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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JANE DOE 1, *et al*., Plaintiffs, v. KIRSTJEN NIELSEN, *et al.*, Defendants.	No. 5:18-cv-02349-BLF **Defendants' Opposition to Plaintiffs' Motion for Class Certification** DATE: June 22, 2018 TIME: 9:00 a.m.. CTRM: 3, 5th Floor

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I. INTRODUCTION

This case arises from Defendants' careful efforts to individually vet overseas refugee applicants for entry into the United States and to explain, to the maximum extent feasible, their reasons for denying certain applications. Plaintiffs' lawsuit claims that the denials of the refugee applications and the Notices of Ineligibility were unconstitutional and violative of the Lautenberg Amendment. The named Plaintiffs include (1) three unadmitted and nonresident Iranian nationals who received Notices of Ineligibility informing them that their refugee applications under the Lautenberg Amendment were denied as a matter of discretion, and (2) two of their U.S.-citizen relatives—an adult son and a parent. The proposed class, however, includes a far wider array of familial relationships that present various legal interests. Because the named Plaintiffs' claims are not justiciable and they fail to meet the basic requirements under Federal Rule of Civil Procedure 23, Plaintiffs' arguments for class certification fail.

As an initial matter, the named Plaintiffs' claims are not justiciable, which precludes the certification of a class. The Supreme Court has long held that, unless expressly authorized by law, the government's decision to exclude an alien is immune from judicial review. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Because neither the statute governing refugee admissions nor its implementing regulations confer any judicial review over decisions denying admission to refugee applicants, this Court lacks the authority to examine such decisions. To be sure, the Ninth Circuit has recognized that a U.S. citizen who filed an immigration petition on her alien spouse's behalf has a marriage-related liberty interest that entitles her to limited judicial review of her husband's denied entry. *See Cardenas v. United States*, 826 F.3d 1164, 1169-72 (9th Cir. 2016). But courts have refused to extend such review to more distant relatives—in this case, the parent of an adult refugee applicant and the adult son of another. This Court should decline to be the first to do so.

These nonreviewability principles also preclude any review of the claims at issue under the Administrative Procedure Act ("APA"). Indeed, the APA, at 5 U.S.C. § 702, states that "other limitations on judicial review" supersede any relief available under it. Because Congress

does not allow an alien present in the United States to obtain review of an exclusion order under the APA, *a fortiori*, nor can aliens abroad or U.S. citizens acting on their behalf. Furthermore, any review of the refugee decisions themselves is precluded by 8 U.S.C. § 1252(a)(2)(B)(ii), which bars review of any immigration decision that is expressly left to the government's discretion, such as refugee denials under 8 U.S.C. § 1157(c)(1).

In addition to Plaintiffs' fatal justiciability flaws, they do not meet the requirements for class certification under either Rule 23(a) or (b)(2). They cannot demonstrate commonality and typicality because of the diverse relationships that the proposed class presents—the named Plaintiffs simply do not represent the different legal issues and varied relationships at issue. The class certification motion also fails because, based on the diverse relationships at issue within the proposed class, the named Plaintiffs do not adequately represent the class and the class is not adequately defined. Finally, class certification is not appropriate because the diversity of relationships create factual and legal variations that make classwide relief unworkable. Accordingly, this Court should deny Plaintiffs' motion for class certification.

II. BACKGROUND

A. Qualification for and Review of Refugee Status Determinations

The statute authorizing refugee admission, 8 U.S.C. § 1157, provides in relevant part that the "Attorney General may, in the Attorney General's discretion . . . admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant." 8 U.S.C. § 1157(c)(1).[1] The plain text of the statute commits refugee admission to agency discretion by law. *Id.*; *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) ("'may' expressly recognizes substantial discretion"). Refugee resettlement thus is an act of discretion, not an entitlement. *See I.N.S. v. Stevic*, 467 U.S. 407, 426 (1984) (recounting legislative history of Refugee Act of 1980, explaining "[i]t was plainly recognized, however, that merely because an individual or group of refugees comes within the

[1] This discretion now rests with the Secretary of the Department of Homeland Security ("DHS"). *See* 6 U.S.C. § 557.

definition will not guarantee resettlement in the United States.") (citation omitted); *cf.* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law.").

