THE HONORABLE MARSHA J. PECHMAN

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, United States Department of Homeland Security; EMILIO GONZALEZ, Director, United States Citizenship and Immigration Services; ANN CORSANO, Director, District 20, United States Citizenship and Immigration Services; JULIA HARRISON, Director, Seattle Field Office, United States Citizenship and Immigration Services; PETER KEISLER, Acting Attorney General, United States Department of Justice; ROBERT MUELLER III, Director, Federal Bureau of Investigation; and the UNITED STATES OF AMERICA. Defendants, Defendants.	No. C07-1739 MJP **MOTION FOR CLASS CERTIFICATION** **CLERK'S ACTION REQUIRED** ORAL ARGUMENT REQUESTED Note for Motion: 1/18/2008

I. INTRODUCTION AND RELIEF REQUESTED

CR 23(b)(2) was intended to "facilitate the bringing of class actions in the civil-rights area," particularly those seeking declaratory or injunctive relief. 7AA Wright & Miller, *Federal Practice & Procedure* § 1775, at 71 (3d ed. 2005). *See also Fujishima v. Bd. of Educ.*, 460 F.2d 1355, 1360 (7th Cir. 1972) ("Rule 23(b)(2) . . . was intended to cover civil-rights cases"). This is

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precisely the type of case CR 23(b)(2) was designed for. Plaintiffs are lawful permanent residents of the United States who wish to pledge allegiance to the United States. Plaintiffs applied to the United States Citizenship and Immigration Services ("CIS") to be naturalized as United States citizens and passed their naturalization examinations. Yet, CIS has failed to adjudicate their naturalization applications within 120 days of the examination, as required by law. *See* 8 U.S.C. § 1447(b); 8 C.F.R. § 335.3(a). The delays have lasted for years, preventing Plaintiffs from participating fully in civic society.

In each case, the unlawful delay was caused by the pendency of the FBI "name check" – an additional, post-examination security check not authorized by law. CIS's documents show that hundreds of lawful permanent residents in this district have been subjected to similar unlawful delays. In this action, plaintiffs challenge both the unlawful delay in adjudicating their naturalization applications and the implementation of the "name check" on behalf of themselves and others similarly affected. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), plaintiffs move the Court to certify the class of

> All lawful permanent residents of the United States residing in the Western District of Washington who have submitted naturalization applications to CIS but whose naturalization applications have not been determined within 120 days of the date of their initial examination due to the pendency of a "name check."

II. ARGUMENT

In order to be certified for class treatment, an action must satisfy the four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, the party seeking class certification must show that the proposed class action falls within one of the types of class actions maintainable under Rule 23(b). The subsection of Rule 23(b) relevant here provides that a class action is maintainable when "the defendants have acted or refused to act on

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grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). This case meets the requirements of Rule 23(a) and Rule 23(b)(2).

A. Requirements of Rule 23(a).

1. Numerosity

The numerosity inquiry asks whether joinder is impracticable. Impracticable does not mean impossible but simply difficult or inconvenient. *See Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Although there is no numeric formula for certification under Rule 23, *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980), courts have presumed that the numerosity requirement is met when there are more than 40 putative class members. *See, e.g., Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982). The court may consider materials outside the pleadings in deciding whether the class is numerous. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir. 1982).

The proposed class consists of hundreds of individuals affected by the unlawful naturalization delays and easily meets the numerosity requirement. According to the government's own statistics, as of May 2007, there were 211,341 naturalization applications nationwide that had been pending for more than 90 days due to the FBI name check; 106,738 applications had been pending for more than one year. *See* Latsinova Decl., Ex. A (CIS Ombudsman, Annual Report 2007) at 37 (available at http://www.dhs.gov/xabout/structure/gc_1183751418157.shtm). As of June 2007, there were 31,144 naturalization cases nationwide that had been pending for more than 33 months due to an FBI name check. *Id*. The number of delayed applications increased by 93,358 from 2006 to 2007. *Id.*

In 2006, the Seattle-Tacoma-Bellevue area was listed as the fifteenth (15th) busiest geographic area in terms of number of naturalizations. *See* Latsinova Decl., Ex. B (Yearbook of

