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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JANE DOE 1, et al.

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.

Defendants.

CASE NO. 5:18-cv-02349 BLF

AMENDED NOTICE OF MOTION AND AMENDED MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

ORAL ARGUMENT REQUESTED
Date: June 22, 2018
Time: 9:00 a.m.
Place: Courtroom 3 (5th Floor)

AMENDED NOTICE OF MOTION AND AMENDED MOTION FOR CLASS CERTIFICATION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on June 22, 2018 at 9:00 a.m. or as soon thereafter as counsel may be heard, before the Honorable Beth Labson Freeman of the United States District Court for the Northern District of California, San Jose Division, located at Courtroom 3 – 5th Floor, 280 South 1st Street, San Jose, California, 95113, Plaintiffs will and do hereby move pursuant to Federal Rule of Civil Procedure 23 for an order: (1) certifying this case as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2); (2) appointing Plaintiffs Does 1 through 5 as class representatives; and (3) appointing the undersigned counsel as class counsel.

This Amended Motion is based on this Amended Notice of Motion and Amended Motion for Class Certification; the attached Memorandum of Points and Authorities; the Declarations of Belinda S Lee, Mariko Hirose, Adam Bates, and Samuel Witten; the Declarations of Jane Doe 1, John Doe 2, Jane Doe 3, Jane Doe 4, and Jane Doe 5 (filed concurrently herewith); all papers and pleadings on file in this action; and upon all other arguments and evidence this Court may consider on this Motion.

Dated: May 18, 2018

Respectfully submitted,

LATHAM & WATKINS LLP

By */s/ Belinda S Lee*
Belinda S Lee
Oliver Rocos
Thomas Golding
Ariel E. Rogers

INTERNATIONAL REFUGEE ASSISTANCE PROJECT
Mariko Hirose (*pro hac vice*)
Kathryn C. Meyer (*pro hac vice*)

Attorneys for Plaintiffs Does 1 through 5

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STATEMENT OF ISSUES TO BE DECIDED

Should the proposed class of:

> All Iranian refugees who (1) applied for refugee admission to the United States under the Lautenberg Amendment, whether as a principal applicant or derivative relatives; (2) traveled to Vienna, Austria, for processing; and (3) received denials from the United States government in or after February 2018 with the sole explanation that their application was denied "as a matter of discretion," and their U.S.-based Close Family Members who served as their U.S. ties.

be certified under Federal Rules of Civil Procedure 23(a) and 23(b)(2)?

"Close Family Member" as used in the class definition is defined as parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whole or half), and step-relationships, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.

I. INTRODUCTION

In February 2018, the U.S. government engaged in a mass denial of the applications of refugees under the Vienna Lautenberg-Specter program who had already traveled to Vienna and, in doing so, provided applicants with the same verbatim response that their applications were denied "as a matter of discretion."[1] These mass rejections, and these same meaningless explanations, were given to nearly 90 Iranian religious refugees who had applied for refugee status in the United States under the 1989 Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1989), and the 2004 Specter Amendment, Pub. L. No. 108-199, § 213, 118 Stat. 3 (2004). Lee Decl., Ex. B. As a result, these refugees—who had traveled to Vienna, Austria at the invitation of the U.S. government—have been deprived of their long-awaited reunion with their U.S.-based family members and now are at risk of deportation back to Iran, where they will likely face an even greater likelihood of persecution for seeking refuge in the United States as a religious minority. *See e.g.* Jane Doe 5 Declaration ("Doe 5 Decl.") at ¶ 15.

[1] *See e.g.* Jane Doe 3 Declaration ("Doe 3 Decl."), Ex. A; Jane Doe 4 Declaration ("Doe 4 Decl."), Ex. A; Jane Doe 5 Declaration ("Doe 5 Decl."), Ex. A; Adam Bates Declaration ("Bates Decl") at ¶ 10; Belinda S Lee Declaration ("Lee Decl."), Ex. B.

These mass rejections were all unlawful because they fail to identify "to the maximum extent feasible, the reason for the denial," as expressly required under the Lautenberg Amendment, 8 U.S.C. § 1157(c) (note). Additionally, these rote denials render any review of the denials an impossible task because there is no way for these refugees to substantively address (or even know) the true reason for their denials in a Request for Review. This suit seeks declaratory judgment and an order requiring Defendants to comply with the Lautenberg Amendment and related agency procedures, including by reissuing Notices of Ineligibility to class members that "state, to the maximum extent feasible, the reason for the denial" and giving refugee class members an opportunity to submit Requests for Reviews based on the reissued Notices.

As set out below, Plaintiffs and the proposed class have standing to bring this action and satisfy Federal Rule of Civil Procedure 23(a) as they meet the numerosity, commonality, typicality, and adequacy requirements. Furthermore, Defendants have acted, and refused to act, on grounds generally applicable to Plaintiffs and all class members such that the relief sought by Plaintiffs would benefit the entire class, satisfying Federal Rule of Civil Procedure 23(b)(2). Plaintiffs' Amended Motion for Class Certification should be granted.

