No. 18-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners.

DONALD J. TRUMP, President of the United States; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; L. FRANCIS CISSNA, in his official capacity as Director of U.S. Citizenship and Immigration Services; MATTHEW D. EMRICH, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of U.S. Citizenship and Immigration Services; and DANIEL RENAUD, in his official capacity as Associate Director of the Field Operations Directorate of U.S. Citizenship and Immigration Services,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

ABDIQAFAR WAGAFE, MEHDI OSTADHASSAN, HANIN OMAR BENGEZI, MUSHTAQ ABED JIHAD, and SAJEEL MANZOOR, on behalf of themselves and others similarly situated,
Real Parties in Interest-Plaintiffs.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING CONSIDERATION OF THIS PETITION

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CIRCUIT RULE 27-3 CERTIFICATE

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EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

Defendants request urgent relief on this matter because the district court has ordered the government to produce, by Wednesday April 25, 2018, a list of class members, defined to include applicants for permanent residence and naturalization where United States Citizenship and Immigration Services (USCIS) at one point determined there is an articulable link between the applicant and a national security ground for inadmissibility or removal. That list will necessarily reveal individuals who are subject to criminal or national security investigations, and in doing so, tend to reveal the existence of those investigations and allow class members to evade those investigations. This information is protected by the law-enforcement privilege, as explained in multiple declarations filed by USCIS, ICE, and the FBI.

We have sought a stay from the district court pending consideration of this mandamus petition, and the district court has indicated that it will ask on that request on April 24, 2018. Doc. 159. If the district court does not grant a stay, immediate relief is needed.

Service will be accomplished via email and through the district court's CM/ECF system. The district court will be served a copy of the petition through the Clerk of Court at William_McCool@wawd.uscourts.gov.

INTRODUCTION AND SUMMARY

Since 2008, the federal government has administered the Controlled Application and Resolution Program (CARRP) to help ensure a careful assessment of applicants for permanent residency and naturalization who have possible terrorism links or are possible agents of foreign powers. A federal district court has issued discovery orders directing the government to produce identity information for all individuals who have been flagged for this sensitive screening. These orders, issued over the government's assertion of the law-enforcement privilege , threaten grave harm to the national security of the United States. The government accordingly requests that this Court exercise its authority under 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure to issue a writ of mandamus vacating the district court's orders compelling production of this sensitive and privileged law enforcement information. Because the district court required production by this Wednesday, April 25, 2018, the government respectfully asks this Court to stay the orders while the Court considers this petition.

Plaintiffs represent classes of applicants for naturalization and lawful permanent residency. They alleged in 2017 that CARRP, a program that has existed since 2008, violates statutory and constitutional provisions by discriminating on the basis of religion and national origin. The government produced demographic information about thousands of class members, including their nationality, place of birth, and, when available, religion. But the government withheld the names and other personally identifying information about class members under the law-enforcement privilege. As

explained in detailed declarations from officials at the Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI), disclosing the names of class members would reveal that the government identified an articulable link to a national-security related ground of inadmissibility or removability for a particular individual, which could lead that individual to change behavior and disrupt government investigations. This is precisely what the law-enforcement privilege is designed to protect. See *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010); *In re DHS*, 459 F.3d 565, 571 (5th Cir. 2006); cf. *In re Perez*, 749 F.3d 849, 855-856 (9th Cir. 2014).

The district court rejected the government's position. The court stated that any harm to law enforcement was speculative and that plaintiffs' need for the identifying information would outweigh the government's interest regardless. But the purpose of the law-enforcement privilege is to prevent harm before it occurs, so it always entails a measure of prediction. The district court never explained why the detailed declarations of seven officials across multiple affected agencies did not establish the government's need to protect this highly sensitive information. Nor did the court offer a single reason why plaintiffs need the *names* of class members to make out their claims of religious and national-origin discrimination. Most recently, the court rejected a proposal by the government to provide the names of class members to plaintiffs' counsel on a restrictive, "attorneys' eyes only" basis. The court instead ordered the government to explain the basis for its national-security concerns about individual class members—information that plaintiffs did not seek in discovery and that would compromise

government investigations even more severely than turning over the privileged list of names.

The district court's orders rest on "clear and indisputable" legal errors. *Cheney* v. *United States Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (citation omitted). And the remaining mandamus factors are satisfied. The government has no other means to appeal the district court's production order, and once the information is disclosed, the harm cannot be remedied on appeal. See *Perez*, 749 F.3d at 855 (this Court granting mandamus to prevent disclosure of privileged information); *Hernandez* v. *Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010) (same). Resolution of this issue raises new and important issues for this Court. See *City of New York*, 607 F.3d at 940 (granting mandamus to resolve new and important questions about law-enforcement privilege). And even if that final factor were not met, mandamus would still be warranted to correct the district court's serious errors in requiring the government to disclose privileged and highly sensitive information. See *Hernandez*, 604 F.3d at 1102.

STATEMENT

1. The Immigration and Nationality Act (INA) charges the Secretary of Homeland Security "with the administration and enforcement" of immigration laws. 8 U.S.C. § 1103(a)(1). Among other immigration benefits, aliens may seek to adjust their status to that of lawful permanent resident (LPR). 8 U.S.C. § 1255(a). LPRs may apply for naturalization as U.S. citizens. 8 U.S.C. § 1427 *et seq.* With certain exceptions not

relevant here, adjudication of applications for permanent residence and naturalization has been delegated to USCIS, a component of the DHS.

The criteria for adjudicating adjustment-of-status and naturalization applications are largely set by statute. Applicants for adjustment to LPR status must, *inter alia*, be admissible to the United States. 8 U.S.C. § 1255(a). Criteria for admissibility are enumerated in Section 1182, which includes a number of security-related grounds of inadmissibility. 8 U.S.C. § 1182(a)(3). Similarly, applicants for naturalization must establish, *inter alia*, good moral character and attachment to the principles of the Constitution. 8 U.S.C. § 1427(a)(3). An applicant who is removable may not be eligibile for naturalization, 8 U.S.C. § 1429, and the INA provides for a number of security-related ground of removability, 8 U.S.C. § 1227(a)(4).

When USCIS receives an application for adjustment to LPR status or for naturalization, it must review the applicant's background to determine whether the applicant satisfies those statutory criteria. See 8 U.S.C. § 1446(a), (b); App. 367-68 ¶¶ 11-13; App. 445-46 ¶ 29. As part of that review, USCIS screens applicants against various government databases, including several databases maintained by the FBI and databases maintained by other agencies. App. 369-70 ¶ 17; App. 431 ¶¶ 9-10. That screening process sometimes reveals concerns related to national security. As noted above, certain national security concerns constitute grounds for inadmissibility or removability, see 8 U.S.C. §§ 1182(a)(3), 1227(a)(4), and thus may lead to denial of an application for LPR status or naturalization. National security concerns also

independently warrant investigation to keep the nation safe from terrorism, hostile foreign influence, and other harms.

In 2008, USCIS established CARRP to ensure a consistent and agency-wide approach to identify, process, and adjudicate applicants who have an articulable link to a national-security related ground of inadmissibility or removability. App. 368 ¶ 14; App. 430 ¶ 6. Applicants subject to CARRP receive more detailed investigation and vetting to address the link to national security concerns. See App. 432 ¶ 15. In some cases, this process reveals that the applicant is no longer a national security concern, and review of the individual's application for immigration benefits then proceeds outside CARRP. *Ibid.* In other cases, the national security concerns identified are confirmed. In those cases, the application for immigration benefits is denied, and further law enforcement or national security actions may be required. See App. 433 ¶ 18. Given the sensitivity of the underlying national security information—which is often derived from confidential sources and methods—and the risk that an individual who learns that he has been identified as a national security concern may change his behavior or otherwise disrupt investigations and endanger public safety, USCIS has a strict policy of not disclosing whether particular immigration-benefit applicants are subject to CARRP. See App. 369 ¶ 16; App. 433-34 ¶ 20; App. 450-52 ¶¶ 4-6.

2. In January 2017—almost a decade after the creation of CARRP—plaintiffs filed a putative class action to invalidate CARRP. Plaintiffs argued, among other things,

that CARRP discriminates on the basis of religion and national origin. App. 1-55.[1] Plaintiffs moved to certify two classes, App. 56-84, and the government moved to dismiss the complaint in its entirety, in part for lack of jurisdiction and in part for failure to state a claim, App. 85-120. On June 21, 2017, the district court denied the government's motion to dismiss, and certified nationwide classes under Federal Rule of Civil Procedure 23(b)(2) consisting of "all persons currently and in the future (1) who have or will have an application for [naturalization or adjustment of status] pending before USCIS, (2) that is subject to CARRP … and (3) that has not or will not be adjudicated by USCIS within six months of having been filed." App. 41-42; 121-51.

The case is now in the fact discovery stage of litigation. As part of the discovery process, the parties entered a stipulated protective order that limited disclosure of certain confidential information. App. 199-215. Among their discovery requests, plaintiffs sought:

> Documents sufficient to identify members of [each class], including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the naturalization application was filed, and current status of the naturalization application.

App. 180.

[1] Plaintiffs also sought to challenge any program that may replace CARRP arising from Executive Orders 13769 and 13780. The dispute here focuses only on CARRP.

The government objected to this request, explaining that the class members' identities were protected by the law-enforcement privilege and were not relevant to the claims or defenses in a facial or class-based challenge to CARRP. The government, however, agreed to produce demographic information relevant to plaintiffs' claims, including nationality and, when available, the class members' religion and nationality, to the extent such information was readily ascertainable. But consistent with the practice of many agencies involved in national security and law enforcement investigations, the government refused to admit or deny whether any particular individual's application was subject to CARRP. App. 263-66.

Plaintiffs moved to compel disclosure of the identities of the class members. Plaintiffs argued that the government failed to meet its burden to substantiate its assertion of the law-enforcement privilege; that the privilege was not absolute; and that each class member was a potential source of information relevant to the litigation. App. 273-91. The government responded by formally invoking the law-enforcement privilege in a declaration by James W. McCament, the then-Acting Director of USCIS, which explained in detail why disclosing the identifies of individuals subject to CARRP could impede ongoing and future investigations and endanger national security. App. 364-71. The government acknowledged that the law-enforcement privilege is a qualified privilege that can be pierced upon a showing of "necessity," App. 299, but the government argued that plaintiffs had failed to show any need to obtain the names and other personally identifying information of the class members, especially given that the

government had provided demographic information about the class members—including their nationality and place of birth and, when available, religion—that is directly pertinent to plaintiffs' claims. App. 299-300.

On October 19, 2017, the district court issued an order compelling the government to disclose the identities of the class members. The court rejected the government's assertion of the law-enforcement privilege, stating that the dangers that Acting Director McCament explained would follow from disclosing the identities of the class members were "mere speculation and a hypothetical result." App. 397-98. The district court went on to state that, even if the law-enforcement privilege applied, the court would find that "the need for Plaintiffs to obtain this information" would outweigh "the Government's reasons for withholding" it. App. 398. The court also "note[d] that there is a protective order in place" and suggested that class counsel could supplement the protective order to "assuage any remaining concerns on the part of the Government." *Ibid.* The court denied the government's motion for reconsideration. App. 414-16.

3. The government subsequently took up the district court's suggestion to propose supplement to the protective order with provisions better suited to preventing disclosure of a list that contained the identities of thousands of individuals who presented a national security concern. The supplement provided that the identities of class members could not be shared beyond class counsel or experts retained by class counsel, and it made plain that class counsel could not contact individuals based on the

information revealed by the list or confirm to an individual whether he or she is on the list. App. 417-27; see also App. 282. The government submitted declarations from USCIS, Immigration and Customs Enforcement (ICE), and FBI explaining the need for the supplemental protective order. App. 429-52.

Plaintiffs opposed the government's proposal, stating that their "two main reasons" for seeking the list were "to communicate with class members who may be witnesses and sources of information" and "to respond to inquiries from potential class members and inform them if their interests are represented in this case" and urged that the "Court has already approved" this use of the list. App. 466-69

On April 11, 2018 the district court declined to supplement the protective order. Notwithstanding the multiple declarations submitted by agency officials explaining that disclosure of the class list would compromise government investigations, the court stated that "there is no evidence that any individuals on the class list are or were subjects of investigations or are, generally, 'bad actors.'" App. 482. The court nevertheless stated that "potential national security risks may exist as to specific individuals" on the class list, and ruled that the government could limit the disclosure of the identities of such individuals to plaintiffs' counsel, provided that the government also produced "case-by-case determinations" detailing the national security concerns that justified this special restriction. App. 483. The court ordered production of the class list, which includes some 4,800 class members, within 14 days—by April 25, 2018. *Ibid.*

4. After obtaining authorization from the Solicitor General to file this mandamus petition, the government on April 20, 2018, asked the district court to stay its production order pending resolution of this petition. The district court has not yet acted on the government's motion, but indicated that it would rule on April 24, 2018.

ARGUMENT

I. The Court Should Exercise Its Mandamus Authority to Correct an Order That Clearly Errs in Denying Law-Enforcement Privilege Protection to the Identities of Individuals Subject to Law Enforcement Investigations

Mandamus is appropriate to review discovery orders "when particularly important interests are at stake." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (citations omitted). In particular, this Court has "exercised [its] mandamus jurisdiction 'to define the scope of an important privilege.'" *Perez*, 749 F.3d at 854 (quoting *Perry*, 591 F.3d at 1157); *see Hernandez*, 604 F.3d at 1102 (attorney-client privilege); *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1490 (9th Cir. 1989) (same); *see also Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 112 (2009) (mandamus is available to review "more consequential" privilege rulings); *City of New York*, 607 F.3d 923, 928 (2d Cir. 2010) (granting mandamus to protect law-enforcement privilege).

This Court has described five considerations for the grant of mandamus. See *Perez*, 749 F.3d at 854. First, the "party seeking the writ has no other adequate means, such as direct appeal, to attain the relief"; second, "the petitioner will be damaged or prejudiced in a way not correctible on appeal"; third, the district court is "clearly

erroneous as a matter of law"; fourth, "the district court's order "is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and fifth, the order "raises new and important problems." *Id.* at 854-55. These factors "serve as guidelines, a point of departure for [the] analysis of the propriety of mandamus relief." *Hernandez*, 604 F.3d at 1099. Importantly, "[n]ot every factor need be present at once" or even "point in the same direction." *Id.* at 1099 & 1102 (granting mandamus even though only three of the factors were met); *see Douglas v. U.S. Dist. Court for Cent. Dist. of Cal.*, 495 F.3d 1062, 1069 (9th Cir. 2007) (granting mandamus even though the fourth factor was not met). Indeed, the fourth and fifth factors will rarely both be present simultaneously. *See Perez*, 749 F.3d at 854.

A. The Government Has No Other Adequate Means to Challenge the District Court's Order

The first factor is met because the government has no "other adequate means, such as a direct appeal," to obtain relief from the district court's order. *Perez*, 749 F.3d at 854. "A discovery order … is interlocutory and non-appealable under 28 U.S.C. §§ 1291, 1292(a)(1) and 1292(b)." *Perry*, 591 F.3d at 1157 (internal quotation marks and citation omitted). Likewise, a privilege ruling is not appealable under the collateral order doctrine. *See Mohawk*, 558 U.S. at 106-13. This Court has thus consistently concluded that discovery orders rejecting invocation of a privilege satisfy the first mandamus factor. *See Perez*, 749 F.3d at 855; *Hernandez*, 604 F.3d at 1101; *Admiral*, 881 F.2d at 1491; *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760-61 (D.C. Cir. 2014); *City*

of New York, 607 F.3d at 933-935. And this Court has indicated that, where there is uncertainty as to whether a claim of privilege is appealable under the collateral order doctrine, it prefers to exercise its mandamus jurisdiction. *See Perry*, 591 F.3d at 1156. The first factor is therefore satisfied.[2]

B. The Damage Caused by Compelled Disclosure Cannot Be Corrected on Appeal

The second factor is satisfied because the government and the public "will be damaged … in a way not correctable on appeal" if the privileged information is disclosed. *Perez*, 749 F.3d at 854; *see Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting the government represents the public interest). If this Court does not vacate the district court's order through mandamus, the government will have to produce highly sensitive law enforcement and national security information. A post-judgment appeal would not provide an effective remedy because, once the information is produced, it can no longer be held in confidence by the government. *See Perry*, 591 F.3d at 1157-58. As this Court has explained, "[s]ecrecy is a one-way street: Once information is published, it cannot be made secret again." *Copley Press*, 518 F.3d at 1025; *see, e.g.*, *In re Sims,* 534 F.3d 117, 129 (2d Cir. 2008) ("[A] remedy after final judgment cannot unsay the confidential information that has been revealed.").

[2] Should the Court conclude this petition would more properly be raised as an appeal under the collateral-order doctrine, the Court should direct the Clerk to modify the docket accordingly. *See In re Copley Press*, 518 F.3d 1022 (9th Cir. 2008); *see also Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc).

This Court has consistently held that the second mandamus factor is satisfied where the alleged injury is disclosure of protected information. *See Perez*, 749 F.3d at 855 ("Once the identities of the 250 anonymous employees are disclosed, they cannot be protected by successful appeal or otherwise"); *Perry*, 591 F.3d at 1157-58 ("If Proponents prevail at trial, vindication of their rights will be not merely delayed but entirely precluded."); *Hernandez*, 604 F.3d at 110 (finding that the second factor is met because an appeal after disclosure is inadequate if it is erroneously required to disclose privileged materials); *United States v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006) (the government is prejudiced because compliance with discovery order would moot an appeal of that order). The second factor is satisfied.

C. The District Court Committed Clear Error in Ordering Disclosure of the Identities of Class Members

The third factor is satisfied because the district court's order compelling disclosure of the identifying information of the class members was "clearly erroneous as a matter of law." *Perez*, 749 F.3d at 855.

1. The District Court Clearly Erred In Rejecting the Government's Assertion of Law-Enforcement Privilege

The Supreme Court recently explained that requiring the government to provide information about individuals it targeted for surveillance "would allow a terrorist (or his attorney) to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government's surveillance program." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 412 n.4 (2013). That is precisely what the district court has

invited by directing the government to produce the names of individuals whose benefit applications have been subject to CARRP.

The identifying information of individuals being investigated for national security concerns falls squarely within the law-enforcement privilege, which protects, *inter alia*, "information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources," and information that would "otherwise ... interfere with an investigation." *City of New York*, 607 F.3d at 944; see *Sanchez* v. *City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990) (describing "official information" privilege"); cf. 5 U.S.C. § 552(b)(7)(E) (Freedom of Information Act exemption protecting "records or information compiled for law enforcement purposes" under multiple enumerated circumstances).[3] The privilege is "rooted in common sense as well as common law," particularly in the principle that "law

[3] This Court recently stated in a nonprecedential opinion that it had not formally recognized a "law enforcement privilege." *Shah v. Dep't of Justice*, 714 Fed. Appx. 657, 659 n.1 (9th Cir. 2017). District courts within this circuit have, however, understood this Court's decisions discussing the "official information" privilege, *see Sanchez,* 936 F.3d at 1033; *Kerr v. U.S. Dist. Court for N. Dist. of California*, 511 F.2d 192, 198 (9th Cir. 1975), to functionally encompass the law-enforcement privilege, see, *e.g.*, *United States v. McGraw-Hill Cos. Inc.*, No. 13-cv-779, 2014 WL 1647385, *6 (C.D. Cal. Apr. 15, 2014); *Brooks v. Cty. of San Joaquin*, 275 F.R.D. 528, 532–33 (E.D. Cal. 2011), and have generally analyzed claims of law-enforcement privilege without dispute that the privilege exists, *see, e.g.*, *Shah v. Dep't of Justice*, 89 F. Supp. 3d 1074, 1080 (D. Nev. 2015). Neither plaintiffs nor the district court here has suggested that the law-enforcement privilege does not exist. To the extent the existence of the privilege were an open question within this circuit, however, that issue would "raise[] new and important problems, or legal issues of first impression" strongly supporting mandamus. *Perez*, 749 F.3d at 855.

enforcement operations cannot be effective if conducted in full public view" and that the government and the public accordingly have an interest in "minimiz[ing] disclosure of documents who revelation might impair the necessary functioning" of law enforcement agencies. *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977); *see Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 62-63 (1st Cir. 2007). That principle is "even more compelling" in "today's times," when "the compelled production of government documents could impact highly sensitive matters relating to national security." *In re DHS*, 459 F.3d 565, 569 (5th Cir. 2006); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring) (disclosure of "security information" will generally satisfy FOIA law enforcement exemption). The government thus may invoke the privilege "to prevent disclosure of information that might impede important government functions such as conducting criminal investigations, securing the borders, or protecting the public from international threats." *In re DHS*, 459 F.3d at 571. The privilege, moreover, applies to information contained in both criminal and civil investigatory files. See *ibid.*; *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1136, 1341 (D.C. Cir. 1984); *McGraw-Hill*, 2014 WL 1647385, *6.

The law-enforcement privilege is qualified, rather than absolute. *See City of New York*, 607 F.3d at 945. In assessing a claim of law-enforcement privilege, the court must balance the government's "interest in nondisclosure" against "the need of a particular litigant for access to the privileged information." *Ibid.* (citation and brackets omitted).

There is "a pretty strong presumption against lifting the privilege." *Ibid.* (quoting *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997)). At a minimum, the "party seeking disclosure" must show a "compelling need" for the information sought in making its case. *Ibid.* And even that showing "does not automatically entitle a litigant to privileged information. Rather, disclosure is required only if that compelling need outweighs the public interest in nondisclosure." *Ibid.*

The district court's conclusion that the government must disclose the identifying information of some 4,800 class members subject to national-security review despite the government's assertion of law-enforcement privilege is clearly erroneous in several respects.

a. First, the district court clearly erred in rejecting the government's assertion of the privilege as speculative and hypothetical. *Every* assertion of law-enforcement privilege inherently involves a prediction of future risks; the purpose of the privilege is to avoid "future" harm. *City of New York*, 607 F.3d at 944; *cf. Bowen v. FDA*, 925 F.2d 1225, 1228-1229 (9th Cir. 1991) (under FOIA, need not disclose investigative techniques because disclosure "would present a serious threat to future law enforcement"). If every assertion of the privilege that relied on the risk of future harm were rejected as "mere speculation," the privilege could never be invoked. See *Black*, 564 F.2d at 541 (explaining that the privilege is "based primarily on the harm to law-enforcement efforts which *might* arise from public disclosure of [government] investigatory files") (emphasis and alteration added); *cf. Ctr. for Nat'l Sec. Studies v. DOJ*,

331 F.3d 918, 928 (D.C. Cir. 2003) (Exemption 7(A) regarding harm to enforcement proceedings necessarily "requires a predictive judgment of the harm that will result from disclosure of information" which should include "long-recognized deference to the executive" in the national security context).

Thus, as courts have long understood, the party invoking the privilege need not establish that any particular future event *will* occur; it is enough to show, through competent evidence, that disclosure would risk compromising, *inter alia*, "law enforcement techniques and procedures, information that would undermine the confidentiality of sources," or information that would "otherwise ... interfere with an investigation." *City of New York*, 607 F.3d at 944. The government met that standard here. The highest official at USCIS formally claimed the privilege in a sworn statement detailing how disclosure of the identities of individuals with an articulable link to national-security grounds of inadmissibility would threaten law-enforcement interests and public safety. App. 367-74. The Acting Director's declaration stated:

> Public confirmation that a particular individual is subject to CARRP would necessarily alert an individual that he/she may be the subject of an investigation, or at least that the government possess information that creates an articulable link to a national security ground of inadmissibility. By alerting an individual that he or she is subject to an investigation and the types of records consulted, that individual might learn the focus of these investigations. The individual could then, for example, alter his or her behavior, conceal evidence of wrongdoing, or attempt to influence witnesses or adjust his or her means of communication or financial dealings to avoid detection of the very behavior that the law-enforcement and intelligence communities have determined may be indicative of a national security threat, and which form the core of pending investigative efforts.

App. 370, ¶ 18. That declaration expressly explains how disclosure of identifying information would disrupt "law enforcement techniques and procedures" and "otherwise ... interfere with an investigation." *City of New York*, 607 F.3d at 944. Moreover, the declaration is neither vague—especially given that it concerns the same identifying information for approximately 4,800 individuals—nor conclusory. The district court's holding that Acting Director McCament's declaration failed to meet the requisite standard is clearly erroneous.

The additional declarations submitted further underscore both the harm that will result from disclosure and the clarity of the district court's error. Section Chief Eisenreich described that the FBI provides name check results to USCIS, App. 440 ¶ 7, and the public release of name check results "could result in subjects or targets of FBI investigations taking countermeasures or other actions to thwart law enforcement, thus potentially compromising investigations, confidential sources, or investigative techniques" App. 446-47, ¶ 31. Assistant Director King described that ICE, Homeland Security Investigations (HSI) shares "derogatory and investigative information" with USCIS, App. 450, ¶ 3, and the release of such information "would effectively reveal sensitive law enforcement information, in addition to revealing the general nature of HSI law enforcement techniques and procedures, and would impact national security," App. 450-51, ¶ 4. And "[r]evealing such sensitive information could undermine the efforts of HSI to carry out its mission of identifying and eliminating vulnerabilities that

post a threat to our nation's borders, as well as ensuring economic, transportation and infrastructure security, and national security." *Id.*

Despite that detailed information, the district court inexplicably stated that "there is no evidence that any individuals on the class list are or were subjects of investigations or are, generally, 'bad actors.'" App. 482. But an individual only becomes subject to CARRP if the "individual . . . has been determined to have an articulable link to" a national security or terrorist ground of inadmissibility or removability – including showing the person may be an agent of a foreign power. App. 368, ¶ 15. This often is because of ongoing national security and criminal investigations. App. 445-46, ¶¶ 29, 31; App. 450, ¶ 3. Because of that link, USCIS investigates whether the individual is inadmissible or removable on national security grounds. *Id.* Thus, the government showed evidence the list is comprised of individuals who posed national security concerns, including bad actors and individuals with national security and criminal investigations.

b. As noted above, the law-enforcement privilege is qualified, not absolute. The court must therefore "balance the public interest in nondisclosure against the need of the particular litigant for access to the privileged information." *Friedman*, 738 F.2d at 1341; see *City of New York*, 607 F.3d at 948. Generally, a "compelling need is required" to obtain protected information. *Id.* at 945.

Here, the district court acknowledged the need to conduct balancing, App. 398, but never actually did so. Rather, the court simply stated in its initial order that "the

balance weighs in favor of disclosure," App. 398, and then stated in its reconsideration order that plaintiffs had "articulated enough to tip the balance in their favor; they requested limited information—only the names of potential class members—and explained that those potential class members may already be aware of the government's additional scrutiny considering the passage of time," App. 416. Critically, however, the court never identified a single reason that plaintiffs had any need—let alone "compelling need"—for the *names* of the class members to make out their claims of religious and national-origin discrimination. *City of New York*, 607 F.3d at 945. Nor did the court provide any reasoning about how plaintiffs' unspecified need could outweigh the significant concerns expressed by the government. This failure to conduct any meaningful balancing alone renders the district court's decision clearly erroneous. *See In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (noting that the district court's "order in this case does not show engagement in this essential balancing process" and that "the failure to balance at all requires remand"); *accord Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr.*, 490 F.3d 718, 724 (9th Cir. 2007) ("We cannot review the district court's exercise of its discretion in weighing these factors unless we know that it has done so and why it reached its result").

In any event, plaintiffs have no need—much less compelling need—for personally identifying information about the class members, and thus their interest in obtaining that information cannot outweigh the government's strong interest in protecting its investigations. By providing demographic information about class

members' citizenship and birthplace and, when available, religion, the government is providing the information plaintiffs need to pursue their claims of discrimination on the basis of religion and national origin. The district court never credited either of the plaintiffs' expressed needs for information personally identifying the class members—"to communicate with class members who may be witnesses and sources of information" and "to respond to inquiries from potential class members and inform them if their interests are represented in this case." App. 466-67. Indeed, to the extent the district court addressed those potential uses of the information, the court indicated that they were improper. See App. 482 (suggesting that plaintiffs could be sanctioned if they "purposely and improperly disclose information," namely the class member identities, that is "subject to the protective order").

This Court's decision in *Perez* is instructive on this point. There, this Court granted mandamus to vacate a district court order that compelled disclosure of the identities of employees who had reported workplace violations to the Department of Labor. As in this case, the government disclosed information necessary for the opposing party to present its legal case, including "the hours the employees worked." 749 F.3d at 859. The information "not disclosed" by the Secretary "consist[ed] of *only* the identifying information." *Ibid.* The Court noted that "this information may meet the general standard for relevance under Federal Rule of Evidence 401," but the Court was "not convinced that its probative value is so great that it is 'essential' to" the opposing party's legal argument." *Ibid.* The Court then concluded that the government

could not be compelled "to reveal the identities of the informants on such a weak showing." *Ibid.*

That same reasoning dictates the result here. As in *Perez*, the information the government intends to withhold consists *only* of identifying information. And as in *Perez*, plaintiffs have not, and cannot, establish that this information is "essential" to their legal argument. 749 F.3d at 859. If anything, plaintiffs' asserted need for the information here is even less compelling than the "weak showing" made by the litigants in *Perez*. *Ibid.* Moreover, this case involves considerations of national security, public safety, and the integrity of ongoing investigations not present in *Perez*. Accordingly, this case presents a greater justification for withholding identities than the Supreme Court and this Court have already approved in *Clapper* and *Perez*.

The district court's only response to *Perez* was to distinguish it as an application of the informants' privilege rather than the law-enforcement privilege. App. 398. In the district court's view, the "premise behind the informants privilege differs from that of the law enforcement privilege" because the informants' privilege protects "individuals who wish to vindicate their own rights." *Ibid.* That distinction fails. Although protecting informants who seek to vindicate their own rights may be one purpose of the informants' privilege, it is not the only one—or even the primary one. In the seminal decision describing the informants' privilege, the Supreme Court explained that "[t]he purpose of the privilege is the furtherance and protection of the

public interest in effective law enforcement." *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957). That is precisely the interest the government invokes here.

Contrary to the district court's suggestion, there is no basis for applying different forms of analysis to these closely related privileges. See, *e.g.*, *Fortunato v. United States*, No. 08-cv-0497, 2008 WL 11339127, *3 (C.D. Cal. June 23, 2008) (concluding that there is no analytical distinction between informer's privilege and law-enforcement privilege); *cf.* 5 U.S.C. § 552(b)(7) (protecting both information that could "interfere with enforcement proceedings" or "disclose the identity of a confidential source"). If anything, the scope of the law-enforcement privilege is broader, because protecting the identities of informants is only one of several purposes of the law-enforcement privilege. *See City of New York*, 607 F.3d at 941 n.18 ("As we and many of our sister circuits have noted, however, the law enforcement privilege is not limited to protecting the identities of informers."); *In re DHS*, 459 F.3d at 569 ("[C]ase law has acknowledged the existence of a law enforcement privilege beyond that allowed for identities of confidential informants."). As in *Perez*, plaintiffs' failure to show any need for the privileged identity information means that the district court clearly erred in compelling the government to produce it.

c. Finally, the district court erred in suggesting that the existence of a protective order justified compelling disclosure. A protective order is no guarantee against disclosure; indeed, as noted above, plaintiffs' counsel have expressly stated that they plan to share the identifying information with class members, thereby informing them

that the government had linked them to national security concerns—precisely the harm the government invoked the law-enforcement privilege to avoid. Courts have upheld assertions of the law-enforcement privilege under similar circumstances, even with a protective order in place. *See City of New York*, 607 F.3d at 935-938 (explaining in detail why a protective order or similar arrangement would not suffice); *cf. Perez*, 749 F.3d at 856 (vacating order to compel identifying information despite opposing party's "promise not to retaliate"); *Islamic Shura Council of S. California v. FBI*, 635 F.3d 1160, 1168 (9th Cir. 2011) (rejecting FOIA plaintiffs' request to view protected information even under "stringent protective order"); *Arieff v. United States Dep't of Navy*, 712 F.2d 1462, 1470 (D.C. Cir. 1983) (Scalia, J., joined by R.B. Ginsburg, J.) (similar).

For similar reasons, the method of disclosure contemplated by the district court's April 11 order does not adequately protect the privileged information. The district court rejected the government's proposal to disclose personally identifying information only to class counsel under additional restrictions on dissemination. App. 482. The court instead allowed the government to make an "attorneys' eyes only" production only "as to specific individuals" presenting "potential national security risks" and only if the government also produced to plaintiffs' counsel "sufficient detail and specificity" for those determinations. *Ibid.* As explained in the declarations accompanying the government's district court stay motion, requiring the government to disclose specific reasons underlying its national security determinations would force law enforcement agencies to divulge highly sensitive information that plaintiffs did not even seek during

the discovery process and that would create harms beyond those inflicted by the court's earlier production order. First, providing case-by-case, individualized information to Plaintiffs' counsel about the national security risks of specific individuals arguably provides far less protection to national security interests than providing the names of the entire class list with no additional information. App. 502-05, ¶¶ 14-19; 509-12, ¶¶ 8-18. Second, such evidence, which may involve classified information, are subject to the law-enforcement privilege, and, perhaps the state secrets privileges. Third, the government has previously filed multiple declarations from USCIS, FBI, ICE, and TSA explaining the law-enforcement privilege covers information describing the reasons why someone is subject to national security scrutiny. Finally, if plaintiffs reach out to some class members but not others, this could itself tend to reveal information about who is and is not the subject of the most extensive governmental concern.

2. The District Court Clearly Erred In Failing to Analyze the Relevance of Individual Class Members as Potential Sources of Information in a Rule 23(b)(2) Class Action

Separate from its error on the privilege issue, the district court also erred in concluding that the identities of the class members were relevant in a Rule 23(b)(2) class action. Indeed, the district court did not consider this issue at all in its balancing. This error independently warrants mandamus and vacatur.

To certify a class under Rule 23(b)(2), plaintiffs alleged that the government acted on grounds equally applicable to the class as a whole. App. 78 (noting "the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to

none of them") (internal citation omitted). But disclosing personally identifying information about class members, such as their names, casts no light on how the class as a whole was allegedly harmed. As noted above, plaintiffs' attorneys have stated that they would like to tell plaintiffs they are subject to CARRP and gather individualized information with respect to those plaintiffs, such as individual "delays, unwarranted denials, or other impacts of CARRP." App. 282. But these interests have no relevance to the resolution of plaintiffs' class-wide claims under Rule 23(b)(2), which does not require individual notice to class members, *see* Fed. R. Civ. P. 23(c)(2)(A), and which provides for litigation "on common facts" and resolution in "a single injunction or declaratory judgment" that provides "relief to each member of the class," *Jennings v. Rodriguez*, 138 S.Ct. 830, 852 (2018). Indeed, if information about individual delays or denials is relevant, then the class should be decertified, because injunctive relief would not be appropriate to the class as a whole. *Cf. Rahman v. Chertoff*, 530 F.3d 622 626 (7th Cir. 2008) (recognizing "the impropriety of certifying open-ended classes to facilitate structural injunctions designed to regulate law-enforcement practices."). Plaintiffs cannot have it both ways. If, as plaintiffs allege, the government acted on grounds equally applicable to all class members, then individual hardships are irrelevant, and plaintiffs' own stated basis for obtaining the personally identifying information fails.

D. The Petition Raises New and Important Problems and Issues of First Impression in This Circuit

The government also satisfies the fifth mandamus factor because the district court's order raises "new and important problems, or legal issues of first impression." *Perez*, 749 F.3d at 855.[4] Here, several new and important issues are implicated.

First, this Court has no precedential decisions interpreting the requesting party's burden when seeking to pierce the law-enforcement privilege. An appellate decision on this issue would aid the government and litigants in framing their cases at the district court level and aid the government by providing guidance on what types of information may ultimately be disclosed in litigation and for what purposes. The Second Circuit recently granted a mandamus petition on precisely this question. *See City of New York*, 607 F.3d at 940 (granting writ "to address how a court should proceed when it establishes that the information at issue is subject to the [law enforcement] privilege" and describing this lacuna as a "critical aspect of our jurisprudence").

Relatedly, there are no appellate decisions discussing the proper way to balance the interests of a requesting party for law-enforcement privileged information against the government's interests in non-disclosure in a civil context. Definitive guidance from this Court on what the requesting party's burden is and what needs justify piercing

[4] The government does not contend that it satisfies the fourth factor, "oft-repeated error," but this Court has often explained that the "fourth and fifth" factors will "rarely be present at the same time," and that mandamus may be warranted if either (or, in some cases, neither) factor is present. *Perez*, 749 F.3d at 855 (citations omitted); *see also Perry*, 591 F.3d at 1157.

the privilege are novel and important questions. A ruling on these issues would also provide critical guidance to the district court, which will soon re-address the applicability of the law-enforcement privilege and balancing of interests related to disclosure under a protective order to much more extensive and future production of documents relating to CARRP. App. 478.

In addition, this matter raises new and important issues because, if law enforcement sensitive information is subject to disclosure notwithstanding the privilege, it may lead agencies to reduce information sharing, especially as it relates to national security and immigration enforcement. App. 509 ¶ 9 & App. 512 ¶ 18. This has public policy implications of the highest order. The 9/11 Commission found that both lack of information sharing and less-than-full partnership of immigration agencies contributed to the 9/11 attacks. *See* The 9/11 Commission Report, 416-17 & Executive Summary, 14 (2004). If USCIS is compelled to disclose sensitive law-enforcement information made available to it by other agencies, it would likely result in reduced information sharing and reduced effectiveness across the government in detecting and countering threats to national security.

In any event, this Court has granted mandamus to resolve important privilege disputes even without finding the fourth or fifth factors satisfied. *See Hernandez*, 604 F.3d at 1102. The same approach would be appropriate here.

II. This Court Should Grant a Stay Pending Review of the Petition

Given that the district court's order requires production of the class list on Wednesday, April 25, we ask that the Court grant an immediate stay pending its consideration of this petition.

In weighing whether to grant a stay, a court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434. Here, the government has made a strong showing that it is likely to succeed on the merits, for all the reasons explained above. Absent a stay, the government will suffer immediate, irreparable, and substantial harm, because the disclosure of sensitive national security information cannot be undone. A brief stay of the district court's production order while this Court considers the mandamus petition will not harm plaintiffs; indeed, discovery on other issues is ongoing in the district court.[5] Finally, the public interest strongly supports a stay.

[5] While the government hopes discovery can proceed without further need for relief, the government also notes its concern about the portion of the Court's April 11, 2018 Order, that indicated that the government may be required to "provide . . . affidavits from heads of agencies for future productions in which the government wishes to claim the law enforcement privilege" at the time that information is first produced in response to a discovery request. App. 478, n.1. As the government has tried to explain in detail to the district court, *see* ECF No. 119, the suggestion that defendants must claim the law-enforcement privilege through a formal declaration by an agency head at the time documents are produced reflects a fundamental

Revealing the identity of individuals who have been identified as national security concerns may cause irreparable harm to ongoing investigations, allow subjects to evade detection, and diminish the willingness of third-party agencies to share information with immigration authorities.

This Court regularly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.*, *In re United States*, No. 17-71692 (July 25, 2017) (staying all proceedings in district court); *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1106 (9th Cir. 2005); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1104 (9th Cir. 1996). The government respectfully asks the Court to do the same here.

CONCLUSION

For the foregoing reasons, this Court should immediately stay the portions of the district court's orders of October 19, 2017 (ECF No. 98), November 28, 2017 (ECF No. 102), and April 11, 2018 (ECF No. 148), grant the petition for writ of mandamus, and vacate the district court's orders to the extent they require the government to disclose the identifying information of the class members.

Respectfully Submitted,

misunderstanding of privilege law. A finding that a privilege is waived at the production step based on this erroneous and unmanageable procedure that requires agency head review – in a case where document review and productions are likely to involve hundreds of thousands of documents – would be highly problematic and inconsistent with basic privilege procedures.

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STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases for purposes of Circuit Rule 28-2.6

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the word limit Federal Rule of Appellate Procedure 21(d)(1) and Circuit Rule 21-2(c) because it contains 7790 words and does not exceed 30 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ August E. Flentje
AUGUST E. FLENTJE

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

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The district court has been provided with a copy via email of this petition for writ of mandamus.

s/ August E. Flentje
AUGUST E. FLENTJE

No. 18-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners.

DONALD J. TRUMP, President of the United States; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; L. FRANCIS CISSNA, in his official capacity as Director of U.S. Citizenship and Immigration Services; MATTHEW D. EMRICH, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of U.S. Citizenship and Immigration Services; and DANIEL RENAUD, in his official capacity as Associate Director of the Field Operations Directorate of U.S. Citizenship and Immigration Services,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

ABDIQAFAR WAGAFE, MEHDI OSTADHASSAN, HANIN OMAR BENGEZI, MUSHTAQ ABED JIHAD, and SAJEEL MANZOOR, on behalf of themselves and others similarly situated,
Real Parties in Interest-Plaintiffs.

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

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

ABDIQAFAR WAGAFE, MEHDI OSTADHASSAN, HANIN OMAR BENGEZI, MUSHTAQ ABED JIHAD, and SAJEEL MANZOOR, on behalf of themselves and others similarly situated, Plaintiffs, v. DONALD TRUMP, President of the United States; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JOHN F. KELLY, in his official capacity as Secretary of the U.S. Department of Homeland Security; LORI SCIALABBA, in her official capacity as Acting Director of the U.S. Citizenship and Immigration Services; MATTHEW D. EMRICH, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of the U.S. Citizenship and Immigration Services; DANIEL RENAUD, in his official capacity as Associate Director of the Field Operations Directorate of the U.S. Citizenship and Immigration Services, Defendants.	COMPLAINT-CLASS ACTION Case No: 2:17-cv-00094-JCC **SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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INTRODUCTION

1. This class action lawsuit seeks to stop the federal government from unconstitutionally preventing Plaintiffs, and others like them, from obtaining immigration benefits, including, but not limited to, asylum, naturalization, lawful permanent residence, and employment authorization.

2. Plaintiff Abdiqafar Wagafe is a Somali national who, at the time this lawsuit was initiated, had waited three and a half years for a decision on his pending naturalization application despite his eligibility to naturalize as a United States citizen. A mere five days after Plaintiffs filed their motion for class certification, the government provided Mr. Wagafe his long-awaited naturalization interview on February 22, 2017. The government approved Mr. Wagafe's application immediately following his interview, and swore him in as a citizen of the United States of America on March 2, 2017.

3. Plaintiff Mehdi Ostadhassan is an Iranian national who has applied for and is eligible to adjust his status to that of a lawful permanent resident. He has waited three years for a decision on his adjustment of status application.

4. Plaintiff Hanin Omar Bengezi is a Libyan national who has applied for and is eligible to adjust her status to that of a lawful permanent resident. She has waited over two years for a decision on her adjustment of status application.

5. Plaintiff Mushtaq Abed Jihad is an Iraqi national who has applied for and is eligible to naturalize as a United States citizen. He has waited more than three and a half years for a decision on his naturalization application.

6. Plaintiff Sajeel Manzoor is a Pakistani national who has applied for and is eligible to naturalize as a United States citizen. He has waited more than a year for a decision on his naturalization application.

7. All Plaintiffs identify as Muslims, are originally from Muslim-majority countries, and have resided in the United States for a significant time. The inordinate delays they experience hold their lives in a state of limbo. They are prevented from having certainty about their future residence in the United

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States, from being able to freely travel overseas, from petitioning for immigration benefits for family members, and, for those seeking naturalization, from obtaining jobs available only to U.S. citizens and from voting in U.S. elections.

8. The Constitution expressly assigns to Congress, not the executive branch, the authority to establish uniform rules of naturalization. The Immigration and Nationality Act ("INA") sets forth those rules, along with the requirements for adjustment of status to lawful permanent residence.

9. Despite the fact that Plaintiffs meet the statutory criteria to be naturalized as United States citizens or adjust their immigration status to that of a lawful permanent resident ("LPR"), U.S. Citizenship and Immigration Service ("USCIS") has refused to adjudicate their applications in accordance with the governing statutory criteria. Instead, USCIS has applied impermissible ultra vires rules under a policy known as the Controlled Application Review and Resolution Program ("CARRP"), which has prevented the agency from granting Plaintiffs' applications (and, in the case of Mr. Wagafe, caused the agency to delay granting his application until this lawsuit motivated it to do so).

10. Since 2008, USCIS has used CARRP—an internal vetting policy that has not been authorized by Congress, nor codified, subjected to public notice and comment, or voluntarily made public in any way—to investigate and adjudicate applications the agency deems to present potential national security concerns. CARRP prohibits USCIS field officers from approving an application with an alleged potential national security concern, instead directing officers to deny the application or delay adjudication—often indefinitely.

11. CARRP's definition of national security concern is far broader than the security-related ineligibility criteria for immigration applications set forth by Congress in the INA. CARRP identifies national security concerns based on deeply-flawed and expansive government watchlists and other vague and overbroad criteria that bear little, if any, relation to the statutory security-related ineligibility criteria. The CARRP definition casts a net so wide that it brands innocent, law-abiding residents, like Plaintiffs—none of whom pose a security threat—as national security concerns on account of innocuous

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activity, associations, and characteristics such as national origin.

12. Although Plaintiffs do not know the total number of people subject to CARRP at any given time, USCIS data reveals that between Fiscal Year 2008 and Fiscal Year 2012, more than 19,000 people from twenty-one Muslim-majority countries or regions were subjected to CARRP. Upon information and belief, USCIS opened nearly 42,000 CARRP cases between 2008 and 2016.

13. Moreover, two recent immigration Executive Orders issued by Defendant Donald Trump suggest the number of residents subjected to CARRP will expand in the coming months and years.

14. On January 27, 2017, Defendant Trump issued Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017) ("First EO").

15. Section 3 of the First EO suspended entry into the United States of citizens or nationals of Syria, Iraq, Iran, Yemen, Somalia, Sudan, and Libya, all of which are predominantly Muslim countries, for 90 days or more. Although the First EO said nothing about suspending adjudications, USCIS determined that the EO required it to suspend adjudication or final action on *all* pending petitions, applications, or requests involving citizens or nationals of those seven countries with the exception of naturalization applications.

16. Section 4 of the First EO further directed federal agencies to create and implement a policy of extreme vetting of all immigration benefits applications to identify individuals who are seeking to enter the country based on fraud and with the intent to cause harm or who are at risk of causing harm after admission. Upon information and belief, any such "extreme vetting" policy would expand CARRP.

17. After Judge James L. Robart enjoined the First EO in *Washington v. Trump*, No. 2:17-cv-141-JLR, ECF 52, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and the United States Court of Appeals for the Ninth Circuit denied the government's motion for stay of that order (847 F.3d 1151 (9th Cir. 2017)), Defendant Trump issued a second Executive Order on March 6, 2017. Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar.

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9, 2017) ("Second EO"). The Second EO targets the same countries as the First EO, with the exception of Iraq, and is intended to have the same broad effect as the First EO.

18. Like the First EO, the Second EO institutes an entry ban of 90 days or more for foreign nationals of the targeted countries, does not specify how it will apply to adjudications of pending applications, and directs federal agencies to create and implement a policy of extreme vetting for *all* immigration benefits. *See* Second EO §§ 2, 5. Further, a memorandum issued by Defendant Trump in connection with the Second EO cautions that the implementation of "heightened screening and vetting protocols" cannot wait, and directs the government to begin implementing these procedures immediately, even while the details of the more permanent extreme vetting policy are being developed. Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security (Mar. 6, 2017) *available at* https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security. Accordingly, upon information and belief, the Second EO sanctions a major expansion of the existing CARRP program.

19. Application of CARRP,[1] both on its own and as potentially expanded pursuant to the Second EO, to pending immigration applications is unlawful and unconstitutional. The First and Second EOs reflect a preference for one religious faith over another in the adjudication of immigration applications, and, *inter alia*, discriminate against immigrants who are Muslim or are from Muslim-majority countries on the basis of their religion and country of origin. CARRP and the "extreme vetting" program to be established under the Second EO are similarly unlawful and ultra vires. The Constitution expressly assigns to Congress, not the executive branch, the authority to establish uniform rules of naturalization. The INA sets forth those rules, along with the requirements for adjustment of status to lawful permanent

[1] As set forth below in paragraph 59, USCIS did not make information about CARRP public, and the program only was discovered through fortuity during federal court litigation. To the extent the program has shifted in name, scope, or method, Plaintiffs may have no way to obtain that information. Thus, Plaintiffs' reference to "CARRP" incorporates any similar non-statutory and sub-regulatory successor vetting policy, including pursuant to Sections 4 and 5 of the Second EO, as described in paragraphs 126-27 below.

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resident, asylum, and all other immigration benefits. By creating additional, non-statutory, substantive criteria for adjudicating immigration applications, CARRP and any successor "extreme vetting" program violate the INA, the Administrative Procedure Act ("APA") and the U.S. Constitution.

20. In addition, on information and belief, and based on USCIS' interpretation of the First EO, the applications of Plaintiff Ostadhassan, Plaintiff Bengezi, and proposed class members will be unlawfully suspended due to the application of the Second EO. Furthermore, adjudications of all Plaintiffs' and proposed class members' applications will be unlawfully subject to, and adjudicated under, CARRP or a successor "extreme vetting" program.

21. On behalf of themselves and others similarly situated, Plaintiffs therefore request that the Court enjoin USCIS from halting adjudications of immigration benefits applications for citizens and nationals of the targeted countries pursuant to the Second EO. They further request that the Court enjoin USCIS from applying CARRP (or any similar ultra vires policy/successor "extreme vetting" program) to their immigration applications and the applications of similarly situated individuals.

JURISDICTION AND VENUE

22. Plaintiffs allege violations of the INA, the APA, and the U.S. Constitution. This Court has subject matter jurisdiction under 28 U.S.C. § 1331. This Court also has authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202, and injunctive relief under 5 U.S.C. § 702 and 28 U.S.C. § 1361.

23. Venue is proper in the Western District of Washington under 28 U.S.C. §§ 1391(b) and 1391(e) because (1) Plaintiff Abdiqafar Wagafe, a citizen of the United States; Plaintiff Hanin Omar Bengezi, an applicant for lawful permanent residence; Plaintiff Mushtaq Abed Jihad, a naturalization applicant; and Plaintiff Sajeel Manzoor, a naturalization applicant, reside in this district and no real property is involved in this action; (2) a substantial part of the events giving rise to the claims occurred in this district; and (3) Plaintiffs sue Defendants in their official capacity as officers of the United States.

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PARTIES

24. Plaintiff Abdiqafar Wagafe is a thirty-two-year-old Somali national and former lawful permanent resident, who is now a citizen of the United States. He has lived in the United States since May 2007 and currently resides in SeaTac, Washington. He is Muslim. He applied for naturalization in November 2013. Even though he satisfied all statutory criteria for naturalization, USCIS subjected his application to CARRP, and as a result, a final decision was not issued for more than three and a half years. Five days after Plaintiffs filed their Motion for Class Certification, on February 14, 2017, USCIS contacted Plaintiff Wagafe to inform him that it had scheduled his long-awaited naturalization interview for February 22, 2017. At his interview, USCIS found Plaintiff Wagafe met all the statutory criteria and approved his naturalization application on the spot following the interview. He became a U.S. citizen on March 2, 2017.

25. Plaintiff Mehdi Ostadhassan is a thirty-three-year-old national of Iran. He has lived in the United States since 2009 and resides in Grand Forks, North Dakota. He applied for adjustment to lawful permanent resident status in February 2014. He is Muslim. Even though he satisfies all statutory criteria for adjustment of status, USCIS has suspended or will suspend adjudication of his application under the First and Second EOs, respectively, and has subjected his application to CARRP or its successor "extreme vetting" program, and, as a result, a final decision has not been issued.

26. Plaintiff Hanin Omar Bengezi is a thirty-three-year-old national of Libya. She has lived in the United States since December 21, 2014, and currently resides in Redmond, Washington. After marrying a United States citizen, Ms. Bengezi applied for adjustment to lawful permanent resident status in February 2015. She is Muslim. Though she is a Canadian citizen and satisfies all statutory criteria for adjustment of status, USCIS has suspended or will suspend adjudication of her application under the First or Second EOs, respectively, and has subjected her application to CARRP or its successor "extreme vetting" program, and, as a result, a final decision has not been issued.

27. Plaintiff Mushtaq Abed Jihad is a forty-four-year-old national of Iraq. He has lived in the United

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States since August 2008, and currently resides in Renton, Washington. He is Muslim. He applied for naturalization in July 2013. Even though he satisfies all statutory criteria for naturalization, USCIS has subjected his application to CARRP or its successor "extreme vetting" program, and, as a result, a final decision has not been issued for more than three and a half years.

28. Plaintiff Sajeel Manzoor is a forty-year-old national of Pakistan. He has lived in the United States since August 2001, and currently resides in Newcastle, Washington. He is Muslim. He applied for naturalization in November 2015. Even though he satisfies all statutory criteria for naturalization, USCIS has subjected his application to CARRP or its successor "extreme vetting" program, and, as a result, a final decision has not been issued for more than one year.

29. Defendant Donald Trump is the President of the United States. Plaintiffs sue Defendant Trump in his official capacity.

30. Defendant USCIS is a component of the Department of Homeland Security ("DHS"), and is responsible for overseeing the adjudication of immigration benefits. USCIS implements federal law and policy with respect to immigration benefits applications.

31. Defendant John F. Kelly is the Secretary of DHS, the department under which USCIS and several other immigration agencies operate. Accordingly, Secretary Kelly has supervisory responsibility over USCIS. Plaintiffs sue Defendant Kelly in his official capacity.

32. Defendant Lori Scialabba is the Acting Director of USCIS. Acting Director Scialabba establishes and implements immigration benefits applications policy for USCIS and its subdivisions. Plaintiffs sue Defendant Scialabba in her official capacity.

33. Defendant Matthew D. Emrich is the Associate Director of the Fraud Detection and National Security Directorate of USCIS ("FDNS"), which is ultimately responsible for determining whether individuals filing applications for immigration benefits pose a threat to national security, public safety, or the integrity of the nation's legal immigration system. Associate Director Emrich establishes and implements policy for FDNS. Plaintiffs sue Defendant Emrich in his official capacity.

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34. Defendant Daniel Renaud is the Associate Director of the Field Operations Directorate of USCIS, which is responsible for and oversees the processing and adjudication of immigration benefits applications through the USCIS field offices and the National Benefits Center. Plaintiffs sue Defendant Renaud in his official capacity.

LEGAL FRAMEWORK

A. Naturalization

35. To naturalize as a U.S. citizen, an applicant must satisfy certain eligibility criteria under the INA and its implementing regulations. *See generally* 8 U.S.C. §§ 1421-1458; 8 C.F.R. §§ 316.1-316.14.

36. Applicants must prove that they are "at least 18 years of age," 8 C.F.R. § 316.2(a)(1); have "resided continuously, after being lawfully admitted" in the United States, "for at least five years"; and have been "physically present" in the United States for "at least half of that time," 8 U.S.C. § 1427(a)(1).

37. Applicants must also demonstrate "good moral character" for the five years preceding the date of application, "attach[ment] to the principles of the Constitution of the United States, and favorabl[e] dispos[ition] toward the good order and happiness of the United States . . . ." 8 C.F.R. § 316.2(a)(7).

38. An applicant is presumed to possess the requisite "good moral character" for naturalization unless, during the five years preceding the date of the application, he or she is found (1) to be a habitual drunkard, (2) to have committed certain drug-related offenses, (3) to be a gambler whose income derives principally from gambling or has been convicted of two or more gambling offenses, (4) to have given false testimony for the purpose of obtaining immigration benefits; or if the applicant (5) has been convicted and confined to a penal institution for an aggregate period of 180 days or more, (6) has been convicted of an aggravated felony, or (7) has engaged in conduct such as aiding Nazi persecution or participating in genocide, torture, or extrajudicial killings. 8 U.S.C. § 1101(f)(6).

39. The statutory and regulatory requirements set forth in paragraphs 37-38 are less stringent for certain persons who married U.S. citizens and employees of certain nonprofit organizations, in that less

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than five years of residency and good moral character are required. *See generally* 8 U.S.C. § 1430; 8 C.F.R. §§ 319.1 and 319.4.

40. An applicant is barred from naturalization for national security-related reasons in circumstances limited to those codified in 8 U.S.C. § 1424, including, *inter alia*, if the applicant has advocated, is affiliated with any organization that advocates, or writes or distributes information that advocates, "the overthrow by force or violence or other unconstitutional means of the Government of the United States," the "duty, necessity, or propriety of the unlawful assaulting or killing of any officer . . . of the Government of the United States," or "the unlawful damage, injury, or destruction of property."

41. Once an individual submits an application, USCIS must conduct a background investigation, *see* 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1, which includes a full criminal background check by the Federal Bureau of Investigation ("FBI"), *see* 8 C.F.R. § 335.2.

42. After completing the background investigation, USCIS must schedule a naturalization examination at which the applicant meets with a USCIS examiner for an interview.

43. In order to avoid inordinate processing delays and backlogs, Congress has stated "that the processing of an immigration benefit application," which includes naturalization, "should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571(b). USCIS must either grant or deny a naturalization application within 120 days of the date of the examination. 8 C.F.R. § 335.3.

44. If the applicant has complied with all requirements for naturalization, federal regulations state that USCIS "*shall* grant the application." 8 C.F.R. § 335.3(a) (emphasis added).

45. Courts have long recognized that "Congress is given power by the Constitution to establish a uniform Rule of Naturalization. . . . And when it establishes such uniform rule, those who come within its provisions are entitled to the benefit thereof as a matter of right. . . ." *Schwab v. Coleman*, 145 F.2d 672, 676 (4th Cir. 1944) (emphasis added); *see also Marcantonio v. United States*, 185 F.2d 934, 937 (4th Cir. 1950) ("The opportunity having been conferred by the Naturalization Act, there is a statutory

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right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate." (quoting *Tutun v. United States*, 270 U.S. 568, 578 (1926))).

46. Once an application is granted, the applicant is sworn in as a United States citizen.

B. Adjustment of Status to Lawful Permanent Resident

47. Federal law allows certain non-citizens to adjust their immigration status to that of a lawful permanent resident ("LPR").

48. Several events may trigger eligibility to adjust to LPR status, including, but not limited to, an approved petition through a family member, such as a U.S. citizen spouse, or employer. *See, e.g.*, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1.

49. In general, a noncitizen who is the beneficiary of an approved immigrant visa petition and who is physically present in the United States may adjust to LPR status if he or she "makes an application for such adjustment," was "inspected and admitted or paroled" into the United States, is eligible for an immigrant visa and admissible to the United States, and the immigrant visa is immediately available to the applicant at the time the application is filed. 8 U.S.C. §§ 1255(a)(1)-(3); 8 C.F.R. § 245.1.

50. An adjustment applicant may be found inadmissible, and therefore ineligible to become an LPR, if certain security-related grounds apply, including, *inter alia*, the applicant has engaged in terrorist activity, is a representative or member of a terrorist organization, endorses or espouses terrorist activity, or incites terrorist activity. *See* 8 U.S.C. § 1182(a)(3). USCIS's definition of a national security concern in CARRP is significantly broader than these security-related grounds of inadmissibility set by Congress.

51. Congress has directed USCIS to process immigration benefit applications, including for adjustment of status, within 180 days. 8 U.S.C. § 1571(b).

C. Other Immigration Benefits

52. Federal laws provide noncitizens living within the United States the opportunity to apply for a

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myriad of other immigration benefits apart from either naturalization or adjustment of status.

53. For example, persons fleeing persecution or torture may apply for asylum under 8 U.S.C. § 1158, or withholding of removal, under 8 U.S.C. § 1231(b)(3). Victims of certain crimes and trafficking who have suffered serious harm and who have cooperated with law enforcement may apply for nonimmigrant visas under 8 U.S.C. §§ 1101(a)(15)(T), (U). Certain noncitizens from designated countries may apply for Temporary Protected Status ("TPS") in the event of, *inter alia*, a natural disaster or political upheaval in their country of origin. 8 U.S.C. § 1254a. In addition, a significant number of noncitizens within the United States are eligible for employment authorization based on either their current immigration status, their employment status, or their temporary immigration status, including while other applications for immigration benefits are pending. *See generally* 8 C.F.R. § 274.12a(a)-(c).

54. Every immigration benefit has enumerated statutory and/or regulatory requirements that applicants must affirmatively establish to demonstrate eligibility. In addition, each applicant generally must show that they are admissible under 8 U.S.C. § 1182 and/or that any past immigration violation or criminal conduct does not disqualify them for the benefit sought. *See*, *e.g.*, 8 U.S.C., §§ 1158(b)(2) (precluding asylum eligibility to individuals found to have persecuted others, to have been convicted of "a particularly serious crime," or to present a danger to national security); 1231(b)(3)(B) (precluding applicants from receiving withholding of removal based on national security grounds); 1254a(c)(2)(B)(i) (precluding applicants from qualifying for TPS if they have been convicted of a felony or two or more misdemeanors).

FACTUAL BACKGROUND

A. The Controlled Application Review and Resolution Program ("CARRP")

55. In April 2008, USCIS created CARRP, an agency-wide policy for identifying, processing, and adjudicating immigration applications that raise "national security concerns." As described below, however, CARRP unlawfully imposes extra statutory rules and criteria to delay and deny applicants immigration benefits to which they are entitled.

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56. Congress did not enact CARRP, and USCIS did not promulgate it as a proposed rule with the notice-and-comment procedures mandated by the APA. *See* 5 U.S.C. § 553(b)-(c).

57. Upon information and belief, prior to CARRP's enactment, USCIS simply delayed the adjudication of many immigration applications that raised possible national security concerns, in part due to backlogs created by the FBI Name Check process (one of many security checks utilized by USCIS).

58. Indeed, the U.S. District Court for the Western District of Washington previously certified a district class of hundreds of naturalization applicants whose cases were delayed due to FBI Name Checks, *see Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008), and denied the defendants' motion to dismiss the suit, *see Roshandel*, 2008 WL 1969646 (W.D. Wash. May 5, 2008). The case resulted in a settlement in which the defendants agreed to adjudicate class member applications within a specified time period. *See Roshandel*, No. C07-1739MJP, Dkt. 81 (W.D. Wash. Aug. 25, 2008).

59. Now, in lieu of delays based on the FBI Name Check process, USCIS delays applications by applying CARRP. Since CARRP's inception, USCIS has not made information about CARRP available to the public, except in response to Freedom of Information Act ("FOIA") requests and litigation to compel responses to those requests. *See ACLU of Southern California v. USCIS*, No. CV 13-861 (D.D.C. filed June 7, 2013). In fact, the program was unknown to the public, including applicants for immigration benefits, until it was discovered in litigation challenging an unlawful denial of naturalization in *Hamdi v. USCIS*, No. EDCV 10-894 VAP (DTBx), 2012 WL 632397 (C.D. Cal. Feb. 25, 2012), and then revealed in greater detail through the government's response to a FOIA request.

60. CARRP directs USCIS officers to screen citizenship and immigration benefits applications for national security concerns.

61. If a USCIS officer determines that an application presents a national security concern, he or she will take the application off a routine adjudication track and—without notifying the applicant—place it

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on a CARRP adjudication track where it is subject to distinct procedures, heightened scrutiny, and, most importantly, extra-statutory criteria that result in lengthy delays and prohibit approvals, except in limited circumstances, regardless of an applicant's statutory eligibility.

1. CARRP's Definition of a National Security Concern

62. According to the CARRP definition, a national security concern arises when an individual or organization has been determined to have an articulable link—no matter how attenuated or unsubstantiated—to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the INA. Those sections render inadmissible or removable any individual who, *inter alia*, "has engaged in terrorist activity" or is a member of a "terrorist organization." 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4).

63. For the reasons described herein, an individual need not be actually suspected of engaging in any unlawful activity or joining any proscribed organization to be branded a national security concern under CARRP.

64. CARRP distinguishes between two types of national security concerns: those ostensibly involving "Known or Suspected Terrorists" ("KSTs"), and those ostensibly involving "non-Known or Suspected Terrorists" ("non-KSTs").

65. USCIS automatically considers an applicant a KST, and thus a national security concern, if his or her name appears in the Terrorist Screening Database, also referred to as the Terrorist Watchlist ("TSDB" or "Watchlist"). USCIS, therefore, applies CARRP to any applicant whose name appears in the TSDB.

66. Upon information and belief, the TSDB includes approximately one million names, many of whom present no threat to the United States.

67. The government's Watchlisting Guidance sets a very low "reasonable suspicion" standard for placement on the Watchlist. Under the Guidance, concrete facts are not necessary to satisfy the reasonable suspicion standard, and uncorroborated information of questionable or even doubtful

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reliability can serve as the basis for blacklisting an individual. The Guidance further reveals that the government blacklists non-U.S. citizens, including LPRs, even where it cannot meet the already low reasonable suspicion standard of purported involvement with terrorist activity. The Guidance permits the watchlisting of noncitizens simply for being associated with someone else who has been watchlisted, even if there is no known involvement with that person's purportedly suspicious activity. The Guidance also states explicitly that noncitizens may be watchlisted based on information that is very limited or of suspected reliability. These extremely loose standards significantly increase the likelihood that the TSDB contains information on individuals who are neither known nor appropriately suspected terrorists.

68. Furthermore, the Terrorist Screening Center ("TSC"), which maintains the TSDB, has failed to ensure that individuals who do not meet the Watchlist's criteria are promptly removed from the TSDB (or not blacklisted in the first place). In 2013 alone, the watchlisting community nominated 468,749 individuals to the TSDB, and the TSC rejected only approximately one percent of those nominations. Public reports also confirm that the government has nominated or retained people on government watchlists as a result of human error.

69. The federal government's official policy is to refuse to confirm or deny any given individual's inclusion in the TSDB or provide a meaningful opportunity to challenge that inclusion. Nevertheless, individuals can become aware of their inclusion due to air travel experiences. In particular, individuals may learn that they are on the "Selectee List" or the "Expanded Selectee List," subsets of the TSDB, if their boarding passes routinely display the code "SSSS" or they are routinely directed for additional screening before boarding a flight over U.S. airspace. They may also learn of their inclusion in the TSDB if U.S. federal agents regularly subject them to secondary inspection when they enter the United States from abroad. Such individuals are also often unable to check-in for flights online or at airline electronic kiosks at the airport.

70. Where the KST designation does not apply, CARRP instructs officers to look for indicators of a non-Known or Suspected Terrorist ("non-KST") concern.

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71. These indicators fall into three categories: (1) statutory indicators; (2) non-statutory indicators; and (3) indicators contained in security check results.

72. Statutory indicators of a national security concern arise when an individual generally meets the definitions described in Sections 212(a)(3)(A), (B), and (F), and 237(a)(4)(A) and (B) of the INA (codified at 8 U.S.C. § 1182(a)(3)(A), (B), and (F) and § 1227(a)(4)(A) and (B)), which list the security and terrorism grounds of inadmissibility and removability.[2] However, CARRP expressly defines statutory indicators of a national security concern more broadly than the statute, stating that the facts of the case do not need to satisfy the legal standard used in determining admissibility or removability under those provisions of the INA to give rise to a non-KST national security concern.

73. For example, CARRP policy specifically directs USCIS officers to scrutinize evidence of charitable donations to organizations later designated as financiers of terrorism by the U.S. Treasury Department and to construe such donations as evidence of a national security concern, even if an individual had made such donations without any knowledge that the organization was engaged in proscribed activity. Such conduct would not make an applicant inadmissible for a visa, asylum, or LPR status under the statute, *see* 8 U.S.C. § 1182(a)(3)(B), nor does it have any bearing on a naturalization application.

74. Under CARRP, non-statutory indicators of a national security concern include travel through or residence in areas of known terrorist activity; a large scale transfer or receipt of funds; a person's employment, training, or government affiliations; the identities of a person's family members or close associates, such as a roommate, co-worker, employee, owner, partner, affiliate, or friend; or simply other suspicious activities.

[2] These security and terrorism grounds of inadmissibility, if applicable, may bar an applicant from obtaining lawful permanent resident status, asylum, or a visa. However, they do not bar an applicant who is already a lawful permanent resident from naturalization, which is governed by the statutory provisions specific to naturalization. *See* 8 U.S.C. §§ 1421-1458. The security and terrorism provisions also may render a non-citizen removable, *see* 8 U.S.C. § 1227(a)(4), but the government has not charged Plaintiffs with removability under these provisions.

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75. Finally, security check results are considered indicators of a national security concern in instances where, for example, the FBI Name Check produces a positive hit on an applicant's name and the applicant's name is associated with a national security-related investigatory file. Upon information and belief, this indicator leads USCIS to label applicants national security concerns solely because their names appear in a law enforcement or intelligence file, even if they were never the subject of an investigation. For example, an applicant's name could appear in a law enforcement file in connection with a national security investigation because he or she once gave a voluntary interview to an FBI agent, he or she attended a mosque that was the subject of FBI surveillance, or he or she knew or was associated with someone under investigation.

76. Upon information and belief, CARRP labels applicants national security concerns based on vague and overbroad criteria that often turn on national origin or innocuous and lawful activities or associations. These criteria are untethered from the statutory criteria that determine whether a person is eligible for the immigration status or benefit they seek, and are so general that they necessarily ensnare individuals who pose no threat to the security of the United States.

2. Delay and Denial

77. Once a USCIS officer identifies a CARRP-defined national security concern, the application is subjected to CARRP's rules and procedures that guide officers to deny such applications or, if an officer cannot find a basis to deny the application, to delay adjudication as long as possible.

a) Deconfliction

78. One such procedure is called "deconfliction," which requires USCIS to coordinate with—and, upon information and belief, subordinate its authority to—the law enforcement agency, often the FBI, that possesses information giving rise to the supposed national security concern.

79. During deconfliction, the relevant law enforcement agency has authority: to instruct USCIS to ask certain questions in an interview or to issue a Request for Evidence ("RFE"); to comment on a proposed decision on the benefit; and to request that USCIS deny, grant, or hold the application in

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abeyance for an indefinite period of time.

80. Upon information and belief, deconfliction allows law enforcement or intelligence agencies such as the FBI to directly affect the adjudication of a requested immigration benefit, and also results in the agencies conducting independent interrogations of the applicant—or the applicant's friends and family.

81. Upon information and belief, USCIS often makes decisions to deny immigration benefit applications because the FBI requests or recommends the denial, not because the person is statutorily ineligible for the benefit.

82. The FBI often seeks to use the pending immigration application to coerce the applicant to act as an informant or otherwise provide information.

b) Eligibility Assessment

83. In addition to deconfliction, once officers identify an applicant as a national security concern, CARRP directs officers to perform an "eligibility assessment" to determine whether the applicant is eligible for the benefit sought.

84. Upon information and belief, at this stage, CARRP instructs officers to look for any reason to deny an application so that time and resources are not expended to investigate the possible national security concern. Where no legitimate reason supports denial of an application subjected to CARRP, USCIS officers often utilize spurious or pretextual reasons to deny the application.

c) Internal Vetting

85. Upon information and belief, if, after performing the eligibility assessment, an officer cannot find a reason to deny an application, CARRP instructs officers to first "internally vet" the national security concern using information available in DHS systems and databases, open source information, review of the applicant's file, RFEs, and interviews or site visits.

86. After conducting the eligibility assessment and internal vetting, USCIS officers are instructed to again conduct deconfliction to determine the position of any interested law enforcement agency.

d) External Vetting

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87. If the national security concern remains and the officer cannot find a basis to deny the benefit, the application then proceeds to "external vetting."

88. During external vetting, USCIS instructs officers to confirm the existence of the national security concern with the law enforcement or intelligence agency that possesses the information that created the concern and obtain additional information from that agency about the concern and its relevance to the individual.

89. CARRP policy instructs USCIS officers to hold applications in abeyance for periods of 180 days to enable law enforcement agents and USCIS officers to investigate the national security concern. According to CARRP policy, the USCIS Field Office Director may extend the abeyance periods as long as the investigation remains open.

90. Upon information and belief, CARRP provides no outer limit on how long USCIS may hold a case in abeyance, even though the INA requires USCIS to adjudicate a naturalization application within 120 days of examination, 8 C.F.R. § 335.3, and Congress has made clear its intent that USCIS adjudicate immigration applications, including visa petitions and accompanying applications for adjustment of status to lawful permanent residence, within 180 days of filing the application. 8 U.S.C. § 1571(b).

e) Adjudication

91. When USCIS considers an applicant to be a KST national security concern, CARRP policy forbids USCIS adjudications officers from granting the requested benefit even if the applicant satisfies all statutory and regulatory criteria.

92. When USCIS considers an applicant to be a non-KST national security concern, CARRP policy forbids USCIS adjudications officers from granting the requested benefit in the absence of supervisory approval and concurrence from a senior level USCIS official.

93. In *Hamdi*, 2012 WL 632397, when asked whether USCIS's decision to brand naturalization applicant Tarek Hamdi as a national security concern affected whether he was eligible for naturalization,

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a USCIS officer testified that "it doesn't make him statutorily ineligible, but because he is a—he still has a national security concern, it affects whether or not we can approve him." The officer testified that, under CARRP, "until [the] national security concern [is] resolved, he won't get approved."

94. Upon information and belief, USCIS routinely delays adjudication of applications subject to CARRP when it cannot find a reason to deny the application. When an applicant files a mandamus action to compel USCIS to finally adjudicate his or her pending application, it often has the effect of forcing USCIS to deny a statutorily-eligible application on pretextual grounds because CARRP prevents agency field officers from granting an application involving a national security concern.

95. CARRP effectively creates two substantive regimes for immigration application processing and adjudication: one for those applications subject to heightened scrutiny and vetting under CARRP and one for all other applications. CARRP rules and procedures create substantive eligibility criteria that indefinitely delay adjudications and unlawfully deny immigration benefits to noncitizens who are statutorily eligible and entitled by law.

96. At no point during the CARRP process is the applicant made aware that he or she has been labeled a national security concern, nor is the applicant ever provided with an opportunity to respond to and contest the classification.

97. Upon information and belief, CARRP results in unauthorized adjudication delays, often lasting many years, and pre-textual denials of statutorily-eligible immigration applications.

B. Executive Order of January 27, 2017

98. President Donald Trump campaigned for election on promises to ban Muslims from coming to the United States.

99. On December 7, 2015, the Trump campaign issued a press release stating that "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." The press release is attached hereto as Exhibit A.

100. In March 2016, Defendant Trump said, "Frankly, look, we're having problems with the Muslims,

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and we're having problems with Muslims coming into the country." Alex Griswold, *Trump Responds to Brussels Attacks: 'We're Having Problems with the Muslims*,' MEDIAITE, Mar. 22, 2016, *available at* http://www.mediaite.com/tv/trump-responds-to-brussels-attack-were-having-problems-with-the-muslims/ (last visited Feb. 1, 2017).

101. On June 14, 2016, Defendant Trump promised to ban all Muslims entering this country until "we as a nation are in a position to properly and perfectly screen those people coming into our country." The transcript of his speech is attached hereto as Exhibit B.

102. In a speech on August 15, 2016, Defendant Trump said that the United States could not "adequate[ly] screen[]" immigrants because it admits "about 100,000 permanent immigrants from the Middle East every year." Defendant Trump proposed creating an ideological screening test for immigration applicants, which would "screen out any who have hostile attitudes towards our country or its principles—or who believe that Sharia law should supplant American law." During the speech, he referred to his proposal as "extreme, extreme vetting." A copy of his prepared remarks is attached hereto as Exhibit C. A video link to the delivered speech is available at: https://www.c-span.org/video/?413977-1/donald-trump-delivers-foreign-policy-address (quoted remarks at 50:46).

103. During an August 2016 speech, Michael Flynn, who is President Trump's former National Security Advisor, called Islam "a political ideology," suggesting it is not a religion, and called it "a vicious cancer inside the body of 1.7 billion people on this planet and it has to be excised." A copy of a news article reporting this speech is attached hereto as Exhibit D. A video link with clips of his speech is available at: http://www.cnn.com/2016/11/22/politics/kfile-michael-flynn-august-speech/.

104. On January 20, 2017, Donald Trump was inaugurated as the President of the United States.

105. In his first television appearance as President, he again referred to his plan for "extreme vetting." The transcript of this interview is attached hereto as Exhibit E.

106. On January 27, 2017, one week after taking office, Defendant Trump signed the First EO, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." The Executive

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Order is attached hereto as Exhibit F. On information and belief, and in light of the statements by Mr. Trump and his advisors set forth above, the First EO was intended to target Muslims.

107. Citing the threat of terrorism committed by foreign nationals, the First EO directed a variety of changes to the processing of certain immigration benefits. Most relevant to the instant action was Section 3, which fell within a section entitled "Suspension of Issuance of Visas and Other Immigration Benefits," in which President Trump ordered, in Section 3(a), an immediate "review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat." In Section 3(c), the order then explained that to reduce the burden of the reviews described in Section 3(a), "immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. § 1187(a)(12), would be detrimental to the interests of the United States," and that Defendant Trump was therefore "suspend[ing] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order."

108. There were seven countries that fit the criteria in 8 U.S.C. § 1187(a)(12): Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. The populations of those countries are overwhelmingly Muslim.

109. The First EO purported to rely on 8 U.S.C. § 1182(f) for the authority to suspend entry into the United States.

110. On information and belief, USCIS relied on Section 3 of the First EO to subsequently suspend processing of all immigrant visas and immigration benefits applications, including *all* pending petitions, applications, or requests involving citizens or nationals of the seven targeted countries with the exception of naturalization applications.

111. Section 4 of the First EO ordered the creation of a screening program for all immigration benefits applications, which would seek to identify individuals "who are seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their

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admission" and "a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest."

112. Sections 5(a) and (b) of the First EO suspended the U.S. Refugee Admissions Program in its entirety for 120 days and then, upon its resumption, directed the program to prioritize refugees who claim persecution on the basis of religious-based persecution, "provided that the religion of the individual is a minority religion in the individual's country of nationality." Section 5(e) stated that notwithstanding the suspension of the Refugee Program, on a case-by-case basis, the United States may admit refugees "only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution."

113. In a January 27, 2017, interview with the Christian Broadcasting Network, President Trump confirmed his intent to prioritize Christians in the Middle East for admission as refugees. A copy of the report of this interview is attached hereto as Exhibit G (David Brody: "As it relates to persecuted Christians, do you see them as kind of a priority here?" President Trump: "Yes.").

C. Executive Order of March 6, 2017

114. On January 30, 2017, the State of Washington filed a lawsuit in this district seeking to enjoin application of the First EO. Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. 2:17-cv-00141-JLR, ECF 1 (W.D. Wash. Jan. 30, 2017). On February 3, Judge James L. Robart granted the State of Washington's motion for a temporary restraining order, which enjoined enforcement of Sections 3(a), 5(a)-(c), and 5(e) of the First EO nationwide during the pendency of the case. Temporary Restraining Order, *Washington v. Trump*, No. 2:17-cv-00141-JLR, ECF 52, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). Defendant Trump subsequently lashed out at the "so-called judge" who granted the temporary restraining order, calling the court's opinion "ridiculous" and predicting it would be overturned. Donald Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 05:12 AM), https://twitter.com/realDonaldTrump/status/827867311054974976. To the contrary, the Ninth Circuit

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Court of Appeals— in a unanimous per curiam opinion—denied the government's motion for an emergency stay of the district court's temporary restraining order. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

115. In response to the Ninth Circuit's decision, Defendant Trump simultaneously vowed to "vigorously defend[] this lawful order [First EO]," while "going further" to "issue[] a new executive action . . . that will comprehensively protect our country." *See* Aaron Blake, *Donald Trump's combative, grievance-filled news conference, annotated*, THE WASHINGTON POST at 5-6, 28 (Feb. 16, 2017) *available at* https://www.washingtonpost.com/news/the-fix/wp/2017/02/16/donald-trumps-grievance-filled-press-conference-annotated/?utm_term=.696842f824c0. "Extreme vetting will be put in place," Defendant Trump promised, "and it already is in place in many places." *Id*. Later during the same press conference, Defendant Trump again addressed the forthcoming Second EO, noting "we can tailor the [executive] order to that [Ninth Circuit] decision and get just about everything, in some ways, more." *Id*.

116. That same day, the government clarified in a brief to the Ninth Circuit that "[r]ather than continuing this litigation, the President intends in the near future to rescind the [First Executive] Order and replace it with a new . . . Executive Order." Supplemental Brief on *En Banc* Consideration at 4, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 16, 2017).

117. In the days that followed, Defendant Trump's senior policy advisor, Stephen Miller, confirmed that though the new executive order would have "minor technical differences," "[f]undamentally," it would achieve "the same basic policy outcome for the county." *See Miller: New order will be responsive to judicial ruling; Rep. Don DeSantis: Congress has gotten off to a slow start* at 2 (Feb. 21, 2017), *available at* http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis/.

118. Similarly, White House Press Secretary Sean Spicer noted that though "the second executive order attempts to address the court's concerns that they made, the goal is obviously to maintain the way

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that we did it the first time because we believe that the law is very clear about giving the President the authority that he needs to protect the country." *See Press Briefing by Press Secretary Sean Spicer, 2/27/2017, #17*, The White House at 26-27 (Feb. 27, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/27/press-briefing-press-secretary-sean-spicer-2272017-17.

119. As promised, on March 6, 2017, Defendant Trump issued a Second EO, which espouses the same discriminatory policy and effect as the First EO. The Second EO revoked the First EO as of its March 16, 2017 effective date. Second EO § 13. The Second EO is attached hereto as Exhibit I.

120. The Second EO modifies the First EO in two relevant ways. First, whereas the First EO banned entry into the United States for 90 days or more of foreign nationals from seven countries, the Second EO omits Iraq—bringing the number of countries affected by this entry bar down to six (Iran, Libya, Somalia, Sudan, Syria, and Yemen). *Id.* §§ 1(f),1(g), 2(c).[3] Second, the Second EO clarifies that the 90-day entry bar applies only to foreign nationals who: (1) are outside of the United States on the effective date of the Second EO; (2) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and (3) do not have a valid visa on the effective date of the Second EO. *Id.* §3(a).

121. Despite these changes, however, the same intent and effect of unlawfully discriminating against Muslim immigrants underlying the First EO similarly underlies the Second EO. On information and belief, and in light of the statements made by Defendant Trump and his advisors set forth above, the Second EO was intended to continue the First EO's intent to target Muslims.

122. Indeed, the Second EO retains in almost identical form the provisions from the First EO that are central to Plaintiffs' allegations in this case.

123. Section 2(a) of the Second EO, like Section 3(a) of the First EO, instructs the Secretary of Homeland Security to "conduct a worldwide review to identify whether, and if so what, additional

[3] Though, as explained below in paragraph 126, this exclusion of Iraq from the 90-day entry bar is tempered by the Second EO's simultaneous provision of heightened scrutiny to applications for visas, admission or other immigration benefits made by Iraqi nationals.

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information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." Section 2(b) specifies that the Secretary of Homeland Security shall report on the results of this review within 20 days of the effective date of the Second EO. *Compare* First EO § 3(b), *with* Second EO § 2(b).

124. In order to "reduce investigative burdens" while this "worldwide review" is ongoing, Section 2(c) of the Second EO demands that "the entry into the United States of nationals of those six countries be suspended for 90 days." *Compare* First EO §3(c), *with* Second EO § 2(c).

125. Moreover, if these countries do not supply the additional information identified by the Secretary of Homeland Security within 50 days of notification, the Secretary of Homeland Security "shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals" of these countries. *Compare* First EO §§ 3(d), 3(e), *with* Second EO §§ 2(d), 2(e).