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Immigration Statistics: 2006, Table 23, Persons Naturalized by Core Based Statistical Area (CBSA) of Residence: Fiscal Years 1997 to 2006) (available at http://www.dhs.gov/ximgtn/statistics/publications/YrBk06Na.shtm). In 2006, 9,407 naturalizations – or 1.3 percent of all naturalizations nationwide – occurred in the Seattle-Tacoma-Bellevue geographic area. *Id.*[1] Assuming, reasonably, that the number of lawful permanent residents affected by naturalization delays bears similar proportionate relationship to delays nationwide,[2] this district has over 400 lawful residents whose naturalization petitions have been delayed by more than 30 months – far beyond the 120-day limit imposed by law.

Within two weeks of filing this lawsuit, which was covered in local media, plaintiffs' counsel received approximately a dozen calls from lawful permanent residents who, like the named plaintiffs, experienced long delays in their naturalization applications due to pending "name checks." Each of the callers inquired "what they need to do to join the class." *See* Latsinova Declaration, at ¶ 4. This volume of responses indicates that the actual size of the class is much larger and meets the numerosity requirement. *See Orantes-Hernandez v. Smith,* 541 F. Supp. 351, 371 (C.D. Cal. 1982) ("Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.").

In addition to its size, the unique demographics of the proposed class underscore the importance of maintaining the present suit as a class action. All the class members are immigrants, most were not educated in the United States and have no experience in using the court system to vindicate their rights. Many class members are refugees who cannot afford private counsel. "Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals, such as many of the class members here, who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf." *Morgan v. Sielaff,* 546 F.2d 218, 222 (7th Cir. 1976).

[1] For comparison, Los Angeles and San Francisco, CIS's second and sixth busiest geographic areas, accounted for 65,813 (9 percent) and 24,042 (3.4 percent) naturalizations, respectively.

[2] 31,144 x 1.3 percent = 404.

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2. Common Questions of Law or Fact

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." *Ali v. Ashcroft*, 213 F.R.D. 390, 409 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003). "Rule 23(a)(2) has been construed permissively." *Staton v. Boeing Co*., 327 F.3d 938, 953 (9th Cir. 2003); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1225 (9th Cir. 2007) ("all questions of law and fact need not be common to satisfy the rule"). Because members of the proposed class share several common questions of law and fact central to their claims, the class easily meets the commonality requirement.

Members of the proposed class share several facts common to their naturalization applications:

- All class members passed their naturalization examination;
- None had their applications adjudicated within 120 days of the examinations; and
- The delay in each case is caused by the pending FBI "name check."

In addition, this case presents numerous legal questions common to the class claims, including, without limitation:

- Whether defendants' practices and policies relating to the FBI name check for naturalization applicants violate the statutory requirement that the class members' applications be adjudicated within 120 days of the examination;
- Whether members of the class are entitled to judicial remedies under 8 U.S.C. § 1447(b);
- Whether defendants' practices and policies relating to the FBI name check for naturalization applicants violate the APA's requirement that government agencies conclude matters within a reasonable time;

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- Whether defendants' practices and policies relating to the FBI name check actions violate APA's requirement of public notice and comment.

A lawsuit challenging a pattern and practice of allegedly illegal conduct presents common question of law and fact. *See, e.g.*, *LaDuke v. Nelson*, 762, F.2d 1318, 1332 (9th Cir. 1985); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1066-67, 1072 (7th Cir. 1976); *Medrano v. Allee*, 347 F. Supp. 605, 610 (S.D. Tex. 1972), *modified*, 416 U.S. 802 (1974). This lawsuit does not ask the Court to naturalize the entire class. Instead, it seeks declaratory and injunctive relief to remedy the pervasive ***institutional*** name check-related delays and to force the government to process the naturalization applications of eligible lawful permanent residents in a timely manner, as required by law. There are no divergent issues of law or fact related to relief sought by the class. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (differences among class members regarding merits of individual cases were "simply insufficient to defeat the propriety of class certification"); *Doe v. Los Angeles Unified Sch. Dist.*, 48 F. Supp. 2d 1233, 1241 (C.D. Cal. 1999) ("[C]ommonality exists if plaintiffs share a common harm or violation of their rights, even if individualized facts supporting the alleged harm or violation diverge."). Commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that the claims of the named plaintiffs be "typical of the claims . . . of the class." Typicality overlaps with the common question requirement under Rule 23(a)(2). *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1764 at 232-35 (2d ed. 1986). "[T]he allegation that defendant engaged in a scheme common to all members of the class has been held to support the finding that the claims of the representative parties are typical." 3B *Moore's Federal Practice* § 23.06-2, at 23-189 to 23-190.

