.P. 9645 and had not been issued a visa since P.P. 9645's rescission. ECF 211 at 3. And two plaintiffs remained who had sought immigrant visas refused under P.P. 9645 and had not yet been issued an immigrant visa since P.P. 9645's rescission. ECF 211 at 3.

On February 9, 2023, the Court held a status conference to discuss the competing remedy plans that had been filed by each party. ECF No. 229. On February 9, 2023, the Court issued an order which outlined relief for all "non-immigrant visa applicants who were denied a waiver during the existence of Presidential Proclamation 9645 and who have not subsequently been granted a visa," including notice to those individuals and non-assessment of fees for those who still wanted to reapply for a nonimmigrant visa. ECF No. 227. The Court ordered Defendants to file: (i) a proposed schedule for providing notice; (ii) proposed language for the notice; and (iii) whether updated materials will be required, and if so, the relevant statutory or regulatory citation for any such materials." *Id.* at 3.

On April 24, 2023, the parties filed a Joint Status Report, wherein they proposed competing terms for relief in these cases and contested whether there had been a settlement agreed to during the February 9, 2023, conference. Defendants maintained that they continued to reserve their right to appeal, had agreed to no settlement, and had submitted the Joint Status Report in good faith to facilitate the entry of a remedial order by the Court. ECF No. 234 at 3-4.

Plaintiffs filed their motion for class certification on June 15, 2023. ECF No. 242.

II. THE NAMED PLAINTIFFS

Plaintiffs in this suit have continued to shift over time since the initial complaint was filed. At the outset, *Emami* named a total of 26 noncitizens who sought either an immigrant or nonimmigrant visa. *Id.* Similarly, initially *Pars* Plaintiffs included 25 individuals, who applied for either an immigrant or nonimmigrant visa. *Id.*

Prior to granting Plaintiffs' summary judgment, on May 9, 2022, the Court dismissed 28 individual plaintiffs on joint stipulation from the parties that their claims were moot. ECF No. 201. Since summary judgment, the parties have continued to dispute who remains among the named Plaintiffs, as more visas continue to issue. ECF Nos. 211, 212, 213, 214, 221, 225. At present, based on the most recent visa processing updates from the State Department, Defendants believe that only six named Plaintiffs (one immigrant visa and five nonimmigrant visa applicants) from both cases have not obtained visas. *See* ECF No. 225 at 1, n.1.

SUMMARY OF THE ARGUMENT

Plaintiffs' motion for class certification comes too late in this case. Plaintiffs filed their initial complaints over five years ago, the challenged presidential proclamation and related guidance was rescinded over two and half years ago, this Court lifted its stays on the matter nearly sixteen months ago, and Plaintiffs sought summary judgment—on behalf of a handful of remaining plaintiffs—without ever moving for class certification over a year ago. This late-in-time class certification request is improper under Rule 23(a) and unduly prejudicial to the government, since it did not have the opportunity to respond to class-wide claims when it briefed summary judgment in Spring 2022, and it stands to revive the claims of numerous other challenges to P.P. 9645 that have long since been dismissed by other courts. The motion should be denied on this basis.

The Court should also deny Plaintiffs' motion for class certification because Plaintiffs have failed to meet their burden to establish the adequacy of their class representatives. Their motion lacks any discussion of their named Plaintiffs, whether they continue to have a live controversy, and does not even identify class representatives to allow the adequacy of those representatives to be evaluated. Numerous named Plaintiffs throughout this litigation have mooted out because they received the visa they sought. Some might no longer have plans to travel to the United States or have other avenues for travel. And in the months since summary judgment, the parties have contested just how many plaintiffs remain and whether certain claims are actually live making it critical that Plaintiffs establish the adequacy of identified class representatives.

Further, Plaintiffs' proposed class definition is overbroad and cannot establish typicality or commonality. Many claims are moot. Some putative class members have received adjudications—

including denials—after the prior proclamation was revoked, and another opportunity to apply is not warranted. Additionally, some proposed class members have no viable claim at all due to the fact that they lack any connection to the United States.

Last, Plaintiffs cannot demonstrate that the Court can issue uniform injunctive relief across the class. Summary judgment was granted on the section 706(2)(A) APA claim, for which relief is typically limited to vacatur of the unlawful agency action and remand back to the agency. Of course, here, the unlawful agency action was rescinded two and a half years ago, which is why the government argued the APA claim was moot. Further, the Court, and Plaintiffs, have been clear that the only action challenged in this case was the now-rescinded policy—the waiver program under P.P. 9645—and explicitly disclaimed any intent to challenge individual consular decisions. For that reason, this Court previously held that Plaintiffs' claims could survive a challenge of consular nonreviewability. Thus, Plaintiffs' remedy must remain similarly limited, and puts Plaintiffs' proposed relief of reconsideration of previously-refused visa applications squarely out of reach.

Further, a uniform injunction is not viable because different class members are eligible for disparate types of legally available relief. The class definition pulls in disparate categories of visas with differing requirements, and questions of available remedy produce different answers for immigrant visas and nonimmigrant visas. Additionally, the proposed class also seeks to unite many different nationalities to include nationals of state sponsors of international terrorism, as to whom Congress has restricted nonimmigrant visa issuance absent a separate discretionary decision and a mandatory interview. Relief must also be handled differently for individuals who applied again for a visa after the P.P. 9645 rescission but were denied based on Immigration and Nationality Act ("INA") § 221(g) (8 U.S.C. §1201(g). Many individuals may present circumstances that require review longer than the time limit proposed by Plaintiffs. Accordingly, the Court is left incapable of providing a single remedy that comports with the Departments' governing laws and can still provide actual relief to the class members.