126. Notably, Section 4 of the Second EO applies heightened scrutiny to immigration applications received from Iraqi nationals. Section 4 specifies that applications for "a visa, admission, or other immigration benefit" made by Iraqi nationals must still be subjected to "thorough review" to determine whether the applicant has any connections to ISIS or any other terrorist organization or may be a terrorist or national security threat. Accordingly, though Iraqi nationals are exempted from the 90-day entry bar outlined in Section 2(c), they continue to be targeted under Section 4.

127. Additionally, Section 5 of the Second EO demands the creation of the same "extreme vetting" program outlined in Section 4 of the First EO. The Second EO specifies that "[t]he Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm

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subsequent to their entry." *Compare* First EO §4(a), *with* Second EO § 5(a). Section 5 further envisions "[t]his program shall include the development of a uniform baseline for screening and vetting standards and procedures" and applies to both admission and all "other immigration benefits." Second EO § 5(a).

128. Finally, Section 6 of the Second EO, like Section 5 of the First EO, "suspend[s] travel of refugees into the United States" and "suspend[s] decisions on applications for refugee status, for 120 days." *Compare* First EO § 5(a), *with* Second EO § 6(a). Following this 120-day suspension, "the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States." Second EO § 6(a). Notably, the Second EO removed the First EO's explicit preference for refugees who claim persecution based on their ascription to a minority religion. *Compare* First EO §§ 5(b), 5(e), *with* Second EO §§ 6(a), 6(c). The Second EO further purports to claim that the First EO "did not provide a basis for discriminating for or against members of any particular religion," and that "[w]hile that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion." Second EO § 1(b)(iv).

129. Just hours before the Second EO was scheduled to go into effect, on March 15, 2017 the U.S. District Court for the District of Hawaii granted a nationwide temporary restraining order, blocking application of Sections 2 and 6 of the Second EO during the pendency of that legal challenge. Order Granting Motion for Temporary Restraining Order, *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 15, 2017).

130. Hours later, a second federal judge in Maryland issued a nationwide preliminary injunction, blocking Section 2(c) of the Second EO from going into effect. Memorandum Opinion, *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361 (D. Md. Mar. 15, 2017).

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131. No court has yet enjoined the "extreme vetting" provisions, including Sections 4 and 5, of the Second EO.

D. Impact of Executive Orders on Implementation of CARRP

1. Ban on the Adjudication of Immigration Benefits Applications for Immigrants from the Targeted Countries

132. After the issuance of the First EO, at least two department heads within USCIS sent internal communications barring any final action on any petition, benefits application, or requests involving citizens or nationals of Syria, Iraq, Iran, Somalia, Yemen, Sudan, and Libya.

133. On January 28, 2017, Associate Director of Service Center Operations for USCIS, Donald Neufeld, issued instructions to Service Center directors and deputies in an email message directing the suspension of the "adjudication of all applications, petitions or requests involving citizens or nationals of the [seven] listed countries." The email continues, "At this point there are no exceptions for any form types, to include I-90s or I-765s. Please physically segregate any files that are impacted by this temporary hold pending further guidance." Photographs of the internal email communication are attached hereto as Exhibit H.

134. In another email to staff from Daniel M. Renaud, Associate Director of Field Operations for USCIS, on January 28, 2017, Mr. Renaud stated, "Effectively [sic] immediately and until additional guidance is received, you may not take final action on any petition or application where the applicant is a citizen or national of Syria, Iraq, Iran, Somalia, Yemen, Sudan, and Libya." Alice Speri and Ryan Devereaux, *Turmoil at DHS and State Department*, THE INTERCEPT, Jan. 30, 2017, *available at* https://theintercept.com/2017/01/30/asylum-officials-and-state-department-in-turmoil-there-are-people-literally-crying-in-the-office-here/. The email continued, "Offices are not permitted [to] make any final decision on affected cases to include approval, denial, withdrawal, or revocation. Please look for additional guidance later this weekend on how to process naturalization applicants from one of the seven countries listed above who are currently scheduled for oath ceremony or whose N-400s have been

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approved and they are pending scheduling of oath ceremony." *Id.*; *see also* Michael D. Shear and Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, NEW YORK TIMES (Jan. 29, 2017), *available at* https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html.

135. On January 31, 2017, U.S. Customs and Border Protection, a subdivision of DHS, reported on its website that the First EO does not apply to pending naturalization applications and that "USCIS will continue to adjudicate N-400 applications for naturalization and administer the oath of citizenship consistent with prior practices." *Protecting the Nation from Foreign Terrorist Entry into the United States*, CBP, https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states.

136. Referencing the hold on adjudications for people from the seven countries subject to the First EO, a USCIS official told The Intercept, "We know what is coming. These cases will all be denied after significant waits." Alice Speri and Ryan Devereaux, *Turmoil at DHS and State Department*, THE INTERCEPT, Jan. 30, 2017.

137. This halt in USCIS adjudications took place pursuant to provisions of the First EO which also appear, in similar form, in the Second EO. Implementation of the Second EO was enjoined before Section 2 could go into effect. However, upon information and belief, USCIS similarly will apply the Second EO to suspend adjudication of immigration benefits to people from its six targeted countries. The application of the Second EO to USCIS immigration benefits applications will effectuate the intent of the Second EO to target Muslims.

2. "Extreme Vetting" of Muslim Immigrants

138. As described above, Section 5 of the Second EO orders the Secretary of Homeland Security, the Secretary of State, the Director of National Intelligence, and the Attorney General to "implement a program, as part of the process for adjudications, to identify individuals . . . who present a risk of causing harm." The Second EO calls for the implementation of a "program [that] shall include the

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development of a uniform baseline for screening and vetting standards and procedures," including "a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States," and "any other appropriate means for ensuring . . . a rigorous evaluation of all grounds . . . for denial of…immigration benefits."

139. Similarly, Section 4 of the Second EO applies heightened scrutiny to immigration applications received from Iraqi nationals. Section 4 specifies that applications for "a visa, admission, or other immigration benefit" made by Iraqi nationals must still be subjected to "thorough review" to determine whether the applicant has any connections to ISIS or any other terrorist organization or may be a terrorist or national security threat. Accordingly, though Iraqi nationals are exempted from the 90-day entry bar outlined in Section 2(c), they continue to be targeted under Section 4.

140. In conjunction with the issuance of the Second EO, Defendant Trump published a "Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security" on the subject of "Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits…." March 6, 2017, *available at* https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security. In this memorandum, Defendant Trump cautions that "this Nation cannot delay the immediate implementation of additional heightened screening and vetting protocols and procedures for issuing visas to ensure that we strengthen the safety and security of our country." Accordingly, he instructs the Secretary of State and the Secretary of Homeland Security, in conjunction with the Attorney General, to "implement protocols and procedures as soon as practicable that in their judgment will enhance the screening and vetting of applications for visas and all other immigration benefits." Moreover, this implementation shall begin immediately, "[w]hile th[e] comprehensive review" ordered by Section 2 of the Second EO "is ongoing." The memorandum also instructs government officials to "rigorously enforce all existing grounds of inadmissibility and to ensure subsequent compliance with related laws after admission."

141. Upon information and belief, the "extreme vetting" program required by the Second EO, as

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enhanced by Defendant Trump's accompanying memorandum, will dramatically expand CARRP, an existing program USCIS has implemented since April 2008.

B. Facts Specific To Each Plaintiff

Abdiqafar Wagafe

142. Plaintiff Abdiqafar Aden Wagafe is a thirty-two-year-old Somali national who currently resides in SeaTac, Washington.

143. Between 2001 and 2007, Mr. Wagafe lived in refugee camps and temporary refugee housing in Kenya and Ethiopia.

144. On May 24, 2007, he moved to the United States with nine family members and was admitted as a refugee. He has lived in the United States since then.

145. After arriving in the United States, Mr. Wagafe briefly stayed in Minneapolis, Minnesota with his brother. He then moved to Seattle, where his two sisters and another brother live.

146. All of the nine family members who moved to the United States with Mr. Wagafe have become U.S. citizens.

147. From July 2007 until February 2011, Mr. Wagafe worked for Delta Global Services until widespread layoffs left him without a job. Since February 2011, he has worked at a Somali restaurant, which he currently co-owns and manages.

148. On May 28, 2008, Mr. Wagafe filed an application for refugee adjustment of status to become an LPR.

149. USCIS granted his application on November 3, 2008, retroactively granting him LPR status as of May 24, 2007, the date he was admitted to the U.S. as a refugee. *See* 8 C.F.R. § 209.1(e).

150. Mr. Wagafe filed his first application for naturalization on July 3, 2012. USCIS interviewed him on October 29, 2012, but he failed the English-language portion of the exam. USCIS interviewed Mr. Wagafe a second time on January 3, 2013, but he again failed the English writing portion of the exam. He also did not understand English sufficiently to comprehend the Oath of Allegiance. On these bases,

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USCIS denied his first application for naturalization on January 9, 2013.

151. Mr. Wagafe has since improved his English skills significantly.

152. Mr. Wagafe filed a second application for naturalization on November 8, 2013. USCIS scheduled his interview for February 25, 2014, but cancelled it on January 29, 2014 without explanation.

153. Mr. Wagafe made various inquiries concerning his case to USCIS, but did not receive any explanation for the delay. USCIS responded to his queries in July 2015, instructing his attorney to have patience and that the agency would let him know when the agency was ready to interview him. His subsequent inquiries went unanswered.

154. On February 14, 2017—five days after Plaintiffs filed their motion for class certification in this case—a USCIS officer suddenly informed Mr. Wagafe's attorney that an interview had been scheduled on his immigration application. At the interview, which occurred on February 22, 2017, the immigration officer approved Mr. Wagafe's application on the spot. Mr. Wagafe took the oath of allegiance on March 2, 2017 and became a United States citizen on that same day. In sum, after keeping his application on hold for three and a half years without explanation, the government processed and approved Mr. Wagafe's application within two weeks of Plaintiffs filing for class certification.

155. Mr. Wagafe resided continuously in the United States for at least five years preceding the date of filing his application for naturalization, and has resided continuously within the United States from the date of filing his application until the present.

156. Mr. Wagafe has never been convicted of a crime.

157. There is and was no statutory basis for denying his naturalization application.

158. Mr. Wagafe is Muslim and regularly attends mosque. He also frequently sends small amounts of money to his relatives in Somalia, Kenya, and Uganda. He has been married to a woman in Uganda since December 2015 and makes visits to see her. He had been unable to bring her to the United States because of the delays in his case.

159. Mr. Wagafe's immigration Alien file ("A-file") makes clear that USCIS subjected his pending

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application to CARRP. The A-file states that a CARRP officer handled his case. In addition, a document in the A-File shows that on December 8, 2013, there was a hit on Mr. Wagafe's name in the FBI Name Check and that the Name Check result contained "derogatory information." The document also states that Mr. Wagafe appears eligible for naturalization absent confirmation of national security issues. The document then states that the case is being forwarded for external vetting.

160. Upon information and belief, Mr. Wagafe's naturalization application was subject to CARRP or its successor "extreme vetting" program, which caused the delay in adjudication of his naturalization application, despite the fact that he was statutorily entitled to naturalize.

161. Mr. Wagafe suffered significant harm due to the delay in adjudication of his naturalization application. Although he is married to a Ugandan woman, he was unable to bring her to live with him in the United States, because, until he became a U.S. citizen, his wife did not qualify as an immediate relative, *see generally* 8 U.S.C. § 1151, and thus could not avoid the waiting list for petitions filed by lawful permanent residents on behalf of their spouses. Subjecting Mr. Wagafe's application to CARRP also harmed his professional options and prevented him from voting in local and national elections.

Mehdi Ostadhassan

162. Plaintiff Mehdi Ostadhassan is a thirty-three-year-old national of Iran. He resides in Grand Forks, North Dakota.

163. Mr. Ostadhassan moved to the United States in 2009 on a student visa and studied at the University of North Dakota. He earned his Ph.D. in Petroleum Engineering, and, after graduation, was immediately hired by the University of North Dakota as an Assistant Professor of Petroleum Engineering.

164. At the University of North Dakota, Mr. Ostadhassan met Bailey Bubach, a United States citizen. In January 2014, they were married in a small religious ceremony in California, and then obtained their marriage license in Grand Forks, North Dakota. Their first child was born in July 2016.

165. In February 2014, Ms. Bubach filed an immigrant visa petition (USCIS Form I-130) for Mr.

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Ostadhassan and he concurrently filed an application to adjust status (USCIS Form I-485) based upon his marriage.

166. Mr. Ostadhassan has never been convicted of a crime.

167. USCIS scheduled Mr. Ostadhassan for an interview on May 19, 2014, but when he appeared for the interview, USCIS informed him that it was cancelled.

168. USCIS rescheduled and conducted an interview almost a year and a half later, on September 24, 2015. At that interview, a USCIS officer told Mr. Ostadhassan that the agency still could not make a decision and that it needed to complete further background and security checks. To date, Mr. Ostadhassan is still waiting for a decision from USCIS.

169. Mr. Ostadhassan and Ms. Bubach are Muslim and active participants in their religious community. Each year they donate to Muslim charities in accordance with the teachings of Islam. They are both involved in the Muslim Student Association at the University of North Dakota. In addition, they run a Muslim Sunday School. Mr. Ostadhassan also coordinates the Muslim Congress's Koran competition every year.

170. Upon information and belief, USCIS considers Mr. Ostadhassan a non-KST national security concern and is subjecting him to CARRP. USCIS may have subjected Mr. Ostadhassan's adjustment application to CARRP because he has resided in and traveled through what the government considers areas of known terrorist activity—namely, Iran—and because of his donations to Islamic charities and involvement in the Muslim community.

171. In October 2014, an FBI agent contacted Mr. Ostadhassan and asked to meet to discuss his recent trip to Iran to visit family. Mr. Ostadhassan declined to meet with the FBI, and his lawyer informed the agent that any further communications should go through the attorney. The FBI has not contacted Mr. Ostadhassan since.

172. Upon information and belief, the request for a visit by the FBI was a product of CARRP's deconfliction process.

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173. Upon information and belief, Mr. Ostadhassan's application for adjustment of status is subject to CARRP or its successor "extreme vetting" program, which has delayed the adjudication of his application, despite the fact that he is statutorily eligible for adjustment of status.

174. As Mr. Ostadhassan is a citizen of Iran, one of the countries targeted in the First EO and Second EO, USCIS suspended adjudication of his application for adjustment of status under the First EO and, on information and belief, will suspend adjudication indefinitely under the Second EO.

175. Mr. Ostadhassan has been significantly harmed by the delay in adjudication of his adjustment of status application. Because of his temporary nonimmigrant status, and without an approved adjustment application, he cannot travel outside the United States. He recently was unable to travel to Iran to introduce his U.S. citizen wife and infant to his Iranian family; his wife and child traveled to Iran without him. He has also lost out on significant professional opportunities. He is a college professor, and his unapproved adjustment application has prevented him from attending conferences overseas. Due to the delay, he and his wife feel that their lives and future in the United States are suspended in limbo, not knowing whether they have a future in the United States.

Hanin Omar Bengezi

176. Plaintiff Hanin Omar Bengezi is a 32-year-old Libyan national and Canadian citizen who currently resides in Redmond, Washington. She is an elementary school substitute teacher.

177. Ms. Bengezi was born in Libya. She lived with her family in Slovenia from 1985 to 1990 and then in Libya from 1990 to 1995.

178. Ms. Bengezi immigrated to Canada with her family in 1995, where she lived until she moved to the United States.

179. She became a Canadian citizen in February 2012.

180. When Ms. Bengezi attempted to visit the U.S. as a Canadian citizen in May 2012 near Buffalo, New York via the Western Hemisphere Travel Initiative, she and her accompanying family members were refused entry.

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181. In 2012, Ms. Bengezi met her current husband, who is a U.S. citizen. Their relationship blossomed and they were engaged in December 2012.

182. Her husband filed a Form I-129F, Petition for Alien Fiancée, with USCIS for Ms. Bengezi on February 13, 2013.

183. USCIS approved the fiancée petition for Ms. Bengezi on May 31, 2013.

184. On December 16, 2013, Ms. Bengezi interviewed for her K-1 Fiancée visa at the U.S. embassy in Montreal, Canada.

185. The U.S. embassy in Montreal issued Ms. Bengezi's K-1 Fiancée visa on November 4, 2014.

186. Ms. Bengezi came to the U.S. on December 21, 2014, and got married on January 23, 2015 in Lynnwood, Washington.

187. On February 5, 2015, Ms. Bengezi filed for Adjustment of Status to become an LPR with USCIS.

188. USCIS has not scheduled an adjustment of status interview for Ms. Bengezi and her husband.

189. Ms. Bengezi has made various inquiries concerning her case to USCIS, but has not received an explanation for the delay. USCIS last responded to her queries on December 19, 2016, informing her attorney, "We continue to work on this application and understand your client is concerned about the progress of her case. The application will be scheduled for interview when it is interview ready; we will contact [you] should we need any further information prior to scheduling." Her subsequent inquiries have gone unanswered.

190. Ms. Bengezi is Muslim.

191. Ms. Bengezi has never been convicted of or arrested for a crime.

192. There is no statutory basis for denying Ms. Bengezi's adjustment of status application.

193. When Ms. Bengezi flies, she is required to obtain her airplane ticket at the airline counter (instead of being able to check in online), her ticket is marked "SSSS" for "Secondary Security Screening Selection," and she is required to undergo additional and unnecessary secondary screening.

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194. When Ms. Bengezi travels through land border crossings, such as the CBP Blaine Station, she is referred to secondary inspection for screening and additional questioning.

195. Ms. Bengezi's Canadian family members continue to be refused entry to the U.S. and denied visitor visas without explanation.

196. USCIS's delays in adjudicating Ms. Bengezi's case, the additional scrutiny when traveling by air or when crossing the border, and the refusal to issue visitor visas to her family members make it clear that USCIS has subjected her pending application to CARRP or its successor "extreme vetting" program. This has delayed the adjudication of her application, despite the fact that she is statutorily eligible for adjustment of status.

197. As Ms. Bengezi is a citizen of Libya, one of the countries targeted in the First EO and Second EO, USCIS suspended adjudication of her application for adjustment of status under the First EO and, on information and belief, will suspend adjudication indefinitely under the Second EO.

198. Ms. Bengezi has been significantly harmed by the delay in adjudication of her adjustment of status application. Because of her temporary nonimmigrant status, and without an approved adjustment application, she has had a difficult time traveling outside of the United States. This has negatively impacted her ability to visit her family. Additionally, the delay has impacted her ability to obtain full-time employment due to the need to regularly renew her employment authorization, and has also limited her ability to pursue other professional opportunities. It has prevented her from establishing a normal life in the United States by interfering with her ability to enter into routine transactions such as, inter alia, obtaining loans and signing leases. The delay has also caused much stress and anxiety for Ms. Bengezi, who is uncertain whether she and her husband will be allowed to live together as a family in the United States.

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Mushtaq Abed Jihad

199. Plaintiff Mushtaq Abed Jihad is a 44-year-old refugee from Iraq who currently resides in Renton, Washington.

200. In April 2005, Mr. Jihad, then a successful business owner, was abducted from one of his stores in Iraq. He was beaten and tortured before ultimately escaping.

201. Mr. Jihad challenged his attackers in court, which led to death threats. Once, when leaving court, there was an attempt on his life, and he was shot.

202. In April 2007, the day the court would decide Mr. Jihad's case against his kidnappers, Mr. Jihad and his family were again victims of a vicious attack. As he stepped out of the front door of his house with his one-week-old son in his arms, his home was rocked by an explosion. He lost his leg and his newborn son was killed. In the aftermath of the explosion, the attackers also shot Mr. Jihad numerous times. The rest of Mr. Jihad's family managed to escape the attack.

203. Once released from the hospital where had stayed for several months following that incident, he and his family fled Iraq to Syria. The United States eventually accepted them as refugees for resettlement.

204. In August 2008, Mr. Jihad and his family entered the United States and resettled in the Tri-Cities area of Washington.

205. His lawful permanent residence became effective as of the date of his arrival in the U.S.

206. Mr. Jihad filed his N-400 Application for Naturalization on July 1, 2013.

207. On his N-400 Application Mr. Jihad affirmatively responded that he seeks to change his surname. He no longer wishes to use his family name because of the unrelenting negative reactions directed at him every time he is required to use his name.

208. On July 26, 2013, Mr. Jihad completed his biometrics appointment for his naturalization application.

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209. Approximately one week after his biometrics appointment, two FBI agents and an interpreter visited Mr. Jihad. The agents questioned Mr. Jihad extensively about his history and why he had elected to change his name on his naturalization application. Multiple times Mr. Jihad attempted to correct the interpreter when he felt he was not being interpreted correctly, but the corrections were rejected.

210. In October 2013, Mr. Jihad started to feel ill and was subsequently diagnosed with leukemia.

211. Because he is not a U.S. citizen, Mr. Jihad's social security disability support terminated in 2015, after he had been present in the U.S. for more than 7 years.

212. Following his diagnosis, Mr. Jihad moved to the Seattle area due to his ongoing chemotherapy treatments and his need to support his family. His wife and four daughters still live in Richland, Washington.

213. Mr. Jihad does odd jobs between chemotherapy treatments for his leukemia in Seattle. Currently, he is a driver for Lyft.

214. Mr. Jihad has never left the U.S. since arriving and has no criminal history.

215. There is no statutory basis for denying his naturalization application.

216. USCIS has repeatedly told Mr. Jihad that his case is pending due to security checks.

217. Upon information and belief, the FBI's visit and interrogation of Mr. Jihad about his pending naturalization application is the product of CARRP's deconfliction process and indicate that USCIS has subjected his application to CARRP or its successor "extreme vetting" program. This has delayed the adjudication of his application, despite the fact that he is statutorily eligible to naturalize.

218. As Mr. Jihad is a citizen of Iraq, one of the countries targeted in the First EO, USCIS suspended adjudication of his application for adjustment of status under the First EO.

219. Mr. Jihad has been significantly harmed by the delay in adjudication of his naturalization application. With every passing day, Mr. Jihad's health and treatment are being materially harmed by USCIS's delay. His and his family's financial prospects are also being negatively affected, creating a strain on the family. The delay has also prevented him from voting in local and national elections.

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Sajeel Manzoor

220. Plaintiff Sajeel Manzoor is a 40-year-old Pakistani national and lawful permanent resident of the United States who currently resides with his family in Newcastle, Washington.

221. Mr. Manzoor came to the United States on August 16, 2001 as a non-immigrant F-1 student to study for a Master of Science in Marketing Research at the University of Texas at Arlington.

222. In 2003, Mr. Manzoor was hired by Taylor Nelson Sofres and granted his first H-1B visa.

223. Mr. Manzoor married his wife on May 11, 2005 in Lahore, Pakistan, and has two children with her. Both of his children are United States citizens.

224. On January 29, 2007, Immigration and Customs Enforcement ("ICE") agents interviewed Mr. Manzoor about his employment history, travel, and contacts inside and outside of the United States.

225. Mr. Manzoor's H-1B visa was temporarily administratively revoked while the Compliance Enforcement Unit in the National Security Investigations Division at ICE Headquarters reviewed his file. His visa was automatically reinstated when he was found in compliance and the case was closed on or about July 3, 2007.

226. On October 18, 2007, Mr. Manzoor applied for adjustment of status based on a business petition.

227. On September 18, 2010, Mr. Manzoor was granted lawful permanent resident status.

228. On November 30, 2015, Mr. Manzoor filed his N-400 Application for Naturalization.

229. Mr. Manzoor has not been scheduled for an interview.

230. On December 2, 2016, the Acting Field Office Director for the Seattle Field Office confirmed that Mr. Manzoor's case is still pending background checks.

231. On December 14, 2016, the Seattle Field Office Directory confirmed that the background checks were still pending and that Mr. Manzoor's wife's naturalization case would be held until after his application was complete.

232. Mr. Manzoor does not have a criminal history.

233. There is no statutory basis for denying his naturalization application.

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234. Upon information and belief, USCIS's three-year delay in adjudicating his adjustment of status and ICE's National Security Investigations Division's additional scrutiny and review indicate that USCIS has subjected Mr. Manzoor's pending naturalization application to CARRP or its successor "extreme vetting" program. This has delayed the adjudication of his application, despite the fact that he is statutorily entitled to naturalize.

235. Mr. Manzoor has been significantly harmed by the delay in adjudication of his naturalization application. He has not been able to travel due to fear of not being allowed back into the country, causing him to miss his grandfather's funeral and his sister-in-law's engagement, among other important family events. Feeling that his immigration status is in limbo and that he is being discriminated against on the basis of his national origin and religion have also caused him extreme stress and anxiety. Additionally, the delay has prevented him from voting in local and national elections.

CLASS ACTION ALLEGATIONS

236. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiffs bring this action on behalf of themselves and all other similarly-situated individuals. Plaintiffs do not bring claims for compensatory relief. Instead, Plaintiffs seek injunctive relief broadly applicable to members of the Plaintiff Classes, as defined below. The requirements for Rule 23 are met with respect to the classes defined below.

237. Plaintiffs seek to represent the following nationwide classes:

> A **Muslim Ban Class** defined as:
> A national class of all persons currently and in the future (1) who are in the United States, (2) have or will have an application for an immigration benefit pending before USCIS, and (3) are a citizen or national of Syria, Iran, Yemen, Somalia, Sudan, or Libya.
>
> An **Extreme Vetting Naturalization Class** defined as:
> A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.
>
> An **Extreme Vetting Adjustment of Status Class** defined as:

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A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

238. Plaintiffs Wagafe, Ostadhassan, and Bengezi are adequate class representatives of the Muslim Ban Class. Plaintiffs Wagafe, Jihad, and Manzoor are adequate representatives of the Extreme Vetting Naturalization Class. Plaintiffs Ostadhassan and Bengezi are adequate representatives of the Extreme Vetting Adjustment of Status Class.

239. The Proposed Classes are each so numerous that joinder of all members is impracticable.

240. Although Plaintiffs do not know the total number of people from the six countries targeted in the Second EO who have *pending* immigration benefits applications at any given time, publicly available USCIS data reveals that in 2015, there were 83,147 people from those six countries who were *granted* applications for naturalization, lawful permanent residence, asylum, and refugee admission. U.S. Department of Homeland Security, Office of Immigration Statistics, 2015 Yearbook of Immigration Statistics, *available at* https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf (showing 31,385 people granted lawful permanent residence (table 3), 30,644 granted refugee admission (table 14), 1,731 granted asylum (table 17) and 19,387 persons naturalized (table 21) from the six countries targeted by the Second EO).

241. Similarly, although Plaintiffs do not know the total number of people subject to CARRP or any successor "extreme vetting" program at any given time, USCIS data reveals that between Fiscal Year 2008 and Fiscal Year 2012, more than 19,000 people from twenty-one Muslim-majority countries or regions were subjected to CARRP. Upon information and belief, between 2008 and 2016, USCIS opened 41,805 CARRP cases.

242. This data includes individuals with pending naturalization and adjustment of status applications. For example, in March 2009, there were 1,437 adjustment of status (I-485) applications subject to CARRP that had been pending for at least six months and 1,065 naturalization (N-400) applications

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subject to CARRP that had been pending for at least six months.

243. The exact number of individuals subject to the First EO or Second EO, CARRP, or any successor "extreme vetting" program at any given time fluctuates as applications are filed and USCIS applies these policies and practices to the applications. Moreover, members of the class reside in various locations across the country. For these and other reasons, joinder of the members of the Classes would create substantial challenges to the efficient administration of justice. Joinder is thus impracticable here.

244. In addition, there are questions of law and fact common to the members of the Classes. The Muslim Ban and Extreme Vetting Adjustment of Status Class are subject to Defendants' unauthorized suspension of immigration benefits adjudications. All classes are subject to CARRP (or a successor "extreme vetting" program). Accordingly, common questions of law and fact include, but are not limited to, the following:

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the Second EO violates Defendants' duty to timely adjudicate immigration benefit applications authorized by the Immigration and Nationality Act;

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the First or Second EO to Plaintiff Wagafe's, Plaintiff Ostadhassan's and Plaintiff Bengezi's applications violates the Establishment Clause of the First Amendment to the United States Constitution by not pursuing a course of neutrality with regard to different religious faiths;

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the Second EO and application of CARRP (or a successor "extreme vetting" program) to Plaintiffs' applications discriminates against Plaintiffs on the basis of their country of origin and without sufficient justification, and therefore violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution;

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the Second EO and application of CARRP (or a successor "extreme vetting" program) to Plaintiffs' applications is substantially motivated by animus toward—and has a disparate effect on—Muslims in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution;

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the Second EO and application of CARRP (or a successor "extreme vetting" program) to Plaintiffs' applications for immigration benefits, for which they are statutorily eligible and to which they

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are legally entitled, constitutes an arbitrary denial in violation of Plaintiffs' right to substantive due process under the Fifth Amendment to the United States Constitution;

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the Second EO and application of CARRP (or a successor "extreme vetting" program) to Plaintiffs' applications violates the INA by creating additional, non-statutory, substantive criteria that must be met prior to a grant of a naturalization or adjustment of status application;

- Whether Defendants' unauthorized suspension of immigration benefits adjudications under the Second EO and application of CARRP (or a successor "extreme vetting" program) to Plaintiffs' applications violates the APA, 5 U.S.C. § 706, as final agency action that is arbitrary and capricious, contrary to constitutional law, and in excess of statutory authority;

- Whether Defendants' application of CARRP (or a successor "extreme vetting" program) to Plaintiffs' applications constitutes a substantive rule and, as a result, Defendants violated the APA, 5 U.S.C. § 553, when they promulgated CARRP without providing a notice-and-comment period prior to implementing it;

- Whether Defendants' failure to give Plaintiffs notice of their classification under CARRP (or a successor "extreme vetting" program), a meaningful explanation of the reason for such classification, and a process by which Plaintiffs can challenge their classification violates the Due Process Clause of the Fifth Amendment to the United States Constitution; and

- Whether Defendants' application of CARRP (or a successor "extreme vetting" program) to Plaintiffs Wagafe, Jihad, and Manzoor's applications violates the Uniform Rule of Naturalization, Article I, Section 8, Clause 4 of the United States Constitution by establishing criteria for naturalization not authorized by Congress.

245. The claims of the named Plaintiffs are typical of their respective Plaintiff Classes. Plaintiffs know of no conflict between their interests and those of the Plaintiff Classes they seek to represent. In defending their own rights, the named Plaintiffs will defend the rights of all proposed Plaintiff Class members fairly and adequately. The members of the Classes are readily ascertainable through notice and discovery.

246. Plaintiffs are represented by counsel with particular expertise in immigration and constitutional law, and extensive experience in class action and other complex litigation.

247. Defendants have acted or refused to act on grounds generally applicable to each member of the Plaintiff Classes by applying additional non-statutory, substantive requirements for naturalization and

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adjustment of status, including CARRP (or its successor "extreme vetting" program) to their immigration applications and the First EO and/or Second EO—thus causing them to have suffered and continue to suffer injury in the form of unreasonable delays and denials of their applications.

248. A class action is superior to other methods available for the fair and efficient adjudication of this controversy because joinder of all members of the Classes is impracticable. Absent the relief they seek here, there would be no other way for the Plaintiff Class members to individually redress the wrongs they have suffered and will continue to suffer.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Immigration and Nationality Act and the Administrative Procedure Act

(Plaintiffs Wagafe, Ostadhassan and Bengezi on behalf of themselves and the Muslim Ban Class)

249. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

250. Section 212(f) of the Immigration and Nationality, 8 U.S.C. § 1182(f), is entitled "Suspension of Entry or Imposition of Restrictions by President." That provision authorizes the President to suspend entries or impose restrictions on entries. That provision does not authorize the President to suspend adjudication of immigration petitions, applications, or requests of any class of persons.

251. Defendants have interpreted the First EO and will interpret the Second EO to authorize the suspension of immigration petitions, applications, or requests involving Plaintiff Wagafe, Plaintiff Ostadhassan, Plaintiff Bengezi, and members of the Muslim Ban Class.

252. Accordingly, Defendants will suspend adjudication of such immigration benefits petitions, applications, or requests.

253. Defendants' actions in suspending adjudications will violate 8 U.S.C. § 1182(f) and will be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or

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limitations, or short of statutory right; and without observance of procedure required by law, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)-(D).

SECOND CLAIM FOR RELIEF

Mandamus (28 U.S.C. § 1361)

(Plaintiffs Wagafe, Ostadhassan and Bengezi on behalf of themselves and the Muslim Ban Class)

254. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

255. Defendants have a duty to adjudicate all immigrant benefits petitions, applications or requests authorized by the Immigration and Nationality Act, implementing regulations, or other law.

256. The First and Second EOs do not authorize the suspension of adjudication of immigration benefits petitions, applications, or requests.

257. Defendants have interpreted the First EO and will interpret the Second EO to authorize the suspension of immigration benefit applications for petitions, applications, or requests involving Plaintiff Wagafe, Plaintiff Ostadhassan, Plaintiff Bengezi, and members of the Muslim Ban Class.

258. Accordingly, Defendants will suspend adjudication of immigration benefits petitions, applications, or requests.

259. Defendants' refusal to adjudicate immigration benefits petitions, applications, or requests will violate Defendants' statutory and constitutional duty to adjudicate these matters, and to do so in a nondiscriminatory manner.

THIRD CLAIM FOR RELIEF

First Amendment (Establishment Clause)

(Plaintiffs Wagafe, Ostadhassan and Bengezi on behalf of themselves and the Muslim Ban Class)

260. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

261. The First EO was and Second EO is intended to target a specific religious faith—Islam. The First EO gave preference to other religious faiths—principally Christianity—and the Second EO has that intended effect when applied to Plaintiffs and members of the Muslim Ban Class. Defendants'

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application of the First EO and Second EO to Plaintiffs and members of the Plaintiff Classes violates the Establishment Clause of the First Amendment to the United States Constitution by not pursuing a course of neutrality with regard to different religious faiths.

FOURTH CLAIM FOR RELIEF

Fifth Amendment (Procedural Due Process)

(All Plaintiffs on behalf of themselves and the Plaintiff Classes)

262. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

263. Defendants' failure to give Plaintiffs and members of the Extreme Vetting Naturalization and Extreme Vetting Adjustment of Status Classes notice of their classification under CARRP (or successor "extreme vetting" program), a meaningful explanation of the reason for such classification, and any process by which Plaintiffs can challenge their classification, violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

264. Because of these violations of their constitutional rights, Plaintiffs and members of the Plaintiff Classes have suffered and continue to suffer injury in the form of unreasonable delays and unwarranted denials of their immigration applications.

FIFTH CLAIM FOR RELIEF

Fifth Amendment (Substantive Due Process)

(All Plaintiffs on behalf of themselves and the Plaintiff Classes)

265. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

266. Defendants' unauthorized and indefinite suspension of the adjudication of Plaintiffs' and the Proposed Classes' applications for immigration benefits violates their right to substantive due process under the Fifth Amendment to the United States Constitution, because Plaintiffs cannot be denied immigration benefits for which they are statutorily eligible, and to which they are entitled by law, in an arbitrary manner.

SIXTH CLAIM FOR RELIEF

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Fifth Amendment (Equal Protection)

(All Plaintiffs on behalf of themselves and the Plaintiff Classes)

267. Plaintiffs incorporate the allegations of the proceeding paragraphs as if fully set forth herein.

268. Defendants' indefinite suspension of the adjudication of Plaintiffs' applications for immigration benefits on the basis of their country of origin, and without sufficient justification, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

269. Additionally, Defendants' indefinite suspension of the adjudication of Plaintiff Wagafe's, Plaintiff Ostadhassan's, Plaintiff Bengezi's, and the Muslim Ban Class' applications for immigration benefits under the First and Second EOs was and is substantially motivated by animus toward—and has a disparate effect on—Muslims, which also violates the equal protection component of the Due Process Clause of the Fifth Amendment.

270. Applying a general law in a fashion that discriminates on the basis of religion violates Plaintiffs' and the Plaintiff Classes' rights to equal protection under the Fifth Amendment Due Process Clause.

271. The Second EO is intended and will be applied primarily to exclude individuals on the basis of their national origin and religion.

272. Defendants have applied the First EO and will apply the Second EO with discriminatory animus and discriminatory intent in violation of the equal protection component of the Fifth Amendment.

SEVENTH CLAIM FOR RELIEF

Immigration and Nationality Act and Implementing Regulations

(Plaintiffs on behalf of themselves and the Extreme Vetting Naturalization and Extreme Vetting Adjustment of Status Classes)

273. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

274. To secure naturalization and adjustment of status, an applicant must satisfy certain statutorily-enumerated criteria.

275. By its terms, CARRP creates additional, non-statutory, substantive adjudicatory criteria.

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276. Accordingly, CARRP violates 8 U.S.C. § 1427, 8 C.F.R. § 316.2, and 8 C.F.R. § 335.3, as those provisions set forth the exclusive applicable statutory and regulatory criteria for a grant of naturalization.

277. CARRP also violates 8 U.S.C. § 1255, 8 U.S.C. § 1159, 8 C.F.R. § 245.1, and 8 C.F.R. § 209.1, as those provisions set forth the applicable statutory and regulatory criteria for individuals present in the United States to adjust their status.

278. Because of these violations and/or because CARRP's additional, non-statutory, substantive criteria have been applied to their applications, Plaintiffs and Plaintiff Class members have suffered and will continue to suffer injury in the form of unreasonable delays and unwarranted denials of their applications for naturalization and adjustment of status.

EIGHTH CLAIM FOR RELIEF

Administrative Procedure Act (5 U.S.C. § 706)

(Plaintiffs on behalf of themselves and the Extreme Vetting Naturalization and Extreme Vetting Adjustment of Status Classes)

279. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

280. CARRP constitutes final agency action that is arbitrary and capricious because it "neither focuses on nor relates to a [noncitizen's] fitness to" obtain the immigration benefits subject to its terms. *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011).

281. CARRP is also not in accordance with law, is contrary to constitutional rights, and is in excess of statutory authority because it violates the INA and exceeds USCIS's statutory authority to implement (not create) the immigration laws, as alleged herein.

282. As a result of these violations, Plaintiffs and members of the Proposed Extreme Vetting Naturalization and Extreme Vetting Adjustment of Status Classes have suffered and continue to suffer injury in the form of unreasonable delays and unwarranted denials of their immigration applications.

NINTH CLAIM FOR RELIEF

Administrative Procedure Act (Notice and Comment)

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(Plaintiffs on behalf of themselves and the Extreme Vetting Naturalization and Extreme Vetting Adjustment of Status Classes)

283. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

284. The APA, 5 U.S.C. § 553, requires administrative agencies to provide a notice-and-comment period prior to implementing a substantive rule.

285. CARRP constitutes a substantive agency rule within the meaning of 5 U.S.C. § 551(4).

286. Defendants failed to provide a notice-and-comment period prior to the adoption of CARRP.

287. Because CARRP is a substantive rule promulgated without the notice-and-comment period, it violates 5 U.S.C. § 553 and is therefore invalid.

288. As a result of these violations, Plaintiffs and members of the Plaintiff Classes have suffered and continue to suffer injury in the form of unreasonable delays and unwarranted denials of their immigration applications.

TENTH CLAIM FOR RELIEF

"Uniform Rule of Naturalization"

(Plaintiffs Wagafe, Jihad, and Manzoor on behalf of themselves and the Naturalization Class)

289. Plaintiffs incorporate the allegations of the preceding paragraphs as if fully set forth herein.

290. Congress has the sole power to establish criteria for naturalization, and any additional requirements not enacted by Congress are ultra vires.

291. By its terms, CARRP creates additional, non-statutory, substantive criteria that must be met prior to a grant of a naturalization application.

292. Accordingly, CARRP violates Article I, Section 8, Clause 4 of the United States Constitution.

293. Because of this violation and because CARRP's additional, non-statutory, substantive criteria have been applied to their applications, Plaintiffs Wagafe, Jihad, Manzoor, and the Naturalization Plaintiff Class members have suffered and will continue to suffer injury in the form of unreasonable delays and unwarranted denials of their naturalization applications.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

1. Certify the case as a class action as proposed herein;
2. Appoint Plaintiffs Wagafe, Ostadhassan and Bengezi as representatives of the Muslim Ban Class;
3. Appoint Plaintiffs Wagafe, Jihad, and Manzoor as representatives of the Extreme Vetting Naturalization Class;
4. Appoint Plaintiffs Ostadhassan and Bengezi as representatives of the Extreme Vetting Adjustment of Status Class;
5. Order Defendants to adjudicate the petitions, applications, or requests of Plaintiffs and members of the proposed classes;
6. Order Defendants to adjudicate Plaintiffs' and proposed class members' petitions, applications, or requests based solely on the statutory criteria;
7. Declare Sections 2(c), 4 and 5 of the Second EO contrary to the Constitution and the INA;
8. Issue an order enjoining Defendants from applying Sections 2(c), 4 and 5 to Plaintiffs and members of the proposed classes;
9. Declare that CARRP or any successor "extreme vetting" program violates the Constitution, the INA, and the APA;
10. Enjoin Defendants, their subordinates, agents, employees, and all others acting in concert with them from applying CARRP or any successor "extreme vetting" program to the processing and adjudication of the immigration benefit petitions, applications, or requests of Plaintiffs and members of the proposed classes;
11. Order Defendants to rescind CARRP or any successor "extreme vetting" program because they failed to follow the process for notice and comment by the public;

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12. Alternatively, order Defendants to provide Plaintiffs and members of the proposed classes with notice that they have been subjected to CARRP or any successor "extreme vetting" program, the reasons for subjecting them to CARRP or any successor "extreme vetting" program, and a reasonable opportunity to respond to those allegations before a neutral decision-maker;
13. Award Plaintiffs and other members of the proposed class reasonable attorneys' fees and costs; and
14. Grant any other relief that this Court may deem fit and proper.

Respectfully submitted this 4th day of April, 2017.

By:

s/Matt Adams

s/Glenda M. Aldana Madrid

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing **SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 4th day of April, 2017, at Seattle, Washington.

By: s/ David A. Perez

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, MEHDI OSTADHASSAN, HANIN OMAR BENGEZI, MUSHTAQ ABED JIHAD, and SAJEEL MANZOOR, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JOHN F. KELLY, in his official capacity as Secretary of the U.S. Department of Homeland Security; LORI SCIALABBA, in her official capacity as Acting Director of the U.S. Citizenship and Immigration Services; MATTHEW D. EMRICH, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of the U.S. Citizenship and Immigration Services; DANIEL RENAUD, in his official capacity as Associate Director of the Field Operations Directorate of the U.S. Citizenship and Immigration Services,

Defendants.

No. 2:17-cv-00094-JCC

FIRST AMENDED MOTION FOR CLASS CERTIFICATION

NOTED FOR MAY 19, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs Abdiqafar Wagafe, Mehdi Ostadhassan, Hanin Omar Bengezi, Mushtaq Abed Jihad, and Sajeel Manzoor ("Plaintiffs") are five of thousands of individuals whose immigration applications have been delayed, or denied altogether, because of a secret and unlawful government vetting program that targets applicants who are Muslim or from certain Muslim-majority countries. In the wake of President Trump's First and Second Executive Orders 13769, 82 Fed. Reg. 8977, 8978-79 § 4 ("First EO"), and 13780, 82 Fed. Reg. 13209, 13215 §§ 4-5 ("Second EO"), both of which direct federal agencies to develop additional extreme vetting standards and procedures for all immigration benefits, this Court's review of Defendants' existing web of discriminatory and non-statutory vetting programs is especially critical.

Plaintiff Wagafe is a Muslim, Somali national who meets all statutory requirements to naturalize as a United States citizen. Despite his eligibility, and despite the statutory timeline prescribed by Congress, Mr. Wagafe waited more than three and a half years for a decision on his naturalization application. In an effort to moot Mr. Wagafe's individual claims and transfer this case to the District of North Dakota, just days after Plaintiffs had filed their original motion for class certification Defendant U.S. Citizenship and Immigration Services ("USCIS") finally scheduled an interview for Mr. Wagafe. Following the interview, USCIS approved Mr. Wagafe's application and he became a United States citizen on March 2, 2017.

Plaintiff Ostadhassan is a Muslim, Iranian national who meets all statutory requirements to adjust his status to that of a lawful permanent resident ("LPR"). Despite his eligibility, Mr. Ostadhassan waited over three years for a decision on his application. On April 5, 2017, USCIS issued a Notice of Intent to Deny his I-485 Application to Adjust Status.

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Plaintiff Bengezi is a Muslim, Libyan national and Canadian citizen who meets all statutory requirements to adjust her status to that of a LPR. Despite her eligibility, Ms. Bengezi has been waiting for over two years for a decision on her pending application.

Plaintiff Jihad is a Muslim, Iraqi national who meets all statutory requirements to naturalize as a United States citizen. Despite his eligibility, Mr. Jihad has been waiting over three and a half years for a decision on his pending naturalization application.

Plaintiff Manzoor is a Muslim, Pakistani national who meets all statutory requirements to naturalize as a United States citizen. Despite his eligibility, Mr. Manzoor has been waiting over one year for a decision on his pending naturalization application.

All Plaintiffs, and thousands of applicants like them, face such inordinate and unexplained delays because Defendant USCIS diverted their applications to an undisclosed and unauthorized program known as the Controlled Application Review and Resolution Program ("CARRP"). Congress did not enact or approve CARRP.

Through CARRP, the government surreptitiously blacklists thousands of applicants who are seeking immigration benefits, labeling them "national security threats." Such designations are often based on flimsy and unreliable factors. Once so designated, CARRP mandates immigration officials delay indefinitely, or outright deny, affected applications, even when the applicant is *statutorily eligible* to have his or her application granted. Relying on CARRP, immigration officials simply disregard governing statutory criteria for certain classes of applicants—most frequently applicants who are Muslim or are perceived to be Muslim—and instead adjudicate those applications pursuant to a process that applies heightened, generally insurmountable criteria to anyone caught in CARRP's dragnet. As Plaintiffs explain more fully in their Second Amended Complaint, CARRP and the manner in which it is being applied are illegal. Not only did USCIS not provide the required public notice and opportunity to

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comment before creating the program, but once in place, the program violates the Constitution, the Immigration and Nationality Act ("INA"), and the Administrative Procedure Act ("APA").

Thousands of individuals, including Plaintiffs, have had their applications for naturalization or adjustment of status halted, delayed, or denied by CARRP. A class action lawsuit is appropriate to challenge CARRP and any other successor "extreme vetting" program that the Executive branch may seek to implement pursuant to Sections 4 and 5 of the Second EO or through other extra-statutory means. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs Wagafe, Jihad, and Manzoor respectfully request that the Court certify the following class, and appoint them as class representatives:

> A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

Similarly, Plaintiffs Ostadhassan and Bengezi request that the Court, pursuant to Rules 23(a) and 23(b)(2), certify the following class and appoint them as class representatives:

> A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

Undersigned counsel are experienced in both class action and immigration matters, and Plaintiffs request that they be appointed as class counsel for both classes.[1]

[1] Plaintiffs filed an amended complaint on February 1, 2017, to assert additional claims and an additional class ("Muslim Ban Class"), relating to the effect of Section 3(c) of the First EO. Dkt. 17. On April 4, 2017, Plaintiffs filed a Second Amended Complaint, which preserves the assertion of this Muslim Ban Class relating to the effect of Section 2(c) of the Second EO. Dkt. 47. Plaintiffs do not seek certification of this additional class at this time because, after the filing of the First Amended Complaint, the Acting Director of USCIS issued a memorandum indicating that Section 3(c) of the First EO would no longer operate to stop the processing of immigration benefits for those already in the United States. *See generally* Notice Regarding Related Cases (Dkt. 22). And, in any event, Section 3(c) of the First EO and the corresponding Section 2(c) of the Second EO have since been more broadly enjoined. Temporary

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II. BACKGROUND

Although the Court need not engage in "an in-depth examination of the underlying merits" at this stage, it may analyze the merits to the extent necessary to determine the propriety of class certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011). For that reason, Plaintiffs provide a brief discussion of their claims relating to CARRP here. The claims are further described in the Second Amended Complaint (Dkt. 47).

A. The CARRP Policy

USCIS created CARRP in April 2008. Declaration of Jennie Pasquarella, Dkt. 27 ("Pasquarella Decl."), Ex. A (4/11/2008 policy memorandum introducing CARRP). Ostensibly, it is an agency-wide program for processing immigration applications that allegedly may implicate "national security concerns." *Id*. But the criteria used to determine whether a particular applicant implicates national security are vague and overbroad. They often turn on an applicant's national origin or otherwise lawful activities (such as living or traveling in areas of known terrorist activity), thereby ensnaring thousands of individuals who pose no threat to the United States. Worse still, CARRP's criteria for what constitutes a "national security concern" are untethered from the *statutory* criteria, including statutory criteria that are expressly security-related, that Congress enacted to determine whether a person is eligible for the immigration status he or she seeks.

Any immigration application that falls within CARRP's broad scope is immediately, and without any notice to the applicant, taken off the "routine adjudication" track and placed on a CARRP adjudication track, where it is subject to distinct procedures and criteria not authorized

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Restraining Order, *Washington v. Trump*, No. 2:17-cv-00141-JLR, ECF 52, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency motion to stay denied* 847 F.3d 1151 (9th Cir. 2017); Order Granting Motion for Temporary Restraining Order, *Hawaii et al. v. Trump*, No. 17-00050 DKW-KSC, ECF 219 (D. Haw. Mar. 15, 2017); Order Granting Motion to Convert Temporary Restraining Order to a Preliminary Injunction, *Hawaii et al. v. Trump*, No. 17-00050 DKW-DSC, ECF 270 (D. Haw. Mar. 29, 2017). Plaintiffs reserve the right to seek certification of the additional class if circumstances change again.

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by statute. An application will languish in CARRP indefinitely unless and until the alleged national security concern no longer is present. Indeed, even if an individual otherwise meets all the statutory criteria of eligibility for the benefits he or she seeks, USCIS officers are instructed that they *cannot approve* the application so long as the "national security concern" remains. *See* Pasquarella Decl., Ex. A at ("Officers are not authorized to approve applications" subject to CARRP); *id.*, Ex. B (7/26/2011 policy memorandum revising CARRP procedures) at 2 (an officer "is not authorized to approve applications or petitions" subject to CARRP).

Once an application is saddled with the "national security concern" tag, the next step in the CARRP process is called an "Eligibility Assessment." But far from trying to determine eligibility during the Eligibility Assessment process, the officer is encouraged to find *any* reason to deny the application outright so that "time and resources" are not spent determining whether there was any basis for the national security concern in the first place. Pasquarella Decl., Ex. A at 5; *see also id.*, Ex. C (1/2012 CARRP training presentation) at 52-59, 68 (providing "tips" on how to find an applicant ineligible). CARRP essentially creates a presumption of guilt that becomes difficult, if not impossible, to rebut.

The thousands of persons labeled as national security concerns based on CARRP's broad and vague criteria receive no notice of that determination, much less an opportunity to disprove it. As a result, their applications are effectively denied through indefinite delay. At no point are applicants told about the decision to subject their applications to CARRP, even though the decision to do so is often dispositive. Nor are applicants ever given the opportunity to contest the government's labeling of them as a national security threat.

Congress did not enact CARRP, nor did USCIS promulgate it as a proposed rule with the notice-and-comment procedures that the APA mandates. *See* 5 U.S.C. §§ 553(b)-(c). On the contrary, USCIS takes steps to deliberately keep the existence of CARRP a secret. The program was only discovered through litigation challenging a denial of naturalization in *Hamdi v. USCIS*, No. EDCV 10-894 VAP (DTBx), 2012 WL 632397 (C.D. Cal. Feb. 25, 2012), and then revealed

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in greater detail through the government's response to Freedom of Information Act ("FOIA") requests and litigation to compel responses to those requests. *See ACLU of Southern California v. USCIS*, No. CV 13-861 (D.D.C. filed June 7, 2013).

B. Plaintiffs' Legal Claims

On its face and as applied to Plaintiffs, CARRP violates federal law and the Constitution. First, CARRP violates the INA, which sets forth exclusive statutory and regulatory criteria governing applications for naturalization and adjustment of status. *See* 8 U.S.C. § 1427 and 8 C.F.R. §§ 316.2 and 335.3 (criteria for naturalization); 8 U.S.C. §§ 1255 and 1159, and 8 C.F.R. §§ 245.1 and 209.1 (criteria for adjustment of status). In fact, federal regulations provide that if an applicant has complied with all requirements for naturalization, USCIS "*shall* grant the application." 8 C.F.R. § 335.3(a) (emphasis added). But under CARRP, even when applicants meet all the criteria for naturalization, USCIS will delay or deny their applications based on criteria unrelated to the statute. By imposing such additional requirements and unauthorized impediments for naturalization and adjustment of status, CARRP violates the INA.

CARRP also violates the APA. First, because CARRP is a final agency action that "neither focuses on nor relates to a [non-citizen's] fitness to" obtain the immigration status subject to its terms, *Judulang v. Holder*, 565 U.S. 42, 55 (2011), it is arbitrary and capricious under 5 U.S.C. § 706(2)(A). Second, CARRP violates the APA's requirement that administrative agencies provide a notice-and-comment period prior to implementing a substantive agency rule. 5 U.S.C. § 553(b), (c). CARRP is fairly characterized as a substantive rule, and therefore is subject to the APA's notice-and-comment rulemaking procedures, because it imposes extra-statutory eligibility criteria that effectively alter applicants' ability to naturalize or obtain legal permanent residency. *See United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010).

Finally, CARRP violates several constitutional provisions. Under the Uniform Rule of Naturalization Clause, the Constitution expressly assigns to Congress, not the Executive branch,

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the authority to establish the rules of naturalization. *See* U.S. Const. art. I, § 8, cl. 4. Congress set forth those rules in the INA. By imposing additional, non-statutory, substantive criteria that must be met prior to granting a naturalization application, CARRP violates the Uniform Rule of Naturalization Clause. CARRP also violates the Due Process Clause of the Fifth Amendment. Plaintiffs and putative class members have a constitutionally protected interest in having their naturalization and adjustment of status applications adjudicated in accordance with the law. *See, e.g.*, *Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014) ("[Plaintiff] had [a constitutionally] protected interest in being able to apply for citizenship" under the Due Process Clause). CARRP violates the Due Process Clause because the government never provides naturalization and adjustment applicants notice of their classification under CARRP, a meaningful explanation of the reason for such classification, nor any process by which they can challenge their classification.

In sum, CARRP cannot survive judicial scrutiny.

C. President Trump's Promise for More "Extreme" Vetting

President Trump campaigned on promises to impose a "total and complete ban" on Muslims coming to the United States. He and his associates consistently expressed disdain for Muslims. *See* Second Amended Complaint, Dkt. 47, ¶¶ 98-101. Both during the campaign and after his election and inauguration, President Trump expressed his intention to establish a program of "extreme vetting" to achieve such a ban. *See id.* ¶¶ 102-05.

President Trump began to implement his stated goal of keeping Muslims out of the United States and otherwise subjecting them to "extreme vetting" when he signed the First EO on January 27, 2017. After the First EO was enjoined, President Trump replaced it with a Second EO, which mirrors the First EO's efforts to implement his anti-Muslim agenda.[2] To the extent any "extreme vetting" policy developed pursuant to the Second EO expands or continues

[2] The Second EO has also been enjoined. *Internat'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361-TDC (D. Md.), appeal pending *Internat'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir.); *Hawaii, et al. v. Trump*, No. 1:17-cv-50-KSC (D. Haw.), appeal pending *Hawaii, et al. v. Trump*, No. 17-15589 (9th Cir.).

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CARRP, it will suffer from the same legal deficiencies as CARRP itself. And to the extent the policy targets Muslims, CARRP and any successor program also would violate the guarantee of equal protection under the Due Process Clause of the Fifth Amendment.

D. CARRP Has Delayed Named Plaintiffs' Applications.

Plaintiff Wagafe is a 32-year-old Somali national who is a lawful permanent resident of the United States, currently residing in SeaTac, Washington. Second Amended Complaint, Dkt. 47 ¶¶ 142, 149. After fleeing Somalia, Mr. Wagafe lived as a refugee in Kenya and Ethiopia before coming to the United States as a refugee in 2007. *Id.* ¶¶ 143-44. Mr. Wagafe filed an application for naturalization on November 8, 2013, and satisfied all the statutory requirements for naturalization. *Id.* ¶¶ 152, 156-57. USCIS scheduled him for a naturalization interview on February 25, 2014, but then abruptly cancelled it on January 29, 2014, without explanation. *Id.* ¶ 152. Mr. Wagafe had not heard from USCIS, other than a response to his attorney's inquiry in July 2015 instructing his attorney to have patience. *Id.* ¶ 153. It was only because his attorney filed a FOIA request concerning his case that Mr. Wagafe discovered that USCIS had "shelved" his pending application, relying on CARRP. A document in his "Alien file" obtained through that request indicates that his case was handled by a CARRP officer, without revealing the reasons why. Pasquarella Decl., Exs. D (cover page indicating CARRP); E (mentions file was reviewed "by prior CARRP officer").

Following the filing of this lawsuit, Defendant USCIS suddenly adjudicated Mr. Wagafe's application, in what appears to have been an attempt to moot Mr. Wagafe's individual claims and lend support to Defendants' motion to transfer venue to North Dakota. Five days after Plaintiffs filed their original motion for class certification in this case, a USCIS officer informed Mr. Wagafe's immigration attorney that an interview had been scheduled on his naturalization application. Second Amended Complaint, Dkt. 47 ¶ 154. Recognizing Mr. Wagafe met all statutory requirements for naturalization, Defendant USCIS approved his

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application immediately following his interview, and Mr. Wagafe became a United States citizen on March 2, 2017. *Id.*

Plaintiff Ostadhassan is a 33-year-old national of Iran who resides in Grand Forks, North Dakota. *Id.* ¶ 162. Mr. Ostadhassan moved to the United States in 2009 on a student visa to study at the University of North Dakota. *Id.* ¶ 163. He earned his Ph.D. degree in Petroleum Engineering. After graduation, Mr. Ostadhassan was hired immediately by the University of North Dakota as an Assistant Professor. *Id.* In 2014, he married a U.S. citizen. *Id.* ¶ 164. Mr. Ostadhassan and his wife had their first child in July 2016. *Id.* In February 2014, Mr. Ostadhassan applied to adjust his immigration status to that of a lawful permanent resident based upon his marriage. *Id.* ¶ 165. USCIS initially scheduled Mr. Ostadhassan for an interview on May 19, 2014, but abruptly canceled the interview when Mr. Ostadhassan arrived at the appointed time and place. *Id.* ¶ 167. After some delay, USCIS finally interviewed Mr. Ostadhassan more than 16 months later, on September 24, 2015. At the interview, the USCIS officer told Mr. Ostadhassan that the government was not ready to make a decision. *Id.* ¶¶ 168-69. On March 24, 2017, USCIS approved the immigrant visa petition that Mr. Ostadhassan's wife had filed on his behalf over three years earlier. *See* Supplemental Pasquarella Declaration ¶ 2. And on April 5, 2017, USCIS issued a Notice of Intent to Deny Mr. Ostadhassan's Form I-485 Application to Adjust Status, indicating that though Mr. Ostadhassan satisfies all statutory criteria, USCIS intends to deny his application "as a matter of discretion." *Id.* ¶ 3 & Ex. A at 4.

As USCIS acknowledges, Mr. Ostadhassan is statutorily eligible to adjust his immigration status. On information and belief, his application was delayed for over three years because the government subjected the application to CARRP. This is likely true because Mr. Ostadhassan has resided in and traveled through what the government considers "areas of known terrorist activity" (Iran), has donated to Islamic charities, and is involved in his local Muslim community in North Dakota. Such circumstances typically cause an application to be subjected to CARRP. *See* Second Amended Complaint, Dkt. 47, ¶¶ 170-74.

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Plaintiff Bengezi is a thirty-two-year-old national of Libya who resides in Redmond, Washington. *Id.* ¶ 176. Ms. Bengezi immigrated to Canada with her family in 1995 and became a Canadian citizen in 2012. *Id.* ¶¶ 178-79. After becoming engaged to a U.S. citizen, Ms. Bengezi entered the country on a K-1 Fiancée visa and, after getting married, filed for an application to adjust her status on February 5, 2015. *Id.* ¶¶ 181-87. Though Ms. Bengezi meets all statutory requirements to adjust her immigration status, USCIS has not scheduled an interview on her application. *Id.* ¶¶ 188, 191-92. On information and belief, Defendant USCIS has applied CARRP or its successor "extreme vetting" program to her application, which has indefinitely delayed the adjudication process. *Id.* ¶ 196. When Ms. Bengezi flies, she is unable to check in for her flight online and she is routinely subjected to additional security screening measures due to her "Secondary Security Screening Selection." *Id.* ¶ 193. These additional security measures are a common indication that an individual's application is subject to CARRP.

Plaintiff Jihad is a forty-four-year-old Iraqi national who resides in Renton, Washington. *Id.* ¶ 199. In August 2008, Mr. Jihad and his family were admitted to the United States as refugees and settled in the Tri-Cities area of Washington. *Id.* ¶ 203-04. After becoming a lawful permanent resident, Mr. Jihad filed his application for naturalization on July 1, 2013. *Id.* ¶¶ 205-06. Soon after completing his biometrics appointment, two FBI agents visited Mr. Jihad and questioned him extensively about his background. *Id.* ¶ 209. Though Mr. Jihad satisfies all statutory criteria for naturalization, his application has been pending for over three and a half years. On information and belief, Defendant USCIS has subjected Mr. Jihad's application to CARRP or an "extreme vetting" successor program, which explains the FBI's interrogation and the extreme delay Mr. Jihad has experienced. *Id* ¶ 217.

Plaintiff Manzoor is a forty-year-old Pakistani national and lawful permanent resident who resides in Newcastle, Washington. *Id.* ¶ 220. After coming to the United States on a student visa, Mr. Manzoor was granted lawful permanent resident status in September 2010 based on a business petition. *Id.*¶¶ 221, 226-27. He subsequently filed his application for

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naturalization on November 30, 2015. *Id.*¶ 228. Though Mr. Manzoor is statutorily eligible to naturalize as a United States citizen, USCIS has not adjudicated his application for over three years. This unexplained delay indicates that USCIS has subjected Mr. Manzoor's application to CARRP or its successor "extreme vetting" program. *Id.* ¶¶ 233-34.

III. ARGUMENT

Under Civil Rule 23, a lawsuit may proceed as a class action if two conditions are met: the "suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010) (citing Fed. R. Civ. P. 23(b)). By its terms, "this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id*.

Plaintiffs meet all four of the Rule 23(a) requirements, and satisfy Rule 23(b) because "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Consistent with numerous Ninth Circuit authorities involving certification of class actions on behalf of noncitizens who challenge immigration policies and practices, class certification is warranted here.[3]

[3] *See, e.g.*, *Mendez Rojas, et al. v. Johnson, et al.*, 2:16-cv-1024-RSM, ECF 37 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures); *A.B.T. v. U.S. Citizenship and Immigration Services*, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving settlement amending practices by the Executive Office for Immigration Review and USCIS that precluded asylum applicants from receiving employment authorization); *Santillan v. Ashcroft*, No. C 04–2686, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Ali v. Ashcroft*, 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd on other grounds*, 219 F.3d 1087 (9th Cir. 2000) (en banc) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Walters v. Reno*, No. C94–1204C, 1996 WL 897662, at *5-8 (W.D. Wash. 1996), *aff'd*, 145 F.3d 1032, 1045-47 (9th Cir. 1998), *cert. denied*, *Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases). *See also Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying districtwide class of delayed naturalization cases); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district court's denial of class certification in

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Plaintiffs do not request that this Court adjudicate their individual immigration applications, nor do they seek money damages. Plaintiffs request only that this Court determine that CARRP or any successor policy is unlawful, and enjoin Defendants from applying such policy to the processing and adjudication of Plaintiffs' and other class members' applications for citizenship and adjustment of immigration status applications. Alternatively, and at a minimum, Plaintiffs request an order compelling USCIS to provide applicants notice that the government has decided to subject their application to CARRP and an opportunity to challenge that decision.

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

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

This case easily meets the numerosity requirement. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." While no specific number of class members is required, *Perez-Funez v. District Director, Immigration & Naturalization Service*, 611 F. Supp. 990, 995 (C.D. Cal. 1984), courts have recognized that "where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied," *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008) (internal quotation marks and citations omitted). Additionally, where the class includes "unnamed and unknown future members," joinder is impractical, "and the numerosity requirement is therefore met, regardless of class size." *Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (internal quotation marks and citation omitted).

Here, the numbers of naturalization and adjustment of status applications subject to CARRP are more than sufficient for class certification purposes. As of March 2009, for those applications pending for six months or longer, the government was applying CARRP to at least

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case challenging inadequate notice and standards in Immigration and Naturalization Service vehicle forfeiture procedure).

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1,437 applications for adjustment of immigration status, and at least 1,065 applications for naturalization. Pasquarella Decl., Ex. F (monthly case load report). Between July 1 and September 30, 2013—the most recent time period for which Plaintiffs have reliable data—USCIS reported 2,644 pending applications subjected to CARRP. *Id*., Ex. G (quarterly workload report). USCIS data shows that applications for naturalization and adjustment of immigration status make up the majority of all applications now pending before USCIS subject to CARRP. *Id*., Ex. F. Based on this data, and as a matter of "general knowledge and common sense," the number of members in each proposed class makes joinder of each individual member impracticable. Class certification is also appropriate here given the unknown future class members to whose immigration applications Defendant will apply CARRP. *See Ali*, 213 F.R.D. at 408-09.

Plaintiffs have met the numerosity requirement.

2. This Case Presents Questions of Law and Fact Common to the Members of the Classes.

Rule 23(a) also requires that the case present "questions of law or fact common to the class." Plaintiffs "need not show, however, that 'every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is 'even a single common question,' a would-be class satisfies the commonality requirement." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quoting *Dukes*, 564 U.S. at 350 (2011)); *see also Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (noting that "commonality only requires a single significant question of law or fact").

Plaintiffs raise multiple questions common to the classes, including but not limited to:

- Whether CARRP violates the INA by creating additional, non-statutory, substantive criteria that must be met prior to a grant of a naturalization or adjustment of status application (both Classes);
- Whether CARRP violates the APA, 5 U.S.C. § 706, as a final agency action that is arbitrary and capricious, contrary to constitutional law, and in excess of statutory authority (both Classes);

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- Whether CARRP constitutes a substantive rule and, as a result, is unenforceable because Defendants violated the mandatory requirements for rulemaking under APA, 5 U.S.C. § 553, as they promulgated CARRP without providing a notice-and-comment period prior to implementation (both Classes);

- Whether CARRP violates the Uniform Rule of Naturalization, Article I, Section 8, Clause 4 of the Constitution by establishing criteria for naturalization that were never authorized by Congress (Extreme Vetting Naturalization Class);

- Whether CARRP is unconstitutional because Defendants failed to provide Plaintiffs notice of their classification under CARRP and a meaningful explanation of the reason for such classification, as well as a process by which Plaintiffs can challenge their classification, resulting in a violation of the Due Process Clause of the Fifth Amendment to the Constitution (both Classes);

- Whether CARRP discriminates against Plaintiffs on the basis of their country of origin, and without sufficient justification, and therefore violates the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution (both Classes);

- Whether the application of CARRP to Plaintiffs' applications for naturalization and adjustment of status—benefits to which they are statutorily eligible and to which they are legally entitled—constitutes arbitrary denial in violation of Plaintiffs' right to substantive due process under the Fifth Amendment to the Constitution (both Classes).

Defendants may argue that Plaintiffs cannot satisfy commonality because each application subject to CARRP hinges on the particular facts and circumstances unique to each applicant. But this argument would misconstrue and misapply the commonality requirement. As the Ninth Circuit recently observed, "[t]o assess whether the putative class members share a common question, the answer to which 'will resolve an issue that is central to the validity of each one of the [class members's] claims,' [the court] must identify the elements of the class members' case-in-chief." *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014) (quoting *Dukes*, 564 U.S. at 350). Here, the gravamen of Plaintiffs' Second Amended Complaint is not focused on how CARRP was specifically applied to any given individual seeking immigration benefits, but rather how USCIS's overall decision to implement CARRP and its subsequent application to Plaintiffs and others similarly situated violates federal

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statutory and constitutional law. Because each class member's statutory and constitutional claims can be resolved in one stroke, "a classwide proceeding" will "generate common answers apt to drive the resolution of the litigation." *See Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 652-53 (W.D. Wash. 2011). Plaintiffs have met their burden to demonstrate commonality because "the court must decide only once whether the application [of CARRP] . . . does or does not violate" the law. *See id*. at 654. Should Plaintiffs prevail, all proposed class members will benefit the same way: either from an order enjoining the government from applying CARRP to their applications, or from an order directing the government to allow affected applicants an opportunity to respond to CARRP-related allegations.

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

Typicality is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of the typicality requirement is to ensure that the interests of the named representatives align with the interests of the class as a whole. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Claims of the proposed class representatives are considered "typical" if they are "reasonably coextensive with those of the absent class members." *Parsons*, 754 F.3d at 685 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). In this way, commonality and typicality "tend to merge" because both "serve as guideposts for determining whether, under the particular circumstances presented by the case, 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." *Dukes*, 564 U.S. at 349 n.5.

Plaintiffs' claims are typical of the proposed classes to be certified because they proceed under the same legal theories, seek the same relief, and have suffered the same injuries. Like each proposed class member, Plaintiffs have filed immigration applications (for naturalization and adjustment of immigration status, respectively) that the government has unlawfully subjected

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to review under CARRP. Despite meeting all the statutory requirements to receive the immigration benefits they seek, all five named Plaintiffs have been injured by the delay and failure to adjudicate their immigration applications based on CARRP. Because Plaintiffs have suffered the same statutory and constitutional injuries as the proposed class members, their claims are typical of the classes which they propose to represent. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (upholding typicality where plaintiffs "raise[d] similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings").

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

Rule 23(a)(4) requires that "[t]he representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Rodriguez*, 591 F.3d at 1125 (citing *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)).

a. Named Plaintiffs

The named Plaintiffs will fairly and adequately protect the interests of the respective classes because they seek relief on behalf of the classes and have no individual interest that could be considered antagonistic to other class members. *See* Declaration of Mehdi Ostadhassan (Dkt. 29); Declaration of Abdiqafar Wagafe (Dkt. 28); Declaration of Hanin Omar Bengezi; Declaration of Mushtaq Abed Jihad; Declaration of Sajeel Manzoor. Their shared goal is to have the Court declare CARRP unlawful and issue injunctive relief preventing CARRP from being applied to their immigration applications. Plaintiffs do not seek money damages. The interests of the named Plaintiffs therefore coincide precisely with those of the class members.

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b. Counsel

Plaintiffs' counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984), *amended on rehearing*, 763 F.2d 1091, 1098 (9th Cir. 1985). Plaintiffs are represented by attorneys with the ACLU of Washington Foundation, the ACLU Foundation of Southern California, the ACLU Foundation, the Law Offices of Stacy Tolchin, the National Immigration Project of the National Lawyers Guild, the Northwest Immigrant Rights Project, and the Perkins Coie law firm. Class counsel are able and experienced in protecting the interests of noncitizens and have considerable experience in handling complex and class action litigation, including in the area of immigration law. *See* Dkts. 27, 30-34 (Pasquarella Decl.; Declaration of Lee Gelernt; Declaration of Matt Adams; Declaration of Stacy Tolchin; Declaration of Trina Realmuto; Declaration of Harry Schneider). As detailed in their declarations, class counsel have the experience and ability to vigorously and effectively represent both named and absent class members.

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

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the requirements of Rule 23(b). Certification under Rule 23(b)(2) requires that Defendants "ha[ve] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The underlying premise of subsection (b)(2) is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (citation omitted). In other words, (b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*

Here, Plaintiffs are asking the Court to declare CARRP unlawful and unenforceable and to enjoin the government from subjecting Plaintiffs' and proposed class members' immigration

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applications to CARRP. This relief would benefit Plaintiffs as well as all members of the proposed classes in identical fashion. In other words, no individual class member would be entitled to a *different* injunction or declaratory judgment. Accordingly, Plaintiffs have met the requirements of Rule 23(b)(2), because they "seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *See Parsons*, 754 F.3d at 688 (citation omitted); *see also Walters*, 145 F.3d at 1047 (holding that certification under Rule 23(b)(2) was proper where plaintiffs challenged INS practices in document fraud proceedings); *Rodriguez*, 591 F.3d at 1125-26 (holding that certification under Rule 23(b)(2) was proper in challenge to defendants' policy of failing to provide bond hearings to immigration detainees).

Given the nature of Plaintiffs' claims implicating CARRP, class certification should be nationwide. Certification that is not nationwide in scope would result in Defendants continuing to apply an unlawful policy to noncitizens applying for naturalization simply by virtue of their geographic location, which would undermine the constitutional imperative of "a *uniform* Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4 (emphasis added). Such piecemeal relief would lead to arbitrary and unjust results. *See Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (holding certification of a nationwide class was particularly fitting because "anything less [than] a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in"). Moreover, it would be equally arbitrary and unjust to certify anything short of a nationwide class for adjustment of status applicants, who, regardless of geographic location, are all subjected to Defendants' unlawful policy.

Because Defendants have subjected the members of both classes to the same statutory and constitutional violations, and because class members seek uniform relief, certification is proper under Rule 23(b)(2).

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C. Class Certification Is Also Warranted to Prevent Defendants from Avoiding Adjudication of the Legality of CARRP.

Certification of the proposed classes is also appropriate to prevent Defendants from attempting to evade judicial review by adjudicating Plaintiffs' individual applications. As the Supreme Court has acknowledged, "some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (citation omitted). In such cases, the named plaintiff's claims are "capable of repetition, yet evading review." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). Because of this, a class action may be the only way for meaningful review. *See id*. at 1090 (where the class representative's claims are transitory, "mooting the putative class representative's claims will not necessarily moot the class action" even if "the district court has not yet addressed the class certification issue").

Class certification is especially appropriate here because challenges to CARRP historically have proven to be the very sort of transitory claims that are "capable of repetition, yet evading review." Indeed, Plaintiffs expect that discovery will confirm that, in the past, Defendants have engaged in a deliberate strategy of mooting the claims of applicants adversely impacted by CARRP before a ruling on the merits could be obtained. In *Muhanna v. USCIS*, No. 14-cv-05995 (C.D. Cal. July 31, 2014), five individual plaintiffs filed suit challenging the delay to their naturalization applications caused by CARRP.[4] Within months of the commencement of that lawsuit, USCIS adjudicated the naturalization applications of all five plaintiffs, each of whom had been waiting years for a decision, and the lawsuit was voluntarily dismissed as moot. *Muhanna*, No. 14-cv-05995, Dkt. 51 (entered Dec. 23, 2014); *see also* Pasquarella Decl., ¶ 4. In *Arapi v USCIS*, No. 16-cv-00692 JLR (E.D. Mo. 2016), twenty individual plaintiffs filed suit asserting causes of action relating to application of CARRP to their pending naturalization

[4] Plaintiffs in *Muhanna* were represented by some of the same attorneys representing Plaintiffs here.

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applications. Once again, promptly after their suit was commenced, USCIS moved to adjudicate the applications of all twenty plaintiffs. Nineteen of the plaintiffs voluntarily dismissed their claims at that point, and USCIS moved to dismiss the remaining plaintiff's claims as moot. *Arapi*, No. 16-cv-00692 JLR, Dkt. 22 (filed Dec. 19, 2016).

Defendants already have deployed this strategy in this case, in an attempt to moot the individual claims of a named Plaintiff and transfer venue from this Court to North Dakota. When Plaintiffs initiated this lawsuit in January 2017, named Plaintiff Abdiqafar Wagafe had been waiting over three and a half years with no explanation for a decision on his application to naturalize as a U.S. citizen. Second Amended Complaint, Dkt. 47 ¶¶ 152-53. Just five days after Plaintiffs filed their initial Motion for Class Certification, Defendant USCIS suddenly scheduled Plaintiff Wagafe for an interview on his naturalization application. *Id.* ¶ 154. Following his interview, which occurred on February 22, 2017, Mr. Wagafe's application was immediately approved and he became a U.S. citizen on March 2, 2017. *Id*. Defendants filed their Motion to Transfer Venue on the same day, contending that because Plaintiff Wagafe no longer had an active individual-capacity claim, and he was the only named Plaintiff who resided in the forum, the interests of justice favored transfer.[5] Dkt. 39 at 5-8.

As Defendants have a practice of attempting to evade judicial review of CARRP challenges by adjudicating individual Plaintiffs' claims and then seeking dismissal on mootness grounds, class certification is necessary to ensure judicial review of these important claims. *See Pitts*, 653 F.3d at 1090–91 (holding defendant's "unaccepted offer of judgment did not moot Pitts's case because his claim is transitory in nature and may otherwise evade review," thereby "avoid[ing] the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved"); *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 909 (N.D. Cal. 2014) (holding that the defendant's attempt to refund the plaintiff's money did not moot the class

[5] Plaintiffs have since filed a Second Amended Complaint (Dkt. 47), which adds three named Plaintiffs—all of whom reside in King County, Washington.

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action claims because the bank's behavior was evidence of a "calculated strategy that includes picking off named Plaintiffs"); *Ramirez v. Trans Union, LLC*, No. 3:12-CV-00632 (JSC), 2013 WL 3752591, at *2 (N.D. Cal. July 17, 2013) (holding that Rule 68 Offer of Judgment to the named plaintiff did not moot the class action because the plaintiff's claims would "evade review" if the defendant were able to "pick off" each subsequent lead plaintiff).

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Class Certification and enter an order certifying the proposed classes under Rules 23(a) and 23(b)(2), appoint Plaintiffs as class representatives for the respective classes, and appoint Plaintiffs' counsel as class counsel for both classes.

DATED: April 10, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing MOTION FOR CLASS CERTIFICATION via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 10th day of April, 2017, at Seattle, Washington.

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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants.[1]

No. 2:17-cv-00094-JCC

DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR LACK OF JURISDICTION, IN PART, AND FAILURE TO STATE A CLAIM, IN PART

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR:
May 12, 2017

[1] Ms. Lori Scialabba, named as a defendant in her official capacity as Acting Director, United States Citizenship and Immigration Services, has been replaced as USCIS Acting Director by Mr. James McCament, who is automatically substituted for Ms. Scialabba as a defendant in this action by operation of Fed. R. Civ. P. 25(d).

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STATUTES

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REGULATIONS

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I. INTRODUCTION

On January 23, 2017, Plaintiffs filed a Complaint alleging U.S. Citizenship and Immigration Services ("USCIS") unlawfully delayed adjudication of Plaintiffs' applications for immigration benefits under a policy known as the Controlled Application Review and Resolution Program ("CARRP"). Complaint, ECF No. 1, at ¶¶ 1-2. On January 27, 2017, the President issued Executive Order ("E.O.") 13769, which temporarily suspended entry of visa holders from seven designated countries. 82 Fed. Reg. 8977 (Feb. 1, 2017). On February 1, 2017, Plaintiffs filed a First Amended Complaint, adding several causes of action related to E.O. 13769, including allegations that section 3(c) unlawfully suspended adjudication of Plaintiffs' benefit applications. ECF No. 17, at ¶¶ 54, 58-60, 154-158, 159-164, 165-166, 171-172, 173-178.

On February 2, 2017, the USCIS Acting Director clarified that E.O. 13769 did not affect the processing of benefit applications of individuals in the United States. Exhibit A (hereinafter "Scialabba Memo"). Then, on February 7, 2017, Plaintiffs filed a Notice of Related Cases, ECF No. 22, in which they acknowledged that, in light of the Scialabba Memo, "if Defendants adhere to the position stated in the [Scialabba Memo], it would appear that the section 3(c) claims in this action may become moot."[2] The "section 3(c) claims" to which Plaintiffs referred were Claims for Relief 1-3, 5, and 6, which were all based on the allegation USCIS had suspended adjudication of immigration benefit applications from people from the seven countries designated by the Executive Order.

On March 6, 2017, the President issued E.O. 13780, which revoked E.O. 13769 effective March 16, 2017. E.O. 13780, § 13, 82 Fed. Reg. 13209, 13218 (Mar. 9, 2017). On April 4, 2017, Plaintiffs filed a Second Amended Complaint ("SAC"). ECF No. 47. Despite their earlier acknowledgement to the contrary, Plaintiffs again alleged Defendants had suspended adjudication of benefit applications from Plaintiffs. SAC, ECF No. 47, at ¶¶ 249-61, 265-72.

As Plaintiffs correctly said in their Notice of Related Cases, ECF No. 22, these claims are moot. Specifically, their First, Second, Third, Fifth, and Sixth Claims present no live case or

[2] Plaintiffs also declined to pursue this theory in their motion for class certification. *See* Motion for Class Certification, ECF No. 26, at 3 n.1.

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controversy because (1) E.O. 13769 has been entirely rescinded, (2) even if it were still in force, binding guidance from the USCIS Acting Director confirms USCIS is processing benefit applications for individuals present in the United States regardless of country of origin, and (3) nothing in E.O. 13780 directs USCIS to suspend adjudication of benefit applications of applicants present in the United States. This is illustrated by the recent approval of Mr. Wagafe's naturalization application,[3] and the issuance of a notice of intent to deny Mr. Ostadhassan's adjustment-of-status application. *See* SAC ¶154; Exhibit B (Declaration of Leslie Tritten).

Further, insofar as Plaintiffs challenge the so-called "extreme vetting" under E.O. 13780, those claims fail to state claims upon which relief can be granted as the complaint does not allege sufficient facts to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 540, 555 (2007).

Plaintiffs' Fourth Claim fails to state a claim for relief as a matter of law, as they lack a constitutionally protected liberty or property interest in either the immigration benefits sought or the pace of adjudication. The remaining allegations—Claims for Relief Seven, Eight, Nine, and Ten—must be dismissed because they also fail to state claims upon which relief can be granted. Even accepting Plaintiffs' descriptions of CARRP as accurate for purposes of this motion, Plaintiffs fail to demonstrate CARRP is a final agency action under the Administrative Procedure Act ("APA"), or a "legislative rule" for purposes of APA notice-and-comment rulemaking. Further, Plaintiffs do not have a private right of action under either the Immigration and Nationality Act ("INA") or the Constitution's Uniform Rule of Naturalization clause. Accordingly, the Court should dismiss the Second Amended Complaint in its entirety—in part, for lack of jurisdiction, and, in part, for failure to state claims upon which relief can be granted.

II. LEGAL STANDARDS

A. Rule 12(b)(1) Standard

Because mootness and standing both pertain to a federal court's subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss. *White v. Lee*, 227 F.3d

[3] As Mr. Wagafe's application has been granted, his individual-capacity claims are now moot and he should be dismissed from the action.

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1214, 1242 (9th Cir. 2000). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In reviewing a facial challenge, which contests the sufficiency of the pleadings, the court considers only the allegations of the complaint, accepting such allegations as true and drawing reasonable inferences in favor of the plaintiff. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In resolving a factual attack, however, "the district court may review evidence beyond the complaint" and "need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone*, 373 F.3d at 1039.

B. Rule 12(b)(6) Standard

Under Rule 12(b)(6), dismissal is appropriate when the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). "To survive a motion to dismiss, a complaint must contain more than 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555). Rather, the complaint must include "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotations and citations omitted).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). Under Rule 12(b)(6), as with a facial challenge under Rule 12(b)(1), allegations of fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Spreewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Allegations of law framed as factual statements, however, need not be taken as true. *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) ("We do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations"). Likewise, merely conclusory statements and formulaic recitations of the elements of a cause of action are not entitled to the presumption of truth. *Chavez v. United States*, 683 F.3d 1102, 1108-09 (9th Cir. 2012).

