Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Concely del Carmen MENDEZ ROJAS, Elmer Geovanni RODRIGUEZ ESCOBAR, Lidia Margarita LOPEZ ORELLANA, and Maribel SUAREZ GARCIA, on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs,

v.

Jeh JOHNSON, Secretary of the Department of Homeland Security, in his official capacity; Loretta E. LYNCH, Attorney General of the United States, in her official capacity; Thomas S. WINKOWSKI, Principal Deputy Assistant Secretary for U.S. Immigration and Customs Enforcement, in his official capacity; Leon RODRIGUEZ, Director of U.S. Citizenship and Immigration Services, in his official capacity; R. Gil KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection, in his official capacity; and Juan P. OSUNA, Director of the Executive Office for Immigration Review, in his official capacity,

Defendants.

Case No. 2:16-cv-01024-RSM

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:
December 21, 2016

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Individuals seeking refuge in the United States have a right to apply for asylum, but must exercise that right within a year of their arrival. Despite this requirement, the Department of Homeland Security (DHS) Defendants do not, as a matter of policy, provide notice of this one-year deadline to asylum seekers they encounter and release from their custody; nor do Defendants provide a uniform mechanism that guarantees an opportunity to file applications in a timely fashion. Plaintiffs ask this Court to certify the proposed classes and subclasses and to enjoin this unlawful interference with their statutory right to apply for asylum and their constitutional right to due process. They ask this Court to order Defendants to provide notice of the deadline to Plaintiffs and all proposed class members and to create a uniform procedural mechanism that ensures they all can submit an application for asylum before the deadline.

Defendants do not dispute Plaintiffs' contentions that they lack a policy of providing notice of the one-year deadline to all putative class members. And while Defendants point out that, during the settlement negotiations, Defendant Executive Office for Immigration Review (EOIR) changed its filing policy for individuals in removal proceedings, they do not dispute that this new policy does not provide a mechanism for those class members who are not yet placed in removal proceeding or are only placed in proceedings near or after the one-year deadline. In addition, they argue Plaintiffs lack standing, class certification is inappropriate because their claims require individualized assessments of injury, and Plaintiffs are not members of the classes. But these arguments misconstrue Plaintiffs' claims and are based on conclusory allegations. Thus, this Court should certify the proposed classes and subclasses.

II. ARGUMENT

Defendants fail to rebut Plaintiffs' showing that they meet all requirements for class certification under Federal Rule 23(a). Moreover, while they assert that Plaintiffs fail to meet their burden under Federal Rule 23(b)(2) because now, subsequent to the filing of this litigation, Defendants have "provide[d] a mechanism for Plaintiffs and putative class members to comply with the [one-year] deadline," Dkt. 29 at 15, this argument rests primarily on a new

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policy benefiting only certain individuals in removal proceedings, *see id.* at 14-15. Defendants never assert that a uniform mechanism exists for class members *not yet placed* in removal proceedings. Defendants also do not—and cannot—explain how this mechanism aids those who are placed in removal proceedings after the one-year deadline or even shortly before it.

Finally, Defendants have not challenged the propriety of certification of a nationwide class. Nor can they: their lack of adequate policies is a nationwide problem that cannot be addressed piecemeal by region, as they release class members at the border who then relocate throughout the country.

A. Plaintiffs have standing to bring this suit.

Plaintiffs have demonstrated numerosity by citing, inter alia, Defendants' own statistics establishing the existence of tens of thousands of potential class members, as well as declarations of several immigration attorneys from throughout the country who, collectively, testify that hundreds of individuals fall within the class definitions. *See* Dkt. 7 at 14-16. Defendants make no attempt to refute this evidence. Instead, they challenge numerosity by claiming that Plaintiffs lack standing and that jurisdictional restrictions in the Immigration and Nationality Act (INA) bar review. *See* Dkt. 29 at 6-8. These arguments are more appropriate to a motion to dismiss. *See* Fed. R. Civ. P. 12(b)(1). In any event, neither has merit.