II. STATEMENT OF RELEVANT FACTS

A. The Lautenberg Specter Program

Congress enacted the Lautenberg Amendment in 1989 to facilitate the refugee admission of certain persecuted categories of individuals, including Jews and Christians from the Former Soviet Union. P.L. 101-167, Title V, § 599D. With the passage of the Specter Amendment in 2004, Congress added Iranian religious minorities to the categories of people eligible for the special protections of the Lautenberg Amendment. P.L. 108-199, Division E, Title II, § 213. Congress has consistently reauthorized the Lautenberg and Specter Amendments with bipartisan support, including most recently on March 23, 2018. P.L. 115-141, Division J, §7034(l)(5). The Amendments have proved to be a resounding success, with approximately 30,000 Iranian religious minorities resettled to the United States under their protection so that they can freely and safely practice their religious beliefs. Lee Decl., Ex. B. The United States government has recognized that Iran severely violates religious freedoms and has designated Iran as a "Country

of Particular Concern" under the International Religious Freedom Act for 17 consecutive years. Lee Decl., Ex. C at 44, 49.

Because the United States does not have an embassy in Iran, Iranians seeking to flee religious persecution may apply for refugee status under the Lautenberg Amendment through the Vienna Lautenberg-Specter Program. Refugee applicants must take multiple steps under this program before they can be resettled to the United States. Witten Decl. at ¶ 8. *First*, Iranians seeking refuge must have a U.S.-based tie submit an application on their behalf, which is processed by HIAS, a non-profit organization that operates a refugee Resettlement Support Center in Vienna, Austria, under a contract with the United States State Department. Witten Decl. at ¶ 7. This U.S. tie also enters into a contract with HIAS committing them to support the refugee applicant during the application process, which includes depositing between $2,600 and $3,000, or more depending on circumstances, per sponsored refugee applicant. Witten Decl. at ¶ 7; Doe 1 Decl. at ¶ 5; John Doe 2 Declaration ("Doe 2 Decl.") at ¶ 6; Doe 5 Decl. at ¶ 7.

Second, once the deposit has been made, the application received, and the applicant has passed initial screening in Iran, the applicant receives a visa to travel to Vienna where they can apply for the Vienna Lautenberg-Specter program. Witten Decl. at ¶¶ 7-9. As the refugees are fleeing Iran and do not anticipate ever returning, they typically sell almost all of their belongings before leaving the country. Doe 3 Decl. at ¶ 10; Doe 4 Decl. at ¶ 12; Doe 5 Decl. at ¶ 9.

Third, and finally, upon arrival in Austria the refugee applicant registers with HIAS and completes an interview with the United States Citizenship and Immigration Services ("USCIS"), who reviews and adjudicates the refugee applicant's application. Witten Decl. ¶ 10. The refugee applicant also completes medical screening, attends cultural orientation, and receives an assurance of sponsorship from one of the resettlement agencies in the United States to help them resettle. *Id.* Once these steps are complete, refugee applicants then travel to the United States.

Prior to February 19, 2018, the success rate for applications in this program was almost 100%. Lee Decl., Exs. D-E. Despite the historically high approval rate for applications, in or after February 2018 the Department of Homeland Security denied the applications of approximately 87 of the 100 Iranian Lautenberg-Specter program applicants in Vienna, stating

only that: "After review . . . your application for refugee resettlement to the United States under INA § 207 has been denied as a matter of discretion." *See e.g.* Doe 3 Decl., Ex. A; Doe 4 Decl., Ex. A; Doe 5 Decl., Ex. A.

These denials further informed the refugees they could submit a Request for Review ("RFR") of their application within 90 days from the date of the denial notice, which for those denied on February 19, 2018 are due on May 20, 2018. *See e.g.* Doe 5 Decl., Ex. A.[2]

RFRs require the refugee applicant to provide "(1) a detailed account explaining how a significant error was made by the adjudicating officer, or (2) new information that would merit a change in the determination." *Id.* However, without any explanation for the denial other than "as a matter of discretion," the refugees and U.S. Ties cannot actually provide the information required to file an RFR.

The Lautenberg Amendment expressly requires all decisions of refugee applications to state "to the maximum extent feasible, the reason for the denial." P.L. 101-167, Title V, § 559D; *see also* 8 U.S.C. § 1157(c) (note). The materials provided to U.S. government employees making the decisions reinforce that requirement, as they state that a negative exercise of discretion "must contain a complete analysis of the factors considered in exercising discretion, with a specific and cogent explanation of why you exercised discretion negatively. Your decision will be reviewed, and it is imperative that those who review your decision are able to understand exactly how you reached it." Lee Decl., Ex. F at 172.

