UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSHANAK ROSHANDEL; VAFA GHAZI-MOGHADDAM; HAWO AHMED; and LIN HUANG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security; EMILIO GONZALEZ, Director, U.S. Citizenship and Immigration Services; ANN CORSANO, Director, District 20, U.S. Citizenship and Immigration Services; JULIA HARRISON, Director, Seattle Field Office, U.S. Citizenship and Immigration Services; MICHAEL MUKASEY, Attorney General, U.S. Department of Justice; ROBERT MUELLER III, Director, Federal Bureau of Investigation; and the UNITED STATES OF AMERICA,

Defendants.

No. C07-1739 MJP

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

ORAL ARGUMENT REQUESTED

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

I. INTRODUCTION

Plaintiffs are longtime lawful permanent residents who have satisfied all statutory requirements for naturalization. They challenge defendants' unlawful and unreasonable delay in adjudicating their naturalization applications on the ground that so-called "name checks" remain pending. There is no dispute that such delays afflict hundreds of similarly situated individuals in this judicial district. This systemic problem cries out for a class-wide relief.

The Rule 23 prerequisites are met. Defendants do not challenge numerosity or the adequacy of plaintiffs' counsel. All members of the Proposed Class share a common issue that is central to this case—whether defendants' implementation of a name check program that has caused undisputed systemic delays in the naturalization process violates the INA and APA. In their motion to dismiss, defendants offer generalized evidence that the name check process is reasonable without reference to individual plaintiffs' circumstances. Defendants thus tacitly concede that the central issue in this case applies equally to each member of the Proposed Class. Because defendants have acted on grounds that apply generally to the Proposed Class, Rule 23(b)(2) is an appropriate procedural vehicle to challenge defendants' conduct.

The bulk of defendants' opposition focuses on factors that are not part of the Rule 23 inquiry—the nature of relief available under each of the plaintiffs claims and the alleged lack of standing. None of these arguments have merit. Plaintiffs' motion for class certification should be granted.

II. ARGUMENT

A. The Proposed Class Meets All Rule 23 Prerequisites.

The Proposed Class consists of hundreds of similarly situated lawful permanent residents in this judicial district who have been subjected to unlawful and unreasonable delays in the naturalization process. Defendants do not dispute that the Proposed Class is numerous. Their

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

arguments regarding typicality, commonality, and adequacy of the class representatives[1] boil down to a single theme: each case is different. ***However defendants make no reference to the individual circumstances of each plaintiff as a reason for the delay.***[2] Instead, they attempt to justify the delay as reasonable by providing a generalized explanation of the name check process. See Motion to Dismiss (Dkt. No. 9) at 12-13; Cannon Decl. (Dkt. No. 9-3) ¶¶ 4-40. Defendants' own position thus illustrates the common central issue in this case:

> [F]or some individuals who desire to be citizens, the path to citizenship has become torturous, not because of anything in their background, but apparently only due to bureaucratic delay, snafu, inertia and/or oversight. All three Plaintiffs in the above cases, and apparently many others who are plaintiffs before other judges in this Court and other district courts, allege that they meet all standards for citizenship, and have nothing in their backgrounds to prevent them from becoming naturalized citizens, but nonetheless, the delay in application processing has become so long and frustrating that they are forced to retain lawyers and file lawsuits, obviously at significant expense, to secure citizenship.
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> * * *
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> Although it does not appear that any of these plaintiffs have sought to litigate this issue on a class action basis, it may be warranted, to avoid the multiplicity of lawsuits and the great expense to each of the plaintiffs hiring their own lawyer.

Mocanu v. Mueller, 2007 U.S. Dist. LEXIS 93702, at *1-*2 (E.D. Pa. Dec. 21, 2007).

Defendants cannot try to justify the delay by offering generic descriptions of the name check process and at the same time argue that applicants who experience these problems do not share common issues of law or fact. All members of the Proposed Class share a common issue that is central to this case—whether defendants' implementation of the name check program in a manner that has caused undisputed systemic delays in the naturalization process violates the INA and APA.