This case concerns the barriers faced by Plaintiffs and purported class members in satisfying the statutory mandate that they apply for asylum within one year of entry into the United States. Plaintiffs and all putative class members have an unquestioned right to apply for asylum. *See, e.g.*, *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994); Dkt. 7 at 5-6 (citing multiple cases supporting the right to apply for asylum). However, asylum seekers who fail to file their applications by the deadline lose their statutory right to apply, unless they can persuade an adjudicator that either changed or extraordinary circumstances justified their delayed filing. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. §§ 208.4(a)(2)(B), (a)(4)-(5). The obstacles faced by Plaintiffs—including both an absence of notice of this requirement and the

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lack of a guaranteed mechanism through which to timely apply for asylum—caused the four Plaintiffs to miss the one-year deadline. *See* Dkt. 1 ¶¶14-17. Each has thus suffered a concrete harm: they lost their right to timely apply for asylum.

Defendants challenge Plaintiffs' standing by arguing any harm "is merely speculative" because the Board of Immigration Appeals has not yet made a final decision denying asylum "for failure to file an application within the one-year deadline." Dkt. 29 at 6-7. However, Plaintiffs are not challenging any actual denial, past or future, of asylum. Rather, they challenge the denial of the opportunity to apply within the one-year deadline, which is caused by Defendants' failure to provide adequate notice of the deadline and failure to implement a uniform method by which Plaintiffs can comply with it. They thus continue to suffer concrete, ongoing harm. At a minimum, this procedural violation forces them to overcome an additional obstacle of demonstrating that they qualify for an exception to the filing deadline. As such, Defendants' reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is wholly misplaced. *See* Dkt. 29 at 6-7. "When a person is denied the procedural opportunity to influence an administrative decision, standing is based on the denial of that right, even if that decision would not have been affected." *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1356 (D. Ariz. 1990) (citing *McClelland v. Massinga*, 786 F.2d 1205, 1210 (4th Cir. 1986), and *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986)).[1] For this very reason, standing requirements for class challenges to certain procedural violations are relaxed. *See, e.g., Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086-87 (9th Cir. 2003). Because the injury Plaintiffs allege is the denial of process completely separate from any part of the removal proceedings, Defendants' invocation of the INA's jurisdictional bar on review of asylum claims, *see* Dkt. 29 at 7-8, is similarly flawed. Contrary to Defendants' unsupported assertion, Plaintiffs are not asking the Court to make any type of finding related to EOIR's process for

[1] *See also Brody v. Village of Port Chester*, 345 F.3d 103, 112-113 (2d Cir. 2003) (Sotomayor, J.) ("Whether [the plaintiff] has demonstrated that he would have prevailed in the appellate process had he been given notice . . . is beside the point for purposes of assessing his standing . . .").

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adjudicating the extraordinary circumstances exception to the deadline.

The deprivation of the right to apply for asylum without adequate notice and a process to meet the deadline is an injury in fact, sufficient to confer standing under Article III. "[T]he central meaning of procedural due process [is] clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1864)). Plaintiffs who challenge the violation of a procedural right have Article III standing so long as they "demonstrate that [they have] 'a procedural right that, if exercised, *could* protect [their] concrete interests and that those interests fall within the zone of interests protected by the statute at issue.'" *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (quoting *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946, 957 (9th Cir. 2005)). Here, Plaintiffs allege that they have a right to notice of the one-year deadline and to a uniform procedure whereby they may file their applications within one year. There is no doubt these procedural rights would protect Plaintiffs' and putative class members' concrete interests in their right to apply for asylum—interests protected by the INA.

Plaintiffs' standing also rests on the violation of their statutory right to apply for asylum, which "may be violated by a pattern or practice that forecloses the opportunity to apply." *Campos*, 43 F.3d at 1288. Defendants' failure to provide notice and an adequate mechanism deprives Plaintiffs of their statutory right to apply for asylum by foreclosing their opportunity to apply as of right. The fact that they might be able to convince an adjudicator that they fall within a narrow statutory exception to the one-year deadline—a determination the government routinely asserts is "discretionary," *see, e.g.*, *Khan v. Filip*, 554 F.3d 681, 687 (7th Cir. 2009) (describing the determination as "inherently discretionary"); *but see Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (describing the determination as a reviewable mixed question of law and fact)—does not erase the harm.

As Defendants' sole challenge to Plaintiffs' evidence of numerosity is based on a

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mistaken interpretation of standing, the Court should find Plaintiffs satisfy Rule 23(a)(1).

