IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AFGHAN AND IRAQI ALLIES UNDER SERIOUS THREAT BECAUSE OF THEIR FAITHFUL SERVICE TO THE UNITED STATES, ON THEIR OWN AND ON BEHALF OF OTHERS SIMILARLY SITUATED, Plaintiffs, – against – MICHAEL R. POMPEO, et al., Defendants.	Case No. 18-cv-01388-TSC **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND COUNSEL

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Putative class representatives John/Jane Does Alpha, Bravo, Charlie, Delta, and Echo (collectively, ***Plaintiffs*** or ***Allies***) respectfully submit this memorandum of points and authorities in further support of their motion for an Order: (1) certifying a class of SIV applicants who have been forced to wait longer than nine months for the government to process their SIV applications (the ***Class***); (2) appointing Plaintiffs as class representatives; and (3) appointing Freshfields Bruckhaus Deringer US LLP and the International Refugee Assistance Project as class counsel (the ***Motion*** or ***Mot.***) and in reply to the Defendants' opposition to class certification (the ***Opposition*** or ***Opp.***).[1]

PRELIMINARY STATEMENT

At its core, Defendants' argument against certification—whether couched in terms of commonality, typicality, adequacy or the propriety of 23(b)(2) certification—is that certification is unwarranted because Defendants interpret the nine-month processing timeframe set forth in the AAPA and RCIA to apply to, at most, only the subset of SIV applicants who are in the final stages of the fourteen-step process that Defendants created. But Defendants ignore that this precise statutory argument has been considered—and rejected—in this District. In Nine Iraqi Allies, the court held that the nine-month timeframe within which Congress directed the Defendants to adjudicate SIV applications applies to the entirety of the application process, including the first step of seeking and obtaining Chief of Mission Approval, not just to the final few steps of that process as Defendants now assert. See Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Kerry, 168 F. Supp. 3d 268, 293 (D.D.C. 2016) (***Nine Iraqi Allies***). As Defendants' proffered statutory interpretation has

[1] Capitalized terms used but not defined herein have the meaning assigned to them in the Motion.

already been squarely rejected in this District, Defendants' attempt to recycle this substantive argument to contest commonality, typicality, adequacy, and 23(b)(2) certification must also fail.

Even if Nine Iraqi Allies did not foreclose Defendants' arguments, certification is nevertheless appropriate here because Defendants' arguments—including with respect to the application of the nine-month timeframe and whether a national security exception may allow Defendants to take longer than nine months to determine certain applications—put the merits cart before the certification horse. That is, even if Defendants were correct that different timeframes govern Plaintiffs' unreasonable delay claims depending on where the plaintiff is in the SIV application process (and, Plaintiffs respectfully submit that they are not), it would not provide a basis to refuse to certify a class alleging that proposed class members across the SIV application process have suffered unreasonable delays in adjudication. At worst, if the application of the statutory timeframe depends on the stage of the SIV application process or Defendants' designation of an SIV application as presenting national security concerns, the solution is to certify subclasses to include a subclass of SIV applicants whose applications are early in the SIV process, a subclass for those who have advanced to the later stages, and/or a subclass of SIV applicants whom Defendants have designated as falling within the national security exception, if any. In each case, the critical legal question will be the same—whether Defendants' delay in adjudicating the SIV applications is unreasonable—and, in each case, that question will be capable of resolution by a common answer.

Finally, the plain language of the proposed Class definition establishes clear, objective criteria by which the Court and the parties will be able to determine whether a putative Class member is, or is not, a member of the Class. Defendants' contention that the proposed Class is fail safe relies on a twisted reading of the Class definition proposed by Plaintiffs, with

Defendants replacing Plaintiffs' clear, objective criterion of applications pending for longer than nine months in government-controlled steps with the subjective criterion of reasonableness. Further, and contrary to Defendants' assertions, the proposed Class is easily ascertainable because—as Defendants themselves concede—Defendants have within their exclusive possession the information necessary to identify all Class members. Defendants' arguments accordingly fail, and the proposed Class should be certified.[2]

