**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

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| Bianey GARCIA PEREZ, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. CITIZENSHIP AND IMMIGRATION SERVICES, et al.,<br><br>Defendants. | Case No. 2:22-cv-806<br><br>**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**<br><br>Noted on Motion Calendar:<br>July 1, 2022<br><br>ORAL ARGUMENT REQUESTED |



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## I. INTRODUCTION

Plaintiffs and proposed class members (hereinafter "Plaintiffs") are eligible to obtain employment authorization based on their long-pending asylum applications. However, Defendants U.S. Citizenship and Immigration Services' (USCIS) and Executive Office for Immigration Review's (EOIR) policies and practices unlawfully prevent them from receiving this critical benefit. Under the Immigration and Nationality Act (INA), USCIS and EOIR have 180 days to adjudicate asylum applications, but in the vast majority of cases, Defendants fail to comply with that deadline. Accordingly, the INA and federal regulations authorize asylum applicants who have been forced to wait more than 180 days for Defendants to adjudicate their asylum application to obtain an employment authorization document (EAD). However, Defendants' policies and practices unlawfully prevent Plaintiffs acquiring the requisite 180 days. Specifically, Plaintiffs challenge Defendants' failure to provide notice of and a meaningful opportunity to contest Defendants' 180-day determinations as well as three policies and practices for calculating the time period—hereinafter called the "asylum EAD clock." Without an EAD, Plaintiffs are left in dire financial straits, without any means of supporting themselves or their families.

The questions presented in this case—whether these policies and practices regarding the asylum EAD clock violate the Administrative Procedure Act, the INA, implementing regulations, and the U.S. Constitution—can and should be resolved on a class-wide basis. The proposed class and subclasses satisfy the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(2). Plaintiffs thus request that the Court certify the following class and appoint them as class representatives:

> All noncitizens in the United States who have been or will be placed in removal proceedings; who filed or will file with Defendants a complete I-589 (Application



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> for Asylum and Withholding of Removal); who would be eligible for employment authorization under 8 C.F.R. 274a.12(c)(8) but for the fact that the asylum EAD clock was stopped or not started prior to 180 days; and whose asylum EAD clock determinations have been or will be made without written notice or a meaningful opportunity to contest such determinations.

Plaintiffs further request that the Court certify the following subclasses:

> *Remand Subclass*: Asylum and/or withholding of removal applicants whose asylum EAD clocks were or will be stopped following a decision by an immigration judge and whose asylum EAD clocks are not or will not be started or restarted following an appeal in which either the BIA or a federal court of appeals remands their case resulting in further adjudication of their asylum and/or withholding of removal claims.
>
> *Unaccompanied Children Subclass*: Asylum applicants in removal proceedings who are deemed unaccompanied children pursuant to 6 U.S.C. 279(g) and whose asylum EAD clocks are not started or will be stopped while waiting for USCIS to initially adjudicate the filed asylum application.
>
> *Change of Venue Subclass*: Asylum and/or withholding of removal applicants in removal proceedings who have changed residence or will change residence within the United States after having filed asylum and/or withholding of removal applications with the immigration court, whose proceedings have been or will be transferred to a different immigration court with jurisdiction over their new place of residence, and, as a consequence, for whom EOIR has stopped or will stop the asylum EAD clock based solely on the change of venue.

All named Plaintiffs move to be appointed as representatives of the class. Additionally, Plaintiffs Garcia Perez and Martinez Castro move to be appointed as representatives of the Remand Subclass. Plaintiff J.M.Z. moves to be appointed as representative of the Unaccompanied Children Subclass. Plaintiff Martinez Hernandez moves to be appointed as representative of the Change of Venue Subclass.

On behalf of themselves and proposed class members, Plaintiffs seek an order from this Court certifying the class and subclasses, appointing Plaintiffs as representatives of the class and the respective subclasses, and appointing Plaintiffs' counsel as class counsel.



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## II. BACKGROUND

### A. Plaintiffs' Legal Claims

Adjudicating a motion for class certification does not call for "an in-depth examination of the underlying merits," but a court may analyze the merits to the extent necessary to determine the propriety of class certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–52 (2011). Plaintiffs thus briefly summarize their claims below.

1. Asylum Applications and Applications for Employment Authorization

Any noncitizen in the United States or seeking admission at a port of entry may apply for asylum or withholding of removal. 8 U.S.C. §§ 1158(a)(1), 1231(b)(3)(A). Absent exceptional circumstances, an asylum application must be adjudicated within 180 days after it is filed. 8 U.S.C. § 1158(d)(5)(A)(iii).