ARGUMENT

I. STANDARD FOR CLASS CERTIFICATION.

A party seeking certification of a proposed class must demonstrate the existence of the four

required elements set forth in Rule 23(a) of the Federal Rules of Civil Procedure. Specifically, the moving party must show that:

(1) the class is so numerous that joinder of all members is impracticable ("numerosity");

(2) there are questions of law or fact common to the class ("commonality");

(3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and

(4) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation").

See Fed. R. Civ. P. 23(a); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011) ("Class certification is governed by Federal Rule of Civil Procedure 23."). In addition to meeting the requirements of Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Wal-Mart*, 564 U.S. at 345; *see also Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs seek certification under Rule 23(b)(2). ECF No. 242 at 15. Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that generally apply to the class." Fed. R. Civ. P. 23(b)(2). The "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (citation omitted).

"At an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1). The party seeking class certification bear the burden of demonstrating that it has met all four Rule 23(a) prerequisites and that the class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Zinser*, 253 F.3d at 1186 ("As the party seeking class certification, Zinser bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).") (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Moreover, the failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is]

indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). A district court, therefore, must conduct a rigorous analysis to determine that an action meets all the requirements of Rule 23. *Gen. Tel. Co.*, 457 U.S. at 161.

Even if a court finds that an action meets all of Rule 23's requirements, "[t]he decision of whether to certify a class is entrusted to the sound discretion of the district court." *In re Google Play Store Antitrust Litig.*, Case No. 21-md-02981-JD, 2022 WL 17252587, *29-30 (N.D. Cal. Nov. 28, 2022) (citing *Zinser*, 253 F.3d at 1186). Toward that end, a court may "probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co.*, 457 U.S. at 160. This is because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (internal quotation omitted). Nonetheless, the ultimate decision regarding class certification must necessarily "involve[] a significant element of discretion." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010).

Finally, Defendants note that while the parties have filed several proposals for remedy in these matters, the Court has yet to order formal remedy briefing. ECF Nos. 211, 212, 213, 214, 221, 225, 234. The Court permitted Plaintiffs to include their requested remedy in their motion for class certification. *See* ECF No. 241, Tr. 14:15-16; *see also* ECF No. 242 at 8; *and* ECF No. 242-11 (Plaintiffs' Proposed Order). To the extent it impacts the legal analyses below, Defendants provide their preliminary response to Plaintiffs' proposed remedy, but it is impossible to evaluate a remedy without knowing whether a class is certified or the scope of the certified class. Class certification is also not "an occasion to hold a mini-trial on the merits." *In re Google Play Store,* 2022 WL at *29-30 (citing *Amgen Inc. v. Conn. Re. Plans & Trust Funds*, 568 U.S. 455, 465-66 (2013). Defendants therefore request that the Court permit full briefing on remedy prior to issuing a final order in this matter. *Id.* (citing *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th Cir. 2015)).

II. PLAINTIFFS' LATE-IN-TIME MOTION FOR CLASS CERTIFICATION IS UNDULY PREJUDICIAL TO THE GOVERNMENT.

Plaintiffs did not seek class certification at "an early practicable time after [they] . . . sued as [] class representative[s]." Fed. R. Civ. P. 23(c). Instead, at the invitation of this Court, they sought class certification after they had prevailed on the merits. In doing so, the government was prejudiced

in opposing summary judgment and the class faced no risk of an adverse ruling on their claims. For this reason, courts have regularly rejected efforts to certify a class after resolution of the merits of a dispute.

In this case, Plaintiffs filed their complaints over five years ago (*Emami* ECF No. 1; *Pars* ECF No. 1), the rescission of the challenged P.P. 9645 and its waiver program occurred two and half years ago (*see* P.P. 10141), and the stays in these cases were lifted over sixteen months ago (ECF No. 192). Plaintiffs allege that the prior discovery disputes were the source of delay in "this matter being able to be ready for the Court's ruling," and that "in light of Defendants' accession to all of the factual and most all legal allegations in the summary judgment phase, Plaintiffs have now been able to make this motion without further discovery." ECF No. 242 at 9, n.47. But Plaintiffs give no explanation as to why those discovery disputes prevented seeking certification at an earlier time in this litigation and cite no "accession to all" issues in support of certification. At the latest, they should have sought certification prior to or simultaneously with moving for summary judgment. They have simply failed to explain why filing at that time would not have been "practicable." *See Wright v. Shock*, 742 F.2d 541, 543 (9th Cir. 1984) ("district court must rule on the issue of class certification '[a]s soon as practicable after the commencement of an action brought as a class action'") (quoting Fed. R. Civ. P. 23(c)(1) (1984)). Here, all discovery disputes were vacated in March 2021 in the Court's order staying the matters following rescission of P.P. 9645. ECF No. 176. When the stays were lifted, without pursuing any further discovery, Plaintiffs opted to file for summary judgment and did not file for class certification. ECF No. 197. Plaintiffs have provided no basis for waiting until after the merits were decided in favor of a small number of named Plaintiffs to press for global class certification.