The government itself has acknowledged that the "FBI name checks, one of several security screening tools used by USCIS, continue to significantly delay adjudication of

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immigration benefits for many customers, hinder backlog reduction efforts, and may not achieve their intended national security objectives." *See* Latsinova Decl., Ex. A (CIS Ombudsman, Annual Report 2007) at 37. The proposed class consists of individuals who have experienced such delays. The named plaintiffs' claims are typical of the class. The named plaintiffs and class members have the same legal theories and seek the same declaratory and injunctive relief for themselves and for the class as a whole. Typicality is met.

4. Adequacy of Representation

The final requirement, Rule 23(a)(4), is that the named plaintiff "will fairly and adequately protect the interest of the class." To satisfy the adequacy requirement, plaintiffs must show (1) that their interests are common with, and not antagonistic to, the interests of the class; and (2) that they are able to prosecute the action vigorously through qualified and competent counsel. *Dukes*, 474 F.3d at 1233; *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238-39 (9th Cir. 1998); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). As already set forth above, named plaintiffs share the proposed class' desire to enforce reasonable time limits on the government's processing of naturalization applications.

Plaintiffs will be able to prosecute this action vigorously. Plaintiffs are represented by attorneys from Americal Civil Liberties Union of Washington, Northwest Immigrant Rights Project, and the law firm of Stoel Rives LLP, who have extensive collective experience in immigration law, civil-rights litigation, and class-action litigation, and have the necessary resources and commitment to pursuing the class interests vigorously. *See* Latsinova Decl., ¶¶ 3a-e. The adequacy of representation is met.

B. Requirements of Rule 23(b)(2)

In addition to satisfying the four requirements of Rule 23(a), the proposed class must meet one of the requirements of Rule 23(b). *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 163 (1974). This action meets the requirements of Rule 23(b)(2) that "the party opposing the class

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has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The plaintiffs challenge – and seek declaratory and injunctive relief from – a pattern of systemic delays in the processing the naturalization applications due to FBI name checks that affects the class as a whole. This is precisely the type of challenge Rule 23(b)(2) was designed to facilitate. *See Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) ("23(b)(2) class is an effective weapon for an across-the-board attack against systematic abuse").

1. Courts have Certified Rule 23(b)(2) Classes Involving Unreasonable Agency Delays

Rule 23(b)(2) was "intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Rule 23, Comment to Subdivision (b)(2). *See also id*. ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

Courts have certified Rule 23(b)(2) classes in cases challenging the government's policies and practices of delay. *Cockrum v. Califano*, 475 F. Supp. 1222, 1225 (D.D.C. 1979), *remanded without opinion sub nom. Cockrum v. Harris*, 634 F.2d 1358 (D.C. Cir. 1980), involved a proposed class that challenged delays in appeals from the denial, termination or reduction of Social Security benefits. The district court certified the class because it "unite[d] people with the factual similarity of suffering delays of 120 days or longer in receiving a decision on their appeals" and because plaintiffs sought to advance the class members' "common interest in prompt decisions on their appeals." *Id. See also Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (vacating denial of class certification in a case challenging delays in processing public assistance benefits and stating that an injunction requiring timely decisions by the agency would affect all potential class members); *Andujar v. Weinberger*, 69 F.R.D. 690, 696

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(S.D.N.Y. 1976) ("information received from defendants reveals that large numbers of SSI recipients have reported non-receipt of checks;" "in paying SSI benefits, defendant acts in a manner generally applicable to the class and, if plaintiffs' claims prove meritorious, declaratory and injunctive relief will be appropriate").