B. Plaintiffs satisfy the commonality requirement.

Plaintiffs' claims present common questions of law and fact that are shared by the putative class members. As an initial matter, Defendants' assertion, Dkt. 29 at 8, that Plaintiffs could not share an injury with class members because they have not yet suffered *any* injury is unavailing. All face the prospect of being denied the opportunity to apply within one year.

Defendants erroneously assert that establishing harm to a class member requires individualized inquiry as to notice the individual received. *See id.* at 9-10. Plaintiffs allege common injuries capable of class-wide resolution—that Defendants have a policy and practice of failing to advise asylum seekers of the filing deadline and failing to provide an adequate application mechanism for timely filing. Significantly, Defendants do not dispute either claim: they never allege that DHS *does* have a policy and practice of providing class members notice, and fail to address the lack of a uniform procedural mechanism for all class members.[2]

Instead, Defendants' assert that *some* asylum seekers receive notice of the one-year deadline in *some* fashion. Even were this true, it is notable that Defendants do not claim that that they provide, or even ensure, that all purported class members receive notice. Rather, they first argue that information about the one-year deadline is on the instructions to the asylum application. *See id.* at 9, 13. Notably, they do not allege that they provide the application form, let alone the accompanying 13 pages of instructions (all written in English), to Plaintiffs. Nor can they. When DHS released the Plaintiffs from custody—after each expressed a fear of persecution—DHS provided them with a Notice to Appear (NTA); it did *not* provide an asylum application nor instructions (or any other notice of the one-year deadline). *See* Dkt. 1 ¶¶62-63, 69-70, 76-77, 79, 84-85. This is consistent with the experiences of other putative class members. *See* Dkt. 13 ¶¶4-5; Dkt. 15 ¶¶7-9; Dkt. 16 ¶¶5-8; Dkt. 18 ¶¶6, 8; Dkt. 19 ¶9; Dkt. 31

[2] Indeed, Defendants do not dispute Plaintiffs' commonality or typicality with regard to their claims that Defendants failed to provide them with a uniform procedural mechanism for timely filing asylum applications.

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¶3; Dkt 32 ¶¶5, 8; Dkt. 33 ¶¶10, 15-16. Indeed, many asylum seekers are surprised to learn they need to file an application after their release from DHS custody. *See, e.g.*, Dkt. 1 ¶70; Dkt. 15 ¶8; Dkt. 19 ¶9; Dkt. 31 ¶3; Dkt. 32 ¶5.

Similarly, Defendants suggest that third-party Legal Orientation Program (LOP) providers provide notice of the deadline. *See* Dkt. 29 at 9-10, 13. However, few, if any, of the proposed class members have or will receive LOP orientation because that program is only available to those in "detained removal proceedings," while the proposed classes encompass only those released from custody. *See* Legal Orientation Program, EOIR, *available at* https:/www.justice.gov/eoir/legal-orientation-program (last visited Dec. 21, 2016). LOP purportedly operates in 41 Immigration and Customs Enforcement facilities, Dkt. 29 at 10, but ICE operates well over 100 detention facilities, *see* Detention Facility Locator, ICE, *available at* https:/www.ice.gov/detention-facilities (last visited Dec. 21, 2016).[3] This list does not include *any* of the short-term Customs and Border Protection facilities from which many proposed class members will be released. *Id.* Notably, Defendants do not allege that class members have participated in the program. *See* Dkt. 29 at 9-10, 13.

Additionally, nothing in the record suggests that LOP actually provides detainees with notice of the one-year deadline. According to EOIR, LOP provides only a "general overview of immigration removal proceedings [and] forms of relief." Legal Orientation Program, *supra*. And Defendants merely assert that LOP materials "may" provide notice of the deadline, but point to no evidence to support that statement. *See* Dkt. 29 at 9. Mere arguments of counsel "do[] not constitute evidence" that LOP actually provides such notice. *Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003).

[3] Moreover, even in those facilities, less than half of the detainees pass through LOP, as it is not mandatory. *See, e.g.*, Nina Siulc et al., *LOP Evaluation and Performance and Outcome Measurement Report, Phase II*, VERA INSTITUTE OF JUSTICE, at 32 (May 2008), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_evalution_updated_5-20-08.pdf (last visited Dec. 21, 2016).