B. Named Plaintiffs and the Proposed Class

Named Plaintiffs are three refugees currently in Vienna, Austria who received Notices of Ineligibility that said only that their applications had been denied "as a matter of discretion" and two United States citizens who served as the U.S. tie for two of the named Plaintiffs. In particular:

- Plaintiff Jane Doe 1 is a U.S. citizen and a resident of San Jose, California. Doe 1 Decl. at ¶ 1. She served as the U.S. tie for the refugee application of her daughter,

[2] Pursuant to the May 10, 2018 Court Order, the deadline for filing RFRs was extended by 120 days from the original deadline. (ECF 52).

Plaintiff Jane Doe 3, and young grandson. *Id.* at ¶ 2. Plaintiff Jane Doe 3 is an Iranian citizen currently located in Vienna, Austria. Doe 3 Decl. at ¶ 1 . She is Mandaean and applied for refugee status for her and her eight-year-old son through the Vienna Lautenberg-Specter program. *Id.*

- Plaintiff John Doe 2 is a U.S. citizen and a resident of West Chicago, Illinois. Doe 2 Decl. at ¶ 1. He served as the U.S. tie for the refugee application of his mother, Plaintiff Jane Doe 4, and disabled brother. *Id.* at ¶ 3. Plaintiff Jane Doe 4 is an Iranian citizen currently located in Vienna, Austria. Doe 4 Decl. at ¶ 1. She is Mandaean and applied for refugee status with her developmentally disabled son through the Vienna Lautenberg-Specter program. *Id.* at ¶¶ 1-3.
- Plaintiff Jane Doe 5 is an Iranian citizen currently located in Vienna, Austria. Doe 5 Decl. at ¶ 1. She is a Christian of Armenian ethnic descent and a widow, and applied for refugee status with her elderly father and her disabled son through the Vienna Lautenberg-Specter program. *Id.* at ¶¶ 1-3.

Plaintiffs Jane Doe 1 and John Doe 2 completed the requisite application forms and paid the deposits required of all U.S. family ties under the Vienna Lautenberg-Specter Program. Doe 1 Decl. at ¶ 5; Doe 2 Decl. at ¶ 6. After an initial screening, Plaintiffs Jane Does 3, 4, and 5 each traveled to Vienna to continue processing their applications, selling almost all of their possessions in anticipation of their ultimate resettlement to the United States. Doe 3 Decl. at ¶ 10; Doe 4 Decl. at ¶ 12; Doe 5 Decl. at ¶ 9. On February 19, 2018, Jane Does 3, 4, and 5 each received Notices of Ineligibility denying their refugee applications. Doe 3 Decl., Ex. A; Doe 4 Decl., Ex. A; Doe 5 Decl., Ex. A. All three Notices of Ineligibility said the same thing—that the application was denied "as a matter of discretion." *Id.*

Plaintiffs Does 1 through 5 have brought this suit pseudonymously because of their fear that they, and their family members, could be subjected to religious persecution and harassment if their names were identified. *See* Mot. for Leave to File Under Pseudonyms (ECF 4).

As noted above, Plaintiffs seek to certify a class of similarly situated Vienna Lautenberg-Specter program refugees who received the same non-explanation that their refugee applications were denied "as a matter of discretion," and their Close Family Member U.S. ties.

C. Plaintiffs' Legal Claims

Defendants violated the Lautenberg Amendment by failing to provide "to the maximum extent feasible, the reason for the denial" of the refugees' applications. *See* P.L. 101-167, Title V, § 559D; *see also* 8 U.S.C. § 1157(c) (note). Plaintiffs therefore assert class claims for declaratory relief, declaring the Notices of Ineligibility unlawful for failure to comply with 8 U.S.C. § 1157 (note) and the *Accardi* doctrine; claims pursuant to 5 U.S.C. § 702 and 5 U.S.C. § 706(2) of the Administrative Procedures Act ("APA") seeking to set aside the Notices of Ineligibility as unlawful; and a claim under 5 U.S.C. § 702 and 5 U.S.C. § 706(1) of the APA, and 28 U.S.C. § 1361 to compel Defendants to provide Plaintiffs and putative class members with Notices that comply with 8 U.S.C. § 1157 (note) and agency procedures.[3] Plaintiffs are moving for partial summary judgment on these claims concurrently with this amended motion for class certification. In addition, Plaintiffs seek to declare unlawful and set aside undisclosed program changes that resulted in the mass denials. *See* Compl. ¶¶ 95-96 (ECF 1).

Through this suit, Plaintiffs seek declaratory, mandamus, and other equitable relief applicable to all members of the proposed class and, therefore, request certification pursuant to Rule 23(b)(2). In particular, Plaintiffs seek declaratory relief and an order, that: (1) the Notices of Ineligibility are unlawful; (2) the Notices of Ineligibility are set aside; (3) should Defendants reissue Notices, those Notices shall comply with the Lautenberg Amendment and applicable agency procedures by "stat[ing], to the maximum extent feasible, the reason for the denial"; (4) if Notices are reissued, Defendants give putative class members an opportunity to submit Requests for Reviews based on the reissued Notices; and (5) that the undisclosed program changes that resulted in the mass denials are unlawful and are set aside. *See id.*

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[3] Additionally, Plaintiffs Does 1 and 2 bring their own claims pursuant to the Due Process clause of the Fifth Amendment.