And while the *Pars* and *Emami* plaintiffs have litigated their matters here, many other individuals and putative classes alleged similar harms under P.P. 9645 and brought their own claims in numerous courts around the country. Some of those claims were dismissed even while P.P. 9645 was still in force. *See, e.g., Alharbi v. Miller*, 368 F. Supp. 3d 527 (E.D.N.Y. 2019), *aff'd Alharbi v. Miller*, 829 Fed. App'x 570 (2d Cir. 2020). Many were dismissed as moot in the wake of the rescission of P.P. 9645 and its waiver program. *See, e.g.*, *Kavoosian v. Blinken*, 2021 WL 1226734,

at *1 (9th Cir. Feb. 9, 2021) (dismissing appeal as moot following revocation of P.P. 9645); *Motaghedi, et al. v. Blinken, et al.*, No. 1:19cv1466 (E.D. Cal. Apr. 22, 2021) (voluntarily dismissed after revocation of P.P. 9645 and Order to Show Cause from court why case should not be dismissed as moot); *Almerdaei v. Trump*, No. 19-CV-830(EK), 2021 WL 949945, at *2 (E.D.N.Y. Mar. 12, 2021) (dismissing case as moot following revocation of P.P. 9645). If this Court were to certify a class now, it would revive countless claims that were dismissed years prior in other jurisdictions.

The government has been prejudiced in two ways here. First, late certification raises the issue of a "one-way intervention" where "a plaintiff would not be bound by a decision that favors the defendant but could decide to benefit from a decision favoring the class." *Villa v. San Francisco Forty–Niners, Ltd.*, 104 F. Supp. 3d 1017, 1020 (N.D. Cal. 2015) (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974)); *see also American Pipe*, 414 U.S. at 547 (explaining that 1966 amendments were intended to ensure that "members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments"); *Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir.1995). By granting class certification now, the court would be allowing thousands of individuals whose matters have long-since been dismissed, or never pursued claims, to prevail without any risk of not prevailing. "One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success." *Villa*, 104 F. Supp. 3d at 1021 (quoting *Fireside Bank v. Super. Ct.*, 40 Cal.4th 1069, 1078 (2007)). This is a concern that arises most often in Rule 23(b)(3) class actions, but it is also a concern here, where a class member would not be bound had Plaintiffs lost, but the government would now be bound with respect to every class member if a class is certified, having not prevailed. Note, Reopening the Debate Postjudgment Certification, 66 Cornell L.Rev. 1218, 1225 (1981) ("[i]t is difficult . . . to ascertain the basis" to "distinguish[] (b)(3) actions from non-(b)(3) actions for purposes of one-way intervention").

Further, as discussed above, the government has resolved or prevailed in many cases brought by individuals who would now be class members under Plaintiffs' tardy proposal. The government prevailed in those cases, and now would be ordered to provide a remedy by a different court. That is quintessential litigation prejudice.

Second, the government is also prejudiced by not being able to seek or oppose summary judgment on class claims. As the Court knows, in seeking summary judgment the government argued only that the APA claim was moot given the rescission of the policy and the ongoing ability of Plaintiffs to obtain visas without regard to the policy. The government had been apprising the Court in a series of filings over a period of years of the status of the individual claims as they became moot through the issuance of visas, the submission of new applications, or reopening and reconsideration of pending applications. Mootness may have been the "entirety of the government's arguments in opposition to summary judgment" sought by *6 named Plaintiffs*, but the government did not waive any arguments with respect to any claims by a class of 27,000 individual visa applicants, since there was no class. *Cf. U.S. v. Mendoza*, 464 U.S. 154, 161 (1984) ("government's litigation conduct in a case is apt to differ from that of a private litigant" given the "limited resources of the government and the crowded dockets of the courts" and other "prudential concerns"). It therefore would be prejudicial to certify at this late date.

Indeed, the Ninth Circuit has stressed that while in some circumstances, it may be appropriate to certify a class after summary judgment proceedings "after extensive discussions with the parties" about how to streamline litigation and where "the defendants consented," it "might be a different case if the defendants had not consented to the chosen procedure." *Wright*, 742 F.2d at 543. In fact, the Court there favorably cited other circuit court decisions holding that "no decision on the merits of a class action can precede a determination on class certification," but found it important that in the case at hand, the defendant "waived the protection afforded by an early ruling on class certification." *Id*. There has been no such waiver here or a procedure that front-loaded merits adjudication, and we think certification at this late stage of litigation would be improper and prejudicial.[4]

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[4] We note that then Judge Stevens observed as follows with respect to late certification in a 23(b)(2) case:

> the failure to certify may make it impossible for the parties to conduct meaningful settlement negotiations because of uncertainty with respect to both the magnitude of the contingent liability and the burdens of going forward with a trial.

Jimenez v. Weinberger, 523 F.2d 689, 700 (7th Cir. 1975) (Stevens, J.). In this case, failure to seek timely class certification has made settlement discussions over the past 9 months very difficult and frustrating for both the parties and the Court for this very reason. The court in *Jimenez* ultimately affirmed a late class action

III. PLAINTIFFS FAIL TO SATISFY THE REQUIREMENTS OF FEDERAL RULES OF CIVIL PROCEDURE 23(A) OR 23(B)(2).

A. Plaintiffs Failed to Demonstrate that the Remaining Named Plaintiffs Are Adequate Class Representatives.

Plaintiffs have made no attempt to demonstrate that any of the remaining named Plaintiffs could adequately represent the class. Indeed, many of the named Plaintiffs' claims have mooted out during this litigation as they received their sought-after visas. It is the obligation of Plaintiffs to identify a class representative with a live claim to help ensure adequate representation of the class. Fed. R. Civ. P. 23(a)(4). The adequacy requirement serves to protect the due process rights of absent class members who will be bound by the judgment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). A determination of legal adequacy is based on two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* This notion is compounded by the nature of a proposed 23(b)(2) class, the members of which do not have a right to opt out of their class. *See Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam)).