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Lastly, class certification is appropriate even where class members face different degrees of injury. *See, e.g., Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (class of prisoners with health problems of varying severity); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122-23 (9th Cir. 2010) (class of individuals detained for varying lengths of time under various statutes). By statute, Congress has provided noncitizens with one year after arrival to undertake the time-consuming process of seeking asylum. *See* 8 U.S.C. § 1158(a)(2)(B). Plaintiffs seek to vindicate their right to a meaningful opportunity to apply for asylum, including notice of the filing deadline in a timely manner so that they have adequate time within the statutory period in which to apply. *See* Dkt. 1 ¶¶132-140. Noncitizens who do not receive adequate notice of the filing deadline from DHS when they are released from custody, and then belatedly learn of the deadline, are also harmed—they do not have the amount of time Congress intended to undertake the laborious process of compiling an adequate asylum application. Thus, even if certain class members eventually learn of the filing deadline, they are harmed by Defendants' policies, and meet the liberal commonality standard applicable in civil rights cases. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005) (noting it had previously held "in a civil-rights suit, that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members"). Plaintiffs have shown commonality.

C. Plaintiffs are members of the class and subclass they seek to represent.

Defendants allege, without explanation, that Plaintiffs are not members of the class and subclass they seek to represent. *See* Dkt. 29 at 12. These allegations are meritless. Plaintiffs are appropriate representatives of their respective class and subclass. *See* Dkt. 7 at 21-22. Plaintiffs Rodriguez and Mendez are members of Class A. *Compare* Dkt. 7 at 2 (defining Class A) *with* Dkt. 1 ¶¶62-63, 69-70 (describing history of plaintiffs' encounter with DHS). Further, Plaintiff Rodriguez is plainly in subclass A.I. *Compare* Dkt. 7 at 2 (defining subclass A.I.) *with* Dkt. 1 ¶¶63-66 (describing filing attempts). Similarly, Plaintiff Mendez is part of subclass A.II.

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Compare Dkt. 7 at 2 & n.1 (defining subclass A.II.) *with* Dkt. 1 ¶73 (describing procedural posture of her case). Plaintiffs Lopez and Suarez are members of Class B. *Compare* Dkt. 7 at 3 (defining Class B) *with* Dkt. 1 ¶¶ 76-77, 79, 84-85 (describing history of plaintiffs' encounter with DHS). Plaintiff Lopez is in subclass B.I. *Compare* Dkt. 7 at 3 (defining subclass B.I.) *with* Dkt. 1 ¶81 (describing termination of removal proceedings and application with USCIS). And Plaintiff Suarez is a part of subclass B.II. *Compare* Dkt. 7 at 3 (defining subclass B.II.) *with* Dkt. 1 ¶¶86-87 (asylum hearing scheduled for May 2017).

Contrary to Defendants' suggestion, *see* Dkt. 29 at 11, and as Plaintiffs have explained, *see* II.A., *supra*, all putative class members and Plaintiffs faced—and continue to face—the risk of the same injury: losing their statutory right to apply for asylum because they were not advised by Defendants of the filing deadline. Plaintiffs Mendez, Lopez, and Suarez all missed the deadline because of lack of notice. *See* Dkt. 1 ¶¶71, 80-81, 87.

DHS, moreover, does not have a mechanism that guarantees all asylum seekers a chance to actually file their application for asylum before the deadline. EOIR's new filing policy, *see* Dkt. 29 at 14, does not provide a mechanism enabling timely filing for individuals who are not yet placed in removal proceedings or for those individuals in removal proceedings whose NTAs are filed after, or close to, the deadline. Thus, class members share the risk of losing (or having lost) the right to apply for asylum before the deadline. In fact, Plaintiff Rodriguez already has suffered this injury due to the lack of a filing mechanism. *See* Dkt. 1 ¶¶63-65. Accordingly, Defendants' allegations that Plaintiffs have not suffered an injury, and that their injury is not similar to that of proposed class and subclass members, are unavailing.

