UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ; MIRNA S.; AND VICENTA S., Plaintiffs, v. DONALD J. TRUMP, President of the United States of America, et al., Defendants.	Civil Action No. 1:20-cv-1419

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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TABLE OF CONTENTS

Page

Cases

Statutes

Rules

Regulations

INTRODUCTION

This Court should deny Plaintiffs' request to certify a class in which none of them is a member. The three named Plaintiffs seek immediate certification of a class action to enjoin Presidential Proclamation 10014, Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak ("COVID-19 Labor Proclamation" or "the Proclamation"), 85 Fed. Reg. 23,441 (Ex. 1). But all three named Plaintiffs lacks standing to bring any challenge against the Proclamation, and accordingly their motion seeking class certification should be denied.

Plaintiffs are U.S. citizens and lawful permanent residents (LPRs) who sponsor child immigrant petition beneficiaries seeking immigrant visas. The beneficiaries are foreign family members, who turn 21 years old this month, and who claim that if they do not receive their visas and enter the United States before their birthday, they will "age out" of their visa eligibility. Plaintiffs contend that "Defendants' enforcement of the Proclamation against Plaintiffs . . . will cause immense and irreparable harm if not enjoined: Should they age out, Plaintiffs will forever lose their present opportunity to obtain visas and rejoin their families . . . ." TRO Mot., ECF No. 21 at 20. They propose a class of individual visa sponsors "whose sponsored child or sponsored derivative child relative is subject to the Proclamation and will, as a result of the Proclamation, age out of his or her current visa preference category by turning 21 years old while the Proclamation remains in effect." Class Cert. Mot., ECF No. 20 at 9. None of the named Plaintiffs is a member of this class because none "will, as a result of the Proclamation, age out . . . while the Proclamation is in effect." Plaintiffs hold the burden to support class certification, and they have failed to carry that burden.

As a threshold matter, the Court must deny class certification because none of the named Plaintiffs has stated a justiciable claim. Two of the three beneficiaries at issue have been determined to be eligible for national-interest exceptions under the Proclamation and have been issued immigrant visas. The claims of the Plaintiffs petitioning for those beneficiaries are therefore moot. And any alleged injury relating to the third and sole remaining beneficiary has no causal connection to the Proclamation: that beneficiary faces obstacles to obtaining a visa that have nothing to do with the Proclamation—including a lockdown in his home country that has affected his ability to obtain a visa. So the Plaintiff petitioning on that beneficiary's behalf lacks standing. Without any justiciable claim for the named Plaintiffs, the Court must deny their motion for class certification.

Even if Plaintiffs had brought any justiciable claim, their motion should be dismissed nonetheless. Plaintiffs hold the burden of proving by a preponderance of the evidence that each of the requirements of "numerosity," "commonality," "typicality," and "adequacy" articulated by Federal Rule of Civil Procedure 23(a) is satisfied. In addition to making a showing as to each one of Rule 23(a)'s requirements, Plaintiffs must also prove by a preponderance of the evidence that at least one of the factors outlined under 23(b) is satisfied. They have failed that burden across the board.

First, Plaintiffs failed to show that the class is so numerous that joinder is impractical. They present no direct evidence of a single individual who qualifies for the class, much less that the class is so numerous that joinder is impractical. Fed. R. Civ. P. 23(a)(1). Instead, they rely on speculation that such a class exists based on State Department data for the number of sponsored individuals waiting in line to receive a visa in the F-2A preference category as 182,156. But they provide no further analysis to support the extrapolation that there are sufficiently numerous

individual beneficiaries who will turn 21 during the 60-day scope of the Proclamation, who are not entitled to statutory relief for potential age-outs, and who are not otherwise ineligible for a visa or unable to receive one due to country conditions unrelated to the Proclamation.

Second, Plaintiffs fail to show "commonality" among the class, as well as "typicality" between the named Plaintiffs and proposed class members. Fed. R. Civ. P. 23(a)(2), (3). The proposed class fails the commonality requirement because its over-inclusive definition would capture individuals for whom the requested injunction would provide no relief, as demonstrated by the three named Plaintiffs' circumstances. Likewise, they fail to show "typicality" because the class members, like the named Plaintiffs, would be subject to a wide array of defenses that would not be suitable for class treatment.

Third, the named Plaintiffs fail to show that they can adequately protect the interests of the class because they themselves do not even have standing to assert a claim. Fed. R. Civ. P. 23(a)(4). The Supreme Court has made clear over and over again, that without standing for any of the named Plaintiffs, there can be no adequate class representation.

Finally, Plaintiffs failed to show that any of the factors outlined under Rule 23(b) are satisfied. Plaintiffs rely on Rules 23(b)(2) and (b)(1)(A), but neither is satisfied because any injunction issued by the Court providing the relief requested in Plaintiffs' complaint will not provide relief uniformly across the class.

In short, Plaintiffs failed to meet their burden to support the certification of a class, and accordingly, this Court should deny their motion.

I. BACKGROUND

A. The Family-Based Immigrant Visa Process and the Child Status Protection Act.

United States citizens and LPRs may petition for an immigrant visa on behalf of certain categories of relatives so that those relatives may immigrate to the United States and become permanent residents themselves. *See* 8 U.S.C. §§ 1153(a), 1154(a)(1). To do so, the petitioning U.S. citizen or LPR files a Form I-130, Petition for Alien Relative, with United States Citizenship and Immigration Services (USCIS). On this form, the petitioning relative must establish that she is a U.S. citizen or LPR and that she has a qualifying relationship with the beneficiary. 8 C.F.R. § 204.1(a). Once the agency is satisfied that the petitioner has met her burden, USCIS approves the I-130 petition. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 46–48 (2014) (citing 8 U.S.C. § 1154(b)).

An approved petition does not, however, necessarily mean that the beneficiary may immediately apply for an immigrant visa. Instead, the approved petition is given a priority date and classified in the appropriate category depending on the immigration status of the petitioning relative and the petitioning relative's relationship with the beneficiary. Immigrant visas are always available for "immediate relatives"—beneficiaries who are the spouses, parents, and unmarried children under the age of 21 of U.S. citizens. 8 U.S.C. § 1151(b)(2)(A)(i). All other family relationships are classified in "preference" categories. For these preference categories, Congress imposes annual limits on the number of available visas. 8 U.S.C. §§ 1151(c)(1), 1152, 1153(a)(1)-(4). Demand for family-preference category visas frequently exceeds the congressionally established number of available visas. *Cuellar de Osorio*, 573 U.S. at 48.