ARGUMENT

A. All Class Members Have a Claim of Unreasonable Delay.

Defendants' first and chief argument against class certification—whether cast as an attack on commonality, typicality, adequacy or 23(b)(2) certification—is a regurgitation of a merits-based statutory interpretation argument rejected in Nine Iraqi Allies that, at most, only those applicants in the latest steps of the SIV application process can state a claim of unreasonable delay. Opp. at 18. As detailed below, even if Defendants were correct on the substance of this argument, it does not provide a basis to deny class certification. However, Defendants' argument is also meritless because this precise argument was rejected in Nine Iraqi Allies, 168 F. Supp. 3d at 292, where, as Defendants now concede (see Defs.' Notice of Errata at 1, ECF 29),[3] the court specifically held that the SIV applicant plaintiffs, including one at the start of the SIV application process, had stated claims for unreasonable delay because the defendants'

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[2] Defendants concede that Freshfields Bruckhaus Deringer US LLP and the International Refugee Assistance Project are qualified to serve as Class counsel, and this Court should therefore appoint Freshfields and IRAP as putative Class counsel.

[3] Defendants' Errata corrects only one of several instances in which Defendants erroneously claim that Nine Iraqi Allies was limited to considering only SIV applications of those who had "submitted visa applications and completed visa interviews." Opp. at 19. As admitted by Defendants in their Notice of Errata, this statement too is incorrect because plaintiff Kilo had not yet received COM Approval at the time that Nine Iraqi Allies was decided. 168 F. Supp. 3d at 292

"duty to adjudicate Plaintiffs' applications within a reasonabl[e] period, as informed by the nine-month timelines in the RCIA and AAPA is nondiscretionary." Nine Iraqi Allies, 168 F. Supp. 3d 268, 296 (D.D.C. 2016).

Specifically, in Nine Iraqi Allies, the court expressly considered the SIV application delay experienced by plaintiff Kilo, who was awaiting COM Approval. Nine Iraqi Allies, 168 F. Supp. 3d at 292. In evaluating the viability of Kilo's unreasonable delay claim, the court concluded that Kilo had stated a claim for relief because the defendants had a mandatory, non-discretionary duty to decide his application within a reasonable amount of time. The court went on to consider the plain language, purpose, and legislative history of the governing statute (the AAPA),[4] as well as the agency defendants' interpretation of the AAPA as stated in the publicly filed Joint Reports,[5] and specifically rejected the very same statutory interpretation that Defendants now advance. Id. at 274-76, 286, 292-93. The court concluded instead that the nine-

[4] As Defendants have acknowledged, see Opp. at 8 n.2, the operative language of the AAPA and the RCIA is identical. Thus, Plaintiffs will generally cite only to the AAPA for purposes of this pleading.

[5] Defendants try to hide from their prior statements and denigrate the court's analysis in Nine Iraqi Allies by stating that this Court should not rely upon the Joint Reports as authority on agency policy. See Opp. at 11 n.3. But Defendants offer no support for this argument or for their assertion that only rules that have gone through notice-and-comment rulemaking would have been proper subjects for the court's consideration. See id. The law shows the opposite. The Supreme Court has held that agency interpretations that have not gone through notice-and-comment rulemaking nonetheless merit deference given the agency's specialized experience and "the value of uniformity in its administrative and judicial understandings of what the national law requires." United States v. Mead Corp., 533 U.S. 218, 228, 235 (2001) (holding that more informal interpretative choices of agencies may be due Skidmore deference according to, inter alia, the consistency and persuasiveness of the agency's position). Further, in their opposition, Defendants rely on the Joint Reports, the State Department's website, and a Congressional Research Service report, none of which are the result of notice-and-comment rulemaking and all of which consistently describe the SIV application process in the same manner to include all 14 steps of the process. See Opp. at 2-4, 11-12. Defendants cannot have it both ways.

month timeframe that informs the reasonableness analysis applies to all stages of the SIV application process, including the adjudication of an application for COM Approval. Id. at 293.