Defendants also mistakenly suggest that Plaintiffs are not class members because they "already ha[ve] notice of the one-year filing deadline." Dkt. 29 at 11. Importantly, however, none of them received notice from DHS. Instead, they belatedly received information about the filing deadline only after they were fortuitous enough to contact immigration attorneys. *See* Dkt. 1 ¶¶63, 71, 80, 87. This does not alter their membership in the classes they proffer, both

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of which are defined in relevant part by *DHS*'s failure to give them notice of the deadline. *See* Dkt. 7 at 2-3 (defining class members as those who "did not receive notice *from DHS* of the one-year deadline") (emphasis added). The fact that Plaintiffs later learned of this requirement, in most cases after the one-year deadline, only illustrates the need for DHS to provide such notice rather than relying on happenstance discovery.

Relying on Plaintiffs' knowledge of the one-year deadline, Defendants assert that the relief sought in this lawsuit would not resolve their claims. *See* Dkt. 29 at 12.[4] However, a decision from this Court ruling that Defendants must provide notice and an opportunity for Plaintiffs to meet the one-year deadline undoubtedly is in the Plaintiffs' interest. *See* Dkt. 1 at 39 (requesting injunctive relief, including that Defendants "provide . . . notice of the one-year deadline" and "authorize Plaintiffs . . . to file an asylum application within one year of the date such notice is provided"). Such a decision would resolve Plaintiffs' claims by providing them with a meaningful opportunity to apply for asylum within one year of DHS Defendants' compliance with their statutory and constitutional obligations to provide notice of the filing deadline. Injunctive relief would help Plaintiffs in their individual immigration cases, and their claims are typical of the class. *See, e.g., Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (requiring plaintiffs to "be part of the class and 'possess the same interest and suffer the same injury' as class members") (citation omitted).[5] There is no conflict between their claims and interests and those of the putative class members; they are certainly "reasonably co-extensive." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *cf. Arnott v. U.S. Citizenship & Immigration Servs*, 290 F.R.D. 579, 584, 587 (C.D. Cal. 2012) (finding that

[4] This argument, which focuses only on Plaintiffs' notice claim, is not relevant to assessing Plaintiffs' typicality vis-à-vis their request for a uniform procedural mechanism for timely filing asylum applications. *See* Dkt. 1 ¶¶60-87 & 38-39 (each Plaintiff was unable to file an asylum application within one year of entry and seeks relief on this basis).

[5] Defendants also argue that Plaintiffs' claims are not typical "where [they] seek only injunctive relief," Dkt. 29 at 12, but courts routinely certify classes of individuals seeking injunctive relief, including injunctions requiring modified notice procedures, *see, e.g., Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998). Plaintiffs, moreover, seek declaratory relief as well for every one of their claims. *See* Dkt. 1 at 38-39.

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named plaintiffs' claims were typical of the putative class despite fact that the government had corrected its allegedly unlawful behavior as to four named plaintiffs, since all plaintiffs "share[d] a common interest" in a finding that the government's behavior, which could still impact those four named plaintiffs, was unlawful); *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 487 (D. Idaho 2014), *order clarified* (Apr. 21, 2014), *order clarified*, No. 1:12-CV-22-BLW, 2015 WL 632214 (D. Idaho Feb. 13, 2015), *aff'd*, 789 F.3d 962 (9th Cir. 2015), *and aff'd sub nom. K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962 (9th Cir. 2015) (finding typicality where not all proposed class members might be actually affected by the inadequate notice, as "all proposed class members have a shared interest in the constitutional and statutory adequacy of the budget notice form").[6]

In sum, Plaintiffs all share an interest in a judicial determination addressing the unlawfulness of Defendants' failure to provide notice of the one-year deadline, as well as the failure to afford an adequate mechanism for all asylum seekers to be able to file their asylum applications before the expiration of the deadline. Thus, their claims and interests are typical of those of the putative class members and they are adequate class representatives.

D. Defendants have acted unlawfully with regard to the class as a whole.

Defendants argue that they have taken affirmative measures to: (1) provide notice of the one-year filing deadline to members of the putative classes; and (2) provide a mechanism by which they can timely file their asylum applications. *See* Dkt. 29 at 13-15. Neither is accurate.

