IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

J.O.P., *et al.*, Plaintiffs, v. **U.S. DEPARTMENT OF HOMELAND SECURITY**, *et al.*, Defendants.	Civil Action No. 8:19-CV-01944-GJH

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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I. INTRODUCTION

This case turns on a limited set of facts and overarching legal questions. As to facts, for years Defendants followed the 2013 Kim Memo, which required USCIS asylum officers to adopt determinations made by CBP and ICE that asylum applicants were UACs, without engaging in independent factfinding to determine whether the applicant had turned 18 or been reunited with a parent or legal guardian before filing their asylum application. In July 2019, Defendants implemented a new policy set forth in the 2019 Redetermination Memorandum, which required asylum officers to engage in just such factfinding and to defer to jurisdictional determinations made by immigration judges. The 2019 Redetermination Memorandum was issued and put into effect without notice and comment, instead being summarily released on USCIS's website mere weeks before going into effect.

As to questions of law, Plaintiffs claim that Defendants were required to engage in notice-and-comment rulemaking under the APA. Plaintiffs also contend that the 2019 Redetermination Memorandum is arbitrary and capricious because Defendants failed to consider asylum applicants' reliance interests and also because the policy is incompatible with the governing statute, the TVPRA. Additionally, Plaintiffs contend that the 2019 Redetermination Memorandum violates the Due Process Clause by applying retroactively to asylum applicants who had reliance interests in the 2013 Kim Memo's procedures, and that Defendant ICE exacerbated these violations with a practice of advocating for immigration judges to preempt USCIS's statutory jurisdiction. These legal questions have single answers, equally applicable to the claims of each prospective class member, and can be resolved once through this action instead of through repeated piecemeal litigation brought by hundreds of affected asylum applicants.

Defendants attempt to evade certification of the proposed class by attempting to complicate this fairly simple set of issues. First, Defendants argue that it is necessary to identify each individual member of the proposed class up front (though it is not), but also impossible to do so (though it is not). By introducing a flood of details as to internal agency administration, including pages of alleged factual background (which does no work in the argument opposing class certification) and pages relating to the various statuses applied to applications in Defendants' internal systems, Defendants seek to create the appearance of complexity where it does not really exist. Next, despite the Court's recent ruling that the claims in the original complaint are still unresolved, Defendants assert that they have eliminated all common questions by conceding to the preliminary injunction, even while continuing to oppose the relief sought by Plaintiffs. Finally, they invent a host of differences as between prospective members of the proposed class, even though the differences are not relevant to resolution of the straightforward disputes at issue here. Because Plaintiffs seek to undo Defendants' unlawful application of the 2019 Redetermination Memorandum and not to achieve any particular result in their individual asylum applications, any distinctions relating to those applications are immaterial here, and the Fourth Circuit's relatively undemanding commonality and typicality standards are easily satisfied.

The operative facts and the controlling questions of law in this case are simple to identify. Defendants unlawfully instituted a policy that damaged the legal interests of thousands of asylum applicants who came to the United States as unaccompanied children. These applicants all seek the same result, a declaration that the 2019 Redetermination Memorandum is unlawful and an injunction against its application that also requires Defendants to adjudicate asylum applications "consistent with the terms of the 2013 Kim Memorandum." D.I. 94 at 41. That relief will

resolve all the class members' claims with one stroke. Members of the class can be identified based on the same clear, objective criteria that render them vulnerable to application of the 2019 Redetermination Memorandum. Because there are claims, arguments, injuries, and interests of the prospective class members that are common to the prospective class members, Plaintiffs respectfully request that the Court certify their class under Federal Rules of Civil Procedure 23(a) and 23(b)(2).[1]

II. ARGUMENT[2]

A. Ascertainability Is Not a Bar to Certification

Defendants devote eight pages of their brief to various arguments that the proposed class is not ascertainable. D.I. 126 at 11-18. These arguments are all without merit, first because the ascertainability threshold does not apply to Rule 23(b)(2) classes like this one, and second because the proposed class here is ascertainable at any rate.[3]

1. An Ascertainability Threshold Does Not Apply to Rule 23(b)(2) Classes

The Fourth Circuit has required in some Rule 23(b)(3) cases that plaintiffs satisfy "an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). Those circuits that impose this

[1] In addition, Plaintiffs attach to this brief a revised proposed order. In light of named plaintiff K.A.R.C. being granted asylum, Plaintiffs merely request that the Court specifically identify the remaining named plaintiffs as the class representatives. The proposed order is otherwise unchanged.