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[1] Defendants do not dispute the adequacy of plaintiffs' counsel. See Opposition (Dkt. No. 15) at 17 n.10.

[2] Indeed, defendants have not disclosed and have resisted producing information concerning plaintiffs' name checks. See Opposition to Motion to Dismiss (Dkt. No. 13) at 6-7.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
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The Court should also reject defendants' argument that this case may not be maintained under Rule 23(b)(2). "Rule 23(b)(2) . . . has been used extensively to challenge the enforcement and application of complex statutory schemes, such as suits involving the . . . benefits under the Social Security Act, actions on behalf of persons under the Food Stamp Program, and suits testing the eligibility criteria for person Aid to Families with Dependent Children." 7AA Wright, Miller, and Kane, Federal Practice & Procedure § 1775, at 73-78 (2005) (hereinafter, "FPP"). This case is no different. See Califano v. Yamasaki, 442 U.S. 682, 700 (1979) ("in the absence of a direct expression by Congress of its intent to depart from the usual course trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court . . . in cases where judicial review of such determinations is authorized").

B. The Claims in This Case Are Well Suited for Class-Action Treatment.

Defendants argue that the Court should deny certification because 8 U.S.C. § 1447(b) does not specifically authorize class-wide relief. See Opposition (Dkt. No. 15) at 5 ("class certification should be denied as it is not an available remedy under 1447(b)"). Of course §1447(b) does not do what defendants ask; that is what Rule 23 is for. Defendants confuse class certification, a ***procedural tool*** for adjudicating cases that present common issues or law or fact, with ***substantive remedies*** available if liability is established.

Nothing in the remedial scheme of § 1447(b) is contrary to class certification. As this Court has recognized in a recent decision,[3] § 1447(b) authorizes two remedial options: (1) to determine the matter on the merits; or (2) to "remand the matter, with appropriate instructions, to USCIS to determine the matter." The Court remanded Mr. Abo Ghanim's application to CIS with explicit instructions to adjudicate his application. That is precisely the remedy plaintiffs seek on behalf of the Proposed Class. Complaint (Dkt. No. 1) ¶ 68. Nothing in the statute (or common sense) precludes applying this remedy on a class-wide basis.

[3] Abo Ghanim v. Mukasey, et al., Case No. C07-594MPJ, slip op. at 4 (W. D. Wash. Feb. 19, 2008).

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
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Defendants offer no contrary argument on the merits except for an assertion that class-wide remand would be "unsurmountable [sic] . . . and would cause further delays in processing other applications, such as those for adjustment of status." Opposition (Dkt. No. 15) at 4. In addition to being conclusory, defendants' argument ignores CIS's recent policy change eliminating the name check program for virtually every category of immigration benefit, including applications for adjustment of status, except in naturalization applications. See Opposition to Motion to Dismiss (Dkt. No. 13) Ex. 5 (CIS Policy Memorandum dated Feb. 4, 2008).

Defendants also argue that "a . . . remand would make all approximately 400 applications of equal weight, giving no consideration to which applications have remained pending the longest." Opposition (Dkt. No. 15) at 4. This argument is based on defendants' stubborn—and plainly incorrect—insistence that "nothing" in § 1447(b) compels CIS to adjudicate a naturalization a petition within 120 days. The plain text of the regulations governing the naturalization process set forth a mandatory, nondiscretionary 120-day timeline for CIS to act on naturalization applications:

> A decision to grant or deny the application ***shall be made*** at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization under § 335.2.

8 C.F.R. § 335.3(a). Under § 1447(b), the district court gains exclusive jurisdiction over a naturalization application if 120 days have elapsed since the naturalization interview and the applicant seeks judicial review. See United States v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004). Common sense suggests that the 120-day timeline in the regulations and the 120-day period in § 1447(b) are not a coincidence. Rather, the only fair reading of statute and regulations is that CIS has a mandatory, nondiscretionary duty to adjudicate naturalization applications within 120-days of the examination, and that § 1447(b) authorizes the district court to enforce that duty.