Pursuant to regulation, an asylum applicant whose application is not adjudicated within 180 days of filing (not including periods of applicant-caused delay) may be provided employment authorization. 8 C.F.R. § 208.7(a)(1).[1] Where an asylum applicant is eligible for employment authorization, USCIS has no discretion to deny an EAD application. *See* 8 C.F.R. § 274a.13(a)(1)–(2).[2]

In determining whether 180 days have passed for purposes of asylum EAD clock determinations, the time begins to accrue on the date an applicant files a complete asylum

[1] The previous version of this rule is in effect. *Asylumworks v. Mayorkas*, No. 20-CV-3815 (BAH), --- F. Supp. ---, 2022 WL 355213 (D.D.C. Feb. 7, 2022) (vacating Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020)). DHS has not appealed this ruling. *See* Compl. ¶¶ 7–8 & p. 8 n.2.

[2] As with § 208.7, a previous version of this rule is in effect. *Asylumworks*, 2022 WL 355213.



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application. 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1),[3] 208.3, 208.4, 1208.3, 1208.4. The asylum EAD clock continues to run except for any period of "delay requested or caused by the applicant," 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2), or unless the asylum application is denied before the EAD application is adjudicated, 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1). For individuals in removal proceedings, asylum EAD clock stoppages occur where immigration judges (IJs) or EOIR staff apply certain earmarked adjournment codes to a case with a pending asylum application. *See* Maltese Decl. Ex. I, EOIR Policy Manual, App'x O – Adjournment Codes (last updated May. 18, 2022). For individuals in removal proceedings, USCIS relies upon EOIR's assessment to determine whether to deny an EAD application on the basis of the asylum EAD clock. *See* Maltese Decl. Ex. F, EOIR & USCIS, The 180-Day Asylum EAD Clock Notice (May 9, 2017); *see also* Maltese Decl. Ex. G, USCIS, Applicant-Caused Delays in Adjudication of the "Form I-589, Application for Asylum and Withholding of Removal" and Impact on Employment Authorization (Aug. 25, 2020).

2. Defendants' Policies and Practices Challenged by Plaintiffs

Plaintiffs challenge four policies and practices with respect to the asylum EAD clock:

*Notice and Opportunity to Challenge*. Defendants have a policy and practice of failing to provide notice of or adequate opportunity to contest asylum EAD clock determinations, although these calculations often are the basis of USCIS's denial of EAD applications. IJs are not required to inform asylum applicants when they have utilized an adjournment code that will stop the asylum EAD clock, and, absent specific inquiries, neither EOIR nor USCIS informs asylum applicants of the reason that the asylum EAD clock has stopped or not restarted, or that EOIR's

[3] The previous version of this rule is in effect. *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021).



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assessment of the asylum EAD clock is controlling for purposes of USCIS's EAD adjudication. Nor do EOIR or USCIS provide Plaintiffs with a meaningful opportunity to contest errors in asylum EAD clock determinations. Regulations prohibit appeals of EAD application denials. *See* 8 C.F.R. § 274a.13(c). Defendant EOIR prohibits IJs from issuing orders regarding the asylum EAD clock. Maltese Decl. Ex. H, Mem. from James R. McHenry III, Director, to EOIR, PM 21-06, at 5–6 n.15 (Dec. 4, 2020). USCIS declines to correct the asylum EAD clock despite its responsibility for adjudicating EAD applications. Maltese Decl. Ex. G, USCIS, Applicant-Caused Delays in Adjudication of the "Form I-589, Application for Asylum and Withholding of Removal" and Impact on Employment Authorization, at 2 (Aug. 25, 2020). Thus, any requests for correction must be made to the relevant EOIR court administrator or the BIA outside of the record and on an ad hoc basis. Defendants' uniform policy of failing to provide Plaintiffs with notice of or meaningful opportunity to contest asylum EAD clock determinations violates Plaintiffs' rights under the Due Process Clause of the Fifth Amendment, the APA, and governing regulations.

*Remand Policy and Practice*. Defendants have a policy and practice of stopping the asylum EAD clock where an asylum application is denied before the EAD application is adjudicated. 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1). Subclass members have prevailed or will prevail in appeals before the BIA or a federal court, resulting in remand. However, it is Defendants' policy and practice *not* to restart the asylum EAD clock following such remands; instead, they deem the asylum EAD clock permanently stopped when an asylum application is denied initially, even if the agency's decision is subsequently vacated. This uniform policy unlawfully prevents these subclass members from obtaining employment authorization and violates the INA and the asylum EAD regulations.