As to review of refugee status determinations and admission, section 1157 is silent. *See* 8 U.S.C. § 1157(c)(1); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992) (per curiam) ("Contrary to the extensive procedures provided for with regard to aliens within the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from outside the United States, makes no provision for judicial review."). The relevant regulation likewise provides no formal appeal process. *See* 8 C.F.R. § 207.4 ("There is no appeal from a denial of refugee status under this chapter.")

B. Refugee Processing under the Lautenberg Amendment

Since 2004, Iranian religious minorities seeking refugee status have been processed under the Lautenberg Amendment, a statutory provision that defines certain categories of refugees for whom less evidence is needed to establish refugee status. *See* Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195 (1989). The Lautenberg Amendment does not strip DHS of its discretionary authority to grant or deny refugee applications. The Amendment requires that "each decision to deny an application for refugee status" under its purview "shall be in writing and shall state, to the maximum extent feasible, the reason for the denial." 8 U.S.C. § 1157(c)(1) (note).

Since 2017, over 800 Iranian religious minorities have been approved for admission to the United States through the Lautenberg program in Vienna and have been successfully resettled in the United States. (Ruppel Decl. at ¶ 8.) But changes to the vetting process introduced in 2016—before the current president was inaugurated—have resulted in a greater number of denials. (*Id*. at ¶ 3.)

In February 2018, United States Citizenship and Immigration Services ("USCIS") issued denials to 56 Iranian refugee applicants and their 31 family members in Vienna. (*Id*. at ¶ 4.) Each denied application was scrutinized individually and was subject to the same rigorous screening process for resettlement as all refugee applicants. (*Id*.) The denials were unrelated to the refugee-related Executive Orders issued since January 2017. (*Id*. at ¶ 3.) The applicants were informed in Notices of Ineligibility that they are entitled to request review of their denials. (Amended Motion for Class Certification ("Pls.' Class Cert. Mot.") at 4, ECF No. 60).[2]

Although neither the relevant statute nor regulations provide for a formal appeal after a denial of refugee resettlement, USCIS may, in its discretion (as it has done here), entertain a denied applicant's informal request for review ("RFR") of the denial. (Ruppel Decl. at ¶ 7.) Upon review of the RFR, USCIS determines whether a preponderance of the evidence in the record establishes that the applicant would qualify for refugee resettlement in the United States, including whether USCIS will exercise its discretion to approve the refugee application. (*Id*.)

C. Named Plaintiffs and Class Certification Sought

Plaintiffs filed this lawsuit on April 18, 2018 (Complaint ("Compl."), ECF No. 1), and they filed their amended motion to certify class on May 18, 2018 (Pls.' Class Cert. Mot.). Plaintiff Jane Doe 1 is a U.S. citizen whose adult daughter, Plaintiff Jane Doe 3, is an Iranian national whose refugee application under the Lautenberg Amendment was denied in Vienna in February. (*Id*. at 4-5.) Plaintiff John Doe 2 is an adult U.S. citizen whose mother, Plaintiff Doe 4, is also an Iranian national whose refugee application under the Lautenberg Amendment was denied in Vienna in February. (*Id*. at 5.) Like Jane Does 3 and 4, Plaintiff Jane Doe 5 is an Iranian national whose refugee application under the Lautenberg Amendment was denied in Vienna in February. (*Id*.) Each received a Notice of Ineligibility from USCIS that provided the following justification:

[2] References to the actual text of Plaintiffs' amended motion for class certification are to the page numbers of the motion itself, rather than to the ECF-stamped page numbers.

> For the reason(s) indicated below, we have determined that you are not eligible for resettlement to the United States.
> [. . .]
> 7. OTHER REASON(S): After review of all the information concerning your case, including your testimony, supporting documentation, background checks, country conditions, and other available information, your application for refugee resettlement to the United States under INA § 207 has been denied as a matter of discretion.

(*Id*. at 3-4; Compl. at ¶ 40.) USCIS, in its discretion, provides a process for review of the denial determinations (Ruppel Decl. at § 7), and Plaintiff-refugee applicants here are provided an opportunity to submit an RFR no later than 120 days from June 4, 2018, or 120 days from the date that the RFR originally was due, whichever date is later, *see* ECF No. 54.

