LATHAM & WATKINS LLP
Belinda S Lee (Bar No. 199635)
Ariel E. Rogers (Bar No. 316910)
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel: +1.415.391.0600
Fax: +1.415.395.8095
Email: *Belinda.Lee@lw.com*
Ariel.Rogers@lw.com

Oliver Rocos (Bar No. 319059)
Thomas Golding (Bar No. 308070)
10250 Constellation Blvd., Suite 1100
Los Angeles, CA 90067
Tel: +1.424.653.5500
Fax: +1.424.653.5501
Email: *Oliver.Rocos@lw.com*
Thomas.Golding@lw.com

INTERNATIONAL REFUGEE ASSISTANCE PROJECT
Mariko Hirose (*pro hac vice*)
Kathryn C. Meyer (*pro hac vice*)
40 Rector Street, 9th Fl.
New York, NY 10006
Tel: +1.646.459.3044
Fax: +1.212.533.4598
Email: *mhirose@refugeerights.org*
kmeyer@refugeerights.org

Attorneys for Plaintiffs Does 1 through 5

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

PLAINTIFFS' REPLY IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION

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

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I. INTRODUCTION

By Defendants' own count, there are 87 individuals whose Lautenberg-Specter refugee applications were denied in February 2018. They were given no explanation for their rejection other than a form response, which said only that their applications were denied "as a matter of discretion." They are now stranded in Vienna (at risk of deportation back to Iran) and separated from their U.S.-based sponsors. This is the sad story of Does 1 through 5, and it is exactly what happened to the rest of the class.

In a classic strawman argument, Defendants oppose Plaintiffs' Amended Motion for Class Certification (and Plaintiffs' claims, more broadly) with the argument that this Court cannot review the Department of Homeland Secretary's discretionary decision to accept or reject refugee applications. But Plaintiffs do not bring any such claim and do not seek such relief on behalf of the class. Instead, Plaintiffs ask this Court to set aside the denials that failed to comply with the Lautenberg Amendment and applicable agency procedures, and to order that if Defendants deny those applications again, any reissued denials must "state, to the maximum extent feasible, the reason for the denial" so Plaintiffs and class members have a meaningful opportunity to request reviews of those denials. Plaintiffs are *not* asking this Court to review the denial decision itself or admit the refugee class members to the United States.

Perhaps Defendants' Opposition misconstrues Plaintiffs' claims because Defendants have no response to the one question of justiciability raised by this Court and addressed in Plaintiffs' Amended Motion—that Plaintiffs have standing to bring their claims, including on behalf of a class that includes foreign nationals living abroad. Plaintiffs have suffered injuries-in-fact caused by Defendants' violations of the Lautenberg Amendment and this Court has the power to grant redress. That is sufficient to establish standing for Plaintiffs, regardless of their location or nationality.

As to Rule 23 itself, Defendants' Opposition does nothing more than recycle their off-base "justiciability" arguments about claims that Plaintiffs have not asserted. For the reasons set out in Plaintiffs' Amended Motion and below, Plaintiffs' claims are justiciable, Plaintiffs and the

proposed class have standing to bring this action, and the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) have each been met. As Defendants have acted, and refused to act, on grounds generally applicable to Plaintiffs and all class members, the declaratory and mandamus relief sought would benefit the entire class and Rule 23(b)(2) is satisfied. Accordingly, Plaintiffs respectfully request that the Court grant their Amended Motion for Class Certification.

II. ARGUMENT

A. Plaintiffs' Claims are Justiciable

Defendants' primary argument, which pervades their entire brief, is that Plaintiffs' claims are not justiciable. However, the claims Defendants argue are not justiciable are claims that Plaintiffs *have not brought*, and Defendants' arguments are therefore irrelevant. In any event, each of Plaintiffs' actual claims is justiciable. And, tellingly, Defendants' Opposition does not contest the justiciability issue of standing—as it is evident that Plaintiffs have standing to assert claims on behalf of a class that includes foreign nationals living abroad.