III. LEGAL STANDARD

A. Standing

"Standing . . . is a jurisdictional element that must be satisfied prior to class certification." *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985). To satisfy standing in a class action, "at least one named plaintiff" must meet the requirements. *Darisse v. Nest Labs, Inc.*, No. 5:14-cv-01363-BLF, 2016 WL 4385849, at *3 (N.D. Cal. Aug. 15, 2016) (Freeman, J.) (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)). So long as a named plaintiff has standing and the Rule 23 requirements are met, the class can consist of named plaintiffs and individuals in the United States and/or abroad, regardless of their nationality. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996) (affirming certification of a class defined as "[a]ll current civilian citizens of the Republic of the Philippines, their heirs and beneficiaries" who had been tortured, executed, or disappeared by the military in the Philippines); *Silva v. Bell*, 605 F.2d 978, 984 (7th Cir. 1979) (affirming certification of a class of foreign nationals in the U.S. and abroad).

Under Article III, standing is shown where plaintiffs demonstrate that: (1) they "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical," (2) there is "a causal connection between the injury and the conduct complained of," and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). This same standing test under Article III applies regardless of the plaintiff's location and nationality. *See Cardenas v. Smith*, 733 F.2d 909, 913 (D.C. Cir. 1984) ("For purposes of Article III standing, Cardenas' status as a nonresident alien does not obviate the existence of her injury; it is the injury and not the party that determines Article III standing."); *Silva*, 605 F.2d at 984 (holding that the constitutional standing analysis is not affected by the plaintiffs' non-residence in the country); *see also, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993-94 (9th Cir. 2012) (applying the Article III test to determine standing of a foreign national abroad).

A plaintiff has prudential standing to bring a claim under the APA where they are "arguably within the zone of interests to be protected or regulated by the [underlying] statute." *Bennett v. Spear*, 520 U.S. 154, 175 (1997). As with standing under Article III, this test applies to all plaintiffs, regardless of their location and nationality. *See e.g. Constructores Civiles de Centroamerica, S. A. (CONCICA) v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972) (noting that APA affords review to "any person," not "any citizen," and permitting Honduran corporation to maintain action); *People of Saipan By & Through Guerrero v. U.S. Dep't of Interior*, 356 F. Supp. 645, 652 (D. Haw. 1973) (holding that plaintiffs' status as nonresident foreign nationals does not detract from their standing under the APA), *aff'd as modified,* 502 F.2d 90 (9th Cir. 1974).

B. Class Certification Under Rule 23(a) and Rule 23(b)(2)

Class certification is a multi-part inquiry committed to the broad discretion of the district court. *Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). *First*, this Court must be satisfied that Plaintiffs have met all four prongs of Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010). These four factors typically are referred to as numerosity, commonality, typicality, and adequacy of representation. *Mazza v. Am. Honda Motor Co., Inc.,* 666 F.3d 581, 588 (9th Cir. 2012). *Second*, Plaintiffs must also demonstrate this action fits into "at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Rule 23(b)(2) allows for class certification where, as here, "the party opposing the class has 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); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (noting that "[c]lass certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive" (citation omitted)).

As the moving party, Plaintiffs bear the burden of showing, by a preponderance of the evidence, that each of the requirements of Rule 23(a)(1) through (4) and Rule 23(b)(2) have been met. *See Wal-Mart Stores*, 564 U.S. at 350; *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011). "In considering a motion for class certification, the substantive allegations of the complaint are accepted as true, but 'the court need not accept conclusory or generic allegations regarding the suitability of the litigation for resolution through a class action.'" *In re: Optical Disk Drive Antitrust Litig.*, No. 10-MD-02143-RS, 2017 WL 6448192, at *2 (N.D. Cal. Dec. 18, 2017) (quoting *Hanni v. Am. Airlines, Inc.*, No. 08–cv–00732–CW, 2010 WL 289297, at *8 (N.D. Cal. Jan. 15, 2010)). In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Supreme Court has made clear that "[a] court's class-certification analysis . . . may entail some overlap with the merits of the plaintiff's underlying claim." 568 U.S. 455, 465-66 (2013) (internal quotation marks omitted). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id*. at 466. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*.

IV. ARGUMENT

A. Plaintiffs Have Standing to Bring This Action as a Class Action

1. Plaintiffs Have Standing Under Article III

Each of the five named Plaintiffs have Article III standing to bring their claims, as each (1) have suffered concrete, particularized, and actual injuries in fact; (2) which are causally connected to the complained-of conduct; and (3) which will be "redressed by a favorable decision." *See Lujan*, 504 U.S. at 560-61 (citations and internal quotations omitted).