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*Unaccompanied Children Policy and Practice*. Congress mandated that unaccompanied children receive special protections in removal proceedings, including that USCIS adjudicate their asylum applications in the first instance. 8 U.S.C. § 1158(b)(3)(C). Thus, IJs must adjourn or administratively close removal proceedings for unaccompanied children and transfer their asylum applications to USCIS for initial adjudication. Critically, this type of adjournment is based on a statutory mandate, not a choice by the individual child asylum applicant. Nevertheless, EOIR applies an adjournment code that stops the asylum EAD clock. *See, e.g.*, Maltese Decl. Ex. I, EOIR Policy Manual, App'x O – Adjournment Codes ("*7A . . . Adjourned to allow the adjudication of an application pending with DHS."). This policy and practice unlawfully prevents these subclass members from obtaining employment authorization and violates the INA and the asylum EAD regulations.

*Change of Venue Practice*. Defendants have a practice of stopping the asylum EAD clock where an asylum applicant in removal proceedings files a change of venue motion to place the case with the immigration court with jurisdiction over their place of current residence, including after the individual is released from detention. Similarly, Defendants have a practice of stopping the asylum EAD clock for asylum applicants who were originally placed in the Migrant Protection Protocols (MPP), a program that forces noncitizens who seek to apply for asylum to remain in Mexico while awaiting an immigration court hearing at a court located on the United States' side of the U.S.-Mexico border. Yet many of these noncitizens subsequently enter the country and move to change the venue to the court with jurisdiction over their new place of residence. Although it is standard practice to transfer venue after an asylum applicant in removal proceedings changes their residence, EOIR has a practice of regularly stopping the asylum EAD clock in these circumstances. The agency does so even though this practice is in tension with the



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agency's own adjournment codes, *see* Maltese Decl. Ex. I, EOIR Policy Manual, App'x O – Adjournment Codes ("1B . . . Adjourned because the case was transferred to a non-detained docket."), and even though such changes of venue are often necessary for the case to proceed, *see, e.g.*, Maltese Decl. Ex. M, Mem. From Mary Beth Keller to All Immigration Judges, et al., PM 18-01 (Jan. 17, 2018) (recognizing that motions for change of venue are generally necessary to move a case from a detained to a non-detained court). This practice unlawfully prevents these subclass members from obtaining employment authorization and violates the INA and the asylum EAD regulations.

**B. Named Plaintiffs' Factual Backgrounds**

1. Plaintiff Bianey Garcia Perez

Plaintiff Bianey Garcia Perez is a class member of the Remand Subclass. She is a noncitizen from Mexico who applied for asylum on April 5, 2018. Garcia Perez Decl. ¶¶ 2, 4. Ms. Garcia Perez and her three daughters initially sought admission to the United States on November 15, 2017, and DHS placed the family in removal proceedings three days later, on November 18. *Id.* ¶ 3. At an April 5, 2018, master calendar hearing (MCH) before the Seattle Immigration Court, Ms. Garcia Perez filed her application for asylum and chose a non-expedited date for her individual calendar hearing (ICH). *Id.* ¶ 4. Because she chose a non-expedited date, her asylum EAD clock did not start. *Id.*

On December 19, 2018, Ms. Garcia Perez had her ICH, where the IJ denied Ms. Garcia Perez's asylum application and ordered her removed. *Id.* ¶ 5. Ms. Garcia Perez filed a notice of appeal with the BIA, and over two years later, on April 19, 2021, the BIA denied the appeal. *Id.* ¶ 6. Following that denial, on May 17, 2021, Ms. Garcia Perez filed a petition for review with the



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Ninth Circuit Court of Appeals. *Id.* ¶ 7. The Court remanded Ms. Garcia Perez's case on January 3, 2022, vacating the agency decision denying her asylum and withholding application. *Id.*

However, following the remand, EOIR did not start Ms. Garcia Perez's asylum EAD clock. *Id.* ¶ 12. To this day, the clock remains stopped at zero days. *Id.* As a result, and due solely to Defendants' Remand Policy and Practice, Ms. Garcia Perez cannot accrue time towards EAD eligibility. But for that policy, Ms. Garcia Perez would be eligible for an EAD.