1. Defendants Challenge the Justiciability of Unasserted Claims

In both the Amended Motion for Class Certification and the Complaint, Plaintiffs expressly 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." Amended Motion for Class Certification ("Class Mot.") at 6 (ECF 60); *see also* Compl. ¶¶ 78-96 (ECF 1). But instead of addressing whether the Court should certify a class with respect to those claims, Defendants focus their arguments on the justiciability of a claim Plaintiffs *have never made*: that this Court order the Defendants to permit the refugee class members to enter the United States. *See e.g.* Defendants' Opposition to

Plaintiffs' Motion for Class Certification ("Opp.") at 1 (ECF 72) ("the government's decision *to exclude an alien* is immune from judicial review") (emphasis added).

Plaintiffs do not ask this Court to overturn Defendants' "decision to exclude" any proposed class member, and Defendants' arguments about the justiciability of a claim of that nature are irrelevant. The absence of a "statutorily prescribed procedure" for "challenging a statutorily discretionary determination" to deny admission to an alien, (Opp. at 9), the consular nonreviewability doctrine that "denial or revocation of a visa for an alien abroad is not subject for judicial review," (*id.* at 10-11), and the bar under 8 U.S.C. § 1252(a)(2)(B)(ii) on judicial authority "to review the refugee denials themselves," (*id*. at 15), are matters of only academic interest ***and are of no consequence to this action***. Those arguments plainly cannot affect the justiciability of Plaintiffs' claims, which instead request an order setting aside the Notice of Ineligibility and requiring any subsequent denials to "state, to the maximum extent feasible, the reason for the denial," as well as an order setting aside the undisclosed program changes that caused this mass denial. Compl. ¶¶ 78-91, 95-96 (ECF 1).

Further, Defendants' argument that there is no constitutional right to review visa denials outside of the marriage context also is irrelevant to this Motion. Opp. at 12-14. As made clear in the Complaint, the constitutional claim made under the Fifth Amendment liberty interest claim is filed on behalf of Plaintiffs Jane Doe 1 and John Doe 2 only, and not on behalf of the proposed class. Compl. ¶¶ 92-94 (heading) (stating claim is "On Behalf of Does 1 and 2"). Thus, the justiciability of this claim also is irrelevant to Plaintiffs' claims made on behalf of the proposed class and to the determination of this Motion.

In sum, all of Defendants' arguments regarding nonjusticiability are entirely irrelevant to the issues in this Motion and the action as a whole, and should be disregarded.[1]

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[1]And, even if Defendants were correct that Plaintiffs had asserted claims that are subject to various doctrines of non-reviewability and jurisdiction stripping statutes, many of Defendants'arguments are not truly about Article III justiciability and, instead, raise only substantive defenses to the merits of (unasserted) claims. As the Supreme Court has made clear, courts deciding class certification should not consider substantive merits issues unless relevant and necessary to determining if Rule 23 has been met. *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 US 455, 465-66 (2013); *Stockwell v. City & County of San Francisco*,

2. Plaintiffs' Claims are Justiciable

Having focused their arguments on claims Plaintiffs do not assert, Defendants failed to challenge the justiciability of the claims Plaintiffs do assert. Nevertheless, and for the avoidance of doubt, each such claim is justiciable.

a. First through Fourth Causes of Action

Plaintiffs' first four causes of action seek: (1) declaratory judgment; (2) relief under the Administrative Procedure Act ("APA") for violation of the Lautenberg Amendment; (3) relief under the APA for violation of the *Accardi* doctrine; and (4) mandamus under the Mandamus Act. Each claim seeks an order requiring the government to comply with a non-discretionary duty, and the justiciability of such claims is beyond challenge.

As to the non-discretionary nature of the obligation, section 8 U.S.C. § 1157 (note), Pub. L. 101-167, Title V, § 599 D (c) (Nov. 21, 1989) (as amended), is clear that government's obligation is mandatory as it "*shall state*, to the maximum extent feasible, the reason for the denial." (Emphasis added.) Indeed, Defendants expressly concede the non-discretionary nature of the obligation as they admit that the section "*requires* that the government shall 'state, to the maximum extent feasible, the reason for the denial'" and communicates Congress's "desire for the government to disclose its reasons for denying refugee applicants when possible." Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment at 2, 13 (emphasis added) (ECF 71).