The system is "first-come, first-served" within each preference category, meaning that an immigrant visa number becomes available to a beneficiary based on the priority date of her

approved I-130 petition. 8 U.S.C. § 1153(e)(1); *Cuellar de Osorio*, 573 U.S. at 48; 8 C.F.R. § 204.1(b); 22 C.F.R. § 42.53(a). The amount of time the beneficiary must wait depends on supply and demand within a given category, and some beneficiaries may wait years before a visa in a given preference category becomes available. *Cuellar de Osorio*, 573 U.S. at 50. When the visa becomes current or is about to become current, the National Visa Center (NVC) notifies the beneficiary, who may then begin the application process for an immigrant visa. The NVC then schedules the beneficiary for a visa interview at the appropriate United States Embassy or Consulate. *See* 8 U.S.C. § 1202(a), (e); 22 C.F.R. § 42.62. Under this legal regime, a beneficiary will not necessarily remain in the same visa-preference category during the pendency of her petition. For example, while waiting for a visa to become available in a family-preference category, a beneficiary who initially qualified as a "child" may have turned 21 and "aged-out" into a different family-preference category. *See Cuellar de Osorio*, 573 U.S. at 45.

In 2002, Congress passed the Child Status Protection Act (CSPA), *see* Pub. L. No. 107-208, to protect certain beneficiaries who were minors when their sponsors filed their petitions but risked "aging out" due to administrative processing delays (*i.e.*, the time it takes USCIS to adjudicate the petition). Certain provisions under CSPA "prevent an alien from 'aging out' because of—but only because of—bureaucratic delays: the time Government officials spend reviewing (or getting around to reviewing) paperwork at . . . the front and back ends of the immigration process." *Cuellar de Osorio*, 573 U.S. at 53. Notably, if a beneficiary's CSPA age is under 21 and she has sought to acquire an immigrant visa by, for example, submitting an online application or paying her immigrant-visa-application fees—steps taken prior to appearing for an in-person interview or even completing the application—then the beneficiary will maintain her CSPA age, so long as the

beneficiary does not marry and the petitioner maintains her immigration status. 9 Foreign Affairs Manual (FAM) 502.1-1(D)(6).

B. The COVID-19 Pandemic and the COVID-19 Labor Proclamation.

The COVID-19 pandemic has presented serious and unique challenges for countries around the world. The United States government has taken a range of steps to respond to the pandemic and stem the spread of the virus. The State Department has, for example, sought to protect its employees and the public while maintaining mission-critical services. On March 20, 2020, the State Department announced that it would "temporarily suspend routine visa services at all U.S. Embassies and Consulates," but noted that "emergency and mission critical visa services" would continue as resources allow. U.S. Department of State–Bureau of Consular Affairs, *Suspension of Routine Visa Services*, https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html (last visited June 10, 2020). That announcement remains in effect. *Id.*

About a month after that announcement, on April 22, the President signed the COVID-19 Labor Proclamation. *See* Presidential Proclamation 10014, Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 Fed. Reg. 23,441 (Apr. 27, 2020). The President issued the Proclamation to address the severe damage to the economy caused by the COVID-19 virus in the United States, especially the rising unemployment rate from the virus and the policies that have been necessary to mitigate its spread. *Id*. Unemployment claims have reached "historic levels"—between March 13, when the President declared a national emergency, and April 11, "more than 22 million Americans have filed for unemployment." *Id*.

As the President explained, administering our immigration system during the pandemic requires "be[ing] mindful of the impact of foreign workers on the United States labor market,

particularly in an environment of high domestic unemployment and depressed demand for labor," as well as "conserv[ing] critical State Department resources so that consular officers may continue to provide services to United States citizens abroad." 85 Fed. Reg. 23,441. "[W]ithout intervention, the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand." *Id*. An excess labor supply "is particularly harmful to workers at the margin between employment and unemployment," as they are the ones "likely to bear the burden of excess labor supply disproportionately." *Id*. Recently, "these workers have been disproportionately represented by historically disadvantaged groups, including African Americans and other minorities, those without a college degree, and the disabled." *Id*.

Once immigrants are admitted as LPRs, they are immediately eligible "to compete for almost any job," and the "vast majority of immigrant visa categories do not require employers to account for displacement of United States workers." 85 Fed. Reg. 23,441. For example, there is typically no way to direct "new residents to particular economic sectors with a demonstrated need not met by the existing labor supply" so that "already disadvantaged and unemployed Americans" would be protected "from the threat of competition for scarce jobs from new lawful permanent residents." *Id*. Although "some employment-based visas contain a labor certification requirement," that certification, issued long before the visa is granted, would not "capture the status of the labor market today." *Id.* at 23,442.

In addition to these labor impacts, the Proclamation addresses other harms caused by continuing immigration during this 60-day period. First, "introducing additional permanent residents when our healthcare resources are limited puts strain on the finite limits of our healthcare system at a time when we need to prioritize Americans and the existing immigrant population." *Id*. The Proclamation also recognizes burdens abroad on the State Department, explaining that

"[e]ven with their ranks diminished by staffing disruptions caused by the pandemic, consular officers continue to provide assistance to United States citizens." *Id*. Thus, the Proclamation serves to "conserve critical State Department resources so that consular officers may continue to provide services to United States citizens abroad." *Id*.

To address these complex challenges, the President issued the COVID-19 Labor Proclamation under, *inter alia*, 8 U.S.C. § 1182(f) and § 1185(a), and suspended entry into the United States, for 60 days, of intending immigrants abroad who did not already have a valid immigrant visa or travel document as of the date the Proclamation was signed, April 23, 2020. 85 Fed. Reg. 23,442, §§ 1, 2(a). The Proclamation exempts individuals who are already in the United States, LPRs, and several categories of intending immigrants. 85 Fed. Reg. 23,442, § 2(b).[1] The Proclamation also exempts any intending immigrant "whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee," or "whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees." *Id*.

The Proclamation expires on June 22, 2020. 85 Fed. Reg. 23,443, §§ 4, 5. By June 12, 2020, the Secretary of Homeland Security, upon consultation with the Secretaries of State and Labor, will recommend to the President whether to continue or modify the Proclamation, and then the President will decide if such action is necessary. *Id*. The State Department posted notice online,

[1] These categories include individuals who apply for visas to work as healthcare professionals, COVID-19 researchers, or other COVID-19 essential workers, and their spouses and children; any individual applying for an EB-5 immigrant investor visa; any spouse of a U.S. citizen; anyone under age 21 who is the child of a U.S. citizen or is coming to the United States to be adopted; members of the United States Armed Forces, and their spouses and children; and nationals of Afghanistan and Iraq who are applicants for "Special Immigrant Visas" in the SI or SQ classifications, and their spouses and children.

which explains that, as with the earlier notice informing the public of the suspension of routine visa services at U.S. consular posts worldwide, "as resources allow, embassies and consulates will continue to provide emergency and mission critical visa services for applicants who may be eligible for an exception under this presidential proclamation." U.S. Department of State–Bureau of Consular Affairs, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, https://travel.state.gov/content/travel/en/News/visas-news/Proclamation-Suspending-Entry-of-Immigrants-Who-Present-Risk-to-the-US-labor-market.html (last visited May 6, 2020).