2. Plaintiff Maria Martinez Castro

Plaintiff Maria Martinez Castro is a member of the Remand Subclass. She is a noncitizen from Honduras who first applied for asylum on April 19, 2019. Martinez Decl. ¶¶ 2, 3. Ms. Martinez's asylum clock began to run over two months later, on July 30, 2019, at her Individual Calendar Hearing (ICH). *Id.* ¶ 4. The clock did not start until this date because Ms. Martinez had not accepted the earliest possible date for her ICH. *Id.*

On August 9, 2019, the IJ issued a decision denying Ms. Martinez's asylum application. *Id.* Her asylum EAD clock, then at 9 days, stopped that same day because of the IJ's decision. *Id.* ¶ 8. She filed a Notice of Appeal to the BIA, which dismissed Ms. Martinez's appeal on January 17, 2020. *Id.* ¶ 4. Ms. Martinez subsequently filed a petition for review with the Ninth Circuit Court of Appeals. *Id.* On July 14, 2021, the Ninth Circuit granted the petition for review and vacated the agency decision ordering Ms. Martinez removed. *Id.* The Court of Appeals remanded the case to the BIA for further consideration of Ms. Martinez's asylum application. *Id.*

However, despite vacating the agency decision and remanding for further consideration of Ms. Martinez's asylum application, EOIR and USCIS did not restart the asylum EAD clock. *Id.* ¶ 8. The clock remains stopped at 9 days to this day. *Id.* As a result, Defendants consider Ms. Martinez ineligible for an EAD. *Id.* ¶¶ 5–8.



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3. Plaintiff J.M.Z.

Plaintiff J.M.Z. is a member of the UC Subclass. She is a minor and a noncitizen from Honduras who applied for asylum on April 23, 2018. Dobrin Decl. ¶¶ 3–4. J.M.Z. was designated as an unaccompanied child when she entered the United States. *Id.* ¶ 4. She was placed in removal proceedings, but because of her designation as an unaccompanied child, federal law requires USCIS to initially adjudicate her asylum application. *Id.* For this reason, J.M.Z.'s attorney filed her asylum application with USCIS's San Francisco asylum office, *id.*, and a courtesy copy with EOIR. *Id.* ¶ 5.

Because the application was pending with USCIS, EOIR stopped or never started J.M.Z.'s asylum EAD clock, instead entering an adjournment code that classified the pending asylum application as applicant-caused delay, even though federal law requires USCIS to first adjudicate the asylum application. *Id.* ¶ 7. Still, J.M.Z. filed an application for an EAD on December 18, 2018, over 180 days past the date that J.M.Z. submitted her application for asylum. *Id.* ¶ 6. Yet on January 28, 2019, USCIS denied the EAD application, stating that J.M.Z. had not accrued the 180 days necessary to apply for an EAD. *Id.* ¶ 7. J.M.Z.'s attorney subsequently filed a request for reconsideration, explaining that J.M.Z.'s application had been pending 180 days and that there was no applicant-caused delay associated with her application. *Id.* ¶ 8. USCIS never responded to that request. *Id.* J.M.Z. filed a new EAD application in June 2021, but that application remains pending and subject to the same unlawful policy that barred J.M.Z. from receiving an EAD in the first place. *Id.* ¶¶ 9-10. Thus, but for Defendants' practice regarding UCs seeking asylum in removal proceedings, J.M.Z. would be eligible for an EAD.



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4. Plaintiff Alexander Martinez Hernandez

Plaintiff Alexander Martinez Hernandez is a member of the Change of Venue Subclass and a noncitizen from El Salvador. Martinez Hernandez Decl. ¶ 2. Mr. Martinez applied for asylum while detained at Winn Correctional Center in Winnfield, Louisiana. *Id.* ¶ 3. He submitted his application to the Oakdale, Louisiana Immigration Court on August 16, 2021, and his asylum EAD clock began to run that same day or shortly thereafter. *Id.* ¶¶ 3, 9.

Mr. Martinez was scheduled to have an ICH in his case on December 6, 2021. *Id.* ¶ 4. However, on December 2, 2021, he was released from detention. *Id.* As a result of that release, Mr. Martinez's ICH was cancelled. *Id.* He and DHS then filed a joint motion to change venue of his immigration case from the Oakdale, Louisiana Immigration Court to the San Francisco, California Immigration Court, near where Mr. Martinez began to reside after his release. *Id.* ¶ 5.

EOIR stopped Mr. Martinez's EAD clock due to the change of venue motion and his clock remains frozen at 148 days. *Id.* ¶ 9. While Mr. Martinez was scheduled to attend an MCH in March 2022—which would have restarted his clock—EOIR cancelled that hearing and did not restart Mr. Martinez's asylum EAD clock. *Id.* ¶ 10. Mr. Martinez is now scheduled to attend an MCH in September 2022. *Id.* As a result, but for Defendants' Change of Venue Policy and Practice, Mr. Martinez would be eligible for an EAD.