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III. BACKGROUND

A. Immigration Processes

1. Naturalization Process

The Secretary of Homeland Security has "sole authority to naturalize persons as citizens of the United States." 8 U.S.C. § 1421(a).[4] Under the Secretary's authority, USCIS adjudicates naturalization applications, to include investigating applicants, conducting examinations, and determining whether to grant applications. 8 U.S.C. §§ 1446(a), (c). If USCIS denies an application, the applicant may request a hearing before an immigration officer. 8 U.S.C. § 1447(a); 8 C.F.R. § 336.2(b).

The statutory requirements for naturalization are described in 8 U.S.C. §§ 1427 and 1429. The alien must show, *inter alia*, that he or she was lawfully admitted for permanent residence in the United States in accordance with all applicable provisions of the INA, resided continuously and was physically present within the United States for specified periods of time, was and still is a person of good moral character, and is attached to the principles of the Constitution. 8 U.S.C. §§ 1427(a), (d), 1429. To have been lawfully admitted for permanent residence, the alien must have been admissible at the time of adjusting to permanent resident status. 8 U.S.C. § 1255(a)(2). An alien who has sought any immigration benefit by fraud or willfully misrepresenting a material fact is inadmissible. 8 U.S.C. § 1182(a)(6)(C)(i). Certain behavior, including giving false testimony to obtain an immigration benefit, disqualifies an applicant from demonstrating good moral character. *See, e.g.*, 8 U.S.C. § 1101(f)(6). Similarly, membership in or financial contributions to a terrorist organization may make the applicant inadmissible, and may adversely reflect on an applicant's good moral character. 8 U.S.C. § 1427(e); 8 C.F.R. § 316.10(a)(2).

As is generally the case with all benefit applications, USCIS conducts security checks of naturalization applicants to enhance national security, public safety, and ensure the integrity of the immigration process. USCIS is required by statute and regulation to complete a full

[4] The transfer of the former Immigration and Naturalization Service's ("INS") naturalization functions to the Department of Homeland Security included the transfer of the authority to naturalize from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No.107-296, § 1512(d), 116 Stat. 2135, 2310 (Nov. 25, 2002).

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background investigation of naturalization applicants. Indeed, Congress has mandated that USCIS "receiv[e] confirmation from the Federal Bureau of Investigation ("FBI") that a full criminal background check has been completed, except for those excepted by regulation as of January 1, 1997," before adjudicating a naturalization application. Pub. L. No. 105-119, Title I, 111 Stat. 2448 (Nov. 26, 1997).

USCIS must, therefore, thoroughly investigate the background of every naturalization applicant to determine whether the applicant is eligible to naturalize. *See* 8 U.S.C. § 1446(a), (b); 8 C.F.R. § 335.1 ("The investigation shall consist, at a minimum, of a review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and has been employed, or engaged in business, for at least the five years immediately preceding the filing of the application.").

If USCIS does not decide an application within 120 days following the applicant's examination, the applicant may sue in district court to obtain a determination of the application. 8 U.S.C. § 1447(b). A naturalization applicant may file a Form N-336 with USCIS to appeal a denial of naturalization, and if that is denied, then seek *de novo* review in district court. 8 U.S.C. § 1421(c).

2. Adjustment of Status Process

In the past, a non-immigrant alien who sought to obtain permanent residence in the United States had to leave the country and seek an immigrant visa at a U.S. consulate abroad. To alleviate that burden, Congress created the adjustment-of-status process, subject to the ultimate discretion of, originally, the Attorney General, and now, the Secretary of Homeland Security. 8 U.S.C. § 1255; *Jain v. Immigration & Naturalization Serv.*, 612 F.2d 683, 686 (2d Cir. 1979).

An alien becomes eligible to adjust to lawful permanent resident ("LPR") in several circumstances, including through marriage to a U.S. citizen. *See, e.g.*, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1. For an alien married to a U.S. citizen and residing within the United States, the process has two-steps. First, the citizen spouse files a Petition for Alien Relative ("Form I-130") on behalf of the alien spouse, to establish the existence of the marital relationship. 8 U.S.C. §1154(b); 8 C.F.R. § 204.1(a)(1). Second, the alien spouse may file an adjustment-of-status

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application. 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1.

The alien spouse must: (1) be eligible to receive an immigrant visa; (2) be admissible to the United States; and (3) have a visa immediately available to him or her at the time the application is filed. 8 U.S.C. § 1255(a). The alien has the burden to demonstrate eligibility for the benefit, including admissibility. 8 U.S.C. § 1255(i)(2)(a); 8 C.F.R. § 103.2(b)(1). An alien is inadmissible if any of the factual circumstances described in the law exist. For example, an alien may be inadmissible on grounds related to health, criminality, national security, and misrepresentations. 8 U.S.C. § 1182. An alien has no right to adjustment to LPR status, even if the alien meets the objective eligibility requirements for adjustment of status; the grant of LPR status is solely within the discretion of the Secretary of Homeland Security. 8 U.S.C. § 1255(a); *Diric v. INS*, 400 F.2d 658, 660-61 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969); *Santos v. INS*, 375 F.2d 262, 264 (9th Cir. 1967); *Jarecha v. INS*, 417 F.2d 220, 223 (5th Cir. 1969); *Matter of Blas*, 15 I & N Dec. 626, 630 (BIA 1974).

B. CARRP

Plaintiffs allege CARRP is a process by which applications that raise national security concerns are handled. SAC ¶ 55. This policy ensures that benefit requests with national security concerns are consistently and uniformly adjudicated across USCIS. SAC ¶ 61; ECF 27-1 at 7.[5] A national security concern arises when an individual or organization is determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in INA sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B). SAC ¶ 62. Those INA sections make inadmissible or removable any individual who, *inter alia*, "has engaged in terrorist activity" or is a member of a "terrorist organization." 8 U.S.C. §§ 1182(a)(3), 1227(a)(4). CARRP directs officers to identify applications for immigration benefits

[5] In a motion to dismiss under Rule 12, the Court can consider materials including documents attached to the complaint, incorporated by reference in the complaint, or matters of judicial notice, without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in motion to dismiss.). In this case, Plaintiffs have incorporated by reference in the complaint information about CARRP obtained via the Freedom of Information Act, *see* SAC ¶ 59, and have provided that information to the Court in in support of their motion for class certification. ECF No. 27-1.

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(including naturalization and adjustment of status) that raise national security concerns and thoroughly investigate the applicant's background, in consultation with supervisors and other agencies, to determine whether the applicant is statutorily eligible to naturalize or adjust status. SAC ¶¶ 61, 83, 85-88. Nevertheless, the handling of an application pursuant to CARRP does not render the applicant statutorily ineligible for the benefit sought. SAC ¶ 93. *See* 8 U.S.C. §§ 1255(a), 1427, 1429. Instead, CARRP provides a process to resolve issues that surface during background checks on benefit applications. ECF 27-1, 4-5. Resolution often requires communication with law enforcement or intelligence agencies to determine whether information is relevant to an applicant and, if so, whether the information has an impact on eligibility for the benefit. *Id*. at 6.

Once vetting is completed, if an applicant is ineligible for the benefit sought, the application is denied, and if the applicant is eligible for the benefit sought, then it is approved. *Id*. at 7. As a safeguard to ensure reasoned adjudication, supervisory review and concurrence is required for denial or approval of such applications. *Id*.; SAC ¶ 92.

C. Executive Orders

On January 27, 2017, the President issued E.O. 13769. Section 3(c) temporarily suspended entry of certain visa holders from seven countries. 82 Fed. Reg. at 8978. On February 2, 2017, the USCIS Acting Director clarified that section 3(c) did not affect USCIS's processing of benefit applications for individuals in the United States. *See* Scialabba Memo. Section 4 of E.O. 13769 directed the Secretaries of State and Homeland Security and the Directors of National Intelligence and the FBI to "implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission." *Id*. The Executive Order directed this program to include "a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest." *Id*. at 8979.

On March 6, 2017, the President issued E.O. 13780. 82 Fed. Reg. 13209, 13218 (Mar. 6, 2017). Section 13 of E.O. 13780 rescinded E.O. 13769 in its entirety, effective March 16, 2017.

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Id. at 13218. Nothing in E.O. 13780 directs USCIS to suspend adjudication of immigration benefit applications by people within the United States, although the Executive Order does (in section 5), like its predecessor, direct Executive Branch officials to "implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures." *Id.* at 13215.

D. Factual Allegations

Mr. Abdiqafar Wagafe was a Somali national and lawful permanent resident of the United States. SAC ¶¶ 142, 149. On July 3, 2012, Mr. Wagafe applied to naturalize as a U.S. citizen. *Id.* ¶ 150. USCIS interviewed him on October 29, 2012, but he lacked sufficient command of English to understand and respond to the immigration officer's questions. *Id.* USCIS re-interviewed Mr. Wagafe on January 3, 2013, but he failed the English language portions of the naturalization test. *Id.* Accordingly, USCIS denied his naturalization application on January 9, 2013. *Id.* On November 8, 2013, Mr. Wagafe submitted a second naturalization application. *Id.* ¶ 152. USCIS interviewed him in connection with this application on February 22, 2017, and approved his application. *Id.* at ¶ 154. Plaintiff Wagafe naturalized on March 2, 2017. *Id.*

Mr. Mehdi Ostadhassan is an Iranian national. *Id.* ¶¶ 162, 165. He was originally admitted to the United States on a student visa in 2009. *Id.* ¶ 163. He married Ms. Baily Bubach, a U.S. citizen, on January 25, 2014, and on February 11, 2014, Ms. Bubach, submitted a Form I-130, Petition for Alien Relative, to have Mr. Ostadhassan recognized as her immediate relative. *Id.* ¶ 164. Contemporaneously, Mr. Ostadhassan applied to adjust status LPR. *Id.* ¶ 165. USCIS interviewed Mr. Ostadhassan and his wife on the petition and application on September 24, 2015. *Id.* ¶ 168. On March 24, 2017, USCIS granted Ms. Bubach's I-130 Petition, and on April 5, 2017, USCIS sent Mr. Ostadhassan a Notice of Intent to Deny ("NOID") his adjustment-of-

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status application. The NOID gives Mr. Ostadhassan thirty-three (33) days to respond to the issues raised in the NOID, as the document was served by mail.

Ms. Hanin Omar Bengezi is a Libyan national and Canadian citizen who applied to adjust status in February 2015. SAC ¶¶ 176, 187. She came to the United States in December 2014 on a fiancée visa, and married a U.S. citizen in January 2015. SAC ¶ 186. Mr. Mushtaq Abed Jihad is an Iraqi national, who originally came to the United States as a refugee in August 2008. SAC ¶¶ 199, 204. He became an LPR upon arrival in the United States as a refugee. He applied to naturalize in July 2013. SAC ¶¶ 205-06. Mr. Sajeel Manzoor is a Pakistani national. SAC ¶ 220. He originally came to the United States on a student visa, SAC ¶ 221, and later obtained an H-1B employment visa in October 2007. SAC ¶ 222. In September 2010, Mr. Manzoor obtained LPR status, SAC ¶ 227, and in November 2015, he applied to naturalize, SAC ¶ 228.

IV. ARGUMENT[6]

A. Because Plaintiffs Admit They Have No Interest In Adjudication of Their Applications, No Real Case or Controversy Exists

In their Motion for Class Certification, Plaintiffs disclaimed any interest in obtaining a court order directing Defendants to adjudicate their individual applications for immigration benefits. ECF No. 26 at 9. Instead, Plaintiffs want only a determination that CARRP is unlawful, and an injunction preventing Defendants from applying it to the proposed class members (or, at a minimum, notice and an opportunity to challenge a decision to process a particular application in accordance with CARRP). *Id*. The Court has discretion to treat this statement as a judicial admission. *See Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) (courts have discretion to consider statements in briefs judicial admissions); *Cook v. Reinke*, 484 F. App'x 110, 112 (9th Cir. 2012) (court could construe statement in motion as judicial

[6] Although not directly stated in any Claim for Relief, Plaintiffs make repeated references to CARRP directing USCIS officials to make "unwarranted denials" on "pretextual grounds." *See* SAC at ¶¶ 84, 91, 94, 97, 278, 282, 288, 293. Plaintiffs lack standing to challenge an allegedly unlawful denial because no Plaintiff's application has been denied, nor do Plaintiffs' proposed class definitions seek to represent applicants whose applications have already been adjudicated. *See* Motion for Class Certification, ECF No. 26 at 8. As well, the Court would lack jurisdiction to review discretionary denials of adjustment of status applications under 8 U.S.C. §1252(a)(2)(B)(ii); *Aldarwich v. Hazuda*, 593 F. App'x 654, 655 (9th Cir. 2015), and anyone denied naturalization has an adequate alternate remedy at law pursuant to 8 U.S.C. § 1421(c).

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admission); *Wilson v. Bank of America, N.A.*, No. 12-cv-1532, 2013 WL 275018, at *6 (W.D. Wash. Jan. 24, 2013) (construing admission in response memorandum as judicial admission).

If Plaintiffs lack any interest in adjudication of their applications, they lack standing to bring this action. They cannot manufacture standing by identifying a policy they claim is causing their applications to be delayed, and simultaneously disclaim any interest in a judicial resolution of the specific delays they claim to have suffered. That is no case or controversy. "[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Having disclaimed any interest in adjudication of their individual applications, Plaintiffs seek judicial determination only of the "abstract" harm allegedly caused by the policy. The Supreme Court and the Ninth Circuit have repeatedly held that abstract disputes—even those alleging the government has acted unlawfully—are insufficient to establish jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (*per curiam*) ("The only injury [they] allege is that the law . . . has not been followed"); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"), *abrogated on other grounds by Lexmark Int'l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). In light of Plaintiffs' admission that they have no personal interest in this matter, the Court should dismiss the action in its entirety for lack of jurisdiction.

B. Plaintiffs' First, Second, Third, Fifth, Sixth, and Tenth Claims for Relief Must Be Dismissed Because Plaintiffs Lack Standing

It is axiomatic that Article III of the Constitution limits the jurisdiction of federal courts to actual "cases" or "controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). One of the prerequisites for the existence of a case or controversy under Article III is that the plaintiff have standing. *Id*. at 560. To have standing, (1) the plaintiff must have suffered an injury in fact, i.e. an invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct

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complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Id*. at 560-61. Plaintiffs do not meet this test, as adjudication of their benefit applications has not been suspended and they are not be injured by any violation of the Uniform Rule Clause.

1. Because Adjudication of Plaintiffs' Benefit Applications Has Not Been Suspended Pursuant to E.O. 13780, Plaintiff Have Not Suffered Injury-in-Fact

In Claims One, Two, Three, Five, and Six, Plaintiffs make various claims based on the alleged suspension, pursuant to E.O. 13780, of the adjudication of their benefit applications. Plaintiffs lack standing to bring these claims, because E.O. 13780 does not suspend the adjudication of immigrant benefit applications by persons within the United States, and USCIS has not suspended the adjudication of Plaintiffs' benefit applications pursuant to E.O. 13780.

As Plaintiffs acknowledged, *see* Plaintiffs' Notice of Related Cases, ECF No. 22, at 2-3, despite some initial guidance from subordinate USCIS officials interpreting E.O. 13780's predecessor, E.O. 13769, to preclude adjudication of benefit applications from citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, the USCIS Acting Director confirmed USCIS would continue to process benefit applications from nationals of those countries present in the United States. *See* Scialabba Memo ("Section 3(c) of the [E.O. 13769] does not affect USCIS adjudication of applications and petitions filed for or on behalf of individuals in the United States regardless of their country of nationality.").[7]

While the President subsequently rescinded E.O. 13769, and issued E.O. 13780 in its stead, E.O. 13780, 82 Fed. Reg. 13209, 13218, nothing in E.O. 13780 suspends the adjudication of immigration benefit applications made by persons present in the United States. *Id*. Indeed, the Order explicitly limits application of its entry suspension provision in section 2 (which is distinct

[7] In *Washington v. Trump*, No. 17-35105, 2017 WL 526497 (9th Cir. 2017), the Ninth Circuit concluded that it could not rely on the White House Counsel's guidance that Section 3(c) of the Executive Order did not apply to lawful permanent residents because the Executive Order prima facie applied, and the White House Counsel was not "empowered to issue an amended order superseding the Executive Order" nor was he "known to be in the chain of command for any of the Executive Departments." *Id.*, slip copy at 21-22. Here, in contrast, the Scialabba Memo was issued by the Acting Director who is clearly in the chain of command, and her interpretation is consonant with section 3(c) of E.O. 13769, which, on its face, applies only to entry and not to benefit applications submitted by or on behalf of individuals already present in the United States.

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from adjudication of immigrant benefit applications) to persons who "are outside the United States on the effective date of this order." *Id*. at § 3(a)(i), 82 Fed. Reg. at 13213.

That USCIS has not suspended processing or adjudication of Plaintiffs' benefit applications pursuant to either of the executive orders is demonstrated by the recent approval of Mr. Wagafe's naturalization application and issuance of a NOID to Mr. Ostadhassan.

Clearly, Plaintiffs have not suffered any injury-in-fact from a suspension of adjudication of their benefit applications as alleged in Claims One, Two, Three,[8] Five, and Six. Consequently, they lack standing to bring these claims, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992), and those claims should be dismissed.

2. Plaintiffs Lack Standing To Complain About a Violation of the Constitution's Uniform Rule of Naturalization Clause

Plaintiffs allege that applying CARRP to the processing of their naturalization applications (and those of the putative Naturalization Plaintiff Class members) violates the clause of the Constitution that confers on Congress the power "[t]o establish a uniform rule of naturalization . . . throughout the United States," i.e. Article I, Section 8, Clause 4. SAC ¶¶ 289-293. Plaintiffs lack standing to assert a violation of this clause.

First, there is no private right of action under Article I, Section 8, Clause 4. *Flores v. City of Baldwin Park*, No. 14-cv-9290, 2015 WL 756877, *3 (C.D. Cal. Feb. 23, 2015). The Clause is an affirmative grant of authority to Congress, and does not confer any rights on private individuals. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (*citing* THE FEDERALIST No. 32 (Alexander Hamilton)). As the Ninth Circuit recently explained, "[t]he uniformity requirement was a response to tensions that arose from the intersection of the Articles of Confederations Comity Clause and the states' divergent naturalization laws, which allowed an alien ineligible for citizenship in one state to move to another state, obtain citizenship, and return

[8] To the extent Plaintiffs' Third Claim for Relief was intended also to allege that the "extreme vetting" directed under section 5 of E.O. 13780 violates the Establishment Clause of the Constitution (which is not at all clear from the language of the Second Amended Complaint), the allegation provides no basis to find it justiciable, *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc*., 454 U.S. 464, 485-86 (1982), and fails to state a plausible claim to relief. *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

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to the original state as a citizen entitled to all of its privileges and immunities." *Korab v. Fink*, 797 F.3d 572, 580-81 (9th Cir. 2015) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 (1824)).

Second, because the Clause is an affirmative grant of authority to Congress, even assuming *arguendo* that CARRP violates the clause, the entity suffering any invasion of a legally protected interest as a result of a violation would be Congress, not Plaintiffs.[9] Consequently, Plaintiffs have not suffered an injury-in-fact, i.e., an invasion of a legally protected interest. Because Plaintiffs cannot have suffered a legally cognizable injury from a violation of the Clause, and because the Clause does not create a private right of action, Plaintiffs lack standing to pursue a claim based on its alleged violation.

C. Plaintiffs' Claims Concerning "Extreme Vetting" Under E.O. 13780 Must Be Dismissed Because They Fail To Allege Sufficient Facts To Give Rise To Plausible Claims For Relief

Plaintiffs' obligation to allege the grounds of their entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Courts are not bound to accept as true legal conclusions couched as factual allegations, and factual allegations must be sufficient to raise the right to relief above the speculative level. *Id.* In other words, the complaint must contain sufficient *factual* allegations to state a claim that is "plausible." *Iqbal*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal citations and quotations omitted).

As alleged in the Second Amended Complaint, section 5 of E.O. 13780 requires Defendants to "implement a program, as part of the process for adjudications, to identify individuals . . . who present a risk of causing harm," and develop a "*uniform baseline* for

[9] Further, it is doubtful the Executive can violate the Uniform Rule of Naturalization Clause, which concerns the division of authority over naturalization as between Congress and state governments. If the Executive has exceeded its statutory authority by applying CARRP—which, according to Plaintiffs' allegations, USCIS is applying uniformly throughout the entire country—the problem is not that USCIS is violating the Uniform Rule clause, but rather that its actions are *ultra vires* under the INA. We address that claim, which Plaintiffs assert in their Fourth Claim for Relief, in section IV.E. below.

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screening and vetting standards and procedures, including a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States, and any other appropriate means for ensuring . . . a rigorous evaluation of all grounds . . . for denial of…immigration benefits." SAC ¶ 138 (internal quotations omitted) (emphasis added). Further, they allege section 4 of the Order "specifies that applications for a visa, admission, or other immigration benefit made by Iraqi nationals must still be subjected to thorough review to determine whether the applicant has any connections to ISIS or any other terrorist organization or may be a terrorist or national security threat." *Id*. ¶ 139 (internal quotations omitted). Plaintiffs also allege that, in the Presidential Memorandum issued March 6, 2017, the President "instruct[ed] the Secretary of State and the Secretary of Homeland Security, in conjunction with the Attorney General, to implement protocols and procedures as soon as practicable that *in their judgment* will enhance the screening and vetting of applications for visas and all other immigration benefits," and "rigorously enforce all existing grounds of inadmissibility and to ensure subsequent compliance with related laws after admission." *Id*. at ¶ 139 (internal quotations omitted) (emphasis added).

Apart from conclusory and formulaic allegations that the development and implementation of a baseline for screening and vetting benefit applicants "will dramatically expand CARRP," SAC ¶ 140, Plaintiffs allege no actual facts that plausibly establish Defendants, in carrying out the directives of sections 4 and 5 of E.O. 13780, or the Presidential Memorandum of March 6, 2017, have adopted, or will adopt, measures that would expand CARRP, violate the law, or require notice and an opportunity to respond. Because Plaintiffs have failed to allege sufficient facts to establish they have suffered any injury from the provisions of sections 4 and 5 of E.O. 13780 or the Presidential Memorandum of March 6, 2017, they have failed to state a claim upon which relief can be granted.

D. Plaintiffs' Fourth Claim for Relief Fails to Allege a Procedural Due Process Violation and Must Be Dismissed Because Plaintiffs Have Not Been Deprived of a Protected Liberty or Property Interest

In their Fourth Claim for Relief, Plaintiffs allege "Defendants' failure to give Plaintiffs and members of the Extreme Vetting Naturalization and Extreme Vetting Adjustment-of-Status

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Classes notice of their classification under CARRP (or successor "extreme vetting" program), a meaningful explanation of the reason for such classification, and any process by which Plaintiffs can challenge their classification, violates the Due Process Clause of the Fifth Amendment to the United States Constitution." SAC ¶¶ 263. "To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due." *Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008). *See also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). Here, Plaintiffs have failed to state a viable claim for relief because they are not being deprived of any liberty or property interest.

To begin, there is no protected liberty or property interest in discretionary benefits, such as adjustment of status. *See* 8 U.S.C. § 1255(a) ("The status of an alien . . . may be adjusted by the Attorney General, in his discretion . . ."); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008). *See also McCreath v. Holder*, 573 F.3d 38, 41 (1st Cir. 2009); *Hamdan v. Gonzales*, 425 F.3d 1051, 1060 (7th Cir. 2005); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 808 (8th Cir. 2003). And because, as a constitutional matter, "no alien has the slightest right to naturalization," *Fedorenko v. United States*, 449 U.S 490, 506 (1981) (internal quotation omitted), there is no "protected liberty interest in naturalization beyond that which Congress has provided by statute." *Morgovsky v. DHS*, 517 F. Supp. 2d. 581, 585 (D. Mass. 2007) (citing *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)).

Nor do Plaintiffs (and the class members they seek to represent) have a constitutionally protected liberty or property interest in the pace of adjudication of their benefit applications. *See Mendez-Garcia v. Lynch*, 840 F.3d 655, 666 (9th Cir. 2016) (procedural delays in adjudication "do not deprive aliens of a substantive liberty or property interest unless the aliens have a 'legitimate claim of entitlement' to have their applications adjudicated within a specified time."). Plaintiffs erroneously rely on 8 U.S.C. § 1571(b) as creating an enforceable time limit. That provision, however, under the heading "Policy," provides "the sense of the Congress that the processing of an immigration benefit should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571(b). The Ninth Circuit has explained that "'Sense of the

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Congress' provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law." *Orkin v. Taylor*, 487 F.3d 734, 740 (9th Cir. 2007).

Even if section 1571(b) constituted positive law rather than a policy statement, statutory deadlines for government actions are generally interpreted as hortatory and do not limit [the government's] power or render its exercise in disregard of the requisitions ineffectual." *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872). As the Supreme Court observed: "It ignores reality to expect that the Government will be able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990). Thus, statutory deadlines, when applied to the Government, are typically advisory and meant to prod the Government to expeditious action.

The Ninth Circuit has cautioned that "[a] statutory time period providing a directive to an agency or public official is not ordinarily mandatory 'unless it *both* expressly requires the agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.'" *Ezell v. United States*, 778 F.3d 762, 765 (9th Cir. 2015) (quoting *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997)) (emphasis in original). *See also Brock v. Pierce Cty.*, 476 U.S. 253, 259 (1986) (internal citation and quotations omitted); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) ("If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."); *Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 272 (1st Cir. 1998) ("Before operating as a mandate, a statutory time limitation addressed to a public official generally must contain both an express command that the official act within a given temporal period and a consequence attached to noncompliance."); *St. Regis Mohawk Tribe, N.Y. v. Brock*, 769 F.2d 37, 41-42 (2d Cir. 1985) (collecting authority and noting a statutory time period is not mandatory unless it both expressly requires action and provides a

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consequence for failure to comply). Here, there is no express guarantee of decision within any particular time-frame.[10] Nor is there any consequence for failing to meet a statutory schedule.

Accordingly, there is no liberty or property interest protected by the Due Process Clause at stake. Without a liberty or property interest in either the benefits sought or the pace of adjudication, Plaintiffs cannot be due the process to which they claim entitlement. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."). Plaintiffs have, therefore, failed to state a claim upon which relief may be granted.

E. Plaintiffs' Seventh Claim for Relief Must Be Dismissed Because the Immigration and Nationality Act Does Not Create A Private Right of Action

Plaintiffs Seventh Claim for Relief asserts that CARRP violates 8 U.S.C. §§ 1427 and 1255, which establish the requirements to naturalize and the eligibility criteria for adjustment of status, respectively. SAC ¶¶ 276-77. This claim must be dismissed because neither section creates a private right of action. Consequently, Plaintiffs lack standing to bring a claim under those sections, and the court lacks jurisdiction over it.

"[P]rivate rights of action to enforce federal law must be created by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (the remedies available are those 'that Congress enacted into law')). "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co.*, 442 U.S. at 568 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979)) (internal quotations omitted).

"The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 286 (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). Where the statute does not reveal a congressional intent to create a private right of action, the

[10] Section 1447(b) of Title 8, U.S. Code, provides that if 120 days after an applicant has been examined regarding his naturalization application no determination has been made, the applicant may apply to a district court for a hearing on the matter. 8 U.S.C. § 1447(b). But even this provides only an alternative forum, not an entitlement to a decision within a particular time. *Ahmadi v. Chertoff*, No. 07-cv-03455, 2007 WL 3022573, at *10 (N.D. Cal. Oct. 15, 2007) ("There is no right to have an application adjudicated within 120 days of completion of the examination").

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federal courts "may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. *See also Touche Ross & Co*, 442 U.S. at 568 ("our task is limited solely to determining whether Congress intended to create the private right of action asserted"). "[T]he burden is on [the plaintiff] to demonstrate that Congress intended to make a private remedy available." *Suter v. Artist M.*, 503 U.S. 347, 363 (1992).

On its face, neither section 1427 nor 1255 expressly creates a private right of action. 8 U.S.C. §§ 1255, 1427. To determine whether Congress implied a private right of action in a statute that contains no express provision, the Court must consider whether: (1) the plaintiff is of the class for whose especial benefit the statute was enacted; (2) there is any indication of legislative intent to create or exclude a private right of action; (3) it is consistent with the underlying purposes of the legislative scheme to imply a private right of action; and (4) whether the cause of action is traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78 (1975). A few years after *Cort*, the Supreme Court clarified that "the focus of the inquiry is on whether Congress intended to create a remedy." *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

The Supreme Court also explained that, in considering whether the plaintiff is of a class for whose "especial benefit" the statute was enacted, "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Id*. at 294. The Court also said that silence on the remedy question serves to confirm that, in enacting the law, Congress was not concerned with private rights. *Id*. at 296. Additionally, the Supreme Court has held that statutory schemes that provide private rights of action in some situations but not others weigh against inferring a private right of action because "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross & Co.*, 442 U.S. at 572; *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773 (1981).

When sections 1255 and1427 are examined in light of these principles, the Court must conclude Congress implied no private rights of action of which Plaintiffs might avail themselves. First, while Plaintiffs might benefit from statutes that establish requirements for naturalization or criteria for adjustment of status, these statutes were not enacted for Plaintiffs' "especial benefit."

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Rather, the primary purpose of both these statutes is to protect the interests of the People of the United States by establishing requirements and criteria that must be met before an alien may become a permanent resident or citizen, just as criminal laws are enacted for the benefit of society, and not for the "especial benefit" of future crime victims.

Second, there is no indication Congress intended to imply any private right of action to challenge alleged violations beyond those explicitly provided in 8 U.S.C. §§ 1421(c) and 1447(b). Indeed, Congress' explicit creation of a private right of action in section 1447(b) for a naturalization applicant who has not received a decision within 120 days following examination on his application strongly suggests Congress did not intend to create a private right of action to challenge the pre-examination application of the INA.

Further, inferring a private right of action under sections 1255 and 1427 would be inconsistent with the statutory scheme of the INA. An applicant begins the process by submitting an application to USCIS. 8 U.S.C. §§ 1255, 1445(a). Next, for a naturalization applicant, USCIS must conduct an investigation of the applicant. 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1. As part of the investigation of the applicant, USCIS requests a full criminal background investigation on the applicant. 8 C.F.R. § 335.2(b). USCIS is prohibited by law from interviewing a naturalization applicant until USCIS receives a definitive response from the FBI that a full criminal background check of the individual has been completed. Dep't of Commerce & Related Agencies Appropriation Act, 1998, Pub. L. 105-119, title I, 111 Stat. 2440, 2448-49 (Nov. 26, 1997) (beginning with fiscal year 1998, no USCIS funds may be used to complete adjudication of an application for naturalization unless USCIS has received confirmation from the FBI that a full criminal background check has been completed); 8 C.F.R. § 335.2(b). The INA does not prescribe a time limit for the pace of the investigation, or the examination required by section 1446. Once USCIS interviews an applicant, however, the applicant may petition the district court for a *de novo* determination of his eligibility for naturalization, if the agency does not render a decision within 120 days. 8 U.S.C. § 1447(b).

Similarly, for adjustment applicants, Congress did not create a private right of action in the INA. 8 U.S.C. § 1255 (lacking any right for adjustment applicants to seek judicial review).

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And, the Secretary is only permitted to approve individuals for LPR status after determining that the applicant is eligible for the status—which includes a finding that the alien is (1) physically present in the United States, (2) eligible to receive an immigrant visa, (3) an immigrant visa is immediately available to the alien, and (4) the alien is admissible to the United States—and warrants a favorable exercise of the Secretary's discretion. 8 U.S.C. § 1255(a).

From this statutory scheme, it is apparent Congress intended that applicants be fully and thoroughly vetted before being granted benefits under the INA, and recognized that the time it would take to adequately investigate applicants and determine eligibility would vary based on individual circumstances. Accordingly, while Congress provided a private right of action for an naturalization applicant who had not received a decision within 120 days following his examination, it omitted any similar private right of action during the pre-examination, investigation phase of the naturalization process, or during the adjudication of an adjustment-of-status application. The Court should, therefore, conclude that 8 U.S.C. §§ 1255 and 1427 do not provide Plaintiffs with private rights of action. If those sections do not provide private rights of action, then Plaintiffs lack standing, and the Court lacks jurisdiction over that claim.

F. Plaintiffs' Eighth Claim for Relief Fails to State a Claim Under the APA Because It Does Not Relate To a Final Agency Action

Plaintiffs' Eighth Claim fails to state a claim and should therefore be dismissed. *See* SAC ¶¶ 279-82. The APA provides a right to judicial review of "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. § 704. APA review, however, is unavailable here because the CARRP handling process is not final action, and there is no legally required time within which USCIS must decide naturalization or adjustment-of-status applications.

For an action to be final, and reviewable under the APA, the action must (1) "mark the 'consummation' of the agency's decision-making process," and (2) the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The first question courts ask is whether the agency "has rendered its last word on the matter." *Oregon Natural Desert Ass'n v. United States Forest Service*, 465 F.3d 977, 984 (9th Cir. 2006) (citing *Whitman v. Am. Trucking Ass'n*, 531

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U.S. 457 (2001)).

As alleged, CARRP is not a final agency action but rather part of the process of adjudicating an application, falling within the eligibility and background investigation process mandated by the INA, *see* 8 U.S.C. §§ 1446(a), (b); 1255(a)(2). It is a way for USCIS to investigate and verify information in certain cases, and to ensure reasoned decisions. Further, by their own definition, Plaintiffs' proposed Adjustment-of-Status and Naturalization Classes only cover cases that are "pending," not ones in which a final decision has been reached. Because CARRP itself is not a final agency action, and none of the Plaintiffs challenge a final administrative decision to deny a benefit application, this Court should dismiss Plaintiffs' Eighth Claim for Relief.

G. Plaintiffs' Ninth Claim for Relief Must Be Dismissed For Failure To State a Claim as the Allegations in the Complaint Establish CARRP Is *Not* a "Substantive" or "Legislative" Rule

Plaintiffs' Ninth Claim for Relief alleges CARRP is a substantive agency rule, within the meaning of 5 U.S.C. § 551(4), that was not properly promulgated through notice-and-comment rulemaking. SAC ¶¶ 285-87. Nevertheless, the facts Plaintiffs allege demonstrate CARRP does not violate the APA's notice-and-comment requirements.

The APA provides that, absent good cause, an agency may issue a "legislative rule" only by using the APA's notice-and-comment procedure. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003). An agency need not follow notice-and-comment procedures, however, to issue "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A); *Mora-Meraz v. Thomas*, 601 F.3d 933, 939 (9th Cir. 2010). In general, legislative rules "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Indus.*, 333 F.3d at 1087. Interpretive rules and rules of agency organization, procedure, or practice, on the other hand, "do not add to[] the substantive law that already exists in the form of a statute or legislative rule." *Id.*

To distinguish between the two, the Ninth Circuit has adopted a framework first articulated by the D.C. Circuit in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). *Hemp Indus.*, 333 F.3d at 1087; *Wilson v.*

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Lynch, 835 F.3d 1083, 1099 (9th Cir. 2016); *Erringer v. Thompson*, 371 F.3d 625 (9th Cir. 2014) (all applying the *Am. Min. Congress* framework). Under this framework, a legislative rule, *i.e.*, a rule that "has the force of law," will be found: (1) when, in the absence of the rule, there would not be an adequate legislative basis for agency action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule. *Hemp Indus.*, 333 F.3d at 1087. Here, USCIS has not invoked its general legislative authority, so only the first and third prongs of the *American Mining Congress* test are at issue.

CARRP does not fill a legislative void that Congress left to USCIS to fill; rather, an adequate legislative basis for CARRP exists. With respect to naturalization, sections 1423 through 1427 and 1429 of title 8, United States Code, and 8 C.F.R. § 316.2, provide a number of criteria that an applicant must meet to demonstrate eligibility to naturalize. Section 1446(a) of title 8 mandates a "personal investigation of the person applying for naturalization." Likewise, section § 1255 provides eligibility criteria for adjustment of status, and gives the Secretary of Homeland Security discretion whether to grant the benefit. Further, section 1357(b) authorizes USCIS to take and consider evidence concerning any matter which is material or relevant to the enforcement of the INA.

These statutes and regulations constitute an adequate legislative basis for USCIS to undertake the procedural steps laid out in CARRP in the adjudication of benefit applications. Even as described by Plaintiffs in their Second Amended Complaint, CARRP is a process to ensure USCIS is considering all relevant information relating to cases with possible national security concerns. Nothing in CARRP, however, is required to enable or authorize USCIS to investigate an applicant's eligibility or to consult with supervisors or other agencies concerning whether an applicant is eligible for the benefit sought, and, in the case of an adjustment-of-status applicants, whether the applicant warrants a favorable exercise of discretion.[11]

[11] Plaintiffs also mention 8 U.S.C. § 1159(b) and 8 C.F.R. § 209.1, which concern the adjustment of status of refugees. Although Plaintiffs allege Mr. Wagafe previously adjusted under this provision, *see* First Amended Complaint, ECF No. 17 at ¶¶ 115-116, no plaintiff is currently seeking adjustment in this manner.

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Second, as described in Plaintiffs' Second Amended Complaint, CARRP does not effectively amend a prior legislative rule. This scenario occurs "'only if it is inconsistent with another rule having the force of law.'" *Erringer*, 371 F.3d at 632 (quoting *Hemp Indus.*, 333 F.3d at 1088). In the naturalization context, 8 U.S.C. § 1427(a) and 8 C.F.R. § 316.2 enumerate the criteria for naturalization. With respect to adjustment of status, 8 U.S.C. § 1255(a) delegates rule-making authority for adjustment of status to the Executive Branch, which has crafted several categories of "restricted" and "ineligible" aliens. *See* 8 C.F.R. § 245.2(b)-(c). CARRP neither alters these criteria, nor purports to restrict the statutory discretion conferred by section 1255(a).

Instead, CARRP is a process to vet cases with an articulable link to national security concerns and to determine the proper adjudicative action to take within statutory limits. SAC ¶¶ 55, 60, 62. *See also* ECF 27-1 at 7-8. A directive to fully vet potential national security concerns is not a substantive change in the standards for either adjustment of status or naturalization. Applying the *American Mining Congress* factors, CARRP is not a legislative or substantive rule. Rather, it is properly characterized as a "general statement[] of policy, or rule[] of agency organization, procedure or practice," and thus exempt from APA notice-and-comment rulemaking. *See Mora-Meraz*, 601 F.3d at 939 (citing 5 U.S.C. § 553(b)(3)(A)).

This conclusion is consistent with established Ninth Circuit precedent. In *L.A. Closeout, Inc. v. DHS*, 513 F.3d 940 (9th Cir. 2008), the Ninth Circuit held that an internal Department of Homeland Security memorandum that, as here, "simply provided the agency's construction of the regulation in a particular factual circumstance" was an interpretive rule. *Id.* at 942. The fact that there may be a substantive impact on Plaintiffs because a particular procedure is more time consuming than another does not transform an interpretive rule or a rule of agency practice or procedure into one with the force of law. Indeed, the Ninth Circuit "rejected the notion that procedural rules with a substantive impact are subject to notice-and-comment requirements." *So. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985). *See also Alcaraz v. Block*, 746 F.2d 593, 614 (9th Cir. 1984). Finally, the Ninth Circuit long ago adopted the D.C. Circuit's holding that "section 553(b)(3)(A) extends to 'technical regulation of the form of agency action and proceedings.'" *So. Cal. Edison Co.*, 770 F.2d at 783 (citing *Pinkus v. U.S. Bd. of Parole*, 507

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F.2d 1107, 1113 (D.C. Cir. 1974)). That is precisely what Plaintiffs allege CARRP is—a technical regulation of the form of agency proceedings.

It should come as no surprise, then, that courts have consistently rejected similar challenges. In one putative class action concerning naturalization delays, the court rejected a claim that the "expanded name check" program constituted a substantive rule. *Ahmadi v. Chertoff*, No. 07-cv-03455, 2007 WL 3022573 (N.D. Cal. Oct. 15, 2007). The court explained:

> The expanded name check has created significant delays. The expanded name check did not, however, add a new requirement in the naturalization process, as plaintiffs contend. The agencies have long been required to conduct an investigation into an applicant's background before adjudicating an application. The expanded name check merely enlarged the scope of that investigation.

Id. at *9. Numerous other courts have reached identical conclusions in the FBI name check context. *See, e.g.*, *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 833-34 (S.D. Tex. 2008) (collecting cases); *Hani v. Gonzales*, No. 3:07-cv-517-S, 2008 WL 2026092, at *5 (W.D. Ky. May 8, 2008) (collecting cases). According to Plaintiffs' allegations, CARRP likewise expands the scope of an investigation, and directs adjudicators how best to use the limited resources available to them in conducting that investigation. That is not substantive law. Because, as the facts Plaintiffs have alleged demonstrate, CARRP does not establish a substantive rule under delegated legislative authority, it does not violate the APA's notice-and-comment rulemaking mandate. Accordingly, Plaintiffs' Ninth Claim for Relief should be dismissed for failure to state a claim.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the Second Amended Complaint, in part, for lack of jurisdiction, and, in part, for failure to state claims upon which relief can be granted.

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Dated: April 18, 2017

Respectfully submitted,

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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, MEHDI OSTADHASSAN, HANIN OMAR BENGEZI, MUSHTAQ ABED JIHAD, and SAJEEL MANZOOR, on behalf of themselves and others similarly situated, Plaintiffs, v. DONALD TRUMP, President of the United States; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, Defendants.	CASE NO. C17-0094-RAJ ORDER

This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 56) and Plaintiffs' amended motion for class certification (Dkt. No. 49). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss and GRANTS Plaintiffs' motion for class certification for the reasons explained herein.

I. BACKGROUND

This section summarizes the facts as set forth in Plaintiffs' second amended complaint, as is appropriate on a motion to dismiss.

A. The CARRP Policy

This lawsuit is brought by immigration applicants to challenge an allegedly secret and unlawful government program, the Controlled Application Review and Resolution Program (CARRP). (Dkt. No. 47 at ¶¶ 1, 9.) The premise of Plaintiffs' suit is that because the Constitution expressly assigns the authority to establish uniform rules of naturalization to Congress—which Congress has done in the Immigration and Nationality Act (INA)—the United States Citizenship and Immigration Service (USCIS), as part of the executive branch, has created an extra-statutory, unlawful, and unconstitutional program in CARRP. (*Id.* at ¶¶ 1, 8, 9.)

Plaintiffs allege that USCIS created CARRP in 2008 "as an agency-wide policy to identify, process, and adjudicate certain immigration applications that allegedly raise 'national security concerns.'" (*Id.* at ¶ 55.) They allege that CARRP implements "an internal vetting policy that has not been authorized by Congress, nor codified, subjected to public notice and comment, or voluntarily made public in any way." (*Id.* at ¶ 10.) In fact, CARRP was unknown to the public until it was discovered in litigation challenging a denial of naturalization in *Hamdi v. USCIS*, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012). The only information about CARRP that USCIS made public was in response to Freedom of Information Act (FOIA) requests and the litigation necessary to compel those responses. *See ACLU of S. Cal. v. USCIS*, No. 13-cv-0861 (D.D.C., filed June 7, 2013).

The policy imposes criteria to determine when an individual should be labeled a "national security concern" that Plaintiffs claim "are vague and overbroad, and often turn on discriminatory factors such as religion and national origin." (Dkt. No. 47 at ¶¶ 62–76.) The criteria also include many lawful activities such as donating to Muslim charities or

travelling to Muslim-majority countries. (*Id.* at ¶¶ 35–51, 62–76.) Plaintiffs maintain these criteria are "untethered from the specific statutory criteria Congress has authorized to determine when a person is eligible for immigration benefits." (*Id.*)

Even if an applicant meets all the statutory requirements for citizenship or adjustment of status under the INA, USCIS officers are instructed that an application in CARRP cannot be approved. (*Id.* at ¶ 77.) If an applicant meets one of CARRP's national security concern criteria, officers are guided to deny the application or delay it as long as possible. (*Id.* at ¶¶ 77, 78–97.) The applicant is neither informed that her application has been submitted to CARRP, nor able to challenge her classification as a national security concern. (*Id.* at ¶¶ 61, 96.) Ultimately, Plaintiffs allege that CARRP creates a substantive regime for immigration application processing and imposes "eligibility criteria that indefinitely delay adjudications and unlawfully deny immigration benefits to noncitizens who are statutorily eligible and entitled by law." (*Id.* at ¶ 95.)

B. The President's Executive Orders

Although recent court decisions across the country[1] may make Defendant President Trump's (hereinafter "the president") recent Executive Orders a non-issue, the Court will briefly address their impact on this case.

Plaintiffs initiated this lawsuit on January 23, 2017, challenging only the CARRP program. (Dkt. No. 1.) On January 27, 2017, the president issued Executive Order (E.O.) 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977. Section 3(c) of the E.O. suspended entry into the United States of citizens or nationals of Syria, Iraq, Iran, Yemen, Somalia, Sudan, and Libya. *Id.*

[1] *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (upholding a temporary restraining order which enjoined potions of Executive Order 13769); *Int'l Refugee Assistance Project v. Trump*, 2017 WL 2273306 (4th Cir. May 25, 2017) (upholding preliminary injunction enjoining portions of Executive Order 13780); *Hawai'i v. Trump*, 2017 WL 2529640 (9th Cir. June 12, 2017) (upholding preliminary injunction enjoining portions of Executive Order 13780).

at 8978. USCIS initially determined that E.O. 13769 required it to suspend taking action on all pending applications—except those for naturalization—of nationals from those seven countries. (*See* Dkt. No. 47 at ¶ 15; Dkt. No. 56 at 20; Dkt. No. 17 at ¶ 3.) Section 4 of E.O. 13769 called for the Secretaries of State and Homeland Security and the Directors of National Intelligence and the FBI to "implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission." 82 Fed. Reg. at 8978.

In response to E.O. 13769, Plaintiffs amended their complaint to challenge sections 3(c) and 4 of the order. (Dkt. No. 17.) Plaintiffs alleged that USCIS relied on section 3 to suspend processing immigrant visas and other immigration benefits. (*Id.* at ¶ 54.) Plaintiffs also alleged that Section 4 of the E.O. "directs federal agencies to create and implement a policy of extreme vetting of all immigration benefits applications" and that "[a]ny such 'extreme vetting' policy" would expand CARRP. *Id.* at 8978–79; Dkt. No. 17 at ¶ 4. The day after Plaintiffs filed their amended complaint, USCIS Acting Director Lori Scialabba sent a memo to all USCIS employees stating that section 3(c) did not affect the immigration applications of individuals based on the country of their nationality. (Dkt. No. 22 at 2–3.) In their notice of related cases, Plaintiffs stated that if USCIS adhered to the position expressed by Acting Director Scialabba, "it would appear that the Section 3(c) claims in this action may become moot." (*Id.* at 3.)

After the Ninth Circuit upheld a temporary restraining order enjoining portions of E.O. 13769 in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the president promised to "go[] further" with a new executive action, and assured that "[e]xtreme vetting will be put in place," and that "it already is in place in many places." (Dkt. No. 47 at ¶ 115.) The president then issued E.O. 13780, which rescinded E.O. 13769 in its entirety. 82 Fed. Reg. 13209, 13218 (March 6, 2017). Stephen Miller, the president's

Senior Advisor stated that E.O. 13780 would have "the same basic policy outcome for the country." (Dkt. No. 47 at ¶ 117 (citation omitted)). Sean Spicer, the president's Press Secretary, stated that the goal of E.O. 13780 was "obviously to maintain the way we did it the first time." (*Id.* at ¶ 118 (citation omitted)).

Portions of the second E.O. were soon after enjoined in *Hawai'i v. Trump*, 2017 WL 10111673 (D. Haw. Mar. 15, 2017). There, the court concluded that there was "significant and unrebutted evidence of religious animus driving the promulgation of [E.O. 13780] and its related predecessor." *Id.* at *11. Based on this, "a reasonable, objective observer . . . would conclude that [E.O. 13780] was issued with a purpose to disfavor a particular religion." *Id.* at *13. The Ninth Circuit largely upheld the district court's order, finding that the plaintiffs were likely to succeed on their claims that the second E.O. "contravened the [Immigration and Nationality Act (INA)] by exceeding the president's authority under § 1182(f), discriminating on the basis of nationality, and disregarding the procedures for setting annual admissions of refugees." *Hawai'i v. Trump*, 2017 WL 2529640, at *23 (9th Cir. June 12, 2017).

Following the issuance of E.O. 13780, Plaintiffs filed a second amended complaint which added three named plaintiffs and a challenge to E.O. 13780, alleging that it "sanctions a major expansion of the existing CARRP program." (Dkt. No. 47 at ¶¶ 18, 26–28.)

C. Named Plaintiffs

All named Plaintiffs are foreign nationals from Muslim-majority countries, and have applied for naturalization or adjustment of status. (*Id.* at ¶¶ 24–28.)

Plaintiff Wagafe is a Somali national and former lawful permanent resident. (*Id.* at 24.) He applied for naturalization in November 2013 and, although he met the statutory criteria for naturalization, his application was submitted to CARRP. (*Id.* at ¶¶ 24, 142–161.) There his application remained, until five days after Plaintiffs moved for class

certification, at which point he was contacted by USCIS and an interview was scheduled. (*Id.* at ¶ 24) Within two weeks, he became a U.S. citizen. (*Id.*)

Plaintiff Ostadhassan is an Iranian national, and a Professor at the University of North Dakota, who meets all the statutory requirements to adjust his status to that of a lawful permanent resident. (*Id.* at ¶¶ 25, 162–175.) His application was submitted to CARRP. (*Id.* at ¶¶ 25, 170.) Prior to this lawsuit, Mr. Ostadhassan waited over three and a half years for a decision on his application. (*Id.* at 175, Dkt. No. 58 at 12.) On April 5, 2017, one day after Plaintiffs filed their second amended complaint, USCIS notified Mr. Ostadhassan of its intent to deny his application. (Dkt. No. 58 at 3; Dkt. No. 53 at 1.)

Plaintiff Bengezi is a Libyan national married to a United States citizen. (Dkt. No. 47 at ¶ 26.) In February 2015, she applied for adjustment to lawful permanent resident status. (*Id.*) Her application was submitted to CARRP. (*Id.* at ¶¶ 26, 196.) Soon after being added as a named plaintiff, USCIS notified her that her interview had been scheduled. (Dkt. No. 58 at 12.) USCIS approved her application on May 9, 2017. (Dkt. No. 60 at 10; Dkt. No. 60-2.)

Plaintiff Jihad is an Iraqi refugee who has resided in Washington since 2008. (Dkt. No. 47 at ¶¶ 27, 199–204.) His lawful permanent resident status became effective upon arrival in the United States. (*Id.* at ¶ 205.) He applied for naturalization in July of 2013 and satisfied all of the statutory criteria, yet his application was submitted to CARRP. (*Id.* at ¶¶ 26, 206–17.) Over three years passed with no action on Mr. Jihad's application. (Dkt. No. 58 at 12.) On April 4, 2017, Mr. Jihad was added as a named Plaintiff. (Dkt. No. 47.) He received an interview notification on April 13, 2017 and was interviewed on April 25, 2017. (Dkt. No. 58 at 12.) USCIS approved his application on May 9, 2017 and he took his oath of citizenship on May 30, 2017. (Dkt. No. 60 at 10; Dkt. No. 60-4.)

Plaintiff Manzoor is a Pakistani national who has lived in the United States since 2001. (Dkt. No. 47 at ¶ 28.) He came to the United States to obtain his Master of Science

in Marketing Research from the University of Texas and was later granted an H-1B work visa. (*Id.* at ¶¶ 221–22.) He applied for naturalization in 2015 and meets the statutory criteria; his application was submitted to CARRP. (*Id.* at ¶¶ 228–34.) No action was taken on his application, however on May 1, 2017, less than a month after being added as a named plaintiff, Mr. Manzoor was interviewed and his application was approved on the spot. (Dkt. No. 58 at 12.) He took his oath of citizenship the same day. (Dkt. No. 60-5.)

D. Defendants' Motion to Dismiss (Dkt. No. 56)

In response to Plaintiffs' second amended complaint, Defendants now bring this motion to dismiss all claims for two reasons. (Dkt. No. 56.) First, Defendants maintain that under Federal Rule of Civil Procedure 12(b)(1) this Court lacks subject matter jurisdiction because (1) Plaintiffs lack standing, and (2) Plaintiffs' claims are moot. (*Id.* at 10–11.) Second, Defendants argue that under Federal Rule of Civil Procedure 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted for Claims Four, Seven through Nine, and any claims challenging "extreme vetting." (*Id.* at 11.)

E. Plaintiffs' Motion for Class Certification (Dkt. No. 49)

After filing the second amended complaint, Plaintiffs filed the present amended motion for class certification. (Dkt. No. 49.) Plaintiffs argue that "[t]hrough CARRP, the government surreptitiously blacklists thousands of applicants who are seeking immigration benefits, labeling them 'national security threats.'" (*Id.* at 8.) In addition to themselves, "[t]housands of individuals . . . have had their applications for naturalization or adjustment of status halted, delayed, or denied by CARRP." (*Id.* at 9.) Accordingly, Plaintiffs maintain that class treatment is the appropriate avenue through which to "challenge CARRP and any other successor 'extreme vetting' program that the Executive branch may seek to implement pursuant to Sections 4 and 5 of the Second EO or through

other extra-statutory means."[2] (*Id.*)

Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiffs Wagafe, Jihad, and Manzoor move the Court to certify the following class, and appoint them as class representatives:

> A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

(*Id.*) For simplicity, the Court refers to the above putative class as the "Naturalization Class." Additionally, Plaintiffs Ostadhassan and Bengezi move the Court to certify the following class and appoint them as class representatives:

> A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

(*Id.*)[3] For simplicity, the Court refers to the second putative class as the "Adjustment Class."

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[2] Defendants make much of the fact that Plaintiffs challenge a potential successor program. Given the apparent background of CARRP, this is understandable. As Plaintiffs explain in the second amended complaint, "USCIS did not make information about CARRP public, and the program was only discovered through fortuity during federal court litigation. To the extent the program has shifted in name, scope, or method, Plaintiffs may have no way to obtain that information. Thus, Plaintiffs' reference to 'CARRP' incorporates any similar non-statutory and sub-regulatory successor vetting policy, including pursuant to Sections 4 and 5 of [E.O. 13780]." (Dkt. No. 47 at ¶ 19, n.1.)

[3] In Plaintiffs' first amended complaint they asserted an additional "Muslim Ban Class," relating to the effect of Section 3(c) of E.O. 13769. (Dkt. No. 17.) In Plaintiffs' second amended complaint, they preserved the assertion of the "Muslim Ban Class" relating to the effect of Section 2(c) of E.O. 13780. (Dkt. No. 47.) Due to recent court orders enjoining E.O. 13780, *see* footnote 1, *supra*, Plaintiffs do not seek certification of the "Muslim Ban Class" at this time, but "reserve the right to seek certification of the additional class if circumstances change again." (Dkt. No. 49 at 9–10, n.1.)

II. DISCUSSION

A. Defendant's Motion to Dismiss (Dkt. No. 56)

Defendants move to dismiss Plaintiffs' claims in part under Federal Rule of Civil Procedure 12(b)(1) and in part under Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(1), Defendants ask the Court to dismiss all claims for lack of a case or controversy, and Claims One, Two, Three, Five, Six, and Ten for lack of standing. (Dkt. No. 56 at 10–11.) Under Rule 12(b)(6), Defendants request dismissal of Claims Four, Seven, Eight, Nine, and "extreme vetting" claims for failure to state a claim upon which relief may be granted. (*Id.* at 11.) For the following reasons, Defendants' motion to dismiss is **GRANTED** as to Claim Four for the Adjustment Class only. The remainder of Defendants' motion to dismiss is **DENIED**.

1. Standard of Review

A defendant may move to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A 12(b)(1) challenge to jurisdiction may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor," and then determining whether they are legally sufficient to invoke jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). A factual attack, on the other hand, challenges the facts that serve as the basis for subject matter jurisdiction. In evaluating a factual attack, a court may look beyond the complaint without converting the motion into one for summary judgment. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

A defendant may also move for dismissal when a plaintiff "fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a 12(b)(6) motion to dismiss, the Court accepts all factual allegations in the complaint as true and construes

them in the light most favorable to the non-moving party. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007). However, to survive a motion to dismiss, a plaintiff must cite facts supporting a "plausible" cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (internal quotations omitted). "Dismissal for failure to state a claim is appropriate only if it appears beyond doubt that the non-moving party can prove no set of facts in support of his claim which would entitle him to relief." *Vasquez*, 487 F.3d at 1249 (internal quotations omitted).

2. Case or Controversy

Defendants ask this Court to dismiss Plaintiffs' case in its entirety for lack of a case or controversy because Plaintiffs admit they have no interest in adjudication of their applications. (Dkt. No 56 at 18.) Defendants maintain that Plaintiffs "want only a determination that CARRP is unlawful, and an injunction preventing Defendants from applying it to the proposed class members." (Dkt. No. 56 at 18 (citing Dkt. No. 26 at 15)). Defendants ask this Court to exercise its discretion and consider Plaintiffs' statement as a judicial admission, and find that because Plaintiffs have no interest in the adjudication of their claims, there is no case or controversy, which therefore deprives this Court of jurisdiction on standing grounds. (Dkt. No. 56 at 18–19.) This argument fails for three reasons.

First, what Plaintiffs actually said in the cited brief is that they are not asking the Court to adjudicate their individual immigration applications. (Dkt. No. 26 at 9.) Therefore, what Defendants are actually asking this Court to do is consider *their interpretation* of a portion of Plaintiffs' first motion to certify class (Dkt. No. 26) and conclude it is a judicial admission. This the Court will not do.

Second, Defendants misconstrue Plaintiffs' claims. While Plaintiffs do want a determination that CARRP is unlawful, they also seek an order compelling USCIS to "adjudicate Plaintiffs' and proposed class members' petitions, applications, or requests based solely on the statutory criteria." (Dkt. No. 47 at 51.)

Third, as Plaintiffs point out, "adjudicating the named Plaintiffs' applications does not resolve the core issue in this case: whether CARRP and any successor 'extreme vetting' program is lawful." (Dkt. No. 58 at 14.) Defendants' contention that this Court does not have jurisdiction for want of case or controversy fails. Defendants' motion to dismiss on this ground is **DENIED**.

3. Claims One, Two, Three, Five, Six, and Ten

Defendants next move to dismiss Claims One, Two, Three, Five, Six, and Ten for lack of standing. (Dkt. No 56 at 19.) Standing consists of three elements: the plaintiff (1) must have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Once a party asserts the absence of subject matter jurisdiction, the opposing party invoking the court's jurisdiction bears the burden of proving it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

a. Claims One, Two, Three, Five, and Six

Defendants first argue that Plaintiffs have not suffered an injury in fact as to claims One, Two, Three, Five, and Six because Executive Order (E.O.) 13780 "does not suspend the adjudication of immigrant benefit applications by persons within the United States, and USCIS has not suspended the adjudication of Plaintiffs' benefit applications pursuant to E.O. 13780." (Dkt. No. 56 at 19.) Specifically, Defendants point to Plaintiffs' notice of related cases, (Dkt. No. 22), in which they acknowledged that these claims "may become moot." (Dkt. No. 56 at 10, 19.) In that notice, Plaintiffs were referring to

then-Acting Director of USCIS Lori Scialabba's memo regarding E.O. 13769—the predecessor to E.O. 13780—in which she stated that E.O. 13769 "does not affect USCIS adjudication of applications and petitions filed for or on behalf of individuals in the United States regardless of their country of nationality." (Dkt. No. 22 at 2–3; Dkt. No. 56-1.) Defendants argue that because adjudication of Plaintiffs' applications have not been suspended pursuant to E.O. 13780, they have not suffered an injury.

The Court makes three observations in response to Defendants' arguments. First, Plaintiffs stated only that their claims *may* be moot, and made such statements prior to the president issuing E.O. 13780. Second, Acting Director Scialabba's memo pertained to E.O. 13769, which was rescinded by E.O. 13780, and therefore no longer has relevance.

Third, Plaintiffs' claims do establish an injury in fact. Claims One and Two allege that Defendants have interpreted the first E.O. and "will interpret the Second EO to authorize the suspension" of immigration applications. (Dkt. No. 47 at ¶ 251, 257.) Claim Three, which is based on the Establishment Clause, alleges that the "Second EO is intended to target a specific religious faith—Islam," because Defendants are "not pursuing a course of neutrality with regard to different religious faiths." (Id. at ¶ 261.) Claim Five is a Due Process challenge based on Plaintiffs being "denied immigration benefits for which they are statutorily eligible, and to which they are entitled by law." (Id. at ¶ 266.) Claim Six alleges an Equal Protection violation in that Defendants' indefinite suspension of applications under CARRP and E.O. 13780 discriminates on the basis of "country of origin" and is "substantially motivated by animus toward—and has a disparate effect on—Muslims." (Id. at ¶¶ 268–69.) Furthermore, even if E.O. 13780 does not suspend the applications, Plaintiffs allege that CARRP or another "extreme vetting" program,[4] independent of E.O. 13780, suspended Plaintiffs' applications or will suspend applications of the putative class, and that such suspension was unlawful. This is

[4] See note 2, *supra*.

sufficient to survive a motion to dismiss.

Another consideration for the Court is that USCIS has now acted on all of the applications of the named Plaintiffs, after up to three and a half years of inactivity. (Dkt. No. 58 at 11–12.) Curiously, USCIS's actions on these applications took place almost immediately after Plaintiffs were added as proposed class representatives. To the extent that Defendants argue this fact moots Plaintiffs' claims, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). It is the party asserting mootness that has the "heavy burden of persuading" the Court that the challenged conduct will not resume. *Id.* This standard is a "stringent" one, and even "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," a case only "might become moot." *Id.*

Here, Plaintiffs allege this unlawful practice has been ongoing since the inception of the CARRP program in 2008. Plaintiff Wagafe waited three and a half years for action on his application. That prompt action has been taken on Plaintiffs' applications subsequent to their being named class representatives does not convince the Court that Defendants have met their burden that the alleged unlawful conduct could not reasonably be expected to recur. Furthermore, acting on applications subjected to CARRP—that were highlighted by a lawsuit challenging it—is very different than voluntary cessation of the CARRP program.

b. Claim Ten

Defendants next argue that Plaintiffs lack standing to assert Claim Ten—a violation of the Constitution's Uniform Rule of Naturalization Clause—because (1) there is no private right of action under the clause, and (2) even if CARRP violated the clause,

Congress would be injured, not Plaintiffs. (Dkt. No. 56 at 21–22.)

As to Defendants' first argument, the cases cited do not support it. *Flores v. City of Baldwin Park* dealt with a remand issue and whether the Uniform Rule of Naturalization Clause completely preempted state law. 2015 WL 756877, *3 (C.D. Cal. Feb. 23, 2015). *Cazarez-Gutierrez v. Ashcroft* dealt with sentencing. 382 F.3d 905, 912 (9th Cir. 2004). And *Korab v. Fink* mentioned the history of the clause but nowhere in that opinion does this Court find the proposition that a private litigant does not have standing to bring suit for its violation. 797 F.3d 572, 580–81 (9th Cir. 2014). In contrast, a naturalization applicant was allowed to challenge a state law which barred naturalization on the basis of homosexuality because "the resulting inconsistencies undermine[d]" the Uniform Rule of Naturalization Clause. *Nemetz v. I.N.S.*, 647 F.2d 432, 435 (4th Cir. 1981).

Defendants' second argument—that it is Congress, and not Plaintiffs, that would be injured—also fails. Assuming Congress would be injured by CARRP's alleged addition of non-statutory and substantive requirements to naturalization, it does not follow that Plaintiffs could not also be injured. For once Congress "establishes such uniform rule [of naturalization], those who come within its provisions are entitled to the benefit thereof as a matter of right, not as a matter of grace." *See Schwab v. Coleman*, 145 F.2d 672, 676 (4th Cir. 1944). Defendants' motion to dismiss Claims One, Two, Three, Five, Six, and Ten on the basis of standing is **DENIED**.

4. Extreme Vetting Claims

Defendants argue that Plaintiffs' claims "concerning 'extreme vetting' under E.O. 13780 must be dismissed" for failure to allege sufficient facts to support them. (Dkt. No. 56 at 22.) While the Court agrees that any claims about enjoining a potential future extreme vetting program may be premature, Defendants do not direct the Court to any specific claims for relief that must be dismissed. The only claim for relief that even

mentions "extreme vetting"[5] is Claim Four. (Dkt. No. 47 at ¶ 263.) This claim alleges a Due Process violation for failure to give Plaintiffs and members of the putative classes "notice of their classification under CARRP (or successor 'extreme vetting' program), a meaningful explanation of the reason for such classification, and any process by which Plaintiffs can challenge their classification." (*Id.*) The Court cannot enjoin a program that is currently nonexistent; if the Court ultimately enjoins CARRP, and Defendants implement a successor program substantially similar to CARRP,[6] such conduct would be in violation of the Court's injunction. The main thrust of this case is the legality of CARRP. The Court will not dismiss Plaintiffs' claims because they include allegations of a possible future and unlawful program that would embody CARRP in all but name.

5. Claim Four

Defendants next argue that Plaintiffs' Fourth Claim for relief, which alleges a Due Process violation, should be dismissed because Plaintiffs have not been deprived of a protected liberty or property interest. (Dkt. No. 56 at 23.)

Procedural Due Process claims "hinge[] on proof of two elements: (1) a protect[ed] liberty or property interest . . . and (2) a denial of adequate procedural protections." *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998). Given CARRP's apparently clandestine nature, and a lack of opposition from Defendants on this point, the second element is met. Thus, the issue is whether Plaintiffs have asserted a protected liberty or property interest in having their applications adjudicated lawfully. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He

[5] Two of the proposed classes in the second amended complaint—but not the motion for class certification—contain "extreme vetting" in their title, but bear no relevance to the motion to dismiss.

[6] As Plaintiffs point out, due to the secretive nature of CARRP, it is plausible such a program is already in existence. (Dkt. No. 47 at ¶¶ 19 n.1, 59.)

must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

The Ninth Circuit, and other courts, have held that naturalization applicants have a property interest in seeing their applications adjudicated lawfully. *Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013) (finding a constitutionally protected interest in nondiscretionary immigration applications); *I.N.S. v. Pangilinan*, 486 U.S. 875, 884 (1988) (noting there is no discretion to deny naturalization if an applicant is otherwise qualified); *Schwab*, 145 F.2d at 676–77 ("[T]hose who come within [the Uniform Rule of Naturalization] are entitled to the benefit thereof as a matter of right[.]"); *United States v. Shanahan*, 232 F.169, 171 (E.D. Pa. 1916) ("It is, of course, true that . . . admission to citizenship . . . is not a right, but a privilege . . . . When an applicant has met all the requirements of the law, the privilege accorded him ripens into a right . . . he is entitled to citizenship."). As the United States Supreme Court explained nearly 100 years ago:

> The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, Sec. 8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate.

Tutun v. United States, 270 U.S. 568, 578 (1926).

Defendants counter that "no alien has the slightest right to naturalization." (Dkt. No. 56 at 24 (quoting *Fedorenko v. United States*, 449 U.S. 490, 506 (1981)). However, Defendants' citation of *Fedorenko* omits a significant portion of the quote. The complete citation reads, "'No alien has the slightest right to naturalization *unless all statutory requirements are complied with*.'" *Fedorenko*, 449 U.S. at 506 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474–75 (1917)) (emphasis added). Here, Plaintiffs allege that all

the statutory requirements have been complied with, and the application of CARRP's extra-statutory requirements deprives Plaintiffs of the right to which they are entitled. This is sufficient to allege a violation of due process. Defendants' motion to dismiss Claim Four is DENIED as to the Naturalization Class.

Plaintiffs who seek adjustment of their status is a different matter. "The status of an alien . . . may be adjusted by the Attorney General, in his discretion." 8 U.S.C. § 1255(a). As numerous courts have held, discretionary relief, such as adjustment of status, is not a protected property interest. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008); *McCreath v. Holder*, 573 F.3d 38, 41 (1st Cir. 2009); *Hamdan v. Gonzales*, 425 F.3d 1051, 1060 (7th Cir. 2005); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 808 (8th Cir. 2003). Therefore, Plaintiffs who seek an adjustment of status cannot claim a due process violation, and Claim Four is **DISMISSED WITH PREJUDICE** as to the Adjustment Class.

Finally, Defendants argue that Plaintiffs do not have a constitutionally protected interest in the pace of their adjudication. (Dkt. No. 56 at 24.) However, this misconstrues Plaintiffs' claims. Plaintiffs' case centers on their allegation that an extra-statutory policy based on discriminatory and illegal criteria is blocking the fair adjudication of immigration benefits of which they are statutorily eligible. (*See* Dkt. No. 58 at 23.) Pace of the adjudication is a byproduct of that allegation, not the allegation itself. The Court therefore will not address Defendants' argument.

6. Claim Seven

Defendants argue that Plaintiffs' Claim Seven—that CARRP violates the INA—must be dismissed because the INA does not create a private right of action, and therefore Plaintiffs lack standing. (Dkt. No. 56 at 26.) The Court need not decide whether Congress has implied a private right of action under the INA, because Plaintiffs are challenging agency action. Section 10(a) of the Administrative Procedure Act (APA) provides a right

of action for plaintiffs who challenge administrative action that violates a federal statute. Any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see also Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176–77 (9th Cir. 2004) ("[T]he end result is the same whether the underlying statute grants standing directly or whether the APA provides the gloss that grants standing. In both cases, the plaintiff can bring suit to challenge the administrative action in question. In the first case, the substantive statute grants statutory standing directly to the plaintiff. In the second case, the substantive statute is enforced through Section 10(a) of the APA."); *Hernandez-Avalos v. I.N.S.*, 50 F.3d 842, 846 (10th Cir. 1995) ("[A] plaintiff who lacks a private right of action under the underlying statute can bring suit under the APA to enforce the statute."). The proper question for the Court, therefore, is whether Section 10(a) of the APA applies to Plaintiffs' suit.

Whether Section 10(a) applies to a given suit turns on whether a plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The "'zone of interests' test is 'not meant to be especially demanding,' and a court should deny standing only 'if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Cetacean*, 386 F.3d at 1177 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). The "benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). Under this standard, it is arguable that those applying for immigration benefits fall within the zone of interests of the statute that sets forth the requirements for obtaining those benefits. Accordingly, Defendants' motion to dismiss Plaintiffs' Claim Seven is **DENIED**.

7. Claim Eight

Defendants move the Court to dismiss Plaintiffs' Claim Eight—that CARRP is a final agency action that is arbitrary and capricious and in violation of the INA and USCIS's statutory authority—for failure to state a claim because it does not relate to a final agency action. (Dkt. No. 56 at 29.)

Under the APA, for an agency action to be reviewable, it must be final. 5 U.S.C. § 704. An action is final if it (1) "mark[s] the 'consummation' of the agency's decision-making process," and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennet v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Defendants argue that "the CARRP handling process" and the delays caused by CARRP are not final agency actions. However, Defendants again misrepresent Plaintiffs' claim. Plaintiffs allege that CARRP—the policy itself—is a final agency action, "not any one applicant's adjudication thereunder." (Dkt. No. 58 at 30; Dkt. No. 47 at ¶ 280.) The Court therefore analyzes whether the overall CARRP policy, its inception and implementation, constitutes final agency action under the *Bennet* test.

Plaintiffs allege that USCIS initiated CARRP in 2008, and since that time, it has been responsible for delaying and denying thousands of immigration applications. (See Dkt. No. 47 at ¶¶ 55–97.) The first prong is met because CARRP is an active program implemented by the agency and represents the culmination of USCIS's decision making process. The implementation of CARRP affects the thousands of applicants whose qualified applications are allegedly indefinitely delayed or denied without explanation. The second prong is met because this results in distinct legal consequences. The Court therefore finds that CARRP is a final agency action. Defendants' motion to dismiss Claim Eight is **DENIED**.

8. Claim Nine

Finally, Defendants move to dismiss Plaintiffs' Claim Nine—that CARRP was not properly subjected to the notice-and-comment procedure—because it is not a substantive or legislative rule. Under the APA, an agency may issue a "legislative rule" only by using the APA's notice-and-comment procedure. 5 U.S.C. § 553 (b), (c); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003). Failure to implement the notice-and-comment procedure invalidates the resulting regulation. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). Exempt from this rule, however, are "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A); *Mora-Meraz v. Thomas*, 601 F.3d 933, 939 (9th Cir. 2010). Defendant's motion to dismiss Claim Nine therefore turns on whether CARRP is classified as an interpretive rule or substantive rule.

"For purposes of the APA, substantive rules are rules that create law . . . imposing general, extrastatutory obligations pursuant to authority properly delegated by Congress." *S. Cal. Edison Co. v. F.E.R.C.*, 770 F.2d 779, 783 (9th Cir. 1985). On the other hand, "the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez v. Morg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). In the Ninth Circuit, a substantive or legislative rule will be found "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority;[7] or (3) when the rule effectively amends a prior legislative rule." *Hemp Indus.*, 333 F.3d at 1087 (citing *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)).

[7] The parties agree that the second element does not apply here and the Court will not consider it.

Defendants argue that the statutes and regulations already in place in the INA, 8 U.S.C. §§ 1255, 1357(b), 1423–1427, and 1429, "constitute an adequate legislative basis for USCIS to undertake the procedural steps laid out by CARRP in the adjudication of benefit applications." (Dkt. No. 56 at 31.) The Court finds that the sections cited of the INA do not support Defendants' argument. For example, Defendants maintain that because 8 U.S.C. § 1446(a) requires a "personal investigation of the person applying for naturalization," an adequate legislative basis for CARRP exists. (Dkt. No. 56 at 31.) However Plaintiffs' allegations suggest that CARRP goes well beyond a personal investigation and instead "creates a separate substantive regime for immigration application processing and adjudication." (Dkt. No. 58 at 28; Dkt. No. 47 at ¶ 95.) Plaintiffs allege that "[u]nder CARRP, non-statutory indicators of a national security concern include travel through or residence in areas of known terrorist activity; a large scale transfer or receipt of funds; a person's employment, training, or government affiliations . . . [;] or other suspicious activities." (Dkt. No. 47 at ¶ 74.) Those indicators alone may seem like reasonable considerations under a "personal investigation." However, the allegation that the presence of such an indicator therefore labels the application as a "national security concern" and "forbids USCIS from granting the requested benefit," (*id.* at ¶ 92) and guides "officers to deny such applications . . . or delay adjudication as long as possible," (*id.* at 77), taken as true, transports CARRP into the realm of the substantive.

Addressing the third part of the framework, Defendants argue that CARRP does not amend a prior legislative rule but rather "is a process to vet cases with an articulable link to national security concerns and to determine the proper adjudicative action to take within statutory limits." (Dkt. No. 56 at 32.) The Court disagrees. The INA already contains indicators of national security concerns for those seeking lawful permanent resident status, asylum, or a visa. 8 U.S.C. §§ 1182(a)(3)(A), (B), and (F), 1227(a)(4)(A)

and (B). Taking Plaintiffs' allegations as true, CARRP goes beyond these statutory indicators. CARRP would therefore effectively amend a prior legislative rule.

Finally, the Court notes that because CARRP only came to light through litigation and FOIA requests, (*see* Dkt. No. 47 at ¶ 59), its issuance cannot be said to be interpretive because it "advise[d] the public of" nothing. *See Perez*, 135 S. Ct. at 1204. Accordingly, the Court finds that Plaintiffs allege sufficient facts to support their claim that CARRP is a substantive rule subject to the notice-and-comment procedure of the APA. Defendants' motion to dismiss Claim Nine is **DENIED**.

For the foregoing reasons, the Court **GRANTS IN PART and DENIES IN PART** Defendants' motion to dismiss (Dkt. No. 56). It is granted in that Claim Four is **DISMISSED** as to the Adjustment Class only. It is **DENIED** in all other respects.

9. Plaintiffs' Amended Motion for Class Certification (Dkt. No. 49)

1. Legal Standard for Class Certification

A party seeking to litigate a claim as a class representative must affirmatively satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). In determining whether the plaintiffs have carried this burden, the Court must conduct a "rigorous analysis." *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). This inquiry may "entail some overlap with the merits of the plaintiff's underlying claim[,]" though the Court considers the merits only to the extent that they overlap with the requirements of Rule 23 and allow the Court to determine the certification issue on an informed basis. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). The ultimate decision to certify a class is within the Court's discretion. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009).

2. Rule 23(a) Requirements

Rule 23(a) requires that one or more members of a class may sue as a representative plaintiff only if (1) the class is so numerous that joinder is impracticable; (2) there are common questions of law or fact to the class; (3) the claims or defenses of representative parties are typical of those of the class; and (4) the representatives will fairly and adequately protect the interests of the absent class members. Fed. R. Civ. P. 23(a); *See also Mazza*, 666 F.3d at 588 (Rule 23(a) requires "numerosity, commonality, typicality and adequacy of representation"). Defendants contest certification on commonality, typicality, and adequacy grounds. (Dkt. No. 60 at 13.) Because a rigorous analysis is required regardless of a defendant's opposition, the Court addresses each requirement independently. However, the Court first addresses Defendants' more general opposition to class certification on standing grounds.

Defendants oppose class certification because "'[a] named plaintiff cannot represent a class alleging [] claims that the named plaintiff does not have standing to raise."' (*Id.*) (quoting *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001). Defendants argue that the named Plaintiffs, and all proposed class members, lack standing to challenge (1) CARRP, because "they have disclaimed any interest in obtaining decisions on their pending applications, and (2) an "extreme vetting" program under E.O. 13780, because they have not suffered an injury. (*Id.*)

As to the first argument, the Court has already concluded the Plaintiffs have standing to challenge CARRP. *See* Section II(A)(2)(a) and (b), *supra*. Regarding any "extreme vetting" program, Defendants are correct that Plaintiffs may not have not suffered any injury because Plaintiffs are unaware if such program currently exists. However, as discussed above, Plaintiffs' allegations regarding an "extreme vetting" program safeguard against the Government doing away with CARRP and reinstituting a substantially similar program under a different name, either in an effort to moot

Plaintiffs' claims, or insulate CARRP from judicial review. *See* Section II(A)(2)(c), *supra*. As Plaintiffs correctly point out, "[t]o the extent any 'extreme vetting' policy developed pursuant to the Second EO expands or continues CARRP, it will suffer from the same legal deficiencies as CARRP itself." (Dkt. No. 49 at 13–14.) Thus, while the Court cannot preemptively enjoin an "extreme vetting" program, it could enjoin CARRP. If that happens, an "extreme vetting" program developed pursuant to E.O. 13780, which suffers from the same legal deficiencies as CARRP, would violate this Court's order.

a. Numerosity

Rule 23(a)'s first requirement is satisfied when the proposed class is sufficiently numerous to make joinder of all members impracticable. Fed. R. Civ. P. 23(a)(1).[8] The numerosity requirement requires the examination of the specific facts of each case, though "in general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 Fed. App'x 646, 651 (9th Cir. 2010); *see also Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 652 (W.D. Wash. 2011) (certifying a class of 43 to 54 workers). Here, between July 1, 2013 and September 20, 2013, USCIS reported 2,644 pending applications subjected to CARRP. (Dkt. No. 27-1 at 164–169.) The putative class likely contains thousands of members. (Dkt. No. 114 at 4; Dkt. No. 51 at 25.) The Court finds that the numerosity requirement is met.

b. Commonality

Under Rule 23(a)(2)'s commonality requirement, a plaintiff must demonstrate that the "class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.'" *Mazza*, 666 F.3d at 588 (quoting *Dukes*, 564 U.S. at 350). The key inquiry is not whether the plaintiffs have raised common questions, but whether "class treatment will 'generate common *answers* apt to drive the resolution of the litigation.'" *Abdullah v.*

[8] Defendants do not dispute numerosity. (*See generally* Dkt. No. 63.)

U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Dukes*, 564 U.S. at 350) (emphasis in original). Every question of law or fact need not be common to the class. Rather, all Rule 23(a)(2) requires is "a single significant question of law or fact." *Id.* (quotation omitted); *see also Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1041–42 (9th Cir. 2012). The existence of "shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (amended).

Plaintiffs posit that their claims present numerous common factual and legal issues, including whether:

- CARRP violates the INA by creating additional, non-statutory, substantive criteria that must be met prior to a grant of immigration benefits;
- CARRP violates the APA as a final agency action that is arbitrary and capricious, exceeds statutory authority, and violates the Constitution;
- CARRP constitutes a substantive rule and is therefore unenforceable for failure to provide a notice-and-comment period prior to implementation;
- CARRP violates the Uniform Rule of Naturalization, Article I, Section 8, Clause 4 of the Constitution; and
- CARRP violates the Due Process Clause of the Fifth Amendment.

(Dkt. No. 49 at 19–20.)

Defendants argue that "[a]t the heart of this case is the allegation that USCIS has unreasonably delayed adjudicating" immigration applications and resolution of this allegation requires a "fact-intensive, individualized inquiry into the causes of the delay in each case." (Dkt. No. 60 at 15.) This is incorrect. Plaintiffs' claim is that CARRP is an unlawful program. A byproduct of CARRP's alleged unlawful program is unreasonable delays.

The common question here is whether CARRP is lawful. The answer is "yes" or "no." The answer to this question will not change based on facts particular to each class member, because each class member's application was (or will be) subjected to CARRP.

Therefore, "a classwide proceeding" will "generate common answers apt to drive the resolution of the litigation." *See Troy*, 276 F.R.D. at 652–53. The commonality requirement is met.

c. Typicality

Plaintiffs must next show that their claims are typical of the class. Fed. R. Civ. P. 23(a)(3). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named Plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Ellis*, 657 F.3d at 984 (internal quotation omitted). The commonality and typicality inquiries, which "tend to merge," both 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." *Dukes*, 131 S. Ct. at 2551, n.5 (quotations and citation omitted). Ultimately, representative class claims are typical if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (noting the "permissive" nature of the typicality inquiry).

Plaintiffs maintain that their claims are typical of the proposed classes because "they proceed under the same legal theories, seek the same relief, and have suffered the same injuries." (Dkt. No. 49 at 21.) Defendants counter that because the named Plaintiffs allege they are fully eligible for the benefits they seek, and the same cannot be said for every member of the class, the named Plaintiffs are atypical of the class they seek to represent. (Dkt. No. 60 at 21.) However, Rule 23(a)(3) requires that the claims of class representatives be similar to claims of the class. Plaintiffs are not seeking specific adjudication of their applications, only that USCIS adjudicate applications "based solely

on the statutory criteria," and not pursuant to CARRP. (Dkt. No. 47 at 51.) Whether any particular Plaintiff or putative class member were statutorily eligible for the benefits sought is not determinative of typicality. Further, if an applicant were statutorily ineligible under the INA, then submitting such an application to CARRP would be redundant, and grounds for denial already exist.