[2] Defendants do not mention, and apparently concede, that Plaintiffs have established numerosity and adequacy of representation and of class counsel. They also do not contest that if Plaintiffs have met the standards for class certification under Rule 23(a), they can bring a class action under Rule 23(b)(2). Accordingly, Plaintiffs do not address these issues.

[3] Plaintiffs briefed the issue of ascertainability in their opening motion because the class is adequately ascertainable, if that threshold requirement applies. *See* D.I. 117-1 at 18-19. But in light of Defendants' attempt to import a heightened standard for ascertainability from Rule 23(b)(3) case law into the Rule 23(b)(2) context, Plaintiffs here address whether there is any basis to impose an ascertainability requirement to this class at all.

threshold, heightened ascertainability requirement[4] have done so because it "serves several important objectives." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012). Namely, requiring easy identification of class members reduces administrative burdens, it "protects absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) action," and it "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Id.*; *see also Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016) (noting that "ascertainability is a requirement tied almost exclusively to the practical need to notify absent class members and to allow those members a chance to opt-out and avoid the potential collateral estoppel effects of a final judgment"), *cert. denied*, 137 S. Ct. 2220 (2017); *cf. EQT Prod.*, 764 F.3d at 359-60 (finding class not ascertainable where "we have little conception of . . . who may be bound by a potential merits ruling").

These considerations do not apply in the present case because they do not apply to classes certified under Rule 23(b)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011) ("The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*."). Although Defendants make a great issue out of the burdens of identifying all members of the prospective class, asserting that it would be difficult to make various determinations as to each individual

[4] Indeed, several circuits reject any "administrative feasibility" threshold entirely. *See, e.g.*, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) ("In sum, the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification" and "we decline to interpose an additional hurdle into the class certification process delineated in the enacted Rule."); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 658 (7th Cir. 2015) ("Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes.").

who would fall under the class definition, *see* D.I. 126 at 12-15, such up-front identification of every prospective class member in this case is unnecessary. Plaintiffs do not seek any damages for prospective class members such that it is necessary to identify who should share in the recovery, as in the typical Rule 23(b)(3) context. Instead, the only situation in which it would be necessary to determine whether an individual qualifies as a class member is precisely when Defendants have already made the relevant factual determinations: Plaintiffs seek to prevent Defendants from applying the 2019 Redetermination Memorandum to reject jurisdiction over prospective class members' asylum applications when they were determined by a relevant agency to be UACs and were 18 or had a parent or legal guardian available to provide care for them when they filed their application with USCIS. USCIS only rejects jurisdiction in this manner in one of two ways: by determining that an asylum applicant did not meet the definition of a UAC when she filed her application, or by deferring to an immigration judge's determination of the same facts. Plaintiffs seek to prevent Defendants from applying the 2019 Redetermination Memorandum in these situations, and there is no significant administrative burden on Defendants or this Court in regulating Defendants' conduct when faced with a class member. The other purposes of the ascertainability threshold requirement are similarly absent here. There is no need to provide notice to class members under Rule 23(b)(2), as the singular relief sought would benefit all equally and there is no potential endangerment of individual claims. And there is no danger that "those persons who will be bound by the final judgment" will not be "clearly identifiable," *Marcus*, 687 F.3d at 593, as any prospective class members are identifiable based on clear, objective criteria.