Subsequently, a different court in this District reaffirmed the conclusion in Nine Iraqi Allies that the SIV application process includes COM Approval, finding that documents related to the receipt or denial of COM Approval are exempted from disclosure under the Freedom of Information Act because they pertain to the issuance of a visa—a position advanced by the government in that case. See Airaj v. United States, No. CV 15-983 (ESH), 2016 WL 1698260, at *9 (D.D.C. Apr. 27, 2016) (noting that "[i]n every meaningful sense, COM approval was conceived, and is administered, as one stepping stone along the path to Special Immigrant Visa issuance," and that "it strains credulity to view COM approval as anything but pertain[ing] to the issuance of a Special Immigrant visa"), aff'd sub nom. Airaj v. U.S. Dep't of State, No. 16-5193, 2017 WL 2347794 (D.C. Cir. Mar. 30, 2017); Def.'s Mem. of Points and Auths. in Supp. of its Mot. for Summ. Judg. at 16-18, Airaj v. United States, No. CV 15-983 (ESH), ECF No. 17 (D.D.C. Jan. 8, 2016).

Simply put, the statutory interpretation adopted in Nine Iraqi Allies and Airaj is the interpretation most consistent with Congress's intent to speed up the SIV process and with the purpose of the nine-month requirement in the AAPA and RCIA. It would have made no sense for Congress to direct the final stages of the SIV process to take only nine months while allowing the agencies to delay the earlier stages of the process for years at a time, particularly when considered in light of Congress's intent in passing the 2013 Amendments.[6] Defendants

[6] "[W]e are watching the State Department drag its feet on visas for Afghans who have risked their lives, creating impossible burdens for them to establish whether or not they are actually at risk . . . We failed to establish a process that works for them. We have approved a trickle of the special immigrant visas, out of the almost 9,000 that were authorized. It's unnecessary, it's shameful, and it's harmful to long-term American

ignore the Nine Iraqi Allies and Airaj holdings and provide no reason for this Court to depart from this precedent.

Defendants' alternative statutory interpretation argument that class certification is improper because only "eligible aliens" could have a claim for unreasonable delay, and, as the Defendants' dismissal motion makes clear, an alien does not become "eligible" until after the visa is granted, Opp. at 16; Defs.' Mot. to Dismiss at 17-20, ECF 30 (***Mot. to Dismiss***),[7] is also fatally flawed. It not only flies in the face of the core holding of Nine Iraqi Allies that SIV applicants can bring unreasonable delay claims, but would render the nine-month statutory deadline illusory. A more sensible reading of the statute, that also comports with Nine Iraqi Allies and does not render the nine-month timeframe meaningless, is that an "eligible alien" means not those who are finally determined eligible for a visa, but those potentially eligible for the visa—which is all Afghans and Iraqis who have initiated the process by applying for COM Approval.

At an even more basic level, however, Defendants' argument is unfounded because any SIV applicant awaiting non-discretionary government action on their application can bring an unreasonable delay claim, as the court held in Nine Iraqi Allies. Regardless of what triggers the nine-month timeframe, Defendants have a mandatory, nondiscretionary duty to decide: (i) applications for COM Approval; (ii) appeals of the denial of COM Approval; and (iii) the ultimate issuance of an SIV. See AAPA § 602(b)(2)(D)(i) (COM approval),

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interests." 150 Cong. Rec. 162, 1 (2013), https://www.congress.gov/crec/2013/11/14/CREC-2013-11-14.pdf.

[7] Perhaps recognizing the circularity of their own argument, Defendants argue that an applicant becomes "an eligible alien" at the close of the visa interview, Opp. at 16—but nothing supports drawing the line at that point either, as some of the applicants who are interviewed will also be determined ineligible later after various security checks or administrative processing of their applications.

§ 602(b)(2)(D)(ii) (COM appeal), § 602(a) (SIVs generally); see also 22 C.F.R. 42.81 (SIVs generally); Nine Iraqi Allies, 168 F. Supp. 3d at 293 ("[T]he Government actually acknowledges that its duty to eventually reach a decision on pending SIV applications is nondiscretionary."). The APA imposes the additional duty on Defendants to complete these sequential adjudications within a "reasonable time." 5 U.S.C. § 555(b); Nine Iraqi Allies, 168 F. Supp. 3d at 293 ("[A]djudication of Plaintiffs' SIV applications within a reasonable time is non-discretionary.").