The relevant claim for the typicality inquiry is whether subjecting a Plaintiff's immigration application to CARRP is lawful. The class definitions include only immigration benefit applicants whose applications have been submitted to CARRP. Defendants do not claim that any of the proposed class representatives did not have their application submitted to CARRP. Accordingly, the typicality requirement is met.

d. Adequacy

Finally, Rule 23(a)(4) requires that the named plaintiff "fairly and adequately" protect the interests of the class. Fed. R. Civ. P. 23(a)(4). To determine whether the representative parties will adequately represent a class, the Court must examine (1) whether the named plaintiff and her counsel have any conflicts of interest with other class members; and (2) whether the named plaintiff and her counsel will prosecute the action vigorously on behalf of the class. *Ellis*, 657 F.3d at 985 (citing *Hanlon*, 150 F.3d at 1020). As the Ninth Circuit has noted, adequate representation depends upon "an absence of antagonism between representatives and absentees[] and a sharing of interest between representatives and absentees." *Ellis*, 657 F.3d at 985 (quotations and citation omitted).

Plaintiffs contend that the five named Plaintiffs are adequate representatives because "there is no tension between their interests and those of the absent class members they seek to represent." (Dkt. No. 63 at 11.) The class members' interests all focus on challenging CARRP and preventing it from being applied to their or other class members' immigration applications. Further, the named Plaintiffs are all willing to prosecute this action vigorously. (Dkt. Nos. 28, 29, 50, 51, and 52.)

Defendants contest adequacy on three grounds. First, Defendants argue that the named Plaintiffs are inadequate representatives because there may be many putative class members who are aware that their applications have been pending a long time, and who would prefer to let the process "run its course." (Dkt. No. 60 at 22.) This ignores the fact that this lawsuit alleges that applicants do not receive notification that their application has been submitted to CARRP, and Defendants have yet to deny such a claim. Defendants presume that there are potential plaintiffs who applied for immigration benefits but "might prefer to allow their applications to remain pending, continuing to live and work in the United States in their current status, rather than risk having USCIS determine they are inadmissible or removable and be placed in removal proceedings." (*Id.*) This argument is speculative at best, and as such, fails.

Second, Defendants repeat their argument regarding the fact that the named Plaintiffs all claim to be eligible for the benefits they seek, and this would put them at odds with putative class members who are ineligible. (*Id.* at 22–23.) The Court addressed this argument above and applies the same reasoning here. Additionally, the Court sees no basis for conflict on underlying eligibility grounds. If CARRP is an unlawful and unconstitutional program to which all putative class members' applications are submitted, then they all have a shared interest—regardless of eligibility—in putting an end to it.

Finally, Defendants argue that the named Plaintiffs are inadequate representatives because they have all had their applications adjudicated, and thus their claims are moot. (Dkt. No. 60 at 24.) However, this argument has the opposite effect and actually persuades the Court that class certification is appropriate.

Each named Plaintiff had his or her application acted on almost immediately *after* joining this lawsuit. Assuming that this was merely CARRP and the application process running its due course and that Plaintiffs' ultimate adjudications happened to coincide with being added as named Plaintiffs—even after their applications lay stagnant for up to

four years—class certification would still be appropriate. Defendants' argument supports the conclusion that Plaintiffs' claims would appear to be "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *County of Riverside v. McLaughlin*, 500 U.S. 44. 52 (1991) (internal citation omitted). The named Plaintiffs' claims are therefore "capable of repetition, yet evading review." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). In such a case, "mooting the putative class representative's claims will not necessarily moot the class action" even if "the district court has not yet addressed the class certification issue." *Id.* at 1090.

On the other hand, if adjudication of Plaintiffs' applications is not happenstance, and Defendants are purposely and strategically adjudicating Plaintiffs' applications as they are added as named Plaintiffs, such a blatant attempt to moot Plaintiffs' claims will not gain purchase with this Court. If this is true, Defendants appear to be engaging in a strategy of picking off named Plaintiffs to insulate CARRP from meaningful judicial review.

Such a strategy is apparently not without precedent. In *Muhanna v. USCIS*, No. 14-cv-05995 (C.D. Cal. July 31, 2014), five individual plaintiffs filed suit challenging CARRP. After waiting years for adjudication, all five plaintiffs' applications were adjudicated within months of filing suit, and the lawsuit was voluntarily dismissed as moot. *Id.*, Dkt. No. 51 (entered Dec. 23, 2014). Similarly, in *Arapi v. USCIS*, No. 16-cv-00692 (E.D. Mo. 2016), 20 individuals filed suit regarding CARRP and their pending naturalization applications. Soon after, USCIS adjudicated all 20 applications, at which point 19 plaintiffs voluntarily dismissed their claims and USCIS moved to dismiss the final plaintiff's claim as moot. *Id.*, Dkt. No. 22 (filed Dec. 19, 2016).

Defendants' argument that the mooting of named Plaintiffs' claims requires a

finding that they are inadequate representatives, thus defeating class certification, does not have the desired effect. In fact, it counsels in favor of granting class certification. *See Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 909 (N.D. Cal. 2014) (defendant's "calculated strategy that includes picking off named Plaintiffs" did not moot class action claims); *Ramirez v. Trans Union, LLC*, 2013 WL 3752591, at *2 (N.D. Cal. July 17, 2013) (class certification appropriate where plaintiff's claims would "evade review" if the defendant were able to "pick off" each subsequent lead plaintiff).

Furthermore, despite their applications having been adjudicated by USCIS, the Court remains confident that the named Plaintiffs will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court further finds that Plaintiffs' counsel—attorneys from the ACLU, Law Offices of Stacy Tolchin, National Immigration Project of the National Lawyers Guild, Northwest Immigrant Rights Project, and Perkins Coie—have the experience and ability to vigorously and adequately represent the class. The adequacy requirement is met.

3. Rule 23(b)(2) Requirement

After satisfying the Rule 23(a) prerequisites, a plaintiff must also demonstrate that the case is maintainable as a class action under one of the three Rule 23(b) prongs. Plaintiffs move for class certification under Rule 23(b)(2). (Dkt. No. 49 at 23.) In order to satisfy Rule 23(b)(2), Defendants must "ha[ve] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360.

Here, Plaintiffs allege that CARRP is unlawful and ask the Court to enjoin the Government from submitting putative class members' immigration applications to CARRP. A single ruling would therefore provide relief to each member of the class.

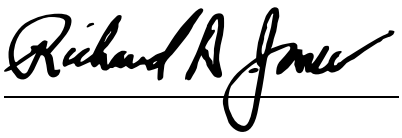
Accordingly, Rule 23(b)(2) is satisfied.

Having satisfied the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiffs' motion for class certification (Dkt. No. 49) is **GRANTED**. The Court approves of the two proposed classes, appoints the five named Plaintiffs as class representatives, and appoints Plaintiffs' counsel as class counsel for both classes. Because certification of anything less than a nationwide class would run counter to the constitutional imperative of "a uniform Rule of Naturalization," U.S. CONST., art. I, § 8, cl. 4, class certification is nationwide.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 56) is **GRANTED IN PART and DENIED IN PART**, and Plaintiffs' motion for class certification (Dkt. No. 49) is **GRANTED**.

DATED this 21st day of June, 2017.



The Honorable Richard A. Jones
United States District Judge

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' MOTION TO RECONSIDER CLASS CERTIFICATION

HON. RICHARD A. JONES

NOTE ON MOTION CALENDAR: Wednesday, July 5, 2017

On June 21, 2017, the Court issued an order granting in part and denying in part Defendants' motion to dismiss, and certifying two nationwide classes. For the following reasons, and mindful that motions for reconsideration are "disfavored," L.R. 7(h), Defendants respectfully move the Court to reconsider its decision to certify a class action or, in the alternative, to modify the class definitions.

I. Plaintiffs Failed to Establish Commonality under Rule 23(a) as Defined by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*

The Court's analysis of the commonality requirement, *see* Fed. R. Civ. P. 23(a), was flawed in a number of respects, beginning by conflating Plaintiffs' causes of action (the allegations that CARRP is unlawful) with the concrete injury required for Article III

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jurisdiction (the allegation that the delay in adjudication resulting from CARRP harmed them). In assessing commonality, the Court concluded:

> Defendants argue that '[a]t the heart of this case is the allegation that USCIS has unreasonably delayed in adjudication' immigration applications and resolution of this allegation requires a 'fact-intensive, individualized inquiry into the cases of the delay in each case.' (Dkt. No. 60 at 15.) This is incorrect. Plaintiffs' claim is that CARRP is an unlawful program. A byproduct of CARRP's alleged unlawful program is unreasonable delays.

ECF No. 69 at 25. If that is so, then the Court is proposing to issue an advisory opinion. A declaration that CARRP is unlawful untethered to its effect, if any, on individual cases presents the exact sort of "abstract harm" that the Ninth Circuit and the Supreme Court have cautioned are insufficient to establish jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (per curiam) ("The only injury [they] allege is that the law . . . has not been followed"); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"), *abrogated on other grounds by Lexmart Int'l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). The Court has no jurisdiction to evaluate the legality of CARRP absent a plausible allegation that CARRP is the proximate cause of unlawful delay. Plaintiffs cannot make that showing because it would require facts suggesting both that the processing time for all of Plaintiffs' applications is unreasonable, and that CARRP, as opposed to any other reason, is the proximate cause for *each* of them. Plaintiffs have not and cannot plausibly make such an allegation as to each named Plaintiff, much less every class member, given the multitude of reasons other than CARRP that can cause delay, such as the Requests for Evidence issued regarding Plaintiff Ostadhassan's marriage. And there can be no commonality among a class that contains members who have not suffered a concrete injury. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)) ("[N]o class may be certified that contains

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members lacking Article III standing."). This alone is a sufficient basis to deny class certification.

Beyond this, however, the Court erred in relying on *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), for the proposition that "shared legal issues with divergent factual predicates is sufficient" to establish commonality under Rule 23(a). *Hanlon* pre-dates and is inconsistent with the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, the Supreme Court held that "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* at 349-50 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). But the injury here cannot be the alleged illegality of CARRP—under *Lance* and *Allen* illegality alone is not a cognizable injury.[1] Instead, the legally cognizable injury suffered, if any, is the delay in adjudication resulting from the purportedly unlawful conduct. Again, Plaintiffs have not demonstrated that the purported delays in adjudicating all class members' applications are attributable to CARRP.

Dukes goes on to explain that the common contention must be "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. This Court concluded that "[t]he common question here is whether CARRP is lawful." ECF No. 69 at 25. But that is only part of the equation. Equally important is whether each of the class members has been injured in the same way, *i.e.*, by CARRP. *See Dukes*, 564 U.S.at 349-50. Because some class members may be subject to CARRP but not harmed by it—their applications may take longer than six months to process for entirely unrelated reasons—the legality of CARRP will not finally resolve any claims on a class-wide basis, nor even resolve a question that is necessary to resolving all class members' claims that they have suffered unreasonable delay.

[1] Indeed, *Dukes* itself observed that a common injury must be more than an allegation "that they have all suffered a violation of the same provision of law." 564 U.S. at 350.

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Dukes explained that "without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored?*" *Id.* at 352 (emphasis in original). The same is true here. Without some glue holding the alleged reasons for delay together it will be impossible to say that examination of all the class members' claims will produce a common answer to the question *why was my application not adjudicated?*

More than a common allegation that they have been subjected to an unlawful policy, Rule 23(a)'s commonality requirement demands that Plaintiffs make an affirmative showing that they have suffered the same injury. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Id.* at 351. The Court identified no such evidence in its decision. *See* ECF No. 69 at 24-26. Plaintiffs have not even *alleged* that CARRP is the proximate cause of delay for each class member's application, much less offered *evidence* that would support any such contention.

In sum, to meet the commonality requirement of Rule 23(a), *Dukes* requires a common injury. Plaintiffs have alleged a common policy, but have failed to demonstrate that all class members have been injured in the same way (or indeed, at all) by that policy.

II. The Class Definitions Are Manifestly Erroneous

1. The Six-Month Benchmark in the Class Definitions Lacks a Rational Basis

In approving Plaintiffs' proposed class definitions, the Court adopted wholesale Plaintiffs' suggestion to define membership in both classes by, *inter alia*, whether the individual's application had been pending for longer than six months. *See* ECF No. 69 at 31. Plaintiffs settled on the six-month mark because 8 U.S.C. § 1571(b) provides the "sense of the Congress" that that the processing of an immigration benefit should be completed not later than 180 days after the initial filing of the application." *See* ECF No. 47 ¶¶ 43, 51. The Ninth Circuit has explained that "'Sense of the Congress' provisions

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are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law." *Orkin v. Taylor*, 487 F.3d 734, 740 (9th Cir. 2007). Moreover, six months is below average processing times at many USCIS offices that adjudicate adjustment-of-status and naturalization applications—most applications remain pending for at least six months at a *minimum* prior to final adjudication. *See* Petty Affidavit (attached hereto as Exhibit A).

The Court is entitled to exercise its discretion in defining classes, but relying on a six-month mark that (1) has no legal significance, and (2) does no work in separating delays cause by CARRP from delays caused by a backlog of applications, is an abuse of discretion.

2. The Court's Reliance on the Uniform Rule of Naturalization Clause Does Not Support Certification of Nationwide Classes

Finally, the Court should revisit its reliance on the Uniform Rule of Naturalization clause as a basis for certifying a nationwide classes. As previously noted, the Supreme Court has held that the uniformity in naturalization and bankruptcy laws demanded by Art. I, § 8, cl. 4 "is geographical, and not personal." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 190 (1902), and Plaintiffs have not alleged that CARRP operates differently in different states. Moreover, even assuming this provision militates in favor of a nationwide *naturalization* class, it is unclear how it supports a nationwide adjustment-of-status class as well. Article I demands no uniformity in conferring that statutory status.

CONCLUSION

The Court should vacate its order of June 21, 2017 and deny Plaintiffs' amended motion for class certification or, in the alternative, modify the class definitions as described herein.

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Dated: July 5, 2017

Respectfully submitted,

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Civil Division

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Office of Immigration Litigation

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/s/ *Aaron R. Petty*
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JOSEPH F. CARILLI, JR.
Trial Attorney, National Security
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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on July 5, 2017, I conferred with opposing counsel and thoroughly discussed the substance of this motion and in good faith attempted to reach an accord to eliminate the need for the motion. Those efforts were unsuccessful.

s/ Aaron R. Petty
AARON R. PETTY
U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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s/ Aaron R. Petty
AARON R. PETTY
U.S. Department of Justice

THE HONORABLE RICHARD A. JONES

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

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated, Plaintiffs, v. DONALD TRUMP, President of the United States, *et al.*, Defendants.	CASE NO. 2:17-cv-00094-RAJ ORDER

This matter comes before the Court on Defendants' Motion to Reconsider Class Certification. Dkt. # 73. Plaintiffs oppose the motion. Having reviewed the briefs, relevant portions of the record, and the applicable law, the Court **DENIES** Defendants' Motion.

"Motions for reconsideration are disfavored." LCR 7(h)(1). "The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." *Id.*

Defendants do not meet this standard. Defendants' motion reargues its position that the Court should not certify the class—a position the Court rejected. Defendants couch their motion in terms of the Court's manifest errors but in reality the motion argues that the Court should revisit its conclusions. Parties cannot use motions for reconsideration to simply obtain a second bite at the apple, and this is what Defendants appear to be doing with this motion. For these reasons, the Court **DENIES** the motion. Dkt. # 73.

Dated this 16th day of August, 2017.

The Honorable Richard A. Jones
United States District Judge

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States *et al.*,

Defendants.

No. 17-cv-00094 RAJ

PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION TO DEFENDANTS

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TO: Defendants Donald J. Trump, United States Citizenship and Immigration Services, John F. Kelly, James McCament, Matthew D. Emrich, and Daniel Renaud.

AND TO: Edward S. White and Aaron R. Petty, Office of Immigration Litigation, U.S. Department of Justice, attorneys for Defendants.

Pursuant to Federal Rules of Civil Procedure 26 and 34, Abdiqafar Wagafe, Mehdi Ostadhassan, Hanin Omar Bengezi, Noah Adam Abraham (f/k/a Mushtaq Abed Jihad), and Sajeel Manzoor (collectively, "Plaintiffs"), on behalf of themselves and others similarly situated, request that Donald Trump, President of the United States; United States Citizenship and Immigration Services; John F. Kelly, in his official capacity as Secretary of the U.S. Department of Homeland Security; James McCament, in his official capacity as Acting Director of the U.S. Citizenship and Immigration Services; Matthew D. Emrich, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of the U.S. Citizenship and Immigration Services ("FDNS"); and Daniel Renaud, in his official capacity as Associate Director of the Field Operations Directorate of the U.S. Citizenship and Immigration Services (collectively, "Defendants") produce for inspection and copying the documents and things within their possession, custody, or control falling within the scope of the requests below within thirty (30) days of service hereof, in accordance with the Federal Rules of Civil Procedure and the definitions and instructions below. Please produce the documents and things described herein to the attention of the law firm of Perkins Coie LLP, 1201 Third Ave., Ste. 4900, Seattle, WA 98101-3099. These requests are continuing in nature. As such, Defendants must supplement their responses in a timely manner in accordance with Federal Rule of Civil Procedure 26(e) as additional or corrective information comes to their or their counsel's attention.

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INSTRUCTIONS

The following instructions shall apply when responding to these requests for production:

1. Each request herein calls for production of all responsive Documents within Your possession, custody, or control, or that of Your agents, consultants, representatives, and, unless privileged, attorneys.

2. Without limitation of the term "control" as used in the preceding instruction, a Document is deemed to be in Your control if You have the right to secure the Document or a copy thereof from another Person having actual possession thereof.

3. Each Document request and subparagraph or subdivision thereof is to be answered separately. After each Document request, state whether all Documents responsive to that request are being produced.

4. Each Document request herein shall be deemed to be continuing and, in the event that additional Documents are later discovered or become known to You, further production is to be made hereto.

5. If You object to answering any of these requests, or withhold Documents from production in response to these requests, in whole or in part, state your objections and/or reasons for not producing and state all factual and legal justifications that you believe support your objection or failure to produce.

6. If any requested Document has been lost, discarded, or destroyed, describe the Document as completely as possible, including: the name, title, and description of employment of each author or preparer of the Document; a complete description of the nature and subject matter of the Document; and the date on which and manner in which the Document was lost, discarded, destroyed, or otherwise disposed of.

7. If any part of a Document is responsive to a Document request, the whole Document is to be produced.

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8. If You contend that it would be unreasonably burdensome to obtain and provide all of the Documents called for in response to any Document request or any subsection thereof, then in response to the appropriate Document request:

a. Produce all such Documents as are available to You without undertaking what You contend to be an unreasonable request;

b. Describe with particularity the efforts made by You or on Your behalf to produce such Documents; and

c. State with particularity the grounds upon which You contend that additional efforts to produce such Documents would be unreasonable.

9. If any request is deemed to call for privileged Documents, and such privilege is asserted in order to avoid production, provide a list with respect to each Document withheld based on a claim of privilege, stating: the name of each author, the name of each recipient and addressee, the date of the Document, the general subject matter of the Document, the basis upon which the claim of privilege is asserted, and the Document request under which the production of the Document is called for.

10. In producing the Documents requested, You are requested to search electronic Documents, records, data, and any other electronically stored information ("ESI") which may be stored in or on any electronic medium or device, including without limitation computers, network servers, computer hard drives, e-mails, and voicemails. Your production of any ESI should be produced in an electronic format permitting electronic search functionality, pursuant to the Parties' stipulation, if any, regarding preservation and production of ESI.

11. In producing records responsive to Document requests, please produce tangible Documents and records organized either (1) in separate groups responsive to specific requests or (2) in the format and organization in which the Documents are kept in the ordinary course of Your business. Please produce electronic Documents and records in Tagged Image File Format ("TIFF"), single page, black and white (or in color, if necessary, for any Document or its content

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to be readable), dithered (if appropriate), at 300 x 300 dpi resolution and 8½ x 11 inch page size, except for Documents requiring different resolution or page size to make them readable. Each TIFF Document should be produced with an image load file in standard Opticon (*.log) format that reflects the parent/child relationship. In addition, each TIFF Document should be produced with a data load file in Concordance delimited format (*.dat), indicating (at a minimum) appropriate unitization of the Documents, including beginning and ending production numbers for (a) each Document set, and (b) each attachment within each Document set. TIFF images should also be accompanied by extracted text or, for those files that do not have extracted text upon being processed, optical character recognition ("OCR") text data; such extracted text or OCR text data should be provided in Document level form and named after the TIFF image. For Documents produced in TIFF format, metadata should be included with the data load files described above, and should include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the Document (that is, the custodian from whom the Document was collected or, if collected from a shared drive or server, the name of the shared driver or server); and MD5 hash value. In addition, for e-mail Documents, the data load files should also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name and address; "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files should be named or foldered in such a manner that all records can be imported without modification of any path or file name information.

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DEFINITIONS

The following definitions shall apply when responding to these requests for production:

1. "A," "an," and "any" include "all," and "all" includes "a," "an," and "any." All of these words should be construed as necessary to bring within the scope of these requests any Documents that might otherwise be construed to be outside of their scope.

2. "Adjustment of Status Application" means an Immigration Benefit Application to adjust the applicant's status to that of permanent legal resident using USCIS Form I-485.

3. "Adjustment of Status Applicant" means any individual who has filed an Adjustment of Status Application.

4. "Adjustment Class" means the following class certified by the Court in its Order Granting Class Certification, Dkt. 69: A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

5. "Alien File" or "A-file" means the collection of documents that the Department of Homeland Security (DHS) maintains for non-citizens, including all official files related to immigration status, citizenship or relief.

6. "And" and "or" shall be construed either conjunctively or disjunctively, whichever makes the request more inclusive.

7. "ACLU FOIA Request" means the American Civil Liberties Union's May 17, 2012 Freedom of Information Act Request, attached hereto as Exhibit A.

8. "CARRP" means the Controlled Application Review and Resolution Program, an internal vetting policy instituted by USCIS in April 2008. Upon information and belief, USCIS first outlined the parameters of CARRP in an April 11, 2008 memorandum addressed to field leadership from Deputy Director Jonathan R. Scharfen regarding "Policy for Vetting and

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Adjudicating Cases with National Security Concerns." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A.

9. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), and encompasses every medium of information transmittal, including but not limited to written, graphic, and electronic communication.

10. "Defendants," "You," "Your," or any similar word or phrase includes each individual or entity responding to these requests and, where applicable, each subsidiary, parent, or affiliated entity of each such Person and all Persons acting on its or their behalf.

11. "Document" and its plural shall be interpreted in the broadest possible manner and shall mean all written, electronic, graphic, or printed matter of any kind in Your possession or control, however produced or reproduced, including all originals, drafts, working papers, and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, and all other tangible things, including anything that would be a writing or recording as defined in Federal Rule of Evidence 1001(1) or as defined in Federal Rule of Civil Procedure 34(a).

12. "Donkey" Security Advisory Opinion means the type of Security Advisory Opinion generated when there are national security and/or terrorism concerns raised by the visa application.

13. "Employee" means any director, trustee, officer, employee, agent, consultant, partner, reseller, distributor, corporate parent, subsidiary, affiliate, or servant of the designated entity, whether active or retired, full-time or part-time, current or former, and compensated or not.

14. "First EO" means Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017).

15. "Immigration Benefit Application" means any application or petition to confer, certify, change, adjust, or extend any status granted under the Immigration and Nationality Act.

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16. "Immigration Benefit Applicant" means any individual who has filed an Immigration Benefit Application.

17. "National Security Concern" or "NS Concern" means the classification of Immigration Benefit Applications and Immigration Benefit Applicants that are subjected to CARRP. This includes, but is not limited to, the definition of National Security Concern used in the April 11, 2008 memorandum addressed to field leadership from Deputy Director Jonathan R. Scharfen regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns": "A NS [C]oncern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A.

18. "Naturalization Application" means an Immigration Benefit Application to naturalize as a U.S. citizen using USCIS Form N-400.

19. "Naturalization Applicant" means any individual who has filed a Naturalization Application.

20. "Naturalization Class" means the following class certified by the Court in its Order Granting Class Certification, Dkt. 69: A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

21. "Person" means an individual, proprietorship, partnership, firm, corporation, association, governmental agency, or other organization or entity.

22. "Relate," "reflect," or "refer," in all forms, means, in addition to the customary and usual meaning of those words, concerning, constituting, embodying, describing, evidencing, or having any logical or factual connection with the subject matter described.

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23. "Second Amended Complaint" means the Second Amended Complaint for Declaratory and Injunctive Relief, Dkt. 47, filed in the above-captioned action by Plaintiffs on April 4, 2017.

24. "Second EO" means Executive Order 13780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 13209 (Mar. 9, 2017).

25. "Security Advisory Opinion" means the Document created in response to a request by a U.S. consulate for a background security check on a foreign national who is applying for a U.S. visa.

26. "USCIS" means U.S. Citizenship and Immigration Services, a federal agency that is a component of the United States Department of Homeland Security and is headed by a director, currently James McCament.

27. Where appropriate, the singular form of a word should be interpreted in the plural and vice versa, to acquire the broadest possible meaning.

28. Any term defined herein shall have the indicated meaning whenever that term is used in these requests for production unless the context clearly requires otherwise. All defined terms are indicated by capitalizing the first letter of each term (except "and," "or," "relate," "reflect," and "refer"), as shown in the instructions and definitions above.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All Documents referring or relating to the development, conception, or origins of CARRP.

RESPONSE:

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

REQUEST FOR PRODUCTION NO. 2: All Documents referring or relating to the implementation of CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: All policy memoranda or other policy Documents referring or relating to CARRP, including any and all attachments. This request includes but is not limited to policy memoranda produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: All operational guidance referring or relating to CARRP, including any and all attachments. This request includes but is not limited to operational guidance produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: All training materials referring or relating to CARRP, including any and all attachments. This requests includes but is not limited to training materials produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland

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Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: All Documents referring or relating to the definition or interpretation of National Security Concern.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: All Documents referring or relating to any and all policies, procedures, guidelines and training materials relating to the processing and adjudication of Immigration Benefit Applications with a National Security Concern from any directorate, department, unit or entity within USCIS, including but not limited to the Fraud Detection and National Security Directorate (FDNS), Domestic Operations Directorate (DomOps), Service Center Operations Directorate, Field Operations Directorate, Background Check Unit (BDU), and The Screening Coordination Office (SCO) of FDNS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: All Documents referring or relating to the definition of or interpretation of "national security indicators" or "national security activities," as these terms are used and applied under CARRP. This request includes, but is not limited to, any policies, procedures, guidelines, and training materials referring or relating to the identification of "national security indicators" or "national security activities," the evaluation of "national security indicators" or "national security activities," the relationship between national security

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indicators," "national security activities" and National Security Concerns, and the vetting, deconfliction and resolution of "national security indicators" and " national security activities."

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: All Documents referring or relating to the definition of or interpretation of the possible "articulable links" between a given individual and a "national security indicator" or "national security activity," as these terms are used and applied under CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: All Documents referring or relating to any policy memoranda or procedures rescinded by the implementation of CARRP. This request includes, but is not limited to, those policy memoranda and procedures listed as rescinded in the April 11, 2008 USCIS memorandum from Jonathan R. Scharfen to Field Leadership regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A at 2-3.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: All Documents referring or relating to the connection between Security Advisory Opinion(s) issued by the U.S. Department of State and CARRP. This request encompasses both connections between CARRP and (1) specific Security Advisory Opinion(s) and (2) the Security Advisory Opinion procedure in general. This request

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includes, but is not limited to, any Security Advisory Opinion(s), including Donkey Security Advisory Opinion(s), as well as requests for Security Advisory Opinion(s) that refer or relate to the applications of any named Plaintiff or any other application subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: All Documents referring or relating to named Plaintiff Abdiqafar Wagafe. This request includes, but is not limited to, Mr. Wagafe's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Wagafe, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Wagafe.

RESPONSE:

REQUEST FOR PRODUCTION NO. 13: All Documents referring or relating to the reasons why Plaintiff Abdiqafar Wagafe's naturalization application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: All Documents referring or relating to named Plaintiff Mehdi Ostadhassan. This request includes, but is not limited to, Mr. Ostadhassan's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local

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databases referring or relating to Mr. Ostadhassan, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Ostadhassan.

RESPONSE:

REQUEST FOR PRODUCTION NO. 15: All Documents referring or relating to the reasons why Plaintiff Mehdi Ostadhassan's adjustment of status application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 16: All Documents referring or relating to named Plaintiff Hanin Omar Bengezi. This request includes, but is not limited to, Ms. Bengezi's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Ms. Bengezi, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Ms. Bengezi.

RESPONSE:

REQUEST FOR PRODUCTION NO. 17: All Documents referring or relating to the reasons why Plaintiff Hanin Omar Bengezi's adjustment of status application was subject to CARRP.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 18: All Documents referring or relating to named Plaintiff Noah Adam Abraham, f/k/a Mushtaq Abed Jihad. This request includes, but is not limited to, Mr. Abraham's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Abraham, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Abraham.

RESPONSE:

REQUEST FOR PRODUCTION NO. 19: All Documents referring or relating to the reasons why Plaintiff Noah Adam Abraham, f/k/a Mushtaq Abed Jihad's naturalization application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 20: All Documents referring or relating to the Immigration Benefit Application(s) of named Plaintiff Sajeel Manzoor. This request includes, but is not limited to, Mr. Manzoor's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Manzoor, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Manzoor.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 21: All Documents referring or relating to the reasons why Plaintiff Sajeel Manzoor's naturalization application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 22: All Documents referring or relating to any proposed, implemented, or planned modifications to CARRP from April 11, 2008 to the present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 23: All Documents referring or relating to any consideration of or reference to CARRP during the planning, drafting, or issuing of the First and Second EOs.

RESPONSE:

REQUEST FOR PRODUCTION NO. 24: All Documents referring or relating to "extreme vetting" or any other screening, vetting, or adjudication program, policy, or procedure connected to the First or Second EOs. This request includes, but is not limited to, programs that reference, relate to, or expand upon CARRP.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 25: All Documents referring or relating to the relationship between CARRP and any other preexisting or planned policy, program, standard, or procedure for screening, vetting, or adjudicating Immigration Benefit Applications.

RESPONSE:

REQUEST FOR PRODUCTION NO. 26: All Documents referring or relating to "extreme vetting" or any other program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications where a National Security Concern is present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 27: All Documents referring or relating to the number of Immigration Benefit Applications subject to CARRP or designated as a National Security Concern at any point from 2008 to the present. This request includes, but is not limited, to all National Security Monthly Case Load and Aging Reports, National Security Quarterly Workload and Aging Reports, and any other periodic reports, data, or statistics related to CARRP, including those that break down applications by country of origin, citizenship, religion, or any other demographics.

RESPONSE:

REQUEST FOR PRODUCTION NO. 28: All Documents referring to, relating to, or reflecting the age, sex, country of origin, country of citizenship, religion, race, ethnicity, or other demographics of Immigration Benefit Applicants who have been identified as a National Security Concern or otherwise subjected to CARRP, including application processing times.

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RESPONSE:

REQUEST FOR PRODUCTION NO. 29: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on national origin.

RESPONSE:

REQUEST FOR PRODUCTION NO. 30: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on religion.

RESPONSE:

REQUEST FOR PRODUCTION NO. 31: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on race or ethnicity.

RESPONSE:

REQUEST FOR PRODUCTION NO. 32: All Documents that any Defendant contends support any denial of any allegation in the Second Amended Complaint, or that any Defendant relies upon in denying any of the allegations in the Second Amended Complaint.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 33: All Documents that any Defendant contends support any affirmative defense set forth in response to the Second Amended Complaint, or that any Defendant relies upon in asserting any affirmative defense set forth in response to the Second Amended Complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 34: All Documents sufficient to identify members of the Naturalization Class, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the naturalization application was filed, and current status of the naturalization application.

RESPONSE:

REQUEST FOR PRODUCTION NO. 35: All Documents sufficient to identify all members of the Adjustment Class, including, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the adjustment application was filed, and current status of the adjustment application.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 36: All versions of USCIS's organization chart for USCIS headquarters and the Seattle USCIS Field Office, reflecting the names, titles, and positions of officials and Employees from 2007 to the present. This request includes organization charts of USCIS as a whole, as well as the Fraud Detection and National Security (FDNS) Directorate of USCIS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 37: All versions of any organization chart or similar document reflecting or identifying the individuals responsible for implementing CARRP, including but not limited to those individuals responsible for drafting and presenting training materials about CARRP and officers designated as CARRP officers.

RESPONSE:

REQUEST FOR PRODUCTION NO. 38: All Documents referring or relating to the names, titles, and job descriptions of all Your officials and Employees who bear any responsibility, directly or indirectly, in whole or in part, for CARRP or any related extreme vetting program. This request includes but is not limited to officials and Employees who are or were responsible for the creation, implementation, execution, oversight, and future development of CARRP or any related extreme vetting program.

RESPONSE:

REQUEST FOR PRODUCTION NO. 39: All Documents previously withheld or produced in redacted form pursuant to any exemption from the Freedom of Information Act,

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produced in unredacted form. This request is limited to Documents withheld or produced in response to the ACLU FOIA Request.

DATED: August 1, 2017

s/Jennifer Pasquarella (admitted pro hac vice)
ACLU Foundation of Southern California
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Los Angeles, CA 90017
Telephone: (213) 977-5236
Facsimile: (213) 997-5297
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s/ Harry H. Schneider, Jr.
Harry H. Schneider, Jr. #9404
s/ Nicholas P. Gellert
Nicholas P. Gellert #18041
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David A. Perez #43959
s/ Laura K. Hennessey
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s/Matt Adams
s/Glenda M. Aldana Madrid
Matt Adams #28287
Glenda M. Aldana Madrid #46987
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98122
Telephone: (206) 957-8611
Facsimile: (206) 587-4025
matt@nwirp.org
glenda@nwirp.org

s/Stacy Tolchin (admitted pro hac vice)
Law Offices of Stacy Tolchin
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s/Hugh Handeyside
Hugh Handeyside #39792
s/Lee Gelernt (admitted pro hac vice)
s/Hina Shamsi (admitted pro hac vice)
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Echiang@aclu-wa.org

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury and the laws of the State of Washington that on August 1st, 2017, I caused service of the foregoing, PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS, via email to all counsel of record herein.

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219 S. Dearborn St.,
5th Floor
Chicago, IL 60604
Telephone: 202-532-4542
aaron.r.petty@usdoj.gov

Edward S. White — Via Email
US Department Of Justice
PO Box 868
Ben Franklin Station
Washington, DC 20044
Telephone: 202-616-9131
Facsimile: 202-305-7000
edward.s.white@usdoj.gov

Joseph F. Carilli, Jr. — Via Email
U.S. Department Of Justice
PO Box 868,
Ben Franklin Station
Washington, DC 20044
Telephone: 202-616-4848
Facsimile: 202-305-7000
joseph.f.carilli2@usdoj.gov

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 1st day of August 2017, at Seattle, Washington.

s/Laura K. Hennessey
Laura K. Hennessey #47447
Perkins Coie LLP
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EXHIBIT A

ACLU FOUNDATION
AMERICAN CIVIL LIBERTIES UNION of SOUTHERN CALIFORNIA
LIBERTY | JUSTICE | EQUALITY

By Regular and Certified Mail, Return Receipt Requested

May 17, 2012

United States Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010
(816) 350-5570
Fax: (816) 350-5785
uscis.foia@dhs.gov

Re: Freedom of Information Act Request
Fee waiver requested

Dear FOIA Officer:

This letter constitutes a request for records made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by the American Civil Liberties Union Foundation of Southern California ("ACLU/SC").

The ACLU/SC makes this request for records related to the policies and procedures of the U.S. Citizenship and Immigration Services (USCIS) with respect to the processing and adjudication of applications for naturalization and other immigration benefits. The Requestor, a non-profit civil rights group, is concerned that certain immigrants – including Muslim, Arab, Middle Eastern and South Asian immigrants – are treated differently than other applicants in their efforts to obtain naturalization and other important immigration benefits. Through this FOIA Request, the ACLU/SC seeks information about the policies and practices that result in USCIS's apparently different treatment of those immigrants.

The ACLU/SC has learned of or assisted dozens of Muslim, Arab, Middle Eastern and South Asian immigrants who are statutorily eligible for naturalization and other immigration benefits, yet have encountered extraordinary hurdles by USCIS in the processing and adjudication of their applications. The ACLU/SC is concerned that USCIS subjects these applicants to higher scrutiny and different treatment due to its policies for identifying and vetting national security concerns, creating significant obstacles to their ability to obtain these important benefits.

Accordingly, through this Request, we seek information regarding USCIS' national security policies and procedures governing the identification, vetting and adjudication of

applications for naturalization and other immigration benefits categorized as presenting national security concerns.

THE REQUESTOR

ACLU/SC is a non-profit organization dedicated to defending and securing the rights granted by the U.S. Constitution and Bill of Rights. ACLU/SC's work focuses on immigrants' rights, the First Amendment, equal protection, due process, privacy, and furthering civil rights for disadvantaged groups. As part of its work, ACLU/SC disseminates information to the public through newsletters, news briefings, "Know Your Rights" documents, and other educational and informational materials. The ACLU/SC regularly submits FOIA requests to USCIS and other agencies – including, past FOIA requests related to the adjudication of naturalization applications – and publicizes the information it obtains through its website, newsletters and "Know Your Rights" presentations and materials.

THE REQUEST FOR RECORDS

We seek disclosure of **any** records[1] created from January 2003 to the present, **relating to** or **concerning:**[2]

Policies for the identification, vetting and adjudication of immigration benefits applications[3] *with national security concerns*

(1) The Operational Guidance, which implements the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns," attached hereto as Exhibit A, including:
   a. Any and all attachments;
   b. Any and all training materials;

---

[1] The term "records" as used herein includes but is not limited to all communications preserved in electronic or hard copy form, including but not limited to correspondence, documents, data, videotapes, audio tapes, CDs, DVDs, floppy disks, zip disks, faxes, files, e-mails, notes (including handwritten notes), letters, summaries or records of personal conversations, reports and/or summaries of interviews, reports and/or summaries of investigations, guidelines, evaluations, instructions, analyses, memoranda, agreements, orders, prescriptions, charts, expressions of statements of policy, procedures, protocols, reports, rules, training manuals, or studies.

[2] The term "concerning" means referring to, describing, evidencing, commenting on, responding to, showing, analyzing, reflecting, or constituting.

[3] The phrase "immigration benefits applications" as used herein refers to those applications or petitions, which confer citizenship by naturalization or immigrant or non-immigrant status.

c. Any and all policy, procedure and/or guidance related to implementation of the Operational Guidance and/or "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.

(2) Any and all policies, procedures, guidelines and training materials pertaining to CARRP (Controlled Application Review and Resolution Program), including, but not limited to,
   a. The CARRP Manual;
   b. CARRP policy memoranda;
   c. CARRP training materials.

(3) Any and all policies, procedures, guidelines and training materials relating to the processing[4] and adjudication of immigration benefit applications with a "national security concern"[5] from any Directorate, department, unit, or entity within USCIS, including but not limited to the:
   a. Fraud Detection and National Security Directorate (FDNS)
   b. Domestic Operations Directorate (DomOps), including, but not limited to, the DomOps Operational Guidance referenced on page 13 of the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.
   c. Service Center Operations Directorate
   d. Field Operations Directorate
   e. Background Check Unit (BCU)
   f. The Screening Coordination Office (SCO) of FDNS

(4) The Operational Guidance related to the adjudication of Replacement Lawful Permanent Resident cards when there is a "national security concern" described on page 14 of the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.

(5) The DHS Memorandum entitled "Department of Homeland Security Guidelines for the Use of Classified Information in Immigration Proceedings" (also referred to as "Ridge Memo") referenced on page 17, footnote 18 of the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.

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[4] For the purposes of this FOIA request, "processing" refers to all steps taken by USCIS from the moment that a naturalization application is filed until it is finally adjudicated. This includes but is not limited to, background/security checks, identification of a national security concern, internal/external vetting, deconfliction, adjudication, the naturalization interview and examination, requests for additional documentation or evidence, etc

[5] The 2008 memo, Exhibit A, defines a "national security concern" as existing when "an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act."

(6) The memorandum entitled "Additional Guidance on Issues Concerning Vetting and Adjudication of Cases Involving National Security Concerns," mentioned on page 271 of the PowerPoint entitled "CARRP: Deconfliction, Internal and External Vetting and Adjudication of NS Concerns," attached hereto as Exhibit B.

(7) The Deconfliction video referenced on page 264 of the PowerPoint entitled "CARRP: Deconfliction, Internal and External Vetting and Adjudication of NS Concerns," attached hereto as Exhibit B.

(8) The IBIS Standard Operating Procedure (SOP) referenced on page 109 of the May 21, 2004 memorandum entitled "New National Security-Related IBIS Procedures," attached hereto as Exhibit C.

(9) The name of and a description and/or explanation of the purpose and function of the "new office" created to centralize and effectively manage the screening initiatives with partners inside and outside the agency, as referenced on page 4 of USCIS Director Mayorkas' congressional testimony in a hearing entitled "Safeguarding the Integrity of the Immigration Benefits Adjudication Process" on February 15, 2012, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, attached hereto as Exhibit D.

(10) A description and/or explanation of the purpose and function of the Screening Coordination Office (SCO) within the Fraud Detection and National Security (FDNS) Directorate, a new office created in fiscal year 2011 to enhance USCIS's screening for national security threats and other information.

(11) Policies, procedures, guidelines, and training materials pertaining to the internal collaboration and coordination between and among USCIS directorates, offices, branches, programs during security checks and deconfliction.

(12) A description and/or explanation of the purpose and function of the "comprehensive recurrent vetting strategy to lead the [DHS's] biographic and biometric screening initiatives and studies," as referenced in Director Mayorkas' congressional testimony on February 15, 2012. *See* Exh. C.

(13) Provide a complete list of all security check and background check systems that are used by USCIS in the processing and adjudication of a naturalization application, including, but not limited to, the systems checked by FDNS or other USCIS entities on cases involving "national security concerns" or "national security indicators," such as the FBI Name Check, the FBI Fingerprint Check, TECS/IBIS, CLASS, SAOs, US-VISIT/IDENT, etcetera.

(14) Policies, procedures, guidelines and training materials related to "national security indicators" (as referenced on page 2 of the CARRP Officer Training's National Security Handout, Attachment A "Guidance for Identifying National Security Concerns," attached hereto as Exhibit E, and the 2008 Memo, page 15, Exh. A), including, but not limited to, the identification of "national security indicators" (including statutory indicators and non-statutory indicators); the evaluation of "national security indicators;" the relationship between "national security indicators" and "national security concerns;" and the vetting, deconfliction and resolution of "national security indicators."

(15) To the extent not covered by (14) above, policies, procedures, guidelines and training materials related to the "suspicious activities" type of "national security indicator," referenced on page 5 of Exh. E, including but not limited to:

a. "Unusual travel patterns and travel through or residence in areas of known terrorist activity;"
b. "Large scale transfer or receipt of funds;"
c. "Membership or participation in organizations that are described in, or that engage in, activities outlined in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Act."

(16) To the extent not covered by (14) above, policies, procedures, guidelines and training materials related to the "family member or close associates" type of "national security indicator," described on page 5 of Exh. E, including but not limited to:

a. How it is determined that a family member or close associate is a subject with a "national security concern;"
b. How that information could impact an individual's eligibility for the benefit sought and/or may indicate a "national security concern" with respect to that individual;
c. How an officer may determine if the "national security concern" relates to the individual and if it gives rise to a "national security concern" for the individual.

(17) Provide a list with the name, author and date of the *current* policies pertaining to the processing and adjudication of immigration benefits applications with a "national security concern." Because some of the policies requested through this FOIA request may have been superseded by later policies, this list will instruct the Requestor and the public as to which records reflect current USCIS policy.

Statistical Information

(1) The number of applications filed in the years 2012, 2011, 2010, 2009 and 2008 for the following types of applications or petitions:

a. N-400;
b. I-485;
c. I-130;

d. I-129F;
e. I-751.
f. For each application or petition type, the number of cases by beneficiary's country of birth for the following countries or territories:
    i. Afghanistan
    ii. Egypt
    iii. Indonesia
    iv. Iraq
    v. Iran
    vi. Jordan
    vii. Kuwait
    viii. Lebanon
    ix. Libya
    x. Morocco
    xi. Pakistan
    xii. Palestine or the Palestinian Territories
    xiii. Saudi Arabia
    xiv. Somalia
    xv. Sri Lanka
    xvi. Sudan
    xvii. Syria
    xviii. Tunisia
    xix. Uzbekistan
    xx. Yemen

(2) The number of applications granted for the years 2012, 2011, 2010, 2009 and 2008 for the following types of applications or petitions:
a. N-400;
b. I-485;
c. I-130;
d. I-129F;
e. I-751.
f. For each application or petition type, the number of cases by country of birth for the following countries or territories:
    i. Afghanistan
    ii. Egypt
    iii. Indonesia
    iv. Iraq
    v. Iran
    vi. Jordan
    vii. Kuwait
    viii. Lebanon
    ix. Libya
    x. Morocco

xi. Pakistan
xii. Palestine
xiii. Saudi Arabia
xiv. Somalia
xv. Sri Lanka
xvi. Sudan
xvii. Syria
xviii. Tunisia
xix. Uzbekistan
xx. Yemen

(3) The number of immigration benefits applications denied for the years 2012, 2011, 2010, 2009 and 2008 for the following types of applications or petitions:
   a. N-400;
   b. I-485;
   c. I-130;
   d. I-129F;
   e. I-751.
   f. For each application or petition type, the number of cases by country of birth for the following countries or territories:
      i. Afghanistan
      ii. Egypt
      iii. Indonesia
      iv. Iraq
      v. Iran
      vi. Jordan
      vii. Kuwait
      viii. Lebanon
      ix. Libya
      x. Morocco
      xi. Pakistan
      xii. Palestine
      xiii. Saudi Arabia
      xiv. Somalia
      xv. Sri Lanka
      xvi. Sudan
      xvii. Syria
      xviii. Tunisia
      xix. Uzbekistan
      xx. Yemen

(4) The number of pending immigration benefits applications that have one or more "national security indicator(s)" and/or "hits" for the years 2012, 2011, 2010, 2009 and 2008;
   a. Of those numbers, provide the following for each year:

i. The number of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth.

(5) The number of pending immigration benefits applications that had a "national security concern" for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

i. The numbers of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth;

iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);

iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(6) The number of immigration benefits applications where the national security concern was resolved or determined to no longer be of concern for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

i. The numbers of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth;

iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);[6]

iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(7) The number of immigration benefits applications with a "national security concern" that were approved for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

[6] The 2008 Memo, Exh. A at page 1, footnote 3, defines a KST and a non-KST.

i. The numbers of cases for the following types of applications or petitions:
    1. N-400;
    2. I-485;
    3. I-130;
    4. I-129F;
    5. I-751.
ii. For each application type, the number of cases by country of birth;
iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);
iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(8) The number of immigration benefits applications with a "national security concern" that were denied for the years 2012, 2011, 2010, 2009 and 2008
    a. Of those numbers, provide the following for each year:
        i. The numbers of cases for the following types of applications or petitions:
            1. N-400;
            2. I-485;
            3. I-130;
            4. I-129F;
            5. I-751.
        ii. For each application type, the number of cases by application type and country of birth;
        iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);
        iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(9) The number of immigration benefit applications with a national security concern that are pending as of the date that this request is processed
    a. More than one year since the date of filing;
    b. More than two years since the date of filing;
    c. More than three years since the date of filing;
    d. More than four years since the date of filing;
    e. More than five years since the date of filing;
    f. More than six years since the date of filing;
    g. More than seven years since the date of filing;
    h. More than eight years since the date of filing;
    i. More than nine years since the date of filing;
    j. More than ten years since the date of filing.

(10) To the extent that a case bearing a "national security concern" is not necessarily a case also designated as a CARRP case, please provide the data requested above in (4)-(9) for CARRP cases.

As to all requests, we do not seek any personal identifying information protected under the Privacy Act, and therefore request that any such personal identifying information be redacted from responsive materials and replaced with a unique identifier that would allow us to identify the treatment of any given case across the various responses, but without revealing the individual identities of the applicants to whom the records pertain.

LIMITATION OR WAIVER OF SEARCH AND REVIEW FEES

We request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by … a representative of the news media …") and 6 C.F.R. § 5.11(d)(1) (search fees shall not be charged to "representatives of the news media"). The information sought in this request is not sought for a commercial purpose. The Requestor is a non-profit organization who intends to disseminate the information gathered by this request to the public at no cost, including through the Requestor's website, newsletters and other publications. Requestors may also compile a report or other publication on USCIS's policies and practices based on information gathered through this FOIA. This information is of critical importance to the public at large to understand how USCIS adjudicates applications for immigration benefits where national security concerns are present, particularly in light of the numerous news stories and repeated complaints regarding USCIS's processing of applications by Muslim, Arab, Middle Eastern and South Asian immigrants. *See, e.g.,* Ctr. for Human Rights and Global Justice, *Americans on Hold: Profiling, Prejudice and National Security*, *Americans on Hold Documentary Film and Advocacy Project* (2010), Preview Footage *at* http://www.chrgj.org/projects/profiling.html (last visited Jun. 14, 2010); Press Release, Ctr. for Human Rights and Global Justice, *CHRGJ Launches Documentary Americans on Hold, Exposing Discrimination* (Apr. 27, 2010); Anna Gorman, *A Victory for Southern California Citizenship Applicants*, L.A. TIMES, Nov. 10, 2009; Cindy Carcamo, THE O.C. REGISTER, *Deal Allows Hundreds to Gain U.S. Citizenship*, Nov. 9, 2009; Press Release, Ctr. for Human Rights and Global Justice, *CHRGJ Calls on Administration to Stop Racial Profiling in Citizenship Process* (Mar. 31, 2009); Sandra Hernandez, *Suit Seeks to Expedite Backlog-Plagued Naturalization Process*, L.A. DAILY JOURNAL, Dec. 5, 2007; Anna Gorman, *Groups Sue Over Citizenship Delays*, L.A. TIMES, Dec. 5, 2007; *SoCal Immigrants Sue Over Citizenship Delay*, THE NATIONAL LAW JOURNAL, Dec. 5, 2007; Press Release, Ctr. For Human Rights and Global Justice, *Profiled Immigrants Delayed Years in Seeking Citizenship* (Apr. 25, 2007); Shreema Mehta, *Barriers Inhibit Legal Road to U.S. Citizenship*, THE NEW STANDARD, Nov. 15, 2006; Bethany McAllister, Esq., *Rumors in Limbo: Muslims Applying for Citizenship*, MUSLIM MEDIA NETWORK, Sep. 28, 2006; Diana Day, *Los Angeles Civil Rights Groups Sue the Government Over Citizenship Delays*, PASADENA STAR-NEWS, Aug. 2, 2006; H.G. Reza, *For Citizenship Delayed, 10 Taking U.S. to Court*, L.A. TIMES, Aug. 1, 2006.

The "term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. §

552(a)(4)(A)(ii). The statutory definition does not require that the requester is a member of the traditional media. As long as the requester meets the definition in any aspect of its work, it qualifies for limitation of fees under this section of the statute.

For the reasons stated above, the Requester qualifies as a "representative of the news media" under the statutory definition, because it routinely gathers information of interest to the public, use editorial skills to turn it into distinct work, and distribute that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requestors who are not traditional news media outlets can qualify as representatives of the new media for the purposes of the FOIA after the 2007 amendments to the FOIA, including specifically as to other ACLU affiliates. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011 WL 887731, at *18 (D. Wash. Mar. 10, 2011). Accordingly, any fees charged must be limited to duplication costs.

WAIVER OR REDUCTION OF ALL COSTS

We request a waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester"); *see also* 6 C.F.R. § 5.11(k). USCIS has granted the ACLU/SC fee waiver in the past, including as recently as April 13, 2011, attached hereto as Exhibit F.

The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The Requestor needs not demonstrate that the records would contain evidence of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, good or bad. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003).

Disclosure of the information sought is in the public interest and will contribute significantly to public understanding of the federal government's policies and practices in adjudicating naturalization and other immigration benefit applications for applicants from certain countries, or with certain affiliations. As shown by the news reporting cited above, these issues are of intense public concern. The requested records relate directly to operations or activities of the government that potentially impact or infringe fundamental rights and freedoms. The Requestor has received numerous complaints from Muslim, Arab, Middle Eastern and South Asian communities regarding the processing of applications for immigration benefits. This information is of particular interest to these communities, as well as the public at large that is concerned about the fairness, equal treatment, and transparency in USCIS's processes.

The records are not sought for commercial use, and the Requestor plans to disseminate the information disclosed through print and other media to the public at no cost, and through meetings with members and affected communities. As demonstrated above, the Requestor has both the intent and ability to convey any information obtained through this request to the public.

The Requestor states "with reasonable specificity that [their] request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government." *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

In the event a waiver or reduction of costs is denied, please notify me in advance if the anticipated costs exceed $100.

CONCLUSION

If this request is denied in whole or part, please justify all deletions by reference to the specific FOIA exemption(s) that apply to each specific request. We expect you to release all segregable portions of otherwise exempt material. For example, we expect you to redact names of individuals for whom privacy waivers are not enclosed, if such redaction is required by the Privacy Act or other law, and release any otherwise disclosable records as redacted. We also expect that this FOIA request will be processed in accordance with the presumption of disclosure and President Obama's directive to federal agencies on January 26, 2009. Pres. Obama, Memo. for the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.").

We reserve the right to appeal any decision relating to this FOIA request, including but not limited to the decision to withhold any information, or to deny expedited processing or to deny a waiver or reduction of fees. We look forward to your reply to the request for expedited processing within ten (10) calendar days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding your decision on the matter of expedited processing, we look forward to your reply to the records request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive statistical information be provided electronically and include all associated metadata. Our first preference is that they be provided in their native file format, if possible. However, when using native formats we request to be consulted first to ensure the particular native formats will be readable at our end. Alternatively, we request that the statistical records be provided

electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, bates-stamped files.

We further request that the agencies provide an estimated date by which they will complete the processing of this request. *See* 5 U.S.C. § 552(a)(7)(B); *Muttitt v. U.S. Cent. Command*, 2011 WL 4478320 (D.D.C. Sept. 28, 2011).

If you have questions, please contact Jennie Pasquarella at 213-977-5236 or via e-mail at jpasquarella@aclu-sc.org. Thank you in advance for your timely consideration of this request. Please furnish records as soon as they are identified to the undersigned at:

ACLU of Southern California
1313 W. Eighth Street
Los Angeles, CA 90017

Sincerely,

Jennie Pasquarella
Staff Attorney
ACLU of Southern California

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated, Plaintiffs, v. DONALD TRUMP, President of the United States, *et al.*, Defendants.	No. 17-cv-00094 RAJ STIPULATED PROTECTIVE ORDER

1 PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, for official use only, law enforcement sensitive, and/or private information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order ("Order"). The parties acknowledge that this Order is consistent with Local Civil Rule 26(c). It does not confer blanket protection on all disclosures or responses to discovery; the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

2 CONFIDENTIAL INFORMATION

"Confidential Information" shall include the following types of information produced or otherwise exchanged:

a) an individual's social security number, personal identification numbers, tax identification number, alien registration number ("A number"), passport numbers, driver license numbers, and any similar identifiers assigned to an individual by the federal government, a state or local government of the United States, or the government of any other country;

b) any other information that, either alone or in association with other related information, would allow the identification of the particular individual(s) to whom the information relates;

c) birth dates;

d) information relating to the basis on which Defendants have identified any individual as a "National Security Concern" under CARRP and any information bearing on why an individual's immigration application was or is being processed pursuant to CARRP;

e) information relating to the content or status of an individual's immigration benefit application, to the extent that information is linked with the applicant's identity;

f) any information that is protected or restricted from disclosure by state or federal statute or regulation, but which the Court may order produced, such as information protected by the Privacy Act, 5 U.S.C. § 552a, and other statutes or regulations that may prevent disclosure of specific information related to noncitizens, including but not limited to: 8 U.S.C. §§ 1160(b)(5), (6); 1186A(c)(4), 1202(f), 1254a(c)(6), 1255a(c)(4), (5); 1304(b), and 1367(a)(2), (b), (c), (d); 22 U.S.C. § 7105(c)(1)(C); 8 C.F.R. §§ 208.6, 210.2(e), 214.11(e),

214.14(e), 216.5(e)(3)(viii), 236.6, 244.16, 245a.2(t), 245a.3(n), 245a.21, 1003.27(b)-(d), 1003.46, and 1208.6, which otherwise could subject either party to civil or criminal penalties or other sanctions in the event of unauthorized disclosure;

g) any information that is (i) a trade secret or other confidential research, development, or commercial information, as such terms are used in Federal Rule of Civil Procedure 26(c)(1)(G), or (ii) non-public proprietary information purchased or obtained from a private entity;

h) photographs of any person, including but not limited to any photographs of any named Plaintiff, unnamed class member, or their family/friends;

i) names of any individuals known to be under 18 years of age;

j) addresses and telephone numbers;

k) any sensitive, but unclassified, information to include limited official use or for official use only information;

l) any information compiled for law enforcement purposes, including but not limited to, investigative files and techniques related to the integrity of the legal immigration system, suspected or known fraud, criminal activity, public safety, or national security, and investigative referrals;

m) any information not in the public domain, or if in the public domain, information that is improperly in the public domain;

n) bank account numbers, credit card numbers, and other financial information that can be specifically linked to an individual's or entity's financial account;

o) medical information, such as medical records, medical treatment, and medical diagnoses; and

p) any other personally identifiable information identified in Federal Rule of Civil Procedure 5.2 and Local Civil Rule 5.2(a).

If a designating party determines that information not described in this paragraph should be designated Confidential Information, the parties shall negotiate the appropriateness of that designation in good faith and endeavor to resolve any dispute prior to the production of that information. If the parties are unable to resolve the dispute within 14 calendar days, the designating party shall designate the material as containing Confidential Information and produce it. The receiving party can then challenge the confidentiality designation(s) pursuant to Section 6 of this Order.

Information that has been made public under the authority of a party, aggregate information that concerns class members, and information that does not permit the identification of the particular individuals to whom the information relates are not considered Confidential Information, unless otherwise covered under of the categories identified above.

3 SCOPE

The protections conferred by this Order cover not only those portions of any documents containing Confidential Information (as defined above), but also (1) any information copied or extracted from those portions of any documents containing Confidential Information; (2) all copies, excerpts, summaries, or compilations of Confidential Information; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal Confidential Information. However, the protections conferred by this Order do not cover information that is properly in the public domain or becomes part of the public domain through trial or otherwise.

4 ACCESS TO AND USE OF CONFIDENTIAL INFORMATION

4.1 Basic Principles. A receiving party may use Confidential Information that is disclosed or produced by another party or by a non-party in connection with this case only for pursuing, defending, or attempting to settle this litigation. It shall not be disseminated outside the confines of this case, nor shall it be included in any pleading, record, or document that is not filed under seal with the Court or redacted in accordance with

applicable law. Confidential Information may be disclosed only to the categories of persons and under the conditions described in this Order. Confidential Information must be stored and maintained by a receiving party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

4.2 Disclosure of Confidential Information or Items. Unless otherwise ordered by the Court or permitted in writing by the designating party, a receiving party may disclose any Confidential Information only to:

a) Defendants, Defendants' employees to whom disclosure is reasonably necessary for this litigation, and named Plaintiffs;

b) Defendants' counsel in this action and any support staff and other employees of such counsel assisting in this action with an appropriate need to know. If any of Defendants' counsel, support staff, or other employees cease to represent Defendants in this action for any reason, such counsel shall no longer have access to or be authorized to receive any Confidential Information;

c) Plaintiffs' counsel in this action and any support staff and other employees of such counsel assisting in this action with an appropriate need to know. If any of Plaintiffs' counsel cease to represent Plaintiffs or class members in this action for any reason, such counsel shall no longer have access to or be authorized to receive any Confidential Information;

d) experts and consultants to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

e) any other person mutually authorized by both parties' counsel to examine such information;

f) the Court, court personnel, and court reporters and their staff;

g) copy or imaging or data processing services retained by counsel to assist in this litigation, provided that counsel for the party retaining the copy or imaging or data processing service instructs the service not to disclose any Confidential Information to third parties and to immediately return all originals and copies of any Confidential Information;

h) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the designating party or ordered by the Court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Confidential Information must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order; and

i) the author or recipient of a document containing Confidential Information or a custodian or other person who otherwise possessed or knew the Confidential Information.

4.3 Use Of Information Subject To Protective Order. Use of any information or documents subject to this Protective Order, including all information derived therefrom, shall be restricted to use in this litigation (subject to the applicable rules of evidence and subject to the confidentiality of such materials being maintained) and shall not be used by anyone subject to the terms of this agreement, for any purpose outside of this litigation or any other proceeding between the parties. Without limiting the generality of the foregoing sentence, no one subject to this Protective Order shall use Confidential Information obtained in this litigation to retaliate against, intimidate, report or refer an individual to any governmental authorities, discriminate against any individual in any manner, or harass any other party or witness, relatives of any other party or witness, including domestic partners

of a party or witness; or any individuals associated with the parties in any way. Notwithstanding the foregoing, nothing in this Protective Order supersedes existing independent statutory, law enforcement, national security, or regulatory obligations imposed on a Party, and this Protective Order does not prohibit or absolve the Parties from complying with such other obligations. Nothing in this Protective Order shall limit or in any way restrict the use of information obtained outside of this litigation.

4.4 Filing Confidential Information. Before filing Confidential Information with the Court, or discussing or referencing such material in court filings, the filing party shall confer with the designating party (where practical, at least seven days prior to the intended filing date) to determine whether the designating party will remove the confidential designation, whether the document can be redacted, or whether a motion to seal or stipulation and proposed order is warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the Court to file material under seal.

5 DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party or non-party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. The designating party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify, so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to unnecessarily encumber or delay the case development process or to impose unnecessary expenses and burdens on other parties) expose the designating party to sanctions.

If it comes to a designating party's attention that information or items that it designated for protection do not qualify for protection, the designating party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, disclosure or discovery material that qualifies for protection under this Order must be clearly so designated before or when the material is disclosed or produced.

a) Information in documentary form (*e.g.*, paper or electronic documents and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings): The designating party must affix the words "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER" to each page that contains Confidential Information. If only a portion or portions of the material on a page qualifies for protection, the producing party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings in the margins).

b) Electronic Information Not Amenable to Marking Document. For electronic information that is provided in native form or a format that is not amenable to visible endorsement on the image, the file name(s) shall begin with "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER." The media on which the Confidential Information is provided (e.g., CD, DVD, external hard drive) also must be and remain plainly labeled with "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER" unless and until the protection of the data within the media is removed. Any copying or transferring of electronic files that are designated as Confidential Material must be done in a manner that maintains the protection for all copies, including, but not limited to, in

the filename(s) and the location where the copies are stored and users' access thereto.

c) Testimony given in deposition or in other pretrial or trial proceedings: The parties must identify on the record, during the deposition, hearing, or other proceeding, all protected testimony, without prejudice to their right to so designate other testimony after reviewing the transcript. Any party or non-party may, within 30 days after receiving a deposition transcript, designate portions of the transcript, or exhibits thereto, as confidential. The entire deposition transcript (including any exhibits not previously produced in discovery in this Action) shall be treated as Confidential Information under this Protective Order until the expiration of the above-referenced 30-day period for designation, except that the deponent (and his or her counsel, if any) may review the transcript of his or her own deposition during the 30-day period subject to this Protective Order and the requirement of executing the certification attached as Exhibit A. After designation of Confidential Material is made, the following shall be placed on the front of the original and each copy of a deposition transcript containing Confidential Information: "CONFIDENTIAL PURSUANT TO PROCTECTIVE ORDER." If the deposition was filmed, both the recording storage medium (i.e. CD or DVD) and its container shall be labeled "CONFIDENTIAL PURSUANT TO PROCTECTIVE ORDER."

d) For interrogatory answers and responses to requests for admissions, designation of Confidential Information shall be made by placing within each interrogatory answer or response to requests for admission asserted

to contain Confidential Information the following: "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER".

e) Other tangible items: The producing party must affix in a prominent place on the exterior of the container or containers in which the information or item is stored the words "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER." If only a portion or portions of the information or item warrant protection, the producing party, to the extent practicable, shall identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If a party inadvertently fails to designate material as Confidential Information at the time of production, it shall take reasonable steps to notify all receiving persons of its failure within five business days of discovery. The producing party shall promptly supply all receiving persons with new copies of any documents bearing corrected confidentiality designations, and the receiving party shall destroy the original materials, and certify in writing to the producing party that such information has been destroyed.

6 CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any party or non-party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The parties must attempt to resolve any dispute regarding confidential designations without court involvement. Any motion regarding confidential designations or for a protective order must include a certification, in the motion or in a declaration or affidavit, that the movant has engaged in a good faith meet and confer

conference with other affected parties in an effort to resolve the dispute without court action. The certification must list the date, manner, and participants to the conference. A good faith effort to confer requires a face-to-face meeting or a telephone conference.

6.3 Judicial Intervention. If the parties cannot resolve a challenge without court intervention, the challenging party may file and serve a motion to withdraw confidentiality under Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of persuasion in any such motion shall be on the designating party. Frivolous challenges, and those made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties) may expose the challenging party to sanctions. All parties shall continue to maintain the material in question as confidential until the Court rules on the challenge.

7 PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER," that party must:

a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Order and provide a copy of this Order with that notification;

c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party or parties whose Confidential Information may be affected, including objecting and seeking a protective order in the litigation in which the subpoena or order issued; and

d) decline to produce the Confidential Information if an objection has been made until the objection has been resolved unless disclosure, dissemination, or transmission is required by law or court order. Any person, entity, or organization who receives Confidential Information shall abide by all terms and conditions set forth herein unless otherwise permitted by court order.

8 UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a receiving party learns that, by inadvertence or otherwise, the party has disclosed Confidential Information to any person or in any circumstance not authorized under this Order, the receiving party must immediately:

a) notify in writing the designating party of the unauthorized disclosure(s);

b) use best efforts to retrieve all unauthorized copies of the protected material;

c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order; and

d) request that such person or persons execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

9 INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a producing party gives notice to receiving parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order or order that provides for production without prior privilege review. Parties shall confer on an appropriate non-waiver order under Federal Rule of Evidence 502.

10 NON-TERMINATION AND RETURN OF DOCUMENTS

Within 60 days after the termination of this action, including all appeals, each receiving party shall destroy all Confidential Information obtained from another party in its

possession, custody, or control. The parties shall agree upon appropriate methods of destruction.

Notwithstanding this provision, counsel are entitled to retain one archival copy of all documents filed with the Court; trial, deposition, and hearing transcripts; correspondence; deposition and trial exhibits; expert reports; attorney work product; and consultant and expert work product, even if such materials contain Confidential Information, provided that such material is and remains clearly marked to reflect that it contains Confidential Information, and such counsel maintain the confidential nature of the discovery, as set forth in this Order. Notwithstanding the foregoing, nothing in this Order shall be construed to supersede any party's independent obligation to maintain records in accordance with the Federal Records Act or other statutory or regulatory record-keeping requirements.

The confidentiality obligations imposed by this Order shall remain in effect until a designating party agrees otherwise in writing or a court orders otherwise.

11 MISCELLANEOUS

11.1 Enforceability Upon Signing. By signing the Order, the parties agree to be bound by its terms unless and until those terms are modified by order of the Court.

11.2 Right to Further Relief. Nothing in this Order abridges the right of any party to seek its modification by the Court in the future.

11.3 Right to Assert Other Objections. By stipulating to entry of this Order, no party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Order. Similarly, no party waives any right to object on any ground to use in evidence of any of the material covered by this Order.

11.4 Effect of Order. This Order shall constitute a court order authorizing disclosure of information designated as confidential, subject to the protections described herein, for purposes of the Privacy Act, 5 U.S.C. § 552a(b)(11) (authorizing disclosure pursuant to the

order of a court of competent jurisdiction) and any other state or federal statute or regulation that provides for disclosure pursuant to court order.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: August 15, 2017

s/ Jennifer Pasquarella (admitted pro hac vice) **ACLU Foundation of Southern California** 1313 W. 8th Street Los Angeles, CA 90017 Telephone: (213) 977-5236 Facsimile: (213) 997-5297 jpasquarella@aclusocal.org	s/ Harry H. Schneider, Jr. Harry H. Schneider, Jr. #9404 s/ Nicholas P. Gellert Nicholas P. Gellert #18041 s/ David A. Perez David A. Perez #43959 s/ Laura K. Hennessey Laura K. Hennessey #47447 Attorneys for Plaintiffs **Perkins Coie LLP** 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 Telephone: 206.359.8000 Facsimile: 206.359.9000 Email: HSchneider@perkinscoie.com NGellert@perkinscoie.com DPerez@perkinscoie.com LHennessey@perkinscoie.com
s/ Matt Adams s/ Glenda M. Aldana Madrid Matt Adams #28287 Glenda M. Aldana Madrid #46987 **Northwest Immigrant Rights Project** 615 Second Ave., Ste. 400 Seattle, WA 98122 Telephone: (206) 957-8611 Facsimile: (206) 587-4025 matt@nwirp.org glenda@nwirp.org	s/ Trina Realmuto (admitted pro hac vice) s/ Kristin Macleod-Ball (admitted pro hac vice) National Immigration Project of the National Lawyers Guild 14 Beacon St., Suite 602 Boston, MA 02108 Telephone: (617) 227-9727 Facsimile: (617) 227-5495 trina@nipnlg.org kristin@nipnlg.org
s/ Stacy Tolchin (admitted pro hac vice) Law Offices of Stacy Tolchin 634 S. Spring St. Suite 500A Los Angeles, CA 90014 Telephone: (213) 622-7450 Facsimile: (213) 622-7233 Stacy@tolchinimmigration.com	s/ Emily Chiang Emily Chiang #50517 ACLU of Washington Foundation 901 Fifth Avenue, Suite 630 Seattle, WA 98164 Telephone: (206) 624-2184 Echiang@aclu-wa.org

s/ Hugh Handeyside
Hugh Handeyside #39792
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Attorneys for Plaintiffs

DATED: August 15, 2017

s/ Aaron R Petty Aaron R. Petty US DEPARTMENT OF JUSTICE 219 S. DEARBORN ST., 5TH FLOOR CHICAGO, IL 60604 202-532-4542 Email: aaron.r.petty@usdoj.gov	s/ Edward S. White Edward S. White US DEPARTMENT OF JUSTICE (BOX 868) PO BOX 868 BEN FRANKLIN STATION WASHINGTON, DC 20044 202-616-9131 Fax: 202-305-7000 Email: edward.s.white@usdoj.gov
s/ Joseph F. Carilli, Jr. Joseph F. Carilli, Jr. Office of Immigration Litigation District Court Section Civil Div., U.S. Dep't of Justice P.O. Box 868, Ben Franklin Station Washington, D.C. 20044-0868 202-616-4848 Fax 202-305-7000 Email: joseph.f.carilli2@usdoj.gov	

Attorneys for Defendants

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: August 18, 2017

The Honorable Richard A. Jones
United States District Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Western District of Washington on [date] in the case of *Wagafe, et al. v. Trump, et al.*, No. 17-cv-00094 RAJ. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al*.,

Defendants.

No. 17-cv-00094 RAJ

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW Defendants Donald Trump, President of the United States; United States Citizenship and Immigration Services; Elaine C. Duke, in her official capacity as Acting Secretary of the U.S. Department of Homeland Security;[1] James McCament, in his official capacity as Acting Director of the U.S. Citizenship and Immigration Services; Matthew D. Emrich, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of the U.S. Citizenship and Immigration Services ("FDNS"); and Daniel Renaud, in his official capacity as Associate Director of the Field Operations Directorate of the U.S. Citizenship and Immigration Services (collectively, "Defendants"), by and through counsel, and provide the following responses to Plaintiffs'

[1] Acting Secretary Elaine C. Duke is automatically substituted for her predecessor, Secretary John F. Kelly. *See* Fed. R. Civ. P. 25(d).

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First Request for Production of Documents, subject to the accompanying objections, without waiving and expressly preserving all such objections. Defendants' objections are based on information known to Defendants at this time, and are made without prejudice to additional objections should Defendants subsequently identify additional grounds for objection. Defendants also submit these responses subject to: (a) any objections as to competency, relevancy, materiality, privilege, and admissibility of any of the responses; and (b) the right to object to other discovery procedures involving and relating to the subject matter of the requests herein.

OBJECTIONS WHICH APPLY TO ALL REQUESTS FOR PRODUCTION

Defendants object to these discovery requests to the extent that they seek (a) attorney work product, trial preparation material, or communications protected by the attorney-client privilege, (b) information protected by the deliberative-process privilege, the joint defense privilege, common interest privilege or law enforcement privilege; (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation, including non-party class members; or (d) any other applicable privilege.

Defendants object to these discovery requests (and the definitions and instructions thereto) to the extent that they purport to impose obligations other than those imposed by the Federal Rules of Civil Procedure, the Local Civil Rules of the U.S. District Court for the Western District of Washington, or an order of the Court.

Defendants object to the discovery requests to the extent they call for production of documents that are either not relevant to a claim or defense of any party or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden of expense of the proposed discovery outweighs its likely benefit.

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Defendants object to the discovery requests to the extent they are not reasonably limited in time or scope.

Defendants object to the discovery requests to the extent they require an unduly burdensome and disproportionate search. In particular, Defendants object to all requests for Documents "referring" to a particular thing as such requests are not limited to those having any logical or factual connection to any matter at issue in this litigation and are likely to result in collection of voluminous responsive but irrelevant Documents.

Defendants object to the discovery request to the extent they call for documents that are publicly available, are already in the custody or control of Plaintiffs or Plaintiffs' counsel, are readily accessible to Plaintiffs, or that would otherwise be less burdensome for Plaintiffs to obtain than Defendants. *See* Fed. R. Civ. P. 26(b)(2)(C)(i).

To the extent Plaintiffs request production of documents concerning Executive Order 13769 and Executive Order 13780, Defendants object to the discovery requests as premature in light of the oral argument scheduled before the Supreme Court on October 10, 2017, in *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 & 16-1540 (S. Ct.). Defendants object to discovery requests to the extent they purport to demand that the President produce responsive documents, as the President is immune from injunctions in civil suits challenging official action as more fully described herein. Defendants further object to any discovery concerning Executive Order 13769 ("First EO") as it was rescinded by Executive Order 13780 ("Second EO") and all injunctive relief Plaintiffs sought or seek with respect to the First EO is no longer possible, as it is moot.

Defendants object to any and all discovery requests to the extent they seek production of documents from non-party agencies and are not in compliance with the *Touhy* regulations of such agencies. *See* 22 C.F.R. part 172; 28 C.F.R. §§ 16.21 - 16.26; 30 C.F.R. part 516, app'x C; 32 C.F.R. part 1703.

Defendants construe Plaintiffs' requests to extend only to unclassified Documents. Defendants can neither confirm nor deny the existence or responsiveness of classified

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Documents, will not search for them, and will not log them. As used in this paragraph, "classified information" means classified national security information as defined by Executive Order 13526, § 6.1(i), 75 Fed. Reg. 707, 727 (Dec. 29, 2009). A response that there are no responsive Documents means that there are no unclassified responsive Documents.

Defendants assert attorney-client privilege over all written correspondence to or from an attorney concerning the subject-matter of this litigation. Such correspondence between Department of Justice attorneys and other attorneys employed by Defendants will not be logged. Written correspondence, other than electronic mail ("email"), between attorneys employed by Defendants and other employees, subordinates, agents, or officers of Defendants or agencies will be logged, but not produced.

Email sent or received by USCIS personnel prior to August 1, 2014, with limited exceptions, is currently stored on back-up tapes due to a 2014 migration of email that occurred in the ordinary course of USCIS business. The process to restore back-up tapes is unduly burdensome, expensive, and would take information technology staff resources away from their core mission. *See* Fed. R. Civ. P. 26(b)(1); 26(b)((2)(C)(i). Consequently, Defendants will not search for any such emails, but may consider a specific request identifying a particular individual or individuals and a particular time frame and subject matter, and explaining in detail what material Plaintiffs seek, why it is reasonable to believe it would be found in the place identified, and the Plaintiffs' need for such materials. Searching emails sent or received after July 31, 2014, while not as burdensome and disproportionate as searching email created prior to that time, would nevertheless burden the agency. If, as discovery progresses, Plaintiffs have reason to believe that relevant, non-privileged material may be found in such post-July 31, 2014 emails, Defendants will, upon request, reconsider the question of burden and proportionality with respect to searching such emails.

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The Controlled Application Review and Resolution Program ("CARRP") is a program USCIS created and developed to adjudicate *only* those Immigration Benefit Applications that are within USCIS's statutory and regulatory authority to adjudicate, and USCIS is *solely* responsible for the administration of CARRP. It would be burdensome and disproportionate to the needs of the case to search for Documents responsive to any of the requests for production that seek Documents that "refer or relate to" CARRP in any place outside of USCIS. Consequently, Defendants object to these requests to the extent they request Defendants to search for Documents that refer or relate to CARRP outside of USCIS, and except where otherwise indicated, will limit their search for responsive Documents within USCIS.

Each and every response contained herein is subject to the above objections, which apply to each and every response, regardless of whether a specific objection is interposed in a specific response. The making of a specific objection in response to a particular request is not intended to constitute a waiver of any other objection not specifically referenced in the particular response.

Defendants specifically reserve the right to make further objections as necessary to the extent that additional issues arise as to the meaning of and/or information sought by discovery.

Defendants have not completed their investigation of the facts underlying this case, have not completed their discovery and have not completed their preparation for trial. Therefore, Defendants reserve the right to supplement these responses in accordance with Federal Rule of Civil Procedure 26(e), and to produce evidence at trial of subsequently discovered facts.

ESTIMATED PRODUCTION TIMELINE

Defendants do not anticipate permitting inspection of any documents in the possession, custody, or control of Defendants. Defendants estimate producing non-privileged, responsive documents on a rolling basis beginning no later than thirty days

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after service of this document and shall substantially complete production within 180 days after service of this document.

INSTRUCTIONS

The following instructions shall apply when responding to these requests for production:

1. Each request herein calls for production of all responsive Documents within Your possession, custody, or control, or that of Your agents, consultants, representatives, and, unless privileged, attorneys.

2. Without limitation of the term "control" as used in the preceding instruction, a Document is deemed to be in Your control if You have the right to secure the Document or a copy thereof from another Person having actual possession thereof.

3. Each Document request and subparagraph or subdivision thereof is to be answered separately. After each Document request, state whether all Documents responsive to that request are being produced.

4. Each Document request herein shall be deemed to be continuing and, in the event that additional Documents are later discovered or become known to You, further production is to be made hereto.

5. If You object to answering any of these requests, or withhold Documents from production in response to these requests, in whole or in part, state your objections and/or reasons for not producing and state all factual and legal justifications that you believe support your objection or failure to produce.

6. If any requested Document has been lost, discarded, or destroyed, describe the Document as completely as possible, including: the name, title, and description of employment of each author or preparer of the Document; a complete description of the nature and subject matter of the Document; and the date on which and manner in which the Document was lost, discarded, destroyed, or otherwise disposed of.

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7. If any part of a Document is responsive to a Document request, the whole Document is to be produced.

8. If You contend that it would be unreasonably burdensome to obtain and provide all of the Documents called for in response to any Document request or any subsection thereof, then in response to the appropriate Document request:

a. Produce all such Documents as are available to You without undertaking what You contend to be an unreasonable request;

b. Describe with particularity the efforts made by You or on Your behalf to produce such Documents; and

c. State with particularity the grounds upon which You contend that additional efforts to produce such Documents would be unreasonable.

9. If any request is deemed to call for privileged Documents, and such privilege is asserted in order to avoid production, provide a list with respect to each Document withheld based on a claim of privilege, stating: the name of each author, the name of each recipient and addressee, the date of the Document, the general subject matter of the Document, the basis upon which the claim of privilege is asserted, and the Document request under which the production of the Document is called for.

10. In producing the Documents requested, You are requested to search electronic Documents, records, data, and any other electronically stored information ("ESI") which may be stored in or on any electronic medium or device, including without limitation computers, network servers, computer hard drives, e-mails, and voicemails. Your production of any ESI should be produced in an electronic format permitting electronic search functionality, pursuant to the Parties' stipulation, if any, regarding preservation and production of ESI.

11. In producing records responsive to Document requests, please produce tangible Documents and records organized either (1) in separate groups responsive to specific requests or (2) in the format

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and organization in which the Documents are kept in the ordinary course of Your business. Please produce electronic Documents and records in Tagged Image File Format ("TIFF"), single page, black and white (or in color, if necessary, for any Document or its content to be readable), dithered (if appropriate), at 300 x 300 dpi resolution and 8½ x 11 inch page size, except for Documents requiring different resolution or page size to make them readable. Each TIFF Document should be produced with an image load file in standard Opticon (*.log) format that reflects the parent/child relationship. In addition, each TIFF Document should be produced with a data load file in Concordance delimited format (*.dat), indicating (at a minimum) appropriate unitization of the Documents, including beginning and ending production numbers for (a) each Document set, and (b) each attachment within each Document set. TIFF images should also be accompanied by extracted text or, for those files that do not have extracted text upon being processed, optical character recognition ("OCR") text data; such extracted text or OCR text data should be provided in Document level form and named after the TIFF image. For Documents produced in TIFF format, metadata should be included with the data load files described above, and should include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the Document (that is, the custodian from whom the Document was collected or, if collected from a shared drive or server, the name of the shared driver or server); and MD5 hash value. In addition, for e-mail Documents, the data load files should also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name and address; "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files should be named or foldered in such a manner that all records can be imported without modification of any path or file name information.

OBJECTIONS TO INSTRUCTIONS

1. To the extent that any instructions are inconsistent with any Order of the Court, Defendants understand that the Order of the Court shall prevail.

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2. Defendants object to Instructions Nos. 1 and 2 to the extent that they conflict in any way with the Ninth Circuit's standard for possession, custody, or control which defines control as "the legal right to obtain upon demand." *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999).

3. Defendants object to Instruction No. 6 as unduly burdensome insofar as it purports to require a document-by-document recounting, including, as completely as possible the "name, title, and description of employment of each author or preparer of the Document; a complete description of the nature and subject matter of the Document; and the date on which and manner in which the Document was lost, discarded, destroyed, or otherwise disposed of," for every such responsive Document, without regard to the date on which it was created, the date on which it was lost, discarded, destroyed, or otherwise disposed of, or whether litigation involving the substance of the Document was reasonably foreseeable at that time it was lost, discarded, destroyed or otherwise disposed of.

4. Defendants object to Instruction No. 7 to the extent that it calls for production of privileged material.

5. Defendants object to Instruction No. 9 as an unduly burdensome requirement and outside the scope of obligation for privilege logs as required under Federal Rule of Civil Procedure 26(b)(5). Defendants reserve the right to create a categorical privilege log.

6. Defendants object to Instructions Nos. 10 and 11 to the extent they are inconsistent with the AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION AND ORDER, entered by the Court on August 29, 2017. Defendants intend to produce Documents as they are kept in the normal course of business.

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DEFINITIONS

The following definitions shall apply when responding to these requests for production:

1. "A," "an," and "any" include "all," and "all" includes "a," "an," and "any." All of these words should be construed as necessary to bring within the scope of these requests any Documents that might otherwise be construed to be outside of their scope.

2. "Adjustment of Status Application" means an Immigration Benefit Application to adjust the applicant's status to that of permanent legal resident using USCIS Form I-485.

3. "Adjustment of Status Applicant" means any individual who has filed an Adjustment of Status Application.