Multiple circuits have come to the same conclusion that there is no ascertainability requirement for class certification under Rule 23(b)(2). *See, e.g.*, *In re Google Inc. Cookie*

Placement Consumer Privacy Litig., 934 F.3d 316, 328 (3d Cir. 2019) ("A (b)(2) class therefore does not . . . even require that individual class members be ascertainable.");[5] *Cole*, 839 F.3d at 542 ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."); *Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015) ("The ascertainability requirement ensures that the procedural safeguards necessary for litigation as a (b)(3) class are met, but it need not (and should not) perform the same function in (b)(2) litigation."); *Shook v. El Paso Cty.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable; for instance, in a case where the plaintiffs attempt to bring suit on behalf of a shifting prison population."); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (because "notice to the members of a (b)(2) class is not required . . . the actual membership of the class need not . . . be precisely delimited").

The Fourth Circuit has not yet had occasion to address this issue, but Defendants have cited no cases in the Fourth Circuit declining to certify a Rule 23(b)(2) class on the ground that it was not ascertainable. *See EQT Prod.*, 764 F.3d at 357 (although plaintiffs sought certification under 23(b)(2) and 23(b)(3), it was certified in the district court under 23(b)(3)); *Amaya v. DGS Constr., LLC*, 326 F.R.D. 439, 446 (D. Md. 2018) (plaintiff seeking certification under 23(b)(3)), *appeal filed*, No. 18-2186 (4th Cir. Oct. 10, 2018); *Spotswood v. Hertz Corp.*, 2019 WL 498822, at *5 (D. Md. Feb. 7, 2019) (plaintiff seeking certification under 23(b)(3)). The Court should accordingly follow the persuasive reasoning of multiple circuits that have refused to apply the

[5] The Third Circuit is one of the few circuits that imposes a "heightened" ascertainability standard for Rule 23(b)(3) classes, whereby plaintiffs must show ascertainability by a preponderance of the evidence. *See, e.g.*, *City Select Auto Sales Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 439 (3d Cir. 2017). It is thus all the more notable that it categorically states, "The ascertainability standard is not applicable to Rule 23(b)(2) classes." *Id.* at 439 n.2.

sort of ascertainability requirement advanced by Defendants here in the Rule 23(b)(2) context, because doing so would create an artificial barrier to certification by relying on considerations that have no applicability to a Rule 23(b)(2) class.

The advisory committee's notes for Rule 23(b)(2) further support this conclusion, stating: "Illustrative [of proper Rule 23(b)(2) classes] 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." Fed. R. Civ. P. 23 advisory committee's note to amendment 1966. Besides explicitly acknowledging that such class members may not be specifically identified, this illustration also highlights a proposed class (like this one) where membership in the class will depend on facts about each individual determined iteratively rather than all at once.

2. The Proposed Class Is Ascertainable

Even if the Court were to break from the great weight of authority and impose an ascertainability requirement here, the proposed class would satisfy it. Defendants' arguments that it would be impossible to ascertain the prospective class members are overblown, manufacturing obstacles that are irrelevant to resolution of this case. The proposed class is ascertainable because prospective class members are identifiable based on clear, objective criteria.

"The goal [of ascertainability] is not to identify every class member at the time of certification, but to define a class in such a way as to ensure that there will be some administratively feasible way for the court to determine whether a particular individual is a member at some point." *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 658 (4th Cir. 2019) (citation, alteration, and internal quotation marks omitted). And this assessment is not made for mere curiosity, but in order to ensure compliance with the Court's orders. *See, e.g.*, *Planned Parenthood of Md., Inc. v. Azar*, 2020 WL 3893241, at *5 (D. Md. July 10, 2020) ("It is possible

that the court might at some point need to decide whether a specific individual is a class member and bound by the court's judgment or has the power to enforce non-compliance with the judgment. In these situations, if they occur, whether that person has opted out [of abortion-service coverage] can be readily determined[.]").