Plaintiffs challenge the lawfulness of USCIS's denials, in sum, on the grounds that they fail to identify "to the maximum extent feasible" the basis for the denials, as provided by the Lautenberg Amendment, 8 U.S.C. § 1157(c) (note).[3] (Pls.' Class Cert. Mot. at 2.) They contend that the "rote denials render any review of the denials an impossible task because there is no way . . . to substantively address (or even know) the true reason for their denials in a Request for Review." *Id*. Plaintiffs also claim that "Defendants' conduct violates the Administrative Procedure Act because the program changes that resulted in the mass denials constitute final agency actions that were unlawful, including because they were 'arbitrary, capricious, an abuse of discretion, or not in accordance with law.'" (Compl. at ¶ 96.)[4]

Plaintiffs seek certification under Rule 23(a) and 23(b)(2) of a class they define as follows:

> 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

[3] Plaintiffs endeavor to link their challenged admission denials to Executive Orders 13769 and 13780, as well as the subsequent October 2017 "agency memorandum." (*See* Compl. at ¶¶ 32-38.) Plaintiffs contradict their efforts on this point, however, with their own submissions to the contrary. (*See* Doc. 61 (Lee Decl'n at Ex. A.) at 34.) ("But in late 2016 the Obama administration instituted a new, secret security layer.").

[4] Plaintiffs do not seek summary judgment on this claim in their motion for partial summary judgment. (Plaintiffs' Motion for Partial Summary Judgment, ECF No. 25 at 10-11.)

> 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.

(*Id*. at 1.) Plaintiffs define "Close Family Member" 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." (*Id*. at 1.)

III. LEGAL STANDARD FOR CLASS CERTIFICATION

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, Plaintiffs "must affirmatively demonstrate [their] compliance" with Federal Rule of Civil Procedure 23. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Federal Rule of Civil Procedure 23(a) establishes the following four requirements for class certification:

> (1) The class is so numerous that joinder is impractical ("numerosity");
> (2) There are questions of law or fact common to the class ("commonality");
> (3) The claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and
> (4) The named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation").

Fed. R. Civ. P. 23(a). The Supreme Court has held that "[i]t is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" that makes a case appropriate as a class action. *Dukes*, 564 U.S. at 350 (emphasis in original).

In addition to the requirements of Rule 23(a), a proposed class must also qualify under Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). In this case, Plaintiffs seek certification under Rule 23(b)(2), which permits class certification where "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." *See id.*

The party seeking class certification bears the burden of demonstrating they have satisfied all four Rule 23(a) prerequisites and that their class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Zinser*, 253 F.3d at 1186. The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). Consequently, the Court must conduct a rigorous analysis to determine whether the requirements of Rule 23 have been met; if the court is not fully satisfied, the class cannot be certified. *Falcon*, 457 U.S. at 161. Even when all of Rule 23's requirements are met, the district court retains "broad discretion" to determine whether a class should be certified. *Zinser*, 253 F.3d at 1186.

IV. ARGUMENT

As a threshold matter, class certification is not available because Plaintiffs' claims are not justiciable. Because justiciability is a requirement for class certification and is absent here, the Court cannot certify the class that Plaintiffs seek. As well, the doctrine of nonreviewability bars Plaintiffs' claims, and this is a second basis on which the Court should deny class certification for lack of justiciability. The APA likewise provides no review basis, and 8 U.S.C. § 1252(a)(2)(B)(ii) acts as an additional, independent bar to review.

Plaintiffs also fail to meet the actual standard for demonstrating that class certification is appropriate. They cannot show commonality, typicality, or adequacy of representation, as required by subsection (a) of Rule 23. They also fail to show that their requested injunctive and corresponding declaratory relief is appropriate respecting the class as a whole, as required by subsection (b)(2) of Rule 23.

Finally, the class certification motion fails because Plaintiffs do not adequately define their proposed class. In short, by omitting a significant portion of USCIS's articulated ineligibility basis, the proposed class imprecisely describes the nature of the ineligibility notices that Plaintiffs seek to address with this lawsuit.

Multiple independent grounds demonstrate that class certification is not appropriate. The Court thus should deny to certify the class that Plaintiffs seek.