Notably, the State Department's mission-critical or emergency services that remain available during the suspension of routine visa services due to the COVID-19 pandemic, as well as the Proclamation, includes the processing of immigrant visa applications where the applicant would soon turn 21 and age out of her immigrant visa classification, so long as resources permit. Ex. 2, Marwaha Decl., ¶¶ 2, 4. During this period, consular sections at U.S. embassies and consulates have scheduled emergency interviews for visa applicants at risk of aging out. *Id*., ¶ 5. Such emergency interviews may include consideration of a national-interest exception, and the consular officer makes the determination of eligibility for the exception on a case-by-case basis. *Id*.

C. Procedural History.

1. The Complaint.

On May 28, 2020, the three Plaintiffs filed this putative class action lawsuit. Plaintiffs described the putative class as consisting of:

> All individual immigrant sponsors with approved immigrant visa petitions for a child, including for derivative child relatives in applicable preference categories, with a "current" priority date while the Proclamation is in effect; and whose sponsored child or sponsored derivative child relative is subject to the Proclamation

> and will, as a result of the Proclamation, age out of his or her current visa preference category by turning 21 years old while the Proclamation remains in effect.

Compl., ECF No. 1, ¶ 118. The complaint asserts that the COVID-19 Labor Proclamation is illegal and should be enjoined nationwide with respect to "Defendants . . . from implementing or enforcing any part of the Proclamation so as to deny or refuse consideration of Plaintiffs' . . . visa petitions on behalf of their children [or derivative child relatives]." *Id.* at 51, Prayer for Relief. Plaintiffs, on behalf of each individual plaintiff and the putative class, assert the following three causes of action: (1) the implementation of the Proclamation is an arbitrary and capricious violation of the APA because it was based on legal error, failed to consider all relevant factors, and lacked rational explanation, *id.*, ¶¶ 129-138; (2) the Proclamation is contrary to law and *ultra vires* under the APA because it contravenes Congress' goal of preserving family unity *id*., ¶¶ 139-146; and (3) the Proclamation violates due process because, by preventing the consideration of the visa petitions, it forecloses family reunification without legal process. *Id.* ¶¶ 147-154. Along with various other relief, Plaintiffs further request declaratory relief that "the Proclamation is unlawful and invalid as to Plaintiffs and their children . . . ." *Id*. at 52.

2. Mirna S. and M.T.S.

Plaintiff Mirna S., who obtained a U-visa in 2013 and adjusted her status to LPR in 2018, filed an I-929 petition to sponsor M.T.S., her daughter, for an immigrant visa. TRO Mot. 11. M.T.S. turns 21-years old on June 23, 2020. *Id*. The Department of State's Consular Consolidated Database (CCD)[2] reflects that the U.S. Consulate General in Ciudad Juarez, Mexico, granted an expedited immigrant visa appointment for M.T.S., scheduled for May 29, 2020. Ex. 3, Dus Decl.,

[2]The CCD is the State Department's records database for non-immigrant and immigrant visas adjudicated at U.S. embassies and consulates overseas and information on petitions approved by and provided to the Department by USCIS. *E.g.*, Ex. 3, ¶ 1. These records are accessible to consular officers at U.S. embassies and consulates worldwide. *Id*.

¶ 2. M.T.S. appeared for her in-person interview in support of her immigrant visa application. *Id*., ¶ 3. At the interview, the consular officer determined that M.T.S. qualified for an immigrant visa, but was ineligible due to the Proclamation's restriction on entry. *Id*. The consular officer, however, pursued a national-interest waiver, as provided for in the Proclamation, on M.T.S.' behalf. *Id*. CCD records indicate that the State Department approved M.T.S.' national-interest waiver on June 4, 2020, and on the same day, the consulate general requested M.T.S. to produce her Mexican passport so her case could be processed to conclusion. *Id*., ¶¶ 4-5. On June 9, 2020, the consular officer determined that M.T.S. established her eligibility for a national-interest exception and issued M.T.S.'s visa. *Id*., ¶ 6.

3. Gomez and Alondra.

Plaintiff Domingo Arreguin Gomez, a LPR, filed an I-130 petition with USCIS in 2016 on behalf of his wife. Ex. 4, Second Dus Decl., ¶ 2. His wife's application included her daughter (Gomez's stepdaughter), Alondra, as a derivative child beneficiary. *Id*., ¶ 5. Alondra turns 21-years old on June 15, 2020. The CCD reflects that, on April 20, 2020, and May 28, 2020, the United States Consulate General in Ciudad Juarez, Mexico, informed Alondra that it had determined that she qualified for relief under CSPA that would allow her to immigrate to the United States even after she turns 21 years old. *Id*., ¶¶ 6-7. The determination that Alondra qualified for CSPA was based on State Department records that indicated that she submitted an immigrant visa application in September 2019. *Id*., ¶ 5. On June 4, 2020, the U.S. Consulate General found that the earlier determination that Alondra was a child under CSPA was incorrect because she had not actually filed an immigrant visa application in September 2019 and had not taken any other steps to seek to acquire LPR status within a year of the visa becoming available, as required under 8 U.S.C. § 1153(h)(1). *Id*., ¶ 9. The U.S. Consulate General then contacted Alondra on June 5, 2020, to

schedule an expedited visa interview on June 9, 2020. *Id*. ¶ 10. On June 9, 2020, the consular officer determined that Alondra established her eligibility for a national-interest exception under the Proclamation and issued her visa. *Id*., ¶ 11.

4. Vicenta S. and W.Z.A.

Plaintiff Vicenta S. is a U.S. citizen of Salvadoran origin. TRO Mot. 17. She sponsored her son, the principal beneficiary, as well as derivative beneficiaries, including her grandson, W.Z.A., for family-preference immigrant visas. TRO Mot. 17; Ex. 5, Bent Decl., ¶ 4. The visa date assigned to W.Z.A. and his father has been current since January 2016. *Id*., ¶ 5. W.Z.A. turns 21-years old on June 30, 2020. On March 5, 2020, the consular section of the U.S. Embassy in San Salvador sent an email to W.Z.A.'s father that explained that W.Z.A. did not qualify for CSPA relief and needed to enter the United States by June 30, 2020. Ex. 5, ¶ 6. The email provided information regarding the visa application process, which explained how to make an appointment, schedule the necessary medical examination, and obtain all required paperwork necessary for the visa interview. *Id*. Although Vicenta S.' beneficiaries, which included W.Z.A. and his father, scheduled a visa appointment for April 30, 2020, the embassy emailed W.Z.A.'s father on April 1, 2020, to inform him that the appointment was cancelled due to COVID-19, and provided information on how to request an emergency appointment. *Id*., ¶ 8.