4. "Adjustment Class" means the following class certified by the Court in its Order Granting Class Certification, Dkt. 69: A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

5. "Alien File" or "A-file" means the collection of documents that the Department of Homeland Security (DHS) maintains for non-citizens, including all official files related to immigration status, citizenship or relief.

6. "And" and "or" shall be construed either conjunctively or disjunctively, whichever makes the request more inclusive.

7. "ACLU FOIA Request" means the American Civil Liberties Union's May 17, 2012 Freedom of Information Act Request, attached hereto as Exhibit A.

8. "CARRP" means the Controlled Application Review and Resolution Program, an internal vetting policy instituted by USCIS in April 2008. Upon information and belief, USCIS first outlined the parameters of CARRP in an April 11, 2008 memorandum addressed

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to field leadership from Deputy Director Jonathan R. Scharfen regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A.

9. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), and encompasses every medium of information transmittal, including but not limited to written, graphic, and electronic communication.

10. "Defendants," "You," "Your," or any similar word or phrase includes each individual or entity responding to these requests and, where applicable, each subsidiary, parent, or affiliated entity of each such Person and all Persons acting on its or their behalf.

11. "Document" and its plural shall be interpreted in the broadest possible manner and shall mean all written, electronic, graphic, or printed matter of any kind in Your possession or control, however produced or reproduced, including all originals, drafts, working papers, and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, and all other tangible things, including anything that would be a writing or recording as defined in Federal Rule of Evidence 1001(1) or as defined in Federal Rule of Civil Procedure 34(a).

12. "Donkey" Security Advisory Opinion means the type of Security Advisory Opinion generated when there are national security and/or terrorism concerns raised by the visa application.

13. "Employee" means any director, trustee, officer, employee, agent, consultant, partner, reseller, distributor, corporate parent, subsidiary, affiliate, or servant of the designated entity, whether active or retired, full-time or part-time, current or former, and compensated or not.

14. "First EO" means Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017).

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15. "Immigration Benefit Application" means any application or petition to confer, certify, change, adjust, or extend any status granted under the Immigration and Nationality Act.

16. "Immigration Benefit Applicant" means any individual who has filed an Immigration Benefit Application.

17. "National Security Concern" or "NS Concern" means the classification of Immigration Benefit Applications and Immigration Benefit Applicants that are subjected to CARRP. This includes, but is not limited to, the definition of National Security Concern used in the April 11, 2008 memorandum addressed to field leadership from Deputy Director Jonathan R. Scharfen regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns": "A NS [C]oncern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A.

18. "Naturalization Application" means an Immigration Benefit Application to naturalize as a U.S. citizen using USCIS Form N-400.

19. "Naturalization Applicant" means any individual who has filed a Naturalization Application.

20. "Naturalization Class" means the following class certified by the Court in its Order Granting Class Certification, Dkt. 69: A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

21. "Person" means an individual, proprietorship, partnership, firm, corporation, association, governmental agency, or other organization or entity.

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22. "Relate," "reflect," or "refer," in all forms, means, in addition to the customary and usual meaning of those words, concerning, constituting, embodying, describing, evidencing, or having any logical or factual connection with the subject matter described.

23. "Second Amended Complaint" means the Second Amended Complaint for Declaratory and Injunctive Relief, Dkt. 47, filed in the above-captioned action by Plaintiffs on April 4, 2017.

24. "Second EO" means Executive Order 13780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 13209 (Mar. 9, 2017).

25. "Security Advisory Opinion" means the Document created in response to a request by a U.S. consulate for a background security check on a foreign national who is applying for a U.S. visa.

26. "USCIS" means U.S. Citizenship and Immigration Services, a federal agency that is a component of the United States Department of Homeland Security and is headed by a director, currently James McCament.

27. Where appropriate, the singular form of a word should be interpreted in the plural and vice versa, to acquire the broadest possible meaning.

28. Any term defined herein shall have the indicated meaning whenever that term is used in these requests for production unless the context clearly requires otherwise. All defined terms are indicated by capitalizing the first letter of each term (except "and," "or," "relate," "reflect," and "refer"), as shown in the instructions and definitions above.

OBJECTIONS TO DEFINITIONS

1. For purposes of Definitions Nos. 4 and 20, Defendants understand the classes to exclude former unnamed class members whose Adjustment of Status or Naturalization

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Applications were adjudicated after the classes were certified. *See* Fed. R. Civ. P. 82; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997).

2. Defendants object to Definition No. 5 to the extent that it inaccurately describes A-files and the contents of A-files. *See* 78 Fed. Reg. 69864 (Nov. 21, 2013). Defendants will treat any reference to A-files to refer to the type of files described in 78 Fed. Reg. 69864.

3. Defendants object to Definition No. 9 to the extent that it purports to encompass verbal communication as such communication is outside the scope of Rule 34.

4. For purposes of Definition No. 10, Defendants understand "You" and "Your" with respect to Defendant Duke to extend to the Office of the Secretary as that term is used in the Homeland Security Act of 2003, Pub. L. No 107-296, 116 Stat. 2135 (Nov. 25 2002). Defendants do not understand subordinate Department of Homeland Security directorates and agencies further removed from the Secretary to be "applicable" subsidiaries for purposes of this request, as such an understanding would require unduly burdensome and oppressive searches disproportionate to the needs of the case. For example, otherwise applicable subordinate agencies could be read to include the U.S. Coast Guard and the Federal Emergency Management Agency, whose missions have no relation to the claims at issue in this matter.

5. For purposes of Definition 10, Defendants understand "You" and "Your" with respect to Defendant Trump to extend to the White House Office as defined by Executive Order 8248, 4 Fed. Reg. 3864 (Sep. 8, 1939), as amended. Defendants do not understand Executive Branch entities further removed from the President to be "applicable" subsidiaries for purposes of this request, as such an understanding would require unduly burdensome and oppressive searches disproportionate to the needs of the case. For example, otherwise applicable subordinate agencies could be read to include the U.S.

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Department of Agriculture and the U.S. Department of Veterans Affairs, whose missions have no relation to the claims at issue in this matter.

6. Defendants object to Definition 10 to the extent that Plaintiffs seek discovery from the President, as the President is not subject to suit for injunctive relief in the performance of his official duties and the potential benefit of responding to discovery demands is exceedingly slight as compared to the burden of conducting the search and the intrusion on the Executive. The Supreme Court requires Plaintiffs to make a heightened showing of need before they can require a search for, and force the government to determine whether to formally assert privileges with respect to, discovery sought from the President or his close advisers. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004) (reversing Court of Appeals decision that the Vice President and other executive officials must first formally assert privilege before the Court may address their separation-of-powers objections to discovery requests). Plaintiffs have not made such showing, nor have they even suggested that the documents sought cannot be obtained from other government defendants.

The Supreme Court in *Cheney* directed that courts must take special care to ensure that civil discovery requests do not intrude on the "public interest" in (1) "afford[ing] Presidential confidentiality the greatest protection consistent with the fair administration of justice"; and (2) "protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney*, 542 U.S. at 382. Courts have thus applied *Cheney* to require a heightened showing of need before imposing the burden of responding to discovery, as the consideration and assertion of applicable privileges in these circumstances must be a "last resort." *United States v. McGraw-Hill Companies, Inc.*, 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014); *see also Dairyland Power Co-op v. U.S.*, 79 Fed. Cl. 659, 662 (2007) ("The Court agrees with the Government that, in the case of a discovery request aimed at the President and his close advisors, the White House need not formally invoke the presidential

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communications privilege until the party making the discovery request has shown a heightened need for the information sought.").

A showing of heightened need is necessary because, as the Supreme Court has recognized, the separation of powers under our Constitution is directly implicated by subjecting the President to judicial process in matters arising out of the performance of his official duties. *Nixon v. Fitzgerald*, 457 U.S. 731, 748-55 (1982); *cf. Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). This is motivated not solely by the concern for maintaining Presidential confidentiality and preventing the need to address difficult separation of powers issues, but also with the distractions created by the burden of responding to discovery requests, and evaluating documents for the assertion of privilege, in light of the President's weighty official duties. *See Cheney*, 542 U.S. at 382, 385, 389-90. The *Cheney* principle also properly avoids embroiling courts in difficult and potentially unnecessary privilege issues implicating the separation of powers. *Id.*

A related principle further precludes discovery from the President in these circumstances. A federal court cannot "enjoin the President in the performance of his official duties." *See Mississippi*, 71 U.S. at 501; *see also County of Santa Clara v. Trump*, 17-cv-00574, --- F. Supp. 3d ---, 2017 WL 1459081, at *29 (N.D. Cal. April 25, 2017) ("extraordinary remedy of enjoining the President himself is not appropriate"). *A fortiori*, a federal court likewise could not compel the President to comply with a civil discovery request. *Cf. Fitzgerald*, 457 U.S. at 748-55 (holding that the President has absolute immunity for civil liability for acts within his official responsibilities). That conclusion is grounded on the President's "unique constitutional position" and "respect for separation of powers." *See Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). Although the Supreme Court has recognized limited exceptions permitting judicial process against the President, *Clinton v. Jones*, 520 U.S. 681, 703, 704 n.39 (1997) (civil discovery permitted where private, rather than official, act was involved); *United States v. Nixon*, 418 U.S. 683, 710-13 (1974) (permitting subpoena directed at President for use in criminal

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prosecution), neither of those exceptions is relevant here. Indeed, Plaintiffs seek discovery concerning Executive Orders issued pursuant to statutory authority – the zenith of the President's constitutional role under Article II. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at is maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). Under these principles, the President is immune from this kind of civil injunctive action challenging his official conduct. He therefore cannot properly be the subject of discovery in this civil litigation.

7. Defendants object to Definition No. 22 insofar as it purports to define "relate," "reflect," or "refer," to include "any logical or factual connection with the subject matter described" as the use of any such terms are not proportional to the needs of the case, overly broad, oppressive, and the burden of a request using any such term would outweigh its benefit. Defendants further object to Definition 22 on the grounds that the terms "relate," "reflect," and "refer," as defined, are overlapping and therefore vague and confusing.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All Documents referring or relating to the development, conception, or origins of CARRP.

OBJECTIONS TO RFP NO. 1:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. Based on preliminary inquiries,

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Defendants believe 40 to 50 people were likely involved in development of CARRP, at least some of whom are now no longer employed by USCIS. It would be burdensome, time consuming, and expensive to attempt to identify each individual involved in CARRP, and recover from all those people all Documents dating to nearly ten years ago, referring or relating to the development, conception, and origins of CARRP. Furthermore, the request calls for pre-decisional documents subject to the deliberative process privilege.

RESPONSE TO RFP NO. 1:

Notwithstanding these objections, USCIS will produce non-privileged Documents of national applicability, except those pertaining solely to immigration benefit application types other than adjustment-of-status and naturalization applications, falling within the scope of the request, to the extent such Documents exist and can be located after a reasonable search. Defendants intend to limit their search for Documents responsive to this request to USCIS headquarters and to documents created in 2007 and 2008, as CARRP was developed at USCIS headquarters during that date range.

> **REQUEST FOR PRODUCTION NO. 2:** All Documents referring or relating to the implementation of CARRP.

OBJECTIONS TO RFP NO. 2:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, not temporally bounded, not limited to the types of Immigration Benefit Applications at issue in this litigation, and could be read to cover all Documents referring or relating to the implementation of CARRP in every individual case subject to CARRP since the program's inception nearly a decade ago – potentially more than 41,000 individual cases. *See* Defendants' Answer, ECF No. 79, ¶¶ 12 & 241.

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Furthermore, all Documents "referring" to CARRP is an unduly burdensome request and unlikely to identify relevant Documents that do not also "relate" to CARRP. Read literally, all documents referring or relating to CARRP would involve collection from 85 field offices, 26 district offices, 24 international field offices, 5 service centers, 13 directorates and program offices, and headquarters, regardless of whether they issued national-level policy or processed the types of immigration benefit applications at issue in this litigation.

RESPONSE TO RFP NO. 2:

Consistent with Plaintiffs' claims and the definitions of the certified classes, Defendants construe "implementation" as it is used in Request for Production No. 2 to refer to implementation at the national policy level. So construed, Defendants will produce non-privileged Documents falling within the scope of the request, that pertain to adjustment-of-status and naturalization applications, to the extent such Documents exist and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 3:** All policy memoranda or other policy Documents referring or relating to CARRP, including any and all attachments. This request includes but is not limited to policy memoranda produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

OBJECTIONS TO RFP NO. 3:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. All Documents "referring" to CARRP is an unduly burdensome request and unlikely to identify relevant Documents that do not

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also "relate" to CARRP. Additionally, the request is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. Defendants further object on the ground that the request does not define what constitutes a "policy memoranda" or "other policy Document" in that it is unclear exactly what Plaintiffs are seeking. Defendants further object to the request to the extent that it seeks Documents from non-parties U.S. Department of Defense, U.S. Department of Justice, U.S. Department of State, and the Office of the Director of National Intelligence without having followed the applicable *Touhy* regulations.

RESPONSE TO RFP NO. 3:

Notwithstanding these objections, and consistent with class definitions Defendants will produce non-privileged Documents of national applicability pertaining to adjustment-of-status and naturalization applications falling within the scope of the request that are in the custody, possession, or control of U.S. Citizenship and Immigration Services or the Secretary of Homeland Security, to the extent such Documents exist and can be located after a reasonable search. Defendants will not produce responsive documents, if any, in the possession, custody, or control of non-party federal agencies or entities identified in the Request. For purposes of this request, Defendants understand "policy memoranda" and "other policy document" to mean documents setting out general goals, plans, priorities, visions, expectations, or objectives on a national or programmatic level from a person occupying a position of authority within an organization to subordinates within that organization, and excluding technical procedures or instructions on how to implement the policy.

> **REQUEST FOR PRODUCTION NO. 4:** All operational guidance referring or relating to CARRP, including any and all attachments. This request includes but is not limited to operational guidance produced by USCIS, U.S. Department of Defense, U.S. Department

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of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

OBJECTIONS TO RFP NO. 4:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. All Documents "referring" to CARRP is an unduly burdensome request and unlikely to identify relevant Documents that do not also "relate" to CARRP. Additionally, the request is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. Defendants object on the ground that the request does not define what constitutes "operational guidance" in that it is unclear exactly what Plaintiffs are seeking. Defendants further object to the request to the extent that it seeks Documents from non-parties U.S. Department of Defense, U.S. Department of Justice, U.S. Department of State, and the Office of the Director of National Intelligence without having followed the applicable *Touhy* regulations.

RESPONSE TO RFP NO. 4:

Notwithstanding these objections, and consistent with the class definitions Defendants will produce non-privileged Documents of national applicability pertaining to adjustment-of-status and naturalization applications falling within the scope of the request that are in the custody, possession, or control of U.S. Citizenship and Immigration Services or the Secretary of Homeland Security, to the extent such Documents exist and can be located after a reasonable search. Defendants will not produce responsive documents, if any, in the possession, custody, or control of non-party

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federal agencies or entities identified in the Request. Defendants understand "operational guidance" as used in this request to mean documents setting out generally or broadly applicable instructions of national scope for executing policy objectives pertaining, to adjustment-of-status and naturalization applications.

> **REQUEST FOR PRODUCTION NO. 5:** All training materials referring or relating to CARRP, including any and all attachments. This requests includes but is not limited to training materials produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

OBJECTIONS TO RFP NO. 5:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. All Documents "referring" to CARRP is an unduly burdensome request and unlikely to identify relevant Documents that do not also "relate" to CARRP. Defendants further object that the request purports to calls for materials produced at any organizational level, including local field offices that cannot issue guidance of national scope. Additionally, the request is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. Defendants further object on the ground that the request does not define what constitutes "training materials" in that it is unclear exactly what Plaintiffs are seeking. Defendants further object to the request to the extent that it seeks Documents from non-parties U.S. Department of Defense, U.S. Department of Justice, U.S. Department of State, and the Office of the Director of National Intelligence without having followed the applicable *Touhy* regulations.

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RESPONSE TO RFP NO. 5:

Notwithstanding these objections, and consistent with the class definitions, Defendants will produce non-privileged Documents of national applicability pertaining to adjustment-of-status and naturalization applications falling within the scope of the request that are in the custody, possession, or control of U.S. Citizenship and Immigration Services or the Secretary of Homeland Security, and which were created by USCIS headquarters or DHS headquarters, to the extent such Documents exist, pertain to adjustment-of-status and naturalization applications, and can be located after a reasonable search. Defendants will not produce responsive documents, if any, in the possession, custody, or control of non-party federal agencies or entities identified in the Request. Defendants understand "training materials" for purposes of this response to mean Documents prepared as part of an official formal course of instruction or as official reference material.

> **REQUEST FOR PRODUCTION NO. 6:** All Documents referring or relating to the definition or interpretation of National Security Concern.

OBJECTIONS TO RFP NO. 6:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. A request for all Documents "referring" to the definition or interpretation of National Security Concern is an unduly burdensome request and unlikely to identify relevant Documents that do not also "relate" to the definition or interpretation of National Security Concern. Additionally, the request is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this

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case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. Finally, the request could be understood to include all Documents relating to the interpretation of National Security Concern in individual cases or that are issued by subordinate organizational elements and therefore incapable of affecting all class members equally. The request is also objectionable because it could be understood to include individuals whose cases raise Terrorist-Related Inadmissibility Grounds (TRIG), as many of the INA national security grounds used in determining if TRIG applies to a case are also part of identifying a national security concern. However, not all cases with a TRIG issue are handled under CARRP. In general, cases with a minimal or unsubstantial link to an undesignated terrorist organization, regardless of any TRIG considerations, do not rise to the level of sufficient indicators of a connection to an NS ground for the purposes of CARRP. Because these TRIG cases involve national security concerns, but are not generally handled under CARRP, this request would involve materials that are not relevant to the resolution of this case.

RESPONSE TO RFP NO. 6:

Notwithstanding these objections, and consistent with the definitions of the certified classes, Defendants will produce non-privileged Documents in the possession, custody, or control of USCIS, falling within the scope of the request, that pertain to adjustment-of-status and naturalization applications, are of national applicability, and relate to national security concerns leading to processing under CARRP, to the extent such Documents exist and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 7:** All Documents referring or relating to any and all policies, procedures, guidelines and training materials relating to the processing and adjudication of Immigration Benefit Applications with a National Security Concern

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from any directorate, department, unit or entity within USCIS, including but not limited to the Fraud Detection and National Security Directorate (FDNS), Domestic Operations Directorate (DomOps), Service Center Operations Directorate, Field Operations Directorate, Background Check Unit (BDU), and The Screening Coordination Office (SCO) of FDNS.

OBJECTIONS TO RFP NO. 7:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. Read literally, "any unit" within USCIS would include every field office, international field office, service center, directorate, and headquarters regardless of whether they issued national level policy or processed the types of Immigration Benefit Applications at issue in this litigation. Furthermore, Defendants object to this request as it appears to duplicate requests for Documents sought in other requests and it is therefore confusing and unclear exactly what Plaintiffs seek. Additionally, the request is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. Last, the request could be understood to include policies, procedures, guidelines, and training materials related to the handling of cases that raise Terrorist-Related Inadmissibility Grounds (TRIG), as many of the INA national security grounds used in determining if TRIG applies to a case are also part of identifying a national security concern. However, not all cases with a TRIG issue are handled under CARRP. In general, cases with a minimal or unsubstantial links to an undesignated terrorist organization, regardless of any TRIG considerations, do not rise to the level of sufficient indicators of a connection to an NS ground for the purposes of CARRP. Because these TRIG cases involve national security concerns, but are not generally handled under

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CARRP, this request would involve materials that are not relevant to the resolution of this case.

RESPONSE TO RFP NO. 7:

Notwithstanding these objections, and consistent with the definitions of the certified classes, USCIS will produce non-privileged Documents of national applicability that pertain to adjustment-of-status and naturalization applications, and relate to national security concerns leading to processing under CARRP, falling within the request, to the extent such Documents exist and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 8:** All Documents referring or relating to the definition of or interpretation of "national security indicators" or "national security activities," as these terms are used and applied under CARRP. This request includes, but is not limited to, any policies, procedures, guidelines, and training materials referring or relating to the identification of "national security indicators" or "national security activities," the evaluation of "national security indicators" or "national security activities," the relationship between "national security indicators," "national security activities" and National Security Concerns, and the vetting, deconfliction and resolution of "national security indicators" and " national security activities."

OBJECTIONS TO RFP NO. 8:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is overbroad, insofar as it is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. A request for all Documents "referring" to the definition or interpretation is an unduly burdensome request and unlikely to identify relevant Documents that do not also "relate" to the relevant

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definition or interpretation. Finally, the request could be understood to include all documents in individual cases or that are issued by subordinate organizational elements and therefore incapable of affecting all class members equally.

RESPONSE TO RFP NO. 8:

Consistent with the class definitions, Defendants will produce non-privileged Documents of national applicability issued from USCIS headquarters relating to the definition of or interpretation of "national security indicators" or "national security activities," as these terms are used under CARRP for adjustment-of-status and naturalization applications to the extent such Documents exist and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 9:** All Documents referring or relating to the definition of or interpretation of the possible "articulable links" between a given individual and a "national security indicator" or "national security activity," as these terms are used and applied under CARRP.

OBJECTIONS TO RFP NO. 9:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, and the burden of the request outweighs its likely benefit. The request purports to call for materials produced at any organizational level, including local field offices that cannot issue guidance of national scope. Also, the request calls for materials not related to the Immigration Benefit Applications at issue in this case.

RESPONSE TO RFP NO. 9:

Consistent with the class definitions, USCIS will produce non-privileged Documents of national applicability issued from USCIS headquarters, pertaining to adjustment-of-status

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and naturalization applications falling within the scope of the request to the extent that responsive Documents exist and can be located after a reasonable search. Defendants understand this request as pertaining to generally applicable definitions and interpretations of "articulable links" rather than articulable links specific to a particular individual or individuals.

> **REQUEST FOR PRODUCTION NO. 10:** All Documents referring or relating to any policy memoranda or procedures rescinded by the implementation of CARRP. This request includes, but is not limited to, those policy memoranda and procedures listed as rescinded in the April 11, 2008 USCIS memorandum from Jonathan R. Scharfen to Field Leadership regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A at 2-3.

OBJECTIONS TO RFP NO. 10: Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request because it is not proportional to the needs of the case, is not important to resolve issues and the burden of the request outweighs its likely benefit. Additionally, the request is not temporally bounded and seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. Furthermore, Defendants object on the ground that any policies or procedures rescinded by CARRP are irrelevant and may call for materials that are local or do not pertain to the Immigration Benefit Applications at issue in this case, and the request for "[a]ll Documents referring or relating" to such rescinded policies or procedures is therefore overbroad, unduly burdensome, oppressive, and disproportionate — as well as irrelevant.

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RESPONSE TO RFP NO. 10:

Notwithstanding these objections, USCIS will produce the policy memoranda and procedures listed as rescinded in the April 11, 2008 USCIS memorandum from Jonathan R. Scharfen to Field Leadership regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns," and other responsive non-privileged Documents to the extent such Documents exist,can be located after a reasonable search, are of national applicability issued from USCIS headquarters, and pertain to adjustment-of-status and naturalization applications.

> **REQUEST FOR PRODUCTION NO. 11:** All Documents referring or relating to the connection between Security Advisory Opinion(s) issued by the U.S. Department of State and CARRP. This request encompasses both connections between CARRP and (1) specific Security Advisory Opinion(s) and (2) the Security Advisory Opinion procedure in general. This request includes, but is not limited to, any Security Advisory Opinion(s), including Donkey Security Advisory Opinion(s), as well as requests for Security Advisory Opinion(s) that refer or relate to the applications of any named Plaintiff or any other application subject to CARRP.

OBJECTIONS TO RFP NO. 11:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request in part as it contains multiple overlapping requests and is therefore vague and confusing. Defendants have no responsive documents concerning the Security Advisory Opinion procedure in general as it is a U.S. Department of State program. Defendants object to the request to the extent that the request seeks Documents relating or referring to (1) the connections between CARRP and specific Security Advisory Opinions; (2) requests for Security Advisory Opinions for particular individuals; and (3) specific Security Advisory Opinions referring or relating to any named Plaintiff or any other application subject to CARRP, as any such

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Documents are privileged. It would be unduly burdensome and disproportionate to the needs of the case to search for and log Documents likely to be both privileged and irrelevant. Moreover, Defendants further object as, according to Definition No. 25, Security Advisory Opinions are "created in response to a request made by a U.S. consulate for a background security check on a foreign national who is applying for a U.S. visa" and none of the class members – all of whom are seeking permanent residency or naturalization – are applying for a visa to enter the United States at a U.S. consulate abroad. Furthermore, as Plaintiffs challenge CARRP and other vetting policies on a class-wide basis, the existence and content of individual SAOs is immaterial to their claims. Accordingly, Documents relating or referring to Security Advisory Opinions are therefore not "of consequence in determining" the legality and constitutionality of CARRP or similar policies enacted pursuant to the Second EO. *See* Fed. R. Evid. 401 (defining "relevance").

RESPONSE TO RFP NO. 11:

Defendants have no responsive documents concerning the Security Advisory Opinion procedure in general, as it is a U.S. Department of State program. USCIS will produce non-privileged, general guidance within their possession, custody, or control concerning the relationship, if any, between Security Advisory Opinions and CARRP. To the extent Defendants may have other responsive documents in their possession, custody, or control, that relate to identifiable individuals, Immigration Benefit Applications, or Security Advisory Opinions, they will be withheld as privileged.

> **REQUEST FOR PRODUCTION NO. 12:** All Documents referring or relating to named Plaintiff Abdiqafar Wagafe. This request includes, but is not limited to, Mr. Wagafe's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases

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referring or relating to Mr. Wagafe, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Wagafe.

OBJECTIONS TO RFP NO. 12:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because discovery into individual files is of little importance to resolving allegations concerning class-wide national policy. Every application is adjudicated on its own merits. Defendants further object to producing "all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases" because those records or portions of those records may be privileged, the request is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and mere access to information does not constitute possession, custody, or control of that information, or imply that such information was acted upon in processing or adjudicating the application. To the extent the request calls for information in the possession, custody, or control of a non-party federal agency, Plaintiffs have failed to follow the applicable *Touhy* regulations. To the extent the request calls for information in the possession, custody, or control of a state of local entity, Plaintiffs are better placed than Defendants to demand such documents by serving a subpoena on the relevant entity. Defendants further object to producing "all records created by any U.S. Department of Homeland Security official" because coordination with subordinate agencies whose work is not related to immigration, such as FEMA or the U.S. Coast Guard, is not relevant or proportional to the needs of the case.

RESPONSE TO RFP NO. 12:

Notwithstanding these objections, USCIS will produce non-privileged portions of Plaintiff Wagafe's A-File, non-privileged data stored in FDNS-DS concerning Plaintiff

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Wagafe to the extent such Documents exist, and non-privileged email correspondence contained in the A-File to the extent such email correspondence exists.

> **REQUEST FOR PRODUCTION NO. 13:** All Documents referring or relating to the reasons why Plaintiff Abdiqafar Wagafe's naturalization application was subject to CARRP.

OBJECTION TO RFP NO. 13:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request insofar as it assumes that Plaintiff Wagafe's naturalization application was subject to CARRP. Defendants can neither confirm nor deny that Plaintiff Wagafe's naturalization application was subject to CARRP as this information is privileged.

RESPONSE TO RFP NO. 13:

To the extent responsive Documents exist, USCIS intends to withhold such Documents, as disclosure of the fact that such documents exist would negate the privilege, and any such documents are, themselves, likely to be privileged.

> **REQUEST FOR PRODUCTION NO. 14:** All Documents referring or relating to named Plaintiff Mehdi Ostadhassan. This request includes, but is not limited to, Mr. Ostadhassan's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Ostadhassan, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Ostadhassan.

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OBJECTIONS TO RFP NO. 14:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because discovery into individual files is of little importance to resolve allegations concerning class-wide national policy. Every application is adjudicated on its own merits. Defendants further object to producing "all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases" because those records or portions of those records may be privileged, the request is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and mere access to information does not constitute possession, custody, or control of that information, or imply that such information was acted upon in processing or adjudicating the application. To the extent the request calls for information in the possession, custody, or control of a non-party federal agency, Plaintiffs have failed to follow the applicable *Touhy* regulations. To the extent the request calls for information in the possession, custody, or control of a state of local entity, Plaintiffs are better placed than Defendants to demand such documents by serving a subpoena on the relevant entity. Defendants further object to producing "all records created by any U.S. Department of Homeland Security official" because coordination with subordinate agencies whose work is not related to immigration is not proportional to the needs of the case.

RESPONSE TO RFP NO. 14:

Notwithstanding these objections, USCIS will produce non-privileged portions of Plaintiff Ostadhassan's A-File, non-privileged data stored in FDNS-DS concerning Plaintiff Ostadhassan to the extent such Documents exist, and non-privileged email correspondence contained in the A-File, to the extent such email correspondence exists.

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REQUEST FOR PRODUCTION NO. 15: All Documents referring or relating to the reasons why Plaintiff Mehdi Ostadhassan's adjustment of status application was subject to CARRP.

OBJECTION TO RFP NO. 15:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request insofar as it assumes that Plaintiff Ostadhassan's adjustment of status application was subject to CARRP. Defendants can neither confirm nor deny that Plaintiff Ostadhassan's adjustment of status application was subject to CARRP as this information is privileged.

RESPONSE TO RFP NO. 15:

To the extent responsive Documents exist, USCIS intends to withhold such Documents, as disclosure of the fact such documents exist would negate the privilege, and any such documents are, themselves, likely to be privileged.

REQUEST FOR PRODUCTION NO. 16: All Documents referring or relating to named Plaintiff Hanin Omar Bengezi. This request includes, but is not limited to, Ms. Bengezi's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Ms. Bengezi, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Ms. Bengezi.

OBJECTIONS TO RFP NO. 16:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because discovery into individual files is of little importance to resolve allegations concerning

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class-wide national policy. Every application is adjudicated on its own merits. Defendants further object to producing "all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases" because those records or portions of those records may be privileged, the request is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and mere access to information does not constitute possession, custody, or control of that information, or imply that such information was acted upon in processing or adjudicating the application. To the extent the request calls for information in the possession, custody, or control of a non-party federal agency, Plaintiffs have failed to follow the applicable *Touhy* regulations. To the extent the request calls for information in the possession, custody, or control of a state of local entity, Plaintiffs are better placed than Defendants to demand such documents by serving a subpoena on the relevant entity. Defendants further object to producing "all records created by any U.S. Department of Homeland Security official" because coordination with subordinate agencies whose work is not related to immigration is not proportional to the needs of the case.

RESPONSE TO RFP NO. 16:

Notwithstanding these objections, USCIS will produce non-privileged portions of Plaintiff Bengezi's A-File, non-privileged data stored in FDNS-DS concerning Plaintiff Bengezi to the extent such Documents exist, and non-privileged email correspondence contained in the A-File, to the extent such email correspondence exists.

REQUEST FOR PRODUCTION NO. 17: All Documents referring or relating to the reasons why Plaintiff Hanin Omar Bengezi's adjustment of status application was subject to CARRP.

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OBJECTIONS TO RFP NO. 17:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request insofar as it assumes that Plaintiff Bengezi's naturalization application was subject to CARRP. Defendants can neither confirm nor deny that Plaintiff Bengezi's naturalization application was subject to CARRP as this information is privileged.

RESPONSE TO RFP NO. 17:

To the extent responsive Documents exist, USCIS intends to withhold such Documents, as disclosure of the fact such documents exist would negate the privilege, and any such documents are, themselves, likely to be privileged.

> **REQUEST FOR PRODUCTION NO. 18:** All Documents referring or relating to named Plaintiff Noah Adam Abraham, f/k/a Mushtaq Abed Jihad. This request includes, but is not limited to, Mr. Abraham's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Abraham, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Abraham.

OBJECTIONS TO RFP NO. 18:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because discovery into individual files is of little importance to resolve allegations concerning class-wide national policy. Every application is adjudicated on its own merits. Defendants further object to producing "all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases" because those records or

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portions of those records may be privileged, the request is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and mere access to information does not constitute possession, custody, or control of that information, or imply that such information was acted upon in processing or adjudicating the application. To the extent the request calls for information in the possession, custody, or control of a non-party federal agency, Plaintiffs have failed to follow the applicable *Touhy* regulations. To the extent the request calls for information in the possession, custody, or control of a state of local entity, Plaintiffs are better placed than Defendants to demand such documents by serving a subpoena on the relevant entity. Defendants further object to producing "all records created by any U.S. Department of Homeland Security official" because coordination with subordinate agencies whose work is not related to immigration is not proportional to the needs of the case.

RESPONSE TO RFP NO. 18:

Notwithstanding these objections, USCIS will produce non-privileged portions of Plaintiff Jihad's A-File, non-privileged data stored in FDNS-DS concerning Plaintiff Jihad to the extent such Documents exist, and non-privileged email correspondence contained in the A-File, to the extent such email correspondence exists.

> **REQUEST FOR PRODUCTION NO. 19:** All Documents referring or relating to the reasons why Plaintiff Noah Adam Abraham, f/k/a Mushtaq Abed Jihad's naturalization application was subject to CARRP.

OBJECTIONS TO RFP NO. 19:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request insofar as it assumes that Plaintiff Jihad's naturalization application was subject to CARRP. Defendants can

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neither confirm nor deny that Plaintiff Jihad's naturalization application was subject to CARRP as this information is privileged.

RESPONSE TO RFP NO. 19:

To the extent responsive Documents exist, USCIS intends to withhold such Documents, as disclosure of the fact such documents exist would negate the privilege, and any such documents are, themselves, likely to be privileged.

> **REQUEST FOR PRODUCTION NO. 20:** All Documents referring or relating to the Immigration Benefit Application(s) of named Plaintiff Sajeel Manzoor. This request includes, but is not limited to, Mr. Manzoor's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Manzoor, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Manzoor.

OBJECTIONS TO RFP NO. 20:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because discovery into individual files is of little importance to resolve allegations concerning class-wide national policy. Every application is adjudicated on its own merits. Defendants further object to producing "all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases" because those records or portions of those records may be privileged, the request is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and mere access to information does not constitute possession, custody, or control of that information, or imply that such information was acted upon in processing or adjudicating the application. To the extent

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the request calls for information in the possession, custody, or control of a non-party federal agency, Plaintiffs have failed to follow the applicable *Touhy* regulations. To the extent the request calls for information in the possession, custody, or control of a state of local entity, Plaintiffs are better placed than Defendants to demand such documents by serving a subpoena on the relevant entity. Defendants further object to producing "all records created by any U.S. Department of Homeland Security official" because coordination with subordinate agencies whose work is not related to immigration is not proportional to the needs of the case.

RESPONSE TO RFP NO. 20:

Notwithstanding these objections, USCIS will produce non-privileged portions of Plaintiff Manzoor's A-File, non-privileged data stored in FDNS-DS concerning Plaintiff Manzoor to the extent such Documents exist, and non-privileged email correspondence contained in the A-File, to the extent such email correspondence exists.

> **REQUEST FOR PRODUCTION NO. 21:** All Documents referring or relating to the reasons why Plaintiff Sajeel Manzoor's naturalization application was subject to CARRP.

OBJECTIONS TO RFP NO. 21: Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request insofar as it assumes that Plaintiff Manzoor's naturalization application was subject to CARRP. Defendants can neither confirm nor deny that Plaintiff Manzoor's naturalization application was subject to CARRP as this information is privileged.

RESPONSE TO RFP NO. 21:

To the extent responsive documents exists, USCIS intends to withhold such documents, as disclosure of the fact such documents exits would negate the privilege, and any such documents are, themselves, likely to be privileged.

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REQUEST FOR PRODUCTION NO. 22: All Documents referring or relating to any proposed, implemented, or planned modifications to CARRP from April 11, 2008 to the present.

OBJECTIONS TO RFP NO. 22:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because Documents referring or relating to proposed or planned modifications are subject to privilege, and not relevant to the issues in this case. Further, this request is not limited to the types of Immigration Benefit Applications at issue in this litigation.

RESPONSE TO RFP NO. 22:

USCIS will produce non-privileged Documents referring or relating to modifications to CARRP implemented from April 11, 2008, to the present to the extent such Documents exist, are of national applicability, and relate to adjustment-of-status and naturalization applications, and can be located after a reasonable search.

REQUEST FOR PRODUCTION NO. 23: All Documents referring or relating to any consideration of or reference to CARRP during the planning, drafting, or issuing of the First and Second EOs.

OBJECTION TO RFP NO. 23:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request as calling for the production of privileged information. Defendants further object to producing Documents referring or relating to the First EO as it was rescinded by the Second EO and is therefore moot. Defendants further object to producing documents referring or relating to those sections of the Second EO that do not relate to processing of adjustment-of-status and

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naturalization applications as they are neither relevant nor proportional to the needs of the case.

RESPONSE TO RFP NO. 23:

To the extent responsive Documents exist, Defendants intend to withhold them as privileged.

> **REQUEST FOR PRODUCTION NO. 24:** All Documents referring or relating to "extreme vetting" or any other screening, vetting, or adjudication program, policy, or procedure connected to the First or Second EOs. This request includes, but is not limited to, programs that reference, relate to, or expand upon CARRP.

OBJECTIONS TO RFP NO. 24:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is overly broad and unduly burdensome as it extends beyond Plaintiffs' claims and the class members at issue in this litigation to include any screening, vetting, or adjudication program, policy or procedure connected to the First and Second EOs without regard to whether adjustment-of-status and naturalization applicants would be processed in accordance with such program, policy, or procedure. Defendants also object on the ground that "extreme vetting" is a vague and undefined term, and it is therefore unclear exactly what Plaintiffs seek. Furthermore, the request is overly broad and unduly burdensome as the Second EO requires interagency coordination with non-parties. To the extent that Defendants seek Documents from non-party federal entities, Plaintiffs have failed to follow the applicable *Touhy* regulations for such entities. Defendants further object to producing Documents referring or relating to the First EO as it was rescinded by the Second EO and is therefore moot, and to producing documents referring or relating to those sections of the Second EO that do not relate to processing of

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adjustment-of-status and naturalization applications, as they are neither relevant nor proportional to the needs of the case. Defendants further object to providing any Documents connected to the First or Second EOs *unless* the program, policy, or procedure is intended to expand or modify CARRP. This is consistent with the court's ruling that "The main thrust of this case is the legality of CARRP. The Court will not dismiss Plaintiffs' claims because they include allegations of a possible future and unlawful program that would embody CARRP in all but name." ECF 69, at 15. Defendants thus object to any discovery into programs, policies, and procedures connected to the First and Second EOs that are intended to do other than "embody CARRP in all but name."

RESPONSE TO RFP NO. 24:

Notwithstanding these objections, USCIS will produce non-privileged responsive Documents connected to the Second EO, relating to any program, policy, or procedure for screening, vetting, or adjudicating adjustment-of-status or naturalization applications within the custody, possession, or control of USCIS to the extent such Documents exist, are of national applicability, are intended to expand or modify CARRP such that they would embody CARRP in all but name, and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 25:** All Documents referring or relating to the relationship between CARRP and any other preexisting or planned policy, program, standard, or procedure for screening, vetting, or adjudicating Immigration Benefit Applications.

OBJECTIONS TO RFP NO. 25:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it extends beyond Plaintiffs' claims and the class members at issue in this litigation to

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include any preexisting or planned policy, program, standard, or procedure for screening, vetting, or adjudicating any Immigration Benefit Application without regard to whether adjustment-of-status and naturalization applicants would be processed in accordance with such policy, program, standard, or procedure. *See* Fed. R. Evid. 401 (defining "relevance"). Also, Defendants object in part that the term "relationship" is vague and an attenuated understanding of "relationship" would be overly broad, unduly burdensome, oppressive, and disproportionate to the needs of the litigation because under such an understanding CARRP could relate to all applications adjudicated by USCIS. Furthermore, Documents referring or relating to planned policies, programs, standards, and procedures are subject to privilege. Consistent with the Court's June 21, 2017 Order, Defendants will only produce documents for preexisting programs to the extent those programs are intended to expand upon or modify CARRP such that they would embody CARRP in all but name.

RESPONSE TO RFP NO. 25:

Notwithstanding these objections, USCIS will produce non-privileged Documents of national applicability falling within the scope of the request that concern a direct relationship between CARRP and another pre-existing policy, program, standard, or procedure for screening, vetting, or adjudicating adjustment-of-status or naturalization applications, to the extent such Documents exist and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 26:** All Documents referring or relating to "extreme vetting" or any other program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications where a National Security Concern is present.

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OBJECTIONS TO RFP NO. 26:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request because it is overly broad and unduly burdensome, not proportional to the needs of the case, is not important to resolve issues concerning CARRP or the First or Second EOs, the burden of the request outweighs its likely benefit, and the request is not temporally bounded. Other programs pre-dating the Second EO are not "of consequence in determining" the legality and constitutionality of CARRP or similar policies enacted pursuant to the Second EO. *See* Fed. R. Evid. 401 (defining "relevance"). Additionally, Defendants object that "extreme vetting" is a vague and undefined term, and it is therefore unclear exactly what Plaintiffs seek. Last, the request could be understood to include individuals whose cases raise Terrorist-Related Inadmissibility Grounds (TRIG), as many of the INA national security grounds used in determining if TRIG applies to a case are also part of identifying a national security concern. However, not all cases with a TRIG issue are handled under CARRP. In general, cases with a minimal or unsubstantial links to an undesignated terrorist organization, regardless of any TRIG considerations, do not rise to the level of sufficient indicators of a connection to an NS ground for the purposes of CARRP. Because these TRIG cases involve national security concerns, but are not generally handled under CARRP, this request would involve materials that are not relevant to the resolution of this case.

RESPONSE TO RFP NO. 26:

Notwithstanding these objections, USCIS will produce non-privileged Documents falling within the scope of the request that are dated on or after April 11, 2017, that are either

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related to CARRP or were promulgated in response to the Second EO in an effort to expand or modify CARRP such that the change would embody CARRP in all but name, and that relate to national security concerns leading to processing under CARRP, to the extent such Documents exist and can be located after a reasonable search.

> **REQUEST FOR PRODUCTION NO. 27:** All Documents referring or relating to the number of Immigration Benefit Applications subject to CARRP or designated as a National Security Concern at any point from 2008 to the present. This request includes, but is not limited, to all National Security Monthly Case Load and Aging Reports, National Security Quarterly Workload and Aging Reports, and any other periodic reports, data, or statistics related to CARRP, including those that break down applications by country of origin, citizenship, religion, or any other demographics.

OBJECTIONS TO RFP NO 27:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is overly broad and unduly burdensome, and the burden of complying with the request outweighs its likely benefit, in part because the request is not limited to the types of Immigration Benefit Applications at issue in this litigation, in part because the request seeks documents from a timeframe that extends beyond both the commencement of this case and the date on which any Immigration Benefit Applications were filed by any named plaintiff. To the extent Plaintiffs seek Documents related to cases with National Security concerns that are not subject to CARRP, such Documents are not proportional to the needs of the case, and are not relevant to resolving issues concerning CARRP or the First or Second EOs. Further, this request could literally encompass any report created by a local office for any purpose, and it would be unduly burdensome to search every possible office that might have produced such any such report.

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RESPONSE TO RFP NO. 27:

USCIS will produce responsive Documents to the extent they exist in the form sought, were created or generated by the Results and Analysis Branch ("RAB") of FDNS, relate to adjustment-of-status and naturalization applications, are of national scope, and can be located after a reasonable search. Defendants understand this request to call for Documents already in existence and not to require Defendants to create a Document to answer a question that would more appropriately be served as an interrogatory and subject to the numerical limits under Rule 33.

> **REQUEST FOR PRODUCTION NO. 28:** All Documents referring to, relating to, or reflecting the age, sex, country of origin, country of citizenship, religion, race, ethnicity, or other demographics of Immigration Benefit Applicants who have been identified as a National Security Concern or otherwise subjected to CARRP, including application processing times.

OBJECTIONS TO RFP NO. 28:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request as over broad, unduly burdensome, disproportionate to the needs of the litigation, and oppressive, to the extent that it would require individual review of every A-file of every individual applicant identified as a National Security Concern or who filed an Immigration Benefit Application that was processed under CARRP. The A file is maintained in paper and would require time-consuming and labor intensive work to collect Documents containing the demographic information sought. Moreover, this request would be disproportionate given that there is no guarantee that the information contained in the A file would have been reviewed at the time the determination to process the application under CARRP was made. Additionally, this request seeks documents not just for class members, and not just

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for adjustment-of-status and naturalization applicants, but for every Immigration Benefit Application ever processed under CARRP or identified as a National Security Concern.

RESPONSE TO RFP NO. 28:

USCIS will produce responsive Documents to the extent they pertain to adjustment-of-status and naturalization applicants, are produced or created by a USCIS headquarters component, and can be located after a reasonable search. Defendants understand this request to seek existing documents reflecting or reporting compilations of demographic data, and not to include every separate document in the possession, custody, or control of USCIS that in any way reflects a piece of demographic information, *e.g.*, a date of birth, about a person who also happens to have been identified as a National Security concern or whose application is or was subject to handling under CARRP. Further, Defendants understand a reasonable search for purposes of this request to exclude Documents contained in individual A files, as a search of that scope would not be reasonable or proportionate to the needs of the litigation and otherwise objectionable as explained above. Defendants further understand this request to call for Documents already in existence and not to require Defendants to create a Document to answer a question that would more appropriately be served as an interrogatory and subject to the numerical limits under Rule 33.

> **REQUEST FOR PRODUCTION NO. 29:** All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on national origin.

RESPONSE NO. 29:

Defendants understand the term "national origin" to refer to a person's country of origin, or the country of origin of a person's ancestors. Defendants have no documents responsive to this request.

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REQUEST FOR PRODUCTION NO. 30: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on religion.

RESPONSE NO. 30:

Defendants have no documents responsive to this request.

REQUEST FOR PRODUCTION NO. 31: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on race or ethnicity.

RESPONSE NO. 31:

Defendants have no documents responsive to this request.

REQUEST FOR PRODUCTION NO. 32: All Documents that any Defendant contends support any denial of any allegation in the Second Amended Complaint, or that any Defendant relies upon in denying any of the allegations in the Second Amended Complaint.

RESPONSE NO. 32:

Defendants will produce non-privileged, responsive documents.

REQUEST FOR PRODUCTION NO. 33: All Documents that any Defendant contends support any affirmative defense set forth in response to the Second Amended Complaint, or that any Defendant relies upon in asserting any affirmative defense set forth in response to the Second Amended Complaint.

RESPONSE NO. 33:

Defendants will produce non-privileged, responsive documents.

REQUEST FOR PRODUCTION NO. 34: All Documents sufficient to identify members of the Naturalization Class, including, but not limited to, any list that might exist identifying those who are or have been subject to

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CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the naturalization application was filed, and current status of the naturalization application.

OBJECTIONS TO RFP NO. 34:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request, specifically to identifying members of the Naturalization Class by name and A-number, as this information is privileged. Furthermore, Defendants object to this request because the identity of the class members is not relevant to the claims or defenses in this case which, as the Court previously explained, concerns Plaintiffs' "allegation that an extra-statutory policy based on discriminatory and illegal criteria is blocking the fair adjudication of immigration benefits." ECF No. 69 at 17. The identity of individual class members, as distinct from their anonymized demographic information, is not "of consequence in determining" any claim or defense in this action. *See* Fed. R. Evid. 401 (defining "relevance"). Defendants further object to this request as unduly burdensome insofar as it is read to request a copy of the A file of every class member, or a copy of the data in FDNS-DS, CLAIMS, or any other electronic information system for every single class member. Consequently, Defendants interpret this request to mean a preexisting aggregated list or compilation by a USCIS headquarters component, and not a copy of any document that may reference a class member.

RESPONSE TO RFP NO. 34:

Notwithstanding these objections, and understanding this request only to call for the production of any list or compilation of data concerning naturalization class members and reflecting the requested information, and not to include documents in individual A files, or otherwise pertaining to an individual, even if the requested information could be

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gleaned from such documents, USCIS will produce non-privileged responsive Documents or portions of Documents to the extent they exist in the form sought, were produced by a USCIS headquarters component, and can be located following a reasonable search, excluding names and A numbers. Defendants understand this request to call for Documents already in existence and not to require Defendants to create a Document to answer a question that would more appropriately be served as an interrogatory and subject to the numerical limits under Rule 33.

> **REQUEST FOR PRODUCTION NO. 35:** All Documents sufficient to identify all members of the Adjustment Class, including, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the adjustment application was filed, and current status of the adjustment application.

OBJECTIONS TO RFP NO. 35:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request, specifically to identifying members of the Adjustment Class by name and A-number, as this information is privileged. Furthermore, Defendants object to this request because the identity of the class members is not relevant to the claims or defenses in this case which, as the Court previously explained, concerns Plaintiffs' "allegation that an extra-statutory policy based on discriminatory and illegal criteria is blocking the fair adjudication of immigration benefits." ECF No. 69 at 17. The identity of individual class members, as distinct from their anonymized demographic information, is not "of consequence in determining" any claim or defense in this action. *See* Fed. R. Evid. 401 (defining "relevance"). Defendants further object to this request as unduly burdensome insofar as it is read to request a copy of the A file of every class member, or a copy of the data in FDNS-DS, CLAIMS, or any other electronic information system of every single class

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member. Defendants interpret this request to mean a preexisting aggregated list or compilation by a USCIS headquarters component, and not a copy of any document that may reference a class member.

RESPONSE TO RFP NO 35:

Notwithstanding these objections, and understanding this request only to call for production of any list or compilation of data concerning adjustment-of-status class members and reflecting the requested information, and not to include documents in individual A files, or otherwise pertaining to an individual, even if the requested information could be gleaned from such documents, USCIS will produce non-privileged responsive Documents or portions of Documents to the extent they were produced by a USCIS headquarters component and exist in the form sought and can be located after a reasonable search, excluding names and A-numbers. Defendants understand this request to call for Documents already in existence and not to require Defendants to create a Document to answer a question that would more appropriately be served as an interrogatory and subject to the numerical limits under Rule 33.

> **REQUEST FOR PRODUCTION NO. 36:** All versions of USCIS's organization chart for USCIS headquarters and the Seattle USCIS Field Office, reflecting the names, titles, and positions of officials and Employees from 2007 to the present. This request includes organization charts of USCIS as a whole, as well as the Fraud Detection and National Security (FDNS) Directorate of USCIS.

OBJECTIONS TO RFP NO. 36:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to the request for the organization charts for the Seattle USCIS Field Office as inconsistent with and irrelevant to Plaintiffs' claims and the nationwide scope of the certified classes.

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RESPONSE TO RFP NO. 36:

USCIS will produce organization charts for USCIS headquarters and FDNS reflecting information from April 2008 to the present, to the extent such charts exist and can be located after a reasonable search. Defendants understand this request to call for Documents already in existence and not to require Defendants to provide information not maintained on responsive organization charts that would more appropriately be served as interrogatories and subject to the numerical limits under Rule 33.

> **REQUEST FOR PRODUCTION NO. 37:** All versions of any organization chart or similar document reflecting or identifying the individuals responsible for implementing CARRP, including but not limited to those individuals responsible for drafting and presenting training materials about CARRP and officers designated as CARRP officers.

OBJECTIONS TO RFP NO. 37:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and the request calls for production of documents potentially a decade or more old that may be archived, not reasonably accessible, or destroyed prior to the commencement of this litigation. Read literally, this request seeks production of any organizational chart that shows the name or position of any person who might have a role in implementing CARRP, even where the organizational chart does not identify the individual's CARRP role. (Note: USCIS organizational charts do not reflect an individual's or position's duties, but rather simply the position/title). There are hundreds of individuals throughout USCIS, in nearly every office in the agency, who are designated to work on CARRP cases. CARRP designated officers are well-integrated into the organizational structure of

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USCIS and decentralized to work side by side with all other personnel performing vetting and adjudications work. Organizational charts listing individual personnel (rather than going by positions) tend to be executed at the local office level. Therefore, to produce organizational charts that show the individuals who work CARRP cases and their locations would require the retrieval of materials down to the individual field office level. This production request is also complicated by the fact that many FDNS officers, while trained in CARRP, do not actually work national security cases. And many ISOs *are* trained in CARRP, despite not being part of the FDNS organization, and *do* work CARRP cases. Additionally, the request calls for documents concerning CARRP as it existed since its inception in 2008 and are therefore only marginally relevant to the policy as it stands today and as applied to the class members.

RESPONSE TO RFP NO. 37:

Notwithstanding these objections, USCIS will produce non-privileged Documents falling within the scope of the request to the extent they exist and can be located after a reasonable search. Defendants understand this request to call for Documents already in existence, related to individuals/positions at USCIS headquarters who are involved in national-level CARRP policy, and not to require Defendants to provide information not maintained on responsive organization charts that would more appropriately be served as an interrogatory and subject to the numerical limits under Rule 33.

> **REQUEST FOR PRODUCTION NO. 38:** All Documents referring or relating to the names, titles, and job descriptions of all Your officials and Employees who bear any responsibility, directly or indirectly, in whole or in part, for CARRP or any related extreme vetting program. This request includes but is not limited to officials and Employees who are or were responsible for the creation, implementation, execution, oversight, and future development of CARRP or any related extreme vetting program.

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OBJECTIONS TO RFP NO. 38:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object in part to this request because it is not proportional to the needs of the case, is not important to resolve issues, the burden of the request outweighs its likely benefit, the request is not temporally bounded, and the request calls for production of documents potentially a decade or more old that may be archived, not reasonably accessible, or destroyed prior to the commencement of this litigation. Read literally, this request calls for every letter or other Document signed by every Field Office Director at every Field Office, as well as every Document identifying every USCIS officer assigned to FDNS, and substantial numbers of officers assigned to field offices and service centers, numerous headquarters component employees. The request is therefore overly broad, unduly burdensome, disproportionate to the needs of the case, oppressive, and likely to result in production of enormous amounts of irrelevant Documents. Defendants also object on the ground that "extreme vetting" is a vague and undefined term, and it is therefore unclear exactly what Plaintiffs seek. In addition, the request calls for documents concerning CARRP as it existed since its inception in 2008 and are therefore only marginally relevant to the policy as it stands today and as applied to the class members. Finally, to the extent that the request seeks relevant information, it is duplicative of other requests for production.

RESPONSE TO RFP NO. 38:

In light of the above objections, Defendants interpret this request to seek only documents that identify employees as responsible for duties concerning CARRP, or any vetting program that expands or modifies CARRP, and not to seek every document that merely reflects some piece of identifying information for a person who otherwise has CARRP responsibilities. As so interpreted, and notwithstanding the above objections, USCIS will

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produce non-privileged responsive Documents identifying relevant officers and employees of USCIS headquarters and FDNS to the extent they exist and can be located after a reasonable search. Defendants understand this request to call for Documents already in existence and not to require Defendants to create a document to answer a question that would more appropriately be served as an interrogatory and subject to the numerical limits under Rule 33.

REQUEST FOR PRODUCTION NO. 39: All Documents previously withheld or produced in redacted form pursuant to any exemption from the Freedom of Information Act, produced in unredacted form. This request is limited to Documents withheld or produced in response to the ACLU FOIA Request.

OBJECTIONS TO RFP NO. 39:

Defendants incorporate here by reference their earlier "Objections Which Apply to All Requests for Production." Further, Defendants object to this request in part, in that in response to the FOIA request referenced above, Documents and portions of Documents were redacted or withheld under FOIA exemptions (5), (7)(C), and (7)(E). *See* 5 U.S.C. § 552(b)(5), (b)(7)(C), (b)(7)(E). Documents and portions of Documents redacted pursuant to FOIA exemptions (5) and (7)(E) are categorically privileged. Documents and portions of Documents redacted pursuant to FOIA exemption 7(C) may be privileged.

RESPONSE TO RFP NO. 39:

USCIS will produce non-privileged responsive Documents and portions of Documents previously withheld or redacted under FOIA exemption 7(C).

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Dated: September 5, 2017

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Acting Assistant Attorney General

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Director, District Court Section

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Deputy Chief
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Respectfully submitted,

/s/ Edward S. White

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5, 2017, pursuant to the agreement of the parties at the Rule 26(f) conference, I served Defendants' Response to Plaintiffs' First Request for Production of Documents by email on Nicholas Gellert, Esq., Jennie Pasquarella, Esq, David Perez, Esq., and Laura Hennessey, Esq.

/s/ Edward S. White
EDWARD S. WHITE
U.S. Department of Justice

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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

NOTE ON MOTION CALENDAR: OCTOBER 13, 2017

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I. INTRODUCTION

Plaintiffs served Defendants with discovery requests two months ago. In response, Defendants served a series of general and specific objections riddled with legal errors and proposed an unreasonable and lengthy six-month timeline for production. In this motion, Plaintiffs address four discrete issues with Defendants' responses.[1] First, the Court should compel Defendants to produce a list of class members, other documents sufficient to identify class members, and documents regarding why Named Plaintiffs have been subject to CARRP. Although this Court has certified two nationwide classes whose membership is defined through application of a secret vetting program of which class members themselves never receive notice, Defendants improperly refuse to provide the list of class members. Second, the Court should compel Defendants to review classified documents for responsiveness and produce a log for any such documents they seek to withhold. Third, the Court should order Defendants to produce documents relating to the First and Second Executive Orders, which institute "extreme vetting" procedures that promise to expand CARRP. Despite the Court's denial of Defendants' motion to dismiss claims related to the Orders, Defendants have elected not to search for or produce responsive documents relating to those claims. And finally, the Court should make clear that Defendants cannot artificially limit their production to documents of "national applicability."

II. RELEVANT PROCEDURAL BACKGROUND

This lawsuit challenges the legality of the Controlled Application Review and Resolution Program ("CARRP"), an agency-wide policy created by Defendant U.S. Citizenship and Immigration Services in 2008, Dkt. 47 ¶ 55, and "extreme vetting" programs instituted in Executive Orders 13769, 82 Fed. Reg. 8977 ("First EO"), and 13780, 82 Fed. Reg. 13209 ("Second EO") *id.* ¶¶ 18, 138-141. Plaintiffs allege that CARRP implements an extra-statutory

[1] The negotiation process is ongoing with respect to several others of Plaintiffs' concerns, including fundamental issues related to the burden, scope, and timeliness of Defendants' productions. Declaration of David A. Perez in Support of Plaintiffs' Motion to Compel Production of Documents ("Perez Decl.") Exs. C, D. Should these negotiations prove unsuccessful, Plaintiffs may need to again seek the Court's assistance.

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internal vetting policy that discriminates on the basis of religion or national origin to indefinitely delay or pretextually deny statutorily-qualified immigration benefit applicants. *Id.* ¶¶ 35-51, 62-76. The Court certified two nationwide classes of individuals subject to CARRP or a successor "extreme vetting" program: one made up of individuals who have applied for adjustment of status ("Adjustment Class"), and the other of individuals who have applied for naturalization. ("Naturalization Class"). Dkt. 69 at 31.

Subsequently, Plaintiffs served a first set of 39 requests for production ("RFPs"). Defendants served their objections and responses on September 5, 2017. Perez Decl. Ex. A (Defendants' Objections and Responses to Plaintiffs' First Request for Production of Documents) ("Defendants' Responses"). Plaintiffs promptly wrote to Defendants, setting out a wide array of concerns with Defendants' Responses and requesting a time to meet and confer on the issues. *Id.* Ex. B (September 11, 2017 letter from Nick Gellert to counsel for Defendants). During the three-hour meet and confer conference, the parties discussed each of the concerns Plaintiffs had identified in their letter and attempted to resolve their differences. *Id.* ¶¶ 5-6. Though the parties made progress on some of Plaintiffs' concerns, and are continuing negotiations with respect to several others, the parties agreed they were at an impasse on four important issues, which are the subject of this motion. *Id.* ¶¶ 7-12.

III. LEGAL STANDARD

The Federal Rules of Civil Procedure authorize broad discovery "regarding any non-privileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1); *see Broyles v. Convergent Outsourcing, Inc.*, No. C16-775-RAJ, 2017 WL 2256773, at *1 (W.D. Wash. May 23, 2017) ("Most importantly, the scope of discovery is broad."). Moreover, relevance is assessed independently of the Federal Rules of Evidence—material "need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1).

The Federal Rules authorize motions to compel production to remedy an opposing party's evasive or incomplete answers or disclosures. FED. R. CIV. P. 37(a)(1), (3)–(4). Under the

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"liberal discovery principles" codified in the Federal Rules, a party opposing discovery "carr[ies] a heavy burden of showing why discovery was denied." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). The party seeking to compel discovery need only show that its request complies with the broad relevancy requirements of Rule 26(b)(1) to place this heavy burden on the opposing party. *Colaco v. ASIC Advantage Simplified Pension Plan*, 301 F.R.D. 431, 434 (N.D. Cal. 2014).

IV. ARGUMENT

A. Defendants Must Identify Class Members

Defendants' refusal to produce requested documents sufficient to identify class members, including a list of class members, as well as documents related to the reasons why Named Plaintiffs' applications were subject to CARRP, is improper. Perez Decl., Ex. A at 32, 34-39, 48-51 (RFP Nos. 13, 15, 17, 19, 21, 34, 35).

Defendants have made broad and unspecified assertions of privilege over class members' names and A-numbers, *id.* at 48-51 (RFP Nos. 34-35), and have asserted similar privilege concerns to prevent disclosure of whether Named Plaintiffs were subject to CARRP, *id.* at 32, 34-39 (RFP Nos. 13, 15, 17, 19, 21). But courts must reject such "blanket refusals inserted into a response to a Rule 34 request for production of documents" as "insufficient to assert a privilege." *See Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005); *see also United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009) (noting that "blanket claims of privilege are generally disfavored") (citations omitted).[2]

To the extent Defendants claim that the law enforcement investigatory privilege bars identification of individuals subject to CARRP or the reasons why the Named Plaintiffs were subjected to CARRP, they have failed to meet their burden. *See, e.g.*, *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996) (outlining strict requirements

[2] Defendants also refuse to produce any privilege log for these documents, contrary to their obligations under the Federal Rules of Civil Procedure. *See infra* at IV.B (discussing privilege log requirements).

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for asserting law enforcement privilege).[3] Even if Defendants had properly asserted the privilege, it is not absolute. *Kerr v. United States Dist. Court for N. Dist.*, 511 F.2d 192, 198 (9th Cir. 1975). Where, as here, the requested documents "are 'both relevant and essential' to the presentation of the case on the merits, 'the need for disclosure outweighs the need for secrecy,' and the privilege is overcome." *See Hemstreet v. Duncan*, No. CV-07-732, 2007 WL 4287602, at *2 (D. Or. Dec. 4, 2007) (quoting *In re Search of Premises Known as 1182 Nassau Averill Park Rd.*, 203 F. Supp. 2d 139, 140 (N.D.N.Y. 2002)); *Mueller v. Walker*, 124 F.R.D. 654, 656-57 (D. Or. 1989).

In other contexts, even Defendants do not treat the identification of CARRP cases or the reasons why an individual was subjected to CARRP as privileged, including in responses to Freedom of Information Act requests and litigation. *See, e.g.*, Dkt. 27-1, Ex. E (document, obtained through FOIA, indicating Plaintiff Wagafe's file was reviewed by a CARRP officer); Declaration of Stacy Tolchin in Support of Plaintiffs' Motion to Compel Production of Documents, Exs. 1, 2 (documents, obtained through FOIA, indicating CARRP officers involved in naturalization and adjustment of status applications); Perez Decl. Ex. E at 276:15-17 (in deposition, USCIS officer confirming that plaintiff's case was "a CARRP case"); *id.* at 277:3-9 (providing officer's understanding "of why [case] was designated a CARRP case"); *cf. id.*, Ex. F (providing for notice to individuals on the "No Fly List" of their status on the list). Thus, the Court should reject Defendants' assertion of privilege in RFPs 13, 15, 17, 19, 21, 34 and 35.[4]

Second, Defendants incorrectly assert that the identity of class members is not relevant to Plaintiffs' claims and defenses in this certified nationwide class action. *See* Perez Decl., Ex. A at 48-51 (RFP Nos. 34-35). But each individual identified is a potential witness or source of

[3] In Defendants' Responses, they assert an unspecified privilege, but indicated during the meet and confer that they referred to the law enforcement privilege. Perez Decl., ¶ 9.

[4] Because Defendants assert that privilege prevents disclosure of *whether* Named Plaintiffs are subject to CARRP, they do not address what privilege, if any, they believe applies to documents disclosing *why* Named Plaintiffs are subject to CARRP, as requested in RFP Nos. 13, 15, 17, 19 and 21. But, to the extent that they intended their blanket assertion of law enforcement privilege to cover such information, it is improper and insufficient for the reasons discussed *supra*.

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relevant information regarding, inter alia, delays, unwarranted denials, or other impacts of CARRP and successor extreme vetting programs.

Additionally, members of the Naturalization Class are witnesses and/or sources of relevant information regarding the government's failure to provide naturalization applicants any notice that they are subject to CARRP or explanation for their classification under CARRP. This is directly relevant to the Naturalization Class's procedural due process claim, which contends, inter alia, that individuals subjected to CARRP deserve the right to notice of and a meaningful explanation for their classification. *See* Dkt. 47 ¶ 263.

Moreover, now that the court has certified the classes, many individuals reach out to class counsel to inquire as to whether they are class members. Until Defendants produce a class list, Class Counsel is unable to appropriately advise potential class members whether their interests are represented in this lawsuit, or whether they face a separate issue causing delay that requires a separate legal analysis. In addition, in certifying classes of noncitizens, courts have often required Defendants to provide notice to class members in circumstances where "INS [now DHS] is uniquely positioned to ascertain class membership." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (requiring Defendants to provide notice to class members). The requested documents also may be necessary should the Court eventually require notice pursuant to Federal Rule of Civil Procedure 23(c)(2)(A) or order class-wide relief. *Cf. Algee v. Nordstrom, Inc.*, No. C 11-301, 2012 WL 1575314, at *4 (N.D. Cal. May 3, 2012) ("The disclosure of names, addresses, and telephone numbers is a common practice in the class action context.").

Thus, the requested documents are relevant pursuant to the broad scope of discovery, especially given that Named Plaintiffs and class members otherwise have no access to this information. *See, e.g.*, FED. R. CIV. P. 26(b)(1) (requiring consideration of, among other factors, "the parties' relative access to relevant information"). Nor would a response be overly burdensome, as applicants for adjustment of status and naturalization are not subject to CARRP

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unless Defendants first identify them as such, making that information readily available. The Court should order Defendants to produce documents responsive to RFP Nos. 34 and 35.

B. Defendants Must Log Responsive Classified Documents

Defendants have taken the position that they will not search any documents that have been marked classified, much less list any such responsive documents in a privilege log or produce them. Perez Decl. ¶ 10. Thus, Defendants have unilaterally decided—before reviewing such documents for responsiveness—that they will not produce any classified documents in this case because they are all privileged. But purported classification is not in itself a basis for circumventing Defendants' discovery obligations. *See, e.g.*, *Salim v. Mitchell*, No. CV-15-0286-JLQ, Dkt. No. 75 (E.D. Wash. Mar. 8, 2017) (government reviewed classified materials, deemed some no longer classified, disclosed documents in full or in redacted form, and produced a privilege log identifying objections on a document-by-document basis). By refusing even to search documents the executive branch has deemed classified, Defendants are conflating classification and privilege, and failing to determine (1) whether any such information is still properly classified; (2) whether unclassified information may be segregated and produced to Plaintiffs; and (3) whether classified information may be produced in summary and/or redacted form. If accepted, Defendants' position would also preclude Plaintiffs from effectively arguing, and the Court from adjudicating, whether classified information nevertheless must be produced because vindication of Plaintiffs' constitutional rights requires it.[5]

[5] In their September 22, 2017 letter, Defendants tried to clarify their position by saying "there are no classified documents relating to CARRP on a programmatic level," and that therefore they would only search "programmatic level" documents. *See* Perez Decl., Ex. C. But the scope of discovery is not limited to "programmatic" documents. To the extent Defendants have documents responsive to Plaintiffs' discovery requests which fall outside their narrow category of programmatic documents, Defendants refuse to search for or produce them. In addition, Defendants made clear in the parties' telephonic meet and confer conference that their claim that some non-programmatic documents could be classified was speculative. They did not actually know at that point in time if any responsive documents were in fact classified–only that, to the extent there are classified documents, they refuse to search them for responsive documents, produce any non-privileged information, and catalogue privileged information in a privilege log. *See id.* ¶ 10.

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It is well-established that an entity that withholds discovery materials based on a privilege must provide sufficient information (i.e., a privilege log) to enable the requesting party to evaluate the applicability of the privilege or other protection. FED. R. CIV. P. 26(b)(5); *see Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). Failure to provide sufficient information may constitute a waiver of the privilege. *See Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984) (privilege waived when defendant did not make a timely and sufficient showing that the documents were protected by privilege). Asserting a "blanket objection" to document requests is insufficient and improper. *Clarke*, 974 F.2d at 129 (blanket assertions of privilege are "extremely disfavored"); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (blanket privilege objection is improper); *Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182-83 (E.D. Cal. 1991) (a "blanket objection" to each document on the ground of privilege with no further description is clearly insufficient). Defendants are obligated to review any classified documents and properly determine—and invoke for adjudication—which, if any, privilege they believe applies.

At a threshold level, then, although Defendants have asserted that responsive documents previously labeled classified may exist, they have not reviewed these documents to determine whether they are *still* classified. Nor do Defendants intend to produce a log identifying each document they are withholding on the basis that it is classified. Perez Decl. ¶ 10. Thus, Defendants have not shown that the purpose of whatever privilege they would attach to these documents is even implicated in this case. *See Clarke*, 974 F.2d at 129 (failure to show purpose of attorney/client privilege had been implicated). This Court should "not sustain an objection by [Defendants] on this ground as there is no showing that the privilege attaches to any of the requested documents. In the event that the privilege is later invoked as to any specific document, [Defendants] must provide [Plaintiffs] the requisite privilege log." *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, CV-058444-DDPPLAX, 2012 WL 12875772, at *9 (C.D. Cal. Aug. 29, 2012).

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Closely reviewing these documents and generating a privilege log is especially important if the government plans to assert that the state secrets privilege applies to any particular document or documents. In another similar context in which the government identified particular documents over which it claimed the privilege, litigation was able to progress so that the privileged information was not required to be produced. *Salim v. Mitchell*, No. CV-15-0286-JLQ, Dkt. No. 188 (E.D. Wash. May 31, 2017). That may well be possible here. Moreover, the Ninth Circuit has cautioned that the state secrets privilege "is not to be lightly invoked." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007). Therefore, the privilege should be invoked, if at all, only with respect to a specific record, and it is well established that to assert the state secrets privilege, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after *actual personal consideration by the officer*." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (emphasis added). Blanket objections without individual review of *specific* documents do not suffice here. If the privilege is in fact invoked, Plaintiffs may object and the court must determine whether the privilege assertion is appropriate under the circumstances. *Id*. at 8. In short, even this exceptional privilege requires Defendants to review any responsive classified document.

Defendants must review these documents for responsiveness. If they are responsive, Defendants should determine whether they are still legitimately classified, and whether there are any alternatives to withholding the information entirely.[6] If Defendants seek to assert that any particular document is privileged, they must make a formal claim of privilege to facilitate the necessary judicial review of that determination.

C. Defendants Must Produce Documents Related to the First and Second Executive Orders

Defendants' outright refusal to produce documents related to the First and Second Executive Orders is improper because there is a recognized potential connection between

[6] Moreover, if a responsive document is classified, Plaintiffs' counsel may pursue the necessary security clearance to view classified materials.

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CARRP and the "extreme vetting" policies instituted by the First and Second EOs. Dkt. 47 ¶¶ 138-141; Dkt. 69 at14-15, 23-24. Accordingly, Defendants must produce documents related to the First and Second EOs, as requested in Plaintiffs' RFP Nos. 23 and 24.

The SAC challenges the legality of CARRP on several constitutional and statutory grounds. Dkt 47. Plaintiffs contend that CARRP applies extra-statutory, secret criteria to delay indefinitely, or deny on pretextual grounds, the applications of statutorily-qualified adjustment of status and naturalization applicants who are Muslim or hail from Muslim-majority countries. *See, e.g., id.* ¶¶ 7, 11, 76, 94-95. The First and Second EOs order the implementation of an "extreme vetting" regime that, upon information and belief, would dramatically expand CARRP as it currently exists. *See id.* ¶¶ 138-141.[7] Due to the secrecy of CARRP, Plaintiffs have no way of knowing whether and to what extent CARRP has shifted over time, including pursuant to these EOs. *See id.* ¶ 19 n.1. Thus, Plaintiffs' challenge to CARRP incorporates a challenge to any similar successor vetting policy that may exist. *Id.*

In their motion to dismiss, Defendants contended the claims "concerning 'extreme vetting'" under the Second EO should be dismissed. Dkt. 56 at 22. Defendants also challenged the inclusion of the EOs in their Response to Plaintiffs' First Amended Motion for Class Certification. Dkt. 60 at 7-8. The Court already rejected both challenges. Dkt. 69 at 15 & n.6, 23-24.

Following the Court's ruling, Plaintiffs sought targeted discovery regarding any consideration of CARRP in the promulgation of the First or Second EOs, as well as documents regarding the "extreme vetting" program the EOs promised. Specifically, Plaintiffs' Requests state:

[7] A recent Presidential Proclamation expanding the scope of the travel ban does not alter the "extreme vetting" provisions of the First and Second EOs. *Compare* Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorist or Other Public-Safety Threats, Sept. 24, 2017, https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry, *with* Second EO, sections 4, 5.

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REQUEST FOR PRODUCTION NO. 23: All Documents referring or relating to any consideration of or reference to CARRP during the planning, drafting, or issuing of the First and Second EOs.

REQUEST FOR PRODUCTION NO. 24: All Documents referring or relating to "extreme vetting" or any other screening, vetting, or adjudication program, policy, or procedure connected to the First or Second EOs. This request includes, but is not limited to, programs that reference, relate to, or expand upon CARRP.

Perez Decl. Ex. A at 40-42 (Defendants' Responses).

First, discovery related to the EOs is not, as Defendants contend, "premature in light of the oral argument scheduled before the Supreme Court on October 10, 2017, in *Trump v. Int'l Refugee Assistance Project*." *Id.* at 3. The issues before the Supreme Court are limited to the legality of the temporary suspension of the entry of non-citizens pursuant to Section 2(c) of the Second EO. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572, 579 (4th Cir. 2017). Plaintiffs' Requests, in contrast, are aimed at Section 4 of the First EO and Sections 4 and 5 of the Second EO, which relate to the "extreme vetting" program to be promulgated thereunder that promises to expand or modify CARRP. Dkt. 47 ¶¶ 111, 138-141; Perez Decl. Ex. A at 40-42 (RFP Nos. 23-24).[8]

Second, discovery related to the First EO is not moot based on Defendants' contention that the Second EO rescinded and replaced the First EO. Perez Decl. Ex. A at 3, 40-41. Although any "extreme vetting" policy would currently be implemented pursuant to the Second EO, such a program may have been discussed, planned, or initially implemented pursuant to the First EO.

Third, discovery related to the EOs is not, as Defendants contend, categorically privileged pursuant to the deliberative process privilege. *Id.* Ex. A at 41; *id.* ¶ 11. As explained in IV.B, *supra*, Defendants cannot assert privilege on a categorical basis before searching for and

[8] Though the Supreme Court has since canceled the October 10 oral argument to permit supplemental briefing on the recent Presidential Proclamation, Plaintiffs' response to Defendants' objections remains is unchanged.

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reviewing potentially responsive documents. Indeed, Rule 26 requires parties to detail the nature and basis for withholding all otherwise responsive documents. FED. R. CIV. P. 26(b)(5)(A); *see Broyles*, 2017 WL 2256773 at *3 ("Under Rule 26, a party who withholds information as privileged must produce a privilege log."). Moreover, the deliberative process privilege would only potentially attach to the subset of responsive documents that are (1) "predecisional," meaning "prepared in order to assist an agency decisionmaker in arriving at his decision," and (2) "deliberative," meaning "disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992), *as amended on denial of reh'g* (Sept. 17, 1992) (quotations omitted). Defendants' contention that every document referencing or referring to CARRP in the planning, drafting or issuing of the First and Second EOs satisfies this narrow standard—without even reviewing the potentially responsive documents—strains credulity. Relatedly, production of documents directly from the President may be subject to heightened standards of relevancy, but the President—as a party to this case—is not automatically immune from all discovery. During the parties' meet and confer, Defendants admitted that though they believed the President's office would be the primary source of information related to the EOs, they had not asked the President's office about potentially responsive custodians or sources of non-custodial documents.[9] Perez Decl. ¶ 11. If Defendants argue that the President himself must be insulated from document production obligations, they must provide alternate custodians and non-custodial sources of information that will capture the documents Plaintiffs seek.

[9] Accordingly, it is unclear whether a litigation hold has been issued at the Executive Office of the President.

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D. Defendants Cannot Limit Production to Documents of "National Applicability"

Finally, Defendants' refusal to produce documents other than those of "national applicability" is improper. Defendants state that they will restrict the bulk of their production of responsive documents to those of "national applicability." *See* Perez Decl. Ex. A at 17-29, 40-43 (RFP Nos. 1, 3-10, 22, 24-25). Though this term is undefined in Defendants' Responses, the parties' meet and confer confirmed that Defendants intend to produce only national, policy-level documents related to CARRP because they interpret Plaintiffs' case to challenge the CARRP policy on a national and not individual level. *Id.* ¶ 12.

Defendants' claim is based on an incorrect understanding of Plaintiffs' challenge to the legality of CARRP. As outlined in Plaintiffs' SAC, CARRP is an agency-wide policy by which USCIS identifies immigration benefit applications that raise "national security concerns," and then processes and adjudicates those applications subject to extra-statutory rules and criteria that result in indefinite delay or pretextual denial of statutorily-qualified applicants. *See, e.g.*, Dkt. 47 ¶¶ 55, 60-61. The official CARRP policy imposes several criteria to determine whether an applicant is considered a "national security concern," which, in practice, "often turn on discriminatory factors such as religion or national origin." *Id.* ¶¶ 62, 76. Plaintiffs seek documents that will reveal not only what these criteria are, but how they are applied in a discriminatory manner. In addition to official policy documents, such evidence is likely to also appear in regional or individual communications about CARRP's application to specific categories of applications or people. Defendants' qualification that they will only produce documents of "national applicability" promises to conceal any discriminatory application of CARRP by local offices adjudicating applications for adjustment of status and naturalization and to prevent the judicial review that the Court has ordered must occur.

V. CONCLUSION

The Court should enter an order compelling Defendants to produce the categories of documents as outlined in this motion and the proposed order submitted herewith.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 28th day of September, 2017, at Seattle, Washington.

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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, Plaintiffs, v. DONALD TRUMP, *et al.*, Defendants.	CASE NO. C17-0094-RAJ RESPONSE IN OPPOSTION TO PLAINTIFF'S MOTION TO COMPEL

I. INTRODUCTION

Plaintiffs have alleged that, for close to a decade, a government conspiracy cutting across three administrations of both major political parties has intentionally and unlawfully delayed processing of certain immigration benefit applications based on impermissible criteria. Relying almost exclusively on authority that pre-dates the 2015 amendments to the Federal Rules of Civil Procedure concerning the scope of discovery, Plaintiffs (i) demand that Defendants identify members of the certified classes notwithstanding that, by definition, each class member has an articulable link to a national-security ground of inadmissibility; (ii) demand Defendants search for and log classified documents; (iii) demand Defendants produce documents subject to the deliberative process privilege and Executive privilege as a class; and (iv) demand Defendants produce voluminous documents concerning individual class members that are inconsistent with Plaintiffs' facial challenges and shed no light on the legality of national

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policy. For the reasons detailed below, Plaintiffs' demands are inconsistent with Rule 26, which limits discovery to relevant, non-privileged material that is proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Each of the categories of information Plaintiffs seek to compel fails to meet at least one (and often more than one) of these requirements for documents to be discoverable.

II. PROCEDURAL HISTORY

On August 1, 2017, Plaintiffs served Defendants with Plaintiffs' First Requests for Production to Defendants ("Requests for Production"). *See* ECF No. 92, Ex. A. On September 5, 2017,[1] Defendants served Objections and Responses to Plaintiffs' First Request for Production of Documents ("Objections and Responses"). *Id.* On September 11, 2017, Plaintiffs' counsel sent a letter to Defendants' counsel, outlining Plaintiffs' issues with Defendants' Objections and Responses. *Id.*, Ex. B. On September 19, 2017, via telephone conference, the Parties' counsel met and conferred to discuss Plaintiffs' counsel's September 11, 2017 letter. After the meet and confer, the Parties' counsel exchanged letters on September 22 and 27, 2017, in an attempt to resolve the issues. *Id.*, Exs. C, D. In Plaintiffs' counsel's September 27, 2017 letter, Plaintiffs' counsel requested Defendants' counsel to confirm whether the Parties had reached an impasse on four issues:

> We also write to confirm that the parties are at an impasse on the following four issues: (1) Defendants' refusal to produce a list or other documents sufficient to identify the members of each class and documents regarding why Named Plaintiffs have been subject to CARRP; (2) Defendants' refusal to review classified documents and produce a privilege log of any such documents they seek to withhold; (3) Defendants' refusal to produce documents relating to the First and Second Executive Orders; and (4) Defendants' refusal to produce responsive documents that are not of "national applicability."

[1] Plaintiffs consented to a modest extension of time, from August 31, 2017 to September 5, 2017 to respond to their 39 individual Requests for Production. Defendants' response to the Requests for Production was timely.

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Id., Ex. D. In Plaintiffs' counsel's letter of September 27, 2017, Plaintiffs' counsel requested a response by October 2, 2017. *Id.* On September 28, 2017, Plaintiffs filed the instant motion to compel.[2]

III. LEGAL STANDARD

In describing the relevant standard under Rule 26, Plaintiffs state that "[t]he Federal Rules of Civil Procedure authorize broad discovery 'regarding any non-privileged matter that is relevant to any party's claim or defense.'" Doc. 91 at 2. That is only part of the rule. The rest of Rule 26 provides that, in addition to privilege and relevancy, discovery is limited to that which is:

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to the relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). Thus, the possibility that a category of documents will be privileged (or even that many documents within a category will be privileged) is relevant to determining whether the request is proportional to the needs of the case, and especially whether the burden outweighs its likely benefit. *In re Blue Cross Blue Shield Antitrust Litig.*, 13-cv-20000, 2017 WL 2889679, *2 (N.D. Ala. Jul 6, 2017) ("given the likelihood that most of the responsive documents relating to Professional Liability insurance coverage will be subject to some privilege or work-product protection, the burden and expense of searching for the remaining non-privileged responsive documents outweighs the potential benefit."); *IDS Prop. & Cas. Ins. Co v. Fellows*, No. 15-cv-2031, 2017 WL 202128, *5 (W.D. Wash. Jan. 18, 2017) (holding potential privilege rendered discovery request disproportionate to the needs of the case).

IV. ARGUMENT

This case raises a facial challenge to the Controlled Application Review and Resolution Program ("CARRP"), a procedure used by U.S. Citizenship and Immigration

[2] Plaintiffs' counsel did not propose the use of the Court's expedited joint motion procedure. *See* LCR 37(a)(2).