## III. THE COURT SHOULD CERTIFY THE CLASSES.

Plaintiffs seek certification of the proposed class and subclasses to challenge Defendants' policies and practices regarding the asylum EAD clock that prevent Plaintiffs from obtaining work authorization while their asylum applications are pending. Under Federal Rule of Civil Procedure 23, class certification is warranted where two conditions are met:

> The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into



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> one of the three categories described in subdivision (b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.

*Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (internal citation omitted). Plaintiffs' proposed classes satisfy Federal Rule of Civil Procedure 23(a) and (b)(2). Courts in the Ninth Circuit routinely certify classes challenging the adequacy of policies and procedures under the immigration laws. *See, e.g.*, *A.B.T. v. USCIS*, No. C11-2108-RAJ, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving a settlement amending practices by EOIR and USCIS that precluded asylum applicants from receiving employment authorization); *Rosario v. USCIS*, No. C15-0813JLR, 2017 WL 3034447 (W.D. Wash. July 18, 2017) (granting nationwide certification to class of initial asylum applicants challenging the government's adjudication of employment authorization applications); *Wagafe v. Trump*, C17-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017) (certifying two nationwide classes of immigrants challenging legality of a program applied to certain immigration benefits applications); *Rojas v. Johnson*, C16- 1024RSM, 2017 WL 1397749 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures); *Santillan v. Ashcroft*, No. C 04–2686 MHP, 2004 WL 2297990 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Ali v. Ashcroft*, 213 F.R.D. 390 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Walters v. Reno*, No. C94-1204C, 1996 WL 897662 (W.D. Wash. Mar. 13, 1996), *aff'd*, 145 F.3d 1032 (9th Cir. 1998), *cert. denied, Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of noncitizens challenging adequacy of notice



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in document fraud cases).

In reviewing whether to certify a nationwide class, courts consider whether (1) there are similar cases currently pending in other jurisdictions, and (2) the plaintiffs are challenging a nationwide policy or practice. *See, e.g.*, *Arnott v. USCIS*, 290 F.R.D. 579, 589 (C.D. Cal. 2012); *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011). There are no other similar cases currently pending in other jurisdictions. Nationwide classes challenging immigration policies and practices are regularly certified given that immigration policy is based on uniform, federal law, as in this case. Certification that is not nationwide in scope could result in Defendants applying a patchwork asylum EAD clock policy that would result in unlawful procedures being applied to affected noncitizens simply by virtue of their location—an arbitrary and unjust result. *See Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (finding certification of a nationwide class particularly fitting because "anything less" would "allow[ ] the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in").

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

A class "may be divided into subclasses that are each treated as a class." Fed. R. Civ. P. 23(c)(5). Each subclass "must independently meet the requirements of Rule 23." *Buus v. WAMU Pension Plan*, 251 F.R.D. 578, 581 (W.D. Wash. 2008) (citing Rule 23(c)(5) and *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981)). Here, the class and the subclasses meet the requirements of Rule 23.

1. <u>The Proposed Class and Subclass Members Are So Numerous That Joinder Is Impracticable.</u>

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or



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inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (citation omitted). "Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such situation . . . ." William B. Rubenstein, 1 *Newberg on Class Actions* § 3:11 (5th ed. 2018) (internal footnote omitted). "Thus, Rule 23(a)(1) is an impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due process, judicial economy, and the ability of claimants to institute suits." *Id.* (internal footnote omitted). Determining numerosity therefore "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980); *see also Perez-Funez v. Dist. Dir., INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) (noting that "no fixed number of class members" is required).

Courts generally find this requirement is satisfied even when relatively few class members are involved. *See, e.g.*, *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) ("There is no magic number for determining when too many parties make joinder impracticable. Courts have certified classes with as few as thirteen members, and have denied certification of classes with over three hundred members."); *McCluskey v. Trs. Of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673–76 (W.D. Wash. 2010) (certifying class with 27 known members); *Rivera v. Holder*, 307 F.R.D. 539, 550 (W.D. Wash. 2015) (certifying class where it was "highly plausible" that there were more than 40 class members); *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 605–06 (N.D. Cal. 2014) (noting that courts routinely find numerosity "when the class comprises 40 or more members"); *see also Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (affirming decision not to decertify a class with 20 members).[4]

[4] *See also Arkansas Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971)