The embassy was unable grant W.Z.A. an emergency appointment due to the pandemic: In response to COVID-19, El Salvador has been under a government-imposed lock-down quarantine, in which no one is allowed on the streets except to buy food and medicine. *Id*. ¶ 9. Although the State Department suspended routine visa services in response to COVID-19, the embassy granted and prioritized emergency appointments to individuals at risk of aging out. *Id*. ¶ 14. During this period, the embassy was unable to process immigrant visas applications without a completed

medical examination. Ex. 5, ¶¶ 9, 11-12; 9 FAM 504.4-7. The medical examination is statutorily required to determine visa eligibility. Ex. 5, ¶ 11. The embassy has no record that W.Z.A. had completed his required medical examination to be qualified for an immigrant visa. *Id*., ¶ 9. El Salvador's quarantine prevented panel physicians from conducting the required medical examinations for immigrant visa applicants. *Id*. ¶¶ 9, 11. The embassy had expected a gradual re-opening starting June 8, 2020, but El Salvador extended the quarantine to June 15, 2020. *Id*., ¶ 9.

The embassy has engaged with W.Z.A. on his next steps in the process. Panel physicians have confirmed that medical examinations will resume when El Salvador lifts the quarantine. *Id*. One panel physician indicated that he intended to open for limited medical appointments on June 16, 2020. *Id*., ¶ 14. On June 10, 2020, the embassy emailed W.Z.A.'s father to schedule appointments for medical examinations and in-person interviews. *Id*. The embassy is currently attempting to schedule appointments for the week of June 15, 2020.

W.Z.A.'s father, however, must also be eligible for a visa. Because W.Z.A. is the derivative beneficiary of his father, who is the principal beneficiary, in order for W.Z.A. to receive a visa, his father must also have his visa application positively adjudicated. *See generally* 8 U.S.C. § 1153(d). According to Plaintiffs, W.Z.A.'s father is married, lives in the United States, owns a tow company, and possesses an unlawful presence waiver. Pls' Ex. H., ¶¶ 5, 7.

5. The TRO.

On June 2, 2020, Plaintiffs filed an emergency motion for a TRO seeking to enjoin "Defendants' enforcement of the Proclamation as it applies to visa applicants with approved visa petitions who are in danger of aging out while the Proclamation is in effect." TRO Mot. 2, ECF No. 21. Plaintiffs argue that they are likely to succeed on the merits of their first cause of action, which claims that the implementation and enforcement of the Proclamation is arbitrary, capricious,

and not in accordance with law under the APA. *Id.* at 23-32. Plaintiffs did not raise any arguments regarding the likelihood of success on the merits in connection to their *ultra vires* and due process claims. *See generally id*.

6. The Class Certification Motion

Contemporaneously with their TRO motion, Plaintiffs filed the immediate motion to certify a class. Class Cert. Mot., ECF No. 20. The three named Plaintiffs requested that the Court certify the class proposed in its complaint, as well as "appoint all named Plaintiffs as class representatives." *Id*. at 7. Plaintiffs contend that "[t]heir experiences exemplify the lifelong impact that the Proclamation will have on families seeking to reunite with their families." *Id*. at 19. Relevant to the issues addressed in this opposition brief, Plaintiffs assert that they have satisfied Federal Rule of Civil Procedure 23(a)'s requirements for numerosity (*id*. at 22-25); commonality (*id*. at 25-29); typicality (*id*. at 29-31); and adequacy (*id*. at 31-32).

To show numerosity, Plaintiffs concede they do not have direct data as to how many individuals may satisfy their class criteria, but point to a November 2019 State Department Report providing "the number of sponsored individuals waiting in line to receive a visa in the F-2A preference category" as 182,156." *Id*. at 24. From this broad category, Plaintiffs contend that "[o]ne can reasonably infer . . . that there are at least 40, and likely more, U.S. citizens and lawful permanent residents who are sponsoring 20-year-old children with 'current' priority dates whose birthdays fall within the 60-day period during which the Proclamation applies." *Id*. at 24-25.

For commonality, Plaintiffs contend that their "proposed class, and the claims they assert on behalf of the class readily satisfy Rule 23(a)(2)'s commonality requirement" because they have asserted seven different legal issues that are common to the class. *Id*. at 25-27. According to Plaintiffs, all members of the class are "subject to a new, possibly insurmountable admissibility

requirement, and if they cannot this requirement, will 'age out' of their current visa preference category, causing substantial delays in their visa adjudication and resulting in prolonged—and in some case, indefinite—family separation." *Id*. at 27-28. They argue that "all members of the proposed class would benefit from the relief that Plaintiffs seek," in the form of an injunction against the Proclamation. *Id*. at 28.

To show typicality, Plaintiffs assert that their "claims are typical of the claims of every member of the class they seek to represent" because "the Proclamation will be imposed equally on every minor child and derivative child relative of every member of the proposed class." *Id*. at 30.

As for adequacy, Plaintiffs assert that they "will fairly and adequately protect the interests of the proposed class," and that they "seek no unique or additional benefit from this litigation that may make their interests different from or adverse to the claims of absent class members." *Id*. at 31.

Plaintiffs also assert that their proposed class satisfies the consideration of "ascertainability." *Id*. at 32-33. According to Plaintiffs, their "proposed class is defined by clear and objective criteria" because the "beneficiary minor child must have a petition with a 'current' priority date, must be subject to the Proclamation, must turn 21 years old while the Proclamation remains in effect, and must therefore be about to 'age out' of his or her current visa preference category if he or she does not receive a visa before turning 21." *Id*. at 33.

Finally, Plaintiffs contend that their proposed class satisfies the criteria outlined in Rule 23(b). *Id*. at 34-36. According to Plaintiffs, Rule 23(b)(2) is satisfied because "a single injunction prohibiting the application and implementation of the Proclamation to the beneficiaries of class members' approved visa petitions would protect both Plaintiffs and absent class members from injury resulting from the unlawful government action." *Id*. at 35. They also assert that Rule

23(b)(1)(A) is met because "an injunction would protect all class members from the harms resulting from implementing the alleged unlawful Proclamation against them." *Id*. at 36.

Based on these arguments, Plaintiffs request that the Court certify their proposed class, appoint the three named Plaintiffs as class representatives, and Plaintiffs' counsel as class counsel. *Id*. at 36.

II. LEGAL STANDARD FOR CLASS CERTIFICATION

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To fall within the exception, Plaintiffs "must affirmatively demonstrate [their] compliance" with Rule 23 of the Federal Rules of Civil Procedure. *Wal–Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551–52 (2011). The burden of a party seeking certification of a proposed class includes demonstration of the existence of the required elements set forth in Rule 23(a) of the, including: (1) The class is so numerous that joinder is impractical ("numerosity"); (2) There are questions of law or fact common to the class ("commonality"); (3) The claims or defenses of the Named Plaintiffs are typical of claims or defenses of the class ("typicality"); and (4) The Named Plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation"). Fed. R. Civ. P. 23(a). The Supreme Court has held that "[i]t is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" that makes a case appropriate as a class action. *Dukes*, 564 U.S. at 350 (emphasis in original). In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

The proponents of a class action have the burden of proof as to each of Rule 23's requirements. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 n. 9 (D.C. Cir. 1984). "[P]laintiffs must establish the requirements of Rule 23 by a preponderance of the evidence, and this standard applies to any factual disputes. . . that bear on the decision whether to certify a class." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, (D.D.C. June 21, 2012), *vacated on other grounds*, 725 F.3d 244 (D.C. Cir. 2013). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). If a court is not fully satisfied, the class cannot be certified. *Id.* "While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23." *Zinser*, 253 F.3d at 1186. When reviewing a motion for class certification, it "'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 160–61).