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Services ("USCIS") to adjudicate some applications for immigration benefits where there is an articulable link between the applicant and a national-security related ground of inadmissibility. Specifically, Plaintiffs have challenged the lawfulness of CARRP, and any successor program. ECF No. 58, at 24 ("Plaintiffs, however, 'do not seek damages for specific acts of discrimination against themselves,' but rather ask only that the Court review the legality of CARRP against requirements dictated by Congress in the INA."). The Court has agreed—"The common question here is whether CARRP is lawful. The answer is 'yes' or 'no.' The answer to this question will not change based on facts particular to each class member, because each class member's application was (or will be) subjected to CARRP." ECF No. 69, at 27. Given these challenges to the overall program, the discovery Plaintiffs seek is not related to the claims or defenses of any party, is not proportional to the needs of the case under Rule 26(b)(1), and much of it is privileged as well. Indeed, the likelihood that many documents or categories of documents will be privileged weighs against permitting discovery as disproportionate and burdensome. A lengthy and accurate privilege log benefits no one, least of all the Court if asked to review documents *in camera*.

A. The Identity of Class Members Is Not Discoverable Under Rule 26(b)(1)

1. The Identity of Class Members Is Not Relevant to This Rule 23(b)(2) Class Action

The specific identity of individual class members—as distinct from anonymized data that does not include names—is irrelevant to this litigation. Indeed, it is far from clear that demographic information about class members is itself relevant, as Plaintiffs claim that Defendants have acted on grounds equally applicable to the class as a whole. ECF No. 49 at 17 (noting "the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to none of them") (internal citation omitted). Disclosing personally identifiable information (i.e., names and A-numbers) of particular individuals adds nothing to Plaintiffs' case.

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Plaintiffs suggest that "each individual is a potential witness or source of relevant information." ECF No. 91, at 4-5. But Rule 23 no longer permits discovery of information merely "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 23(b)(1), advisory committee notes to 2015 amendments. Moreover, witnesses who can attest only to their own situation are not—indeed, cannot—be relevant to the claims that can be pursued by a Rule 23(b)(2) class. As noted, Plaintiffs have alleged that Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added); *see* ECF No. 49, at 17-18. If individual class members are relevant witnesses because they can speak to individual "delays, unwarranted denials,[3] or other impacts of CARRP," ECF No. 91, at 5, then the class should be decertified, because injunctive relief would not be appropriate to the class as a whole. Plaintiffs cannot have it both ways. If, as Plaintiffs allege, Defendants acted on grounds equally applicable to all class members, then individual hardships are irrelevant.[4]

Plaintiffs claim that courts "often" require disclosure of class members' contact information. ECF No. 91 at 5. But neither of the two cases Plaintiffs cite for this proposition raise national security concerns. *See Barahona-Gomez v. Reno,* 167 F.3d 1227, 1238 (9th Cir. 1999) (requiring notice to class-member aliens to prevent their deportation in violation of injunction); *Algee v. Nordstrom, Inc.*, No. 11-cv-301, 2012 WL 1575314, *4-*5 (N.D. Cal. May 3, 2012) (permitting discovery of contact information for putative class members in a labor dispute to "determine whether a class action is maintainable"). Indeed, the *Algee* court noted that, in the context of a labor

[3] As Defendants have noted, *see* ECF No. 77 at 3, n.5; ECF No. 56 at 9 n.6, Plaintiffs' repeated assertions that they are challenging "unwarranted" or otherwise unlawful denials is inconsistent with the definitions of the certified classes, and no class representative has had an application denied. The classes concern delay only.

[4] The same is true for Plaintiffs' contention that identifying members of the Naturalization Class is relevant to determining whether Due Process entitles them to notice and explanation of why their application was handled pursuant to CARRP. ECF No. 91, at 5. Individualized anecdotal evidence is not relevant to determining whether Defendants acted or refused to act on grounds applicable to the class as a whole. *See* Fed. R. Civ. P. 23(b)(2).

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dispute, contact information for putative class members was "not particularly sensitive." *Id.* at *5. The same cannot be said here, where identifying class members *ipso facto* identifies aliens with an articulable connection to a national-security related ground of inadmissibility or deportability. ECF No. 94 ¶¶ 61-62; Declaration of James W. McCament (Ex. E) ¶¶ 14-15. Plaintiffs also claim they have difficulty in advising individuals who may be class members whether their interests are adequately represented. This is not relevant to whether the identity of class members is discoverable.[5] *See* Fed. R. Civ. P. 26(b)(1) (limiting analysis of discoverability to that which is relevant, non-privileged, and proportionate).

2. Identifying Class Members is Unreasonably Burdensome

Beyond this, Plaintiffs cavalierly suggest that because applicants for adjustment of status and naturalization are subjected to CARRP by Defendants, it necessarily follows that Defendants' identification of class members cannot be unreasonably burdensome. ECF No. 91 at 5-6. But as Defendants have explained, CARRP is a method, not a status; it is a "how" rather than a "what." ECF No. 74 ¶ 96 ("CARRP is not a 'classification' but rather an internal handling policy to guide USCIS personnel in the thorough and consistent investigation and adjudication of immigration benefit applications that raise national security concerns."); Ex. E ¶ 14. As such, determining the identity of class members based on the factors enumerated in the class definitions would require manual compilation of data from multiple sources, including paper records for each individual class member.

As USCIS Deputy Director James McCament explains in his attached declaration, USCIS employs different systems to track adjudication and national-security concerns. Declaration of James W. McCament (Ex. F) ¶¶ 7-12. Additionally, some USCIS systems require manual data entry and, like any such systems, are subject to occasional errors, omissions, and delays in data entry. *Id.* ¶ 12. Identifying all likely class members would thus require a time- and labor-intensive process requiring engagement among multiple

[5] It does highlight, however, the difficulty of certifying classes that may contain class members who lack Article III standing. *See* ECF No. 73, at 2-4.

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components of USCIS. USCIS estimates the cost of doing so would exceed $1.2 million. *Id.* ¶ 27. This figure does not account for changes in the composition of the class, which would occur each time an application subject to CARRP reaches the six-month mark, and when an application is adjudicated and the former class member no longer has standing. *Id.* ¶ 28.

Furthermore, compiling a list of likely class members would have detrimental consequences for USCIS, and in particular FDNS, "to conduct its core mission to enhance the integrity of the legal immigration system by leading USCIS's efforts to identify threats to national security and public safety, detect and combat immigration benefit fraud, and remove systematic and other vulnerabilities." *Id.* at 29. In short, the burden on Defendants to identify class members—both monetary and by degrading USCIS's law-enforcement capability—far outweigh the utility of providing Plaintiffs with a list of class members that may be outdated as soon as it is created. *See* Fed. R. Civ. P. 23(b)(1).

3. The Identities of Class Members Are Privileged

In any event, the identities of class members are privileged. The law enforcement privilege protects from dissemination information contained in both criminal and civil investigatory files. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1136, 1341 (D.C. Cir. 1984); *United States v. McGraw-Hill Cos. Inc.*, No. 13-cv-779, 2014 WL 1647385, *6 (C.D. Cal. Apr. 15, 2014). The privilege acknowledges the strong public interest in safeguarding the integrity of investigations, *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988), and it may be invoked to protect the ongoing or future effectiveness of investigatory techniques, *Shah v. Dep't of Justice*, 89 F. Supp. 3d 1074, 1080 (D. Nev. 2015).

As more fully explained in the attached declaration, disclosure of whether a particular individual application is subject to CARRP could cause substantial harm to law enforcement investigations and intelligence activities. Ex. E ¶ 18. Acknowledging that a particular individual has an articulable link to national-security related grounds of

inadmissibility or removability, 8 U.S.C. §§ 1182(a)(3)(A), (B), (F) or 1227(a)(3)(A), (B), (F), could understandably cause the individual, or his associates, to seek out means to avoid detection, or frustrate an on-going investigation by revealing to the individual that the government has information linking him or her to a national security ground of inadmissibility or removability. *Id.* Because disclosure of the identities of individuals subject to CARRP could naturally and directly impede the effectiveness of ongoing and future investigations, the identities of class members are protected from disclosure by the law enforcement privilege. *See Shah*, 89 F. Supp. 3d at 1080.

Plaintiffs observe that the law enforcement privilege can be overcome in certain, limited instances upon a showing of necessity. *See* ECF No. 91, at 4. But the "key" to evaluating necessity is "the extent to which adequate alternative means could have substituted." *United States v. Cintolo*, 818 F.2d 980, 1003 (1st Cir. 1987) (internal quotation omitted). Here, there is no need to personally identify the class members. Defendants have offered to provide, if requested, class members' anonymized biographical data reasonably available to Defendants in electronic systems, which goes to the crux of Plaintiffs' theory that class members are being unlawfully discriminated against because of their religion or national origin. Because names and other personally identifying information add nothing to Plaintiffs' case, the privilege cannot be overcome.[6]

Plaintiffs suggest that in other contexts Defendants have disclosed information concerning specific applications subject to CARRP. ECF No. 91, at 4. But, as discussed in separate declarations, any such disclosures were made by mistake. Ex. E ¶ 19 (documents released in litigation); Declaration of Jill A. Eggelston (Ex. G) ¶¶ 13-26 (documents released pursuant to FOIA request). Moreover, the Government's mistaken "release of a document only waives these privileges for the document or information specifically released, and not for related materials." *In re Sealed Case*, 121 F.3d 729, 741

[6] To the extent that the Court requires disclosure of class-wide demographics despite the burden it places on Defendants, for what should be obvious reasons the Court should not require Defendants to disclose the identities of individual class members.

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(D.C.Cir.1997); *see also Smith v. Cromer*, 159 F.3d 875, 880 (4th Cir.1998) (explaining that "disclosure of factual information does not effect a waiver of sovereign immunity as to other related matters"); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 66 (1st Cir. 2007).

B. No Relevant Classified Documents Exist

Plaintiffs next demand that Defendants search for and log classified information. Defendants previously indicated that responsive classified documents may exist. Defendants' investigation has now progressed to the point that Defendants are confident there are no classified documents that pertain to the CARRP policy.

Matthew D. Emrich, the Associate Director of the Fraud Detection and National Security Directorate of USCIS, is unaware of any classified information that was used or consulted in developing, drafting, revising, or modifying CARRP; does not believe that any relevant classified CARRP policy, guidance, or training exists; does not believe that any CARRP policy, training, or guidance has been discussed over classified email; and, accordingly, is not aware of any places that classified information concerning CARRP might be found. Declaration of Matthew D. Emrich (Ex. H) ¶ 10-13. Although there are likely classified communications related to the specific case and circumstances of individual class members, as explained above, such case-specific information is not relevant to the facial CARRP challenge being raised in this case. As the individual responsible for the relevant directorate is unaware of any classified information or data sources likely to contain documents pertaining to CARRP, there is nowhere to search and nothing to log.

C. Discovery Concerning the Executive Orders Is Improper

Plaintiffs next contend that "there is a recognized potential connection between CARRP and the 'extreme vetting' policies instituted by the First and Second EOs." ECF No. 91 at 8-9. This "potential connection" is merely an allegation. The Court permitted claims related to the Executive Orders to move beyond the pleading stage because "they include allegations of a possible future and unlawful program that would embody

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CARRP in all but name." ECF No. 69 at 15. The Court cautioned, however, that "[t]he main thrust of this case is the legality of CARRP." *Id.* As described in the attached declaration, however, there is no actual connection between CARRP and the Executive Orders. The CARRP policy and any EO-related policies are distinct. Declaration of Julie H. Farnam (Ex. I) ¶ 10.

In its Order, the Court construed "Plaintiffs' allegations regarding an 'extreme vetting' program as a safeguard against the Government doing away with CARRP and reinstituting a substantially similar program under a different name." ECF No. 69, at 23. That has not happened. *Id.* ¶¶ 8-9. Thus, any discovery into the rationale behind Executive Orders that have neither affected Plaintiffs nor superseded CARRP is neither related to the claims currently at issue nor proportionate to the needs of the litigation. It is, at a minimum, wildly premature. As the Court indicated, discovery would be appropriate only if and when CARRP is replaced by a new program pursuant to Executive Order. But no such plans are currently under consideration. *Id.*

Moreover, regardless of whether Defendants can assert a categorical deliberative-process privilege over materials related to the EOs before searching and logging documents, Defendants can show, simply based on the language of Request for Production No. 23, that any responsive documents are virtually assured to be privileged under the deliberative-process privilege, Executive privilege, or both. *See* Ex. A, Request for Production No. 23 (requesting "[a]ll documents referring or relating to any consideration of or reference to CARRP during the planning, drafting, or issuing of the First and Second EOs"). The burden of searching for, reviewing, and logging documents—virtually all of which are assured to fall under the deliberative-process privilege simply by virtue of being part of the "planning" or "drafting" process—is disproportionate to the needs of the case under Rule 26(b)(1).

Beyond this, as the President is not subject to suit for injunctive relief in the performance of his official duties and the potential benefit of responding to discovery demands is exceedingly slight as compared to the burden of conducting the search and

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the intrusion on the Executive. The Supreme Court requires Plaintiffs to make a heightened showing of need before they can require a search for, and force the government to determine whether to formally assert privileges with respect to, discovery sought from the President or his close advisers. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004) (reversing court of appeals decision that the Vice President and other executive officials must first formally assert privilege before the Court may address their separation-of-powers objections to discovery requests).

Courts have thus applied *Cheney* to require a heightened showing of need before imposing the burden of responding to discovery, as the consideration and assertion of applicable privileges in these circumstances must be a "last resort." *United States v. McGraw-Hill Companies, Inc.*, No. 13-cv-0779, 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014); *see also Dairyland Power Co-op v. United States*, 79 Fed. Cl. 659, 662 (2007) ("The Court agrees with the Government that, in the case of a discovery request aimed at the President and his close advisors, the White House need not formally invoke the presidential communications privilege until the party making the discovery request has shown a heightened need for the information sought.").

A showing of heightened need is necessary because, as the Supreme Court has recognized, the separation of powers under our Constitution is directly implicated by subjecting the President to judicial process in matters arising out of the performance of his official duties. *Nixon v. Fitzgerald*, 457 U.S. 731, 748-55 (1982); *cf. Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). This is motivated not solely by the concern for maintaining Presidential confidentiality and preventing the need to address difficult separation of powers issues, but also with the distractions created by the burden of responding to discovery requests, and evaluating documents for the assertion of privilege, in light of the President's official duties. *See Cheney*, 542 U.S. at 382, 385, 389-90. Plaintiffs have not made this showing.

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D. Only Documents of Nationwide Applicability Are Relevant to Nationwide Classes

1. Producing Documents From Over 100 Locations Is Unduly Burdensome

If USCIS were compelled to conduct an agency-wide domestic search for documents referring or relating to CARRP, it could potentially involve collection from 85 field offices, 26 district offices, and 5 service centers, regardless of whether they issued national-level policy or processed the types of immigration benefit applications at issue in this litigation, as well as certain directorates and program offices within USCIS headquarters. Moreover, as written, the relevant Requests for Production would require Defendants to search for, review, and produce or log documents relating to CARRP solely in the context of adjudication of specific benefit applications. As explained above, searching for, reviewing, and producing or logging documents that shed no light on the legality of national policy are beyond the claims that can be pursued by the two nationwide classes. Plaintiffs' request is therefore not related to their claims or defenses and is clearly disproportionate to the needs of the litigation.

2. Plaintiffs Have Challenged CARRP on Its Face, Not As Applied

Finally, Defendants insist that Plaintiffs produce documents to include "regional or individual communications about CARRP's application to specific categories of applications or people." ECF No. 91 at 12. Plaintiffs contend that this information is necessary to uncover "any discriminatory application of CARRP by local offices adjudicating applications for adjustment of status and naturalization." This rationale is inconsistent with Plaintiffs' claims and the scope of the certified classes.

Plaintiffs have framed their case as a challenge to "the legality of CARRP against requirements dictated by Congress in the INA." ECF No. 58 at 24. And, as noted above, the Court has observed that the "common question here is whether CARRP is lawful. The answer is 'yes' or 'no.' The answer to this question will not change based on facts particular to each class member, because each class member's application was (or will be) subjected to CARRP." ECF No. 69 at 27. As such, application of CARRP to specific

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types of applications, categories of people, or specific individuals—including Plaintiffs' demand for discovery into information regarding "discriminatory application of CARRP by local offices," ECF No. 91 at 12—is beyond the purview of the classes certified by the Court. *See* Fed. R. Civ. P. 23(b)(2); ECF No. 69, at 30 ("Here, Plaintiffs allege that CARRP is unlawful and ask the Court to enjoin the Government from submitting putative class members' immigration application to CARRP. A single ruling would therefore provide relief to each member of the class.").

Plaintiffs sought—and were granted—permission to represent two nationwide classes. Remedies for discriminatory application at regional or local offices is inconsistent with the relief that can be provided to a nationwide class certified under Rule 23(b)(2). The scope of discovery must now align with the certified classes and exclude documents not relevant to whether the Court can grant relief on a national class-wide basis.

V. CONCLUSION

The Court should deny Plaintiffs' Motion to Compel Production of Documents.

Dated: October 10, 2017

Respectfully submitted,

/s/ Aaron R. Petty
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 10, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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David A. Perez, Esq.
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s/ Aaron R. Petty
AARON R. PETTY
U.S. Department of Justice

Exhibit A

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States *et al.*,

Defendants.

No. 17-cv-00094 RAJ

PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION TO DEFENDANTS

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
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TO: Defendants Donald J. Trump, United States Citizenship and Immigration Services, John F. Kelly, James McCament, Matthew D. Emrich, and Daniel Renaud.

AND TO: Edward S. White and Aaron R. Petty, Office of Immigration Litigation, U.S. Department of Justice, attorneys for Defendants.

Pursuant to Federal Rules of Civil Procedure 26 and 34, Abdiqafar Wagafe, Mehdi Ostadhassan, Hanin Omar Bengezi, Noah Adam Abraham (f/k/a Mushtaq Abed Jihad), and Sajeel Manzoor (collectively, "Plaintiffs"), on behalf of themselves and others similarly situated, request that Donald Trump, President of the United States; United States Citizenship and Immigration Services; John F. Kelly, in his official capacity as Secretary of the U.S. Department of Homeland Security; James McCament, in his official capacity as Acting Director of the U.S. Citizenship and Immigration Services; Matthew D. Emrich, in his official capacity as Associate Director of the Fraud Detection and National Security Directorate of the U.S. Citizenship and Immigration Services ("FDNS"); and Daniel Renaud, in his official capacity as Associate Director of the Field Operations Directorate of the U.S. Citizenship and Immigration Services (collectively, "Defendants") produce for inspection and copying the documents and things within their possession, custody, or control falling within the scope of the requests below within thirty (30) days of service hereof, in accordance with the Federal Rules of Civil Procedure and the definitions and instructions below. Please produce the documents and things described herein to the attention of the law firm of Perkins Coie LLP, 1201 Third Ave., Ste. 4900, Seattle, WA 98101-3099. These requests are continuing in nature. As such, Defendants must supplement their responses in a timely manner in accordance with Federal Rule of Civil Procedure 26(e) as additional or corrective information comes to their or their counsel's attention.

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INSTRUCTIONS

The following instructions shall apply when responding to these requests for production:

1. Each request herein calls for production of all responsive Documents within Your possession, custody, or control, or that of Your agents, consultants, representatives, and, unless privileged, attorneys.

2. Without limitation of the term "control" as used in the preceding instruction, a Document is deemed to be in Your control if You have the right to secure the Document or a copy thereof from another Person having actual possession thereof.

3. Each Document request and subparagraph or subdivision thereof is to be answered separately. After each Document request, state whether all Documents responsive to that request are being produced.

4. Each Document request herein shall be deemed to be continuing and, in the event that additional Documents are later discovered or become known to You, further production is to be made hereto.

5. If You object to answering any of these requests, or withhold Documents from production in response to these requests, in whole or in part, state your objections and/or reasons for not producing and state all factual and legal justifications that you believe support your objection or failure to produce.

6. If any requested Document has been lost, discarded, or destroyed, describe the Document as completely as possible, including: the name, title, and description of employment of each author or preparer of the Document; a complete description of the nature and subject matter of the Document; and the date on which and manner in which the Document was lost, discarded, destroyed, or otherwise disposed of.

7. If any part of a Document is responsive to a Document request, the whole Document is to be produced.

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8. If You contend that it would be unreasonably burdensome to obtain and provide all of the Documents called for in response to any Document request or any subsection thereof, then in response to the appropriate Document request:

a. Produce all such Documents as are available to You without undertaking what You contend to be an unreasonable request;

b. Describe with particularity the efforts made by You or on Your behalf to produce such Documents; and

c. State with particularity the grounds upon which You contend that additional efforts to produce such Documents would be unreasonable.

9. If any request is deemed to call for privileged Documents, and such privilege is asserted in order to avoid production, provide a list with respect to each Document withheld based on a claim of privilege, stating: the name of each author, the name of each recipient and addressee, the date of the Document, the general subject matter of the Document, the basis upon which the claim of privilege is asserted, and the Document request under which the production of the Document is called for.

10. In producing the Documents requested, You are requested to search electronic Documents, records, data, and any other electronically stored information ("ESI") which may be stored in or on any electronic medium or device, including without limitation computers, network servers, computer hard drives, e-mails, and voicemails. Your production of any ESI should be produced in an electronic format permitting electronic search functionality, pursuant to the Parties' stipulation, if any, regarding preservation and production of ESI.

11. In producing records responsive to Document requests, please produce tangible Documents and records organized either (1) in separate groups responsive to specific requests or (2) in the format and organization in which the Documents are kept in the ordinary course of Your business. Please produce electronic Documents and records in Tagged Image File Format ("TIFF"), single page, black and white (or in color, if necessary, for any Document or its content

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to be readable), dithered (if appropriate), at 300 x 300 dpi resolution and 8½ x 11 inch page size, except for Documents requiring different resolution or page size to make them readable. Each TIFF Document should be produced with an image load file in standard Opticon (*.log) format that reflects the parent/child relationship. In addition, each TIFF Document should be produced with a data load file in Concordance delimited format (*.dat), indicating (at a minimum) appropriate unitization of the Documents, including beginning and ending production numbers for (a) each Document set, and (b) each attachment within each Document set. TIFF images should also be accompanied by extracted text or, for those files that do not have extracted text upon being processed, optical character recognition ("OCR") text data; such extracted text or OCR text data should be provided in Document level form and named after the TIFF image. For Documents produced in TIFF format, metadata should be included with the data load files described above, and should include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the Document (that is, the custodian from whom the Document was collected or, if collected from a shared drive or server, the name of the shared driver or server); and MD5 hash value. In addition, for e-mail Documents, the data load files should also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name and address; "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files should be named or foldered in such a manner that all records can be imported without modification of any path or file name information.

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DEFINITIONS

The following definitions shall apply when responding to these requests for production:

1. "A," "an," and "any" include "all," and "all" includes "a," "an," and "any." All of these words should be construed as necessary to bring within the scope of these requests any Documents that might otherwise be construed to be outside of their scope.

2. "Adjustment of Status Application" means an Immigration Benefit Application to adjust the applicant's status to that of permanent legal resident using USCIS Form I-485.

3. "Adjustment of Status Applicant" means any individual who has filed an Adjustment of Status Application.

4. "Adjustment Class" means the following class certified by the Court in its Order Granting Class Certification, Dkt. 69: A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

5. "Alien File" or "A-file" means the collection of documents that the Department of Homeland Security (DHS) maintains for non-citizens, including all official files related to immigration status, citizenship or relief.

6. "And" and "or" shall be construed either conjunctively or disjunctively, whichever makes the request more inclusive.

7. "ACLU FOIA Request" means the American Civil Liberties Union's May 17, 2012 Freedom of Information Act Request, attached hereto as Exhibit A.

8. "CARRP" means the Controlled Application Review and Resolution Program, an internal vetting policy instituted by USCIS in April 2008. Upon information and belief, USCIS first outlined the parameters of CARRP in an April 11, 2008 memorandum addressed to field leadership from Deputy Director Jonathan R. Scharfen regarding "Policy for Vetting and

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Adjudicating Cases with National Security Concerns." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A.

9. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), and encompasses every medium of information transmittal, including but not limited to written, graphic, and electronic communication.

10. "Defendants," "You," "Your," or any similar word or phrase includes each individual or entity responding to these requests and, where applicable, each subsidiary, parent, or affiliated entity of each such Person and all Persons acting on its or their behalf.

11. "Document" and its plural shall be interpreted in the broadest possible manner and shall mean all written, electronic, graphic, or printed matter of any kind in Your possession or control, however produced or reproduced, including all originals, drafts, working papers, and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, and all other tangible things, including anything that would be a writing or recording as defined in Federal Rule of Evidence 1001(1) or as defined in Federal Rule of Civil Procedure 34(a).

12. "Donkey" Security Advisory Opinion means the type of Security Advisory Opinion generated when there are national security and/or terrorism concerns raised by the visa application.

13. "Employee" means any director, trustee, officer, employee, agent, consultant, partner, reseller, distributor, corporate parent, subsidiary, affiliate, or servant of the designated entity, whether active or retired, full-time or part-time, current or former, and compensated or not.

14. "First EO" means Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017).

15. "Immigration Benefit Application" means any application or petition to confer, certify, change, adjust, or extend any status granted under the Immigration and Nationality Act.

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16. "Immigration Benefit Applicant" means any individual who has filed an Immigration Benefit Application.

17. "National Security Concern" or "NS Concern" means the classification of Immigration Benefit Applications and Immigration Benefit Applicants that are subjected to CARRP. This includes, but is not limited to, the definition of National Security Concern used in the April 11, 2008 memorandum addressed to field leadership from Deputy Director Jonathan R. Scharfen regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns": "A NS [C]oncern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A.

18. "Naturalization Application" means an Immigration Benefit Application to naturalize as a U.S. citizen using USCIS Form N-400.

19. "Naturalization Applicant" means any individual who has filed a Naturalization Application.

20. "Naturalization Class" means the following class certified by the Court in its Order Granting Class Certification, Dkt. 69: A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

21. "Person" means an individual, proprietorship, partnership, firm, corporation, association, governmental agency, or other organization or entity.

22. "Relate," "reflect," or "refer," in all forms, means, in addition to the customary and usual meaning of those words, concerning, constituting, embodying, describing, evidencing, or having any logical or factual connection with the subject matter described.

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23. "Second Amended Complaint" means the Second Amended Complaint for Declaratory and Injunctive Relief, Dkt. 47, filed in the above-captioned action by Plaintiffs on April 4, 2017.

24. "Second EO" means Executive Order 13780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 13209 (Mar. 9, 2017).

25. "Security Advisory Opinion" means the Document created in response to a request by a U.S. consulate for a background security check on a foreign national who is applying for a U.S. visa.

26. "USCIS" means U.S. Citizenship and Immigration Services, a federal agency that is a component of the United States Department of Homeland Security and is headed by a director, currently James McCament.

27. Where appropriate, the singular form of a word should be interpreted in the plural and vice versa, to acquire the broadest possible meaning.

28. Any term defined herein shall have the indicated meaning whenever that term is used in these requests for production unless the context clearly requires otherwise. All defined terms are indicated by capitalizing the first letter of each term (except "and," "or," "relate," "reflect," and "refer"), as shown in the instructions and definitions above.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All Documents referring or relating to the development, conception, or origins of CARRP.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 2: All Documents referring or relating to the implementation of CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: All policy memoranda or other policy Documents referring or relating to CARRP, including any and all attachments. This request includes but is not limited to policy memoranda produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: All operational guidance referring or relating to CARRP, including any and all attachments. This request includes but is not limited to operational guidance produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: All training materials referring or relating to CARRP, including any and all attachments. This requests includes but is not limited to training materials produced by USCIS, U.S. Department of Defense, U.S. Department of Homeland

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Security, U.S. Department of Justice, U.S. Department of State, U.S. Customs and Border Protection, or the Office of the Director of National Intelligence.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: All Documents referring or relating to the definition or interpretation of National Security Concern.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: All Documents referring or relating to any and all policies, procedures, guidelines and training materials relating to the processing and adjudication of Immigration Benefit Applications with a National Security Concern from any directorate, department, unit or entity within USCIS, including but not limited to the Fraud Detection and National Security Directorate (FDNS), Domestic Operations Directorate (DomOps), Service Center Operations Directorate, Field Operations Directorate, Background Check Unit (BDU), and The Screening Coordination Office (SCO) of FDNS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: All Documents referring or relating to the definition of or interpretation of "national security indicators" or "national security activities," as these terms are used and applied under CARRP. This request includes, but is not limited to, any policies, procedures, guidelines, and training materials referring or relating to the identification of "national security indicators" or "national security activities," the evaluation of "national security indicators" or "national security activities," the relationship between national security

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indicators," "national security activities" and National Security Concerns, and the vetting, deconfliction and resolution of "national security indicators" and " national security activities."

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: All Documents referring or relating to the definition of or interpretation of the possible "articulable links" between a given individual and a "national security indicator" or "national security activity," as these terms are used and applied under CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: All Documents referring or relating to any policy memoranda or procedures rescinded by the implementation of CARRP. This request includes, but is not limited to, those policy memoranda and procedures listed as rescinded in the April 11, 2008 USCIS memorandum from Jonathan R. Scharfen to Field Leadership regarding "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Declaration of Jennifer Pasquarella in Support of Plaintiffs' Motion for Class Certification, Dkt. 27, Ex. A at 2-3.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: All Documents referring or relating to the connection between Security Advisory Opinion(s) issued by the U.S. Department of State and CARRP. This request encompasses both connections between CARRP and (1) specific Security Advisory Opinion(s) and (2) the Security Advisory Opinion procedure in general. This request

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includes, but is not limited to, any Security Advisory Opinion(s), including Donkey Security Advisory Opinion(s), as well as requests for Security Advisory Opinion(s) that refer or relate to the applications of any named Plaintiff or any other application subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: All Documents referring or relating to named Plaintiff Abdiqafar Wagafe. This request includes, but is not limited to, Mr. Wagafe's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Wagafe, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Wagafe.

RESPONSE:

REQUEST FOR PRODUCTION NO. 13: All Documents referring or relating to the reasons why Plaintiff Abdiqafar Wagafe's naturalization application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: All Documents referring or relating to named Plaintiff Mehdi Ostadhassan. This request includes, but is not limited to, Mr. Ostadhassan's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local

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databases referring or relating to Mr. Ostadhassan, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Ostadhassan.

RESPONSE:

REQUEST FOR PRODUCTION NO. 15: All Documents referring or relating to the reasons why Plaintiff Mehdi Ostadhassan's adjustment of status application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 16: All Documents referring or relating to named Plaintiff Hanin Omar Bengezi. This request includes, but is not limited to, Ms. Bengezi's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Ms. Bengezi, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Ms. Bengezi.

RESPONSE:

REQUEST FOR PRODUCTION NO. 17: All Documents referring or relating to the reasons why Plaintiff Hanin Omar Bengezi's adjustment of status application was subject to CARRP.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 18: All Documents referring or relating to named Plaintiff Noah Adam Abraham, f/k/a Mushtaq Abed Jihad. This request includes, but is not limited to, Mr. Abraham's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Abraham, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Abraham.

RESPONSE:

REQUEST FOR PRODUCTION NO. 19: All Documents referring or relating to the reasons why Plaintiff Noah Adam Abraham, f/k/a Mushtaq Abed Jihad's naturalization application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 20: All Documents referring or relating to the Immigration Benefit Application(s) of named Plaintiff Sajeel Manzoor. This request includes, but is not limited to, Mr. Manzoor's Alien File, any records and information stored in the Fraud Detection and National Security Directorate Data System ("FDNS-DS"), e-mail correspondence, any and all records to which USCIS adjudicators and FDNS officers had access in federal, state, or local databases referring or relating to Mr. Manzoor, and any and all records created by any U.S. Department of Homeland Security official referring or relating to Mr. Manzoor.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 21: All Documents referring or relating to the reasons why Plaintiff Sajeel Manzoor's naturalization application was subject to CARRP.

RESPONSE:

REQUEST FOR PRODUCTION NO. 22: All Documents referring or relating to any proposed, implemented, or planned modifications to CARRP from April 11, 2008 to the present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 23: All Documents referring or relating to any consideration of or reference to CARRP during the planning, drafting, or issuing of the First and Second EOs.

RESPONSE:

REQUEST FOR PRODUCTION NO. 24: All Documents referring or relating to "extreme vetting" or any other screening, vetting, or adjudication program, policy, or procedure connected to the First or Second EOs. This request includes, but is not limited to, programs that reference, relate to, or expand upon CARRP.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 25: All Documents referring or relating to the relationship between CARRP and any other preexisting or planned policy, program, standard, or procedure for screening, vetting, or adjudicating Immigration Benefit Applications.

RESPONSE:

REQUEST FOR PRODUCTION NO. 26: All Documents referring or relating to "extreme vetting" or any other program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications where a National Security Concern is present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 27: All Documents referring or relating to the number of Immigration Benefit Applications subject to CARRP or designated as a National Security Concern at any point from 2008 to the present. This request includes, but is not limited, to all National Security Monthly Case Load and Aging Reports, National Security Quarterly Workload and Aging Reports, and any other periodic reports, data, or statistics related to CARRP, including those that break down applications by country of origin, citizenship, religion, or any other demographics.

RESPONSE:

REQUEST FOR PRODUCTION NO. 28: All Documents referring to, relating to, or reflecting the age, sex, country of origin, country of citizenship, religion, race, ethnicity, or other demographics of Immigration Benefit Applicants who have been identified as a National Security Concern or otherwise subjected to CARRP, including application processing times.

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RESPONSE:

REQUEST FOR PRODUCTION NO. 29: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on national origin.

RESPONSE:

REQUEST FOR PRODUCTION NO. 30: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on religion.

RESPONSE:

REQUEST FOR PRODUCTION NO. 31: All Documents referring or relating to any program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications based on race or ethnicity.

RESPONSE:

REQUEST FOR PRODUCTION NO. 32: All Documents that any Defendant contends support any denial of any allegation in the Second Amended Complaint, or that any Defendant relies upon in denying any of the allegations in the Second Amended Complaint.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 33: All Documents that any Defendant contends support any affirmative defense set forth in response to the Second Amended Complaint, or that any Defendant relies upon in asserting any affirmative defense set forth in response to the Second Amended Complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 34: All Documents sufficient to identify members of the Naturalization Class, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the naturalization application was filed, and current status of the naturalization application.

RESPONSE:

REQUEST FOR PRODUCTION NO. 35: All Documents sufficient to identify all members of the Adjustment Class, including, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the adjustment application was filed, and current status of the adjustment application.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 36: All versions of USCIS's organization chart for USCIS headquarters and the Seattle USCIS Field Office, reflecting the names, titles, and positions of officials and Employees from 2007 to the present. This request includes organization charts of USCIS as a whole, as well as the Fraud Detection and National Security (FDNS) Directorate of USCIS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 37: All versions of any organization chart or similar document reflecting or identifying the individuals responsible for implementing CARRP, including but not limited to those individuals responsible for drafting and presenting training materials about CARRP and officers designated as CARRP officers.

RESPONSE:

REQUEST FOR PRODUCTION NO. 38: All Documents referring or relating to the names, titles, and job descriptions of all Your officials and Employees who bear any responsibility, directly or indirectly, in whole or in part, for CARRP or any related extreme vetting program. This request includes but is not limited to officials and Employees who are or were responsible for the creation, implementation, execution, oversight, and future development of CARRP or any related extreme vetting program.

RESPONSE:

REQUEST FOR PRODUCTION NO. 39: All Documents previously withheld or produced in redacted form pursuant to any exemption from the Freedom of Information Act,

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produced in unredacted form. This request is limited to Documents withheld or produced in response to the ACLU FOIA Request.

DATED: August 1, 2017

s/Jennifer Pasquarella (admitted pro hac vice)
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s/Hugh Handeyside
Hugh Handeyside #39792
s/Lee Gelernt (admitted pro hac vice)
s/Hina Shamsi (admitted pro hac vice)
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury and the laws of the State of Washington that on August 1st, 2017, I caused service of the foregoing, PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS, via email to all counsel of record herein.

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219 S. Dearborn St.,
5th Floor
Chicago, IL 60604
Telephone: 202-532-4542
aaron.r.petty@usdoj.gov

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PO Box 868,
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Telephone: 202-616-4848
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joseph.f.carilli2@usdoj.gov

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 1st day of August 2017, at Seattle, Washington.

s/Laura K. Hennessey
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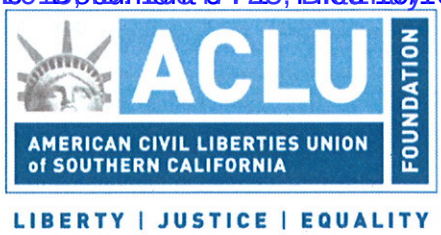
EXHIBIT A



By Regular and Certified Mail, Return Receipt Requested

May 17, 2012

United States Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010
(816) 350-5570
Fax: (816) 350-5785
uscis.foia@dhs.gov

Re: Freedom of Information Act Request
Fee waiver requested

Dear FOIA Officer:

This letter constitutes a request for records made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by the American Civil Liberties Union Foundation of Southern California ("ACLU/SC").

The ACLU/SC makes this request for records related to the policies and procedures of the U.S. Citizenship and Immigration Services (USCIS) with respect to the processing and adjudication of applications for naturalization and other immigration benefits. The Requestor, a non-profit civil rights group, is concerned that certain immigrants – including Muslim, Arab, Middle Eastern and South Asian immigrants – are treated differently than other applicants in their efforts to obtain naturalization and other important immigration benefits. Through this FOIA Request, the ACLU/SC seeks information about the policies and practices that result in USCIS's apparently different treatment of those immigrants.

The ACLU/SC has learned of or assisted dozens of Muslim, Arab, Middle Eastern and South Asian immigrants who are statutorily eligible for naturalization and other immigration benefits, yet have encountered extraordinary hurdles by USCIS in the processing and adjudication of their applications. The ACLU/SC is concerned that USCIS subjects these applicants to higher scrutiny and different treatment due to its policies for identifying and vetting national security concerns, creating significant obstacles to their ability to obtain these important benefits.

Accordingly, through this Request, we seek information regarding USCIS' national security policies and procedures governing the identification, vetting and adjudication of

applications for naturalization and other immigration benefits categorized as presenting national security concerns.

THE REQUESTOR

ACLU/SC is a non-profit organization dedicated to defending and securing the rights granted by the U.S. Constitution and Bill of Rights. ACLU/SC's work focuses on immigrants' rights, the First Amendment, equal protection, due process, privacy, and furthering civil rights for disadvantaged groups. As part of its work, ACLU/SC disseminates information to the public through newsletters, news briefings, "Know Your Rights" documents, and other educational and informational materials. The ACLU/SC regularly submits FOIA requests to USCIS and other agencies – including, past FOIA requests related to the adjudication of naturalization applications – and publicizes the information it obtains through its website, newsletters and "Know Your Rights" presentations and materials.

THE REQUEST FOR RECORDS

We seek disclosure of **any** records[1] created from January 2003 to the present, **relating to** or **concerning:**[2]

Policies for the identification, vetting and adjudication of immigration benefits applications[3] *with national security concerns*

(1) The Operational Guidance, which implements the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns," attached hereto as Exhibit A, including:
   a. Any and all attachments;
   b. Any and all training materials;

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[1] The term "records" as used herein includes but is not limited to all communications preserved in electronic or hard copy form, including but not limited to correspondence, documents, data, videotapes, audio tapes, CDs, DVDs, floppy disks, zip disks, faxes, files, e-mails, notes (including handwritten notes), letters, summaries or records of personal conversations, reports and/or summaries of interviews, reports and/or summaries of investigations, guidelines, evaluations, instructions, analyses, memoranda, agreements, orders, prescriptions, charts, expressions of statements of policy, procedures, protocols, reports, rules, training manuals, or studies.

[2] The term "concerning" means referring to, describing, evidencing, commenting on, responding to, showing, analyzing, reflecting, or constituting.

[3] The phrase "immigration benefits applications" as used herein refers to those applications or petitions, which confer citizenship by naturalization or immigrant or non-immigrant status.

c. Any and all policy, procedure and/or guidance related to implementation of the Operational Guidance and/or "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.

(2) Any and all policies, procedures, guidelines and training materials pertaining to CARRP (Controlled Application Review and Resolution Program), including, but not limited to,
   a. The CARRP Manual;
   b. CARRP policy memoranda;
   c. CARRP training materials.

(3) Any and all policies, procedures, guidelines and training materials relating to the processing[4] and adjudication of immigration benefit applications with a "national security concern"[5] from any Directorate, department, unit, or entity within USCIS, including but not limited to the:
   a. Fraud Detection and National Security Directorate (FDNS)
   b. Domestic Operations Directorate (DomOps), including, but not limited to, the DomOps Operational Guidance referenced on page 13 of the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.
   c. Service Center Operations Directorate
   d. Field Operations Directorate
   e. Background Check Unit (BCU)
   f. The Screening Coordination Office (SCO) of FDNS

(4) The Operational Guidance related to the adjudication of Replacement Lawful Permanent Resident cards when there is a "national security concern" described on page 14 of the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.

(5) The DHS Memorandum entitled "Department of Homeland Security Guidelines for the Use of Classified Information in Immigration Proceedings" (also referred to as "Ridge Memo") referenced on page 17, footnote 18 of the 2008 "Policy for Vetting and Adjudicating Cases with National Security Concerns." *See* Exh. A.

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[4] For the purposes of this FOIA request, "processing" refers to all steps taken by USCIS from the moment that a naturalization application is filed until it is finally adjudicated. This includes but is not limited to, background/security checks, identification of a national security concern, internal/external vetting, deconfliction, adjudication, the naturalization interview and examination, requests for additional documentation or evidence, etc

[5] The 2008 memo, Exhibit A, defines a "national security concern" as existing when "an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act."

(6) The memorandum entitled "Additional Guidance on Issues Concerning Vetting and Adjudication of Cases Involving National Security Concerns," mentioned on page 271 of the PowerPoint entitled "CARRP: Deconfliction, Internal and External Vetting and Adjudication of NS Concerns," attached hereto as Exhibit B.

(7) The Deconfliction video referenced on page 264 of the PowerPoint entitled "CARRP: Deconfliction, Internal and External Vetting and Adjudication of NS Concerns," attached hereto as Exhibit B.

(8) The IBIS Standard Operating Procedure (SOP) referenced on page 109 of the May 21, 2004 memorandum entitled "New National Security-Related IBIS Procedures," attached hereto as Exhibit C.

(9) The name of and a description and/or explanation of the purpose and function of the "new office" created to centralize and effectively manage the screening initiatives with partners inside and outside the agency, as referenced on page 4 of USCIS Director Mayorkas' congressional testimony in a hearing entitled "Safeguarding the Integrity of the Immigration Benefits Adjudication Process" on February 15, 2012, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, attached hereto as Exhibit D.

(10) A description and/or explanation of the purpose and function of the Screening Coordination Office (SCO) within the Fraud Detection and National Security (FDNS) Directorate, a new office created in fiscal year 2011 to enhance USCIS's screening for national security threats and other information.

(11) Policies, procedures, guidelines, and training materials pertaining to the internal collaboration and coordination between and among USCIS directorates, offices, branches, programs during security checks and deconfliction.

(12) A description and/or explanation of the purpose and function of the "comprehensive recurrent vetting strategy to lead the [DHS's] biographic and biometric screening initiatives and studies," as referenced in Director Mayorkas' congressional testimony on February 15, 2012. *See* Exh. C.

(13) Provide a complete list of all security check and background check systems that are used by USCIS in the processing and adjudication of a naturalization application, including, but not limited to, the systems checked by FDNS or other USCIS entities on cases involving "national security concerns" or "national security indicators," such as the FBI Name Check, the FBI Fingerprint Check, TECS/IBIS, CLASS, SAOs, US-VISIT/IDENT, etcetera.

(14) Policies, procedures, guidelines and training materials related to "national security indicators" (as referenced on page 2 of the CARRP Officer Training's National Security Handout, Attachment A "Guidance for Identifying National Security Concerns," attached hereto as Exhibit E, and the 2008 Memo, page 15, Exh. A), including, but not limited to, the identification of "national security indicators" (including statutory indicators and non-statutory indicators); the evaluation of "national security indicators;" the relationship between "national security indicators" and "national security concerns;" and the vetting, deconfliction and resolution of "national security indicators."

(15) To the extent not covered by (14) above, policies, procedures, guidelines and training materials related to the "suspicious activities" type of "national security indicator," referenced on page 5 of Exh. E, including but not limited to:

a. "Unusual travel patterns and travel through or residence in areas of known terrorist activity;"
b. "Large scale transfer or receipt of funds;"
c. "Membership or participation in organizations that are described in, or that engage in, activities outlined in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Act."

(16) To the extent not covered by (14) above, policies, procedures, guidelines and training materials related to the "family member or close associates" type of "national security indicator," described on page 5 of Exh. E, including but not limited to:

a. How it is determined that a family member or close associate is a subject with a "national security concern;"
b. How that information could impact an individual's eligibility for the benefit sought and/or may indicate a "national security concern" with respect to that individual;
c. How an officer may determine if the "national security concern" relates to the individual and if it gives rise to a "national security concern" for the individual.

(17) Provide a list with the name, author and date of the *current* policies pertaining to the processing and adjudication of immigration benefits applications with a "national security concern." Because some of the policies requested through this FOIA request may have been superseded by later policies, this list will instruct the Requestor and the public as to which records reflect current USCIS policy.

Statistical Information

(1) The number of applications filed in the years 2012, 2011, 2010, 2009 and 2008 for the following types of applications or petitions:

a. N-400;
b. I-485;
c. I-130;

d. I-129F;
e. I-751.
f. For each application or petition type, the number of cases by beneficiary's country of birth for the following countries or territories:
    i. Afghanistan
    ii. Egypt
    iii. Indonesia
    iv. Iraq
    v. Iran
    vi. Jordan
    vii. Kuwait
    viii. Lebanon
    ix. Libya
    x. Morocco
    xi. Pakistan
    xii. Palestine or the Palestinian Territories
    xiii. Saudi Arabia
    xiv. Somalia
    xv. Sri Lanka
    xvi. Sudan
    xvii. Syria
    xviii. Tunisia
    xix. Uzbekistan
    xx. Yemen

(2) The number of applications granted for the years 2012, 2011, 2010, 2009 and 2008 for the following types of applications or petitions:
a. N-400;
b. I-485;
c. I-130;
d. I-129F;
e. I-751.
f. For each application or petition type, the number of cases by country of birth for the following countries or territories:
    i. Afghanistan
    ii. Egypt
    iii. Indonesia
    iv. Iraq
    v. Iran
    vi. Jordan
    vii. Kuwait
    viii. Lebanon
    ix. Libya
    x. Morocco

xi. Pakistan
xii. Palestine
xiii. Saudi Arabia
xiv. Somalia
xv. Sri Lanka
xvi. Sudan
xvii. Syria
xviii. Tunisia
xix. Uzbekistan
xx. Yemen

(3) The number of immigration benefits applications denied for the years 2012, 2011, 2010, 2009 and 2008 for the following types of applications or petitions:
   a. N-400;
   b. I-485;
   c. I-130;
   d. I-129F;
   e. I-751.
   f. For each application or petition type, the number of cases by country of birth for the following countries or territories:
      i. Afghanistan
      ii. Egypt
      iii. Indonesia
      iv. Iraq
      v. Iran
      vi. Jordan
      vii. Kuwait
      viii. Lebanon
      ix. Libya
      x. Morocco
      xi. Pakistan
      xii. Palestine
      xiii. Saudi Arabia
      xiv. Somalia
      xv. Sri Lanka
      xvi. Sudan
      xvii. Syria
      xviii. Tunisia
      xix. Uzbekistan
      xx. Yemen

(4) The number of pending immigration benefits applications that have one or more "national security indicator(s)" and/or "hits" for the years 2012, 2011, 2010, 2009 and 2008;
   a. Of those numbers, provide the following for each year:

i. The number of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth.

(5) The number of pending immigration benefits applications that had a "national security concern" for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

i. The numbers of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth;

iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);

iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(6) The number of immigration benefits applications where the national security concern was resolved or determined to no longer be of concern for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

i. The numbers of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth;

iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);[6]

iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(7) The number of immigration benefits applications with a "national security concern" that were approved for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

[6] The 2008 Memo, Exh. A at page 1, footnote 3, defines a KST and a non-KST.

i. The numbers of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by country of birth;

iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);

iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(8) The number of immigration benefits applications with a "national security concern" that were denied for the years 2012, 2011, 2010, 2009 and 2008

a. Of those numbers, provide the following for each year:

i. The numbers of cases for the following types of applications or petitions:
   1. N-400;
   2. I-485;
   3. I-130;
   4. I-129F;
   5. I-751.

ii. For each application type, the number of cases by application type and country of birth;

iii. For each application type, the number of cases of Known or Suspected Terrorists (KST);

iv. For each application type, the number of cases of non-Known or Suspected Terrorists (non-KSTs).

(9) The number of immigration benefit applications with a national security concern that are pending as of the date that this request is processed

a. More than one year since the date of filing;
b. More than two years since the date of filing;
c. More than three years since the date of filing;
d. More than four years since the date of filing;
e. More than five years since the date of filing;
f. More than six years since the date of filing;
g. More than seven years since the date of filing;
h. More than eight years since the date of filing;
i. More than nine years since the date of filing;
j. More than ten years since the date of filing.

(10) To the extent that a case bearing a "national security concern" is not necessarily a case also designated as a CARRP case, please provide the data requested above in (4)-(9) for CARRP cases.

As to all requests, we do not seek any personal identifying information protected under the Privacy Act, and therefore request that any such personal identifying information be redacted from responsive materials and replaced with a unique identifier that would allow us to identify the treatment of any given case across the various responses, but without revealing the individual identities of the applicants to whom the records pertain.

LIMITATION OR WAIVER OF SEARCH AND REVIEW FEES

We request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by … a representative of the news media …") and 6 C.F.R. § 5.11(d)(1) (search fees shall not be charged to "representatives of the news media"). The information sought in this request is not sought for a commercial purpose. The Requestor is a non-profit organization who intends to disseminate the information gathered by this request to the public at no cost, including through the Requestor's website, newsletters and other publications. Requestors may also compile a report or other publication on USCIS's policies and practices based on information gathered through this FOIA. This information is of critical importance to the public at large to understand how USCIS adjudicates applications for immigration benefits where national security concerns are present, particularly in light of the numerous news stories and repeated complaints regarding USCIS's processing of applications by Muslim, Arab, Middle Eastern and South Asian immigrants. *See, e.g.,* Ctr. for Human Rights and Global Justice, *Americans on Hold: Profiling, Prejudice and National Security*, *Americans on Hold Documentary Film and Advocacy Project* (2010), Preview Footage *at* http://www.chrgj.org/projects/profiling.html (last visited Jun. 14, 2010); Press Release, Ctr. for Human Rights and Global Justice, *CHRGJ Launches Documentary Americans on Hold, Exposing Discrimination* (Apr. 27, 2010); Anna Gorman, *A Victory for Southern California Citizenship Applicants*, L.A. TIMES, Nov. 10, 2009; Cindy Carcamo, THE O.C. REGISTER, *Deal Allows Hundreds to Gain U.S. Citizenship*, Nov. 9, 2009; Press Release, Ctr. for Human Rights and Global Justice, *CHRGJ Calls on Administration to Stop Racial Profiling in Citizenship Process* (Mar. 31, 2009); Sandra Hernandez, *Suit Seeks to Expedite Backlog-Plagued Naturalization Process*, L.A. DAILY JOURNAL, Dec. 5, 2007; Anna Gorman, *Groups Sue Over Citizenship Delays*, L.A. TIMES, Dec. 5, 2007; *SoCal Immigrants Sue Over Citizenship Delay*, THE NATIONAL LAW JOURNAL, Dec. 5, 2007; Press Release, Ctr. For Human Rights and Global Justice, *Profiled Immigrants Delayed Years in Seeking Citizenship* (Apr. 25, 2007); Shreema Mehta, *Barriers Inhibit Legal Road to U.S. Citizenship*, THE NEW STANDARD, Nov. 15, 2006; Bethany McAllister, Esq., *Rumors in Limbo: Muslims Applying for Citizenship*, MUSLIM MEDIA NETWORK, Sep. 28, 2006; Diana Day, *Los Angeles Civil Rights Groups Sue the Government Over Citizenship Delays*, PASADENA STAR-NEWS, Aug. 2, 2006; H.G. Reza, *For Citizenship Delayed, 10 Taking U.S. to Court*, L.A. TIMES, Aug. 1, 2006.

The "term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. §

552(a)(4)(A)(ii). The statutory definition does not require that the requester is a member of the traditional media. As long as the requester meets the definition in any aspect of its work, it qualifies for limitation of fees under this section of the statute.

For the reasons stated above, the Requester qualifies as a "representative of the news media" under the statutory definition, because it routinely gathers information of interest to the public, use editorial skills to turn it into distinct work, and distribute that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requestors who are not traditional news media outlets can qualify as representatives of the new media for the purposes of the FOIA after the 2007 amendments to the FOIA, including specifically as to other ACLU affiliates. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011 WL 887731, at *18 (D. Wash. Mar. 10, 2011). Accordingly, any fees charged must be limited to duplication costs.

WAIVER OR REDUCTION OF ALL COSTS

We request a waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester"); *see also* 6 C.F.R. § 5.11(k). USCIS has granted the ACLU/SC fee waiver in the past, including as recently as April 13, 2011, attached hereto as Exhibit F.

The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The Requestor needs not demonstrate that the records would contain evidence of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, good or bad. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003).

Disclosure of the information sought is in the public interest and will contribute significantly to public understanding of the federal government's policies and practices in adjudicating naturalization and other immigration benefit applications for applicants from certain countries, or with certain affiliations. As shown by the news reporting cited above, these issues are of intense public concern. The requested records relate directly to operations or activities of the government that potentially impact or infringe fundamental rights and freedoms. The Requestor has received numerous complaints from Muslim, Arab, Middle Eastern and South Asian communities regarding the processing of applications for immigration benefits. This information is of particular interest to these communities, as well as the public at large that is concerned about the fairness, equal treatment, and transparency in USCIS's processes.

The records are not sought for commercial use, and the Requestor plans to disseminate the information disclosed through print and other media to the public at no cost, and through meetings with members and affected communities. As demonstrated above, the Requestor has both the intent and ability to convey any information obtained through this request to the public.

The Requestor states "with reasonable specificity that [their] request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government." *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

In the event a waiver or reduction of costs is denied, please notify me in advance if the anticipated costs exceed $100.

CONCLUSION

If this request is denied in whole or part, please justify all deletions by reference to the specific FOIA exemption(s) that apply to each specific request. We expect you to release all segregable portions of otherwise exempt material. For example, we expect you to redact names of individuals for whom privacy waivers are not enclosed, if such redaction is required by the Privacy Act or other law, and release any otherwise disclosable records as redacted. We also expect that this FOIA request will be processed in accordance with the presumption of disclosure and President Obama's directive to federal agencies on January 26, 2009. Pres. Obama, Memo. for the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.").

We reserve the right to appeal any decision relating to this FOIA request, including but not limited to the decision to withhold any information, or to deny expedited processing or to deny a waiver or reduction of fees. We look forward to your reply to the request for expedited processing within ten (10) calendar days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding your decision on the matter of expedited processing, we look forward to your reply to the records request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive statistical information be provided electronically and include all associated metadata. Our first preference is that they be provided in their native file format, if possible. However, when using native formats we request to be consulted first to ensure the particular native formats will be readable at our end. Alternatively, we request that the statistical records be provided

electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, bates-stamped files.

We further request that the agencies provide an estimated date by which they will complete the processing of this request. *See* 5 U.S.C. § 552(a)(7)(B); *Muttitt v. U.S. Cent. Command*, 2011 WL 4478320 (D.D.C. Sept. 28, 2011).

If you have questions, please contact Jennie Pasquarella at 213-977-5236 or via e-mail at jpasquarella@aclu-sc.org. Thank you in advance for your timely consideration of this request. Please furnish records as soon as they are identified to the undersigned at:

ACLU of Southern California
1313 W. Eighth Street
Los Angeles, CA 90017

Sincerely,

Jennie Pasquarella
Staff Attorney
ACLU of Southern California

Exhibit B

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September 11, 2017

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VIA EMAIL

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Re: *Wagafe et al. v. Donald Trump et al.*
United States District Court No. 17-cv-00094-RAJ

Dear Counsel:

We write in reference to Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Production of Documents ("Responses"). Based on our initial review, we have several concerns that we would like to discuss at your earliest convenience. Our review of Defendants' Responses is ongoing, and we reserve the right to supplement these concerns at a later date.

As an initial matter, the proposed production timeline is unworkable. Given the complexity and breadth of this case, Plaintiffs are amenable to rolling productions over a reasonable period of time, but Defendants' proposal of rolling productions over a six-month period would put Plaintiffs dangerously close to the agreed discovery cutoff date before Plaintiffs would even receive a full production on their first set of discovery requests. This timing would make follow-up discovery requests and depositions before the discovery deadline impracticable, if not impossible. The Rules require that Defendants produce documents within 30 days after they are requested (a deadline that has already passed) or "another reasonable time specified in the response." FED. R. CIV. P. 34(b)(2)(B). A six-month timeline is not reasonable. We can offer

Defendants until October 31 to complete production of the first set of discovery requests, with weekly rolling productions between now and then—which is three full months from the date the requests were made.

Turning to the substance, Defendants' Responses include sweeping general objections and do not clearly state whether and to what extent responsive, non-privileged information will be withheld in response to each request. Defendants are required to state objections with specificity and state whether any responsive materials are being withheld on the basis of the objections. FED. R. CIV. P. 34(b)(2)(B), (C). As the Responses currently stand, Plaintiffs cannot ascertain whether and to what extent Defendants plan to withhold responsive documents based on the several broad categories outlined in Defendants' general objections.

Moreover, Defendants' objections are improper. For example:

- Privilege: Defendants' categorical assertion of several privileges, implying that unidentified categories of responsive documents will be withheld without inclusion on a privilege log, is improper. The Rules require, among other things, that Defendants individually log every document they claim is responsive but privileged, and identify (a) the persons involved with such communication, and (b) the nature of the privilege. *See, e.g.*, FED. R. CIV. P. 26(b)(5)(A).

- Executive Orders: Discovery sought in this case related to the Second Executive Order (EO) is not wedded to the issues before the Supreme Court this term. Additionally, although the First EO was rescinded, Plaintiffs seek discovery related to the consideration of the Controlled Application Review and Resolution Program (CARRP) or a similar program in connection with the First EO and, therefore, is not moot. The Court denied Defendants' motion to dismiss the claims related to the Executive Orders, which forecloses Defendants' argument that Plaintiffs are not entitled to discovery on these claims.

- Classified Documents: The mere fact that a document is classified does not automatically render it unresponsive, untraceable, and untouchable by the discovery process. Defendants' categorical refusal to search any classified documents is unacceptable. To the extent responsive documents are classified, the parties can discuss methods by which those documents can be produced to and accessed by Plaintiffs' counsel. Simply stating that Defendants will not produce them violates obligations under the Rules.

- Attorney-Related Communications: Defendants' categorical refusal to produce any communications to or from attorneys is inappropriate. Not every communication with an attorney is inherently or automatically privileged. Defendants cannot avoid their

obligation to review all potentially responsive documents and make a privilege determination for each document. Again, as outlined above, if Defendants' position is that a document is privileged, it must be included in a privilege log.

- E-mail: Defendants' categorical refusal to produce any email correspondence is unacceptable. The Court has certified two nationwide classes and has denied Defendants' motion to dismiss. E-mail is a typical (often the primary) source of document production, and the inconvenience of Defendants' chosen storage methods does not outweigh the obvious relevance of this material. The Second Amended Complaint was filed in April—Defendants have had time to obtain externally stored e-mails. To the extent Defendants have not yet requested these externally stored e-mails for purposes of this document production, we ask that Defendants do so immediately so that they can be included in weekly productions before October 31.

- Non-USCIS Documents: The President of the United States and the Department of Homeland Security are Defendants in Plaintiffs' Second Amended Complaint, which the Court has ruled adequately pleads several claims for relief. As such, the same discovery obligations attach to these entities as attach to the named USCIS entities. Defendants' purported refusal to produce any documents from non-USCIS entities is improper. Further, even if it were correct that injunctive relief is not available against the President (which Plaintiffs do not concede under the circumstances), the Second Amended Complaint also seeks declaratory relief and thus Defendants' objection to participating in discovery from the President on the basis that an injunction cannot be sought is without merit.

- Documents Outside of USCIS: Plaintiffs are entitled to discovery from all Defendants of documents within Defendants' possession, custody, or control, not just those stored at or generated by USCIS. Defendants' assertion to the contrary is without merit.

Plaintiffs accordingly request clarification on the scope and application of these general objections, including a discussion of how each general objection will apply to Defendants' production of documents responsive to Plaintiffs' requests for production.

In addition, Plaintiffs also note several substantive issues with Defendants' responses to individual RFPs. For example:

- Identification of Class Members (RFPs 13, 15, 17, 19, 21, 34, 35): The Court has certified two nationwide classes represented by the five named Plaintiffs. In order to pursue their claims regarding CARRP, the named Plaintiffs need to know whether they were in fact subjected to CARRP. With respect to persons who are not named plaintiffs but who are subjected to CARRP, they have a right to know whether they are Plaintiffs

and part of these certified classes. (Please note that for class members who are not named plaintiffs we are not requesting information on why they were subjected to CARRP.) Defendants' vague and categorical assertion that this information is privileged is unacceptable.

- FOIA Documents (RFP 39): Defendants' assertion that two of the FOIA exemptions—(5) and (7)(E)—are categorically privileged does not appear to have any legal justification and defies the plain text of the exemptions.

- No Responsive Documents Assertion (RFPs 29, 30, 31): Plaintiffs do not understand how Defendants can assert that there are "no documents responsive" to these RFPs before they have searched for such responsive documents, produced those that are not privileged, and logged those they claim are privileged. If such a search has occurred and no responsive documents were located, Plaintiffs request Defendants provide information regarding the breadth of what was searched and how the search was conducted.

- Documents Relating to Development of CARRP (RFP 1): The development of CARRP is central to all of Plaintiffs' claims. Defendants' outright refusal to identify who was involved in CARRP's development and collect documents from those custodians is inappropriate. These documents are highly relevant and the average and expected burden of identifying custodians and producing documents from those custodians cannot outweigh this relevance.

- Documents of "National Applicability" (throughout): Throughout the Responses, Defendants limit their production to documents of "national applicability." This term is unclear, though the implication is that Defendants intend to limit any document production to formal documents stored centrally at USCIS headquarters. As stated above, Defendants cannot avoid the identification of custodians and production of responsive, non-privileged documents from those custodians' files.

- Documents Dated Before April 11, 2017 (RFP 26): RFP 26 asks for "all Documents referring or relating to 'extreme vetting' or any other program, policy or procedure to identify, screen, vet, or adjudicate naturalization or adjustment of status applications where a National Security Concern is present." In response, Defendants contend, without reason or justification, that they will only produce responsive documents "that are dated on or after April 11, 2017." There is no reason for this arbitrary deadline, and Defendants are required to produce all responsive documents before that date.

- Documents Produced by the U.S. Department of Defense, U.S. Department of Justice, U.S. Department of State, and the Office of the Director of National Intelligence (RFPs

3, 4, 5): Defendants contend that they will not produce responsive documents from these federal agencies because they were not explicitly named as Defendants in the Second Amended Complaint. As explained above, to the extent any documents produced by these federal agencies are in the possession, custody, or control of named Defendants (the President, the Department of Homeland Security, USCIS, etc.), they are responsive and must be produced.

- Documents with respect to any other immigration benefits that are subject to CARRP (throughout): Defendants contend that because the certified classes address only applicants for naturalization and adjustment of status that any other programs are irrelevant. This is incorrect for several reasons—including, (1) the fact that the implementation of CARRP as to other immigration benefits may directly impact applicants' ability to adjust or naturalize (e.g., the application of CARRP to visa petitions, or application of CARRP to I-751's, depriving persons of the opportunity to move forward with naturalization applications); and (2) policies clarifying the processing of CARRP may have been initially directed at other programs.

Finally, Plaintiffs would like to discuss the process for agreeing on search terms to be used in Defendants' document production. Plaintiffs request that, on or before September 18, Defendants propose search term strings on an RFP-by-RFP basis, complete with a catalogue of the document hits that accompany each string. Plaintiffs will review and suggest modifications by September 22.

Please let us know a time on Thursday or Friday (September 14 or 15) when you can meet and confer on these items.

Very truly yours,

Nicholas P. Gellert

cc: Jennie Pasquarella
Sameer Ahmed
David Perez
Laura Hennessey

Exhibit C

U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section

Direct Dial: (202) 616-9131
Facsimile: (202) 305-7000

P.O. Box 868
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September 22, 2017

VIA EMAIL

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Re: *Wagafe v. Trump*, No. 2:17-cv-00094-RAJ (W.D. Wash.)

Dear Counsel:

Thank you for taking the time on Tuesday, September 19, 2017, to discuss, during a telephone conference, Defendants' Objections and Responses to Plaintiffs' First Requests for Production (hereinafter "Responses to the RFPs") for *Wagafe v. Trump*. The conversation focused on Plaintiffs' counsel's September 11, 2017 letter to Defendants' counsel about the Responses to the RFPs. During the conversation, Plaintiffs' counsel reviewed the content of the September 11, 2017 letter and requested Defendants to reconsider the Responses to the RFPs. As promised, we are writing to follow up on that conversation. We do not intend in this letter to address every point raised in your September 11th letter or during our September 19th telephone conference, but rather just those matters on which we said we would follow up with you.

1. United States Citizenship and Immigration Services ("USCIS") informed counsel that the non-custodial source "FDNS ECN," listed in Defendants' September 11, 2017 ESI Disclosures (hereinafter "ESI Disclosures"), includes FDNS's CARRP materials that are stored on the ECN. On our call, we referred to that as the CARRP SharePoint site, but that is not a term that USCIS uses. There are also CARRP materials on the ECN sites of other directorates/offices listed on the ESI disclosures. FDNS's ECN site, however, has the most extensive CARRP documents. Defendants intend to prioritize the responsiveness and privilege review (hereinafter "review") of the documents from that non-custodial source, because that non-custodial source is the *best* source of discoverable information. Once the review is complete, Defendants intend to prioritize the review of the remaining non-custodial sources listed in the ESI Disclosures because

those non-custodial sources are the most likely sources to contain discoverable information relevant to the claims and defenses at issue in this matter.

2. As discussed during the telephone call, Defendants have commenced the review of the CARRP documents contained on the FDNS ECN site. Additionally, Defendants are working diligently to continue to transfer documents from USCIS to our review platform as quickly as possible. That said, after discussing the collection, review, and production timeframe with USCIS, Defendants and counsel continue to believe that a production timeline of less than six months is unrealistic. Once Defendants have loaded the documents contained in all of the non-custodial sources listed in the ESI Disclosures into the review platform, Defendants may be in position to re-assess the six month production timeline; however, this still will not account for documents collected from Custodians.

a. During our phone conversation, Plaintiffs' counsel stated multiple times that Defendants were obliged to produce responsive materials within 30 days of the request. Defendants respectfully disagree with that reading of the Federal Rules of Civil Procedure. Defendants have complied with our obligation under Federal Rule Of Civil Procedure 34(b)(2) to respond in writing within thirty days.[1] Rule 34(b)(2) further states that the documents requested must be produced by the responding party "no later than the time . . . specified in the request *or another reasonable time specified in the response*." Fed. R. Civ. P. 34(b)(2)(B) (emphasis added). Defendants assert that the timeline delineated in our Responses to the RFPs is reasonable. That said, Defendants intend to produce documents on a rolling basis, and Defendants will endeavor to complete, if able, production in less than six (6) months.

b. Additionally, to the extent Plaintiffs' counsel are concerned that Plaintiffs will be unable to complete additional discovery if Defendants' take six months to complete their production of documents responsive to the First RFPs, Defendants continue to propose a joint motion to the Court to extend the discovery period (and all other associated dates), so that both sides have adequate time to work through discovery in this case.

3. After consulting with USCIS, Defendants propose to prioritize the search, collection, review, and production from the Custodians identified in Defendants' ESI Disclosures, as follows:

a. Christopher Heffron
b. Ronnie Thomas
c. Jaime Benevides
d. Ronald Atkinson
e. Cristina Hamilton
f. Susan Knafla
g. Mark Freeman
h. Markus Montezemolo

Please inform counsel if Plaintiffs agree or prefer a different prioritization. You also requested that Defendants identify the "main architects" of CARRP. Various individuals have worked on

[1] Defendants recognize that the response occurred 35 days after service, based on Plaintiffs' consent.

Wagafe v. Trump, No. 2:17-cv-00094-RAJ

CARRP, and until there has been a thorough search and review of materials, any attempt to identify the key individuals involved in the development of CARRP would be based on any individual's potentially incomplete recollections. Defendants believe the people identified above are the key custodians of potentially discoverable information, but as production of the documents responsive to the First RFPs progresses, Plaintiffs can make their own assessment of who was key. Further, respectfully, your request for us to provide the key individuals involved in the development of the CARRP policy is not appropriately raised through a Request for Production.

4. Ronald A. Atkinson was the Chief of the National Security Adjudications Unit within the National Security Branch of FDNS when CARRP was developed, and was involved in planning its operational implementation. He is listed in Defendants' ESI Disclosure. He has identified at least one meeting invitation from January 2008 with the subject "CARRP policy memo" that has 20 invitees. He believes there would have been additional staff who were working technical, legal, coordination, and other issues, which led to the estimate in Defendants' Response to the RFPs that "40 to 50 people" were involved in the creation of CARRP.

5. As we discussed, Defendants will search, collect, review, and produce (or withhold and log on a privilege log), e-mail messages from the Custodians identified in the ESI Disclosures that are journaled. In the Response to the RFPs, Defendants stated that, as of August 1, 2014, USCIS began "journaling" its e-mail messages, whereas an e-mail message sent or received prior to that date may not have been migrated to the "journal" and may only be accessible, if at all, on back-up tapes, which would be expensive and time-consuming to restore, making recovery unduly burdensome and disproportionate.

a. To clarify the Response to the RFPs, Custodians may currently have access to e-mail messages older than August 1, 2014, dependent on how individual Custodians maintained their e-mail messages. Therefore, the search of e-mail messages available to Defendants without restoring the back-up tapes may produce e-mail messages older than August 1, 2014, even without searching the backup tapes.

b. Defendants continue to maintain that restoring and searching email on backup tapes would be unduly burdensome, excessively expensive, and disproportionate to the needs of this case, as described in Defendants' ESI Disclosures. As delineated in the Response to the RFPs, Defendants will consider a focused request. After receiving the request, Defendants will determine whether the request significantly reduces burden and expense, but Defendants reserve the right to object to those specific requests pursuant to the Federal Rules of the Civil Procedure.

6. With respect to RFPs, 29, 30, and 31, USCIS confirmed they have no responsive documents. As discussed during the telephone call, USCIS counsel inquired with those officials knowledgeable about the history, development, and implementation of CARRP, and USCIS's vetting programs, policies, and procedures, and were told that, at least since the time CARRP came into being in 2008, USCIS has had no programs, policies, or procedures to identify, screen, vet, or adjudicate naturalization or adjustment-of-status applications based on national origin, religion, race, or ethnicity. Of course, there was a time in U.S. history when U.S. immigration law imposed nationality-based quotas, but those were eliminated by the Immigration and

Nationality Act of 1965. Defendants had not presumed that Plaintiffs seek documents relating to the consideration of nationality, ethnicity, or national origin in the context of administering those pre-1965 immigration quotas. Defendants respectfully decline to provide a written declaration about how USCIS determined the response to the RFPs. Plaintiffs may, of course, inquire further about the response, if and when, Plaintiffs depose the knowledgeable agency officials.

7. USCIS has informed counsel that, putting aside individual case files/application adjudications, there are no classified documents relating to CARRP on a programmatic level. Therefore, there is no need to search for classified documents, as conducting a search for documents that do not exist is unduly burdensome and disproportionate.

8. With respect to communications between Department of Justice ("DoJ") attorneys and USCIS, Plaintiffs recognized that the communications between DoJ attorneys representing USCIS in litigation and USCIS is protected under the attorney-work-product ("AWP") doctrine but argued that DoJ attorneys may have communicated with USCIS about CARRP or "extreme vetting" outside of a litigation context. Defendants agree that Defendants will search and collect communications between DoJ attorneys and USCIS that are not related to any DoJ representation of USCIS in, or in anticipation of, litigation. To the extent Defendants identify responsive material that is privileged, whether under the AWP doctrine or some other privilege, Defendants will log the information on a privilege log. That said, Defendants continue to maintain that Defendants have no obligation to search DoJ records for such communication (or for material responsive to any other RFP), as DoJ is not a defendant in this case. Consequently, any such communications would have to be found in the possession, custody, or control of Defendants.

9. At this point, counsel think that the April 11, 2017 date in the response to RFP No. 26 is a typographical error, as the RFPs and the responses refer, in multiple other places, to April 11, 2008. Consequently, Defendants will treat that date limitation in the response to RFP No. 26 as April 11, 2008, rather than April 11, 2017.

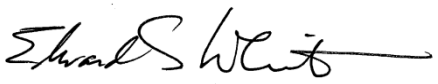
10. With respect to whether Defendants need to search the Office of the Secretary of Homeland Security, counsel has confirmed that agency counsel has consulted with knowledgeable officials within both DHS Headquarters and USCIS Headquarters, and those knowledgeable officials have reported that they believe it is unlikely the Office of the Secretary of Homeland Security would have any documents responsive to Plaintiffs' First Request for Production (as Defendants have interpreted those requests, as explained in Defendants' Responses to the RFPs). Consequently, given the unlikelihood of finding responsive documents in the Office of the Secretary, Defendants continue to assert that it would be unduly burdensome and disproportionate for Defendants to undertake a formal search of the Office of the Secretary.

If there are any other matters that require further response or discussion, or Plaintiffs' counsel desires to discuss the content of this letter, please let me know.

Wagafe v. Trump, No. 2:17-cv-00094-RAJ

Finally, as we move forward with the collection and search of the custodial sources identified in Defendants' ESI Disclosures, we would welcome discussing with Plaintiffs' counsel proposed search terms. Please let me know when you would like to have any such discussion.

Sincerely,



EDWARD S. WHITE
Senior Litigation Counsel
AARON R. PETTY
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Exhibit D

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September 27, 2017

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VIA EMAIL

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Re: *Wagafe et al. v. Donald Trump et al.*
United States District Court No. 17-cv-00094-RAJ

Dear Counsel:

We write in response to your September 22, 2017 letter discussing, among other things, Defendants' proposed six-month timeline to produce documents responsive to Plaintiffs' First Set of Requests for Production of Documents ("RFPs"), Custodians from whom Defendants propose to collect documents, and proposed search terms for custodial sources. We write to address some of our ongoing concerns with your positions regarding these issues.

We also write to confirm that the parties are at an impasse on the following four issues: (1) Defendants' refusal to produce a list or other documents sufficient to identify the members of each class and documents regarding why Named Plaintiffs have been subject to CARRP; (2) Defendants' refusal to review classified documents and produce a privilege log of any such documents they seek to withhold; (3) Defendants' refusal to produce documents relating to the First and Second Executive Orders; and (4) Defendants' refusal to produce responsive documents that are not of "national applicability." As stated on our September 19, 2017 meet and confer call, Plaintiffs will file a motion to compel on these issues.

1. **Proposed Six-Month Timeline**

On our meet-and-confer call on September 19, 2017, we requested that Defendants provide an explanation for their proposed six-month timeline to produce documents responsive to Plaintiffs' First Set of RFPs, including a proposed discovery schedule would include dates certain by which Defendants plan to produce documents within that six-month timeframe and a summary of which categories of documents will be produced on each date. We also requested that Defendants provide an estimate of the number of potentially responsive documents, at least for the FDNS ECN site which you have identified as the best source of discoverable information.

Your response continues to fail to explain your six-month timeframe and failed to provide the information we requested. Your letter vaguely states, without explanation, that "after discussing the collection, review, and production timeframe with USCIS, Defendants and counsel continue to believe that a production timeline of less than six months is unrealistic." You note that "Defendants commenced the review of the CARRP documents contained on the FDNS ECN site," but fail to provide an approximate number of the documents contained in that review. With respect to the FDNS ECN site, it is especially unclear why you should need six months to produce these documents. You informed us that everything in this database is responsive. Therefore, it is our understanding that the only work required to produce these documents is a privilege review.

You further note that "[o]nce Defendants have loaded the documents contained in all of the noncustodial sources listed in the ESI Disclosures into the review platform, Defendants may be in position (sic) to re-assess the six month production timeline," but fail to provide a date by which the documents will be loaded. Finally, you indicate that Defendants intend to produce documents on a rolling basis, and prioritize first the FDNS ECN site, then the remaining non-custodial sources listed in the ESI Disclosures, and then, it appears, the eight Custodians you have identified. However, you fail to explain why review and production of these sources cannot be done simultaneously or to provide internal deadlines as to when these categories of documents will be produced.

Because you acknowledge the difficulty that your proposed six-month timeframe creates for follow up discovery requests and depositions before the court-ordered discovery deadline, you propose that the parties agree to a joint motion to extend the discovery period (and all other associated dates). Plaintiffs cannot agree to your request. In the Joint Status Report and Discovery Plan, Defendants agreed with Plaintiffs that "fact discovery can be completed by May 18, 2018," and only indicated a potential extension of that deadline "if the Supreme Court's decision in *Hawaii* materially alters the scope of discovery in this case." Dkt. 78 at 13. Based on the parties' agreement, the Court ordered the current May 29, 2018 deadline. Dkt. 79 at 1. At that time, Defendants should have been aware of the scope of their discovery obligations in this case, and have failed to provide any justification for extending the deadline.

For these reasons, we again request, by October 2, that Defendants provide us with the following information so that Plaintiffs may be able to assess your requested six-month timeframe for responding to Plaintiffs' First Set of RFPs:

- A production schedule, including dates certain by which Defendants will produce documents on a rolling basis and a summary of which categories of documents will be produced on each date.

- The number of documents contained in the review of the FDNS ECN site.

- The number of documents to be loaded into the review platform for all of the noncustodial sources listed in the ESI Disclosures, or, at least, a date certain by which those documents will be loaded.

If you fail to provide this information, we will assume that the parties are at an impasse regarding the timeline to respond to Plaintiffs' First Set of RFPs and will, therefore, need to seek relief from the Court.

2. <u>Custodians</u>

Regarding discovery from custodial sources, we continue to have the following concerns.

First, your letter provides no explanation for your proposed prioritization of the eight Custodians identified in Defendants' ESI Disclosures. For example, you indicate that "Ronald A. Atkinson was the chief of the National Security Adjudications Unit within the National Security Branch of FDNS when CARRP was developed, and was involved in planning its operational implementation," but list him fourth for prioritization purposes. By October 2, please provide an explanation for your proposed prioritization, including a summary of the responsibilities of each individual vis-à-vis the CARRP program. Only then will we be able to assess your proposed prioritization.

Second, we continue to object to your position that only eight Custodians need to be searched for documents responsive to Plaintiffs' First Set of RFPs. As acknowledged in your letter, Mr. Atkinson has identified at least one meeting invitation from January 2008 with the subject "CARRP policy memo" that has 20 invitees. Thus, all 20 of these individuals likely have documents responsive to Plaintiffs' First Set of RFPs and would only not be appropriate custodians if their roles were minor. By October 2, please produce this meeting invitation and the underlying "CARRP policy memo," because they are responsive to, at least, RFP Nos. 1-3, and will help us determine whether additional Custodians are needed. Please also provide information about the role of each person on the invite, and an explanation as to why you do not

believe searching all of the 20 invitees is necessary to provide an adequate response to Plaintiffs' First Set of RFPs.

Third, we continue to object to your position that e-mail messages older than August 1, 2014 would be unduly burdensome and disproportionate to search. You acknowledge that some "Custodians may currently have access to e-mail messages older than August 1, 2014, dependent on how individual Custodians maintained their e-mail messages." However, you fail to identify which of the eight Custodians listed in your ESI Disclosures this applies to and whether those individuals have maintained *all* of their e-mail messages older than August 1, 2014 or only a subset of their e-mail messages. You also have not explained, in anything more than bald assertions, why accessing e-mail messages on the back-up tapes would be burdensome. You have provided Plaintiffs with no explanation as to what work would be involved and why restoration of these e-mail messages would be so laborious. For Plaintiffs to accurately understand your alleged burden of producing e-mail messages, please identify by October 2:

(1) which Custodians only have e-mail messages older than August 1, 2014 on back-up tapes;

(2) which Custodians currently have access to their e-mail messages older than August 1, 2014 and, of those, how far back in time they maintained those e-mail messages, and whether they have maintained all or only a subset of their e-mail messages from that time period; and

(3) for those Custodians whose e-mail messages are only stored on back-up tapes, please provide more information on what would be required to access emails saved in this manner.

3. <u>Search Terms</u>

Finally, with regard to your request to discuss proposed search terms regarding the search of the custodial sources, we request that, by October 2, Defendants provide us a list of proposed search terms for, at least, the eight Custodians that you have identified in your ESI Disclosures. We will review your proposed terms and provide our proposed changes to them.

We appreciate your prompt consideration of the issues identified in this letter.

Very truly yours,

Nicholas P. Gellert

cc: Jennie Pasquarella
Sameer Ahmed
David Perez
Laura Hennessey

Exhibit E

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,

Plaintiffs,

v.

TRUMP, et al.,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF JAMES W. MCCAMENT IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

I, James W. McCament, hereby make the following declaration with respect to the above captioned matter.

1. I am the Deputy Director currently serving as the Acting Director of United States Citizenship and Immigration Services ("USCIS") in the Department of Homeland Security (DHS). I began Acting in the capacity of Director on March 31, 2017.[1]

2. As the Acting Director of USCIS, I am responsible for overseeing a workforce of more than 18,000 federal employees, handling approximately 8 million immigration benefit applications each year.

3. After consideration of the information available to me in my capacity as Acting Director for USCIS, the matters contained in this declaration are based upon my

[1] The new USCIS Director, Lee Francis Cissna, was confirmed by the Senate on October 5, 2017, but at the time this document was executed he had not yet been sworn in.

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understanding of the case of *Wagafe, et al., v. Trump, et al.,* Case No. 2:17-cv-00094 in the United States District Court for the Western District of Washington.

4. I am also aware of the Motion to Compel filed by Plaintiffs on September 28, 2017, where it is alleged that a USCIS officer previously confirmed, in a deposition taken on behalf of the Plaintiff in the matter of *Hamdi v. USCIS et al.*, Case No. ED CV 10-00894 VAP (C.D. Cal.), whether a particular case was a CARRP case.

5. I am aware that, pursuant to the Federal Rules of Civil Procedure 23(a) and 23(b)(2), the United States District Court for the Western District of Washington certified two classes as plaintiffs.

a. A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

b. A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

6. I am aware that, in connection with this litigation, Plaintiffs requested the production of certain documents described in Plaintiff's First Request for Production to Defendants, specifically,

a. Request for Production Number 34: All Documents sufficient to identify members of the Naturalization Class, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the

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naturalization application was filed, and current status of the naturalization application; and

b. Request for Production Number 35: All Documents sufficient to identify all members of the Adjustment Class, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the adjustment application was filed, and current status of the adjustment application.

7. I am aware that Defendants, in Defendants' Objections and Responses to Plaintiffs' First Request for Production of Documents, objected to production of certain documents on the ground that the information sought was protected from disclosure as privileged. Although not specified in the Defendant's Objections and Responses to Plaintiffs' First Request for Production of Documents, Defendant USCIS hereby asserts that any documents that may identify the application of an individual as subject to CARRP is protected from disclosure under the law enforcement privilege.

