IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-01419
MOHAMMED ABDULAZIZ ABDUL MOHAMMED, et al., Plaintiffs, v. MICHAEL R. POMPEO, et al., Defendants.	Civil Action No. 1:20-cv-01856
AFSIN AKER, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:20-cv-01926
CLAUDINE NGUM FONJONG, et al., Plaintiffs, v. DONALD J. TRUMP, Defendants.	Civil Action No. 1:20-cv-02128

GOMEZ AND _AKER_ PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

***GOMEZ* PLAINTIFFS RENEWED MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

The *Gomez* Plaintiffs respectfully renew their request that this Court certify Plaintiffs' proposed Diversity Visa Subclass ("DV-2020 subclass"), which includes all individuals who have been selected to receive an immigrant visa through the U.S. Department of State's FY2020 Diversity Visa Lottery and who had not received their immigrant visa on or before April 23, 2020, when Presidential Proclamation 10014, later extended by Presidential Proclamation 10052, took effect. *See* ECF 52, at 1. Plaintiffs make this renewed request based on information they have learned from putative DV-2020 subclass members since the Court issued its September 4 Memorandum Opinion and Order, ECF 123, granting substantive injunctive relief to all DV-2020 Selectees but denying without prejudice the *Gomez* Plaintiffs' Motion for Class Certification for the DV-2020 subclass. ECF 123, at 82–83. That information clearly demonstrates that the absence of class treatment has been an obstacle to numerous putative class members in obtaining the relief the Court intended. Plaintiffs file this renewed request simultaneously with, and in support of, their Joint Submission urging the Court to grant further equitable relief. In support of this request, Plaintiffs incorporate herein by reference all of the arguments they made in support of their Motion for Class Certification. *See* ECF 52.

ARGUMENT

In its Memorandum Opinion and Order issued on September 4, 2020, ECF 123, this Court ordered Defendants to "undertake good-faith efforts . . . to expeditiously process and adjudicate DV-2020 diversity visa and derivative beneficiary applications and issue or reissue diversity and derivative beneficiary visas to eligible applicants by September 30, 2020, giving priority to the named diversity Plaintiffs" in these consolidate cases. ECF 123, at 84. The Court made clear that its order applies to all DV-2020 applicants—not only the named DV-2020 Plaintiffs in these

consolidated cases. *See* ECF 123, at 82 (rejecting Defendants' argument that the Court limit the scope of relief to the named plaintiffs only). In light of that ruling, the Court denied without prejudice the *Gomez* Plaintiffs' request for certification of the DV-2020 subclass, concluding that "it need not rule on the . . . pending motions to certify classes . . . because all proposed class members will benefit from the preliminary relief" the Court afforded. ECF 123, at 82. Likewise, the Court reserved ruling on Plaintiffs' alternative request for equitable relief—an order to reserve visa numbers for DV-2020 Selectees after the September 30 statutory deadline—until after Defendants had begun implementing the Court's order.

Plaintiffs now renew their request that the Court order Defendants to reserve diversity visa numbers and continue processing DV-2020 applications beyond the September 30 deadline. As Plaintiffs explain in their Joint Submission, Plaintiffs' alternative request for equitable relief is both warranted and plainly within the equitable authority of this Court to afford. Joint Submission at 3–8 (citing, *e.g.*, *P.K. v. Tillerson*, 302 F. Supp. 3d 1, 9 (D.D.C. 2017)). Since March 2020, and through at least September 9, 2020, Defendants have imposed several unlawful obstacles to the processing of diversity visa applications, and have failed to implement the order in a way that benefits "all putative class members," as this Court expressly intended it to do. *See* ECF 123, at 83. All DV-2020 Selectees, including all putative class members, have a "right to have their applications processed in accordance with the law." *P.K.*, 302 F. Supp. 3d at 9. *P.K.* holds that this Court has the authority to fashion equitable relief for the entire putative class by directing the government to reserve visa numbers where, as here, agency or executive action violates those rights in a manner that contravenes the Immigration and Nationality Act. *Id.*

Class certification is necessary to fully protect the rights of both the named Plaintiffs and putative class members in accordance with this Court's September 4 Order and modification of that Order. *See* ECF 123 (Order); ECF 132 (Amended Order).