A. Class Certification is Not Available as This Matter is Not Justiciable.

1. The refugee admission statute does not provide for judicial review.

A class may not be certified where its members include those who lack justiciable claims. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citations omitted); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 366 (3d Cir. 2015) ("Before even getting to the point of class certification, however, class representatives need to present a justiciable claim."); *see also Hawkins v. Comparet–Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001) ("A named plaintiff cannot represent a class alleging [] claims that the named plaintiff does not have standing to raise."). Here, the statute governing refugees seeking admission from outside the United States, 8 U.S.C. § 1157, "makes no provision for judicial review." *See Haitian Refugee Ctr., Inc.*, 953 F.2d at 1506) ("Section 1157, as amended, gives the Attorney General discretion, within numerical limits, to permit refugees who are overseas to immigrate to the United States. No judicial review is provided for."). Accordingly, in challenging a statutorily discretionary determination for which there is no statutorily prescribed review procedure, Plaintiffs present claims that are not justiciable.

2. The doctrine of nonreviewability bars judicial review.

(i) <u>No aspect of the refugee application denials is entitled to judicial review.</u>

Plaintiffs' claims are barred by principles of nonreviewability. The Supreme Court has long recognized that "the power to . . . exclude aliens" is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."

Fiallo, 430 U.S. at 792. "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Courts have distilled from these longstanding principles that the denial or revocation of a visa for an alien abroad "is not subject to judicial review . . . unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *see also Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998) ("Administrative decisions excluding aliens are not subject to judicial review unless there is a clear grant of authority by statute."). Courts refer to this rule as the "doctrine of consular nonreviewability," *Saavedra Bruno*, 197 F.3d at 1159, but the short-hand label merely reflects the context in which the principle most often arises—in challenges to decisions by consular officials adjudicating visa applications. The principle underlying the doctrine applies *regardless* of the manner in which the Executive Branch denies entry to an alien abroad, including a refugee applicant. *See Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992) (per curiam).

Under the doctrine of nonreviewability, an "unadmitted and nonresident alien" has "no constitutional right of entry into the country," *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544; *see also Bustamante v. Mukasey*, 531 F.3d 1059, 1062-63 (9th Cir. 2008); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986). Plaintiffs have identified no statute that authorizes judicial review here, and indeed, no such statute exists. The statute authorizing refugee admissions, 8 U.S.C. § 1157 (including the Lautenberg Amendment) does not confer any judicial review over denials of refugee applications. The law simply provides, in relevant part, that the "Attorney General may, in the Attorney General's discretion . . . admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is

admissible . . . as an immigrant." 8 U.S.C. § 1157(c)(1);[5] *see also Haitian Refugee Ctr.*, 953 F.2d at 1506 ("Contrary to the extensive procedures provided for with regard to aliens within the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from outside the United States, makes no provision for judicial review.").

The Ninth Circuit and district courts within it have recently determined that in readily distinguishable cases—when plaintiffs do not seek review of individual adjudicatory decisions, but rather the government's "promulgation of sweeping immigration policy" (in particular, certain executive orders or actions issued recently)—courts may review both constitutional and statutory challenges. *Doe v. Trump*, 288 F. Supp. 3d 1045, 1069 (W.D. Wash. 2017) (finding that consular nonreviewability does not preclude challenge to Executive Order No. 13,815, § 3(a) and its accompanying memorandum to the President) (internal quotation omitted). As the Ninth Circuit explained in a challenge to Executive Order 13,769 (which, among other changes to immigration policies and procedures, banned for 90 days the entry into the United States of individuals from seven countries), "exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard." *Washington v. Trump*, 847 F.3d 1151, 1163 (9th Cir. 2017) (narrow ruling on an appeal of a temporary restraining order); *see also Hawaii v. Trump*, 878 F.3d 662, 769 (9th Cir. 2017) (concluding that the doctrine of consular nonreviewability did not bar the court's review of § 2 of the president's Proclamation 9645), *cert. granted sub. nom. Trump v. Hawaii*, 138 S. Ct. 923 (2018); *Sale v. Haitian Crts. Council, Inc.*, 509 U.S. 155 (1993) (without discussing consular nonreviewability, but over the government's objection that the doctrine applied and barred review, reviewing the merits of a statutory claim challenging an executive order that blocked the entry of Haitians). These holdings are inapposite for purposes of whether the refugee denials in this case are reviewable.

Here, Plaintiffs do not challenge the Executive's promulgation or implementation of immigration policy at the "highest levels of the political branches." *Washington*, 847 F.3d at

[5] This discretion now rests with the Secretary of Homeland Security. *See* 6 U.S.C. § 557.