Plaintiffs Does 1 and 2, the U.S.-based family members of Does 3 and 4, have suffered two concrete and particularized injuries. The first is the prolonged separation from family members without lawful justification. *See* Doe 1 Decl. ¶¶ 8-9; Doe 2 Decl. ¶ 14; *Hawai'i v. Trump*, 859 F.3d 741, 763 (9th Cir. 2017) (recognizing prolonged family separation as an

injury), *vacated as moot*, 138 S. Ct. 377 (2017)[4]; *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (recognizing that "important [irreparable harm] factors include separation from family members" (citation omitted)). The second is the economic loss incurred when they spent thousands of dollars supporting their family members' applications, which were denied for no discernible reason in contravention of the Lautenberg Amendment. *See* Doe 1 Decl. ¶ 5; Doe 2 Decl. ¶¶ 6, 7, 11; *Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000) (holding that economic loss is a cognizable injury where plaintiff expended his own money to obtain government authorization for a permit "only to be denied at the last minute").

Plaintiffs Does 3 through 5, the refugee applicants in Vienna, are subject to the same Article III test as Plaintiffs Does 1 and 2. *See* Section III.A, *supra; Ibrahim,* 669 F.3d at 993-94. Plaintiffs Does 3 through 5 have suffered the same injuries of family separation and economic harm as Does 1 and 2, as they spent thousands of dollars traveling to Vienna and thousands more supporting themselves while their applications were pending. *See* Doe 3 Decl. ¶¶ 5, 10-11; Doe 4 Decl. ¶¶ 6, 12, 22; Doe 5 Decl. ¶¶ 5, 9, 17. They were also harmed by the loss of the opportunity to pursue a fair RFR process through which they can attempt to find refuge in the United States. *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (lost opportunity of immigrant visa is cognizable Article III injury); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 14 (D.D.C. 2017) (loss of opportunity by foreign nationals to obtain parole status is cognizable Article III injury).

All of these injuries were plainly caused by the government's conduct—the unlawful denial of the applications—and each of them will be remedied by a favorable decision in this action that requires the decisions on the applications to comply with the applicable law. *See e.g. Ibrahim*, 669 F.3d at 993 (holding that although the redress sought would not grant plaintiff an immigrant visa, redressability was shown as the relief "would make a grant of a visa more likely"); *Abboud*, 140 F.3d at 847 (holding a lost opportunity to receive an immigrant visa was remediable by a favorable decision). Accordingly, each of the named Plaintiffs has standing to

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[4] Appellate opinions that have been vacated for mootness remain persuasive authority. *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 493 n.4 (9th Cir. 1994).

bring these claims.

2. Plaintiffs Have Prudential Standing to Bring Claims Under the APA

In addition to Article III standing, each of the named Plaintiffs have prudential standing to bring APA claims because they fall "arguably within the zone of interests to be protected or regulated by the statute[.]" *Bennett*, 520 U.S. at 163; *Pai v. U.S. Citizenship & Immigration Servs.*, 810 F. Supp. 2d 102, 108 (D.D.C. 2011) (finding that the same rule regarding prudential standing applied to foreign nationals abroad).

The zone-of-interests test is "not especially demanding." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (citation and internal quotations omitted). Plaintiffs Does 1 and 2 fall within the "zone of interests" of the Refugee Act and the Lautenberg Amendment because the principle of family integrity is embedded within immigration laws. *Hawai'i v. Trump*, 878 F.3d 662, 681-82 (9th Cir. 2017) (finding U.S.-based family of a foreign national abroad fell within the zone of interest of the Immigration and Nationality Act because the statute "implemented the underlying intention of our immigration laws regarding the preservation of the family unit") (citation and internal quotations omitted), *cert. granted*, 138 S. Ct. 923 (2018); *Kaliski v. Dist. Dir. of Immigration & Naturalization Serv.*, 620 F.2d 214, 217 (9th Cir. 1980) (noting the "humane purpose of the [Immigration and Nationality] Act [is] to reunite families"). Both the text and the legislative history of the Refugee Act, as with the rest of the Immigration and Nationality Act, evince the importance of family unification. *See, e.g.*, 8 U.S.C. § 1157(c)(3) (permitting inadmissibility waivers to assure family unity); H.R. Rep. No. 96-608, at 13 (noting "family ties" as a factor that should be considered in refugee admissions).