8. I am aware that the law enforcement privilege, also known as the investigatory files privilege, protects from disclosure law enforcement techniques and procedures, and other information necessary to otherwise prevent interference with a law enforcement investigation. The purpose of the privilege is to protect the law enforcement process because disclosure of investigatory files would undercut the government's efforts to enforce the law by disclosing investigative techniques, forewarning suspects of the investigation, deterring witnesses from coming forward, and prematurely revealing the facts of the government's case. The law enforcement privilege applies to civil enforcement agencies.

9. The electronic system USCIS uses to manage national security cases is the Fraud Detection and National Security Data System (FDNS-DS). FDNS-DS is the

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primary case management system used to record requests and case determinations involving immigration benefit fraud, public safety, and national security concerns. Identifying individuals who are being processed through CARRP would necessarily involve reviewing records in the FDNS-DS system.

10. In the System of Records Notice (SORN) for FDNS, the following exemption is claimed: "The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Additionally, many of the functions in this system require retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule.[2] 5 U.S.C. 552a(k)(2) exempts investigatory materials compiled for law enforcement purposes and 552a(j)(2) exempts records maintained by an agency pertaining to the enforcement of criminal laws.

11. Under the Immigration and Nationality Act, USCIS has authority to adjudicate individual benefit application for adjustment of status, 8 U.S.C. § 1255, and naturalization, 8 U.S.C. § 1421(a)[3]. To make an eligibility determination for an individual who has submitted an immigration benefit application, USCIS must investigate the applicant to determine whether the individual meets the statutory criteria for the immigration benefit sought.

12. For naturalization applicants, USCIS is required to complete full background investigation to determine whether the applicant is eligible to naturalize. *See* 8 U.S.C. § 1446(a), (b); 8 C.F.R. § 335.1 ("The investigation shall consist, *at a minimum*, of a

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[2] See for example: DHS/CBP-011 - U.S. Customs and Border Protection TECS December 19, 2008 73 FR 77778 Final Rule for Privacy Act Exemptions, August 31, 2009 74 FR 45072; asserting exemption 522a(j)(2).

[3] The transfer of the former Immigration and Naturalization Service's ("INS") naturalization functions to the Department of Homeland Security included the transfer of the authority to naturalize from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No.107-296, § 1512(d), 116 Stat. 2135, 2310 (Nov. 25, 2002)

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review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and has been employed, or engaged in business, for at least the five years immediately preceding the filing of the application") (emphasis added).[4] USCIS must wait until criminal background checks are completed before scheduling an applicant for his or her naturalization interview. 8 C.F.R. § 335.2(b); Dep't of Commerce & Related Agencies Appropriation Act, 1998, Pub. L. 105-119, title I, 111 Stat. 2440, 2448-49 (Nov. 26,1997) (beginning with fiscal year 1998, no USCIS funds may be used to complete adjudication of an application for naturalization unless USCIS has received confirmation from the FBI that a full criminal background check has been completed).

13. For adjustment of status applicants, the applicant must be eligible to adjust status to that of a lawful permanent resident, and has the burden to demonstrate eligibility, including admissibility. 8 U.S.C. § 1255(i)(2)(a); 8 C.F.R. § 103.2(b)(1). An alien is inadmissible if any of the factual circumstances described in the law exist. For example, an alien may be inadmissible on grounds related to health, criminality, national security, and misrepresentations. 8 U.S.C. § 1182. USCIS must investigate the application submitted by the applicant, and additional information it receives, to fully vet an individual and make a final determination on the application.

14. CARRP is a consistent, agency-wide approach for identifying, processing, and adjudicating applications and petitions for immigration benefits that involve national security concerns. CARRP allows the investigation and vetting of applicants whose cases raise national security concerns to be adjudicated in a consistent and orderly manner.

15. A national security concern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in 8 U.S.C. §§ 1182(a)(3)(A), (B), or (F) or 1227(a)(3)(A), (B), or (F).

[4] A USCIS district director may waive neighborhood investigation may be waived. 8 C.F.R. § 335.1.

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16. When USCIS identifies a national security concern and begins its investigative and vetting process, it is crucial that the individual not be prematurely notified that the individual is suspected of not being statutorily eligible for the immigration benefit. An individual who becomes aware of an investigation prematurely may alter his or her behavior, conceal evidence of wrongdoing, or attempt to influence witnesses. Further, USCIS interviewers may be unable to sufficiently probe an applicant through the interview process if the applicant is aware that a specific action or behavior is under investigation.

17. In addition, to determine whether an application presents a national security concern, specifically to determine whether an articulable link exists, a USCIS immigration services officer adjudicating an immigration benefit application shall check and review the records held by law enforcement agencies and/or the intelligence community, to include, but not limited to:

- FBI Name Check: The records maintained in the FBI name check process consist of administrative, applicant, criminal, personnel and other files compiled by law enforcement.
- FBI Fingerprint Check: The FBI fingerprint check provides information relating to criminal background within the United States.
- Treasury Enforcement Communications Systems/Inter-Agency Border Inspection System (TECS/IBIS): A multiagency effort with a central system that combines information from multiple agencies, databases and system interfaces to compile data relating to national security risks, public safety issues and other law enforcement concerns.
- United States Visitor and Immigrant Status Indicator Technology (US-VISIT)/Automated Biometrics Identification System (IDENT): IDENT is a DHS-wide electronic record system for the collection and processing of biometric and limited biographic information in connection with the national security, law enforcement, immigration,

intelligence, and other mission-related functions of DHS, as well as for any associated testing, training, management reporting, planning and analysis, or other administrative uses.

18. While the existence of CARRP itself is known, I understand that disclosure of whether any particular application is subject to CARRP may cause substantial harm to the law enforcement investigative and intelligence gathering interests of federal and state agencies. Public confirmation that a particular application is subject to CARRP would necessarily alert an individual that he/she may be the subject of an investigation, or at least that the government possesses information that creates an articulable link to a national security ground of inadmissibility. By alerting an individual that he or she is subject to an investigation and the types of records consulted, that individual might learn the focus of these investigations. The individual could then, for example, alter his or her behavior, conceal evidence of wrongdoing, or attempt to influence witnesses or adjust his or her means of communication or financial dealings to avoid detection of the very behavior that the law enforcement and intelligence community have determined may be indicative of a national security threat, and which form the core of pending investigative efforts.

19. I am aware that Plaintiffs have alleged in the Motion to Compel that USCIS has previously revealed whether a case was processed through CARRP during prior litigation. For example I am aware that during the deposition of USCIS immigration officer Elias Valdez, Jr. in the Hamdi case, *Hamdi v. USCIS et al.*, Case No. ED CV 10-00894 VAP (C.D. Cal.), Officer Valdez confirmed that Hamdi was processed through CARRP. This statement should not have been made. The law enforcement privilege applies to information about whether an application or petition was processed under CARRP; accordingly, USCIS officers may not reveal this information.

20. I am familiar with the CARRP process and submit this declaration as the formal assertion invoking the law enforcement privilege for the information contained in these withheld documents. Revealing whether a specific individual is being processed in

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CARRP would necessarily involve revealing law enforcement and investigatory techniques. Disclosure of such information would reveal investigatory techniques and procedures and would impair the law enforcement investigative process.

21. Based on the reasons set forth above, I invoke the law enforcement privilege for the requested information that the Government seeks to withhold. I declare under penalty of perjury that the foregoing is true and correct.

Executed this __6th___ day of October, 2017 at Washington, D.C.

James W. McCament
Acting Director
U.S. Citizenship and Immigration Services
Washington, D.C.

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Exhibit F

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,

Plaintiffs,

v.

TRUMP, et al.,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF JAMES W. MCCAMENT IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

I, James W. McCament, do hereby declare and say:

1. I am the Deputy Director of United States Citizenship and Immigration Services ("USCIS"), Department of Homeland Security. I began serving as the Deputy Director on March 31, 2017.

2. As the Deputy Director of USCIS, I am responsible, along with the Director, for overseeing 18,000 federal employees, handling approximately 8 million immigration benefit applications, petitions, and requests each year. I served as the Acting Director from March 31, 2017 to October 8, 2017, when Lee Francis Cissna was sworn in as the Director of USCIS.

3. After consideration of information available to me in my capacity as Deputy Director of USCIS, the matters contained in this declaration are based upon my

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understanding of the case of *Wagafe, et al., v. Trump, et al.,* Case No. 2:17-cv-00094, in the United States District Court for the Western District of Washington. I understand that in this class action litigation, Plaintiffs challenge the Controlled Application Review and Resolution Program ("CARRP"). I am also aware of the Motion to Compel filed by the Plaintiffs on September 28, 2017.

4. I am aware that, pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), the United States District Court for the Western District of Washington certified two classes as plaintiffs:

a. A national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

b. A national class of all persons currently and in the future (1) who have or will have an application for adjustment of status pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed.

5. I am aware that, in connection with this litigation, Plaintiffs requested the production of certain documents described in Plaintiff's First Request for Production to Defendants, specifically,

a. Request for Production Number 34: All Documents sufficient to identify members of the Naturalization Class, including, but not limited to, any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the naturalization application was filed, and current status of the naturalization application; and

b. Request for Production Number 35: All Documents sufficient to identify all members of the Adjustment Class, including, including, but not limited to,

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any list that might exist identifying those who are or have been subject to CARRP, and, where available, the following identifying information for each class member: name, A number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the adjustment application was filed, and current status of the adjustment application.

6. I am aware that Defendants, in Defendants' Objections and Responses to Plaintiffs' First Request for Production of Documents, objected to production of certain documents on the ground that the information sought was protected from disclosure as privileged. I also provided another declaration in this case formally asserting the law enforcement privilege over providing the identities of individual class members who are subject to CARRP.

Overview of Relevant USCIS Electronic Systems

7. Applications for adjustment of status are recorded in an electronic system known as CLAIMS 3. CLAIMS 3 tracks the date that an application is filed, as well as other adjudicative actions.

8. Applications for naturalization are recorded in one of two places. Some applications for naturalization are recorded in an electronic system known as CLAIMS 4. Since April 2016, some applications have been filed online or scanned and then adjudicated within an online electronic system known as USCIS ELIS. CLAIMS 4 and the USCIS ELIS track the date that a naturalization application is filed, as well as other adjudicative actions. If an application is processed via USCIS ELIS, not all of the information about the case will be available via CLAIMS 4. If a naturalization application is processed via CLAIMS 4, the case will generally not appear in USCIS ELIS.

9. CLAIMS 3 and CLAIMS 4 are manual systems in which an employee or contractor must type in pertinent and adjudicative information. Because the data in CLAIMS 3 and CLAIMS 4 is generally entered manually, it is possible for typographical errors to occur, or for the systems to not always be completely up-to-date. USCIS ELIS is an online system. Since April 2016, certain naturalization applications

have been filed online and adjudicated with ELIS. Other individuals have mailed paper applications, which USCIS employees or contractors then scanned into USCIS ELIS for adjudication. Certain other naturalization applications have continued to be adjudicated using the paper application, and are recorded only in CLAIMS 4. Some manual data entry was required when applications submitted by mail were scanned into the electronic immigration system, making it possible for typographical errors to occur, or for the electronic system to not always be completely up-to-date.

10. When an individual's case raises national security concerns, pertinent information is recorded in an electronic system known as the Fraud Detection and National Security Data System ("FDNS-DS"). FDNS-DS is the primary case management system used to record requests and case determinations involving immigration benefit fraud, public safety, and national security concerns.

11. FDNS-DS is not used to adjudicate applications, and does not record the same data as CLAIMS 3, CLAIMS 4, or USCIS ELIS. For example, the fact that an individual's case has raised a national security concern may not be evident from the information recorded about the case in CLAIMS 3, CLAIMS 4, or USCIS ELIS. Similarly, FDNS-DS does not systematically record certain adjudicative information, including the date that the specific application was filed. Rather, FDNS-DS would record the date that the individual's case was entered as a fraud, public safety, or national security concern.

12. Similar to CLAIMS 3 and CLAIMS 4, FDNS-DS is a manual system in which an individual person must type in pertinent information and case updates. Because it is a manual system, it is possible for typographical errors to occur, or for the systems to not always be completely up-to-date.

Process to Identify Class Members and Burden on Agency

13. The Office of Performance and Quality ("OPQ"), within USCIS's Management Directorate, is responsible for data and operational analyses of USCIS systems, including CLAIMS 3, CLAIMS 4, and USCIS ELIS. OPQ conducts system

queries and responds to a variety of data requests, such as from USCIS stakeholders or the public.

14. Within the Fraud Detection and National Security Directorate ("FDNS"), the Reports and Analysis Branch ("RAB") has technical expertise within the FDNS-DS system. RAB's role in FDNS is to coordinate data quality efforts, assist in inferential analysis of FDNS data, and produce all official statistics out of the FDNS-DS system. RAB is the authority for reporting and analysis of, among other things, national security concerns data.

15. The Case Analysis Branch ("CAB") is another branch within FDNS. One of CAB's roles in FDNS is to perform research on national security cases. CAB has the expertise to vet and deconflict national security cases, and to verify the accuracy of any information presented in electronic systems through paper file and electronic system review.

16. To identify all of the individuals in the naturalization subclass, OPQ would first have to conduct a query of data in CLAIMS 4 and USCIS ELIS to identify the receipt number, A number, applicant name, and filing date for all naturalization cases that have been pending for six months or more.

17. USCIS estimates it would take approximately 10 employee work hours and cost the agency approximately $600 for OPQ to complete this task.

18. To identify all of the individuals in the adjustment of status subclass, OPQ would similarly have to conduct a query of data in the CLAIMS 3 system to identify the receipt number, A number, applicant name, and filing date for all adjustment of status cases that have been pending for six months or more.

19. USCIS estimates it would take approximately 5 employee work hours and cost the agency approximately $500 for OPQ to complete this task.

20. RAB would then use the data provided by OPQ, indicating receipt numbers for responsive records from adjudicative systems, to conduct a query to obtain open national security concern cases from FDNS-DS with matching receipt numbers. RAB

would pull from FDNS-DS additional information for those matching open national security cases.

21. USCIS estimates it would take 5 approximately employee work hours and cost the agency approximately $500 for RAB to complete this task.

22. After RAB completes this task, CAB would need to conduct quality assurance by reviewing the physical Alien File (A file), and cross-checking various electronic systems. This quality assurance and verification is a necessary step to determine that the electronic information is accurate and up-to-date.[1] This review would include identifying whether any errors existed in the electronic systems. Errors could include an incorrect filing date, such that the case has not actually be pending for six months, or that a case is still marked as open even though the case was already adjudicated. CAB would also confirm the case involves a naturalization or adjustment of status application that has been pending for six months or more, in which an open national security concern existed on the date that RAB ran its initial query.

23. Based on historical numbers of CARRP cases, USCIS estimates that this would require review of approximately 3,000 cases. However, this number is impossible to estimate with certainty before the queries described above are performed.

24. A files may be located in various field offices and service centers across USCIS, and it would be necessary to transport those A files to USCIS Headquarters for the CAB team to complete its review.

25. USCIS estimates it would take approximately 2000 employee work hours and it would cost the agency approximately $93,000 for the A files to be routed and delivered.

[1] The A file review would ensure that any individual identified as a class member through the electronic system checks is accurate. However, it is important to emphasize that it is possible that a data entry error (such as inaccurately marking a case as closed, or the filing date being marked incorrectly) in the electronic systems could lead to an individual not being identified as a class member, even though he or she is in fact a class member. Unfortunately, there is no way, short of a manual review of potentially hundreds of thousands of A files, to identify and account for those errors. These data entry errors do not mean that the case is not being adjudicated.

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26. USCIS estimates it would take approximately 15,000 employee work hours and cost the agency approximately $1,173,000 for CAB to complete its quality assurance review.

27. In aggregate, making reasonable assumptions, USCIS estimates it would take approximately 17,020 employee work hours and cost the agency approximately $1,267,600 to identify all of the class members in this lawsuit.

28. Further, the class in this case changes over time as new individuals become class members as their applications reach six months since filing, and other individuals are no longer class members after their case is adjudicated. The shifting nature of the class would presumably require the agency to update the list of class members over time. Thus, the overall burden to the agency to identify the class members in this case is far larger than $1.2 million, with the precise number dependent on how often the agency is required to update the class roster.

29. Identifying the class members in this case would have a significant impact on the agency as a whole, but particularly, this effort would impact the ability of FDNS staff to conduct its core mission to enhance the integrity of the legal immigration system by leading USCIS's efforts to identify threats to national security and public safety, detect and combat immigration benefit fraud, and remove systematic and other vulnerabilities.

30. I declare under penalty of perjury that the foregoing is true and correct.

Executed this ___10th__ day of October, 2017 at Washington, D.C.

James W. McCament
Deputy Director
U.S. Citizenship and Immigration Service
Washington, D.C.

Exhibit G

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,

Plaintiffs,

v.

TRUMP, et al.,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF JILL A. EGGLESTON IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

I, JILL A. EGGLESTON, do hereby declare and say:

1. I am the Associate Center Director in the Freedom of Information and Privacy Act ("FOIA/PA") Unit, National Records Center ("NRC"), United States Citizenship and Immigration Services ("USCIS"), Department of Homeland Security in Lee's Summit, Missouri. I have held the position of Associate Center Director since February 4, 2008.

2. As the FOIA Officer for USCIS, I supervise over 200 information access professionals who are responsible for the orderly processing of all public, congressional, judicial, and inter-/intra-agency requests or demands for access to USCIS records and information pursuant to the FOIA, Privacy Act, Executive Orders, departmental directives, regulations and compulsory legal process. Through the exercise of my official duties as Associate Center Director, I am personally familiar with USCIS's standard

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process for responding to FOIA requests, including search procedures for locating agency records and FOIA/PA exemptions that exempt information from release.

3. The matters contained in this declaration are based upon my understanding of *Wagafe, et al., v. Trump, et al.,* Case No. 2:17-cv-00094, now pending in the United States District Court for the Western District of Washington, and on information available to me in my capacity as the USCIS FOIA officer.

4. I am aware of the Motion to Compel filed by Plaintiffs on September 28, 2017, which states that documents USCIS released under FOIA reveal that the file of a named plaintiff in the instant litigation, *viz.* Abdiqafar Wagafe, was reviewed by a CARRP officer. I am also aware that it further states that additional documents obtained through FOIA indicate that CARRP officers were involved in the handling of other naturalization and adjustment-of-status applications.

Overview of the USCIS FOIA Process

5. All FOIA requests submitted to USCIS are processed at the NRC. The NRC processes all FOIA requests in compliance with DHS implementing regulations found at 6 C.F.R. Part 5 and Management Directive No. 0460.1. When the NRC receives a FOIA request from an individual seeking his immigration records, that request is first assigned to a USCIS FOIA/PA Assistant to conduct a search for, and to retrieve, responsive records. When those responsive records are located and received by the NRC, the request is then assigned to a USCIS Government Information Specialist to conduct a review of the responsive records, to determine what records, if any, are subject to release, and what records are exempt from release, and to generally respond to the FOIA request in accordance with applicable law and regulation.

6. Under the FOIA, there are nine exemptions under which Agency records may be exempt from release, as well as certain factors that must be considering in determining whether to apply any of these exemptions. If, after fully considering these factors, it is determined that responsive information is exempt from release, the Government

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Information Specialist redacts that information to protect it from release. Once the review and processing of the responsive records is complete, and the NRC has determined that all reasonably segregable, non-exempt information has been produced, the production is sent to the requestor.

USCIS FOIA Policy

7. The USCIS FOIA Processing Guide describes the general USCIS policies and guidelines in processing FOIA requests. It was last updated on February 7, 2017.

8. USCIS officers are required to follow the Processing Guide in examining FOIA requests and determining how to apply exemptions in any given case.

9. The Processing Guide instructs officers to withhold CARRP worksheets and coversheets under FOIA exemption (b)(7)(e). The guide likewise instructs officers to withhold unclassified Letterhead Memoranda ("LHM") under exemption (b)(7)(e).

10. The FOIA Office also has training materials for FOIA officers reviewing CARRP information in files. The CARRP and FDNS training specifically instructs officers to withhold in full, under FOIA exemption (b)(7)(e), additional documents that tend to reveal that an individual may be subject to CARRP processing.

11. FOIA exemption b(7)(e) protects law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

12. USCIS considers documents that tend to reveal if an individual has been subject to CARRP processing to be exempt from release under FOIA exemption b(7)(e).

13. Therefore, any release through FOIA of information that tends to reveal that an individual may be subject to CARRP processing is in contravention of USCIS policy, and would have been released in error.

FOIA Documents Referenced in Plaintiffs' Motion to Compel

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14. I have reviewed the documents referenced in Plaintiffs' Motion to Compel, which seem to be intended to suggest that USCIS reveals through FOIA whether an individual has been subject to CARRP processing.

15. The first document cited in Plaintiffs' Motion to Compel is at Docket 27-1, Exhibit E. Plaintiffs state that this document "indicat[es] Plaintiff Wagafe's file was reviewed by a CARRP officer."

16. Based on my review, the first page of Exhibit E is a Case Summary. The statement under the heading "National Security Concerns" is "Unknown at this time. LHM was reviewed." The first entry under the heading "Completed Actions" states: "04/19/2014 Completed Checks of TECS, Accurint, ATSP, CLAIMS, NLETS by prior CARRP Officer." The second entry under the heading "Completed Actions" states "06/23/2014 Completed checks of TECS and ATSP; LHM reviewed."

17. In my experience and judgement, under USCIS FOIA policy and guidelines, the portions of these three sentences referring to "CARRP" and an "LHM" should have been redacted as exempt from release under FOIA exemption b(7)(e) and were released in error.

18. On page 3 of this document, the statement under "National Security Issues" states "Need to have HSDN LHM pulled." The statement under the heading "Eligibility Assessment," states: "Applicant appears eligible absent confirmation of NS issues."

19. In my experience and judgement, under USCIS FOIA policy and guidelines, the portions of these two sentences referring to "NS issues" and "LHM" should have been redacted as exempt from release under FOIA exemption b(7)(e) and were released in error.

20. I also reviewed the second document cited in Plaintiffs' Motion to Compel, Declaration of Stacy Tolchin in Support of Plaintiffs' Motion to Compel Production of Documents, Exs. 1, 2.

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21. Page 1 of Exhibit 1 is a document containing two charts. The second row, fifth column, second line of the second chart states "Resp: 1007 – BCU CARRP Incoming – 1007."

22. In my experience and judgment, under USCIS FOIA policy and guidelines, this sentence should have been redacted as exempt from release under FOIA exemption b(7)(e) and was released in error.

23. Page 2 of Exhibit 1 is a handwritten note. Although it is not completely readable, it appears to say "screen prints duplicated from 765 & 131 applications by CARRP officer. Atkinson 4-24-15."

24. In my experience and judgment, under USCIS FOIA policy and guidelines, the portion of this sentence referring to CARRP should have been redacted as exempt from release under FOIA exemption b(7)(e) and was released in error.

25. Exhibit 2 is a document containing one chart. The second row, fifth column, second line of the second chart states "Resp: 1379 – CARRP S. Thomas."

26. In my experience and judgment, under USCIS FOIA policy and guidelines, this sentence should have been redacted as exempt from release under FOIA exemption b(7)(e) and was released in error.

Conclusion

27. The Department of Homeland Security (DHS) receives far more FOIA requests than any other department in the federal government, and approximately 40 percent of all FOIA requests in the federal government. USCIS is the component within DHS that processes the vast majority of these FOIA requests.

28. Although the USCIS FOIA office carefully reviews each FOIA production and diligently endeavors to ensure that all applicable exemptions are applied to each FOIA production, it is possible for mistakes to occur, and for information that is subject to an exemption to be inadvertently released.

29. The USCIS FOIA office regrets that such errors have occurred, including those identified in this case. Nevertheless, such occasional errors, within the vast volume

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of FOIA productions that USCIS makes, does not change the fact that information relating to whether an individual applicant is being processed through CARRP is considered by USCIS to be exempt from disclosure pursuant to FOIA exemption (b)(7)(E). Furthermore, it is USCIS policy to redact from documents processed for release pursuant to FOIA any information that would disclose whether an individual's application has been handled pursuant to CARRP.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of October, 2017 at Lee's Summit, MO

Jill A. Eggleston
Associate Center Director
Freedom of Information Act &
Privacy Act Unit
U.S. Citizenship and Immigration Services

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Exhibit H

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,

Plaintiffs,

v.

TRUMP, et al.,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF MATTHEW E. EMRICH IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

I, Matthew E. Emrich, do hereby declare and say:

1. I am the Associate Director of the Fraud Detection and National Security (FDNS) Directorate, United States Citizenship and Immigration Services ("USCIS"), Department of Homeland Security.

2. As the Associate Director of FDNS, I am responsible for overseeing all policy, planning, management, and execution functions for FDNS. FDNS's mission is to enhance the integrity of the legal immigration system by leading USCIS's efforts to identify threats to national security and public safety, detect and combat immigration benefit fraud, and remove systematic and other vulnerabilities. I have held this position since November 15, 2015.

3. Prior to becoming the Associate Director, beginning November 2012, I was the Deputy Associate Director of FDNS. I first joined USCIS in May 2010, as the chief of

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the Intelligence Division within FDNS. Prior to joining FDNS, I held various positions within the Department of Homeland Security (DHS) and its components, including as the chief of the DHS Threat Task Force and the Deputy Assistant Director of Immigration and Customs Enforcement (ICE)'s Office of Intelligence.

4. Currently, and since I began to work at USCIS in May 2010, I hold a Top Secret security clearance that would allow me to review any classified information that has been presented to USCIS.

5. The matters contained in this declaration are based on my review of the Motion to Compel in *Wagafe, et al., v. Trump, et al.*, Case No. 2:17-cv-00094, now pending in the United States District Court for the Western District of Washington, and after consideration of information available to me in my capacity Associate Director of FDNS.

6. I am aware of the class action litigation involving Plaintiffs that has been filed in the United States District Court for the Western District of Washington, and that in this class action Plaintiffs challenge the Controlled Application Review and Resolution Program (hereinafter "CARRP").

7. I am familiar with the USCIS Memorandum entitled, *Policy for Vetting and Adjudicating Cases with National Security Concerns*, dated April 11, 2008 (hereinafter "CARRP Memorandum"), which established the CARRP policy. As Deputy Associate Director, and now as Associate Director, my duties have included overseeing the implementation of the CARRP Memorandum, and overseeing any efforts to consider any updates, reviews, or modifications of the CARRP policy.

8. Because it is my responsibility to oversee CARRP policy, I am aware of all CARRP policy or guidance that has been developed and implemented since CARRP was created in April 2008. I am also aware of the reasoning and information that lead to the development of CARRP, from consultations with my staff and colleagues.

9. I am also familiar with classified national security information as defined by Executive Order 13526, § 6.1(i), 75 Fed. Reg. 707, 727 (Dec. 29, 2009) (hereinafter "classified information"). This order prescribes a uniform system for classifying,

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safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism.

10. To the best of my knowledge, information, and belief, USCIS did not use or otherwise consult any classified information in developing and drafting the CARRP Memorandum. To the best of my knowledge, information, and belief, any subsequent revisions, modifications, or updates to the CARRP policy have not involved the use of any classified information.

11. To the best of my knowledge, information, and belief, there is not currently, nor has there been since the CARRP Memorandum was issued, any classified CARRP policy, guidance, or training.

12. While there may be individual case information relating to specific individuals who may have been processed through CARRP that is classified, to the best of my knowledge, information, and belief, and based on discussions with individuals familiar with the creation of CARRP, efforts to develop CARRP policy, guidance, and training have not been discussed over classified email.

13. If directed to search for classified information relating to CARRP policy and its development, adoption, review, or revision, I would not know where to look for such information, as to the best of my knowledge, information, and belief, such information does not exist at USCIS.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __10th___ day of October, 2017 at Washington, D.C.

Matthew E. Emrich
Associate Director, FDNS
U.S. Citizenship and Immigration Service
Washington, D.C.

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Exhibit I

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF JULIE E. FARNAM IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

I, Julie E. Farnam, do hereby declare and say:

1. I am a Senior Advisor for Field Operations Directorate (FOD), United States Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"). From January 30, 2017 to August 7, 2017, I was detailed to the Acting Director's Office of USCIS as a Senior Advisor.

2. During my detail to the Acting Director's Office, I was tasked with leading implementation efforts for USCIS for Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Feb. 1, 2017), and Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 9, 2017) (hereinafter "Executive Orders" or "First EO and "Second EO" respectively). This assignment involved leading agency

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efforts related to all applicable deliverables required in the Executive Orders, meeting regularly with DHS headquarters officials, serving as USCIS's representative on the DHS Executive Order Task Force and coordinating with other agencies and departments as necessary.

3. The matters contained in this declaration are based on my review of the Plaintiffs' First Requests for Production in *Wagafe, et al., v. Trump, et al.*, Case No. 2:17-cv-00094, now pending in the United States District Court for the Western District of Washington, and information available to me from leading implementation efforts of the Executive Orders from January 30, 2017 to August 7, 2017.

4. I am aware of the class action litigation involving Plaintiffs that has been filed in the United States District Court for the Western District of Washington, and that in this class action Plaintiffs challenge the Controlled Application Review and Resolution Program ("CARRP").

5. I am familiar with the USCIS Memorandum entitled "Policy for Vetting and Adjudicating Cases with National Security Concerns," dated April 11, 2008 (hereinafter "CARRP Memorandum"), which established CARRP.

6. I am aware of current CARRP policies and guidance.

7. I am familiar with the Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Feb. 1, 2017), and Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 9, 2017). Based on my duties while detailed to the Acting Director's Office, I reviewed all agency efforts to implement the Executive Orders and participated in discussions regarding the actions that USCIS should take to implement the EOs. I am aware of actions that USCIS took to implement the Executive Orders.

8. To the best of my knowledge, information, and belief, neither the First nor Second EO has impacted the development, adoption, review, or revision of CARRP.

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9. To the best of my knowledge, information, and belief, efforts to implement the Executive Orders have not involved changing, modifying, or updating CARRP policy.

10. To the best of my knowledge, information, and belief, CARRP and any policy, program, or effort that supports implementation of the Executive Orders are unrelated and distinct from one another.

11. If directed to search for information relating to CARRP and the relationship between its development, adoption, review, or revision and the First and Second EOs, to the best of my knowledge, information, and belief, such information does not exist at USCIS.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of October, 2017 at Washington, D.C.

Julie E. Farnam
Senior Advisor
U.S. Citizenship and Immigration Services
Washington, D.C.

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al*.,

Defendants.

CASE NO. C17-94 RAJ
ORDER

This matter comes before the Court on Plaintiffs' Motion to Compel Production of Documents. Dkt. # 91. The Government opposes the Motion. Dkt. # 94. For the following reasons, the Court GRANTS in part and DENIES in part the Motion.

I. BACKGROUND

On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. # 69. The parties have since been engaged in discovery. The parties have attempted to resolve their discovery disputes without court intervention but have reached an impasse. Plaintiffs now move the Court to compel the Government to produce certain documents.

II. LEGAL STANDARD

The Court has broad discretion to control discovery. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011), *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). That discretion is guided by several principles. Most importantly, the scope of discovery is broad. A party must respond to any discovery request that is not privileged and that is "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

If a party refuses to respond to discovery, the requesting party "may move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997).

III. DISCUSSION

Plaintiffs seek, and the Government refuses to provide, discovery in four discrete areas: (1) information to allow Plaintiffs to identify potential class members and why Named Plaintiffs were subjected to CARRP; (2) responsive documents despite their classified status, or a privilege log in lieu of the documents; (3) documents related to two Executive Orders; and (4) documents outside the scope of "national applicability." Dkt. # 91.

A. Identifying Class Members

As to the first matter, the Government argues that the class members' specific identities are neither relevant nor required for Plaintiffs to pursue this class action. Dkt. # 94 at 4-5. Many of the Government's arguments in opposition to this request are mere

conclusions, and therefore are not sufficient to avoid disclosure. *See id*. at 4-6. However, the Government advances two arguments that are supported by more than mere conclusions: (1) identifying class members is unreasonably burdensome, and (2) the identities of class members are privileged. *Id.* at 6-7.

In asserting that that task of identifying class members is too burdensome, the Government concedes that it already compiles potential class members into searchable databases. Dkt. # 94-6 at ¶¶ 13-21. It claims, however, that conducting detailed, quality assurance on these searches will cost up to $1.17 million. *Id.* at ¶ 26. This does not diminish the fact that the Government is capable of at least providing Plaintiffs with spreadsheets of the potential class members—information that already exists and is readily accessible. *See id.* at ¶ 23 (based on the data it has, the Government estimates that roughly 3,000 CARRP cases exist). This information is relevant and the Government can produce it without incurring such a high expense.

That Government further argues that, even if producing the records were not burdensome, the requested discovery is protected by the law enforcement privilege. Dkt. ## 94 at 7-8, 94-5 at ¶ 7. To claim this privilege, the Government must satisfy three requirements: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege. *In re Sealed Case*, 856 F.2d at 271. This privilege is qualified: "[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *Id*. at 272.

The Government contends, broadly, that releasing the identities of potential class members could lead individuals to potentially alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests. Dkt. # 94-5 at ¶ 18. Such a vague, brief explanation that consists of mere

speculation and a hypothetical result is not sufficient to claim privilege over basic spreadsheets identifying who is subject to CARRP. *See, e.g.*, *In re Sealed Case*, 856 F.2d at 272 (explaining that the SEC "submitted a lengthy declaration detailing the effect disclosure would have on its ongoing Wall Street investigation" to support its claim for privilege). Even if it were sufficient, the privilege is not automatic; the Court must balance the need for Plaintiffs to obtain this information against the Government's reasons for withholding. In doing so, the Court finds that the balance weigh in favor of disclosure. The Court notes that there is a protective order in place, Dkt. # 86, and Plaintiffs' attorneys could supplement the protective order or obtain security clearances to assuage any remaining concerns on the part of the Government. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1160 (D. Or. 2014) (citing *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012)).

Finally, Plaintiffs request to know why the Named Plaintiffs were subjected to CARRP.[1] For the same reasons stated above, the Court finds that this information is relevant to the claims and Plaintiffs' needs outweigh the Government's reasons for withholding.

B. Classified Documents

The Government claims that no relevant classified documents exist. Dkt. # 94 at 9. It appears that the Government only searched for classified documents that relate to CARRP on a programmatic level. *Id.*; *see also* Dkt. # 91 at 11.[2] The Government asserts that any other documentation is irrelevant. As stated above, the Court rejected the

[1] Importantly, Plaintiffs seek this information only on behalf of the Named Plaintiffs, not for each potential class member.

[2] Plaintiffs included this clarifying information in a footnote. The Court strongly disfavors footnoted legal citations. Footnoted citations serve as an end-run around page limits and formatting requirements dictated by the Local Rules. *See* Local Rules W.D. Wash. LCR 7(e). Moreover, several courts have observed that "citations are highly relevant in a legal brief" and including them in footnotes "makes brief-reading difficult." *Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC, 2014 WL 289924, at *1 (D. Ariz. Jan. 24, 2014). The Court strongly discourages the parties from footnoting their legal citations in any future submissions. *See Kano v. Nat'l Consumer Co-op Bank*, 22 F.3d 899-900 (9th Cir. 1994).

Government's conclusory arguments as to relevance. As such, the Government must either produce the relevant documents or provide Plaintiffs with a proper privilege log.

C. Documents Related to the Executive Orders

Plaintiffs seek documents that connect any kind of "extreme vetting" program to two Executive Orders. Dkt. # 91 at 14-15. The Government refuses to search for such documents, arguing that any such documents are subject to the deliberative-process privilege. But this argument is premature; the Government fails to show why it is exempt from providing Plaintiffs with a privilege log. The Court finds that the Government must provide a proper privilege log if it means to assert a deliberative-process privilege over certain documents.

The Government further invokes Executive privilege and argues that Plaintiffs have not made a "showing of heightened need" to demand discovery from the President. Dkt. # 94 at 10-11. Plaintiffs argue that the Government must "provide alternate custodians and non-custodial sources of information that will capture the documents Plaintiffs seek." Dkt. # 91 at 16. The Court is mindful that intruding on the Executive in this context is a matter of last resort, *Cheney v. U.S. Dist. Ct. for the Dist. Of Columbia*, 542 U.S. 367 (2004), and the Court does not find that the record before it justifies such an intrusion. However, the Court orders the parties to meet and confer within thirty (30) days from the date of this Order to discuss alternative custodians and non-custodial sources of information for any discovery over which the Government asserts this specific privilege. The Court requests a joint status report within five (5) days of the court-ordered conference detailing any resolution of this issue.

D. Nationwide Applicability

Plaintiffs object to the Government's refusal to produce documents outside the scope of "national applicability." Dkt. # 91 at 17. The Government argues that searching for documents outside of this scope is unduly burdensome and irrelevant. Dkt. # 94 at 12-13. However, Plaintiffs clarify in their Reply that they are not seeking documents

beyond those that the Government "already agreed to search." Dkt. # 95 at 7. If this is the case, then it appears that the parties are able to resolve this dispute without Court intervention. To the extent that Plaintiffs seek documents for which the Government has already searched, the Court grants the request with the caveat that the Government may produce a privilege log in lieu of the documents if appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part Plaintiffs' Motion to Compel Production of Documents. Dkt. # 91. **The Court orders the parties to meet and confer and submit a joint status report thereafter in accordance with this Order.**

Dated this 19th day of October, 2017.

The Honorable Richard A. Jones
United States District Judge

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' MOTION TO RECONSIDER ORDER OF OCTOBER 19, 2017

HON. RICHARD A. JONES

NOTED ON MOTION CALENDAR: November 2, 2017

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
Ben Franklin Station, P O Box 868
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On October 19, 2017, the Court issued an order granting in part and denying in part Plaintiffs' motion to compel production of certain documents. Defendants respectfully seek reconsideration of Part III.A of the Court's order, which concerns identification of class members. The Court erred in analyzing the law enforcement privilege in Part III.A. And Part III.A presents public-safety and national-security dangers, given the extreme sensitivity of the information at issue and the chilling effect it may have on information sharing within the Government. *See In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006) ("in today's times the compelled production of government documents could impact highly sensitive matters relating to national security"); The 9/11 Commission Report, 416-17 & Executive Summary, 14 (2004) (finding that both lack of information sharing and less-than-full partnership of immigration agencies in the intelligence community contributed to the 9/11 attacks).

In brief, (1) the Court erroneously rejected Acting Director McCament's assertion of the law enforcement privilege as speculative, because all assertions of law enforcement privilege involve an assessment of potential future risk—and Acting Director McCament's invocation of the privilege otherwise meets the requisite standard; (2) the Court failed to identify and apply the correct standard—necessity—to overcome an assertion of the privilege; (3) even assuming Plaintiffs had demonstrated a necessity, the Court did not explain its balancing of Plaintiffs' interest in the information sought against the Government's and the public's interest in nondisclosure of sensitive law enforcement information; and (4) the Court improperly and speculatively relied on other means to protect the information at issue. Any one of these errors would justify reconsideration and vacatur of Part III.A of the Court's order. Accordingly, reconsideration is appropriate under Local Rule 7(h)(1).

1. Rejecting an Assertion of Law Enforcement Privilege as "Speculative" is Improper as All Assertions of Law Enforcement Privilege Involve a Prediction of Potential Future Harm

The Court dismissed the sworn statement of the head of USCIS that releasing a list of thousands of individuals who have articulable ties to terrorism and other national

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security grounds of inadmissibility and removability would impair national security. ECF No. 98 at 3-4. The Court termed the Acting Director's statement "vague" and "brief," and held that "mere speculation" and only "a hypothetical result" was insufficient to claim the law enforcement privilege over the identities of individuals in CARRP—including known or suspected terrorists and individuals who may be the subject of ongoing investigations. *Id.*; Answer ¶¶ 64 & 78.

The Court erred in rejecting the Acting Director's testimony as speculative and hypothetical. *Every* assertion of law enforcement privilege inherently involves a prediction of future risks. This does not make assertion of the privilege "mere speculation." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977) (explaining that the privilege is "based primarily on the harm to law enforcement efforts which *might* arise from public disclosure of [Government] investigatory files") (emphasis and alteration added). The very purpose of the privilege is to prevent what *might* occur if the information is disclosed from actually occurring. The party invoking the privilege need not establish that any particular future event *will* occur; it is enough to show, through competent evidence, that disclosure risks that possibility. Defendants met that bar, and all other criteria to validly invoke the law enforcement privilege. *See Shah v. U.S. Dep't of Justice*, 89 F. Supp. 3d 1074, 1080 (D. Nev. 2015) (explaining that to invoke the privilege (1) the head of the Department must formally claim the privilege; (2) that claim must be based on personal consideration; and (3) the official must identify the information subject to privilege and explain why it is privileged). Here, the highest official at USCIS formally claimed the privilege in a sworn statement detailing how disclosure of the identities of individuals with an articulable link to national-security grounds of inadmissibility would threaten law enforcement interests. ECF No. 94-5. The Acting Director's declaration explained:

> Public confirmation that a particular individual is subject to CARRP would necessarily alert an individual that he/she may be the subject of an investigation, or at least that the government possess information that creates an articulable link to a national security ground of inadmissibility.

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> By alerting an individual that he or she is subject to an investigation and the types of records consulted, that individual might learn the focus of these investigations. The individual could then, for example, alter his or her behavior, conceal evidence of wrongdoing, or attempt to influence witnesses or adjust his or her means of communication or financial dealings to avoid detection of the very behavior that the law enforcement and intelligence communities have determined may be indicative of a national security threat, and which form the core of pending investigative efforts.

ECF No. 94-5, ¶ 18. To the extent the Court believed that the law requires additional certainty of what *would* result from disclosure, the Court erred. To require certainty and specificity in what harm *will* result from disclosure is to negate the law enforcement privilege entirely. Moreover, the declaration is neither vague nor brief—and, in any event, brevity is not a basis to reject a validly invoked privilege. The declaration was based on the Acting Director's personal knowledge of the facts contained therein and provided sufficient specificity to meet the requirement to "provide an explanation." *Shah*, 89 F. Supp. 3d at 1080-81 (providing similarly detailed reasoning).[1] Defendants met all of the criteria to validly invoke the law enforcement privilege. *Id.*

2. The Court Did Not Require Plaintiffs to Demonstrate a "Necessity" for the Identities of Class Members and Erred in Ordering Disclosure Only Upon a Showing of Relevance

Furthermore, the Court did not specify what burden Plaintiffs bore to overcome the privilege, or, indeed, acknowledge they had such a burden at all. *See* ECF No. 98 at 4 (moving directly from whether the privilege was validly asserted to balancing the party's interests without first considering whether Plaintiff's need was sufficiently great to overcome the presumption against lifting the privilege). The Supreme Court and the Ninth Circuit have held that evidence must be "essential," or meet an equally high threshold, to justify piercing the privilege. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982) ("The *Roviaro* Court held that the informer's identity had to be disclosed, but only after it concluded that the informer's testimony would be *highly*

[1] Defendants continue to maintain that, given the nature of this case—a facial challenge to the lawfulness of CARRP, applicable nationwide to all class members—Plaintiffs have no need for the identities of the class members, and that disclosure of anonymous demographic information would be sufficient to meet the needs of the case.

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relevant") (emphasis added); *In re Perez*, 749 F.3d 849, 859 (9th Cir. 2014) (holding identifying information of whistleblowers must be "essential" to justify disclosure). Other courts have ruled similarly. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1998) ("It seems to us, however, and not only to us, that there ought to be a pretty strong presumption against lifting the privilege."); *Dole v. Local 1942, Int'l B'hood of Elec. Workers, AFL-CIO*, 870 F.2d 368-375 (7th Cir. 1989) ("The informer's privilege will yield upon a showing of substantial need"); *United States v. Cintolo*, 818 F.2d 980, 983-84 (1st Cir. 1987) (requiring showing of "necessity" to pierce privilege).

Plaintiffs have not met this "pretty strong presumption," nor explained why the identities of the class members are "necessary" or "essential" to their case rather than merely relevant. *In re Perez* involved an analogous request to disclose specific identities of whistleblowers which the requesting party could then associate with particular facts. The Ninth Circuit concluded that associating an identity with other evidence was not essential and did not justify piercing the privilege:

> The information the Secretary has not disclosed consists of *only* the identifying information in the 250 statements. While this information may meet the general standard for relevance under Federal Rule of Evidence 401, we are not convinced that its probative value is so great that it is "essential" to DSHS's defense. DSHS cannot force the Secretary to reveal the identities of the informants on such a weak showing.

749 F.3d at 859.

Here, as in *In re Perez*, the information Defendants seek to withhold consists *only* of identifying information. Plaintiffs specifically requested the name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the relevant application was filed, and the current status of the relevant application. *See* ECF No. 94-1 at 18-19 (RFP No. 28). Defendants are willing to provide all of this information, to the extent it is known and stored in the relevant electronic system, other than the name and A-number. ECF No. 94 at 8. Because Plaintiffs have not, and cannot, establish a legitimate need for identifying information, there is no basis for releasing the names and other identifying information of those applicants with an articulable tie to national

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security grounds of inadmissibility. As in *In re Perez*, while individual identities may be "relevant" under Federal Rule of Evidence 401, they are not "essential" or "necessary," and, accordingly, Defendants' assertion of privilege should not be disturbed. Moreover, this case involves considerations of national security, public safety, and the integrity of ongoing investigations not present in *In re Perez*. Accordingly, this case presents a greater justification for withholding identities than the Ninth Circuit has already approved.

3. Even Assuming a Necessity, the Court Did Not Articulate Its Basis For Concluding the Plaintiffs' Litigation Needs Outweighed The Public Interest in Nondisclosure

Beyond this, the Court failed to balance the litigation needs of the Plaintiffs against the Government's and the public's interest in nondisclosure. Even assuming Plaintiffs had shown a "necessity" or "compelling need" for the names and A-numbers of the class members, that need must still outweigh the public interest in nondisclosure to justify piercing the privilege. *In re City of New York*, 607 F.3d at 948 ("If the presumption against disclosure is successfully rebutted (by a showing of, among other things, 'compelling need'), the district court must then weigh the public interest in nondisclosure against the need of the litigant for access. . . "); *In re Sealed Case*, 856 F.2d at 272. Here, the Court did not identify a relevant standard or explain its analysis in concluding that "the balance weigh[s] in favor of disclosure." ECF No. 98 at 4. This was error. Explicit balancing of the competing factors is required. *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) ("the failure to balance at all requires remand"). *In re City of New York*, 607 F.3d 943, 948 (2d Cir. 2010), and *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973), contain illustrative lists of factors to be considered in determining the applicability of the privilege. Assuming that Plaintiffs could establish the requisite necessity, the Court must articulate how it is balancing the competing interests, and should conclude that the Government's and the public's interest in nondisclosure of the identities takes precedence over Plaintiffs' desire to associate names with information, jeopardizing ongoing law enforcement efforts.

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4. Courts Have Rejected Protective Orders as Insufficient to Guard Against Improper Disclosure of Law Enforcement Privileged Information

The Court also suggested that Plaintiffs' attorneys could supplement the protective order. ECF No. 98 at 4. Courts, including the Ninth Circuit, have routinely concluded that protective orders are insufficient in contexts implicating law enforcement privileged information, improper disclosure of which could threaten public safety. The Second Circuit, in perhaps the most extensive analysis of this subject, rejected similar procedures, concluding that inadvertent (or intentional) disclosure of law enforcement information was too great a risk, and the potential harm too difficult to remedy. *In re City of New York*, 607 F.3d at 935-39. Likewise, the Ninth and D.C. Circuits have similarly rejected an attorney-eyes-only remedy in cases involving national security interests in FOIA litigation. *Islamic Shura Council of So. Cal. v. FBI*, 635 F3d 1160, 1168 (9th Cir. 2011) (citing *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469-71 (D.C. Cir. 1983)). These courts have concluded that permitting access would "color public perception of the security of confidential information in government files." *Id.* The same analysis applies with equal force here. Once disclosed, the bell cannot be un-rung.

CONCLUSION

For these reasons, Defendants respectfully submit that the Court should grant Defendants' Motion to Reconsider.

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Dated: November 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on November 1, 2017, I conferred with opposing counsel and thoroughly discussed the substance of this motion and in good faith attempted to reach an accord to eliminate the need for the motion.

s/ Edward S. White
EDWARD S. WHITE
U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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s/ Edward S. White
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U.S. Department of Justice

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The Honorable Richard A. Jones

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

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAP

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO RECONSIDER

Upon consideration of Defendants' Motion to Reconsider, the Court **GRANTS** said motion. The Court **VACATES** Part III.A of its Order of October 19, 2017.

Dated this _____ day of _____, 2017.

_____
HON. RICHARD A. JONES
United States District Judge

Presented by:

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Acting Assistant Attorney General

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

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAJ

ORDER

This matter comes before the Court on Defendants' motion for reconsideration. Dkt. # 99. Plaintiffs oppose the motion. Dkt. # 100. For the following reasons, the Court **DENIES** the motion.

"Motions for reconsideration are disfavored." LCR 7(h)(1). "The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." *Id.*

Defendants move the Court to reconsider Part III.A. of its prior discovery order, entered at docket number 98, wherein the Court granted in part and denied in part Plaintiffs' motion to compel. Defendants argue that the Court reached its decision in

error by (1) rejecting Mr. McCament's declaration; (2) failing to find that Plaintiffs did not meet their burden to show "necessity"; (3) failing to articulate why the balance of the parties' needs weighed in favor of disclosure; and (4) suggesting that the parties could cure their issues with a detailed and thorough protective order. *See generally* Dkt. # 99.

First, the Court considered Mr. McCament's declaration and found that it was insufficient under the standard advanced by the Government. That the Government disagrees with this assessment is not proper grounds for granting a motion for reconsideration.

Second, Defendants' Ninth Circuit authority cited for the proposition that Plaintiffs failed to show "necessity" is based on the informants privilege, not the law enforcement privilege.[1] The premise behind the informants privilege differs from that of the law enforcement privilege. For example, Defendants rely on *In re Perez* for "an analogous request to disclose specific identities." Dkt. # 99 at 5. However, *In re Perez* aimed to protect "employees seeking to vindicate rights claimed to have been denied." *In re Perez*, 749 F.3d 849, 856 (9th Cir. 2014) (quotations and citations omitted). Here, the identities that the Government seeks to withhold are those individuals who wish to vindicate their own rights. The Government is not withholding those identities to protect those individuals.

Third, the Court exercised its discretion in balancing the needs of Plaintiffs versus those of Defendants and found that the balance weighed in favor of disclosure. The Government argued that grave national security threats could materialize were the Government forced to reveal the individuals subject to CARRP and "the types of records consulted" because this could lead those individuals to "alter [their] behavior, conceal evidence of wrongdoing, or attempt to influence witnesses or adjust [their] means of

[1] Moreover, the persuasive authority that the Government cited dealt with asserting privilege over evidence collected through surveillance and recording; such situations are not analogous to the one at hand.

communication or financial dealings to avoid detection of the very behavior that the law enforcement and intelligence community have determined may be indicative of a national security threat[.]" Dkt. 94-5 at ¶ 18. But Plaintiffs did not request more than the identities of the class members; Plaintiffs did not request "the types of records consulted" for each potential class member. The Government may not merely say those magic words—"national security threat"—and automatically have its requests granted in this forum. Plaintiffs articulated enough to tip the balance in their favor; they requested limited information—only the names of potential class members—and explained that those potential class members may already be aware of the Government's additional scrutiny considering the passage of time. Under any rational balancing act, such a limited scope of request will not be outbalanced by the speculative scope of what the Government offered in opposition.

Finally, the Government disagreed with the Court's conclusion that a robust protective order was sufficient to protect against improper disclosure of privileged information. The Government cited cases that were not analogous to this matter and therefore did not persuade the Court. Disagreement with the Court's conclusions is not a sufficient basis upon which to grant a motion for reconsideration.

For the foregoing reasons, the Court **DENIES** Defendants' motion for reconsideration. Dkt. # 99.

Dated this 28th day of November, 2017.

The Honorable Richard A. Jones
United States District Judge

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, Plaintiffs, v. DONALD TRUMP, *et al.*, Defendants.	CASE NO. C17-0094-RAJ DEFENDANTS' MOTION FOR LIMITED PROTECTIVE ORDER Noting Date: March 9, 2018

On October 19, 2017, the Court issued an order concerning the discoverability of the identities of class members. Dkt. No. 98. Noting the sensitivity of the information, the Court suggested that the parties "could supplement the protective order . . . to assuage any remaining concerns on the part of the government." *Id.* at 4. The Court subsequently denied the Defendants' motion for reconsideration, noting that a "robust protective order" was sufficient to guard against misuse of official information. Dkt. No. 102 at 3.

Defendants have conducted the searches directed by the Court to create a list of class members (though, consistent with the Court's order, *see* Dkt. No. 98 at 3, they have not conducted the expensive and time-consuming steps required to manually cross-check and verify the accuracy of all of the information in the databases from which the class list was compiled with the individuals' Alien Files). The class list is now ready for disclosure to Plaintiffs' counsel in discovery.

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As explained in the accompanying declarations from officials at United States Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), and the Federal Bureau of Investigation ("FBI"), the information in the class list that identifies individuals (i.e. their names, alien file numbers ("A numbers") and application filing dates) is highly sensitive, non-public, "for official use only" information. The disclosure of this information to those individuals or the public at-large could, in the informed opinion of the declarants, damage national security and/or intelligence investigations and the proper adjudication of the benefit the individual is seeking. Consequently, Defendants now respectfully move this honorable Court to supplement the existing protective order to limit disclosure of the names, A numbers, and application filing dates of the certified class members solely to Plaintiffs' attorneys of record, any experts retained by Plaintiffs, and the Court and court personnel. Further, Defendants ask that the Court require Plaintiffs' counsel take certain security measures identified below in their handling of that information, and prohibit Plaintiffs' counsel from contacting unnamed plaintiffs or confirming to an individual that contacts Plaintiffs' counsel that he or she is a member of either of the two certified classes.

STANDARD

A district court has broad power to fashion protective orders, and may do so upon a showing of good cause. *See* Fed. R. Civ. P. 26(c) (requiring only good cause to issue protective order); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). The Court must identify and discuss the factors it considers, and the party asserting good cause must show that specific prejudice or harm would result from the disclosure of each category of information it seeks to protect. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

ARGUMENT

"Courts commonly issue protective orders limiting access to sensitive information to counsel and their experts." *Nutratech, Inc. v. Syntech (SSPF) Intern, Inc.*, 242 F.R.D. 552, 555 (C.D. Cal. 2007). In the unique context of this litigation, the names, A numbers, and application filing dates of class members are sensitive, and good cause exists to protect them

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from disclosure to those individuals and the public at-large. Names and A-numbers of the class members of the two certified classes would allow one to determine whether a specific individual's immigration benefit application has been processed pursuant to the CARRP policy. The application filing date, together with other biographic information that would be provided on the class list, would also be sufficient to allow an individual to identify him or herself. This fact would, if disclosed to the applicant, alert the applicant that an articulable link exists between that individual and one or more specific national security-related grounds of inadmissibility or removability.

A. Disclosure Risks Prejudice to National Security and Intelligence Interests

Notwithstanding the existing protective order, Plaintiffs' counsel intends to inform unnamed class members of their status in CARRP. *See* Dkt. No. 91 at 4-5. As detailed in the accompanying declarations, Exhibits ("Ex.") A through C, that disclosure would risk damage to national security and intelligence interests and investigations, and the proper adjudication of the benefit the individual is seeking.

In USCIS's experience, it is difficult to gather evidence if an applicant prematurely becomes aware of an investigation. Declaration of Matthew D. Emrich, Ex. A, at ¶¶ 26, 27. That is because the individual may change his or her behavior, coordinate with others to prevent USCIS from collecting statements from other relevant persons, stop certain behaviors, or intentionally provide misleading information. *Id*. at ¶ 27. As a result, USCIS's ability to ensure that only eligible applicants are afforded immigration benefits is degraded, and some persons who might, in fact, be ineligible for the benefit sought, could obtain benefits to which they would not be entitled. *Id*.

Similarly, disclosure that an applicant is (or was) subject to CARRP, and therefore has (or had) an articulable link to a national security ground of inadmissibility or removability, would allow the applicant to infer that he or she may be subject to investigative scrutiny by law enforcement. *Id*. at ¶ 28. For example, an applicant might infer that USCIS received derogatory information from the FBI during the name check process. Declaration of David Eisenreich, Ex. B, at ¶ 32. If an unnamed class member is a bad actor, the individual is likely aware of the bad

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acts in which he or she is involved. Notification that he or she has been subject to CARRP would then certainly lead the individual to suspect or believe that those bad acts are being investigated. That conclusion, in turn, could disrupt an individual investigation, or, if the individual is the subject of an investigation involving a large number of people, that individual could report back to others in the group that their activities are likely being investigated. In this way, large scaled investigations could also be interrupted and adversely affected. Ex. A at ¶ 28; Ex. B at ¶ 31-32; Declaration of Tatum King, Ex. C, at ¶ 5.

An applicant's ability to reasonably infer that he or she is of national security or law enforcement investigative interest to the U.S. government, including whether an individual is or has been the subject of an FBI counterterrorism or counterintelligence investigation or of other intelligence interest, could harm national security and seriously impair the ability of government agencies to conduct future investigations. Ex. A at ¶ 27; Ex. B at ¶ 31-32; Ex. C at ¶ 5.

B. The Existing Protective Order Is Insufficient To Protect Against Disclosure

Although there is an existing protective order in place, it is insufficient to adequately guard against the prejudice to the Government and the public identified above.

On August 15, 2017, almost two months after the Court certified two nationwide classes, the Parties submitted a joint motion for entry of a stipulated protective order. Dkt. No. 84. The Court entered the stipulated protective order three days later. Dkt. No. 86. Under that stipulated protective order, Plaintiffs agreed to terms that prohibit them from divulging to unnamed class members that they are, in fact, class members in this litigation, or that their immigration benefit applications have been processed pursuant to the CARRP policy. *See* Dkt. No. 86 at ¶ 4.2. Although unnamed class members are not authorized to receive confidential information under the Stipulated Protective Order, Dkt. No. 86, Plaintiffs' have indicated their intention to inform unnamed class members whether they are included on the class list. Further, the current protective order would permit the named Plaintiffs to receive the class list, Plaintiffs' counsel to reveal to some unnamed class members the fact of their inclusion on the list by means of deposing them, and could also allow Plaintiffs' counsel to comply with the

letter of the order while violating its spirit by approaching unnamed class members and communicating sufficient information to them to implicitly communicate to those individuals that they are, in fact, unnamed class members. Defendants' proposed order avoids these difficulties by drawing clearer lines than was possible for a protective order that applies generally across all discovery.

Under the current stipulated protective order, certain information is considered "Confidential Information." Confidential Information includes, *inter alia*, A numbers; "any other information that, either alone or in association with other related information[] would allow the identification of the particular individual(s) to whom the information relates" (including names); sensitive but unclassified information, including information deemed "limited official use" and "for official use only"; any information complied for law enforcement purposes[1]; and personally identifiable information. Dkt. No. 86 at ¶ 2(a), (b), (k), (l), (p). Confidential Information "including all information derived therefrom, shall be restricted to use in this litigation . . . and shall not be used by anyone subject to the terms of this agreement, for any purpose outside of this litigation or any other proceeding between the parties." *Id.* at 6 ¶4.3. Disclosure of confidential information is limited, as relevant here, to:

- "named Plaintiffs";
- "Plaintiffs' counsel in this action and any support staff of such counsel assisting in this action with an appropriate need to know";
- "experts and consultants to whom disclosure is reasonably necessary for this litigation";
- "any other person mutually authorized by both parties' counsel";
- "the Court, court personnel, and court reporters, and their staff";
- "copy or imaging or data processing services retained by counsel to assist in this litigation";
- "during their depositions, witnesses in this action to whom disclosure is reasonably necessary"; or

[1] This category presumably concerns any law enforcement information that may not be withheld from disclosure as privileged.

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- "the author or recipient of a document containing Confidential Information or a custodian or other person who otherwise possessed or knew the Confidential Information".

Id. at 5-6 ¶ 4.2(a)-(i). Notably absent from this list is unnamed class members. Thus, unless they are provided access during a deposition under paragraph 4.2(h), the fact that an unnamed class members is included on the list of class members is Confidential Information that cannot be disclosed to the class member.

Although this provides some measure of protection, there is nothing in the current protective order that would prevent an attorney, or the organizations for which they work, from stopping just short of this line while doing the same damage. For example, Plaintiffs' attorneys or agents could seek out class members and provide them factual information on this litigation, explain the class definitions, ask the individuals to contact them in order to learn more—but stop short of actually saying that the individual is a class member and demur if asked. Even without being directly told, the applicant—having full knowledge of his or her own immigration benefit application—would reasonably surmise that he or she is a class member. Plaintiffs would have arguably complied with the letter of the current protective order, while violating its spirit and occasioning the very same harm that would occur as if the individual were directly told that he or she is a class member. Thus, protection beyond the current protective order is necessary to prevent unnamed class members from learning that the Government is considering whether they are ineligible for a benefit under a national-security related ground of inadmissibility and whether they are the subject of a current law enforcement investigation, as well as to prevent the named plaintiffs from learning the identities of others deemed to have an articulable link to a national security ground of inadmissibility.

C. A "For Attorney Eyes Only" Provision Is Appropriate and Necessary

Courts have frequently employed "For Attorneys' Eyes Only" provisions in patent disputes and to protect trade secrets. *See Louisiana Pac. Corp. v. Money Marker 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 490 (N.D. Cal. 2012) (upholding For Attorney Eyes Only designation over investment documents "[e]ven though LP and DBSI are not direct

competitors and do not operate in the same industry"); *Matrix, Inc. v. Midthrust Imports, Inc.*, No. 13-cv-1278, 2014 WL 12589634, *2 (C.D. Cal. Mar. 7, 2018). The need for nondisclosure in this context is substantially greater, as disclosure is likely to risk the ability of USCIS to properly adjudicate immigration benefit applications, or risk important national security and/or intelligence investigations by confirming for "bad actors" that the government has an articulable link between them and a national security ground of inadmissibility or removability.

By (a) limiting disclosure of the names, A numbers, and application filing dates solely to Plaintiffs' attorneys of record; (b) requiring Plaintiffs' attorneys to maintain that information either in a locked filing cabinet (if held in paper copy) or in a password-protected file (if held electronically); (c) requiring Plaintiffs' attorneys not to transmit that information via electronic mail or cloud-based sharing unless the method of transmission employs point-to-point encryption, or other similar encrypted transmission, and (d) prohibiting Plaintiffs' attorneys from contacting the class members, Plaintiffs' counsel will be able to view all of the information they have sought, while preventing the harm the Government has identified. This is an appropriate and necessary balance to permit Plaintiffs' counsel access to this information, while simultaneously protecting the government's legitimate concerns about potential damage to important national security and law enforcement interests.[2]

CONCLUSION

For the foregoing reasons, as well as those described in the accompanying declarations, exhibits A through C, Defendants respectfully move the Court to issue a protective order that

[2] To the extent Plaintiffs' counsel subsequently contend that they need various items of information about particular unnamed class members to develop evidence for use in their case, the parties can meet and confer over ways in which the Defendants might be able to provide Plaintiffs with such information while simultaneously protecting against the above described dangers to important governmental interests. To the extent Plaintiffs contend they need to be able to tell an individual who contacts them asking if he or she is in one of the classes (so that the individual can determine whether to file a separate lawsuit), they are mistaken. Insofar as an individual has different legal claims than those alleged in the Second Amended Complaint, this lawsuit would not advance those distinct claims, regardless of whether the individual is in one of the classes. Insofar as an individual has the same legal claims as those alleged in this case and is in one of the classes, that individual will benefit from any ruling in Plaintiffs' favor in this case and need not file a separate lawsuit. And, finally, insofar as an individual has the same legal claims as those alleged in his case, but is not in one of the classes—which means the individual's application is not pending over six months and subject to CARRP—that individual has no standing to bring such claims. Consequently, there is no reason a curious individual needs to know whether he or she is in one of the certified classes—classes which do not require notice to class members, *see* Fed. R. Civ. P. 23(c)(2)(A)—to determine whether to bring a separate lawsuit.

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(a) limits disclosure of the names, A numbers, and application filing dates of the unnamed class members solely to Plaintiffs' attorneys of record; (b) requires Plaintiffs' attorneys to maintain that information either in a locked filing cabinet (if held in paper copy) or in a password-protected file (if held electronically); (c) requires Plaintiffs' attorneys not to transmit that information via electronic mail or cloud-based sharing unless the method of transmission employs point-to-point encryption, or other similar encrypted transmission; and (d) prohibits Plaintiffs' attorneys, or any person acting on their behalf, from contacting unnamed plaintiff members of the Naturalization Class and Adjustment-of-Status Class for any purpose without prior order of this Court.

Dated: March 1, 2018

Respectfully submitted,

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Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director, District Court Section

TIMOTHY M. BELSAN
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/s/ Edward S. White
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Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on March 1, 2018, I thoroughly discussed the substance of this motion with counsel for Plaintiffs, and in good faith attempted to reach an accord to eliminate the need for the motion. During that discussion, the parties agreed that we were at an impasse over the relief requested in this motion.

/s/ *Edward S. White*
EDWARD S. WHITE
U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 1, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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s/ Edward S. White
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EXHIBIT

A

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF MATTHEW D. EMRICH IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

I, Matthew D. Emrich, do hereby declare and say:

1. I am the Associate Director of the Fraud Detection and National Security ("FDNS") Directorate, U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"). I have held this position since November 15, 2015.

2. As the head of FDNS, I report directly to the Director of USCIS and Deputy Director of USCIS. Prior to becoming Associate Director of FDNS, beginning in November 2012, I was the Deputy Associate Director of FDNS. I first joined USCIS in May 2010, as the Chief of FDNS's Intelligence Division. Prior to my employment with USCIS, I held various positions within the DHS and its components, including as the

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Chief of the DHS Threat Task Force and a Deputy Assistant Director of Immigration and Customs Enforcement ("ICE")'s Office of Intelligence.

3. As the FDNS Associate Director, I am responsible for overseeing all policy, planning, management, and execution functions for FDNS. FDNS's mission is to enhance the integrity of the legal immigration system by leading USCIS's efforts to identify threats to national security and public safety, detect and combat immigration benefit fraud, and remove systemic and other vulnerabilities.

4. After consideration of information available to me in my capacity as USCIS Associate Director of the FDNS Directorate, the matters contained in this declaration are based upon my understanding of the case of *Wagafe, et al., v. Trump, et al.*, Case No. 2:17-cv-00094, now pending in the United States District Court for the Western District of Washington.

How USCIS Identifies Individuals as a National Security Concern

5. The Controlled Application Review and Resolution Process ("CARRP") policy is a consistent USCIS-wide approach to identify, process, and adjudicate applications and petitions for immigration benefits that involve national security concerns. There are four phases in CARRP: identifying the national security concern, internal vetting, external vetting, and adjudication.

6. A national security concern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in 8 U.S.C. §§1182(a)(3)(A), (B), or (F) or 1227(a)(4)(A) or (B).[1] If there is an indicator of a national security concern, but USCIS determines that it does not relate to the individual or there is no articulable link between the individual and the national security concern, the application or petition is not subject to the CARRP policy.

[1] These provisions refer to the statutory inadmissibility and deportability grounds that relate to espionage, sabotage, trade violations, activities in opposition to or to control or overthrow the U.S. government, terrorism, and associations with terrorist organizations where the alien intends, while in the U.S. to be involved in activities that could endanger the U.S.

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7. Although additional eligibility requirements must be met to be eligible for adjustment of status to that of a lawful permanent resident or to naturalize, the grounds above relate to national security, and when an articulable link to one of these grounds exists, the individual is subject to the CARRP policy.

8. Individuals who raise national security concerns are considered either known or suspected terrorists ("KST") or non-KSTs.

9. A KST is an individual who has been nominated and accepted for placement in the Terrorist Screening Database ("TSDB") and is on the Terrorism Watchlist. Individuals who are placed into the TSDB are included in the TECS[2] system with a certain code indicating that the individual is a KST.

10. All other individuals who raise national security concerns are considered non-KSTs. Non-KSTs can be identified in the following ways:

- Information contained within TECS;
- Information from an FBI name check;
- Information from an FBI fingerprint check;
- Information contained within other databases owned by the Department of Homeland Security (DHS), Department of State (DOS), or other agency;
- Applicant-provided information, such as information on the benefit application, or applicant testimony; or
- Any other manner in which USCIS is notified or obtains information that an individual has an articulable link to a national security concern.

11. The fact that there is information about a particular individual from any of these sources does not mean that the individual is subject to the CARRP policy. Rather, if the information contained within these sources provides an articulable link between that individual and a national security ground of inadmissibility or removal, then the

[2] TECS is a multiagency effort with a central system that combines information from multiple agencies, databases, and system interfaces to compile data relating to national security risks and other issues.

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individual would be identified as a national security concern and subject to the CARRP policy.

How the Class Members were Identified as National Security Concerns

12. The composition of the classes certified in this litigation is fluid. Individuals may leave the class when their case is adjudicated, and new individuals may enter the class as their case becomes pending for six months.

13. Within the class, the reasons that an individual is subject to the CARRP policy are also fluid. An individual may be added or removed from the TSDB, which affects whether the individual is a KST or non-KST. Certain investigations may also open or close, affecting which national security ground (if any) applies to a particular individual.

14. Any individual's case may involve multiple pieces of information from various sources, including multiple background check hits, establishing an articulable link between the individual and a national security ground for inadmissibility or removal.

15. Even if an individual is identified as a national security concern, during additional phases of CARRP, such as internal and external vetting, USCIS may conclude from additional information that it receives that a particular individual is not a national security concern and should no longer be subject to the CARRP policy. Depending on how complex the information is and how much additional vetting is needed, the national security concern that was identified for an individual may be resolved in a matter of a few days or weeks. In other instances, additional time is needed to resolve the concern.

16. USCIS understands that individuals remain in the class even after the national security concern is resolved, and the case is no longer subject to the CARRP policy, as long as the individual was subject to the CARRP policy at some point after the class was certified, and the case remains pending. Thus, individuals may still be included in the class even though the individual is no longer subject to the CARRP policy.

17. About 24 percent of the current class members have had their USCIS national security concern resolved, and are no longer subject to the CARRP policy, but

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they remain class members because their immigration benefit request remains pending.[3] In these cases, the adjudication time may be unrelated to the fact that the individual was at some point subject to the CARRP policy. USCIS's current average adjudication time for naturalization and adjustment of status is approximately ten months, even though an individual becomes a class member if an application is pending at least six months.

18. If an applicant is ultimately found ineligible for the immigration benefit sought, then the application is denied. If the applicant is ultimately found eligible for the immigration benefit sought, then the application is granted.

The Stipulated Protective Order is Not Sufficient

19. I understand that, in October 2017, the then-Acting Director of USCIS, James McCament, formally asserted a law enforcement privilege over information that would confirm or deny that any particular individual was subject to CARRP, and therefore is, or was, considered by USCIS to present a national security concern. Dkt. No. 94-5. I also understand that the Court subsequently ruled that Plaintiffs' need to obtain this information outweighed the Government's reasons for withholding it from disclosure to Plaintiffs. Dkt. No. 98 at 4. I also understand that, in its ruling, the Court noted "that there is a protective order in place, Dkt. # 86, and Plaintiffs' attorneys could supplement the protective order." *Id.*

20. USCIS considers the identities of particular individuals subject to the CARRP policy (and considered by USCIS to have an articulable link to a national security ground for inadmissibility or removal) to be highly sensitive, non-public, "for official use only" information.[4] This information identifies individuals currently being vetted by USCIS for national security concerns (or who were considered a national security concern at some point after the class was certified, and their application remains

[3] The class members in this litigation are constantly changing as cases are adjudicated, or the individual's case becomes pending for at least six months. This estimate is based on who was a class member on December 1, 2017.
[4] As Mr. McCament explained in his declaration, any disclosure of information that an individual is or was subject to CARRP is contrary to USCIS policy and should not have occurred. *See* Dkt. No. 94-5 at ¶ 19.

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pending) and who may also be under investigation by another law enforcement or intelligence agency.

21. In my considered professional judgment, the Stipulated Protective Order, Dkt. No. 86, is not sufficient to protect information identifying the class members that is to be provided to Plaintiffs pursuant to the Court's October 19, 2017 Order. The Stipulated Protective Order prohibits Plaintiffs from generally publicizing the class list or telling unnamed class members whether they are included on the list.[5] It does not, however, prohibit plaintiffs' counsel from sharing the information with the named plaintiffs, or witnesses to whom disclosure is reasonably necessary during their depositions.

22. Although the named plaintiffs in this action will not be included on the class list, as their cases have been adjudicated, those individuals have no need to know the identities of other individuals who are class members.

23. The Stipulated Protective Order also allows plaintiffs' counsel to seek depositions, potentially from unnamed class members, and then reveal to them, during the depositions, that they are class members.

24. Unnamed class members have un-adjudicated benefits that are currently pending before USCIS, and USCIS has determined that there may be a national security inadmissibility ground that may affect their eligibility for the benefit sought.

25. Informing those individuals that they are class members is likely to disrupt proper adjudication of the benefit that they are seeking, and may make it difficult or impossible for USCIS to collect all relevant evidence related to eligibility for the benefit.

26. While 8 C.F.R. § 103.2(b)(16)(i) requires USCIS to inform an applicant about derogatory information of which the applicant is unaware, and permit the applicant an opportunity to respond, the regulation is only applicable if the derogatory information

[5] I understand that, despite the terms of the Stipulated Protective Order, Plaintiffs' counsel have indicated their intent to disclose to unnamed class members that they are on the list, i.e. subject to CARRP and are or did have an articulable link to a national security ground for inadmissibility or removal.

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will form a basis of the decision. Unless the regulation is implicated in a particular case, USCIS cannot and does not reveal privileged and sensitive information to an applicant.

27. In USCIS's experience, it is difficult to gather any additional evidence if the individual prematurely becomes aware that they are being vetted for a particular reason. Once aware, the individual may change his or her behavior, coordinate with others to prevent USCIS from collecting statements from other relevant persons, stop certain behaviors, or intentionally provide misleading information.

28. In addition, revealing that an individual is subject to the CARRP policy may disrupt a criminal investigation related to terrorism or other national security issues. For example, if an unnamed class member is a bad actor, notification that he or she has been subject to the CARRP policy would certainly lead the individual to suspect that their bad acts are being investigated. This could disrupt an individual investigation, or, if the individual is the subject of an investigation involving a large number of people, that individual could report back to others in the group that their activities are likely being investigated. In this way, large investigations could also be adversely affected.

29. While USCIS continues to maintain that the identities of the class members are subject to the law enforcement privilege, USCIS also respects this Court's ruling. The information, however, remains highly sensitive, and should not be shared beyond those to whom it is absolutely necessary to reveal it. To that end, USCIS seeks to limit dissemination of the class members' identifying information, i.e. their names, A numbers, and application filing date, to Plaintiffs' attorneys of record, any experts retained by Plaintiffs, and the Court and court personnel, and to require Plaintiffs' counsel to handle the information in a secure fashion, such as maintaining it in a password-protected file, and not transmitting over electronic systems that do not employ point-to-point encryption.

30. USCIS also seeks to have the Court make explicit that plaintiffs' counsel may not contact unnamed class members based on their inclusion in the class members list, and may not confirm to unnamed class members who contact them whether they are

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included on the class list. Such an order would prevent individuals who are currently being vetted by USCIS, and potentially investigated by law enforcement or intelligence agencies, from prematurely becoming aware of that fact.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March, 2018, at Washington, D.C.

Matthew D. Emrich
FDNS Associate Director
U.S. Citizenship and Immigration Service
Washington, D.C.

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EXHIBIT

B

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, Plaintiffs, v. DONALD TRUMP, *et al.*, Defendants.	CASE NO. C17-0094-RAJ DECLARATION OF DAVID EISENREICH IN SUPPORT OF DEFENDANTS' MOTION FOR LIMITED PROTECTIVE ORDER Noting Date: March 9, 2018

DECLARATION OF DAVID EISENREICH

(1) I am currently the Section Chief of the National Name Check Program Section ("NNCPS") with the Federal Bureau of Investigation ("FBI"). I have held that position since June 25, 2017.

(2) In my current capacity as Section Chief, I supervise the National Name Check Units. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the policy and the procedures of the United States Citizenship and Immigration Services ("USCIS").

(4) The purpose of this declaration is to explain the FBI's National Name Check Program and to explain the harms that could result from disclosure to individual Plaintiffs and individual potential class members in *Wagafe, et al v. Trump, et al.* a list of the two classes of Plaintiffs certified by the Court in this case.

NATIONAL NAME CHECK PROGRAM

(5) The National Name Check Program ("Program") has the mission of disseminating information from the FBI's Central Records System ("CRS") in response to requests submitted by federal agencies. The CRS contains the FBI's administrative, personnel, and investigative files. The Program has its genesis in Executive Order No. 10450, issued during the Eisenhower Administration. That executive order addressed personnel security issues and mandated National Agency Checks as part of the pre-employment vetting and background investigation process for prospective Government employees. Although Executive Order No. 10450 was superseded in January of 2017 by Executive Order No. 13467, the FBI continues to perform the primary National Agency Check conducted on all United States Government employees. Since its modest beginning, the Program has grown exponentially, with more and more customers seeking background information from FBI files on individuals before bestowing a privilege, such as Government employment or an appointment, a security clearance, attendance at a White House function, a "green card," naturalization, or a visa. In addition to serving our regular

Government customers, the FBI conducts numerous name searches in direct support of the FBI's counterintelligence, counterterrorism, and homeland security efforts.

RESOLUTION RATE

(6) There are three stages involved in the completion of an individual name check: Batch processing, Name Search, and Analysis & Reporting. The first stage in the process, Batch processing, involves the transfer of the name check requests from USCIS to the NNCPS via electronic medium. The output data is uploaded into an FBI system, and the names are electronically checked against the FBI's CRS.

(7) If there is a possible match with the subject's Personally Identifiable Information (PII) to a FBI record, it is considered a "hit." If a search comes up with an exact match to a name and either a close date of birth or social security number, it is designated an "Ident." During the Batch processing phase, approximately 60 percent of the name checks submitted by USCIS are returned to USCIS as non-reportable information within 48-72 hours. Non-reportable information indicates that the FBI's CRS contains no identifiable information regarding a particular individual or that the FBI has a matching record but the information does not add adjudicative value to USCIS. A non-reportable information result returned to USCIS definitively concludes the name check process concerning that particular request. Duplicate submissions (i.e., identically spelled names with identical dates of birth and other identical information submitted while the original submission is still pending) are not checked, and the duplicate submissions are returned to USCIS within 48-72 hours.

(8) The remaining 40 percent of name checks continue forward to the second stage of the process, Name Search. During Name Search an expanded manual name search is required. NNCPS analysts search computer databases for different fields and identifying information

pertaining to USCIS subjects. Approximately 30 percent of these resulted as non-reportable information in the Name Search process. Again, this result is returned to USCIS and definitively conclude the name check process. NNCPS generally completes 90% of the name check requests in thirty (30) days.

(9) The remaining 10 percent of name checks proceed to the third and final stage of the processing, Analysis and Reporting. During Analysis and Reporting NNCPS analysts are responsible for reviewing and analyzing FBI records and providing results to customers. If a record was electronically uploaded into the FBI's CRS electronic record-keeping system, it can be reviewed quickly. If the record is not electronically available, the relevant information must be retrieved from an existing paper record. Once the information is retrieved, an analyst reviews the records for relevant information. If appropriate, the FBI forwards a summary of the relevant information to USCIS.

(10) At each stage of processing, the NNCPS generally works on the oldest name checks on a first-in, first-served protocol. This protocol reflects that all applicants are equally deserving and ensures that all applicants are treated fairly. However, if an applicant's name check requires a review of numerous FBI records and files, even though that name check request came in first, the name check may require additional time until all responsive records are located and reviewed.

(11) Exceptions to the first-in, first-served policy occur when USCIS directs that name checks be handled on an "expedited" basis. Based on its own criteria, USCIS determines which name checks are to be expedited. Once designated as an "expedite," that name check proceeds to the front of the queue along with other prioritized name check requests, in front of the others waiting to be processed.

(12) Expedited service allows USCIS to expedite name checks based on their internal criteria. However, the FBI limits the number of expedite requests it will accept from USCIS consistent with available resources and personnel, as well as because only a limited number of applications can be expedited for the process to remain meaningful, as too many expedited requests would merely reorder the queue and lead to no net benefit.

USCIS NAME CHECK REQUESTS

(13) I understand that the Plaintiffs certified by the Court as classes in *Wagafe, et al v. Trump, et al.* contain individuals seeking to adjust to legal permanent resident status and individuals seeking naturalization. USCIS typically requests name checks for individuals seeking to adjust to legal permanent resident status and individuals seeking naturalization.

(14) USCIS, in fact, submits a significant portion of all incoming name check requests. In Fiscal Year (FY) 2017, the number of USCIS name checks was more than 20% higher than the average of the prior three years. This equated to approximately 7,250 additional USCIS name check requests submitted to NNCPS weekly. Despite the increase, NNCPS generally continues to complete 60% of the name check requests within 48 – 72 hours. NNCPS generally completes 90% of the name check requests in thirty (30) days. The remaining 10% of the name checks require a more detailed review or further research. These 10% of USCIS name checks are then being assigned to analysts for detailed review and research.

(15) As previously mentioned, the number of "hits" and the availability of electronic files associated with a name may delay the processing of a name check request. A "hit" is a possible match with a name in an FBI record. The number of times the name appears in FBI records correlates to the number of records which require review.

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(16) In addition, the processing of common names also contributes to a delay in processing a name check request. The names associated with a name check request are searched in a multitude of combinations, switching the order of first, last, and middle names, as well as combinations with just the first and last, first and middle, and so on. Without detailed information in both the file and agency submission, it is difficult to determine whether or not a person with a common name is the same person mentioned in FBI records. Common names can often have more than 200 hits on FBI records.

(17) Another contributing factor which was briefly mentioned earlier in this declaration is the customer agencies' elective to expedite name check processing for certain name check requests. NNCPS acknowledges expediting checks is the result of a compelling need, but it does further delay checks which are not expedited.

THE NATIONAL NAME CHECK PROGRAM IS ADDRESSING THE FACTORS THAT CONTRIBUTE TO DELAYS IN PROCESSING A NAME CHECK

(18) I understand that Plaintiffs have alleged that delays in FBI name checks previously led to delays in USCIS adjudication decisions. Complaint at ¶ 57.

(19) The FBI is addressing delays on three fronts: leveraging technology, augmenting resources and refining processes.

(20) NNCPS developed and is implementing the Next Generation Name Check Program ("NGNCP") system to replace the current workflow applications in use and provide additional automation aimed at improving the accuracy and efficiency of the name check process.

(21) In September of 2015, the NNCPS awarded a new five-year analytical services contract. Since awarded, the contract has been modified to increase the overall number of contractors, provide overtime hours and modify terms to incentivize high performers. In

addition, two other FBI support contracts have been modified to support the retrieval and scanning of paper-based records.

(22) The FBI is also using overtime to maximize productivity. The NNCPS is in the process of hiring additional employees to fill current vacancies and has implemented an employee development program to streamline the training of new employees, thereby significantly decreasing the amount of time needed before a new employee can begin to significantly impact the NNCPS workload. The employee development program led to the development of a name check employee training manual.