As to the justiciability of claims requesting that a court order the government to comply with a non-discretionary duty, courts routinely hold that they have jurisdiction to make such an order. By way of example only, the court in *Attifi v. Kerry* held that it had jurisdiction to order the government to provide the reason for a denial of a visa because the provision of that reason was a non-discretionary obligation, No. CIV. S-12-3001 LKK/DAN, 2013 WL 5954818, at *7 (E.D. Cal. Nov. 6, 2013); the court in *Amidi v. Chertoff* held it had jurisdiction to determine a challenge to the government's decision to terminate or cancel a visa application as it did not

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749 F.3d 1107, 1111 (9th Cir. 2014) (no "free-ranging merits inquiries" at class certification stage).

concern "the discretionary decision of whether to approve or deny the application," No. 07CV710 (AJB), 2008 WL 2662599, *3-4 (S.D. Cal. Mar. 17, 2008); the court in *Ibrahim v. Dep't of Homeland Sec.* held it had jurisdiction to review the government's failure to comply with its non-discretionary duty to advise a foreign national of his waiver eligibility, 62 F. Supp. 3d 909, 932 (N.D. Cal. 2014); the court in *Rivas v. Napolitano* held that consular non-reviewability does not bar a court from ordering the government to comply with the non-discretionary duty to act on a request for reconsideration of a visa application, 714 F.3d 1108, 1110-1112 (9th Cir. 2013); and the court in *Singh v. Clinton* noted that the government had correctly abandoned its consular non-reviewability challenge to a claim that they had failed to notify a visa applicant of their intent to terminate his visa application, 618 F.3d 1085, 1088 (9th Cir. 2010).

Accordingly, this Court unquestionably has jurisdiction to determine Plaintiffs' first four claims asserted on behalf of the proposed class, and to resolve the issue of whether or not the government complied with its non-discretionary obligation to "state, to the maximum extent feasible, the reason for the denial" in the Notices of Ineligibility.

b. Sixth Cause of Action[2]

Plaintiffs' sixth cause of action requests the Court order that undisclosed program changes in late 2016 that resulted in the mass denials are unlawful and must be set aside. Compl. ¶¶ 32-50, 95-96. As Defendants agree in their Opposition, such claims are justiciable because they "do not seek review of individual adjudicatory decisions, but rather the government's 'promulgation of sweeping immigration policy.'" Opp. at 11 (citing *Doe v. Trump*, 288 F. Supp. 3d 1045, 1069 (W.D. Wash. 2017)). Indeed, as Defendants note, "'exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the'" consular nonreviewability doctrine. *Id.* (citing *Washington v. Trump*, 847 F.3d 1151, 1163 (9th Cir. 2017)).

[2]As noted above, the fifth cause of action is asserted on behalf of Plaintiffs Does 1 and 2 only, not on behalf of the class.

Thus, this last cause of action asserted by Plaintiffs on behalf of the proposed class also is justiciable.

3. Plaintiffs' Standing to Bring this Class Action is Unchallenged

As explained in the Amended Motion, Plaintiffs have standing to bring these claims. They each have suffered concrete, particularized, and actual injuries of prolonged separation from family members without lawful justification and economic harm, (Class Mot. at 9-10), and Plaintiffs Does 3 through 5 have also been harmed by the loss of their ability to pursue a fair Request For Review process, (*id.* at 10). Each of those injuries is causally connected to the complained of conduct, and each will be redressed by a favorable decision. *Id.* Plaintiffs also have satisfied prudential standing as they each fall within the "zone of interests" to be protected by the APA. *Id.* at 11. Finally, foreign nationals living abroad are entitled to participate in a class action. *Id.* at 12-13. Defendants do not contest any of these points in their Opposition—a concession through silence that Plaintiffs have standing. *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 n.7 (N.D. Cal. 2013) (failure to address a claim in a party's opposition brief concedes the issue raised).

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

1. Defendants Concede the Proposed Class is Numerous

Defendants do not contest that the proposed class fails to satisfy the numerosity requirement of Rule 23(a), and are therefore deemed to have waived any argument to the contrary. *Ramirez*, 941 F. Supp. 2d at 1210 n.7. In fact, Defendants' Opposition confirms that the number of proposed class members is at least 87, which is more than enough to satisfy the numerosity requirement. Opp. at 5:1-2 ("In February 2018, United States Citizenship and Immigration Services ("USCIS") issued denials to 56 Iranian refugee applicants and their 31 family members in Vienna."); *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 court's analysis "did not undermine a district court's discretion" to certify a class of 20 members).