Over the course of this litigation, numerous claims of named Plaintiffs have mooted out because they received their requested visas. During summary judgment briefing, the Court dismissed 28 individual plaintiffs and one organizational plaintiff for this very reason, as they no longer have live claims to pursue. ECF No. 201. Since August 31, 2022, when the Court granted summary judgment, still more consular adjudications have taken place and the parties have disputed which named Plaintiffs had live claims and whether an adjudication that resulted in a refusal on grounds unrelated to P.P. 9645 could render a claim moot. ECF Nos. 211, 212, 213, 214, 221, 225. It is particularly important for Plaintiffs to identify adequate class representatives given these disputes. Nonetheless, Plaintiffs have failed to indicate who might serve as class representatives and whether they have live claims.

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certification, but only after stating "reversal would almost certainly be required" under normal circumstances. Circumstances there were unusual because the Supreme Court had definitively resolved the legal issue for which certification was sought and "it would be futile for [the government to defend any further cases] after the decision of the . . . Supreme Court," meaning no prejudice. *Id.* at 701.

Plaintiffs' motion for class certification is devoid of any showing that the remaining named Plaintiffs are suitable class representatives with live claims. As to adequacy, Plaintiffs obliquely assert that there are no conflicts of interest between the named Plaintiffs and the putative class, and that "the class representatives have demonstrated their commitment to vigorously prosecuting the action." ECF No. 242 at 14. But Plaintiffs fail to address the reality that the vast majority of named Plaintiffs have continued to drop out of this litigation because they no longer have active claims. Indeed, this occurred as recently as February 2023. *See* ECF No. 201; *see also* ECF Nos. 211, 214, 225. Nor do Plaintiffs attempt to show adequacy for the remaining individual Plaintiffs, or that each continues to pursue a live claim. ECF No. 242 at 14.

This exact reasoning applied in a denial of class certification in another case, *Alharbi v. Miller*, that challenged the sufficiency of P.P. 9645's waiver program. 368 F. Supp. 3d at 522. *Alharbi* was a putative class action brought on behalf of Yemeni nationals where the court found that class certification was inappropriate, in part, because most of their class representatives had already received the visa they sought. While the court's holding denied the merits of class certification on plaintiffs' failure to establish other Rule 23(a) factors, it further addressed the thorny issue of plaintiffs dropping out of the suit because their visas had been issued, implicating both adequacy and typicality:

> These plaintiffs are clearly subject to unique claims and defenses, namely mootness, and, as a result, they would not have had an incentive to vigorously adjudicate the rights of those plaintiffs who have not received or were refused a visa, because they have already received the maximum amount of the primary form of relief sought in the amended complaint.

Id. at 552, n.5.

Just so here, without even an attempt to show adequacy, Plaintiffs have not shown that they would vigorously pursue their rights, or even that they are still seeking a visa. Plaintiffs baldly assert the commitment of the named plaintiffs to pursue their claims, however their motion lacks any supporting declarations or other evidence with which to substantiate or evaluate this assertion. ECF No. 242 at 14. Rather, Defendants have reason to doubt this assertion, as visa adjudications for the remaining named Plaintiffs have stalled before the agency due to the applicants' failure to communicate or take necessary next steps to pursue their visa. This suggests the named Plaintiffs

might not vigorously pursue the relief they assert they have an interest in obtaining. ECF Nos. 211, 214, 225. Accordingly, Plaintiffs have failed to meet their burden to identify or establish the adequacy of the class representatives. *Zinser*, 253 F.3d at 1186. Because Plaintiffs have failed to make any showing as to the adequacy of their purported class representatives, Defendants would request permission on surreply to respond to this point, particularly if Plaintiffs attempt to improperly do so on reply.

B. The Proposed Class Lacks Commonality and Typicality in that Class Members Occupy Distinct Legal Positions and are Subject to Particular Defenses.

The proposed class also fails to meet the commonality and typicality because some claims are moot as other putative class members have already been provided a subsequent visa adjudication without regard to the proclamation. And as discussed, some class members have already brought individual claims that have been resolved by another court. The commonality and typicality requirements of Rule 23(a) are interrelated and, in some instances, merge. *Wal-Mart*, 564 U.S. at 350. "Both [requirements] serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id*. Because the proposed class includes individuals in materially different procedural postures, Plaintiffs cannot satisfy Rule 23(a)(3). "These are not mere background differences between putative class members, as plaintiffs contend. These differences prohibit a common answer that would drive resolution of their claims." *Alharbi*, 368 F. Supp. 3d at 544 (denying class certification in another challenge to implementation of P.P. 9645, based on the plaintiffs' failure to establish commonality due to differences in procedural history and eligibility among the class members).

To establish commonality and typicality, Plaintiffs must show "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Dataproducts*, 976 F.2d at 508 (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is not met if the proposed class representatives are subject to unique

defenses. *Id.* Rather, Plaintiffs' arguments on typicality focus almost exclusively on the common alleged injury, but incorrectly assume that the legal issues remaining on remedy will be similarly uniform. ECF No. 242 at 12. They are not.