Ultimately, Defendants' quibbling over what triggers the nine-month timeframe and who is entitled to enforce it is irrelevant for certification purposes. The court in Nine Iraqi Allies has already found that the same agency Defendants owe all SIV applicants a non-discretionary duty to adjudicate SIV applications within a reasonable time (the baseline requirement that allows this Court to hear a claim of unreasonable delay), 168 F. Supp. 3d at 293-94, and to do so on a class basis.

B. Regardless of the Merits Issue of Whether the Nine-Month Timeframe Applies to the Entire SIV Process, Class Certification is Appropriate Here because Plaintiffs Satisfy the Requirements of Rule 23(a).

In any event, the Court need not resolve the Defendants' substantive arguments in deciding the class certification motion. Amgen Inc. v. Conn. Ret. Plans and Tr. Funds, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Conceding that Plaintiffs' Class is sufficiently numerous so as to necessitate class-wide adjudication, Defendants focus their certification attack on the commonality, typicality and adequacy requirements of Rule 23(a). As shown below, however, the Defendants fail to engage with either the arguments made or the authority cited by Plaintiffs, and so for reasons demonstrated in Plaintiffs' moving papers, the proposed Class should be certified. See Mot. at 12-20.

1. Plaintiffs Satisfy the Commonality Requirement of Rule 23(a).

The central contention underlying Plaintiffs' claims—that Defendants have unreasonably delayed processing putative Class members' SIV applications in light of their statutory obligations—is common to the Class, and capable of resolution through a common answer. See Mot. at 14-17. Defendants' argument that adjudicating claims of unreasonable delay necessarily requires individual inquiries making them unsuited for class adjudication, Opp. at 18-19, fails in light of extensive precedent in this District and elsewhere—which Defendants do not address at all—finding that questions presented in unreasonable delay actions brought under the APA and Mandamus Act are appropriate for class-wide resolution. See Mot. at 14-17 (citing Nio, 323 F.R.D. 28, 32 (D.D.C. 2017) (noting that legality of policies and practices causing delay would be a common issue and certifying class under Rule 23(b)(1) and 23(b)(2)); Kaplan v. Chertoff, No. 06-5304, 2008 WL 200108, at *7 (E.D. Penn. Jan. 24, 2008) (whether the FBI owed the plaintiffs a mandatory, nondiscretionary duty to conduct background checks was a common question capable of common resolution for a class of 50,000 noncitizens in an unreasonable delay action); Rosario v. USCIS, No. C15-0813JLR, 2017 WL 3034447, at *9-10 (W.D. Wash. July 18, 2017) (whether USCIS had unreasonably delayed the adjudication of applications for employment authorization was common question)).

Faced with this substantial body of case law supporting class certification in unreasonable delay cases, Defendants argue primarily that Plaintiffs' Class lacks commonality because the nine-month timeframe contained in the AAPA applies only to the last steps in the SIV process, whereas Plaintiffs' Class includes those who are at much earlier stages yet have already experienced delays of far more than nine months. See, e.g., Opp. at 16-18 ("[T]he proposed class lacks commonality because it broadly includes all Afghans and Iraqis who have not yet submitted a visa application but may or may not submit one sometime in the future.").

The fallacy of Defendants' position is shown by their own dismissal motion, in which Defendants argue that no SIV applicants can ever assert a claim of unreasonable delay. Mot. to Dismiss at 18-20. Whether Defendants are correct as a matter of law is surely a common question capable of being answered on a class-wide basis, which in itself is more than sufficient to satisfy the commonality requirement. See Coleman ex. Rel. Bunn v. District of Columbia, 306 F.R.D. 68, 82 (D.C. Cir. 2015) (citing Walmart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011)) (a single legal question would be sufficient to certify a class).

But, the statutory interpretation question Defendants raise is only one of many common questions applicable to all Class members and capable of being answered on a class-wide basis. Many of these questions have nothing to do with the nine-month statutory timeframe, but, as in Nio, Kaplan, and Rosario, are more than sufficient to satisfy the commonality requirement. Here, the Court will first need to determine whether (i) Plaintiffs have Article III standing, and (ii) whether the Class can bring a claim of unreasonable delay pursuant to the Administrative and Procedure Act (***APA***), 5 U.S.C. § 706(1) and/or the Mandamus Act, 28 U.S.C. § 1361. These threshold questions have nothing to do with the merits questions related to the nine-month timeframe argument on which Defendants overwhelmingly rely. And, as shown above, supra at 3-6, the Defendants' arguments on this score are in any event without merit and have already been rejected in this District. See Nine Iraqi Allies, 168 F. Supp. 3d at 295-96 (finding that SIV applicants at all stages of the SIV application process have standing to enforce the nine-month statutory deadline).