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Plaintiffs, on behalf of the Proposed Class, ask this Court to order defendants to carry out their legal mandate by adjudicating naturalization applications that have been pending long past the 120-day deadline. Neither a determination of liability nor the requested relief depends on the individual circumstances of each applicant. An order remanding the Proposed Class members' naturalization application with instructions is an appropriate remedy.[4]

C. The Named Plaintiffs Have Standing to Pursue this Class Action.

Plaintiffs have met all statutory requirements for naturalization and were therefore ***entitled*** to be naturalized within 120 days of their examinations. See 8 C.F.R. § 335.3(a).[5] See also 5 U.S.C. § 555(b). Instead, they have been waiting for ***years***. This is injury. See Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

Plaintiffs also allege that they have suffered injuries above and beyond the deprivation of legal entitlements. See Bennett v. Spear, 520 U.S. 154, 168 (1997) (general allegations of injury suffice to establish standing at the pleading stage). Because of their uncertain immigration status, plaintiffs cannot vote, cannot travel freely, and cannot participate fully in civic society.

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[4] Defendants' also recycle the same flawed arguments from their motion to dismiss to argue that class-wide relief is not available under plaintiffs' APA claims. For the same reasons set forth in plaintiffs' opposition to defendants' motion to dismiss, plaintiffs have stated claim under the APA. If plaintiffs establish liability under the APA, the Court is authorized to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Defendants offer no reason why such relief would not appropriate on a class-wide basis.

[5] Defendants cite United States v. Ginsburg, 243 U.S. 472 (1917), for the proposition that aliens have no right to be naturalized. See Opposition (Dkt. No. 15) at 9. In Ginsburg, the Supreme Court noted: "No alien has the slightest right to naturalization ***unless all statutory requirements are complied with***." 243 U.S. at 475 (emphasis added). Consistent with the qualifying language in quoted passage from Ginsburg and 8 C.F.R. § 335.3(a), plaintiffs ***do*** have a right to be naturalized when, as here, they have met all statutory requirements.

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

See, e.g., Complaint ¶¶ 12, 17, 22, 27, 63-64. They have been relegated to a Kafkaesque state of bureaucratic limbo.[6]

Defendants nevertheless argue that plaintiffs (some of whom have been waiting for over three years for their naturalization applications to be resolved) have not demonstrated "actual or potential harm" arising from defendants' conduct. See Opposition (Dkt. No. 15) at 8. Defendants apparently do not consider ineligibility to vote harmful, arguing instead that plaintiffs should be content with "assisting in campaigns, attending political functions or providing monetary donations" as a substitute for voting. Id. Defendants' argument is as offensive as it is wrong.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," it is a "fundamental political right." Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). See also Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (any "unjustified discrimination" in the distribution of the franchise "undermines the legitimacy of representative government").

Defendants are similarly dismissive of plaintiffs' concerns about traveling abroad. Yet CIS itself has warned lawful permanent residents who were previously granted asylum or entered as refugees that they may lose their status if they travel back to their home country. See USCIS Fact Sheet dated January 4, 2007 (available at http://www.uscis.gov/files/pressrelease/AsylumTravel122706FS.pdf). Moreover, a lawful permanent resident who remains abroad for more than a temporary period may be deemed to have abandoned his or her residence and can be refused admission into the United States. See 22 C.F.R. § 42.22; Singh v. Reno, 113 F.3d 1512,

[6] See Mocanu v. Mueller, 2007 U.S. Dist. LEXIS 93702, at *1 (E.D. Pa. Dec. 21, 2007) ("One reading these Complaints cannot help but recall Joseph K, the protagonist of Kafka's novel The Trial, roaming the halls of government in an effort to find his fate.").