1163. Rather, they seek review of individual adjudications only. Judicial review of individual exclusion findings for unadmitted and nonresident aliens is the core of what the doctrine of nonreviewability precludes. *See Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (allowing for judicial review only because the plaintiffs did "not seek review of an individual consular officer's decision to grant or deny a visa pursuant to valid regulations, which could implicate the consular nonreviewability doctrine.") (vacated and remanded on other grounds); *Doe*, 288 F. Supp. 3d at 1068 (same). Accordingly, under this firmly entrenched principle of nonreviewability and the Supreme Court and Ninth Circuit jurisprudence that cements its footing, Plaintiffs are entitled to no judicial review of any aspect of the refugee application denials in question.

(ii) The U.S.-citizen Plaintiffs do not qualify for even limited judicial review

Plaintiffs assert that the Notices of Ineligibility violate the due process rights of U.S. citizens Jane Doe 1 and John Doe 2. (Pls.' Class Cert. Mot. 9-11.) They are wrong.

The Ninth Circuit has held that a U.S.-citizen spouse who filed an I-130 immigrant visa petition on behalf of her unadmitted and nonresident alien-spouse has a protected liberty interest that entitles her to limited judicial review over the denial of her spouse's visa application.[6] *See Bustamante*, 531 F.3d at 1062 ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause"); *Cardenas*, 826 F.3d at 1169-72. The Supreme Court addressed this issue in *Kerry v. Din*, 135 S. Ct. 2128 (2015). Justice Kennedy—in his concurring opinion—reserved judgment on the issue, but determined that assuming such a right exists, a visa denial is valid when it is made "on the basis of a facially legitimate and bona fide reason." *Id*. at 2141 (quoting *Mandel*, 408 U.S. at 770). Justice Scalia, writing for the plurality, found that "[t]here is no such constitutional right." *Id*. at 2131.

But the due process interest recognized in *Bustamante* and *Cardenas* is distinguishable because it was tied to the fundamental right to marry. No case supports extending due process

[6] No court has allowed a U.S.-citizen relative who did not file a petition on her relative's behalf the same limited judicial review.

rights to the entry of more distant family members, such as the parent of an adult child or an adult child himself. In fact, other courts have rejected extending review under *Din* to such relationships. *See Santos v. Lynch*, 2016 WL 3549366, at *3-4 (E.D. Cal. June 29, 2016) (declining to extend *Din* to find "liberty interest as an adult child to live in the United States with her parents"); *L.H. v. Kerry*, No. 14-06212, slip op. 3-4 (C.D. Cal. Jan. 26, 2017) (same for daughter, son-in-law, and grandson).

A marital relationship is simply not the equivalent of an adult child-parent relationship for due process purposes. To the extent that the Ninth Circuit has recognized that interference with a child-parent relationship "is cognizable as a due process violation," it is only in the context of separation and "official conduct that 'shocks the conscience." *See Lemire v. Ca. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013) (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)); *cf. Butera v. Dist. of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001) ("a parent does not have a constitutionally protected liberty interest in the companionship of a child who is past minority and independent."); *Russ v. Watts*, 414 F.3d 783, 791 (7th Cir. 2005) (declining to recognize a "constitutional right to recover for the loss of the companionship of an adult child" where the parent-child relationship "is terminated as an incidental result of state action"); *McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003) (dismissing section 1983 claim against police officers implicated in the fatal shooting of plaintiff's son on the ground that "the fundamental guarantees of the Due Process Clause do not extend to a parent's interest in the companionship of his independent adult child"). Plaintiffs do not and could not allege that the Notices of Ineligibility rise to that level. More to the point, *Lemire* did not address whether a parent has a constitutional interest in living in the United States with her noncitizen adult child, or whether an adult child has the same interest in living with his noncitizen parent. The Ninth Circuit's use of the phrase "in matters of marriage and family life" has not extended and does not

extend beyond the marriage context, and Plaintiffs provide no persuasive authority to the contrary.[7] *Bustamante*, 531 F.3d at 1062.

Because the limited review available for U.S. citizens who petition on behalf of their alien spouses does not apply to Jane Doe 1 and John Doe 2, the principles of nonreviewability fully apply and foreclose judicial review in this case.