This is not all. Once this Court determines these threshold questions, it will need to consider the ultimate question: whether Defendants' failure to adjudicate Class members' SIV applications over a period measured not in weeks or months, but in years (a clear violation of the

nine-month timeframe), along with the extreme threat to the class members' safety caused by the delays, constitutes unreasonable delay that merits judicial intervention. See American Hosp. Ass'n, 812 F.3d 183, 189 (D.C. Cir. 2016) (holding that analysis of a claim of unreasonable delay is bifurcated into two inquiries: whether the court has the jurisdiction to intervene and whether there are "compelling equitable grounds" for intervention). This inquiry—common to the Class and capable of resolution by a common answer—is also sufficient to warrant certification. See, e.g., Nio, 323 F.R.D. at 32 n.2; Kaplan, 2008 WL 200108, at *7. Defendants' only retort—arguing that such questions are not appropriate for class resolution because they are governed by the D.C. Circuit's decision in Telecomm. Research & Action Ctr. v. Fed. Commc'n Comm'n, 750 F.2d 70 (D.C. Cir. 1984) (***TRAC***), see Opp. at 18-19—is yet another argument that is belied by decisions in this District and elsewhere. See, e.g., Nio, 323 F.R.D. at 32 n.2; Kaplan, 2008 WL 200108, at *7; Rosario, 2017 WL 3034447, at *9; see also Mot. at 14-15 (explaining why adjudication of the TRAC factors is appropriate on a class wide basis).

For example, in Nio (one of the cases Plaintiffs cite in their Motion that Defendants fail to address), the agency defendants argued that, "plaintiffs' unreasonable-delay claim under 5 U.S.C. § 706(1) involves fact-specific inquiries and class members may have naturalization applications pending for varying amounts of time." 323 F.R.D. at 32. The court rejected this argument and certified a class under both 23(b)(1) and 23(b)(2), stating that "[a]lthough class members' naturalization applications may have applications with varying times of delay that could influence the type of relief this Court could grant, courts routinely certify classes in unreasonable-delay cases." Id. at 32 n. 2 (collecting cases). Ignoring Nio, Defendants point to the individualized inquiry conducted by the court in Nine Iraqi Allies. Opp. at 19. That misdirection is unavailing because in Nine Iraqi Allies, the court was not adjudicating the

reasonableness of the defendants' delay, but rather was addressing the wholly inapposite question of whether particular plaintiffs' claims had been rendered moot because their SIV applications purportedly had been adjudicated. Nine Iraqi Allies, 168 F. Supp. 3d at 283-84.[8]

Defendants' remaining arguments—(i) that some or all of the putative Class members lack standing, including those who have not received COM Approval and those who have not yet been deemed "eligible" to receive a visa (Opp. at 15, 19-20), (ii) that the nine-month time period applies to only certain steps of the SIV application process (Opp. at 18-19), and (iii) that the reasons for the delays are different for each class member (Opp. at 19)—are each grounded in the merits of Defendants' ultimate position with respect to the viability of the relief Plaintiffs seek and do nothing to undermine the common nature of Plaintiffs' claims. As noted above, supra at 3-10, these arguments are wrong as a matter of law and have already been rejected in this District, and as explained below they do not undermine the argument for class treatment of Plaintiffs' claims.

First, as noted above, supra at 3-6, Defendants argue that Plaintiffs' claims are not capable of resolution by means of a common answer since some members of the putative Class lack standing because they are awaiting their COM Approval determination and/or have not yet submitted their standard visa applications, Opp. at 15, 18 n.8, 19, or because they are not "eligible" aliens. See Opp. at 16-17, 19. In so doing, the Defendants hardly address Nine Iraqi Allies, which expressly rejects the distinction the Defendants try to draw as a matter of law. 168

[8] Even if Defendants are correct that the Court may need to conduct an individualized analysis of whether a particular SIV applicant's application had been adjudicated—the analysis conducted in Nine Iraqi Allies—the need to adjudicate a narrow question concerning an individual's membership in the proposed Class does not defeat commonality any more so than the need to determine whether a putative class member in a securities class action owns the security at issue defeats certification in the context of a securities class action.