First, as discussed above, there are a number of named Plaintiffs who have mooted out of these matters since the rescission of P.P. 9645 because they have been issued the very visas they sought. *See infra* pp. 11-13. The inclusion of class representatives in the class must maintain typicality. Plaintiffs do not name any class representatives, and so Defendants look to the available pool of named Plaintiffs instead. Because the claims of these named Plaintiffs are no longer live controversies, "these plaintiffs are clearly subject to unique claims and defenses, namely mootness. . . ." *Alharbi*, 368 F. Supp. 3d at 552 n.5. Accordingly, these individuals are subject to defenses that are not applicable to the remainder of the class, and therefore undercuts typicality. *See Abrogina v. Kentech Consulting, Inc.*, Case No. 16-cv-0662 DMS(WVG), 2023 WL 3311858, *18 (S.D. Cal. May 8, 2023) (citing *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1083 (6th Cir. 1996)). "The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Id.*; *see also Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227 (9th Cir. 1996) (holding that because the named Plaintiffs had suffered injuries different from the rest of the class, they failed both adequacy and typicality prongs, and ultimately denied certification). Here, those named Plaintiffs who have received subsequently been issued visas no longer have a live controversy and would trigger legal defenses not relevant to the remainder of the putative class.

Second, Plaintiffs proposed class further loses typicality as it encompasses those individuals who have already received a subsequent consular adjudication not subject to P.P. 9645. Plaintiffs' motion proposes the following class definition:

> All applicants for visas who are nationals of Iran, Libya, North Korea, Somalia, Syria, Venezuela[5], and Yemen who (1) were refused visas under INA 212(f) pursuant to Proclamation 9645 between December 8, 2017 and January 20, 2021; (2) did not obtain a waiver of that refusal; and (3) have not subsequently obtained a visa.

[5] Defendants note that the inclusion of Venezuelan nationals in the putative class definition is improper as no Venezuelans were denied visas pursuant to P.P. 9645. *See supra* n. 2.

ECF No. 242 at 8. Because point 3 of this definition brings in all those who have "not subsequently obtained a visa," Plaintiffs' definition sweeps in those individuals who have already subsequently reapplied and were refused a visa not subject to P.P. 9645, including those individuals who were refused under INA § 221(g). In particular, individuals who were subsequently denied under INA § 221(g) and are subject to further administrative processing are susceptible to strong defenses that are different from other claimants, in that the Department of State has already reviewed their application without regard to P.P. 9645 and a fee waiver would serve no purpose since the Department will reevaluate the visa upon the submission of the needed information. For similar reasons, any class members who received visa refusals subsequent to the revocation of P.P. 9645 were necessarily based on deficiencies wholly unrelated to the proclamation or its waiver guidance, and are subject to an entirely different set of defenses—such as mootness—that this Court has never considered. *Alharbi*, 368 F. Supp. 3d at 549-50 (citing *Already, LLC v. Nike Inc.*, 568 U.S 85, 91 (2013)) ("No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." (internal quotations omitted)). Thus, for those putative class members who have subsequently reapplied for a visa and were refused a visa, they are in materially different procedural postures than those class members who have not reapplied, and are therefore subject to "unique claims and defenses, namely mootness. . . ." *Alharbi*, 368 F. Supp. 3d at 544. Accordingly, Plaintiffs' class further fails typicality and commonality because, as Defendants will further show, "[t]hese differences prohibit a common answer that would drive resolution of their claims." *Id.* [6]

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[6] Additionally, the proposed class members here do not have a common connection to the United States providing a viable claim on the merits. Indeed, the Supreme Court and other courts have limited review in cases such as this one to constitutional claims of U.S. persons sponsoring someone seeking a visa and have relied on this U.S. connection in evaluating statutory claims, without deciding if those statutory challenges could be reviewed at all. *See*, *e.g., Trump v. Hawaii,* 138 S. Ct. 2392, 2406 (2018) ("The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas."); *Kerry v. Din,* 576 U.S. 86, 101 (2015); *Kleindienst v. Mandel,* 408 U.S. 753, 770 (1972).

C. The Proposed Class Lacks Commonality and Typicality in that Class Members are Eligible for Disparate Forms of Relief, Destroying Uniformity Required for an Injunction.

The limited scope of relief, under the APA and the ever-present limit of consular nonreviewability, does not allow for the relief requested by Plaintiffs, and other legally available remedies vary widely based on individualized factors. Plaintiffs must show that the proposed class is entitled to common relief as to each count on which certification is sought. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). The Supreme Court has repeatedly held that "what matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–32 (2009) (emphasis in original). During the remedial phase of this litigation, Plaintiffs must show that their proposed class presents common eligibility for relief and that a uniform injunction will resolve the litigation class-wide. Plaintiffs' motion fails on this account.

For certification under Rule 23(b)(2), Plaintiffs must show that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360. Accordingly, Plaintiffs bear the burden to demonstrate that the differences among the proposed class members are unlikely to affect their entitlement to relief. *See id.* "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Wal-Mart*, 564 U.S. at 360). Plaintiffs' attempt to hand-waive the material differences between their class members is not persuasive. Established caselaw in this circuit holds that although "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to establish commonality]," *Hanlon*, 150 F.3d at 1019, commonality cannot be established where there is wide factual variation requiring individual adjudications of each class member's claims, *see Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 663-64 (N.D. Cal. 1976). Indeed, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350 (quotation omitted).