3. Plaintiffs cannot otherwise proceed under the Administrative Procedure Act.

The nonreviewability principles discussed above also preclude any review under the APA, 5 U.S.C. § 706(2). The APA does not apply "to the extent that . . . statutes preclude judicial review," 5 U.S.C. § 701(a)(1), a determination that turns not only on the statute's express language but also on the "structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved," *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Moreover, Section 702 of the APA preserves "other limitations on judicial review" that predated the APA. *See Saavedra Bruno*, 197 F.3d at 1158. Here, the conclusion is "unmistakable" from history that "the immigration laws 'preclude judicial review' of [] consular visa decisions," *id*. at 1160, and the same is true of refugee determinations, *see Haitian Refugee Ctr.*, 953 F.2d at 1506. At a minimum, the general rule of "nonreviewability . . . represents one of the 'limitations on judicial review' unaffected by § 702's opening clause[.]" *Saavedra Bruno*, 197 F.3d at 1160.

Indeed, when the Supreme Court held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the APA, *see Brownell v. Tom We Shung*, 352 U.S. 180, 184-86 (1956), Congress responded by abrogating that ruling. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-53; *Saavedra Bruno*, 197 F.3d at 1157-62 (recounting history). The House Report accompanying the abrogating statute explained that APA suits would "give recognition to a fallacious doctrine that

[7] Defendants note that the government is not attempting to forbid parents and adult children from living together. Jane Doe 1 and John Doe 2 are free to live with their family members anywhere in the world where they are permitted to reside. *See Din*, 135 S. Ct. at 2138 (plurality opinion).

an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 87-1086, at 33 (1961). Because an alien present in the United States cannot invoke the APA to obtain review of an exclusion order, then *a fortiori* neither can aliens abroad or U.S. citizens acting on their behalf. And because Congress has generally foreclosed judicial review of visa revocations, *see* 8 U.S.C. § 1201(i), it is implausible that Congress would permit review of Executive decisions to restrict entry in the first instance. Significantly, Plaintiffs have identified no precedent holding that the type of refugee denials at issue here are judicially reviewable. Thus, the APA provides Plaintiffs with no relief. [8]

4. Plaintiffs' challenge to the refugee denials are barred by the jurisdiction-stripping provision at 8 U.S.C. § 1252(a)(2)(B)(ii).

The Court lacks jurisdiction to review the refugee denials themselves, which Plaintiffs challenge in their complaint. (Compl. at ¶ 96.) Congress has divested the courts of jurisdiction over immigration suits that concern decisions or actions that are committed to agency discretion. 8 U.S.C. § 1252(a)(2)(B)(ii); *see Hassan v. Chertoff*, 593 F.3d 785 (9th Cir. 2010) ("[J]udicial review of a discretionary determination is . . . expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(ii)."). In explaining the type of discretionary decisions to which section 1252(a)(2)(B)(ii) applies, the Supreme Court specifically pointed to refugee denials rendered pursuant to 8 U.S.C. § 1157(c)(1) as an example. *Kucana v. Holder*, 558 U.S. 233, 248 (2010) ("decisions specified by statute 'to be in the discretion of the Attorney General,' and therefore shielded from court oversight by § 1252(a)(2)(B)(ii), are of a like kind. *See, e.g.*, §

[8] Plaintiffs are also not entitled to a writ of mandamus under 28 U.S.C. § 1361 or relief under 5 U.S.C. § 706(1). (Pls.' Class Cert. Mot. at 6, 18.) The nonreviewability principles that preclude review under § 706(2) apply to § 706(1) and the Mandamus Act with equal force. Moreover, both statutory provisions allow a district court to compel a United States officer or agency to perform a duty not yet performed. *See* 28 U.S.C. § 1361; 5 U.S.C. § 706(1); *Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003). Because USCIS did provide Plaintiffs with notices, relief under the § 702(1) and the Mandamus Act is inappropriate.

1157(c)(1)").[9] Thus, the refugee decisions themselves, pursuant to sections 1157(c)(1) and 1252(a)(2)(B)(ii), are unreviewable.

B. Plaintiffs Cannot Demonstrate the Requisite Commonality, Typicality, and Adequacy of Representation for Class Certification.