In *Tonya K. v. Chicago Bd. of Educ*., 551 F. Supp. 1107, 1108 (N.D. Ill. 1982), the court certified a class of disabled children who were excluded from public schools because of their disabilities. The plaintiffs sought relief from the school board's delays in placing them in private facilities. *Id*. The district court certified a Rule 23(b)(2) class, holding that the plaintiffs had presented a common legal issue as to whether the defendants' actions constituted an unlawful, untimely delay in the plaintiffs' legal rights. *Id*. at 1110-11.

More recently, in *Santillan v. Ashcroft*, No. C-04-2686-MHP, 2004 WL 2297990 (N.D. Cal. Oct. 12, 2004), the court certified a Rule 23(b)(2) class of 49 individuals who challenged delays in issuance of documentation to lawful permanent resident status due to the government's insistence that no such documents could be issued until after certain security checks were complete. *Id*. at *1. The plaintiffs met the commonality and typicality requirements of Rule 23(a) because they were challenging a policy resulting in delay and therefore shared "substantially identical questions of law" and common interest and harms, despite differences in individual lengths of delay. *Id*. at **10-11. The court held that the plaintiffs met the requirements of Rule 23(b)(2), in that they were seeking injunctive relief to change a "a set of national policies and practices in place for background and security checks." *Id*. at *12.

2. Rule 23(b)(2) Certification is Further Made Necessary by the Fact That Named Plaintiffs May Be Naturalized Before the Conclusion of This Action

With 17 days of the Complaint in this action being filed, all four of the named plaintiffs received fingerprinting notices from CIS, indicating that it is moving forward with naturalizing them as United States citizens. *See* Latsinova Decl., Ex. C. It is implausible that this timing is coincidental. More likely, it is part of a pattern in § 1447(b) litigation, where the government

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attempts to moot similar cases before the Court can reach a decision on the merits. This development further supports the appropriateness of, and need for, class certification. The delays experienced by the named plaintiffs are not isolated events but part of a systemic unlawful pattern that deprives hundreds of additional lawful permanent residents in this district of the opportunity to participate fully in civic society. Class certification is necessary to provide them a remedy.

In *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553 (1975), the Supreme Court declined to dismiss as moot a class challenge to Iowa's one-year residency requirement for instituting divorce proceedings, despite the fact that the one year period had passed and the plaintiff had obtained a divorce decree elsewhere. The controversy was not moot with respect to the class of person the plaintiffs had been certified to represent. 419 U.S. at 402. As the Second Circuit subsequently observed:

> [t]he fact that the plaintiffs received their unlawfully delayed benefits after the lawsuit was commenced did not mean that the action thereby became moot. Where class claims are inherently transitory, the termination of a class representative's claim does not moot the claims of the unnamed members of the class. Even where the class is not certified until after the claims of the individual class representatives have become moot, certification may be deemed to relate back to the filing of the complaint in order to avoid mooting the entire controversy.

Robidoux, 987 F.2d at 838-939 (citations and internal quotation marks omitted). *See also Reynolds v. Giuliani*, 118 F. Supp.2d 352, 391-92 (S.D.N.Y. 2000) ("this case involves a fluid class where the claims of the named plaintiffs may become moot prior to completion of this action. 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, this Court, like other courts under these circumstances, believes that class certification is necessary.").

This case is ideally suited for class certification. Plaintiffs challenge government's "refus[al] to act" on their naturalization applications within 120 days from the successful

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completion of the examination, as required by federal law. The delays are systemic and affect hundreds of other permanent legal residents residing in this district. The entire class will benefit if plaintiffs are successful in their claims for declaratory and injunctive relief that address the systemic unlawful delays of naturalization applications. The possibility of mootness and the concomitant interest in judicial economy make class certification additionally appropriate. *See Koster v. Perales*, 108 F.R.D. 46, 54 (E.D.N.Y. 1985) ("the plaintiffs seek to enjoin a practice or pattern of alleged unlawful activity . . . I find that plaintiffs have met the requirements of Rule 23(b)(2)").

III.CONCLUSION

For the reasons stated, Plaintiffs' Motion for Class Certification should be granted.

A form of the proposed order is attached.

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DATED: November 21, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2007 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:

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And I hereby certify that I have mailed by United States Postal Service the document to the following NON-CM/ECF participants:

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