F. Supp. 3d at 292; see also, supra at 3-6. In any event, as explained above, supra at 6-7, this distinction is irrelevant at this stage as a class can be certified before the Court issues its interpretation of the statutory language. See, e.g., Nio, 323 F.R.D. at 32. Moreover, even if Nine Iraqi Allies were not fatal to the substance of the Defendants' argument—and it is—Defendants still could not defeat certification because at most Defendants' argument would require this Court to certify subclasses, including one for those class members who have submitted visa documents and one for those who have not (or, one for those who are "eligible" aliens, and one for those who are not). See McKinney v. U.S. Postal Serv., No. 11-cv-631 (RLW), 2013 WL 164283, at *8 n.10 (D.D.C. Jan. 16, 2013) (rewriting a class definition to avoid overbreadth); Spread Enters., Inc. v. First Data Merch. Servs. Corp., 298 F.R.D. 54, 70 (E.D.N.Y. 2014) (modifying subclass definitions sua sponte to create certifiable class definition).

Second, as explained above, supra at 3-6, Nine Iraqi Allies is also fatal to Defendants' next merits argument that, irrespective of standing, the statutory nine-month deadline applies only to some SIV applicants, but not to others. In Nine Iraqi Allies, the Court held that the nine-month timeframe codified in the AAPA "applies to each of the 14 steps in the SIV adjudication process…that are within Defendants' control, including 'administrative processing' and 'COM Approval.'" 168 F. Supp. 3d at 293; see also Airaj, 2016 WL 1698260, at *9 (COM Approval is "one stepping stone along the path to Special Immigrant Visa issuance"). This holding is consistent with the plain language of the AAPA. Thus, because this logical reading of the authorizing statutes directs that Defendants should complete the entire SIV adjudication process within nine months, the question of whether Defendants have taken an unreasonable amount of time to adjudicate Class members' SIV applications is capable of common adjudication and being resolved by a common answer. See Thorpe v. District of

Columbia, 303 F.R.D. 120, 145–47 (D.D.C. 2014) (indicating that a challenge to a systemic practice will generate a common answer for the entire class).

Finally, third, Defendants also argue that the Class should not be certified by vaguely referencing the national security exception provided by the AAPA, which allows Defendants additional time to process certain applications that present a national security risk. Opp. at 20. Defendants, however, have not alleged that any of the putative Class members have been designated as high risk, and have not put forth any evidence to support such a contention. In any event, this Court should reject Defendants' argument that the need to consider whether the delay with respect to certain individual putative class members is reasonable in light of the national security exception bars class-wide relief for all applicants, including those whose applications will not involve such individualized issues. To hold otherwise would allow the tail to wag the dog, and the exception to swallow the rule. See Mitchell v. Fed. Bureau of Prisons, 587 F.3d 415, 422 (D.C. Cir. 2009) (denying claim given "need to ensure that [a given] exception [does not] swallow the rule" (internal quotations omitted)). Finally, in what is by now a familiar refrain, the Defendants' argument has in any event already been rejected in this District, and should not be countenanced now. See Nine Iraqi Allies, 168 F. Supp. 3d at 295 (rejecting the defendants' argument that an exception to the nine-month timeframe for cases presenting national security concerns applies to all SIV applications).[9]

[9] As with Defendants' other arguments, in the event the Court determines that Defendants are correct and those applicants who are high-risk cases posing a national security concern are not similarly situated to the Class, the appropriate remedy is to create subclasses rather than deny certification. See McKinney, 2013 WL 164283, *8 n.10; see also Spread Enters., Inc., 298 F.R.D. at 70 (removing problematic section of proposed class definition and certifying class).