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Here, the proposed class and subclasses are numerous. Plaintiffs do not know the precise size of the proposed class and subclasses but allege that there are thousands of putative class members. Defendant USCIS's data shows that, in FY2021, more than 212,610 noncitizens applied for initial EADs based on the category for individuals with pending asylum applications, and that 38,873 of those applications were denied. *See* Maltese Decl. Ex. P, Form I-765, Application for Employment Authorization, Eligibility Category and Filing Type FY 2021 (Dec. 15, 2021). Defendants alone possess records identifying how many of those applications were initially denied based on the asylum EAD clock and the bases on which the asylum EAD clock was stopped, not started, or not restarted in those cases. *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (noting that the government is "uniquely positioned to ascertain class membership"). Moreover, many other class members simply decline to file EAD applications, knowing that doing so is futile because of Defendants' policies. Supporting declarations filed by immigration attorneys from across the country have identified 42 members of the proposed class and subclasses. *See* Declarations of Lisa Koop (identifying at least 6 members of the Remand Subclass and 3 members of the Change of Venue Subclass), Ashley Hamill (at least 10 members of the Change of Venue Subclass), Whitney Drake (at least 5 members of the Change of Venue Subclass), Elizabeth Badger (at least 2 members of the Remand Subclass, 2 members of the Change of Venue Subclass, and 2 additional Class members), Christina Gai (4 members of the Change of Venue Subclass), Marin Tollefson Almeida (3 members of the Change of Venue Subclass), Matthew Lamberti (1 member of the Remand Subclass), Katherine Franco (1 member

(finding 17 class members sufficient); *Jones v. Diamond*, 519 F.2d 1090, 1100 n.18 (5th Cir. 1975) (class membership of 48); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (41–46 class members); *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (upholding class of 18).



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of the Remand Subclass), Amy Joseph (1 member of the Remand Subclass), Kathryn Miller (1 member of Change of Venue Subclass), and Kathleen Dolan (1 member of the UC Subclass). These numbers do not include the named Plaintiffs.

Moreover, three additional reasons establish that the proposed class and subclasses in this case satisfy the numerosity requirement. First, joinder is impracticable because of the existence of unnamed, unknown future class members who will be subjected to Defendants' unlawful asylum EAD clock policies and practices. *See Ali*, 213 F.R.D. at 408–09 ("[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met, regardless of class size." (citation omitted)); *Rivera*, 307 F.R.D. at 550 (finding joinder impractical due, in part, to "the inclusion of future class members"); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) (same). Here, joinder is impracticable as the proposed class includes applicants whose asylum EAD clock determinations "have been *or will be* made without legally sufficient notice or a meaningful opportunity to contest" the determination. Importantly, each subclass includes individuals whose asylum EAD clocks are or *will be* stopped, not started, or not restarted improperly.

Second, several other factors render joinder impracticable, including judicial economy, geographic dispersion of class members, financial resources of class members, and the ability of class members to bring individual suits. *See* Rubenstein, *supra*, § 3:12; *see also, e.g.*, *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1327 (W.D. Wash. 2015) (finding joinder impracticable where proposed class members were, inter alia, "spread across the state" and "low-income Medicaid recipients"). Here, members of the proposed class and subclasses are dispersed nationwide, and, by definition, are unable to obtain work authorization. As a result, they lack a stable source of income, rendering it practically impossible for them to afford the costs associated with litigation.



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*See* Garcia Perez Decl. ¶¶ 14–15; Martinez Castro Decl. ¶ 9.

Finally, since Plaintiffs seek injunctive and declaratory relief, the numerosity "requirement is relaxed and plaintiffs may rely on . . . reasonable inference[s] arising from plaintiffs' other evidence that the number of unknown and future members . . . is sufficient to make joinder impracticable." *Arnott*, 290 F.R.D. at 586 (quoting *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004)). Moreover, "where the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1)." *Stewart v. Assocs Consumer Disc. Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998).

While Defendants are "uniquely positioned to ascertain" the precise number of proposed class and subclass members, Plaintiffs have demonstrated that the number of current and future class members, their geographic dispersion, and other issues make joinder of all members impracticable. *Barahona-Gomez*, 167 F.3d at 1237.

2. Because Plaintiffs' Claims Derive from Defendants' Common Policies and Practices, the Proposed Classes Present Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. "'[A]ll questions of fact and law need not be common'" to satisfy the commonality requirement, however. *Ellis*, 657 F.3d at 981 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). One shared legal issue can suffice. *See, e.g.*, *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257 (C.D. Cal. 2008) ("Courts have found that a single common issue of law or fact is sufficient to satisfy the commonality requirement."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirements asks [sic] us to look only for some shared legal issue or a common core of facts.").