Defendants raise many objections based on the supposed difficulties of determining whether an individual had turned 18 or had been reunited with a parent or legal guardian when that individual filed an asylum application, but these supposed difficulties have no bearing on providing common relief to class members.[6] It is only when an applicant is determined by USCIS to have been 18 or reunited with a parent or legal guardian at the time of filing that they are in danger of having the 2019 Redetermination Memorandum applied to them. In other words, the need to identify class members to ensure they would be protected by an order from this Court would arise *after* USCIS has already made the individualized determinations it claims are so onerous.[7]

A recent case in this district illustrates this very principle. In *Planned Parenthood of Maryland, Inc. v. Azar*, 2020 WL 3893241 (D. Md. July 10, 2020), the court found a Rule 23(b)(2) class, of health insurance policyholders who had not opted out of abortion-service coverage, to be ascertainable "because if there is any dispute, the court may look to the issuer's

[6] And as for applicants who have turned 18 before filing their asylum applications, Defendants' recently produced administrative record shows that any complications were not so onerous as to prevent USCIS from *denying* jurisdiction over all such asylum applicants. *See* D.I. 128-20 at US-000234 ("We'll be running a RAPS reports to determine the pending applicants who filed when they were 18+ and will admin close, issue letters and send them back to ICE/EOIR.").

[7] In an attempt to establish the impossibility of ascertaining the class, Defendants argue that "Since enjoining the 2019 Memo, which provided USCIS with the ability to determine whether an applicant met the UAC criteria at the time of filing, USCIS can no longer make these determinations." D.I. 126 at 12. In point of fact, Defendants are in no way prevented or prohibited from determining whether an applicant met these criteria when she applied; they are only prohibited from applying the 2019 Redetermination Memorandum to reject jurisdiction over her application.

records." *Id.* at *5. Because the class members did not seek any monetary damages, there was "less[] . . . likelihood that it will be necessary to engage in any individualized assessment of the precise membership." *Id.* n.9. And, although it was undisputed that factual determinations would need to be made at some stage "to decide whether a policy holder intends to opt out," the court noted that only the issuer must make that determination, and not the court. *Id.* at *6. "This is because whether the policy holder has *in fact* opted out is determined by the issuer and will presumably be documented in the issuer's records. There is no need for extensive and individualized fact-finding or 'mini-trials' to determine who has opted out. Rather, the court need only look to the issuer's records regarding the policy holder." *Id.* (quoting *EQT Prod.*, 764 F.3d at 358) (internal quotation marks omitted). Similarly here, the Court need not conduct mini-trials to determine whether an applicant satisfies the class definition; to the extent such factual determinations must be made, the determinations are ones routinely made by Defendants.

Defendants' additional arguments regarding ascertainability are unfounded. Defendants argue that the class definition is vague as it does not "identify by whom the UAC determination need be made," suggesting that the class is fatally indefinite because "USCIS frequently receives communications from advocates making assertions about the UAC status of applicants." D.I. 126 at 15. But determination of UAC status for purpose of this class action is clear. The 2013 Kim Memo, which this action seeks to restore and enforce, specifies that "[i]n cases in which CBP or ICE has already determined that the applicant is a UAC, Asylum Offices will adopt that determination and take jurisdiction over the case." D.I. 91 ¶ 88; *id.* Ex. 4 at 2. Despite Defendants' contention that "CBP, ICE, HHS, USCIS, and IJs all make determinations about applicants' UAC status at different times," D.I. 126 at 15, there is no ambiguity in the class definition. CBP and ICE determine in the first instance whether an individual is a UAC, and

HHS is relevant only insofar as it may take an affirmative act to vacate that determination. Immigration judges are not authorized by the TVPRA to make UAC determinations that would be binding on USCIS, and the 2013 Kim Memo did not create a USCIS policy of looking to immigration judges to undo a prior DHS UAC determination; thus their judgments are immaterial to Defendants for purposes of this litigation.

Defendants also object that "an applicant may file asylum applications with both USCIS and EOIR" and claim that "[t]he proposed class definition fails to consider how filing first with EOIR would affect the operative filing date in determining whether an individual was a UAC 'on the date they filed their asylum application with USCIS.'" *Id.* Defendants do not explain what problems they envision, nor how the specificity of the proposed class definition renders the class not ascertainable. The proposed class definition speaks for itself.