(23) NNCPS, through the FBI's Records Management Division, Records Automation Section, is scanning the paper files required for review in order to provide machine readable documents for the Analysis and Reporting stage. It is also building an Electronic Records System that allows for future automation of the name check process.

(24) NNCPS is working with federal agency customers to identify high priority requests or requests no longer needed to prioritize/reduce backlog.

(25) As a mid-term improvement, NNCPS is exploring technology updates to the name check process. Specifically, the FBI procured textual analysis software in order to investigate ways to further automate the name check process. The goal is to incorporate analytical software applications that reduce the time spent to verify the identity of the individual and, once verified, assists in the analysis. This type of automation should decrease the time required to process a name check, thereby increasing production.

(26) As a long-term improvement, the FBI is developing a Central Records Complex that will create a central repository of records. Currently, paper files/information must be retrieved from over 265 locations throughout the FBI. The Central Records Complex will

address this issue, creating a central repository-scanning of documents, and expediting access to information contained in billions of documents that are currently manually accessed in locations throughout the United States and the world.

(27) The FBI cannot provide a specific time frame for completing any particular name check submitted by USCIS. The processing of name checks, including those which are expedited at the request of USCIS, depends upon a number of factors, including where in the processing queue the name check lies; the workload of the analyst processing the name check; the volume of expedited name checks the analyst must process for, among others, military deployment, "age-outs," sunset provisions such as Diversity Visa cases, compelling reasons such as critical medical conditions, and loss of Social Security or other subsistence; the number of "hits," (*i.e.*, possible matches) that must be retrieved, reviewed and resolved; the number of records from various Field Offices that must be retrieved, reviewed and resolved; the name check subject's role and extent of involvement in any FBI investigation or case file; whether the case is currently pending or closed; necessary steps to ensure pending investigations and classified or sensitive information is not compromised through a name check response; and, more generally, the staff and resources available to conduct the checks.

(28) When a USCIS name check is completed, the FBI provides the results to USCIS as quickly as possible. On occasion, depending on the results provided to USCIS by the FBI, USCIS may require additional follow-up and coordination with the FBI.

THE FBI DOES NOT ADJUDICATE IMMIGRATION APPLICATION BENEFITS OR ADMINISTER CARRP

(29) It is important to note that the FBI does not adjudicate applications for benefits under the Immigration and Nationality Act. If appropriate, through the Name Check Program, the FBI provides a summary of available information to USCIS for use in its adjudication

process. I am aware from my review of the declaration of James W. McCament submitted in the *Wagafe, et al v. Trump, et al* case ("McCament declaration") that a USCIS immigration services officer adjudicating an immigration benefit application shall check and review law enforcement agencies and/or intelligence community records, including the FBI Name Check, to determine whether an articulable link to national security exists related to a particular applicant.[1]

(30) USCIS's Controlled Application Review and Resolution Program ("CARRP") is not an FBI program. I understand from my review of the McCament declaration that "CARRP is a consistent, [USCIS] agency-wide approach for identifying, processing and adjudicating application and petition for immigration benefits that involve national security concerns." The FBI, however, does not administer CARRP, which is solely a USCIS program.

THE FBI DOES NOT PUBLICLY DISCLOSE NAME CHECKS RESULTS

(31) I have been advised that the Plaintiffs in *Wagafe, et al. v. Trump, et al.*, have requested that USCIS provide to them a list of individuals who are subject to CARRP. While the FBI will acknowledge whether or not a name check was conducted, and process such requests, it does not disclose to individuals the results of their name checks with respect to investigative records. The FBI follows this approach whether or not the name check revealed derogatory information – *i.e.*, the existence of investigative records – because if the FBI only refused to disclose information in those instances involving derogatory information, that refusal would itself be interpreted as an admission that the FBI possessed investigative records about the individual. This, in turn, could result in subjects or targets of FBI investigations taking countermeasures or other actions to thwart law enforcement, thus potentially compromising

[1] Nothing in this declaration should be construed as confirming or denying the name check results of any particular individual.

investigations, confidential sources, or investigative techniques. Through channels developed in the FBI's name check process, the FBI discloses relevant information only to USCIS for its use before USCIS renders final decisions on applicants' petitions.

(32) In light of this concern, a list of individuals to whom USCIS has applied CARRP should not be publicly disclosed or disclosed to individual Plaintiffs because disclosure could allow individuals to infer that they may be subject to scrutiny by law enforcement. Such disclosure could suggest to subjects that USCIS may have received derogatory information from the FBI during the name check process. As explained above, the FBI must take a consistent approach to protecting against the disclosure of information implicating name check results to protect sensitive law enforcement information and prevent individuals from attempting to thwart FBI investigations.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 1st day of March, 2018.

David F. Eisenreich
Section Chief
National Name Check Program Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

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EXHIBIT

C

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

ABDIQAFAR WAGAFE, et al.

Plaintiffs,

v.

TRUMP, et al.,

Defendants

Case No. 2:17-cv-00094-RAJ

Honorable Richard A. Jones

DECLARATION OF TATUM KING IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

I, Tatum King, state as follows:

1. I am the Assistant Director, Domestic Operations, Homeland Security Investigations (HSI), U.S. Immigration and Customs Enforcement (ICE), an agency in the Department of Homeland Security (DHS). Following the enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including the criminal investigations staffs of the former U.S. Customs Service (USCS) and the former Immigration and Naturalization Service (INS). As a result, all Special Agents who formerly worked for the USCS and the INS became a part of ICE. ICE is the second largest investigative agency in the Federal Government. Within ICE, HSI has approximately 8,260 employees, including over 6,100 Special Agents assigned to twenty-six (26) Special Agent-in-Charge (SAC) offices in cities throughout the United States and in countries around the world. Special Agents have a wide array of responsibilities relating to the investigation of criminal activity, which in addition to investigating violations of the country's immigration laws, includes the investigation of contraband and merchandise smuggling, fraud in both import and export transactions, criminal

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finance and money laundering, alien smuggling and human trafficking, cybercrimes, and infringements upon intellectual property rights. ICE's mission is to uphold public safety and protect the United States. ICE has important roles in securing the nation's borders, ensuring economic, transportation, and infrastructure security, and preventing terrorist attacks by investigating and interdicting the people, money, and materials that support terrorist and criminal activity.

2. As the Assistant Director of HSI's Domestic Operations, I provide oversight and support to all HSI domestic field personnel, including 26 SACs with responsibility for more than 200 offices. In this capacity, I am responsible for strategic planning, national policy implementation and the development and execution of operational initiatives. The offices under my direction are responsible for leading HSI's effort to identify, disrupt, and dismantle transnational criminal and terrorist organizations that threaten the security of the United States.

3. As ICE is the investigative arm of DHS, HSI may share sensitive law enforcement information with other agencies in furtherance of homeland security. The information can include investigations into active criminal enterprises and national security threats, including counterterrorism, counter-proliferation, and visa violations with national security or public safety concerns. United States Citizenship and Immigration Services (USCIS) is one of the DHS Agencies to which HSI provides derogatory and investigative information. The individuals that are the subject of the information may have applications for relief or benefits pending before USCIS.

4. Based upon my understanding of the type of information ordered to be released in this case, I believe that release of the information would effectively reveal sensitive law enforcement information, in addition to revealing the general nature of HSI law enforcement

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techniques and procedures, and would impact national security. Revealing such sensitive information could undermine the efforts of HSI to carry out its mission of identifying and eliminating vulnerabilities that pose a threat to our nation's borders, as well as ensuring economic, transportation and infrastructure security, and national security.

5. Given the nature of USCIS's Controlled Application Review and Resolution Program (CARRP), as described in the declaration from James W. McCament, the then-Acting Director, and now Deputy Director, USCIS, disclosure of the names of individuals in USCIS's CARRP program may reveal to those individuals that they are the subject of government inquiry and investigations. The disclosure to individuals (i) that they are the subjects of ongoing investigations and (ii) the general nature of the investigations could compromise existing investigations and endanger the lives or safety of participating law enforcement personnel by revealing the existence of such investigations. It is a critical investigative technique not to reveal to persons that they are the subjects of law enforcement investigations. Subjects who are told of on-going investigations may alter their habits and/or appearances, may alert their compatriots and co-conspirators, may go into hiding, may destroy evidence, or may anticipate the activities of federal agents and thereby put the agents, their investigations or members of the public at risk. Even if the individuals who were the subjects of the investigations were law-abiding themselves, disclosing that they were of investigative interest could alert their business associates who are involved in illegal activities that federal agencies, may have investigated individuals with whom they (the business associates) have had contact. ICE therefore can neither confirm nor deny whether any of the individuals' names provided under the Order are now or ever have been a subject of investigative interest.

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6. Release of this information beyond the attorneys for the plaintiffs, could place in jeopardy the national security, as a result of disruptions to the agency's law enforcement efforts. Moreover, even the inadvertent disclosure of information to either the plaintiffs or the general public creates the risk of compromising investigative techniques, methods, and thus national security. Without directing any aspersions toward the integrity of plaintiffs or the general public, this agency simply cannot afford even a slight risk that the individuals most closely involved with this case could lose possession or control of the documents or otherwise compromise their security, leading to improper and unauthorized use of the information. This risk of disruption and serious injury to ongoing and future investigations and serious injury to the results of prior investigations that would be caused by even inadvertent release of ICE's use of these investigative techniques and methods is unacceptable to ICE for the reasons stated above.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March, 2018.

Tatum King
Assistant Director, Domestic Operations
Homeland Security Investigations
U.S. Immigration and Customs Enforcement
500 12 St. SW, Washington, DC 20536

The Honorable Richard A. Jones

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

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAP

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR LIMITED PROTECTIVE ORDER

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Upon consideration of Defendants' motion for a limited protective order, the Court, finding good cause therefor, **GRANTS** Defendants' motion.

IT IS HEREBY ORDERED that disclosure of, and access to, the names, Alien numbers ("A numbers"), and application filing dates of the unnamed plaintiff members of the Naturalization Class and Adjustment-of-Status Class shall be limited to the following:

(1) Plaintiffs' attorneys of record, during such time as they continue to represent Plaintiffs;

(2) Experts retained by Plaintiffs to the extent reasonably necessary to prepare expert reports and testimony; and

(3) The Court and court personnel.

AND IT IS FURTHER ORDERED that Plaintiffs' attorneys of record shall maintain the above-described information in a secure manner, i.e. in a locked filing cabinet (for any paper copy) or in a password-protected electronic file to which only authorized persons have access, and shall not transmit that information over any electronic mail or cloud-based sharing unless the method of transmission employs point-to-point encryption or other similar encrypted transmission.

AND IT IS FURTHER ORDERED that Plaintiffs' counsel, and any person acting on their behalf, are prohibited from either disclosing to any individual who contacts them whether that individual is an unnamed member of either the Naturalization Class or Adjustment-of-Status class, or contacting the unnamed plaintiff members of the Naturalization Class and Adjustment-of-Status class for any purpose absent prior order of this Court.

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It is so ordered.

Dated this _____ day of _____, 2018.

_____
HON. RICHARD A. JONES
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; *et al.*,

Defendants.

No. 2:17-CV-00094-RAJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER RE CLASS LIST

NOTED ON MOTION CALENDAR: MARCH 9, 2018

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The Court ordered Defendants to produce a class list in its October 19, 2017 Order. Dkt. 98 at 3-4. The Court denied Defendants' motion to reconsider that order. Dkt. 102. Five months after the Court's initial order, Defendants have filed yet another motion, this time asking the Court to impose certain restrictions on the class list. The Court should deny the motion because it is procedurally improper and substantively meritless, and the relief Defendants seek is unnecessary in light of the Stipulated Protective Order and Plaintiffs' proposed compromise.

The motion is improper for several reasons. First, although couched as a motion for protective order, Defendants simply re-argue the same points they advanced in opposing Plaintiffs' motion to compel and in their motion for reconsideration. In effect, Defendants now bring an improper second motion for reconsideration. Notably, at the hearing on February 14, 2018, when Defendants commented that they might "come back to the Court prior to the production deadline [of the class list] to seek further relief," the Court responded:

> I just want to reemphasize, counsel, that two orders have already been issued. I don't know how to make this any clearer of what the court's expectations are. And unless there's something that's *extraordinarily different* that I'm not aware of or hasn't already been identified by either the parties, or the court's order, I expect *full compliance* in a timely fashion without further delay.

Feb. 14, 2018 Transcript, at 27-28 (emphasis added). There is nothing "extraordinarily different" identified in Defendants' motion; there is nothing different at all. Second, Defendants' motion is untimely. There is no reason Defendants could not have made this request months ago, rather than waiting until two business days before their production deadline to file this motion. Third, Defendants did not fully meet and confer, as required by this Court's Standing Order.

Even were the Court to address the merits of Defendants' motion, it should be denied for the same reasons the Court already articulated in its prior orders. As explained before, Plaintiffs' counsel require the class list and class members' personally identifiable information both to communicate with class members to obtain information that is directly relevant to the claims at issue, and to respond to inquiries from potential class members to inform them if their interests

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are represented in this case. The Court has already found (twice) that Plaintiffs' counsel's need for the class list outweighs the exact same speculative law enforcement concerns that Defendants raise again here. Far from striking a balance, the restrictions Defendants propose would defeat Plaintiffs' reasons for requesting the class list in the first place.

And finally, the relief Defendants seek is unnecessary. Defendants assert that the Stipulated Protective Order is inadequate based on strained hypotheticals that involve Plaintiffs' counsel violating "the spirit" of the Court's orders. These are ad hominem attacks, not legal arguments. There is no evidence that anyone entitled to receive confidential information under the Stipulated Protective Order would violate either the letter or the spirit of that court order. Additionally, consistent with the Stipulated Protective Order already in place, Plaintiffs' counsel suggested a reasonable compromise that would provide both an additional layer of protection to the class list, and also enable the list to be used in a way the Court has already approved to advance this litigation. Defendants' counsel rejected this proposed compromise.

In light of the procedural, substantive, and practical flaws with Defendants' motion, Plaintiffs respectfully request that the Court deny the motion. Alternatively, if the Court believes certain information in the class list should be subject to additional protections, the Court should adopt Plaintiffs' proposed compromise because it strikes the right balance.

I. BACKGROUND

This motion is another example of Defendants' delay tactics. On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. 69. On August 1, 2017, Plaintiffs served Defendants with discovery requests asking for, among other things, documents sufficient to identify the class members, including a list of class members. Dkt. 92, Ex. A at 32, 34-39, 48-51. Defendants refused to provide a class list, forcing Plaintiffs to file a motion to compel (Dkt. 91). The Court granted Plaintiffs' motion on October 19, 2017, ordering Defendants to produce a class list. Dkt. 98. Notably, in arguing against producing a class list, Defendants asserted that disclosing class members' personally

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identifiable information would cause class members to "alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." *Id*. at 3. The Court rejected these arguments as vague and speculative. *Id.* at 3-4. The Court also reasoned "that the balance weigh[s] in favor of disclosure," because the list "is relevant to the claims and Plaintiffs' needs outweigh the Government's reasons for withholding." *Id*. at 4. The Court then denied Defendants' motion for reconsideration. Dkt. 102 at 2-3.

In the ensuing months, Plaintiffs repeatedly asked Defendants about the status of the class list, but several requests would go unanswered. *See* Declaration of David A. Perez ("Perez Decl."), Ex. A (2/5/18 Perez E-mail to White re Class List) (two requests go unanswered). Defendants committed to producing the class list by March 5, 2018. Dkt. 114 at 4. On February 14, the Court reminded Defendants that it had already issued two orders concerning the class list, and made clear that absent "something that's *extraordinarily different*," the Court expected full compliance with its orders. Feb. 14, 2018 Transcript, at 27-28 (emphasis added).

At the end of the day on Friday, February 23, Defendants asked for a meet and confer "concerning the production of the Class Member List." Perez Decl., Ex. B (bottom e-mail). Over the next five days, Plaintiffs repeatedly asked "what it is [Defendants] plan on requesting so [Plaintiffs] can make sure [they] have the right people on the line, and prepare accordingly in terms of checking in with our team and conducting research." *Id*. Defendants declined to provide details. Nevertheless, before the meet and confer Plaintiffs sent Defendants a proposed compromise: (a) identifying information on the class list would be subject to "Attorneys' Eyes Only" protection; (b) Plaintiffs could challenge those designations later (pursuant to the procedure in the Stipulated Protective Order); (c) class counsel could inform potential class members whether they are on the list; (d) but the entire class list would not be shared with any named plaintiff or class member. *Id*. (Gellert e-mail to White). Plaintiffs invited Defendants to

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draft a supplement to the Stipulated Protective Order consistent with this compromise. Defendants declined to compromise, and failed to explain the relief they were seeking.[1]

On March 5, 2018, in violation of the Court's order, Defendants produced a class list that *fully redacted* the names, A-numbers and filing dates of each person. Perez Decl., ¶ 6.

II. ARGUMENT

A. Defendants' Motion Is Procedurally Improper Because It Is Effectively an Untimely Second Motion for Reconsideration.

The Court should deny Defendants' motion because it is procedurally improper. First, Defendants raise no new arguments that the Court has not already rejected. *See infra* Section B. For example, the law enforcement concerns Defendants raise here are identical to the concerns that Defendants previously raised in their October 2017 opposition to Plaintiffs' motion to compel production of the class list, and again in their motion for reconsideration. *Compare* Dkt. 126 at 3 (Disclosure to "class members of their status in CARRP" "would risk damage to national security and intelligence interests and investigations.") *with* Dkt. 94 at 7 ("[D]isclosure of whether a particular individual application is subject to CARRP could cause substantial harm to law enforcement investigations and intelligence activities."). Defendants previously argued that class members would "alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." Dkt. 98 at 3; *see also* Dkt. 102 at 2-3. Almost verbatim, Defendants repeat the same argument here. *See* Dkt. 126 at 3 ("the individual may change his or her behavior, coordinate with others to prevent USCIS from collecting statements from other relevant persons, stop certain behaviors, or intentionally provide misleading information"). Back in October, Defendants advanced these arguments to resist disclosing the class list altogether; here, Defendants are regurgitating these arguments to deny Plaintiffs' counsel the ability to *use* the class list in the way that Plaintiffs had requested in their

[1] Defendants did not properly meet and confer. In fact, Plaintiffs did not know Defendants would be seeking relief concerning the "application dates," much less why, until after the motion was filed. Perez Decl., ¶ 4.

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motion to compel—which, in effect, means that Defendants are seeking the same result they had sought back in October. In other words, Defendants' motion is nothing more than an improper and untimely third attempt to get the Court to litigate the order issued five months ago. *See Lopez v. Bollweg*, No. CV 13-00691-TUC-DCB, 2017 WL 4677851, at *3 (D. Ariz. Aug. 28, 2017) ("There is nothing in the Local Rules of Civil Procedure that provides for multiple motions for reconsideration, and filing a successive motion for reconsideration with the same unsuccessful arguments wastes valuable Court resources.").

Second, the Court should reject Defendants' delay tactics. Defendants acknowledge that they agreed to the Stipulated Protective Order two months after class certification, and two weeks after Plaintiffs had requested the class list. Dkt. 126 at 4. They have had six months to ask for this relief—but instead waited until the last possible day to file a motion before the class list was due. These dilatory tactics cast doubt on Defendants' contentions regarding the sensitive nature of the information Defendants seek to protect because. If Defendants' concerns had merit, Defendants would have been far more proactive in seeking this relief.[2]

In sum, this motion is a second request to reconsider, masquerading as a protective order, filed five months late. The Court should deny it.

B. If the Court Addresses the Merits of Defendants' Motion, it Should Be Denied for the Reasons That the Court Has Already Articulated.

If the Court reaches the merits, it should deny the motion for the same reasons articulated in its previous orders, and because the relief Defendants are seeking would undermine Plaintiffs' reasons for seeking the class list.

[2] Defendants also violated the Court's Standing Order by failing to "discuss *thoroughly*, . . . the *substance* of the contemplated motion *and any potential resolution*. The Court construes this requirement strictly. Half-hearted attempts at compliance with this rule will not satisfy counsel's obligation." Dkt. 65 at 3 (emphasis in original). Plaintiffs asked Defendants several times what relief they would seek in their motion, and were not even aware that the motion would include class members' application dates until *two hours* before the motion was filed. Perez Decl., Exs. B and C.

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1. The Government Raises the Same Law Enforcement Concerns That the Court Has Already Rejected and Should Do So Again.

Defendants contend that disclosure to "class members of their status in CARRP" "would risk damage to national security and intelligence interests and investigations." Dkt. 126 at 3. The Court already rejected this argument twice, and should do so again here. In granting Plaintiffs' motion to compel, the Court expressly rejected Defendants' assertion "that releasing the identities of potential class members could lead individuals to potentially alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." Dkt. 98 at 3. The Court recognized that Defendants' argument "consist[ed] of mere speculation and a hypothetical result [and] is not sufficient to claim privilege over basic spreadsheets identifying who is subject to CARRP." *Id.* at 3-4. Defendants moved for reconsideration. The Court once again rejected Defendants' claim, noting that "[t]he Government may not merely say those magic words—'national security threat'—and automatically have its requests granted in this forum." Dkt. 102 at 3.

As the Court has previously acknowledged on multiple occasions, permitting class members to know that they are subjected to CARRP would not cause any of the speculative harm that Defendants' claim for multiple reasons. First, as Plaintiffs explained in their motion to compel briefing, Defendants have *routinely* disclosed to individuals that they are subject to CARRP in response to FOIA requests and in other litigation, and Defendants have failed to provide a single example of how those disclosures caused any harm to law enforcement interests. *See* Dkt. 95 at 4 (citing Dkt. 97 (attorney noting that, in response to FOIA requests, USCIS and ICE have regularly provided him "with a copy of the CARRP Coversheet . . . and other CARRP-related information when [his] client's case has been held under the CARRP program"); *id.*, Exs. A, B, & C (FOIA documents indicating individuals subjected to CARRP)); Dkt. 91 at 4 (citing Dkt. 27-1, Ex. E (FOIA document indicating Plaintiff Wagafe's file was reviewed by CARRP officer); Dkt. 93, Exs. 1, 2 (FOIA documents indicating CARRP officers involved in

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naturalization and adjustment of status applications); Dkt. 92, Ex. E at 276:15-17 (USCIS officer confirming in deposition that plaintiff's case was "a CARRP case")).

Second, Defendants repeat their argument that "disclosure that an applicant is (or was) subject to CARRP . . . would allow the applicant to infer that he or she may be subject to investigative scrutiny by law enforcement." Dkt. 126 at 3-4. But the Court has already rejected that argument too. Because the two certified classes are limited to individuals whose applications have been languishing for at least six months, they are *already* on notice that their applications have been subject to additional scrutiny. *See* Dkt. 95 at 3-4; *see also Latif v. Holder*, 28 F. Supp. 3d 1134, 1151-62 (D. Or. 2014) (holding that individuals on the No Fly List be provided "with notice regarding their status on the No–Fly List" and rejecting similar security concerns raised by the Government). When denying Defendants' motion for reconsideration, the Court explicitly recognized that the limited scope of Plaintiffs' request—only releasing "the names of potential class members" to those individuals—cannot be "outbalanced by the speculative scope of" Defendants' alleged harm in part because "those potential class members may already be aware of the Government's additional scrutiny considering the passage of time." Dkt. 102 at 3.[3] The Court should once again reject Defendants' arguments here.[4]

2. The Court Has Already Found that Plaintiffs' Need for the Class List Outweighs the Government's Concerns.

The Court should also reject Defendants' request for an additional protective order because it would defeat Plaintiffs' purpose in requesting the class list in the first place. As

[3] Defendants also claim that "it is difficult [for USCIS] to gather evidence if an applicant prematurely becomes aware of an investigation." Dkt. 126 at 3. But that argument is as speculative, if not more so, than Defendants' other arguments. As mentioned above, class members whose applications have been unreasonably delayed more than six months already suspect they are being investigated by Defendants, so confirmation of that investigation would not cause any additional harm to the Government.

[4] Defendants also admit that "[a]bout 24 percent of the current class members have their USCIS national security concern resolved . . . but they remain class members because their immigration benefit request remains pending." Dkt. 126-1 ¶ 17. Because these class members are not currently subject to an investigation, Defendants have provided no justification as to why they cannot be notified that their applications were subjected to CARRP.

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Plaintiffs previously explained, Plaintiffs' counsel need the class list and class members' personally identifiable information for two main reasons: (1) to communicate with class members, who may be witnesses and sources of information that is directly relevant to Plaintiffs' claims, and (2) to respond to inquiries from potential class members and inform them if their interests are represented in this case. *See* Dkt. 91 at 5; Dkt. 95 at 1-2; Dkt. 100 at 5-6. In granting Plaintiffs' motion to compel, the Court found that these needs outweighed Defendants' conclusory security concerns. *See* Dkt. 98 at 4 ("[T]he Court must balance the need for Plaintiffs to obtain [the class list] against the Government's reasons for withholding. In doing so, the Court finds that the balance weigh in favor of disclosure."); Dkt. 102 at 2 (denying Defendants' motion for reconsideration because "the Court exercised its discretion in balancing the needs of Plaintiffs versus those of Defendants and found that the balance weighed in favor of disclosure.").

Defendants' request would undermine Plaintiffs' ability to use the class list in a way that the Court has already approved. Defendants contend that the ability of class members to know they are Plaintiffs in this case is not relevant. *See* Dkt. 126 at 7 n.2 ("[T]here is no reason a curious individual needs to know whether he or she is in one of the certified classes."). This is the same relevance argument that Defendants previously made. *See* Dkt. 94 at 4 ("Disclosing personally identifiable information (i.e., names and A-numbers) of particular individuals adds nothing to Plaintiffs' case."); *id.* at 6 (Plaintiffs' "difficulty in advising individuals who may be class members whether their interests are adequately represented … is not relevant[.]"). The Court considered Defendants' arguments and found that they had no merit. *See* Dkt. 98 at 2-3 ("[T]he Government argues that the class members' specific identities are neither relevant nor required for Plaintiffs to pursue this class action. Many of the Government's arguments in opposition to this request are mere conclusions, and therefore are not sufficient to avoid disclosure." (internal citation omitted)); *id.* at 4-5 ("[T]he Court rejected the Government's conclusory arguments as to relevance.").

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The Court was correct. As Plaintiffs previously explained, Plaintiffs' counsel must be able to communicate with class members to obtain information relevant to Plaintiffs' claims regarding, *inter alia*, the unreasonable delays in their applications, the Government's failure to provide them any notice that they are subject to CARRP or explanation for their classification under CARRP, their religious background (given that the Government claims not to record that information), and other harmful impacts of CARRP and successor extreme vetting programs. *See* Dkt. 91 at 5; Dkt. 95 at 1-2; Dkt. 100 at 5-6. Defendants appear to now concede that some of this information is relevant, but state that if Plaintiffs "need various items of information about particular unnamed class members to develop evidence for use in their case, the parties can meet and confer over ways in which the Defendants might be able to provide Plaintiffs with such information." Dkt. 126 at 7 n.2. Defendants' offer to meet and confer makes no sense and fails to explain how Plaintiffs' counsel can obtain information that is solely in the possession of unnamed class members without making those class members aware that they are Plaintiffs in this lawsuit and their applications have been subjected to CARRP.

Furthermore, as Plaintiffs also previously explained, individuals have a right to know that they are members of this class action and their interests are being represented in this case. *See* Dkt. 91 at 5; Dkt. 95 at 1; Dkt. 100 at 6. Defendants contend that Plaintiffs "are mistaken," Dkt. 126 at 7 n.2, but it is Defendants who misunderstand the importance of class counsel's duty to advise individuals who inquire about class membership. "[C]lass counsel represents all class members as soon as a class is certified." *Kleiner v. First Nat'l. Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985); *see also Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122-23 (9th Cir. 2014) (noting that "class counsel's ability to fairly and adequately represent unnamed [class members]" is a "critical requirement[] in federal class actions"); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982) ("Class counsel have the fiduciary responsibility and all the other hallmarks of a lawyer representing a client."). Therefore, when individuals reach out to class counsel to inquire as to whether they are class members, class

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counsel must be able to respond and appropriately advise their clients. It is very important for individuals with pending naturalization and adjustment of status applications to know whether they can seek and obtain relief through this lawsuit, or whether they face a separate issue causing delay that requires a separate legal analysis and potential litigation to ensure the Government properly adjudicates their applications.

Defendants' proposed restrictions would effectively put a ban on class counsel's ability to communicate with class members. The Supreme Court has noted the "adoption of a communications ban that interferes with . . . the prosecution of a class action" must include "specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 104 (1981); *see also Domingo v. New England Fish Co.*, 727 F.2d 1429, 1441 (9th Cir. 1984) (finding that "restrictions on [plaintiffs'] communications [with class members] created at least potential difficulties for them as they sought to vindicate the legal rights of [the class]") (internal quotation marks omitted). Here, Defendants have failed to demonstrate the need for the limitations they seek. To the contrary, because of the important role that class counsel plays in advising and protecting the rights of all class members, Defendants should produce the class list with class members' personally identifiable information, as courts have ordered the Government to produce in similar situations. *See, e.g.*, *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408, at *23 (C.D. Cal. Feb. 26, 2018) ("Defendants shall provide Class Counsel with a list of all [class members]. That list shall include the following information for each person: Name, Alien Number . . . ."); *Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG (C.D. Cal. Mar. 2, 2015), Dkt. 810 at 8 & n.7 (ordering the government to provide "Plaintiffs with a report from the Class Database indicating the [class members] currently identified by Defendants," including their names and A numbers).

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C. The Current Protective Order Is Sufficient. Alternatively, the Court Should Adopt the Compromise That Plaintiffs' Proposed to Defendants.

Defendants assert that they require added protection because the existing protective order "is insufficient." Dkt. 126 at 4. This argument fails for several reasons. First, it simply highlights Defendants' procrastination. Defendants agreed to the Stipulated Protective Order in August—nearly eight months ago. Therefore, after class certification and after Plaintiffs had requested a class list, Defendants expressly agreed to terms that "would permit named Plaintiffs to receive the class list." Dkt. 126 at 4. Contrary to Defendants' suggestion, Plaintiffs never agreed that "inform[ing] unnamed class members whether they are included on the class list" would be subject to the Stipulated Protective Order. *Id.* Instead, Plaintiffs noted that "there is no need to shield the identities of class members pursuant to a protective order." Dkt. 100 at 8. The Court rejected Defendants' argument that class members cannot be made aware of their inclusion in this case, and stated that "Plaintiffs' attorneys could supplement the protective order . . . to assuage any *remaining concerns* on the part of the Government." Dkt. 98 at 4 (emphasis added). But Defendants have raised no new concerns here to justify supplementing the protective order.

Second, Defendants also assert that their proposed changes are necessary because Plaintiffs' counsel "or the organizations for which they work," will violate "the spirit" of the Stipulated Protective Order. Dkt. 126 at 5-6. Put differently, Defendants request this order because they do not believe the Court can trust Plaintiffs' counsel or "the organizations for which they work." To be clear, this is not a legal argument, or a factual statement based on any empirical evidence. It is an ad hominem attack. There is no basis to suggest, much less conclude, that Plaintiffs' counsel will violate either the letter or the spirit of any order, and certainly not one to which Plaintiffs stipulated. On the contrary, Plaintiffs have demonstrated throughout this case their commitment to following all the Court's orders.

And finally, far from striking the right balance, Defendants' proposed restrictions would completely undermine Plaintiffs' ability to use the class list to gather evidence and adequately

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represent their clients. It would also cause significant practical obstacles that would impede Plaintiffs' counsel from accessing the list. For instance, limiting access only to counsel of record may exclude the many other attorneys and staff members (for instance, paralegals and discovery attorneys at Perkins Coie) from accessing the list. And requiring encrypted point-to-point communication would severely limit Plaintiffs' counsel's ability to communicate about the list. Defendants have not explained why such restrictions are necessary (e.g., why Plaintiffs' current e-mail systems are insufficient or why legal staff members could not access the list). Worse, Defendants' proposed restrictions would contravene the very reasons this Court ordered the list produced in the first place.

Alternatively, if the Court is inclined to add additional protections to the class list, Plaintiffs' proposed compromise strikes the right balance. Under Plaintiffs' proposal, class members' identifiable information (names and A numbers) would be subject to Attorneys' Eyes Only protection,[5] with the understanding that Plaintiffs could challenge that designation under the process set forth in the Stipulated Protective Order. However, consistent with the Court's prior orders, Plaintiffs would be able to inform individual persons whether they are on the list, and thus are potential class members. But neither Named Plaintiffs nor unnamed class members would have access to the list itself or information about other persons on the list. This practical compromise gives Defendants the protections they need, while allowing Plaintiffs to use the class list in a manner that is consistent with the underlying reasons for why Plaintiffs requested it in the first place.[6]

[5] Consistent with the general understanding of Attorneys' Eyes Only restrictions, this would not be limited to counsel of record, but would include legal and support staff, such as paralegals, legal secretaries, and others working under the direction and supervision of the attorneys, but would not include Named Plaintiffs or unnamed class members.

[6] Defendants also indicate that the class list they plan to produce "is based on who was a class member on December 1, 2017." Dkt. 126-1, ¶ 17 n.3. As Plaintiffs previously noted, given Defendants' duty under Fed. R. Civ. P. 26(e)(1)(A) to supplement discovery responses "in a timely manner," Plaintiffs request that Defendants produce quarterly updates to the list. *See* Dkt. 95 at 3.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' OPPOSITION TO GOV'T MOTION FOR PROTECTIVE ORDER RE CLASS LIST via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 7th day of March, 2018, at Seattle, Washington.

s/ David A. Perez

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al*.,

Defendants.

CASE NO. C17-94 RAJ
ORDER

This matter comes before the Court on Plaintiffs' Motions to Compel (Dkt. ## 109, 111) and on Defendants' Motion for Protective Order (Dkt. # 126). For the following reasons, the Court grants in part and denies in part the motions.

I. BACKGROUND

On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. # 69. The parties have since been engaged in discovery. The parties have attempted to resolve their discovery disputes without court intervention but have reached an impasse. Plaintiffs now move the Court to compel the Government to produce certain documents. In addition, the Government requests that certain information be subject to a limited and more robust protective order.

II. LEGAL STANDARD

The Court has broad discretion to control discovery. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011), *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). That discretion is guided by several principles. Most importantly, the scope of discovery is broad. A party must respond to any discovery request that is not privileged and that is "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

If a party refuses to respond to discovery, the requesting party "may move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997).

III. DISCUSSION

A. Law Enforcement Privilege

The Government has claimed that the law enforcement privilege protects its documents for quite some time. *See, e.g.*, Dkt. ## 94 at 7-8, 94-5 at ¶ 7. The Court

addressed the issue and required the Government to produce privilege logs if it wished to withhold documents based upon the privilege. The Government created privilege logs and claimed the law enforcement privilege. *See, e.g.*, Dkt. # 110. The Government now argues that it need not satisfy the requirements of this specific privilege unless it "formally invoke[s]" the same. Dkt. # 119 at 8. This argument—that the Government may somehow claim the privilege without actually claiming it—defies logic. The Government's actions and discovery tactics—including, for example, unjustified delays and the questionable timing of affidavits—thus far have been nothing less than obstructionist; such behavior is inappropriate and will not be tolerated.

To claim this privilege, the Government must satisfy three requirements: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege. *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). This privilege is qualified: "[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *Id*. at 272.

The Government did not properly claim this privilege because it refused to abide by the first and second prongs; that is, a department head did not claim the privilege and therefore did not assert such privilege based on actual personal consideration. This is notable considering the Government cited the privilege at least as early as October 2017 and included a declaration from the agency head, Mr. Emrich, though not in support of the privilege. Dkt. ## 94, 94-8. The Government now offers an affidavit of this same agency head—more than four months later—to invoke the law enforcement privilege. *See* Dkt. # 119-2. Tactics like this do nothing more than delay and frustrate the fundamental concept of discovery.

In his new affidavit, Mr. Emrich describes categories of withheld information and the law enforcement interest in keeping the information withheld. *Id.* The compelling portions of the affidavit relate to any documents "for applicants whom adjudicators have determined pose a national security or public risk," and the processes and checks utilized to assess such applicants and related risks. *See, e.g., id.* at ¶ 21. Mr. Emrich states that disclosure of this information "could provide aliens with a roadmap into the techniques USCIS uses to uncover information that an individual may wish to hide, and the techniques used to elicit information." *Id.* But this type of information—the specific process in which USCIS discovers a national security risk and the subsequent investigation—is distinguishable from documents that "relate primarily to immigration benefits processing, not law enforcement in the traditional sense[.]" *Am. Civil Liberties Union of S. California v. United States Citizenship & Immigration Servs.*, 133 F. Supp. 3d 234, 245 (D.D.C. 2015).

Because this is an important distinction, and because the Court must view USCIS's withholding with more skepticism than it might with a different agency, *see id.*, the Court requires the Government's privilege log to reflect such precise distinctions. This is to ensure that the Government's blanket affidavit is not being used in an unbridled sense; the Government must specifically identify the documents that fall within this privilege. The Government's privilege log is insufficient in this regard. For example, most if not all of the Government's law enforcement privilege descriptions relate only to "procedures on the adjudication of an immigrant benefit application" as they pertain to the "applicant's eligibility for the immigration benefit." *See, e.g.*, Dkt. # 11- at 11. There is no law enforcement concern here; the Government's vague concern is that an applicant may learn how eligibility was decided and this may somehow "risk circumvention or evasion of the law." *Id.* This description—repeated throughout the log—relates primarily to immigration benefits processing and not to Mr. Emrich's contention that the individual document is related to law enforcement or national security concerns. Though

the Court accepts Mr. Emrich's affidavit to claim the privilege, generally[1], the Court requires the Government to use the privilege deliberately and will expect the Government to be exacting with which documents fall within this privilege, stating its reasons for withholding clearly in the privilege logs. *Am. Civil Liberties Union of S. California*, 133 F. Supp. 3d at 243–44 ("There is no explanation of how the information, if released, could risk circumvention of the law, no explanation of what laws would purportedly be circumvented, and little detail regarding what law enforcement purpose is involved (other than vague references to 'national security concerns'). This is not enough to justify withholding records . . . .").

The Court will allow the Government to revise its privilege log. Based on its review, the Court is hesitant to conclude that all of the currently claimed law enforcement privileges are accurate. The Government has fourteen (14) days from the date of this Order to revise its log and reproduce to Plaintiffs. The parties may file supplemental briefing at that time to address the privilege's balancing test for any documents that the Government continues to withhold based upon the law enforcement privilege. The Government must produce any documents over which it declines to claim the law enforcement privilege.

The deadlines vacated pursuant to the parties' stipulation, Dkt. # 136, remain vacated pending the Government's revised privilege log and resolution of the remaining discovery issues addressed in this Order. The Government is warned that any further

[1] The Court is perplexed why this affidavit or specific claim of privilege was not asserted months ago, thereby avoiding much of the delays that have occurred. Tactics like this only fuel the notion that the Government's intention is to purposely delay the discovery process in this lawsuit. Nonetheless, the Court finds Mr. Emrich's affidavit suitable for the issue at hand. This does not alleviate the Government of its responsibility to provide additional affidavits from heads of agencies for future productions in which the Government wishes to claim the law enforcement privilege. This affidavit may not be sufficient to cover all discovery productions during the course of litigation.

obstructionist behavior with regard to discovery production will not be met with such leniency.

B. Production of Documents Responsive to RFPs 40, 41, and 44

Plaintiffs' Requests for Production ("RFP") Numbers 40, 41, and 44 are as follows:

> REQUEST FOR PRODUCTION NO. 40: All Documents referring or relating to any interpretation or implementation of the First EO or Second EO that would affect in any way the adjudication of immigration benefits petitions, applications, or requests of those individuals who are part of the Naturalization Class, the Adjustment of Status Class, or the Muslim Ban Class, including, but not limited to, all documents referring or relating to the Extreme Vetting Initiative by the U.S. Immigration and Customs Enforcement agency.
>
> REQUEST FOR PRODUCTION NO. 41: All Documents referring or relating to "the suspension of immigration petitions, applications, or requests involving Plaintiff Wagafe, Plaintiff Ostadhassan, Plaintiff Bengezi, and members of the Muslim Ban Class," pursuant to the First or Second Eos, as described in the First and Second Claims for Relief outline in Plaintiffs' Second Amended Complaint.
>
> REQUEST FOR PRODUCTION NO. 44: All Documents referring or relating to any screening, vetting, or adjudication program, policy, or procedure connection to Section 4 of the First EO or Sections 4 or 5 of the Second EO, including, but

> not limited to, all documents referring or relating to the Extreme Vetting Initiative by the U.S. Immigration and Customs Enforcement agency. This Request is limited to those programs that apply or would apply to, or would affect in any way the immigration benefit petitions, applications, or requests of those individuals who are part of the Naturalization Class, the Adjustment of Status Class, or the Muslim Ban Class.

Dkt. # 112 at 22-24, 25-26.

The parties disagree about the continued relevancy of the Muslim Ban Class (also referred to as the Six Countries Class) and the propriety of producing records from ICE. Plaintiffs referenced the Muslim Ban Class in their Second Amended Complaint. Dkt. # 47 at ¶ 237. But Plaintiffs did not seek certification of this class in their Amended Motion for Class Certification "because, after the filing of the First Amended Complaint, the Acting Director of USCIS issued a memorandum indicating that Section 3(c) of the First EO would no longer operate to stop the processing of immigration benefits for those already in the United States." Dkt. # 49 at 9, n. 1. Plaintiffs reserved the "right to seek certification of the additional class if circumstances change again." *Id.*

Local Rule 23(i)(3) affords parties 180 days after filing a complaint to move for class certification. Local Rules W.D. Wash. LCR 23(i)(3). "This period may be extended on motion for good cause." *Id.* Any such motion "should, whenever possible, be filed sufficiently in advance of the deadline to allow the court to rule on the motion prior to the deadline." LCR 7(j). If a determination as to class certification is postponed, "a date will be fixed by the court for renewal of the motion." LCR 23(i)(3).

Plaintiffs have not pursued certification of the Muslim Ban Class. They claim that RFP Nos. 40, 41, and 44 are pre-certification discovery requests, yet those requests were propounded after the 180-day deadline had passed. Dkt. # 112 at ¶ 2 (Plaintiffs served the RFPs in November 2017; the deadline to seek class certification on the Muslim Ban

Class was in October 2017). Plaintiffs did not seek an extension of any deadlines with regard to pre-certification discovery or certifying the Muslim Ban Class. And, they fail to offer any compelling reasons for failing to conduct such discovery or file such motions within the 180-day window. Moreover, Plaintiffs' articulated reasons for not seeking certification of the Muslim Ban Class related to whether certain portions of the First and Second EOs would be implemented. Plaintiffs do not argue that circumstances have changed to warrant such a request to now certify the Muslim Ban Class. Nor do Plaintiffs argue that RFP Nos. 40, 41, or 44 seek to discover evidence of changing circumstances such that this discovery would impact the decision to request class certification. In fact, at the time of this Order, it is unclear whether Plaintiffs had even contemplated filing a motion to certify the Muslim Ban Class. To follow Plaintiffs' approach would relegate class certification to a moving target subject only to Plaintiffs' control and completely ignore the established Local Rule of this Court.

Plaintiffs did not timely move to certify the Muslim Ban Class. However, this does not affect their ability to pursue discovery as to the representative plaintiffs. Whether the named plaintiffs' claims are moot has not been briefed before this Court, and the Court will not entertain a motion to dismiss embedded in an opposition to a motion to compel.

Defendants object to RFP Nos. 40, 41, and 44 on account of their allegedly broad context and target of ICE records. Dkt. # 120 at 11-12. The Court disagrees that the RFPs are too broad. Indeed, the RFPs are targeted at certain programs that may encompass a successor program to CARRP. The Court finds that the information requested in RFP Nos. 40, 41, and 44 is relevant and within the scope of litigation at this stage in the proceedings, albeit not with regard to the Muslim Ban Class.[2]

[2] The Court will not tolerate the Government using this Order to withhold swaths of information that is discoverable. The Court notes that information relevant to the Muslim Ban Class is most likely relevant to the two certified classes, as well as the named plaintiffs who

Defendants also object to these RFPs because they claim that searching for documents at ICE "is not proportional to the needs of this case," especially in light of ICE's non-party status. *Id*. at 13. But the RFPs do not ask Defendants to search for records "at ICE." *See* Dkt. # 112 at 21, 25-26; *see also* Dkt. # 122 at 9 (stating that Plaintiffs are inquiring into documents that are in the possession, custody, or control of DHS). Plaintiffs are seeking documents within Defendants' control that reference certain programs that are promulgated or maintained by ICE. Any relevant documents within Defendants' possession, custody, and control must be produced.

C. Protective Order

The Government argues that a more robust protective order must be in place before it will produce the class list to Plaintiffs. Dkt. # 126. In support of its argument, the Government contends that disclosure "risks prejudice to national security and intelligence interests." *Id.* at 3. But the risks cited by the Government are vague and speculative—there is no evidence that any individuals on the class list are or were subjects of investigations or are, generally, "bad actors." *Id.* Furthermore, any sensitive information on the class list is subject to the existing protective order. To be sure, the Government creates scenarios in which Plaintiffs may violate the spirit of the protective order. *Id.* at 6. The Court warns Plaintiffs that should they attempt to purposely and improperly disclose information subject to the protective order, then the Court may issue sanctions, which may include dismissal of this matter.

The Court does not find that the Government has supported its argument that the class list, generally, must be subject to an "attorney eyes only" provision. However, the Court recognizes that potential national security risks may exist as to specific individuals; the burden is on the Government to make such case-by-case determinations. Any

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would have represented the Muslim Ban Class. Plaintiffs should not be forced to file yet another motion to compel in the event that the Government purposely withholds such information.

determinations must be made with sufficient detail and specificity. Such determinations and the individuals to which they apply must be protected by the "attorney eyes only" protections described by the Government in its brief. Dkt. # 126. Any such determinations must be produced to Plaintiffs' counsel—with the understanding that this information is considered "attorney eyes only"—within fourteen (14) days from the date of this Order. The remaining portion of the class list must be produced at the same time, subject to the existing protective order, Dkt. # 86.

D. Status Reports (Dkt. ## 124, 125, 130, 132)

The Court is in receipt of the parties' status reports. Dkt. ## 124, 125, 130, 132. The Court is concerned with the Government's behavior in this matter. Based on the record before it, the Court finds reason to believe that the Government is purposely obstructing and hindering the discovery process in this lawsuit.

There is already a pending motion for sanctions in this matter regarding the Government's discovery behavior. Dkt. # 137. As previously noted, the Government must cease its delay tactics in the discovery practice. These tactics do nothing more than unduly delay the production of documents it is obligated to produce. Unless the Government has a credible basis to assert a claim of privilege, it should fully abide by the rules of timely disclosure.

The Court has repeatedly explained to the Government that orders from the federal bench are mandatory, not voluntary. *See, e.g.*, Dkt. ## 115, 121 (hearing and hearing transcript regarding discovery disputes). The executive branch does not stand alone in the federal system; the Government may not usurp the judicial branch and decide for itself when or if it will produce documents. The Court has no patience for Defendants' apparent disregard for the discovery process and for its attorneys' inappropriate actions in

furthering and participating in such behavior.[3] The Court hopes to proceed to the merits in this matter rather than interminably remain in this morass of unnecessary delays and discovery disputes.

IV. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the motions. Dkt. ## 109, 111, 126.

Dated this 11th day of April, 2018.

The Honorable Richard A. Jones
United States District Judge

[3] Attorneys appearing in the Western District of Washington must be familiar with the Washington Rules of Professional Conduct ("RPC"). Local Rules W.D. Wash. LCR 83.3(a)(2). These include RPC 3.3 and 3.4, which aim to prevent "conduct that undermines the integrity of the adjudicative process." WA R RPC 3.3. Attorneys' duty to advocate for their clients "is qualified by the advocate's duty of candor to the tribunal." *Id.*

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

NOTED FOR: April 20, 2018

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Civil Division
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Through Orders issued on October 19, 2017, ECF No. 98, November 28, 2017, ECF No. 102, and April 11, 2018, ECF No. 148, this Court has directed the Defendants to produce a list of class members in this case, including their identifying information. Although this Court has found to the contrary, the Defendants continue to believe that information identifying individuals on the class list—individuals subject to a sensitive program designed to protect national security—is protected under the law enforcement privilege. After the Court's October 19, 2017, and November 28, 2017 Orders, counsel for the Defendants attempted in good faith to find an acceptable solution by which the government could protect its national security and law enforcement interests while disclosing the class list to Plaintiffs' attorneys. In its order dated April 11, 2018, this Court rejected the government's proposed "attorneys' eyes only" solution, requiring instead that the government to disclose to opposing counsel the government's detailed and specific case-by-case determinations of the need to restrict access to particular class members' identifying information. As explained further below, making such disclosures—which Plaintiffs did not request in discovery—is in many ways more harmful that disclosing the class list under the original protective order.

Given the serious concerns about the requirement to disclose privileged information vital to national security and law enforcement, the United States has been authorized by the Solicitor General to file a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit requesting vacatur of this Court's orders directing production of the class list. To permit orderly review by the court of appeals, Defendants respectfully request that this Court stay the requirement that Defendants produce the class list by April 25, 2018, pending disposition of the mandamus petition by the Ninth Circuit. In the alternative, Defendants respectfully request that the Court reconsider the portion of its April 11, 2018 Order rejecting Defendants' "attorneys' eyes only" proposal. Defendants respectfully request a ruling on this motion by 5 p.m., Pacific Daylight Time, on Monday, April 23, 2018. If the Court is unable to rule by that time, Defendants plan to seek a stay in the court of appeals pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure.

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Seeking review of this Court's orders in the court of appeals is not an option that the government takes lightly, but because of the critical importance of this issue, in the absence of a resolution that provides adequate protection to this information, the government has concluded that this unusual step must be taken. Although the reasons for requesting the stay are grounded largely in arguments already presented to the Court, we are attempting to present these concerns with greater clarity and respectfully request that this Court consider this request and permit the opportunity for expedited appellate review.

I. STANDARD FOR SEEKING A STAY

The court has ""inherent power to control the disposition of the causes on its docket [to] promote economy of time and effort for itself, for counsel, and for [the] litigants" by staying this matter pending appellate review. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972); *Mediterranean Enters., Inc. v. Ssangyong Corp*, 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." (citation omitted)).

District courts apply a four-factor test to determine whether to issue a stay of an order: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (*Nken* requires a showing of irreparable harm, but applies a balancing test showing "that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor"). All of those factors are satisfied here.

II. ANALYSIS

A. Defendants Have a Strong Likelihood of Success on the Merits.

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The Court is familiar with Defendants' arguments on the merits, which we will not reprise in detail here. In short, as explained in numerous previous filings and declarations, Defendants believe that the class list is protected by the law enforcement privilege because it includes "information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources," and information that would "otherwise ... interfere with an investigation." *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (internal quotation marks and brackets omitted); accord, *e.g.*, *In re U.S. Dep't of Homeland Security*, 459 F.3d 565, 571 (5th Cir. 2006); *Sanchez* v. *City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990). Exhibit A, Declaration of Tatum King (hereafter "King Decl."), at ¶¶ 16-18; Exhibit B, Declaration of Tracy Renaud (hereafter "Renaud Decl."), at ¶¶ 16-18.

B. Defendants Will Be Irreparably Harmed Absent a Stay.

Defendants would suffer irreparable harm in being required to disclose the identities (as distinct from the demographic information that form the crux of this case) of individuals on the class list. That harm would be both substantial and irreversible. "Secrecy is a one-way street: Once information is published, it cannot be made secret again." *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008). Review on appeal from a final judgment, even if favorable to Defendants, could not un-ring the bell of disclosure. *See In re Ford Motor Co.*, 110 F.3d 954, 962-63 (3rd Cir. 1997) (appealing privilege issues after final judgment is ineffective).

Plaintiffs have stated their desire to inform individuals who contact Plaintiffs' counsel whether they are part of the class, and affirmatively to contact other class members to seek out additional information from them. ECF No. 91 at 4-5. Given the nature of this case as a challenge to the CARRP policy, contact by Plaintiff's counsel will necessarily tend to reveal to that person that he or she is in fact subject to CARRP, even if Plaintiffs' counsel does not directly reveal that such member is subject to CARRP.

The government—and the public at-large—will be harmed irreparably if this sensitive information is released, because it may lead dangerous individuals to attempt to evade the immigration system to obtain benefits for which they are not eligible, and permit those

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individuals to infer the existence of ongoing criminal, national security, or other law enforcement or intelligence investigations, or that the government has information about activities about which they were previously unaware the government had any knowledge. ECF No. 94-5, ¶¶ 16, 18; ECF No. 126-3, ¶ 5. This knowledge could then allow them to change their behavior, alert co-conspirators or larger organizations of government interest in or awareness of their activities, and take actions to conceal wrong-doing. *Id*. Thus, disclosure of this information harms not only Defendants but also puts public safety at risk.

Making any of these disclosures would impair ongoing law enforcement activities. James McCament, the Deputy Director of U.S. Citizenship and Immigration Services ("USCIS") explained that if an individual learns he or she is subject to CARRP, that could lead him or her to infer the type of investigation that is under way (e.g., whether the individual is inadmissible on national security grounds), and to alter his or her behavior or influence witnesses to make it more difficult for USCIS to accurately determine whether those national security grounds bar or adversely impact the benefit application. ECF No. 94-5, ¶ 18. Tatum King, Assistant Director of U.S. Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations, overseeing Domestic Operations, echoed these concerns, explaining that individuals who are prematurely notified that they are the subject of law enforcement interest may "alter their habits and/or appearances, may alert their compatriots and co-conspirators, may go into hiding, may destroy evidence, or may anticipate the activities of federal agents and thereby put the agents, their investigations, and members of the public at risk." ECF No. 126-3, ¶ 5. Furthermore, even inadvertent disclosure could compromise law enforcement techniques and methods, and thereby endanger national security. *Id.* ¶ 6. Matthew Emrich, the Associate Director of U.S. Citizenship and Immigration Services and head of the Fraud Detection and National Security directorate explained that individuals may be subject to CARRP as the result of derogatory information received from the FBI name check or fingerprint check process or from other DHS databases. ECF No. 126-1, ¶ 10. Mr. Emrich also explained that revealing that a person is subject to CARRP could disrupt ongoing investigations of either the individual or a larger group of which

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the individual is a member. *Id.* ¶ 28. Finally, David Eisenreich, Section Chief of the National Name Check Section Program of the Federal Bureau of Investigation ("FBI") similarly explained that disclosure to individuals that they are subject to CARRP would allow them to infer that they are subject to scrutiny by law enforcement beyond the specific immigration benefit application at issue. ECF No. 126-2, ¶ 32. Mr. Eisenreich also explained that the FBI treats all name check results—whether positive or negative—as privileged because it is necessary to do so to avoid telegraphing whether any particular result was positive or negative, and that disclosures that would enable a person to infer the existence of an investigation would impair ongoing FBI investigations. *Id*. at ¶ 31; Exhibit A, Declaration of Tatum King (hereafter "King Decl."), at ¶¶ 16-18; Exhibit B, Declaration of Tracy Renaud (hereafter "Renaud Decl."), at ¶¶ 16-18.

Although the Court stated "there is no evidence that any individuals on the class list are or were subjects of investigations or are, generally, 'bad actors,'" ECF No. 148 at 9, it is a requirement of the class definition that the individual has a pending benefit application and is or was subject to the CARRP policy. CARRP is a USCIS policy to investigate immigrant benefit applicants *whose cases raise national security concerns*. ECF No. 94-5, ¶ 14. In order for USCIS to consider an individual a national security concern, the individual must have an articulable link to one of the national security inadmissibility or deportability grounds listed in the Immigration and Nationality Act ("INA"). These grounds include, for example, membership in a terrorist organization or espionage. 8 U.S.C. §§ 1182(a)(3)(A), (B), (F); 1227(a)(3)(A), (B). ECF No. 94-5, ¶ 15. By virtue of the fact that these individuals were subject to a civil immigration background investigation for a national security concern, they are members of the class. *See* ECF No. 94-5, ¶¶ 14-15. Further, because USCIS engages in information-sharing and gathers information from outside sources, including agencies engaged in criminal and/or intelligence investigations, many of these individuals may also be the subject of a criminal and/or intelligence law enforcement investigation, including terrorism or national security investigations. ECF No. 94-5, ¶ 18; ECF No. 126-1, ¶ 28.

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The Supreme Court and Ninth Circuit agree that "'the Government's interest in combating terrorism is an urgent objective of the highest order.'" *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)). The Government has explained how the Court's order to disclose the identities of class members harms national security and endangers public safety through numerous affidavits from officials at multiple agencies. ECF No. 94-5, ¶ 20; ECF No. 126-1, ¶¶ 20-30; ECN No. 126-2, ¶¶ 31-32; ECN No. 126-3, ¶¶ 5-6. The Government—and the public—deserve an opportunity to have those claims heard by the Ninth Circuit before the irreversible harm that would result from disclosure.

C. Plaintiffs Will Not Be Prejudiced By a Stay.

The potential harm to Plaintiffs from a stay is minimal, if there is indeed any cognizable potential harm at all. The deadlines for expert discovery and to amend the pleadings have been vacated and have not been not reset. In addition, insofar as Plaintiffs seek the class list information to assist them to make a discrimination claim, Defendants have provided Plaintiffs with information on the age, country of citizenship, and country of birth for all class members, and the ethnicity for any class member who submitted a Form N-400 through USCIS Electronic Immigration System (ELIS), which collects that information. Further, other discovery in the case continues and will not be affected by a stay concerning a single document. In any event, it is self-evident that no complaint about the pace of discovery would outweigh the efficacy of ongoing law enforcement investigations and the safety of federal law enforcement officers. *See* ECF No. 126-2, ¶ 32; ECF No. 126-3, ¶ 5.

D. The Public Interest Favors a Stay

The public factor favors a stay for the same reasons that the government would be harmed by disclosure. See *Nken*, 556 U.S. at 435. In addition, a stay would further "the orderly course of justice" by facilitating the court of appeals to review of Defendants' privilege claim before damaging disclosure occurs. *Washington*, 2017 WL 2172020 at *2 (internal quotation omitted). Among other things, the Ninth Circuit's resolution of Defendant's claim of law

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enforcement privilege may provide additional guidance on the applicability of that privilege beyond the particular document at issue and, indeed, may provide guidance on how governmental privileges are to be invoked more generally. A stay is appropriate and beneficial to the orderly course of justice under these circumstances. *See id.*

III. IN THE ALTERNATIVE, THE COURT SHOULD RECONSIDER THE CONDITIONS IT IMPOSED ON DEFENDANTS' USE OF "ATTORNEYS' EYES ONLY DISCLOSURE, AND PERMIT DEFENDANTS TO PRODUCE ALL THE CLASS IDENTITYING INFORMATION TO PLAINTFFS' COUNSEL SUBJECT TO THE RESTRICTIONS INDENTIFIED IN DEFENDANTS' MOTION TO SUPPLEMENT THE PROTECTIVE ORDER

In the alternative, Defendants respectfully seek reconsideration of the Court's April 11, 2018 Order concerning the use of the "attorneys' eyes only" protection. The Court erred in analyzing the harms related to the Court's requirement to provide information under the attorneys' eyes only protective order. This error justifies reconsideration and vacatur of the relevant portions of the Order. Accordingly, reconsideration is appropriate under Local Rule 7(h)(1).

Adherence to the case-by-case determination portion of the Court's order to gain the benefits of releasing the information under an attorneys' eyes only protective order is arguably more damaging to national security than releasing the class list under the current stipulated protective order. First, providing case-by-case, individualized information to Plaintiffs' counsel about the national security risks of specific individuals arguably provides far less protection to national security interests than providing the names of the entire class list with no additional information. Second, such determinations, which may involve classified information, are subject to the law enforcement privilege, and, perhaps the state secrets privileges. The Government has never had an opportunity to assert any privilege over this specific information, given that Plaintiffs never propounded a discovery request for this information or otherwise requested this information before the Court ordered the information to be provided. And, third, the individualized determinations that the Court has ordered here are similar to providing "why"

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information for the five named Plaintiffs. United States Citizenship and Immigration Services, the Federal Bureau of Investigation, Immigration and Customs Enforcement, and the Transportation Security Administration have previously filed declarations explaining that the "why" information is privileged and the harms associated with the disclosure of the "why" information. ECF Nos. 146-2, 146-3, 146-4, 146-5, 146-6, 146-7; King Decl., ¶¶ 14-19; Renaud Decl., ¶¶ 8-18. Additionally, the Government has also filed a motion for the Court to review other declarations *ex parte*. If the Government engaged in the case-by-case process that the Court required to take advantage of the attorneys' eyes only protective order, such review would be contrary to the positions taken in those filings.[1]

IV. CONCLUSION

For the foregoing reasons, the Court should STAY its orders of October 19, 2017, ECF No. 98, November 28, 2017, ECF No. 102, and April 11, 2018, ECF No. 148, to the extent they requires disclosure of the class list.

Dated: April 20, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

/s/ August Flentje
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Counsel for Defendants

[1] The government also notes its concern about the portion of the Court's April 11, 2018 Order, that, after noting the timing of the Ermich declaration, ECF No. 119-2, indicated that the government may be required to "provide additional affidavits from heads of agencies for future productions in which the Government wishes to claim the law enforcement privilege." ECF No. 148, at 5 fn. 1. As the government explained in detail in a previous filing, see ECF No. 119, the suggestion that Defendants must claim the law enforcement privilege through a formal declaration by an agency head at the time documents are produced reflects a fundamental misunderstanding of privilege law.

CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on April 20, 2018, I conferred with opposing counsel, specifically Mr. Nicholas Gellert, and thoroughly discussed the substance of this motion and in good faith attempted to reach an accord to eliminate the need for the motion. The parties were unable to reach an accord.

Dated: April 20, 2018

/s/ August Flentje
AUGUST FLENTJE
Special Counsel
U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 2:17-cv-00094-RAJ
DONALD TRUMP, President of the United States, *et al.*,	)	
Defendants.	)	

DECLARATION OF TATUM KING

I, Tatum King, hereby state as follows:

1. I am the Assistant Director, Domestic Operations, Homeland Security Investigations (HSI), U.S. Immigration and Customs Enforcement (ICE), an agency in the Department of Homeland Security (DHS). Following the enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including the criminal investigations staffs of the former U.S. Customs Service (USCS) and the former Immigration and Naturalization Service (INS). As a result, all Special Agents who formerly worked for the USCS and the INS became a part of ICE. ICE is the second largest investigative agency in the Federal Government. Within ICE, HSI has approximately 8,260 employees, including over 6,100 Special Agents assigned to twenty-six (26) Special Agent-in-Charge (SAC) offices in cities throughout the United States and in countries around the world. Special Agents have a wide array of responsibilities relating to the investigation of criminal activity relating to illicit trade, travel, and finance, which in addition to investigating violations of the

country's immigration laws, includes the investigation of contraband and merchandise smuggling, money laundering, fraud in both import and export transactions, and other criminal activity.

2. As the Assistant Director of HSI's Domestic Operations, I provide oversight and support to all HSI domestic field personnel, including 26 SACs with responsibility for more than 200 offices. In this capacity, I am responsible for strategic planning, national policy implementation and the development and execution of operational initiatives. The offices under my direction are responsible for leading HSI's effort to identify, disrupt, and dismantle terrorist and other transnational criminal organizations that threaten the security of the United States.

3. As ICE is the largest investigative arm of DHS, HSI may share sensitive law enforcement information with other agencies in furtherance of homeland security. The information can include investigations into active criminal enterprises and national security threats, including counterterrorism, counter-proliferation, and visa violations with national security or public safety concerns. ICE's mission strongly depends on the use of sensitive law enforcement and investigative techniques and methods which are not widely known to the public. The disclosure of these techniques and methods would seriously compromise ICE's ability to perform its mission to enforce the law. Notably, such information can come from a variety of sources, including confidential informants, concerned citizens, and companies who report a suspicious purchase or request. Disclosure of the sources of that information could chill the willingness to assist HSI in its investigations and put those sources at risk.

4. This declaration is based on my personal knowledge, as well as information conveyed to me by my staff and other knowledgeable ICE personnel in the course of my official duties and

responsibilities. I have also reviewed the April 11, 2018 court Order and have been briefed on the issues relating to class list disclosure.

5. In my review of the relevant information for this declaration, HSI compared the list USCIS provided of applicants subject to the Controlled Application Review and Resolution Program (CARRP) to HSI's records to identify HSI investigations. HSI reviewed the case files to identify the types of cases represented by the list of unnamed class members, the investigative techniques used, the sources of that information, the partners in the investigations, and the tangible risks to HSI's investigations, sources, techniques, and methods.

6. The purpose of this Declaration is to explain ICE's role in national security investigations and to explain how the April 11, 2018 court Order provides an unworkable mandate to produce sensitive investigatory records that would create a significant harm if the class list is disclosed.

7. For the reasons set forth below, I have determined that the release of this information would be contrary to the public interest, because it would reveal ICE's confidential law enforcement techniques, methods and procedures, thus compromising ongoing national security and public safety investigations as further discussed below.

Homeland Security Investigations (HSI)

8. ICE is the largest investigative arm of DHS and, within ICE, HSI carries out investigations under the authority vested to DHS. HSI uses its legal authority to combat criminal actors and organizations illegally exploiting America's travel, trade, financial, and immigration systems.

9. HSI also serves a crucial role in protecting the country's national security interests by working with domestic and foreign partner agencies, special agents, and program analysts to

employ a broad range of investigative techniques to identify, investigate, and disrupt national security threats against the United States.

10. To conduct such investigations and to support other agencies in operating their programs in the interest of homeland security, HSI may share sensitive law enforcement information with other agencies. Information shared includes details concerning investigations into active criminal enterprises and national security threats, including counterterrorism, counter-proliferation, and visa violations with national security or public safety concerns.

11. U.S. Citizenship and Immigration Services (USCIS) is one of the DHS components to which HSI provides derogatory or investigative information.

HSI and CARRP

12. After review of the declaration submitted by Mr. Matthew Emrich, USCIS Associate Director, Fraud Detection and National Security Directorate (Exhibit A of Defendant's Motion for Limited Protective Order, filed March 1, 2018), I understand that the CARRP is a "consistent USCIS-wide approach to identify, process, and adjudicate applications and petitions for immigration benefits that involve national security concerns."

13. Based on my position and experience, my review of Mr. Emrich's declaration, I understand that USCIS references databases of existing government information when reviewing applications and petitions for immigration benefits to determine whether derogatory information exists on the applicant. These systems checks may or may not reveal an association with an ongoing national security investigation. In the event the systems checks return records, USCIS will contact the owner of the records for the context and details of the records. HSI will receive such inquiries on relevant HSI investigatory records. If the records implicate a national security concern, it is my understanding that USCIS will employ the

CARRP process on the individual. Additionally, HSI can notify USCIS of a national security concern pertaining to an individual who has a pending application with USCIS. Accordingly, the basis for an individual's CARRP designation may or may not be the same basis as the HSI investigation.

Effects of Class List Disclosure

14. Based upon my personal knowledge of the case and the court's Order on the Plaintiff's Motion to Compel, I am formally asserting that the release of the unredacted class list if disclosed will directly harm the ability of HSI to identify, disrupt, and dismantle threats to national security and public safety. Given the stated intent of the Plaintiffs to contact and reveal the unnamed class members, HSI cannot rely on the attorneys to not disclose the information provided to protect the safety of the sources and HSI special agents. In that regard, no sanction, reprimand, or recourse after the fact against the attorneys would mitigate the substantial harm explained below. Further, based on Plaintiffs' previous statements, HSI cannot wait until confirmation that the information was disclosed beyond the attorneys to take precautionary steps to protect the agents and sources.

15. Producing the list of unnamed class members under Attorneys' Eyes-Only protection ordered by the court will not suffice to protect, in cases where HSI has equities, HSI's sources of information, the public at large, or the HSI investigations, because segregating individuals whose disclosure will lead to potential national security and public safety risks from the broader class list, will, in fact, confirm the identities of those individuals of concern to HSI who are national security concerns from those who are not. Further, the Order's requirement that the government include detailed explanations for Attorneys' Eyes-Only, and to maintain

that protection, compounds HSI's initial concerns by requiring a level of specificity that reveals precisely the information that needs to be protected from disclosure.

16. Specifically, I attest that release of the names of the class members will have a detrimental impact on HSI investigations, for the reasons provided below, and the inclusion of details about those investigations, with enough specificity to satisfy the Order, would exacerbate the risks and harms to HSI's investigations, the sources involved, and the unnamed class members and their families. While providing the names alone would inform the subjects and associates about an investigation, the addition of details about the investigations would expose the sources, techniques, and methods of each investigations, creating a greater risk to the sources and agents.

17. The release of the unredacted class list would reveal sensitive and privileged law enforcement information, in addition to exposing the general nature of ICE law enforcement techniques, procedures, and guidelines. Based on my training and experience in law enforcement actions, I know of investigations where the subject of an investigation was informed of an investigation and subsequently the following consequences occurred:

- **Physical harm to sources**: These include sources whose identity is compromised by disclosure, including community members who voluntarily speak with government investigators but likely do not anticipate public disclosure. Sources are at risk of exposure because they could be recent acquaintances of the subject or one of a small set of people privy to the information which led to the investigation. A subject who learns he or she is under investigation might easily glean the source of the information to law enforcement based on the context or type of information guiding the investigation. Also, the source of information may include a concerned company that informed law enforcement of a suspicious purchase or shipment. To reveal an investigation that would implicate such a company could put them in economic and legal jeopardy. The revelation might also include HSI confidential informants. Their safety and cooperation is highly dependent upon their confidentiality. The release of information pertaining to their identities may lead to their safety being compromised by individuals who may be involved in unlawful activities.

- **Physical harm to unnamed class members:** The harm to class members is more direct than to sources, but share similar characteristics. The names of individuals on the class list which are revealed could be in danger from coconspirators and rivals. The unnamed class members and their families could become the target of retribution, if it is known that they are under investigation by the government.

- **Physical harm to law enforcement agents:** When the subject of an investigation or his or her associates becomes aware of the investigation, it puts the investigating agents at serious physical risk. Individuals may attempt to subvert the investigation or target the investigators. Notably, some investigators are operating under cover. The exposure of an undercover agent would put that agent at great risk of harm and potentially compromise the integrity of every undercover investigation that he or she is conducting, regardless of whether the targets of those investigations come under CARRP.

- **Damage to ongoing national security investigations**: By releasing the names of potential subjects of ongoing investigations, subjects may alter their behavior to avoid surveillance and detection. Ongoing investigations may also be compromised by a lack of cooperation by the sources and informants. This may also lead to a lack of cooperation from sources in new investigations, which will have a chilling effect on the use of sources. HSI will then be unable to place new sources or undercover investigators close to the subject of the investigation, because a knowing subject will be inherently distrustful of new individuals around their conspiracy. Further, individuals associated with the unnamed class members may also be made aware that they are under investigation by the government, based on affiliation with the unnamed class members in an illegal conspiracy. Lastly, a vulnerable subject, who is made known, may be excluded from an on-going conspiracy, which will eliminate HSI's exposure to the conspiracy and allow the conspiracy to continue unfettered.

- **Reduced cooperation from other law enforcement agencies and foreign partners**: HSI receives highly sensitive and confidential information from intelligence or other agency sources. Disclosure of such information could be compromised, which may dissuade partner law enforcement from sharing with HSI in the future.

- **Privacy**: Individuals who may be incidentally named as part of an investigation may be exposed. Also, the list HSI has reviewed includes a list of individuals currently under investigation. The inherent purpose of investigations is to determine the presence of illegal actions by the subject or active threat to national security. Naturally, some investigations, based on source information, will not reveal any illegality or threat on behalf of the subject. Investigations such as those are closed without prosecution or administrative action. Revealing the list of individuals with the assumption that all unnamed class members have conclusively been found to have committed illegal acts or are a threat concerning national security would be an inappropriate conclusion, in some instances, which could have repercussions to their employment and other aspects of their lives.

- **Danger to Communities**: The bad actors who are aware of active governmental interest in them may adjust the timeframe for their criminal/terrorist activities. This may hinder law enforcement's ability to stop criminal activity because the individual knows they are under government scrutiny and would change their habits, activities, and communications methods.

Conclusion

18. The disclosure of the information discussed herein would allow potential violators to discover or circumvent ICE investigative techniques, and endanger HSI operations, employees, the public, and the class members themselves and their families. Specifically, the disclosure of these class names may lead to individuals targeted by or involved in investigations to be revealed and exposed. This would enable potential violators to evade HSI investigations and law enforcement activities, thus compromising the safety of HSI agents and the public. The disclosure of this information would also jeopardize the overall effectiveness of ICE and third-party investigations.

19. Accordingly, I respectfully reiterate the grave consequences for submitting any portion of the information included in the class list, for the reasons set forth above.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C., this 20th day of April, 2018.

Tatum King
Assistant Director, Domestic Operations
Office of Homeland Security Investigations
U.S. Immigration and Customs Enforcement

Exhibit B

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DECLARATION OF TRACY L. RENAUD IN SUPPORT OF DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

I, Tracy L. Renaud, do hereby declare and say:

1. I am the Associate Director of the Management Directorate, U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"). I have held this position since November 2, 2014. Since March 5, 2018, I have been serving as the Acting Deputy Director of USCIS, a position I also held from January to October 2017.

2. As the Acting Deputy Director of USCIS, I am responsible, along with the Director, for overseeing a workforce of more than 18,000 federal employees, handling approximately 8 million immigration benefit applications each year.

3. After consideration of information available to me in my capacity as USCIS Acting Deputy Director, the matters contained in this declaration are based upon

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my understanding of the case of *Wagafe, et al., v. Trump, et al.*, Case No. 2:17-cv-00094, now pending in the United States District Court for the Western District of Washington.

4. I understand that, in October 2017, former USCIS Deputy Director James W. McCament formally asserted a law enforcement privilege over information that would confirm whether any particular individual was subject to the Controlled Application Review and Resolution Program ("CARRP"), and therefore is, or was, considered by USCIS to present a national security concern. Dkt. No. 94-5. I also understand that the Court subsequently ruled that Plaintiffs' need to obtain this information outweighed the Government's reasons for withholding it from disclosure to Plaintiffs. Dkt. No. 98 at 4. I also understand that, in its ruling, the Court noted "that there is a protective order in place, Dkt. No. 86, and Plaintiffs' attorneys could supplement the protective order." *Id.*

5. I am aware that on March 1, 2018, the Government moved the Court for a more robust protective order such that the class list would be subject to an attorneys' eyes only provision. Dkt. No. 126 at 2. I am aware that Associate Director for the Fraud Detection and National Security Directorate ("FDNS") Matthew Emrich filed a declaration supporting that motion explaining the sensitivity of this information and the harms that could result from disclosure. Dkt. No. 126-1.

6. I am aware of the Court's April 11, 2018 order, Dkt. No. 148, that requires Defendants within fourteen days of the Court's order to produce a list of class members to Plaintiffs under the current stipulated protective order, Dkt. No. 86, and/or to provide Plaintiffs' counsel detailed and specific case-by-case determinations that explain why specific individuals may present potential national security risks—with the understanding that this information is considered "attorneys' eyes only." Dkt. No. 148 at 9-10.

7. I am also aware that FDNS Associate Director Matthew Emrich filed a declaration stating that, in his considered professional judgment, the Stipulated Protective Order, Dkt. No. 86, is not sufficient to protect information identifying the class members. The Stipulated Protective Order prohibits Plaintiffs from generally publicizing the class

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list or telling unnamed class members whether they are included on the list.[1] It does not, however, prohibit Plaintiffs' counsel from sharing the information with the named plaintiffs, or witnesses to whom disclosure is reasonably necessary during their depositions. Dkt. No. 126-1, ¶ 21.

8. In my considered professional judgment, the Court's alternative to providing the Plaintiffs with the class list—providing Plaintiffs' counsel with detailed and specific case-by-case determinations that explain why specific individuals present a potential national security risk that require the "attorneys' eyes only" protection—is more harmful than disclosing the class list under the less restrictive protective order. This would require the Government to identify to Plaintiffs' counsel the sensitive information related to class members, who pose a potential risk to national security.

9. USCIS has previously articulated the harms associated with disclosing the class list without the additional information required by the Court's April 11 order. Dkt. Nos. 94-5; 126-1. I submit this declaration to explain that the Court's April 11 order creates a new harm by requiring the Government to waive its ability to assert privilege over law enforcement information that has not been requested by Plaintiffs and, therefore, over which defendants have not been provided the opportunity to assert applicable privilege. Further, the April 11 order exacerbates, rather than cures, the three major harms that USCIS has previously described if the class list were disclosed, or if it were disclosed under the current Stipulated Protective Order: 1) harm to USCIS' ability to properly adjudicate benefits, 2) harm to USCIS' law enforcement and/or intelligence partners, and 3) harm to USCIS' information-sharing.

10. The individuals on the class list are people that USCIS has determined have an articulable link to a national security ground for inadmissibility or removal. These

[1] I understand that, despite the terms of the Stipulated Protective Order, Plaintiffs' counsel have indicated their intent to disclose to unnamed class members that they are on the list, *i.e.*, subject to the CARRP policy and are or did have an articulable link to a national security ground for inadmissibility or removal. I further understand that the Court's April 11 order stated, "The Court warns Plaintiffs that should they attempt to purposely and improperly disclose information subject to the protective order, then the Court may issue sanctions, which may include dismissal of this matter." Dkt. No. 148 at 9.

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individuals are or were being vetted by USCIS for national security concerns (or were considered a national security concern at some point after the class was certified, and their application remains pending) and may also be under investigation by another law enforcement or intelligence agency.

11. In order to attempt to avail ourselves of the more robust protection of the attorneys' eyes only provision, USCIS would have to provide information that is not part of the class list and that has not been requested by Plaintiffs that would identify why such individuals are or were subject to the CARRP policy. In doing so, USCIS would likely have to identify what derogatory information it has, which may indicate whether the individual is subject to an ongoing law enforcement or intelligence investigation and may specify which immigration, law enforcement, or intelligence agencies may be investigating that individual.[2]

12. The reason(s) why any particular individual potentially poses a national security risk, in USCIS' judgment, is in itself law enforcement privileged information. Such information, described with "sufficient detail and specificity" would disclose sensitive information that raises a potential national security risk. Compliance with the Court's order necessarily would require the Government to waive any law enforcement privilege associated with that information without providing the opportunity to properly assert it.

13. The April 11 order provides the Government with two untenable options: 1) provide Plaintiffs with a list of names of class members under the current Stipulated

[2] I am also aware that FDNS Associate Director Matthew Emrich filed a declaration stating that a national security concern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in 8 U.S.C. §§1182(a)(3)(A), (B), or (F) or 1227(a)(4)(A) or (B). Individuals who raise national security concerns are considered either known or suspected terrorists ("KST") or non-KSTs. For the purposes of CARRP, a KST is an individual who has been nominated and accepted for placement in the Federal Bureau of Investigation's (FBI) Terrorist Screening Database ("TSDB") and is on the Terrorism Watchlist. Individuals who are placed into the TSDB are included in U.S. Customs and Border Protection's TECS system with a certain code indicating that the individual is a KST. All other individuals who raise national security concerns are considered non-KSTs, which can be identified through information gain from the following sources: TECS, FBI name check, FBI fingerprint check, databases owned by the Department of Homeland Security (DHS), Department of State (DOS), or other agency, applicant-provided information, or any other manner in which USCIS is notified or obtains information that an individual has an articulable link to a national security concern. Dkt. No. 126-1, ¶¶ 6-10.

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Protective Order, without any information about the national security risk that the individual poses, despite USCIS' prior explanations that the current Stipulated Protective Order does not sufficiently protect the information; or 2) provide Plaintiffs' counsel with a list of class members, along with the law-enforcement reasons why those individuals' identities need to be subject to attorneys' eyes only handling, and in doing so disclose highly sensitive national security and/or law enforcement information to Plaintiffs' counsel while also waiving the law enforcement privilege associated with that information.

14. Further, if Plaintiffs' counsel challenge the designation of an individual as a "potential national security risk" under the Court's April 11 order and are successful in doing so, this highly sensitive, privileged information could potentially be disclosed to individuals beyond the attorneys, including the very individuals who pose the national security risk. Dkt. No. 126-1, ¶ 21 (articulating that the Stipulated Protective Order allows confidential information to be disclosed to individuals, as needed, during depositions).

15. Even if such designations cannot be challenged or are not challenged, the risk of inadvertent disclosure of this highly sensitive information is such that no protective order is sufficient to allow it to be disclosed.

16. I have previously explained that simply informing an individual that he or she is subject to the CARRP policy would adversely affect USCIS' ability to properly adjudicate benefit applications. Dkt. No. 126-1, ¶¶ 25-27. In this case, providing Plaintiffs' counsel not just the name of the individual, but the specific reasons that the individual potentially poses a national security risk exacerbates that harm. If the information were inadvertently disclosed (or disclosed if Plaintiffs' counsel challenges the designation of that individual as a potential national security risk) to the individual, that individual would prematurely have insight into specific adverse information that USCIS knows, and could use that knowledge to exploit the adjudication process and attempt to improperly gain an immigration benefit.

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17. Further, disclosing why an individual is subject to the CARRP policy adversely affects USCIS' law enforcement and/or intelligence partners. Disclosure may disrupt a criminal investigation related to terrorism or other national security issues. For example, if an unnamed class member poses a potential threat to national security, notification that he or she has been subject to the CARRP policy would certainly lead the individual to suspect that their bad acts are being investigated. This could disrupt an individual investigation, or, if the individual is the subject of an investigation involving a large number of people, that individual could report back to others in the group that their activities are likely being investigated. In this way, large investigations could also be adversely affected.

18. Relatedly, disclosure of information that USCIS does not own, which originates with other law enforcement or intelligence agencies, could impair USCIS' ability to share and collect necessary information to determine if an individual is eligible for an immigration benefit and could impact other law enforcement or intelligence agencies' missions or operations. USCIS is obligated to protect privileged information that it obtains from third-party agencies. Disclosure could harm the collaborative relationship between USCIS and the law enforcement partners, which could degrade USCIS' ability to collect information it needs to prevent individuals with potential national security concerns from infiltrating the immigration system, despite not being eligible for an immigration benefit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of April, 2018, at Washington, D.C.

Tracy L. Renaud
Acting Deputy Director
U.S. Citizenship and Immigration Service
Washington, D.C.

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The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

[PROPOSED] ORDER GRANTING DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

Having considered Defendants' Emergency Motion for Stay Pending Appellate Review, finding good cause for the granting the motion, and acknowledging the requirements of Federal Rule of Appellate Procedure 8 to first seek a stay in the district court where practicable, it is hereby:

ORDERED that Defendants' Motion is **GRANTED**. Insofar as the Court's Order of April 11, 2018 (ECF No. 148) ordered Defendants to provide the class list to Plaintiffs by April 25, 2018, that portion of said order is **STAYED** pending further order of the Court.

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IT IS SO ORDERED.

HON. RICHARD A. JONES
United States District Judge

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Presented by:

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Dated: April 20, 2018

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Molly C. Dwyer
Clerk of Court

April 23, 2018

No.:	18-71171
D.C. No.:	2:17-cv-00094-RAJ
Short Title:	Donald Trump, et al v. USDC-WAWSE

Dear Petitioners/Counsel

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to FRAP Rule 21(b), no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.