Like the plaintiffs in *Alharbi*, Plaintiffs' proposed resolution merely assumes that because

"the Government has treated them according to a seeming uniform policy, . . . their allegations can be resolved with equal uniformity." 368 F. Supp. 3d at 544. Plaintiffs here cite to *Leyva v. Medline Indus. Inc.* to wash away the individualized differences in remedy in their proposed class, however, Plaintiffs' reliance is misplaced. 716 F.3d 510, 513 (9th Cir. 2013); ECF No. 242 at 12. The controversy in *Leyva* was a wage-and-hour dispute and those plaintiffs had sought certification of a Rule 23(b)(3) damages class. *Id.* The circuit court held that "the precise harm" may differ, i.e. the particular damages owed to each class member, but such was common to wage-and-hour class actions and could readily be calculated once liability was resolved, and thus was not enough to predominate the class questions. *Id. Leyva*'s reasoning does not apply here, where Plaintiffs have moved under Rule 23(b)(2) for a single, uniform injunction across the entire putative class. Rather, this Court should find, as the *Alharbi* court did, that "immigration decisions are uniquely fact-based determinations," and that the divergent facts among Plaintiffs' proposed class drive disparate resolutions. 368 F. Supp. 3d at 544.

Rather, the putative class-wide eligibility for relief subdivides on the points of the differences between immigrant and nonimmigrant visa categories. Moreover, the eligibility for relief splinters further on nationality when the eligibility criteria attributable to nationals of state sponsors of terrorism are factored in. For these reasons, the Court does not have uniform relief it can issue via an injunction to the entire class. Accordingly, Plaintiffs have not met their burden to show commonality under Fed. R. Civ. P. 23(a) or (b), and the Court must deny their motion to certify a class. *See Preap v. Johnson*, 303 F.R.D. 566, 584 (N.D. Cal. 2014), *aff'd*, 831 F.3d 1193 (9th Cir. 2016) (citing *Wal-Mart*, 564 U.S. at 350*; Amchem Products, Inc v. Windsor*, 521 U.S. 591, 620 (1997)). The proposed uniform remedy is corroded by the fact that "immigration decisions are uniquely fact-based determinations," and that the divergent factors discussed below, among Plaintiffs' class, in particular visa categories and nationalities, drive disparate resolutions. *Alharbi*, 368 F. Supp. 3d at 544.

Plaintiffs' proposed class also contains noncitizens who previously sought immigrant and nonimmigrant visas and were refused under P.P. 9645 and determined not to be eligible for a waiver. Immigrant visa eligibility criteria differs from most categories of nonimmigrant visas because an

immigrant visa applicant must have an approved visa petition. *See* 8 U.S.C. §§ 1154 (describing procedures for granting immigrant status through a petition), 1153(f) (providing that a consular officer cannot grant an immigration status until authorized to do so pursuant to an approved petition under section 1154). Conversely, the eligibility criteria for noncitizens seeking a nonimmigrant visa differs as well. Importantly, a noncitizen seeking a nonimmigrant visa are subject to 8 U.S.C. § 1184(b), which presumes they are *ineligible* until the applicant proves otherwise (or are exempted from the immigrant intent bar as an applicant for an H-1B, L, or V nonimmigrant visa). Moreover, the inadmissibility waiver criteria for noncitizens seeking an immigrant visa differ from noncitizens seeking a nonimmigrant visa. *See* 22 C.F.R. §§ 22.1, 42.71. In addition, noncitizens seeking an immigrant visa may seek reconsideration if they adduce evidence to overcome a finding of ineligibility, and may have an ability to seek a waiver of a ground of ineligibility that would not be available to a noncitizen seeking a nonimmigrant visa. *See* 8 U.S.C. § 1153(d); 22 C.F.R. § 42.81(e).

Within immigrant visas, noncitizens seeking a visa in the diversity category are limited to eligibility within the fiscal year in which the Department selected their entry. "Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility." 22 C.F.R. § 42.33(a)(1). "Plainly stated, the mandamus and declaratory relief sought by [the plaintiff]—the *nunc pro tunc* processing of his Diversity Visa application after the relevant fiscal year—is statutorily barred." *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276, 282–83 (D.D.C. 2018) (citations omitted) (collecting cases). In one rare instance, *Almaqrami* stated that in such cases, where before the end of the applicable fiscal year the "plaintiff files suit and the court grants some relief—but not the visa—before October 1" it was "not implausible" that a court "might lawfully take steps to compel the government to process the plaintiff's application and issue her a diversity visa anyway." *Almaqrami v. Pompeo*, 933 F.3d 774, 780–781 (D.C. Cir. 2019). However, the *Almaqrami* court did not definitively determine whether such equitable relief would be permissible, holding that it was a merits question to be remanded to the district court. *Id*. at 781, 784. Regardless, even if such relief were available, no such visa reservations were made in time by this Court, and thus any class members, who sought an immigrant visa in the diversity category, are still subject to the eligibility

criteria in the INA, and, thus cannot be issued an immigrant visa.

Further, Plaintiffs' proposed class draws in nationals of numerous countries, including three of which that are designated state sponsors of international terrorism (Iran, North Korea, and Syria).[7] Class members who are nationals of these countries and seek a nonimmigrant visa cannot be issued a nonimmigrant visa unless or until a separate determination is made that they do not pose a threat to the safety or national security of the United States. *See* 8 U.S.C. § 1735 ("No nonimmigrant visa under section 1101(a)(15) of this title shall be issued to any alien form a country that is a state sponsor of international terrorism unless the Secretary… determines… that such alien does not pose a threat to the United States."). Further, these putative class members must appear for an interview before a consular officer. *See* 8 U.S.C. § 1202(h)(2)(D) (which precludes waiver of consular interview for nationals from state sponsors of terrorism).