1. A relatively small number of DV-2020 Selectees are actually before the Court in these related cases. As this Court knows, tens of thousands of DV-2020 selectees across the globe have been impacted by Defendants' unlawful actions. Many of those individuals did not join this matter as named plaintiffs because they reasonably relied on the fact that the *Gomez* case was being brought as a class action on behalf of all DV-2020 selectees and understood that they would benefit from the class-wide relief it was seeking. *See, e.g.*, Declaration of Nadia Dahab in Support of Joint Submission ("Dahab Decl.") ¶ 9(a) (DV-2020 Selectee explaining that she could not afford to join as a named Plaintiff in *Mohammed* or *Fonjong* and anticipated benefiting as a member of the proposed *Gomez* class). Now, in light of Defendants' limited and haphazard implementation of the Court's Order, *see infra* (2), and without the protection of a class certification order entitling them to the same treatment as the named plaintiffs, members of the putative DV-2020 subclass will continue suffer disparate treatment, separate and successive lawsuits will continue to be filed, and judicial resources will continue to be further taxed. These are the very circumstances that Rule 23 is intended to prevent.

2. The uneven and haphazard manner in which Defendants—through their numerous consular posts—have implemented this Court's order plainly demonstrates that class certification is necessary and is the best and most practical way of ensuring that all putative class members get the benefit of the Court's September 4 Order. Without class certification, and the benefit of appointed class counsel to advocate on behalf of the class, putative class members will continue to be deprived of any relief, with little recourse other than perhaps filing their own lawsuits. Unless this Court grants certification of the DV-2020 subclass, tens of thousands of DV-2020 Selectees not represented by counsel in these related cases will continue to be subject to Defendants' faulty interpretations of the Court's Order without any practical recourse.

3. Since this Court issued its September 4 Order, which was intended to clear the way for putative class members to seek the relief the Court ordered—*e.g.*, based on a putative class member's visa priority number—class members have instead been subject to Defendants' wildly varying manner of implementation of that Order. In response to a questionnaire that *Gomez* counsel issued to putative DV-2020 subclass members, putative class members from across the globe provided substantial information regarding their experience with requesting emergency or mission critical visa services at their local consulates or through the KCC. Dahab Decl. ¶¶ 6–9. Out of the 1,794 individuals who advised the *Gomez* counsel that they requested emergency or "mission critical" appointments after the September 4 Order, 95.5 percent had their requests denied, have received no response, or have been told by the State Department that only named Plaintiffs will receive visa interviews pursuant to the Order. Dahab Decl. ¶ 8. The responses show that Defendants' flagrant deviations from both the letter and spirit of the Court's order are widespread and appear systemic.

4. Among the information gathered through the Gomez counsel's questionnaire, perhaps the most concerning is that numerous of Defendants' consular posts have interpreted the Order as limiting relief to named DV-2020 plaintiffs in the cases before this Court, thereby depriving most putative class members of the relief to which they are entitled. *See* Dahab Decl. ¶ 9. The following reflects a representative sampling of the accounts *Gomez* counsel received, highlighting Defendants' lack of compliance with the Court's September 4 Order:

> Evelyn Babirye, from Uganda, emailed her local consulate several times and received no response. When she finally reached the consulate via phone, she was told that they were working on applications only for the named plaintiffs in these cases. She later received an email response confirming what she learned on the phone. Evelyn further states that it is "sad and unfortunate that we could not afford to be among the plaintiffs." Dahab Decl. ¶ 9(a).
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> Karima Jalal, from Morocco, contacted the Kentucky Consular Center (KCC) several times to request an emergency visa interview. The KCC told her that,