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"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 350 (citation omitted). To establish the existence of a common question of law, the putative class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Thus, "[w]hat matters to class certification . . . is not the raising of common 'questions' . . . but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quotation omitted).

Challenges to the adequacy of a policy of providing—or not providing—notice to a group of people, such as the one raised by the proposed class here, are routinely certified as class actions. That is because the sufficiency of notice is common to the entire class. *See, e.g.*, *Walters*, 145 F.3d at 1046 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Unthaksinkun v. Porter*, No. 11-588, 2011 WL 4502050, at *12 (W.D. Wash. Sept. 28, 2011) (finding that commonality existed where "[a]ll class members were offered the same [notice] process," because any finding that "this process was insufficient" would mean the process "was insufficient as to all class members"); *Rojas*, 2017 WL 1397749, at *5 (finding commonality where plaintiffs allege that "[d]efendants do not have a policy and practice of advising the proposed members of the classes of the filing deadline, and that they do not have an adequate mechanism for timely filing").

Additionally, the commonality standard is more liberal in civil rights suits that "challenge[] a system-wide practice or policy that affects all of the putative class members." *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 808 (9th Cir. 2020) (citation omitted).



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"[C]lass suits for injunctive or declaratory relief," like this case, "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Wright & Miller, *Federal Practice & Procedure* § 1763 at 226.

Factual variations as to, for example, the specifics of the EAD applications at issue, are insufficient to defeat commonality where a uniform policy exists that treats all class members in the same way, notwithstanding those differences. *See, e.g.*, *Walters*, 145 F.3d at 1046 (finding commonality and noting that "[d]ifferences among the class members with respect to the merits of their actual document fraud cases . . . are simply insufficient to defeat the propriety of class certification"); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) ("Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists."); *Moreno Galvez v. Cuccinelli*, No. C19- 0321RSL, 2019 WL 3219418, at *2 (W.D. Wash. Jul. 17, 2019) (finding commonality where case presented questions of "[w]hether the [challenged] policy is in accordance with federal law" and "[w]hether the policy is arbitrary and capricious"); *Nw. Immigrant Rts. Project v. USCIS*, 325 F.R.D. 671, 693 (W.D. Wash. 2016) ("[A]ll questions of fact and law need not be common to satisfy the rule."); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982) (granting certification in challenge to common government practices in asylum cases, even though the outcome of individual asylum cases would depend on individual class members' varying entitlement to relief).

In the instant case, the proposed class and subclass members challenge system-wide policies and practices which have caused the same injuries and would be remedied by the same relief. By definition, all: (1) have filed or will file asylum applications, (2) have been or will be placed in removal proceedings, (3) are eligible for EADs based on their pending asylum



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applications but for an asylum EAD clock determination challenged herein, and (4) have not received sufficient notice of or an opportunity to correct those asylum EAD clock determinations. Members of the proposed subclasses all have had or will have their asylum EAD clocks stopped, not started, or not restarted due to the Remand, Unaccompanied Children, or Change of Venue policy or practice. All of the putative members within the class and each subclass make the same legal claims—that, based on policies and practices with regard to the asylum EAD clock, Defendants have violated their constitutional right to notice and an opportunity to respond, as well as their rights under the INA and its implementing regulations.

These legal questions are common to all members of the class and each subclass. The shared common facts will ensure that the answers as to the legality of these challenged policies and practices will be the same for all who fall within each subclass and will thus "'drive the resolution of the litigation.'" *Ellis*, 657 F.3d at 981 (quoting *Wal-Mart*, 564 U.S. at 350). Should Plaintiffs prevail with respect to the proposed class or any of the proposed subclasses, *all* who fall within the class or subclass will benefit. They all will be entitled to notice of and an opportunity to contest asylum EAD clock determinations, as each subclass member will receive the benefit of asylum clock EAD policies that comply with the INA and its implementing regulations. The proposed class and subclasses are therefore sufficiently common.

In sum, the questions of law presented here are particularly well-suited to resolution on a class-wide basis, as "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 654 (W.D. Wash. 2011); *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact). As such, resolution on a class-wide basis also serves a purpose behind



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the commonality doctrine: practical and efficient case management. *Rodriguez*, 591 F.3d at 1122. Because all putative class and subclass members allege the same injuries and raise the same set of common questions, and because the remedy as to future class members will be the same for all class and subclass members, *see* Section III.A.3, *infra*, this Court should find the commonality requirement satisfied here.