III. ARGUMENT

A. THE NAMED PLAINTIFFS PRESENT NO JUSTICIABLE CLAIMS FOR RELIEF.

The Court should deny class certification at the threshold because the named Plaintiffs lack Article III standing. "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Sweigert v. Perez*, 334 F.Supp.3d 36, 41 n.4 (D.D.C. Sept. 20, 2018) ("Even though [a plaintiff] brings a putative class action, he must nevertheless demonstrate that he individually has standing to litigate this case."); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("A class of

plaintiffs does not have standing to sue if the named plaintiff does not have standing."); *Hodgers-Durgin v. De La Vin*, 199 F.3d 1037, 1045 (9th Cir. 1999) ("Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.").

All three Plaintiffs and their respective beneficiaries lack Article III standing. Initially, consular officers have determined that M.T.S. and Alondra are eligible for national interest exceptions to the Proclamation and have issued their immigrant visas. Ex. 3, ¶ 6; Ex. 4, ¶ 11. Accordingly, for Plaintiffs Gomez and Mirna S., the Proclamation cannot plausibly interfere with their reunification with Alondra and M.T.S., respectively. Thus, for Plaintiffs' claims with respect to these two beneficiaries, "relief sought has been obtained, [so] there no longer is a live controversy and the case must be dismissed as moot." *Cueto v. Director*, 584 F. Supp. 2d 147, 149 (D.D.C. 2008); *see Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). W.Z.A. is therefore the sole remaining beneficiary at issue in this case. But Plaintiff Vicenta S.' request for relief fails at the threshold because she has alleged no concrete and particularized injury that is fairly traceable to the Proclamation and that this Court could redress.

Article III of the Constitution requires that a plaintiff appearing before a federal court have "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (citations and quotations omitted). Built on separation-of-powers principles, standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To satisfy the "'irreducible constitutional minimum' of standing" under Article III, a

plaintiff must demonstrate that she has: "(1) an 'injury in fact' that is 'concrete and particularized' as well as 'actual or imminent'; (2) a 'causal connection' between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, 'that the injury will be redressed by a favorable decision.'" *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The party invoking federal jurisdiction bears the burden of establishing these elements. *See Lujan*, 504 U.S. at 561.

In particular, in the context of a temporary restraining order or preliminary injunction, courts "require the plaintiff to show a substantial likelihood of standing under the heightened standard for evaluating a motion for summary judgment." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity* ("*EPIC*"), 878 F.3d 371, 377 (D.C. Cir. 2017) (internal quotation marks and citation omitted). A plaintiff seeking such extraordinary relief, therefore, "cannot rest on mere allegations, but must set forth by affidavit or other evidence specific facts that, if taken to be true, demonstrate a substantial likelihood of standing." *Id.* (cleaned up) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

"[B]ecause standing is a necessary predicate to any exercise of the Court's jurisdiction, the plaintiff and its claims have no likelihood of success on the merits, if the plaintiff lacks standing." *Arpaio v. Obama*, 27 F. Supp. 3d 185, 207 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015) (citations omitted). Similarly, an absence of standing "dooms the plaintiff's ability to show irreparable harm." *Id.* Thus, when plaintiffs lack standing, the Court must deny a preliminary-injunction motion and dismiss the case outright. *Id.*

Indeed, in a prior challenge to the same Proclamation, this Court denied a TRO based on lack of standing. *Nguyen v. U.S. Dep't of Homeland Security*, — F.Supp.3d —, 2020 WL 2527210 (D.D.C. May 18, 2020). Specifically, this Court found that the plaintiffs had failed to present any

evidence to support their motion for a TRO. *Id*. at *4. And even after considering the evidence that the plaintiffs belatedly submitted in their reply, this Court nonetheless found that the plaintiffs had failed to establish that their alleged "harms are traceable to the Proclamation, or that [the plaintiff's] requested relief would redress them." *Id*.

Here, Plaintiffs allege that child visa beneficiaries aging out of their visa classification would cause the "loss of opportunity to reunite with their family members in the United States." TRO Mot. 21. W.Z.A. will age out (turn 21 years old) on June 30, 2020. As in *Nguyen*, however, Plaintiffs have failed to introduce record evidence to establish standing: they "have not met their burden of demonstrating that it is substantially 'likely, as opposed to merely speculative,'" that the Proclamation caused their injuries, and that this Court can redress those injuries by granting the TRO. *See Nguyen*, 2020 WL 2527210 at *6 (internal citations omitted).

1. Plaintiffs Lack Standing Because They Fail To Establish Causation.

To establish causation, a plaintiff must show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id*. Plaintiffs attempt to establish causation by theorizing "that the reason [W.Z.A.] ha[s] yet to receive [an] emergency interview appointment[ ], despite falling within the definition of applicants warranting emergency services, is the State Department's current policy of refusing even emergency visa services to applicants covered by the Proclamation." TRO Mot. 22 (quotation marks omitted). In other words, Plaintiffs allege causation by claiming that the Proclamation is the reason why the State Department denied W.Z.A. an emergency interview.

That is not so. This speculative theory falls well short of showing a substantial likelihood of causation. *See EPIC*, 878 F.3d at 377. In fact, despite their substantial burden, Plaintiffs tellingly

fail to supply any record evidence that the State Department denied W.Z.A.'s request for an emergency interview due to the Proclamation. *See Nguyen*, 2020 WL 2527210 at *5 ("Presumably, if [the] [d]efendants had ceased processing [the] [p]laintiffs' and their families' visa applications, similar paper trails would exist.").

Rather, U.S. Embassy San Salvador's inability to schedule an expedited appointment for W.Z.A. was due to the circumstances in the country of El Salvador and the lack of any indication that W.Z.A. had completed the required medical examination. Ex. 5, ¶¶ 9, 11. El Salvador is under lockdown quarantine due to COVID-19. *Id*., ¶ 9; *see also* U.S. Department of State, U.S. Embassy in San Salvador, El Salvador – (May 24, 2020), available at https://sv.usembassy.gov/covid-19-information/. The quarantine has prevented the embassy's panel physicians from performing required medical examinations for immigrant visa applicants. Ex. 5, ¶ 9. The medical examination, however, is statutorily required to determine W.Z.A.'s visa eligibility. *Id*., ¶ 9. Although the embassy has scheduled emergency interviews, the embassy cannot process immigrant visas applications without the completed medical examination. *Id*., ¶ ¶¶ 9, 11-12; 9 FAM 504.4-7. Accordingly, because W.Z.A. had no record of a completed medical examination to be qualified for an immigrant visa—a requirement entirely unrelated to the Proclamation, *see* 9 FAM 504.4-7—the consulate did not scheduled W.Z.A. for an expedited interview. *See* Ex. 5, ¶¶ 9-11. Thus, any refusal on the part of the embassy to grant W.Z.A. an emergency interview had nothing to do with the Proclamation.