Plaintiffs Does 3 through 5 also are squarely within the zone of interests of the Refugee Act and, more specifically, the Lautenberg and Specter Amendments, as those statutes exist to facilitate the admission of persecuted Iranian religious minorities such as Does 3 through 5 to the United States as refugees. *See* 8 U.S.C. § 1157 (note); *see also, e.g.*, 101 Cong. R. S11-525 (daily ed. Sept. 20, 1989) (evincing congressional intent to protect refugee applicants under the Lautenberg Amendment from discretionary denials); Pub. L. 96-212, Title I, § 101, codified at 8

U.S.C. § 1521 (note) (declaring, in passing the Refugee Act, that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"); H.R. Rep. No. 96-608, at 13 (emphasizing "the plight of the refugees themselves" in passing the Refugee Act). Indeed, courts have consistently recognized prudential standing for foreign national plaintiffs where, as here, they are seeking to invoke the benefits of an immigration statute. *See, e.g.*, *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 635-37 (6th Cir. 2013) (finding foreign national denied an employment visa had prudential standing to bring a claim under the APA); *Movimiento Democracia Inc. v. Johnson*, 193 F. Supp. 3d 1353, 1368 (S.D. Fl. 2016) (holding that Cuban migrants seeking review of whether they have reached American land are within the zone of interests of the Cuban Adjustment Act).

3. There Is Standing for a Class Action Including Foreign Nationals Living Abroad

For the reasons noted above, each of the named Plaintiffs in this action has standing to bring this action. However, even if it is determined that certain of the named Plaintiffs do not have standing, this action still can proceed as a class action so long as at least "one named plaintiff meets the requirements." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014) (citation omitted); *see Bates*, 511 F.3d at 985 (holding in an action for equitable relief that an entire class had standing because at least one named Plaintiff had standing).

Where, as here, plaintiffs have shown standing for a class action, there is no legal basis for precluding a mixed class of U.S. plaintiffs and foreign nationals living abroad. *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1139 (C.D. Cal. 1999) ("It is evident there is no per se rule against the certification of a class whose members are both foreign and American investors."); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 51 (S.D. Cal. 1975) (noting that "many class actions have been allowed to proceed despite the fact that at least some members of the class were foreigners"). Instead, because named Plaintiffs have shown standing for a class action, the class could and should include the proposed Iranian refugee class members currently living in Vienna, Austria. *See, e.g.*, *Silva*, 605 F.2d at 984 (finding prudential principles of

"[j]ustice and judicial economy" weighed in favor of permitting a class of foreign nationals abroad and in the United States without regard to whether the class members abroad could maintain claims on their own); *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 109 (S.D.N.Y. 2007) (certifying class of all persons from the United States, France, England, and the Netherlands who purchased certain shares), *aff'd sub nom. In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016); *Dziennik v. Sealift, Inc.*, No. 05–CV–4659 (DLI)(MDG), 2007 WL 1580080, *13 (E.D.N.Y. May 29, 2007) (certifying class of Polish and Filipino nationals living abroad).

B. Plaintiffs and the Proposed Class Satisfy the Requirements of Rule 23(a)

1. The Proposed Class is So Numerous that Joinder Would be Impracticable

The proposed class likely contains approximately 87 refugee applicants in Vienna and their corresponding U.S. ties. *See* Lee Decl., Ex. D. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Because "impracticability" does not mean "impossibility," courts focus on whether class certification is appropriate due to "the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). In particular, courts look to ensure that the class action will "further judicial economy by avoiding multiple suits" and "protect the rights of persons who 'might not be able to present claims on an individual basis.'" *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 567 (C.D. Cal. 2008) (citation omitted); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.") (citation omitted). There is no absolute minimum number of class members, and in determining whether this requirement is met courts weigh "other factors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought[.]" *Jordan v. Los Angeles Cnty*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

Here, the proposed class easily satisfies the numerosity requirement of Rule 23(a)(1). According to news reports, approximately 87 refugee applicants in the Vienna Lautenberg-Specter program received Notices of Ineligibility in and around February 2018. *See* Lee Decl., Ex. E. The exact number of people within this group who received the "as a matter of discretion" denials at issue here is in the hands of the government, but counsel is aware of at least 16 such cases, corresponding to 38 individuals (primary applicants and derivative relatives). Bates Decl. ¶ 6. These 38 individuals are sponsored by 16 corresponding U.S. ties who are close family members. *See id.* The class size is therefore at least 54 individuals. This number is far above the size of classes that courts in the Ninth Circuit have routinely certified. *See e.g. Rannis v. Recchia,* 380 F. App'x 646, 651 (9th Cir. 2010) (holding that although the Supreme Court determined that a class of 15 would be too small, the Supreme Court's analysis "did not undermine a district court's discretion" to certify a class of 20 members); *McCluskey v. Trs. Of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673-76 (W.D. Wash. 2010) (holding that 27 class members is sufficient to justify class certification); *Perez-Funes v. INS,* 611 F. Supp. 990, 995 (C.D. Cal. 1984) (holding that "[c]lasses of 25 members has been held large enough to justify class certification").