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

1516 (9th Cir. 1997) ("innocent, well-intentioned, and temporary absences—in this case, spending time abroad with his wife and young child while waiting for the INS to grant the visa petition that would allow them to join him here" resulted in forfeiture of lawful permanent resident status) (Reinhardt, J., dissenting).

Plaintiffs have suffered concrete injuries attributable to defendants' conduct – i.e., the unreasonable delays in the naturalization process caused by name checks. The relief they request in this case will redress these injuries. Plaintiffs plainly have standing to pursue their claims both individually and on behalf of the Proposed Class.

D. Plaintiffs' Claims Are Not Moot.

Defendants' mootness argument is equally wrong. "In class actions . . . courts have come to recognize that an individual plaintiff may continue to represent the interests of others even after any prospect of individual recovery has vanished." 13A FPP § 3533.9 (1984). A named plaintiff that has a live claim before the motion for class certification is filed satisfies the "case or controversy" requirements of Article III and can serve as the class representative. Sosna v. Iowa, 419 U.S. 393, 402 (1975); County of Riverside v. Mc Laughlin, 540 U.S. 44, 51-52 (1991); Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975).

This is particularly so when, as here, claims are "so inherently transitory that the trial court will not even have enough time to rule on a motion for class certification before the proposed representative's individual interest expires." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980). In class actions involving such claims, class certification ***relates back to the filing of the complaint*** and the named plaintiff can continue to represent the class, even if the named plaintiff's own claims have become moot in the interim. Sosna, 419 U.S. at 402 n. 11; Robidoux v. Celani, 987 F.2d 931, 938-39 (2d Cir. 1993).

Court have applied this rule in cases involving governmental delays. See Comer v. Cisneros, 37 F.3d 775 (2d Cir. 1994) (plaintiffs waiting on lists for public housing, some for years); Robidoux , 987 F.2d 931 (all waiting in excess of 30 days); Brown v. Giuliani, 158

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

F.R.D. 251, 265 (E.D.N.Y. 1994) (named plaintiffs waited between 51 days and more than a year to have their applications for review of AFDC benefit requests adjudicated). The rule does not require that the harm claimed by the plaintiff be capable of repetition as to the named plaintiff; it is sufficient that the controversy remains alive for members of the class for the class certification to relate back to the filing of the original complaint. Jane B. v. New York City Dep't of Soc. Servs., 117 F.R.D. 64, 68 (S.D.N.Y. 1987).

Nothing in Sze v. INS, 153 F.3d 1005, 1008-1009 (9th Cir. 1998), is to the contrary. In Sze, the plaintiffs' individual claims for delay in the naturalization process were dismissed as a matter of law; the district court "never actually ruled on the motion for class certification." In contrast, in Geraghty, 445 U.S. at 402, the district court ***did rule*** on the motion for class certification and denied it. The Court of Appeals reversed. The Supreme Court held that if the appeal from denial of class certification results in reversal of the denial, and the class is subsequently certified, the fact that the named plaintiff's individual claim became moot in the interim did not render the class action moot and "the merits of the class claim may be adjudicated pursuant to the holding in Sosna." Geraghty, 445 U.S. at 404; see Sosna, 419 U.S. at 402 n.11 (if mootness occurs "before the district court can reasonably be expected to rule on a certification motion," then class certification may be allowed to relate back to the filing of the complaint as a matter of policy); accord 7AA FPP § 1785.1, at 418-419 ("this [Sosna] approach seems sound").

Here, unlike in Sze, the Court has before it both defendants' motion to dismiss and the plaintiffs' motion for class certification. There is no dispute that plaintiffs had "live" claims when the complaint was filed and none of them have yet been naturalized as United States citizens. There is similarly no dispute that some 400 individuals in this district have similar live claims today. No more is required. See 7AA FPP § 1785.1, at 418 ("the representative party must have a live claim at the time the action is filed").