Lastly, additional elements of Plaintiffs proposed remedy plan are ill-suited to a uniform class-wide injunction. *See* ECF No. 242-11. Because a consular officer adjudication of a visa application is based on the unique facts associated with the noncitizen, the timeframe varies. For example, if the consular officer determines that the noncitizen may be ineligible under a security- or terrorism-related ground of ineligibility, the consular officer may need to request assistance from the Department to coordinate review of the noncitizen's eligibility with other federal agencies that are not subject to control of the Department. *See* 8 U.S.C. § 1105. Plaintiffs' proposal for time-bound adjudications, inclusive of any separate national security processes, is unfeasible given a consular officer cannot issue a visa to a noncitizen that they have a reason to believe is ineligible. 8 U.S.C. § 1201(g). Indeed, Plaintiffs, through their request for class certification, seek to truncate the time the Executive is using to determine whether a putative class member does not pose a threat to the safety or national security of the United States. With respect, this is an area that courts lack competence to adjudge. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) ("That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation

[7] *See* Bureau of Counter Terrorism, State Sponsors of Terrorism (list of designated countries, which includes Iran, North Korea, and Syria), *available at*: https://www.state.gov/state-sponsors-of-terrorism/ (last visited July 6, 2023).

implicates sensitive and weighty interests of national security and foreign affairs."); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). Moreover, this Court has rejected Plaintiffs' prior mandamus claims, and Plaintiffs—who have no right to a visa, *see Kleindienst*, 408 U.S. at 762—should not be allowed to dictate the amount of time a consular officer takes to determine their eligibility.

Additionally, waiver of interviews is explicitly barred for members of this proposed class, as they are nationals of countries where the U.S. does not currently have consular relations, and necessarily means applications would be made outside a class member's country of origin. *See* 8 U.S.C. § 1202(h)(2)(A); *see also* the virtual consulates for Iran, [8] Libya,[9] North Korea,[10] Somalia,[11] Syria,[12] and Yemen[13] (none of these nations have current consular operations and so their nationals are required to file at a consulate outside of their country of origin).

Ultimately, this Court cannot order remedy, even one proposed in equity, that violates the law. *INS v. Pangilinan*, 486 U.S. 875, 883 (1988). And as with the P.P. 9645 putative class members in *Alharbi*, the differences among Plaintiffs' proposed class members "are not mere background differences between putative class members, as plaintiffs contend. These differences prohibit a common answer that would drive resolution of their claims." 368 F. Supp. 3d at 544. Accordingly, Plaintiffs have failed to present uniform, class-wide relief that the Court has the authority to issue, and so fail their burden of establishing eligibility for the class certification. Accordingly, the Court must deny their motion. *Zinser*, 253 F.3d at 1186.

IV. PLAINTIFFS' PROPOSED REMEDY OF RECONSIDERATION OF DENIED CONSULAR DECISIONS EXCEEDS THE SCOPE OF THE APA AND IMPROPERLY OVERRIDES CONSULAR NONREVIEWABILITY.

The uniform relief proposed by Plaintiffs goes well beyond the bounds of standard APA relief and violates the judicial limiting principle of consular nonreviewability. The current cases have

[8] *Available at*: https://ir.usembassy.gov/ (last visited July 5, 2023).
[9] *Available at*: https://ly.usembassy.gov/visas/ (last visited July 5, 2023).
[10] *Available at*: https://www.state.gov/countries-areas/north-korea/ (last visited July 5, 2023).
[11] *Available at*: https://so.usembassy.gov/ (last visited July 5, 2023).
[12] *Available at*: https://sy.usembassy.gov/ (last visited July 5, 2023).
[13] *Available at*: https://ye.usembassy.gov/visas/ (last visited July 5, 2023).

proceeded primarily as claims seeking standard APA review and the Court's prior grant of summary judgment held that the waiver guidance of P.P. 9645 was arbitrary and capricious under 5 U.S.C. § 706(2)(A). The standard corresponding remedy under § 706(2)(A) is to "set aside [the] agency action," that was held to be unlawful. *See also Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989). Cuing off Plaintiffs' assurances, the Court has held that the agency action under review here were "systemic practices with respect to the waiver program, and not individualized determinations for any specific person." ECF No. 74 at 12. In particular, the Court acknowledged that "[i]t is certainly true that certain immigration or exclusion decisions are not reviewable in court," (citing *Hawaii*, 138 S.Ct. at 2407; *Rivas v. Napolitano*, 714 F.3d 1108, 1110-11 (9th Cir. 2013)), and permitted this action to survive consular nonreviewability challenge precisely because Plaintiffs were not challenging the underlying consular decisions. *Id* at 11-12. Plaintiffs' proposed remedy, reconsideration of these prior consular decisions, necessarily requires the Court to now reach past its prior reasoning and set aside those visa refusals en masse, and thus, would flout the limits of the APA and consular nonreviewability. ECF No. 242 at 10.