> because she is not a named plaintiff, she has "no chance" at receiving a visa. Dahab Decl. ¶ 9(b).
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> Maria Nemirovksia, from Russia, contacted the KCC to request an emergency interview. KCC staff told her that they "are processing and scheduling only plaintiffs." KCC staff did not even ask for Maria's case number or country to determine where she falls within the State Department's other so-called "prioritization guidelines." Dahab Decl. ¶ 9(c).
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> Nil Kutliuk, from Turkey, contacted the KCC several times to request an emergency interview. KCC staff told him that the Court's "order is only for the plaintiffs." Dahab Decl. ¶ 9(d).
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> Akwa Unist/Ndefru, 2020AF00048487, from Cameroon, explained, "I think non named plaintiffs should be considered because every selectee is affected emotionally, financially and psychologically. Unequal treatment is given to some diversity visa selectees who could not afford for fees to register under [the *Mohammed* and *Fonjong*] lawsuit[s]. Dahab Decl. ¶ 9(g).

Again, the above stories reflect only a few, among hundreds of others, who have been functionally excluded from the benefits that this Court's September 4 Order was intended to afford. These stories demonstrate that Defendants have plainly instructed the KCC and their embassies and consulates to process diversity visa applications for named plaintiffs, not only *before* processing visas for non-plaintiffs, but often to their outright exclusion from processing. Class certification is necessary to ensure that the relief this Court affords going forward runs to all DV-2020 Selectees who have been harmed by Defendants' unlawful actions.

5. Plaintiffs' proposed DV-2020 subclass also readily satisfies the requirements of Rule 23. As Plaintiffs explain in their Motion for Cass Certification, ECF 52, and their reply in support of that motion, ECF 107, the proposed DV-2020 subclass easily meets the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy.[1] The proposed DV-2020 subclass also satisfies any judicially imposed "ascertainability" requirement. The proposed class

[1] Defendants did not dispute in their opposition to Plaintiffs' Motion for Class Certification that numerosity is satisfied. *See* ECF 95, at 12–18.

should be certified under Rule 23(b)(2) or Rule 23(b)(1)(A). In addition, given that Defendants have chosen to implement this Court September 4 Order in a manner that has—by design—been to the detriment of absent class members, certification under Rule 23(b)(1)(B) may also be appropriate. That rule permits certification where, as here, "the prosecution of separate actions by or against individual members of the class would . . . substantially impair or impede [other class members'] ability to protect their interests." To ensure that any equitable relief this Court affords would evenly be applied to, and therefore protect the interests of, both named plaintiffs and absent class members, the Court should certify a class for all DV-2020 Selectees under Rule 23(b)(1)(B). *See Hilton v. Wright*, 235 F.R.D. 40, 52 (N.D.N.Y. 2006) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999)) (certification under Rule 23(b)(1)(B) appropriate outside of the "limited fund" context where individual adjudication of equitable claims raised by named plaintiffs would affect the interests of absent class members).

CONCLUSION

For the forgoing reasons, and for the reasons explained in Plaintiffs' Motion for Class Certification, ECF 52, Plaintiffs respectfully request that the Court enter an order certifying the proposed DV-2020 subclass under Rule 23(b)(2) or Rule 23(b)(1)(A); appoint as class representatives Plaintiffs Nakamura, Koirala, Kinteh, Karpes, Iwundu, and Bushati; and appoint as class counsel the below-listed attorneys from AILA, Innovation Law Lab, Justice Action Center, and the Law Office of Laboni A. Hoq.

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***AKER* PLAINTIFFS RENEWED MOTION FOR CLASS CERTIFICATION**

The *Aker* Plaintiffs further renew their request that the Court certify their proposed class, appoint all named Plaintiffs as class representatives, and appoint the undersigned *Aker* counsel as class counsel. In accordance with Local Rule 7(m), the parties made a good-faith effort to resolve the issues raised in this motion mut have been unable to do so. Defendants oppose the motion.

Several Plaintiffs in this complaint are part of the proposed class including Plaintiffs Afsin Aker, Mustafa Dogan Eker, Dilara Avadin, Emre Akin, Erdal Tarman, Mustafa Madazli, and Utkirbek Abdjumominov and family. These Plaintiffs would serve as class representatives for the numerous other Plaintiffs not named in this action. *See* Exhibit A to Aker Motion for Class Certification, ECF 84. The proposed class satisfies the requirements of numerosity, commonality, typicality, and adequacy under Rule 23, as well as any judicially implied requirement that the class definition be ascertainable.