2. Plaintiffs Satisfy the Typicality Requirement of Rule 23(a).

Defendants offer no reason why the Class fails to meet the typicality requirement, see Opp. at 21, as shown in Plaintiffs' opening papers. See Mot. at 17-19. Instead, Defendants refer vaguely to individualized determinations they deem necessary to adjudicate the merits of Plaintiffs' unreasonable delay claims. See Opp. at 21. Once again, this argument misses the point. All Plaintiffs are asking is that Defendants be ordered to promptly process all putative Class members' SIV applications, which have already been pending in Defendants' control for far longer than the statutory timeframe permits. Merill v. S. Methodist Univ, the only case to which Defendants point, does not require anything different. 806 F.2d 600 (5th Cir. 1986). In Merill, the plaintiffs sought to certify a class of people claiming discrimination under Title VII in the denial of tenure, and the district court had refused to do so because the evidence to prove and rebut discrimination would necessarily differ from one denial to the next. Id. at 608. Here, by contrast, Plaintiffs are simply asking the Court to certify a class of SIV applicants who allege that Defendants have taken an unreasonable amount of time to process their applications in light of a clear congressional timeframe for that adjudication and who seek to compel Defendants to adjudicate the application—as they are statutorily required to do—more quickly. Accordingly, Plaintiffs have satisfied the typicality requirement.

3. Plaintiffs Satisfy the Adequacy Requirement of Rule 23(a).

Defendants' challenge to the adequacy of the putative Class representatives is equally meritless. Defendants' argument that the putative Class representatives will inadequately represent the Class simply because their SIV applications are pending at different steps of the fourteen-step SIV application process, Opp. at 22-23, is of no moment. Each putative Class representative has an identical interest to the Class: ensuring that Defendants adjudicate putative Class members' applications in compliance with congressionally-imposed deadlines and appoint

an SIV coordinator to oversee the process. Defendants fail to identify an actual conflict between an applicant who is at an earlier stage of the process and one who is near the end, and a hypothetical conflict will not defeat certification. See Nat'l Veterans Legal Servs. Program v. United States, 235 F. Supp. 3d 32, 42-43 (D.D.C. 2017) (dismissing the "sheer speculation" that differences in eligibility for fee discounts among class members and class representatives created a conflict).[10]

C. Plaintiffs Satisfy the Requirements of Rule 23(b)(2).

Defendants' arguments that the injunctive relief Plaintiffs seek would be "unrealistic" and "unworkable," Opp. at 23-24, distorts the putative Class's desired relief. To be clear, Plaintiffs do not seek an order requiring that each member of the Class be granted relief in the form of a positive visa determination. Rather, Plaintiffs simply seek an order requiring Defendants to (i) make decisions on their applications without further delay and (ii) appoint an SIV coordinator, as they are required to do. If granted, this relief will, in fact, apply to the entire Class. This relief can be granted through an injunction and on a class-wide basis, as envisioned by Fed. R. Civ. P. 23(b)(2). See Nio, 323 F.R.D. at 34. Indeed, this is the paradigmatic case for class certification. See Parsons v. Ryan, 289 F.R.D. 513, 520 (D. Ariz. 2013), aff'd, 754 F.3d 657 (9th Cir. 2014) (certifying class "because injunctive relief for some . . . would necessarily result in injunctive relief for all").

Moreover, not only are Plaintiffs' claims capable of class-wide relief, but this Circuit's precedent counsels in favor of class-wide relief so as to avoid unfairly prioritizing the claims of speedy litigants simply because they reached the courthouse first. See American

[10] To the extent that this Court finds these differences relevant, the appropriate remedy is to create subclasses rather than failing to certify the class as a whole. See McKinney, 2013 WL 164283, *8 n.10. The named Plaintiffs, whose applications are at various stages of the application process, would satisfy the requirements to represent any such subclass.

Hospital Ass'n, 812 F.3d at 192 (holding that plaintiffs could only challenge delays as a whole rather than individually to avoid "solving their delay problem at the expense of others similarly situated"). The mere fact that one Class member's application may have been delayed three years while another was delayed only two years does not negate the appropriateness of the class action mechanism. See Kaplan, 2008 WL 200108, at *7 (stating that the length of delay may influence the strength of an individual's claim without negating commonality). Accordingly, certification pursuant to Fed. R. Civ. P. 23(b)(2) is appropriate.