Finally, Defendants contend that their idiosyncratic definition of a "pending" application, which involves several layers of administrative determination, renders the proposed class definition vague. Put simply, there is no real ambiguity as to when an application is pending, and Defendants' private, internal vocabulary does not prevent the class from being ascertained. In ordinary parlance—and in the only way that matters to adjudication of this case—an application is pending during that period between submission and action taken by USCIS. *See, e.g.*, Pending, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/pending (defining "pending" as "while awaiting" or "not yet decided: being in continuance"); Pending, *Dictionary.com*, https://www.dictionary.com/browse/pending (defining "pending" as "in the period before the decision or conclusion of; during" or "remaining undecided; awaiting decision or settlement; unfinished"). No further elaboration is required.

B. Defendants Cannot Defeat Commonality and Typicality Under Rule 23 by Purporting to Concede the Illegality of the 2019 Redetermination Memorandum

In the opening paragraph of Defendants' Opposition, they claim that "by agreeing to temporary restraining orders . . . and a preliminary injunction . . . , Defendants have conceded Plaintiffs' primary allegation in the original Complaint" about the 2019 Redetermination Memorandum and argue that "[t]hat aspect of this case is long concluded." Defendants have raised this same argument at least twice before, in their two motions to dismiss. *See* D.I. 73-1 at 5 (stating that Defendants "acceded to a TRO" and preliminary injunction, and thus "[t]here is no longer a controversy"); D.I. 101-1 at 3 ("The parties agreed to temporary restraining orders (TROs) and a preliminary injunction (PI), essentially concluding that aspect of the case."). But this Court has previously rejected this argument in both these previous iterations, ultimately holding that whether USCIS presently applies the 2019 Redetermination Memorandum or not, Plaintiffs have "not obtained all of the relief they sought," which included a declaration that the 2019 Redetermination Memorandum is unlawful, that it be vacated, and that Defendants be enjoined from applying any aspect of it. D.I. 115 at 32-33. Defendants' refusal to acknowledge this Court's determination and to try to merely stipulate their desired result into reality accomplishes nothing.

Although the Court noted in its Memorandum Opinion that "Plaintiffs assert, and Defendants do not contest, that Defendants have not rescinded the 2019 Redetermination Memo," *id.* at 32, Defendants now appear to have changed their litigating position. For the first time, Defendants claim that "USCIS has *rescinded* the 2019 Memo."[8] D.I. 126 at 19 (emphasis

[8] Defendants respond to several allegations in their Answer with the statement that the paragraphs "contain[] speculation of future agency action under a rescinded memo." *See* D.I. 118 ¶¶ 122-23, 126-27, 130-31, 134. Defendants do not there explain the manner in which that memo was purportedly "rescinded."

added). But Defendants provide no details about how that purported rescission was accomplished. Instead, they cite to a declaration stating that "USCIS agreed to be enjoined from implementing" the 2019 Redetermination Memorandum, "has not relied upon" it since the TRO was issued, has "provided notice on our website" that it may not be applied, and sent "[g]uidance . . . instructing [Asylum Officers] to cease applying" the 2019 Redetermination Memorandum." D.I. 126-2 ¶¶ 10-11; *see* D.I. 126 at 19.

None of these steps has the force of law, and none suffices to effectively rescind the 2019 Redetermination Memorandum. Notably, these purported measures fall well short of actions taken by Defendants to actually rescind other policies. Just last month, USCIS issued a binding policy memorandum "rescinding two policy memoranda regarding the adjudication of certain petitions for H-1B nonimmigrant classification." *See* Ex. A at 1 (June 17, 2020 USCIS Policy Memorandum); *cf.* Ex. B at 6 n.4 (acknowledging reversal of policy as result of litigation in context of binding administrative decision). Defendants' mere "agreement," with a preliminary injunction, and its provision of "guidance" and "notice on [their] website" to stop implementing (at least certain aspects of) the 2019 Redetermination Memorandum is not tantamount to a binding rescission.