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

In their Opposition, Defendants argue that class members can be distinguished from one another in two ways: (1) nonresident aliens have "no constitutional right of entry into the country" but a U.S.-citizen spouse "may have a protected liberty interest that entitles her to limited judicial review" of her spouse's immigration denial; and (2) the class includes spouses and non-spouses, but "no case supports extending due-process rights to the entry of family members other than spouses." Opp. at 17. As both of these distinctions are irrelevant, neither preclude a finding of commonality.

The relevance of a class members' characteristic to the commonality requirement is determined by reference "to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). Because Plaintiffs neither bring a claim for an order permitting the refugees to enter the United States nor assert a due-process claim, the characteristics Defendants have identified regarding their ability to assert such claims are entirely irrelevant "to the factual and legal issues at the core" of the claims. What is relevant is whether the class members have "suffered the same injury," and whether their claims "depend upon 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, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013). Those requirements are met here because all class members suffered the same injury, having been part of a mass denial of Vienna Lautenberg-Specter refugee applications that were denied "as a matter of discretion," and all present the same issue of law, whether those denials violated the Lautenberg Amendment. Class Mot. at 15. This Court should therefore find that that there are questions of law and fact common to the class and that the commonality requirement of Rule 23(a)(2) is satisfied.

3. Plaintiffs' Claims are Typical of the Class

Defendants' argument against typicality is based on a misunderstanding of Plaintiffs' claims. In their Opposition, Defendants claim there is no typicality because Plaintiffs' familial relationships are limited to parent-child while the proposed class includes members related to

each other in a range of other ways.[3] Opp. at 18-19. Defendants contend "the type of family relationship has a profound effect on the justiciability of the proposed class members' claims," and that Plaintiffs' claims are thus atypical of the class. *Id* at 18.

While the nature of a familial relationship may affect the justiciability of Plaintiffs' fifth cause of action, which concerns violation of the Fifth Amendment liberty right, Plaintiffs do not assert any such claim on behalf of the proposed class. *See* Compl. ¶¶ 92-94 (heading) (stating claim is "On Behalf of Does 1 and 2"). Instead, Plaintiffs assert justiciable claims that depend not on familial relationships, but on the fact that they made Vienna Lautenberg-Specter program applications that the Defendants denied "as a matter of discretion." Plaintiffs' claims are typical of those of the class, because they seek the exact same relief from the exact same injury as the absent class members. *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (finding typicality satisfied where named Plaintiffs' claims are "reasonably co-extensive with those of the absent class members"); *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"). Thus, the typicality requirement under Rule 23(a) is satisfied.

4. Plaintiffs Adequately Represent the Class

Here, again, Defendants try to recycle their irrelevant "justiciability" arguments as an argument on adequacy of representation. Defendants acknowledge that Rule 23(a)(4) involves a two-part inquiry: (1) whether Plaintiffs and counsel have any conflicts of interest with class members; and (2) whether Plaintiffs and counsel will prosecute the action vigorously on behalf of the class. Opp. at 19:6-8.

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[3]The proposed class definition limits the U.S. based sponsors to "U.S.-based Close Family Members"only to ensure all class members have Article III and statutory standing. The U.S.-based Close Family Members'standing is based in part on their injury as sponsors for the refugee applicants who submitted the refugee applications as well as in part on prolonged separation from family members without lawful justification and the principle of family integrity, both of which require a familial connection of the types identified in the class definition. *See* Class Mot. at 9-11; *see also Hawai'i v. Trump*, 871 F.3d 646, 658-59 (9th Cir. 2017) (holding that persons in the United States are harmed by separation from individuals with whom they have these types of familial relationships).

As to the first inquiry, Defendants do not contest and, therefore, concede that Plaintiffs and counsel have no conflicts of interest with the class. *Ramirez*, 941 F. Supp. 2d at 1210 n.7.