Numerosity: The proposed class is so numerous that joinder is impracticable, satisfying Rule 23(a)(1). As seen in Exhibit A, a list of potential class members, in addition to the named plaintiffs in this action, there exist a large number of individuals in this proposed class. Absent relief, on September 30, 2020, these individuals will lose all opportunity to obtain reissued Diversity Visas due to the statutory end of the DV-2020 program. A class action is the only appropriate and practical procedural avenue for the protections of the class members' rights.

Commonality: The class claims raise numerous common questions of fact and law, satisfying Rule 23 (a)(2). Each member of the proposed class will suffer the same harm as a result of Defendants' adoption and implementation of the Proclamation. Common questions of law include whether the Proclamations and their implementation violate Plaintiffs' and the class members' rights under the Administrative Procedure Act (APA), the INA, and the U.S. Constitution, and whether the Proclamations and their implementation exceed the statutory

authority provided to Defendants through the INA. Common answers as to the legality of the Proclamation and its implementation will drive the resolution of the litigation.

Common questions of fact pertaining to the Proclamation include whether Defendants relied on factors Congress did not intend for them to consider; failed to consider important aspects of the problem they are purporting to address; quantified or considered harms that would result from the Proclamation and its implementation; implemented and enforced the Proclamation in an arbitrary and irrational manner not in accordance with law; or explained their decision in a manner contrary to the evidence before them when issuing and implementing the Proclamation.

Typicality: Consistent with Rule 23(a)(3), the named *Aker* Plaintiffs in the proposed class claims are also typical of the class of individuals whom they seek to represent—that is, Diversity Visa *recipients* and their derivative beneficiaries, who will be unable to further pursue these visas if they are not reissued by September 30, 2020. Plaintiffs assert the same APA, constitutional, and ultra vires claims as the members of the proposed class.

Adequacy: The proposed class representatives satisfy the adequacy requirement of Rule 23(a)(4), as all representatives and members of the proposed class assert the same claims and seek the same relief: an injunction that will protect themselves and all absent class members from Defendants' actions under the Proclamation and allow them to obtain reissued visas, following their inability to enter the United States due to the Presidential Proclamations and travel restrictions. Proposed class counsel includes attorneys who have significant experience litigating class actions and complex cases in federal court, including cases involving federal statutory and constitutional rights of noncitizens.

Ascertainably: The proposed class is defined by clear and objective criteria and therefore satisfies any judicially implied requirement that the class be ascertainable.

In addition, the proposed class meets the requirements of both Rules 23(b)(2) and 23(b)(1)(A). Plaintiffs' proposed class satisfies Rule 23(b)(2) because Defendants have "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." Fed. R. Civ. P. 23(b)(2). The Proclamation deprives all members of the proposed class from obtaining reissued visas even though they were issued visas *prior* to the proclamations taking effect, but who were unable to enter the U.S. due to travel restrictions and/or the Presidential Proclamations. As a result, the declaratory and injunctive relief that Plaintiffs seek will be appropriate with respect to the proposed class as a whole. The proposed class also satisfies Rule 23(b)(1)(A) because Defendants have adopted a single policy—the Proclamations—through which they seek to improperly bar otherwise qualified visa applicants from receiving visas.

Accordingly, this Court should grant class certification under Rules 23(b)(2) and 23(b)(1)(A) for purposes of entering Plaintiffs' requested classwide temporary restraining order and preliminary and permanent injunctions. *N.S. v. Hughes*, 2020 WL 2219441, at *14 (D.D.C. May 7, 2020) (certification under 23(b)(2) appropriate "[w]hen a single injunction or declaratory judgment would provide relief to each member of the class" (internal quotation marks omitted)); *Nio v. U.S. Dep't of Homeland Sec.*, 323 F.R.D. 28, 34 (D.D.C. 2017) (certification under 23(b)(1)(A) "appropriate when the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class'" (quoting *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002))).

DATED September 25, 2020

Respectfully submitted,

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