Just as the Court recently recognized, Plaintiffs' original claims, that the 2019 Redetermination Memorandum was put into effect in violation of the APA's notice-and-comment requirements, arbitrarily and capriciously, and without regard for prospective class members' due-process rights, are still a part of this case. D.I. 115 at 32. So too are their requests for relief, including a declaration holding the Memorandum unlawful, vacatur of the Memorandum, and an injunction that bars Defendants from "enforcing or applying any aspect of the 2019 Redetermination Memorandum," including Defendants' practice of deferring to

immigration-judge jurisdictional determinations. *Id.* at 32-33. The Court has already reserved these issues for resolution on the merits, and Defendants' resistance to that decision has no bearing on the certification of the proposed class.

C. The Proposed Class Satisfies the Commonality Requirement

Defendants' arguments against commonality stem directly from their attempt to recharacterize the scope of this litigation. As set forth in Plaintiffs' Memorandum in Support, there exist common questions of law and fact. D.I. 117-1 at 12-15. Principal among them is the question of the 2019 Redetermination Memorandum's legality; Plaintiffs' claims stem from its unlawful promulgation and substance. Defendants contend that this question, as well as whether the 2019 Redetermination Memorandum was implemented in an arbitrary and capricious manner and whether applying it to individuals with reliance interests violates due process, "are not questions that currently affect any applicants who have filed with USCIS because USCIS has rescinded the 2019 Memo, retracted all its jurisdictional determinations under it, and has not applied it to any case since it was rescinded." D.I. 126 at 19. As set forth above, the Court has already rejected Defendants' arguments to dismiss these claims from the case based on their vague representations that they are no longer applying the 2019 Redetermination Memorandum.

It is worth noting that, as Plaintiffs seek certification under Rule 23(b)(2) and not Rule 23(b)(3), there is no requirement that common questions of law or fact must *predominate* over individualized questions. Instead, "[a] single common question will suffice," provided it is of "such a nature that its determination will resolve an issue that is central to the validity of each one of the claims in one stroke." *EQT Prod.*, 764 F.3d at 360 (citation and internal quotation marks omitted). Whether the 2019 Redetermination Memorandum was unlawfully issued, in violation of the APA, the Due Process Clause, and in conflict with the TVPRA, are just such questions. Defendants attempt to unilaterally narrow the scope of the case such that this

common question would fall outside it, but the 2019 Redetermination Memorandum's legality (which Defendants, who have vigorously opposed a declaration of the Memorandum's unlawfulness, appear *not* to concede) is still at issue. Thus, "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).

That various members of the proposed class are in a variety of procedural postures with respect to their asylum applications does not change this fact. Defendants raise various reasons why some class members may have their asylum applications denied on the merits, or procedurally dismissed, for different reasons. These are red herrings. First, any such individual issues would not obviate the overarching common issue of the 2019 Redetermination Memorandum's legality. But further, Plaintiffs do not seek to litigate the merits of any prospective class member's immigration relief through this case. If some prospective class members have had their claims denied for failure to appear for a biometrics appointment, that is simply irrelevant to the dispute before the Court. In other words, the fact that some class members may have their asylum applications rejected by USCIS for *other* reasons does not change that they may not lawfully have their asylum applications rejected by USCIS pursuant to the 2019 Redetermination Memorandum. A finding that the 2019 Redetermination Memorandum is unlawful would not entitle prospective class members to any specific outcome in their asylum applications, but nor does any other potential bar to being granted asylum complicate determining the 2019 Redetermination Memorandum to be unlawful.

Further, Defendants' contention that the class should not be certified because Plaintiffs pursue a due process claim is without merit. There is no bar against certifying a class that pursues a due process claim. *See, e.g.*, *Jones v. Murray*, 962 F.2d 302, 305 (4th Cir. 1992); *Jenkins v. Massinga*, 592 F. Supp. 480 (D. Md. 1984). *Jennings v. Rodriguez*, 138 S. Ct. 830

(2018), upon which Defendants rely, is not to the contrary. *Jennings* concerned an issue of statutory interpretation and the Supreme Court's discussion of class certification and due process was raised for handling of the case on remand. *Id.* at 852. Contrary to Defendants' implication, the Supreme Court did not state that a class cannot be certified if it pursues a due-process claim—instead, it suggested that certification may be inappropriate for a class including some members who would not be entitled to the proposed relief, which is not the situation here. *Id.* at 851-52. Additionally, the class's *only* claim in *Jennings* was under the Due Process Clause, which may face a higher bar for establishing commonality than where a due-process claim is one among several.