As to the second, Defendants do not contest that Plaintiffs' counsel are experienced and capable of vigorously representing the class. Instead, Defendants return to their same justiciability and typicality arguments to claim that Plaintiffs will not adequately represent the proposed class as they "do not present a justiciable controversy" and "the proposed class represents a wide range of familial relationships that largely are not reflected by" Plaintiffs. Opp. at 19:22, 20:3-4. But, Plaintiffs do in fact assert justiciable claims, *see supra* Part II.A, and the nature of the familial relationships is not relevant to the determination of the actual claims that Plaintiffs assert.

Thus, it is undisputed that Plaintiffs and counsel have no conflict of interest with other class members and there is no reason to believe Plaintiffs, supported by experienced counsel, will not vigorously represent the class. The class should be certified.

C. <u>The Proposed Class is Properly Defined and Ascertainable</u>

Plaintiffs' class definition is precise and allows for easy identification of class members. Defendants' Opposition claims that the class definition is "imprecise" because "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'" and thus, according to Defendants, "fails to account for the individual review that USCIS indicates it conducted as to *each* denied application under the Lautenberg Amendment." Opp. at 20:17-21. Defendants' ascertainability argument boils down to a complaint that "Plaintiffs do not accurately describe the nature of the admission denials at issue here." Opp. at 20:16-17. This is yet an impermissible merits argument that fails for multiple reasons. *See Amgen*, 568 U.S. at 465-66.

First, while ascertainability is not an explicit requirement under Rule 23, courts within the Ninth Circuit have stated that a "class definition must be 'clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss.'" *I.B. by and through Bohannon v. Facebook,*

Inc., 82 F. Supp. 3d 1115, 1126 (N.D. Cal. 2015) (Freeman, J.) (quoting *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011). Despite "fail[ing] to account for the individual review," the proposed class plainly is "clear in its applicability" because Defendants have already identified the "56 Iranian refugee applicants and their 31 family members in Vienna" who received denials, (Opp. at 5:2), and it is a simple matter to identify their U.S. ties who fit within the Close Family Member definition.

Second, even if this Court were to entertain Defendants' merits objection, whether or not the proposed class members' applications were subjected to individualized review is irrelevant. What matters is that all class members received the same verbatim response, as that is the basis of the claims. As such, the proposed class is properly defined as requiring the member to have received that response, in addition to other requirements, in order to be a class member:

> 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.

Having provided Plaintiffs with identical denials and no way of differentiating between themselves, Defendants cannot legitimately claim that Plaintiffs should nevertheless be treated differently.

Finally, if the Court is inclined to entertain Defendants' objection to the class definition, rather than declining to certify the class the Court should modify the third part of the proposed definition to include the full language repeated in all of the denials sent to class members: "and (3) received denials from the United States government in or after February 2018 with the sole explanation that '[a]fter 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." Declaration of Jane Doe 3 (ECF 67), Ex. A; Declaration of Jane Doe 4 (ECF 68), Ex. A; Declaration of Jane Doe 5 (ECF 69), Ex. A. It is

within this Court's discretion to certify a modified class definition. *Abante Rooter and Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-06314-YGR, 2018 WL 558844, at *2 (N.D. Cal. Jan. 25, 2018).

As demonstrated by Defendants' ready identification of the individuals who received the denials at issue, the proposed class is properly defined and ascertainable. Defendants' ascertainability argument is an impermissible merits argument, which can be easily addressed, and should not be an obstacle to class certification.

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

In a last effort to avoid class certification, Defendants argue that the proposed class cannot meet the requirements of Rule 23(b)(2) but then recycle the same three justiciability, ascertainability, and typicality arguments that: (1) "the named Plaintiffs do not present this Court with a justiciable controversy in light of the nonreviewability doctrine barring review of their claims"; (2) "the class is overbroad"; and (3) "there are far too many factual and legal variations among proposed class members and the named Plaintiffs." Opp. at 21:9-13. As detailed above, each of these arguments fail.

It is beyond doubt that Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class a whole," when they denied all proposed class members' applications "as a matter of discretion." Fed. R. Civ. P. 23(b)(2). Again, Defendants' Opposition does not contest this. Accordingly, Plaintiffs' claims for declaratory and mandamus relief apply equally to all proposed class members, and the requirements of Rule 23(b)(2) are satisfied here. *Parson v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (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.").

III. CONCLUSION

For the foregoing reasons, 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: June 11, 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