Although Alondra's case is now moot, it shares the same theory of causation as W.Z.A.'s case, and State Department records regarding her case illustrate the frailty of Plaintiffs' key allegation. Emails from the U.S. Consulate General in Ciudad Juarez, as well as State Department's CCD records, reflect that on April 20 and May 29, 2020, the consulate informed

Alondra that she qualified for CSPA and "[t]herefore, we will not be scheduling an expedited appointment at this time." Ex. 4, ¶¶ 6-7. Thus, the consulate's refusal to schedule an expedited appointment for Alondra was not due to the Proclamation, but because it had incorrectly determined that she qualified for CSPA, and therefore did not require an expedited interview since the consulate believed that she would not be at risk of aging out of her visa category. *Id*., ¶¶ 6-10. Plaintiffs' own declaration submitted in support of their TRO motion corroborates this explanation. Pls' Ex. F, ¶ 10.[3] Significantly, April 20, 2020, the date of the first email, predates the Proclamation, which shows that the consulate's denials of Alondra's requests for expedited interviews based on the CSPA were entirely unrelated to the Proclamation. And, notably, as soon as the consulate realized its error, it expeditiously scheduled Alondra for an interview, where the consular officer determined that Alondra established her eligibility for a national-interest exception under the Proclamation and issued her visa. *Id*., ¶ 11.

In sum, Plaintiffs have not shown that the Proclamation was ever a basis to deny a request for an emergency interview. *See Nguyen*, 2020 WL 2527210 at *5 ("Plaintiffs have not adduced any evidence that their injuries are attributable to the Proclamation or its implementation and enforcement, rather than other factors that are unchallenged in this action. For two of the Family-Based Visa Plaintiffs . . . delays in their family members' visa processing appear to be due to hiccups with their applications unrelated to the Proclamation."). Thus, Plaintiffs lack standing because they have failed to establish causation.

[3] Plaintiffs neither cite this statement anywhere on the face of their moving papers, nor plead this fact in their complaint.

2. Plaintiffs Lack Standing Because They Fail To Establish Redressability.

To establish redressability, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal citations and quotations omitted); *Florida Audubon Soc.*, 94 F.3d 658, 663–64 (D.C. Cir. 1996) ("Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff."). Causation and redressability are "closely related" concepts, which typically "overlap as two sides of a . . . coin." *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997).

Plaintiffs assert that their "injuries would likely be redressed by a favorable decision in this case." TRO Mot. 22. Specifically, Plaintiffs make the following argument without any citation to their declarations:

> [I]njunctive relief against Defendants' enforcement of the Proclamation would redress all three Plaintiffs' injuries by removing *the only apparent barrier* to their beneficiaries being treated as "emergency" cases who would receive expedited interview and processing in advance of their 21st birthdays. And because there is no other basis on the record to believe that any of Plaintiffs' beneficiaries would be denied a visa on the merits . . .

TRO Mot. 22-23 (emphasis added).

Any injury with respect to W.Z.A. is not redressable by this Court's grant of a TRO. *See Nguyen*, 2020 WL 2527210 at *6 ("Plaintiffs cannot demonstrate that an order preventing Defendants from implementing or enforcing the Proclamation, is substantially likely to redress their injuries because, as discussed, Plaintiffs have not shown that their injuries are caused by the Proclamation or its implementation. Simply put, the court cannot remedy an injury that is not caused by the challenged action before it.") (internal citations and quotations omitted).[4] Again, the

[4] Regarding M.T.S. and Alondra's situation, as discussed above, there is nothing for this Court to redress since their cases are moot.

circumstances surrounding COVID-19 and El Salvador's quarantine, which has been extended to June 15, 2020, have frustrated efforts to facilitate the processing of W.Z.A.'s application for reasons that have nothing to do with the Proclamation. *See* Ex. 5, ¶ 9. A TRO enjoining the Proclamation would not help W.Z.A. obtain a visa before he ages out because the TRO cannot, for example, lift the quarantine in El Salvador.

While the embassy is in the process of scheduling appointments for W.Z.A. in the hopes that the quarantine is lifted and medical examinations resume, *id*., ¶ 14, the TRO would not redress any of Plaintiff Vicenta S.' alleged harms if W.Z.A. does not qualify for a visa. In the event circumstances allow for W.Z.A.'s visa application to be processed, the consular officer would need to find that W.Z.A. qualifies for an immigrant visa using a list of affirmative qualifications and potential ineligibilities. *See generally* 9 FAM 301.1-2. Despite Plaintiffs' burden to establish a substantial likelihood that Vicenta S.'s injury would be redressed by a TRO, Plaintiffs have not shown any evidence to demonstrate that a consular officer is substantially likely to find W.Z.A. eligible for an immigrant visa on the date of his visa interview (in the event that the situation in El Salvador allows for an interview) so that he may be issued a visa by his age-out date of June 30, 2020. *See Nguyen,* 2020 WL 2527210, at *6 ("[the plaintiffs'] family members' visa applications currently require additional information before they can be processed. A favorable decision here cannot remedy those issues."). All that Plaintiffs can say to try to meet their burden is "there is no other basis on the record to believe that any of Plaintiffs' beneficiaries would be denied a visa on the merits . . ." without any citation to any of their supporting documents. *See* TRO Mot. 23.

Finally, yet another hurdle exists for W.Z.A.: he is a derivative beneficiary whose visa application must be adjudicated along with that of his father, who is the principal beneficiary of Vicenta S's petition. *See* Ex. 5, ¶ 4. Under 8 U.S.C. § 1153(d), "when a visa becomes available to

the petition's principal beneficiary, one also becomes available to h[is] minor child." *Cuellar de Osorio*, 573 U.S. at 45. However, Section 1153(d) provides that "a derivative's fate is tied to the principal's: If the principal cannot enter the country, neither can h[is] children." *Cuellar de Osorio,* 573 U.S. at 49. W.Z.A. is eligible for LPR status only through Section 1153(d), which allows for a child of an alien who qualifies for LPR status under 8 U.S.C. 1153(a), (b), or (c) to receive the same immigrant status as his parent. Thus, until the consulate issues W.Z.A.'s father a visa, it cannot issue a visa to W.Z.A. *See* 8 U.S.C. § 1153(d); *Cuellar de Osorio*, 573 U.S. at 48 ("the child can piggy-back on his qualifying parent in seeking an immigrant visa—although . . . he may not immigrate without her.").