Additionally, the "indicia of impracticability" weigh heavily in favor of class certification here. *See Jordan*, 669 F.2d at 1319. Given that at least 38 of the putative class members, but likely many more, are refugees currently in Vienna and are not only physically unable to access the U.S. court system but are financially unable to do so and face linguistic and cultural hurdles, each of the claimants likely could not pursue this claim on their own. *See Pole v. Estenson Logistics*, LLC, 2016 WL 4238635, at *5 (C.D. Cal. Aug. 10, 2016) ("The ability of individual class members to bring suit individually can make joinder impracticable when potential class members lack the financial resources to file individual suits." (citation omitted)). *See also* Doe 1 Decl. ¶ 6; Doe 4 Decl. ¶ 22; Doe 5 Decl. ¶ 17; Declaration of Mariko Hirose ("Hirose Decl.") ¶ 6. In sum, the proposed class meets the numerosity requirement of Rule 23(a)(1).

2. Questions of Law and Fact are Common to the Class

There are common questions of law and fact applicable to Plaintiffs and the putative class. Rule 23(a)(2) requires that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). While not every issue need be common to every class member, Plaintiffs must demonstrate that class members "have suffered the same injury" and their claims "depend on a common contention" that is "capable of classwide resolution . . . [such] that determination of its truth or falsity will resolve an issue . . . in one stroke." *Wal-Mart Stores*, 564 U.S. at 350; *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (citations omitted).

Here, the proposed class plainly meets the commonality requirement. All class members present the same set of factual circumstances: they and their family members were part of a mass denial of Vienna Lautenberg-Specter program refugee applications and received no explanation beyond that the application was denied "as a matter of discretion." *See e.g.* Doe 3 Decl., Ex. A; Doe 4 Decl., Ex. A; Doe 5 Decl., Ex. A; Bates Decl. at ¶ 10. As such, all class members present the same common question of law: whether the government's mass denials violated the Lautenberg Amendment, as they did not provide "to the maximum extent feasible, the reason for the denial[s]." *See* 8 U.S.C. § 1157(c) (note). All class members bring the same claims: that the government violated its obligations under 8 U.S.C. § 1157(c) (note) and applicable agency guidance and regulations. *See* Compl. (ECF 1). Finally, all Class members seek the same legal remedy: declaratory judgment; the setting aside of the Notices of Ineligibility; an order compelling the government to re-issue determinations on Plaintiffs' refugee applications and, if those applications are denied, to identify the reasons for any such denials and permitting Plaintiffs to submit RFRs, if any, based on those newly issued Notices; and an order setting aside the unlawful program changes. *Id.* All Plaintiffs and class members share a common core of factual and legal issues, and there is no significant basis whatsoever upon which to distinguish between class members. This Court should find that there are questions of law and fact common to the class, pursuant to Rule 23(a)(2).

3. The Class Representatives' Claims are Typical of the Class

Does 1 through 5 have claims that are typical of the putative class. Rule 23(a)(3) requires that the "claims or defenses" of the named Plaintiffs be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied when the named Plaintiffs' claims are "reasonably co-extensive with those of the absent class members." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citation omitted); *Garcia v. Johnson*, No. 14-CV-01775-YGR, 2014 WL6657591, at * 14 (N.D. Cal. Nov. 21, 2014) (finding the named plaintiffs' claims typical of the claims of the proposed class when plaintiffs "seek relief identical to that which the members of the proposed class would seek"). The commonality and typicality requirements often "merge" as they "serve as guideposts for determining" if 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." *See Falcon,* 457 U.S. at 157 n.13.

As noted above, all Plaintiffs within the class, including the named Plaintiffs, were equally affected by the government's failure to provide reasons for the denials. As such, the named Plaintiffs' claims are identical to those of the members of the proposed class, and they seek identical remedies. Thus, named Plaintiffs' claims are typical of members of the proposed class and this requirement is satisfied.

4. The Class Representatives Will Adequately Represent the Class

Does 1 through 5 have, and will, adequately represent the absent class. Rule 23(a)(4) requires that the named Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). When evaluating whether this requirement has been met, courts must consider "(1) [whether] the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) [if] the representative plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *see also Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (when evaluating the adequacy of the named plaintiff, courts look to 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") (citation omitted). Here, named Plaintiffs have no conflict of interest with the other members of the proposed class, as they all are equal victims of the Defendants' unexplained denial of their Vienna Lautenberg-Specter program applications. As the relief sought will apply equally to all members, named Plaintiffs have an incentive to fairly and adequately protect the interests of the absent class.

Additionally, Plaintiffs' counsel—attorneys from the law firm of Latham & Watkins LLP and the International Refugee Assistance Project ("IRAP")—will prosecute this matter vigorously on behalf of the entire class. *See* Lee Decl. at ¶¶ 2-5; Hirose Decl. at ¶ 6. Plaintiffs' counsel are experienced, sophisticated, and well-resourced members of the bar in good standing, who have collectively handled numerous immigration and class action matters. *See* Lee Decl. at ¶¶ 2-4; Hirose Decl. at ¶¶ 4-6; *Garcia*, 2014 WL6657591, at *15 (finding class counsel adequate when they were "experienced in protecting the interests of noncitizens and handling complex and class action litigation, including litigation on behalf of immigration detainees"); *Stitt v. San Francisco Mun. Transp. Agency*, No. 12-CV-3704 YGR, 2014 WL 1760623, at *7 (N.D. Cal. May 2, 2014) ("These standards are generally met with members of the bar in good standing"); *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984) (finding counsel adequate as they were "experience in class action litigation and in Medicaid law.").