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

If anything, the risk of mootness reinforces the need for class certification. See Reynolds v. Giuliani, 118 F. Supp. 2d 352, 359 (S.D.N.Y. 2000) ("the danger of mootness is magnified by the fact that defendants have the ability to moot the claims of the named plaintiffs, thereby evading judicial review of their conduct," thus, like other courts concluded under similar circumstances, "class certification is necessary."). See also Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (it would be "contrary to sound judicial administration" if judicial review of challenged conduct could be prevented "simply because the defendant has sought to buy off the individual private claims of the named plaintiffs"); Johnson v. Opelousas, 658 F.2d 1065 (5th Cir. 1981) (district court abused its discretion in denying class certification because it failed to consider the risk of mootness in the litigation).

Plaintiffs' claims are not moot. Even if they were, the proper remedy would be to amend the complaint and substitute the name plaintiffs with one or more of the hundreds of similarly situated individuals residing in this judicial district. The Proposed Class should be certified.

E. Plaintiffs' Have Properly Identified a Subclass of Individuals Who Were Not Informed of Remedies Available Under § 1447(b).

Defendants concede that prior to January 14, 2005, CIS did not provide written notice of the remedies available under § 1447(b) to naturalization applicants. See Opposition to Motion to Dismiss (Dkt. No. 13) at 19. Plaintiffs Roshandel and Ghazi-Moghaddam are typical of persons who did not receive statutorily mandated notice of remedies. See id. at 5-6.

The existence of the a subclass comprised of members of the Proposed Class who did not receive notice of remedies simply means that members of the subclass have four claims against defendants instead of three. This subclass should be certified pursuant to Rule 23(c)(5). But even if the Court concludes that the subclass should not be certified, this has no effect whatsoever on whether the Proposed Class should be certified.

The larger issue highlighted by the notice subclass is that many members of the Proposed Class may have no idea that there are judicial remedies for defendants' unlawful conduct. This

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

is all the more reason to certify the Proposed Class and provide class-wide relief to the numerous lawful permanent residents in this judicial district who have been unlawfully subjected to the same systemic delays in the naturalization process, many of whom may be unaware of their rights under § 1447(b).

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for class certification.

DATED: February 22, 2008.

STOEL RIVES LLP

/s/ Rita V. Latsinova
Alfred Arthur Day, WSBA No. 34926
Rita V. Latsinova, WSBA No. 24447
600 University Street, Suite 3600
Seattle, WA 98101
206-624-0900 (main)
206-386-7500 (fax)
aaday@stoel.com
rvlatsinova@stoel.com

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
Sarah A. Dunne, WSBA No. 34869
Aaron H. Caplan, WSBA No. 22525
705 Second Avenue, Third Floor
Seattle, WA 98104
206-624-2184 (main)
dunne@aclu-wa.org
caplan@aclu-wa.org

NORTHWEST IMMIGRANT RIGHTS PROJECT
Matthew Adams, WSBA No. 28287
Christopher Strawn, WSBA No. 32243
615 Second Avenue, Suite 400
Seattle, WA 98104
206-587-4009 (main)
matt@nwirp.org
chris@nwirp.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2008 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Aaron H. Caplan caplan@aclu-wa.org Counsel for Plaintiffs	Rebecca S. Cohen rebecca.cohen@usdoj.gov Counsel for Defendants
Christopher Strawn chris@nwirp.org Counsel for Plaintiffs	Nancy Safavi Nancy.Safavi@usdoj.gov Counsel for Defendants
Matt Adams matt@nwirp.org Counsel for Plaintiffs	
Sarah A. Dunne dunne@aclu-wa.org Counsel for Plaintiffs	
Alfred Arthur Day aaday@stoel.com Counsel for Plaintiffs	

DATED: February 22, 2008.

STOEL RIVES LLP

/s/ Rita V. Latsinova

Alfred Arthur Day, WSBA No. 34926
Rita V. Latsinova, WSBA No. 24447
600 University Street, Suite 3600
Seattle, WA 98101
206-624-0900 (main)
206-386-7500 (fax)
aaday@stoel.com
rvlatsinova@stoel.com

Attorneys for Plaintiffs