All of this leads to another problem. According to the Vicenta S.' declaration, W.Z.A.'s father is living and working, with his wife, in the United States on an unlawful presence waiver. Pls' Ex. H, ¶ 7. If these assertions are true, then there is a high degree of uncertainty whether W.Z.A.'s father is willing or able to travel to El Salvador to have his visa application adjudicated. Significantly, this is a risky proposition for W.Z.A.'s father because if his is found ineligible for a visa, his unlawful presence waiver could be automatically revoked, jeopardizing his ability to return to the United States. 8 C.F.R. § 212.7(e)(14)(i). According to Vicenta S., she depends on W.Z.A.'s father for care, since she states that her "extreme hardship" was the basis for his waiver. Pls' Ex. H, ¶ 7. Even if W.Z.A.'s father is willing to shoulder the life-changing risk, it is also far from clear to what extent it is even possible for W.Z.A.'s father to travel to El Salvador in time.

Thus, Vicenta S. lacks standing because she fails to establish redressability.

In short, none of the named Plaintiffs can show any injury directly traceable to the Proclamation that this Court could redress. Without any named Plaintiff who can satisfy Article

III standing on their own behalf, this Court must deny Plaintiffs' motion for class certification. *O'Shea*, 414 U.S. at 494 (1974); *Sweigert*, 334 F.Supp.3d at 41 n.4

B. THE PROPOSED CLASS DOES NOT MEET THE CERTIFICATION REQUIREMENTS.

1. Plaintiffs Fail to Demonstrate Numerosity of Class Members.

Plaintiffs do not satisfy Rule 23(a)(1)'s requirement for certification of a class: that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticable means 'difficult or inconvenient' rather than impossible." *In re McCormick & Co., Inc., Pepper Prods. Mktg & Sales Practices Litig.*, 422 F.Supp.3d 194, 235 (D.D.C. 2019) (quoting *Coleman v. District of Columbia*, 306 F.R.D. 68, 76 (D.D.C. 2015)). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). "Plaintiffs must provide some evidence that a class is numerous, but courts may draw 'reasonable inferences from the facts presented to find the requisite numerosity.'" *In re McCormick*, 422 F.Supp.3d at 235 (quoting *Coleman*, 306 F.R.D. at 76). Generally speaking, a class of over 40 members has been held to satisfy the numerosity requirement. *Id*.

Here, however, Plaintiffs failed their burden to adduce evidence of that their proposed class is sufficiently numerous. Indeed, none of the named Plaintiffs satisfies their own criteria because each of them lacks standing to challenge the Proclamation. *See infra* at 17-25.

Without evidence demonstrating that any individual satisfies the proposed class criteria, Plaintiffs rely on a State Department "Annual Report of Immigrant Visa Applicants in the Family- and Employment-Based Categories as of November 1, 2019," suggesting that 182,156 individuals waiting to receive a visa in the F-2A preference category. Class Cert. Mot., ECF No. 20 at 24. According to Plaintiffs, "[o]ne can reasonably infer from that statistic that there are at least 40, and

likely more, U.S. citizens and lawful permanent residents who are sponsoring 20-year-old children with 'current' priority dates whose birthdays fall within the 60-day period during which the Proclamation applies.'" *Id*. at 24-25. But Plaintiffs make no effort to account for how many of these purported individuals have availed themselves of relief pursuant to CSPA; how many already received expedited interviews like Alondra and M.T.S.; or how many cannot obtain a visa due to pandemic-related restrictions in their home country like W.Z.A.

Plaintiffs have the burden to present "specific facts," and any reasonable inference by the Court must be based solely on "the facts presented." *Gen. Tel. Co.*, 446 U.S. at 330; *In re McCormick*, 422 F.Supp.3d at 235. But they have presented none here, instead relying on mere speculation that such individuals are out there despite providing affirmative evidence of any single such person. Accordingly, Plaintiffs failed to show evidence that any number of individuals qualifies for the proposed class certification, and must less that the class is so numerous that it would be impracticable to join them. Fed. R. Civ. P. 23(a)(1). Accordingly, the Court should deny Plaintiffs' motion.

2. Plaintiffs Cannot Satisfy the "Commonality" and "Typicality" Requirements For Class Certification.

Commonality and typicality are not established here, where the putative class is broadly drawn, bringing within its ambit differing factual circumstances and differing legal claims. Fed. R. Civ. P. 23(a)(2), (3). Rule 23(a)'s commonality and typicality requirements occasionally merge: "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting *Wal-Mart, Inc.*, 131 S. Ct. at 2551 n.5). Rule 23(a)(2) requires that Plaintiffs establish "there are questions of

law or fact common to the class." Thus, litigants seeking class certification must show the Court is able to fairly and efficiently resolve the issue raised by the class "in one stroke." *Wal-Mart, Inc.*, 131 S. Ct. at 2545.

Plaintiffs' proposed class lacks commonality for the same reasons it lacks typicality: the proffered class definition includes individuals whose legal and factual interests differ from those of the proposed class representatives, none of whom presents a cognizable claim. The purpose of the commonality requirement is to ensure that members of the would-be class have suffered a common injury and, therefore, their complaints should be aggregated into one lawsuit, thereby husbanding judicial and party resources. *Wal-Mart, Inc.*, 131 S. Ct. at 254. Here, Plaintiffs failed to demonstrate that their class satisfies commonality because it is significantly over-inclusive. The class definition includes all sponsors for all individuals who "as a result of the Proclamation, age out of his or her current visa preference category by turning 21 years old while the Proclamation remains in effect." Class Cert. Mot., ECF No. 20 at 7. But, such a broad definition would sweep up a wide number of individuals who may turn 21 years-old while the Proclamation remains in effect, but who have locked in their CSPA age by seeking to acquire within 12 months of visa availability and, therefore, have avoided the Proclamation's impact, or who would be otherwise ineligible for an immigrant visa for any number of independent reasons. As this Court noted during the June 3, 2020 status conference, jurisdiction of U.S. courts over foreign nations, such as El Salvador, in the operation of their public health orders is dubious at best.