Thus, the adequacy requirement of Rule 23(a)(4) is met.

C. The Proposed Class Also Satisfies the Requirements of Rule 23(b)(2)

The U.S. government provided the same verbatim response to all class members—that their refugee applications were denied "as a matter of discretion." This uniform response is sufficient to satisfy Rule 23(b)(2), which requires that "the party opposing the class has 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 a whole[.]" Fed. R. Civ. P. 23(b)(2); *Ellis*, 657 F.3d at 986 (class certification under this part of the rule "is appropriate only where the primary relief sought is declaratory or injunctive" (citation omitted)). "The rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a

practice applicable to all of them." *Rodriguez*, 59 F.3d at 1125. Rule 23(b)(2) also "does not require a finding that all members of the class have suffered identical injuries." *Parson v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). Likewise, Plaintiffs do not need to prove that Defendants adopted a formal policy of 100% uniformity across the entire class. Instead, all that is required to satisfy this "cohesiveness" requirement of Rule 23(b)(2) is that a "defendant has adopted a pattern of activity that is likely to be the same as to all members of the class." *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 532 (N.D. Cal. 2010) (citations omitted).

This action clearly satisfies Rule 23(b)(2). Defendants' unexplained mass denial of the Vienna Lautenberg-Specter program applications, and the declaratory judgment and mandamus relief sought through this action, apply equally to all members of the proposed class. As the Ninth Circuit has explained, the requirements of Rule 23(b)(2) "are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parson,* 754 F.3d at 688.

Accordingly, the requirements of Rule 23(b)(2) are met.

D. <u>The Court Should Designate Plaintiffs' Counsel as Class Counsel</u>

Rule 23(g) provides that, upon class certification, the Court "must appoint class counsel[,]" and in doing so, must consider:

> "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]"

Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider "any other matter pertinent to the counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. P. 23(g)(1)(B).

Plaintiffs' counsel satisfy each of these factors. Counsel have invested a significant amount of time and effort in identifying Plaintiffs and investigating their potential claims. *See* Lee Decl. at ¶ 5; Hirose Decl. at ¶ 6. Counsel also have tremendous experience in handling both class actions and other complex litigation, including immigration and refugee matters. *See* Lee

Decl. at ¶ 3; Hirose Decl. at ¶¶ 4-6. Finally, counsel are strongly committed to representing the class. *See* Lee Decl. at ¶ 5; Hirose Decl. at ¶ 6. Thus, Plaintiffs respectfully request that Latham & Watkins LLP and IRAP be appointed as counsel for the proposed class.

V. CONCLUSION

Plaintiffs respectfully request that the Court grant this Motion and certify the proposed class, appoint the named Plaintiffs as Class Representatives, and appoint undersigned counsel to represent the class.

Dated: May 18, 2018

Respectfully submitted,

LATHAM & WATKINS LLP

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JANE DOE 1, et al.

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.

Defendants.

Case No. 5:18-cv-02349 BLF

CLASS ACTION

[PROPOSED] ORDER GRANTING LEAD PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

Having considered Plaintiffs' Amended Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23, filed by Plaintiffs Does 1 through 5 on May 18, 2018, the Declarations of Belinda S Lee, Mariko Hirose, Adam Bates, and Samuel Witten in support thereof, the Declarations of Jane Doe 1, John Doe 2, Jane Doe 3, Jane Doe 4, and Jane Doe 5 in support thereof, the papers filed in response, as well as all other arguments and the record of this case, and good cause appearing therefor, the Court hereby ORDERS as follows:

1. Plaintiffs' Amended Motion For (1) Class Certification, (2) for Plaintiffs to be appointed as Class Representatives, and (3) For Latham & Watkins LLP and the International Refugee Assistance Project to be appointed as Class Counsel is GRANTED;

2. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), this action is certified as a class action with respect to the following class of people:

> All Iranian refugees who (1) applied for refugee admission to the United States under the Lautenberg Amendment, whether as a principal applicant or derivative relatives; (2) traveled to Vienna, Austria, for processing; and (3) received denials from the United States government in or after February 2018 with the sole explanation that their application was denied "as a matter of discretion," and their U.S.-based Close Family Members who served as their U.S. ties.

As used in the class definition, "Close Family Member" is defined as parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whole or half), and step-relationships, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.

Dated: _____, 2018

_____

Honorable Beth Labson Freeman

United States District Judge
for the Northern District of California