Standard relief following APA review under § 706(2)(A) is to set aside the agency action that was held to be unlawful. "When a court finds that an agency regulation is invalid in substantial part, and that the invalid portion cannot be severed from the rest of the rule, its typical response is to vacate the rule and remand to the agency." *Harmon*, 878 F.2d at 494; *see also League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen,* 615 F.3d 1122, 1130 (9th Cir. 2010). Plaintiffs have previously argued during summary judgment, in regard to remedy, that this Court could reach beyond the challenged the P.P. 9645 waiver guidance, and set aside and reopen the prior consular decisions themselves. ECF No. 204 at 10-11. In support of this, Plaintiffs cited a number of cases. (ECF No. 204 at 10) (*Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993) (review of a drivers licensing policy and permitted reconsideration of a denied license application)); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (review of a Board of Immigration Appeals policy regarding resident aliens and permitted remand regarding their applications for relief from deportation); *La Union del Pueblo Entero v. FEMA*, No. 1:08-CV-487, 2017 WL 2539451, at *15 (Feb. 15, 2017) (review of a FEMA inspection policy affecting claims arising from damage due to

Hurricane Dolly, the court however declined to reach any remedy); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 49-50 (D.D.C. 2020) (review of a USCIS lesson plan on credible fear of persecution and torture determinations, and warranted new credible fear determinations and required the return of removed individuals back to the U.S.). But none of these cases address consular decisions, which are insulated from judicial interference.

For example, *Kiakombua* is distinguishable to the case at hand because the court there addressed credible fear and expedited removal decisions by Department of Homeland Security officials affecting applicants for asylum who were *inside* the United States at the time the improper guidance regarding their credible fear interviews was applied to them. *Id.* at 9-11. Indeed, "in light of [t]raditional administrative law principles[,]which dictate that, [w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated. . . ." *Id.* at 54 (citing *Harmon*, 878 F.2d at 495 n.21 (internal citations omitted)). However, in order to reach further relief beyond merely vacating the unlawful guidance, the court held that those plaintiffs had also satisfied the four-factor test for injunctive relief per *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006). *Id.* at 57. That stands in stark contrast to these cases, where Plaintiffs have made no such showing (ECF No. 242 at 15), and the individual decisions Plaintiffs seek to have set aside are barred from judicial interference.

Even if Plaintiffs articulated the factors required for additional injunctive relief, consular nonreviewability precludes this Court from reaching that far. The doctrine sweeps so broadly that it "applies even where it is alleged that the consular officer failed to follow regulations[,] . . . where the applicant challenges the validity of the regulations on which the decision was based[,] where the decision is alleged to have been based on a factual, procedural, or legal error, or where the applicant challenges "the process followed[.]" *Capistrano v. Dep't of State*, 267 F. App'x 593, 594-95 (9th Cir. 2008); *Chun v. Powell*, 223 F. Supp. 2d 204, 206 (D.D.C. 2002) (citations omitted). Courts have rejected "attempts to circumvent the doctrine by claiming [they are] not seeking a review of the consular officer's decision, but [are] challenging some other, related aspect of the decision." *Malyutin v. Rice*, 677 F. Supp. 2d 43, 46 (D.D.C. 2009) (citing cases), *summarily aff'd* No. 10- 5015,

2010 WL 2710451 (D.C. Cir. July 6, 2010), *cert denied*, 562 U.S. 1140 (2011); *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 3-5 (D.D.C. 2009).

Plaintiffs argue in their motion for class certification that because the putative class was allegedly harmed in a similar fashion, they are entitled to sweeping class-wide relief, "formed in equity," despite the fact that their proposed relief goes well beyond the scope of APA relief under 5 U.S.C. § 706(2)(A) and disregards consular nonreviewability. ECF No. 242 at 11. Simply because Plaintiffs have prevailed on the merits of their injury claim, that does not also entitle them to equitable relief. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32-33 (2008); *see also Alharbi*, 368 F. Supp. 3d at 544. Absent a showing from Plaintiffs that their proposed class is eligible for the relief, the countervailing APA statute does not allow this Court to reach agency decisions which were determined to have been beyond the scope of this Court's review. Thus, the proper relief is to set aside the various guidance provisions that the district court found violative of the APA, here limited only to P.P. 9645's waiver and its guidance. *See* ECF No. 208 at 3. Indeed, this Court has explicitly held that the individual consular decisions are beyond its scope, and for the Court to now consider them would violate consular nonreviewability. ECF No. 74 at 11-12.

The APA does not authorize the court to fashion a new special agency process, especially when it is expressly precluded by settled doctrine and issues of justiciability. *See Vermont Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good"). Plaintiffs' relief for injunctive reconsideration of visa refusals contemplates the very improper circumvention of the doctrine that has been rejected by this circuit. *Capistrano*, 267 F. App'x at 594-95 (9th Cir. 2008). Moreover, "[a] Court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law[.]" *Pangilinan*, 486 U.S. at 883 (citing *Hedges v. Dixon Cty*, 150 U.S. 182, 192 (1893); *Rees v. Watertown*, 86 U.S. 107 [19 Wall.], 122 (1874)). The Court cannot certify a class on this improper theory of uniform relief.

Lastly, because of the legal complexity pertaining to any available relief, Defendants request an opportunity to fully brief the issue of remedy, were the Court to certify a class.[14]

CONCLUSION

For these reasons, the Court should deny the motion to certify this class.

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Respectfully submitted,

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[14] Defendants note that they were ordered by the Court to provide an outline of a possible remedy in this case. (ECF 211 and ECF 234). However, Defendants have not at any time agreed to settle this case and continue to maintain that position. In particular, Defendants have consistently argued that allowing this Court to tamper with individual consular decisions would violate the doctrine of consular nonreviewability.