3. Plaintiffs' Claims Are Typical of the Members of the Proposed Class and Subclasses.

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . of the class." To establish typicality, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (citation omitted). Factual differences among class members do not defeat typicality in a case dealing with a uniform policy or practice, provided that "the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001); *see also LaDuke*, 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (finding typicality where class representatives "allege the same or similar injury as the rest of the putative class; they allege that this injury is a result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims" (internal quotation marks omitted)).

Here, the claims of the named Plaintiffs are typical of the claims of the putative class and subclass members. Each named Plaintiff, just like each putative class member, is unable to obtain employment authorization due to an asylum EAD clock determination, and Defendants



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failed to provide them with either written notice or a meaningful opportunity to correct errors in that determination. Plaintiffs Garcia Perez and Martinez Castro, like members of the Remand Subclass, are unable to obtain employment authorization because their asylum EAD clocks have not been or will not be started or restarted after winning a remand on appeal requiring further adjudication. Plaintiff J.M.Z., like members of the Unaccompanied Children Subclass, is unable to obtain employment authorization because her asylum EAD clock has been stopped because the IJ administratively closed her removal proceedings to comply with Congress's mandate that USCIS adjudicate her asylum applications in the first instance. Plaintiff Martinez Hernandez, like members of the Change of Venue Subclass, is unable to obtain employment authorization because his asylum EAD clock has been or will be stopped after a change of venue of his removal proceedings. Both class representatives and class members are thus victims of the "same, injurious course of conduct": the inability to obtain employment authorization that they are otherwise entitled to. For all, their injuries stem from Defendants' uniform policies and practices with respect to the asylum EAD clock.

Because Plaintiffs and the proposed class and subclasses raise common legal claims and are united in their interest and injury, the element of typicality is met.

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class and Subclass Members, and Counsel are Qualified to Litigate This Action.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citations omitted).



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i. Named Plaintiffs

Named Plaintiffs each seek relief on behalf of the class and their respective subclass as a whole and have no interest antagonistic to those of other class or subclass members; they will thus fairly and adequately protect the interests of the class and subclass they seek to represent. Their mutual goal is to declare Defendants' challenged policies and practices unlawful and to obtain declaratory and injunctive relief that would not only cure this illegality but remedy the damage to all class and subclass members. They thus seek a remedy for the same injuries, and all share an interest in having a meaningful opportunity to seek employment authorization, receipt of which is critical to their ability to maintain a stable livelihood. *See* Garcia Perez Decl. ¶¶ 13–14; Martinez Castro Decl. ¶ 9; Martinez Hernandez Decl. ¶ 11. Furthermore, named Plaintiffs do not seek money damages. Thus, the representatives' and class members' interests are aligned.

ii. Counsel

Plaintiffs' counsel are adequate. Counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same field of law. *See Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223–24 (N.D. Ill. 1985); Rubenstein, *supra*, § 3:72 ("The fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action."). Plaintiffs' counsel have a demonstrated commitment to protecting the rights of noncitizens and have considerable experience in handling complex and class action litigation in the immigration field. *See* Declarations of Matt Adams, Mary Kenney, and Trina Realmuto. Plaintiffs' counsel will zealously represent both named and absent class members.



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**B. Plaintiffs Satisfy the Requirements of Rule 23(b).**

Federal Rule of Civil Procedure 23(b)(2), under which Plaintiffs seek certification, requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) is "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." *Parsons*, 754 F.3d at 688; *see also Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) ("Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive."). "The rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125. This suit satisfies the requirements of Rule 23(b)(2), as Defendants have nationwide policies with respect to the asylum EAD clock that are injurious to Plaintiffs' rights and interests.

Defendants have subjected or will subject all members of the proposed class and subclasses to unlawful policies and practices. For all, Plaintiffs are subject to Defendants' failure to provide written notice of or a meaningful opportunity to contest erroneous asylum EAD clock determinations. For each subclass, Plaintiffs are subject to Defendants' policy or practice that stops or fails to start or restart the asylum EAD clock. These policies violate the constitutional, statutory, and regulatory rights of Plaintiffs. "The only appropriate remedy, if these allegations are established, is declaratory judgment and final injunctive relief," *Walters*, 1996 WL 897662 at *7, as Defendants have acted "on grounds generally that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a



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whole." Fed. R. Civ. P. 23(b)(2).

## IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion and enter the accompanying proposed certification order.

DATED: June 9, 2022.

s/ Matt Adams
Matt Adams, WSBA No. 28287

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974

s/ Leila Kang
Leila Kang, WSBA No. 48048

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