While the commonality analysis looks at the relationship among the class members, the typicality analysis looks at the relationship between the proposed class representative and the rest of the class. Newberg on Class Actions § 3:26 (5th ed.). "The typicality requirement 'aims at ensuring that the class representatives have suffered injuries in the same general fashion as absent

class members.'" *Hoyte v. District of Columbia*, 325 F.R.D. 485, 490 (D.D.C. July 27, 2017) (quoting *Hardy v. District of Columbia*, 283 F.R.D. 20, 26 (D.D.C. 2012). "Generally speaking, typicality is satisfied when the plaintiffs' claims arise from the same course of conduct, series or events, or legal theories of other class members." *Daskalea v. Washington Humane Soc*., 275 F.R.D. 346, 358 (D.D.C. 2011). "The facts and claims of each class member do not have to be identical to support a finding of typicality; rather, typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff." *Id.* But, "[b]ecause Rule 23 requires that both the claims and the defenses be typical, a proposed class representative will not satisfy Rule 23(a)(3) if the representative is subject to a unique defense that is likely to become a major focus of the litigation." *In re Rail Freight Fuel*, 287 F.R.D. at 33 (internal citations and quotation marks omitted). The typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Plaintiffs' proposed class likewise fails to establish typicality, as demonstrated by W.Z.A.'s case compared to the others. While Alondra and M.T.S. both needed only the opportunity for an expedited interview, W.Z.A.'s entitlement to a visa is subject to multiple additional requirements not present in the other cases. Like W.Z.A., any additional class members would surely present a wide of array of allegations that would present a plethora of defenses, such as deficiencies in predicate visa holders' statuses, country conditions preventing interviews, or failure to avail oneself of relief under CSPA, just to name a few. In other words, the proposed representatives are subject to "unique defense[s] that [are] likely to become a major focus of the litigation." *In re Rail Freight Fuel*, 287 F.R.D. at 33.

In short, as demonstrated by even this small sample of named Plaintiffs, any class will surely include a broad array of issues that are not typical of the class and therefore unsuitable for class certification. Accordingly, the Court should deny Plaintiffs' motion.

3. The Proposed Representatives Have Failed to Demonstrate That They Will Fairly And Adequately Protect Class Interests.

Pursuant to Rule 23(a)(4), the named Plaintiffs must fairly and adequately protect the interests of other members of the class. Fed. R. Civ. P. 23(a)(4). The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See *Gen. Tele. Co. of Southwest v. Falcon,* 457 U.S. 147, 157–58 n. 13 (1982). "As [the Supreme Court] has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977) (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974); *Kremens v. Bartley*, 431 U.S. 119, 130 (1977); *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Rosario v. Rockefeller*, 410 U.S. 752, 759 n. 9 (1973); *Hall v. Beals*, 396 U.S. 45, 49 (1969); and *Bailey v. Patterson*, 369 U.S. 31, 32–33 (1962)).

The named Plaintiffs here fail this test. None can adequately protect the proposed class interests because none is "part of the class." *Id*. In *Rodriguez*, the Supreme Court reversed a circuit court's class certification ruling in an employment discrimination case brought by truck drivers because "abundant evidence" at the district court demonstrated that the named plaintiffs "lacked the qualifications to be hired as line drivers." *Rodriguez*, 431 U.S. at 403. Here, none of the subject children qualifies the named Plaintiffs because the affirmative evidence demonstrates that none of the children will be kept out of the United States due to the Proclamation. The proposed class definition requires that members be "individual immigrant sponsors with approved immigrant visa petitions for a child … [who] will, as a result of the Proclamation, age out of his or her current visa

preference category by turning 21 years old while the Proclamation remains in effect." Class Cert. Mot., ECF No. 20 at 7. Alondra has been issued a visa prior to her twenty-first birthday, and even if she had not been issued a visa, she would have been entitled to CSPA relief but for her failure to timely file necessary documents—wholly unrelated to the Proclamation. M.T.S. likewise was granted an expedited interview and found to be eligible for the national-interest exception, and has been issued a visa prior to her twenty-first birthday, removing her sponsor from the defined class. Finally, W.Z.A. is not a member for multiple reasons—his twenty-first birthday falls after the operative Proclamation lapses and he faces multiple hurdles to obtaining an immigrant visa that in no way relate to the Proclamation.

In short, none of the Plaintiffs is a member of the class they propose, and accordingly they cannot adequately represent class interests. *Rodriguez*, 431 U.S. at 403. Therefore, Plaintiffs' requested class certification should be denied.

4. The Proposed Class Fails Federal Rule of Civil Procedure 23(b).

In addition to meeting the requirements of Federal Rule of Civil Procedure 23(a), a proposed class must fall within at least one of the three subsections of Rule 23(b). Plaintiffs rely on Rule 23(b)(2) and Rule 23(b)(1)(A), but both fail.

a. Rule 23(b)(2)

For Rule 23(b)(2), Plaintiffs must show 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." Fed. R. Civ. P. 23(b)(2). As Plaintiffs acknowledge, under Rule 23(b)(2), "two elements must exist: (1) the defendant's action or refusal to act must be generally applicable to the class; and (2) plaintiff must seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Lightfoot v.*

District of Columbia, 246 F.R.D. 326, 341 (D.D.C. 2007) (internal quotation marks omitted). The Supreme Court has explained that Rule 23(b)(2) is satisfied "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart, Inc.*, 564 U.S. at 360.

Plaintiffs failed to meet their burden as to Rule 23(b)(2) because any single injunction or declaration relief would *not* provide relief to each member of the class. *Id*. Indeed, even if the Court issued an injunction against the Proclamation as to the three named Plaintiffs alone, relief would not be issued to any of them because two have already obtained relief and one would still have additional hurdles to overcome notwithstanding the Proclamation. Any class certified pursuant to Plaintiffs proposed definition would likewise encompass numerous circumstances under which individuals likely would receive no relief. Accordingly, Plaintiffs' proposed class does not satisfy Rule 23(b)(2).

b. Rule 23(b)(1)(A)

To qualify under Rule 23(b)(1)(A), Plaintiffs must show that "prosecuting separate actions by or against individual class members would create a risk of…inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Plaintiffs have failed their burden here as well. "Rule 23(b)(1)(A) certification is 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." *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. Aug. 19, 2002). Certification under Rule 23(b)(1)(A) "'is most common' in cases in which the class seeks declaratory or injunctive relief against the government 'to provide unitary treatment to all members of a defined group.'" *Id.* (quoting 5 Moore's Federal Practice, § 23.41[4] (3d ed. 2000)).

Plaintiffs argue that this factor applies to their proposed class because they seek a "single injunction against the government's implementation and enforcement of the Proclamation with respect to all members of the proposed class," and that "[s]uch an injunction would protect all class members from the harms resulting from implementing the alleged unlawful Proclamation against them." Class Cert. Mot., ECF No. 20 at 36. These arguments, however, also fail. Again, as demonstrated by the three named Plaintiffs, Vicenta S.'s beneficiary W.Z.A. must overcome multiple hurdles that any injunction of the Proclamation will not effect, and any class as proposed by Plaintiffs would likely also include individuals facing various barriers to obtaining entry, such that an injunction would not provide relief to all class members.

In short, in additional to failing their burden under Federal Rule of Civil Procedure 23(a), Plaintiffs have also failed to meet their burden under 23(b).

IV. CONCLUSION

None of the named Plaintiffs has standing to challenge the Proclamation. They have failed to show that they are members of the class that they propose, much less that the relief they request would provide relief to the proposed class or that they could adequately represent the interests of the class. In short, Plaintiffs failed their burden under Federal Rule of Civil Procedure 23, and the Court should deny Plaintiffs' motion accordingly.

Dated: June 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court of for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Thomas B. York*
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