1. Commonality is lacking among proposed class members.

Commonality focuses on the relationship among class members. To demonstrate commonality, plaintiffs must "demonstrate that the class members 'have suffered the same injury,'" not merely violations of "the same provision of law." *Dukes*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157). The proposed class members' claims must therefore *depend* upon a common contention, the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Falcon*, 457 U.S. at 157. Although the "existence of shared legal issues with divergent factual predicates is sufficient [to establish commonality]," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), commonality is defeated where there is wide factual variation requiring individual adjudications of each class member's claims, *see Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 663-64 (N.D. Cal. 1976). Indeed, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 564 U.S. at 350 (quotation omitted). If factual differences are likely to change the outcome of the legal issue, then class certification may not be appropriate. *Cf. Yamasaki*, 442 U.S. at 701.

Plaintiffs argue factual commonality among the proposed class because "[they] were part of a mass denial . . . and received no explanation," and they argue legal commonality on the question whether the "mass denials violated the Lautenberg Amendment." (Pls.' Class Cert. Mot. at 15.) But this description glosses over the fact that the proposed class members can be

[9] Congress did carve out an exception to 8 U.S.C. § 1252(a)(2)(B)(ii): "[C]onstitutional claims or questions of law" are subject to judicial review notwithstanding § 1252(a)(2)(B), so long as an alien plaintiff has been ordered removed from the United States and the alien has duly filed a petition for review of that removal order. *Id.* 8 U.S.C. § 1252(a)(2)(D). But because Plaintiffs have not been ordered removed, their claims do not fit within this exception.

divided into two groups (and likely more) with distinct circumstances. One group includes unadmitted and nonresident aliens who applied for refugee status under the Lautenberg Amendment ("alien-Plaintiffs"); the other group includes U.S. citizens who did not apply for refugee status and are only related to those who did ("U.S.-citizen Plaintiffs"). As discussed above, the law treats both groups differently. An "unadmitted and nonresident alien" has "no constitutional right of entry into the country," *Mandel*, 408 U.S. 753, while in certain cases, a U.S.-citizen spouse may have a protected liberty interest that entitles her to limited judicial review over the denial of her spouse's immigration application. *See Bustamante*, 531 F.3d at 1062; *Cardenas*, 826 F.3d at 1169-72.

There are even factual disparities with legal implications within the group of U.S.-citizen plaintiffs. Plaintiffs define "Close Family Member" 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." (*Id*. at 1.) But no case supports extending due-process rights to the entry of family members other than spouses. In fact, other courts have rejected extending review under *Din*, 135 S. Ct. 2128, to non-spousal relationships. *See Santos*, 2016 WL 3549366, at *3-4 (declining to extend *Din* to find "liberty interest as an adult child to live in the United States with her parents"); *L.H.*, No. 14-06212, slip op. 3-4 (same for daughter, son-in-law, and grandson).

The factual distinctions among the proposed class members are likely to change the outcome of the legal issues here and are precisely the type of variations that impede the generation of common answers. *See Dukes*, 564 U.S. at 350; *Nguyen Da Yen*, 70 F.R.D. at 663-64. Because there are too many factual and legal dissimilarities among the proposed class' claims that require individual answers, Plaintiffs cannot establish the requisite commonality.

2. Typicality is lacking between class representatives and proposed class members.

Where the commonality analysis focuses on the relationship among the class members, typicality focuses on the relationship between the proposed class representatives and the rest of the proposed class. NEWBERG ON CLASS ACTIONS § 3:26 (5th ed.). The inquiry is whether the interests of the named plaintiffs align with the interests of the class. *Hanon v. Dataproducts*, 976 F.2d 497, 508 (9th Cir. 1992). The test to be applied "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." *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). As such, the typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Id.*

Plaintiffs contend that the proposed class representatives and the rest of the proposed class "were equally affected by the government's failure to provide reasons for the denials." (Pls.' Class Cert. Mot. at 16.) That is not the case. The alien-plaintiffs and U.S.-citizen plaintiffs are in fundamentally different positions that affect the justiciability of their claims, as explained above. The proposed class includes family relationships that are not found among the named plaintiffs. Jane Doe 1 is the U.S.-citizen parent of an alien-Plaintiff and Jane Doe 2 is the U.S.-citizen son of another. (Pls.' Class Cert. Mot. at 4, 5.) But the proposed class *also* includes U.S. citizens who are the parents-in-law, spouses, fiancés, children, 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 of aliens who applied for refugee status. (*Id*. at 1 n.1.) *None* of these relationships are represented by the U.S.-citizen plaintiffs, and the type of family relationship has a profound effect on the justiciability of the proposed class members' claims.