D. The Class is Properly Defined using Objective Criteria, and is also Ascertainable.

Unable to effectively attack the definition Plaintiffs have put forth, Defendants seek to redefine the purported class by reference to a subjective "reasonableness" definition pulled out of thin air, and then argue that this imaginary definition should be rejected because it creates a "fail-safe" class. Opp. at 25-26. This gambit fails.

Contrary to Defendants' reinterpretation, Plaintiffs define their class using clear, simple, and objective criteria: (i) whether the person has submitted an application for COM Approval to initiate the SIV application process and (ii) whether the government has been in control of the person's SIV application for longer than nine months. See Moore's Federal Practice § 23.21[3] ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria."); see also Mot. Exs. C-D (January 2018 Joint Reports), ECF 3, (defining government-controlled steps). This is an eminently confirmable definition of a class. Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539 (6th Cir. 2012) (class defined by "classic categories of objective criteria" when inclusion in class depended on location of insured property, tax rates in that geographic area, and taxes charged).

Even the out-of-circuit case law on which Defendants rely in making their fail-safe argument shows that Plaintiffs' objective definition is confirmable. See Opp. at 25 (citing McCaster v. Darden Rests., Inc., 845 F.3d 794, 799 (7th Cir. 2017) (rejecting class defined as those "who did not receive all earned vacation pay benefits" rather than using objective criteria); Spread Enters., Inc., 298 F.R.D. at 69 (rejecting class defined as those who "were charged excessive fees" rather than using objective criteria)). Unlike the authorities on which Defendants rely, there is no need for a case-by-case merits trial to determine if a particular person is in the proposed Class. Rather, one must simply count the number of months the person's application was pending in each of the government-controlled steps.[11] Those that have been in government-controlled steps for longer than nine months are in the Class; those that have not are not.[12]

Finally, Defendants' argument that the Class is not acertainable must be rejected. Defendants claim that because the Court and Plaintiffs cannot figure out which applicants have been designated national security risks and thus would be excluded from the Class under an exception to the AAPA and RCIA, see Opp. at 24-25, the Class is unascertainable. This is simply untrue. Courts routinely certify classes where, as here, the information needed to ascertain the class is exclusively within the control of the defendants. See Hardy v. District of Columbia, 283 F.R.D. 20, 26 (D.D.C. 2012) (certifying class where defendant maintained

[11] Defendants seem to suggest that, contrary to what they report in the Joint Reports, not all steps that make up the "Total Government Processing Time" are within the government's control. See Opp. at 25. Beyond Defendants' repeated admissions to the contrary in the Joint Reports, this also contradicts the plain language of the AAPA, §§ 602(4)(A), which speaks of government-controlled "steps" rather than government-controlled "days" or "time," and the court's holding in Nine Iraqi Allies, 168 F. Supp. 3d at 293, and should be rejected.

[12] To the extent that the Court finds that the Class is a fail-safe class—which Plaintiffs assert it is not—the appropriate remedy is for the Court to modify the class definition rather than to refuse to certify the whole class. See Spread Enters., Inc., 298 F.R.D. at 70 (court modified subclass definitions sua sponte to remove offending language, certifying class and subclasses).

databases through which "it [was] possible to ascertain putative class members"); In re Newbridge Networks Secs. Litig., 926 F. Supp. 1163, 1176 (D.D.C. 1996) (certifying class where class members "can only be ascertained from books and records maintained by [defendants]"). Further, Defendants concede that they are able to ascertain the class, see Opp. at 25, and cannot withhold the information they exclusively control in order to prevent Plaintiffs from ascertaining their Class while simultaneously claiming the Class is unascertainable. See Hardy, 283 F.R.D. at 26; see also Young, 693 F.3d at 539 ("[S]ubclasses can be discerned with reasonable accuracy using Defendants' electronic records and available geocoding software.").

CONCLUSION

For the foregoing reasons, Plaintiffs have met the prerequisites in Rule 23(a) and the criteria for Rule 23(b)(2). Accordingly, Plaintiffs respectfully request that the Court certify this action as a Rule 23(b)(2) class action, appoint Allies as Class representatives, and appoint Freshfields and IRAP as Class Counsel.

Dated: New York, NY
August 16, 2018

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