Finally, Defendants argue that because some prospective class members would not have had their asylum applications adjudicated on the merits under the 2013 Kim Memo, addressing the due-process issue in a class context "would require the Court to engage in fact-intensive analyses of each putative class member." D.I. 126 at 21-22. That is incorrect: there is no need to come to any individualized determinations with respect to Plaintiffs' due process claims. If it violated the Due Process Clause to apply the 2019 Redetermination Memorandum retroactively to asylum applicants who had already filed,[9] then that is the end of the inquiry. There are no individual damages to be assessed or reasons why retroactively applying the policy to one prospective class member would differ from retroactively applying it to another.

D. The Proposed Class Satisfies the Typicality Requirement

Class representatives are "typical" under Rule 23(a)(3) where they have similar claims to proposed class members that will be advanced by similar facts and defenses. "Although a

[9] Plaintiffs note that Defendants appear to have conceded, at the TRO hearing early in this case, that the retroactive application of the 2019 Redetermination Memorandum violates due process. Defendants' apparent withdrawal from that position colors their current claims that the 2019 Redetermination Memorandum is no longer in contention due to their present putative concessions.

representative's claims and the claims of other members of the class need not be 'perfectly identical or perfectly aligned,' the representative's pursuit of his own interests 'must simultaneously tend to advance the interests of the absent class members.'" *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 305 (4th Cir. 2013) (quoting *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006)); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) ("The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." (citation omitted)). As set forth above, the overarching issue in this case is whether the 2019 Redetermination Memorandum was unlawfully issued and implemented, and relatedly whether it may be applied to prospective members of the class.

Defendants argue that because named plaintiffs J.O.P., M.A.L.C., and M.E.R.E. have not received any decisions regarding their asylum applications, they are not typical of the proposed class. D.I. 126 at 22-23. According to Defendants, "Plaintiffs cannot establish that USCIS 'acted or refused to act' on a ground that applies generally to the class since . . . jurisdiction has not yet been determined for many of those described in the proposed class." *Id.* at 22. Under Defendants' view, the Court's issuance of a TRO and preliminary injunction against application of the 2019 Redetermination Memorandum precluded any future class action by forestalling irreparable harm. But interim injunctive relief exists for the very purpose of maintaining the status quo and preventing injury that cannot be rectified while the merits of a claim are determined.

Further, though Defendants seek to show factual differences between the circumstances of some named plaintiffs and some class members, they neglect the consideration that underlies the typicality analysis: Regardless of their individual differences, each prospective class member

pursues the same claims for the same result. Whether a prospective class member has already received a jurisdictional denial based on the 2019 Redetermination Memorandum or has a pending application but meets the criteria that would warrant denial under the 2019 Redetermination Memorandum, each has the same unified interest in not having that policy applied to their asylum application. *See Broussard*, 155 F.3d at 344 (noting that typicality requirement does not "require that members of the class have identical factual and legal claims in all respects," but rather that "typicality [is] satisfied if class claims [are] fairly encompassed by those of named representatives even if not identical" (citation omitted)); *Edmondson v. Eagle Nat'l Bank*, 2020 WL 3128955, at *7 (D. Md. June 12, 2020) (finding class representative typical despite potential differences in claims with other class members, as "the kickback scheme described by Plaintiffs would be violative of RESPA (if proven), regardless of whether an individual class member had engaged in first-time financing or refinancing").

III. CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court: (i) certify the class as defined; (ii) appoint named plaintiffs J.O.P., M.A.L.C., M.E.R.E., and E.D.G. to serve as representatives of the class; and (iii) appoint KIND, CLINIC, Public Counsel, and Goodwin Procter LLP as class counsel.

Dated: July 27, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 27, 2020.

/s/ Brian T. Burgess