Typicality requires that class representatives "be a part of the class and possess the same interest and suffer the same injury as the class member." *Falcon*, 457 U.S. at 157. Because the

named plaintiffs do not possess the same interests or suffer the same injury as the class members, Rule 23(a)(3)'s typicality requirement is unmet.

3. Adequacy of class representation is lacking.

The adequacy of representation requirement under Rule 23(a)(4) serves to protect the due process rights of absent class members who will be bound by the judgment. *Hanlon*, 150 F.3d at 1020. The adequacy of representation determination is based on two inquiries: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *Id.* at 1021; *see also Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) ("proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members"). Indeed, "uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). The nature of class certification under Rule 23(b)(2) amplifies the need to identify such conflicts of interest among class members because members of a Rule 23(b)(2) class have no right to opt out of the class. *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

As applied to this case, Plaintiffs have, once again, failed to demonstrate how adjudication of the named Plaintiffs' claims will fairly and adequately protect the diverse interests of the proposed class. Most critically, as discussed above, the named Plaintiffs do not present a justiciable controversy. The law is clear that named representatives of a proposed class whose claims are not justiciable are in no position to sustain their own claims and thus cannot prosecute an action vigorously on behalf of the class. *See Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 986 (9th Cir. 2011) (concluding that former employees are not adequate representatives of a class of current employees seeking injunctive relief arising out of gender discrimination claim); *Schulken v. Washington Mut. Bank*, No. 09-cv-02708, 2012 WL 28099, *5 & n.2 (N.D. Cal. Jan. 5, 2012) (analogizing Rule 23(a)(4) analysis to standing analysis).

Moreover, and as discussed further above in the context of justiciability, the interests of named Plaintiffs, as class representatives, are incongruous with the interests of members of the proposed class. Again, the proposed class represents a wide array of familial relationships that largely are not reflected by the U.S.-citizen Plaintiffs, who only include a parent and an adult child of refugee applicants. (Pls.' Class Cert. Mot. at 4-5.) Thus, Plaintiffs fall short of demonstrating they are adequate class representatives.

C. The Proposed Class is Not Adequately Defined.

"[T]he requirements of Rule 23(a) and (b) [] are designed to protect absentees by blocking unwarranted or overbroad class definitions." *Narouz v. Charter Commc'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). Thus, apart from the explicit requirements of Rule 23(a), a class definition must be "'precise, objective, and presently ascertainable.'" *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1988) (quoting Manual for Complex Litigation, Third § 30.14, at 217 (1995)). Further, a class should be narrowly tailored to include only aggrieved parties. *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009).

Plaintiffs' proposed class definition is imprecise. Plaintiffs do not accurately describe the nature of the admission denials at issue here. Where the denials that USCIS issued indicated a "review of all information concerning your case including your testimony [and other applicant-specific supporting materials]" resulted in denial "as a matter of discretion" (Compl. at 11), the proposed class definition fails to account for the individual review that USCIS indicates it conducted as to *each* denied application under the Lautenberg Amendment. (Ex. 1 at ¶ 4.) As defined, the proposed class tells only half the story. It therefore is imprecise and fails the adequacy requirement.

D. Plaintiffs Do Not Satisfy Rule 23(b)(2).

Class certification movants also must establish that—in addition to common questions of law or fact applicable to proposed class members—the relief sought will apply commonly to the entire class. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). Under Rule 23(b)(2), Plaintiffs must prove that

Defendants have "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 key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360.

Despite Plaintiffs' claims to the contrary (Pls.' Class Cert. Mot. at 17-18), the injunctive relief and corresponding declaratory relief that Plaintiffs seek cannot be enjoined or declared as to the entire proposed class. This is because, as articulated above, the named Plaintiffs do not present this Court with a justiciable controversy in light of the nonreviewability doctrine barring review of their claims. Further, the proposed class is overbroad and there are far too many factual and legal variations among the proposed class members and the named Plaintiffs such that class-wide relief would be inappropriate, if not impossible. Rule 23(b)(2) thus is not satisfied, and the Court should deny class certification.

V. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for class certification.

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