Plaintiffs already have explained why LOP and the instructions on the asylum application do not suffice to show that DHS Defendants provide notice of the one-year deadline

[6] Defendants contend that the class is overbroad for the same reasons that they claim it lacks commonality and typicality. *See* Dkt. 29 at 11 n.8. However, Plaintiffs and proposed class members are subject to Defendants' policies and practices of failing to advise asylum seekers of the filing deadline and failing to provide an adequate application mechanism for timely filing, and all have suffered a common injury. Defendants' reliance on *Lyon v. US ICE*, *see* Dkt. 29 at 11 n.8, is misplaced, as the *Lyon* court rejected the government's argument that the class was overbroad, 300 F.R.D. 628, 635-36 (N.D. Cal. 2014). In so finding, it recognized that a class is properly defined and not overbroad where, as here, the definition does "not use subjective standards or terms that depend on the resolution of the merits." *Id.* at 635.

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to all putative class members. *See* II.B, *supra*. Defendants also suggest, without citing any legal authority, that "the statute and regulations provide the requisite notice" of the one-year deadline. Dkt. 29 at 13. Under these circumstances—where Plaintiffs and proposed class members recently have arrived in the United States, are fleeing persecution, and have little or no familiarity with the intricacies of this country's asylum law—Defendants must provide additional notice. Indeed, federal courts have required immigration authorities to provide notice to noncitizens of statutory or regulatory requirements.

Additionally, Defendants argue that they have provided a mechanism for Plaintiffs and putative class members to timely apply for asylum based on new policies outlined in EOIR's September 24, 2016, memorandum. *See id.* at 14. These policies now allow applicants to file their asylum applications with the clerk of the immigration court, rather than having to "lodge" their applications or wait to file them at a master calendar hearing. *Id.*

Defendants' new policy fails to provide a guaranteed mechanism for Plaintiffs and many putative class members to timely apply for asylum. First, the new policy is of no use to Plaintiffs and to similarly situated putative class members who have already missed the one-year deadline. Second, Defendants' new policy fails to provide a mechanism for class members who are not placed into removal proceedings within one year of their arrival, leaving them with no mechanism to timely file their applications. *See, e.g.*, Dkt. 1 ¶¶60-74 (identifying two Plaintiffs against whom DHS failed to initiate removal proceedings within one year of arrival). EOIR's new policy would not have benefited these Plaintiffs or other similarly situated individuals, because no immigration court would have had jurisdiction over their asylum applications. *See* 8 C.F.R. §§ 1208.4(b)(3), (4). Moreover, the experience of these Plaintiffs is typical, as Defendants frequently do not initiate removal proceedings within one year of an asylum seeker's arrival into the United States. *See* Dkt. 7 at 9-10; Dkt. 14 ¶¶6-11; Dkt. 15 ¶¶11, 13; Dkt. 16 ¶¶10-11; Dkt. 17 ¶¶8, 11-13; Dkt. 18 ¶¶10-11; Dkt. 19 ¶¶12-14; Dkt. 31 ¶6; Dkt. 32 ¶¶4, 7; Dkt. 33 ¶¶6, 13; Dkt. 34 ¶5. Because of extensive delays involved in

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every step of the process—i.e., scheduling of credible fear interviews, issuing the NTA, and filing and docketing the NTA—EOIR's new policy thus falls far short of providing a guaranteed mechanism for class members to timely file their applications.

Defendants also appear to argue that they have provided a mechanism for class members to timely apply for asylum because the asylum statute provides statutory exceptions to the one-year deadline. *See* Dkt. 29 at 14. The possibility that an asylum seeker *might* convince an immigration judge to recognize an exception to a late-filed application is hardly a *guaranteed* mechanism to timely apply. *See* II.A., *supra*. Instead, these individuals, whose applications are rejected for lack of jurisdiction because Defendants have failed to initiate removal proceedings against them, must overcome an additional obstacle by first convincing an immigration judge to find that they missed the deadline due to "extraordinary circumstances," a determination that Defendants regularly describe as discretionary. *See* II.A., *supra*.[7]

Defendants do not describe a mechanism whereby putative class members are assured the opportunity to timely file their asylum applications. Nor do they describe a system whereby putative class members are guaranteed notice of the one-year deadline. Defendants thus fail to refute Plaintiffs' clear showing that they "have a nationwide policy of inaction that is injurious to the rights and interests of the Plaintiffs and putative class members." Dkt. 7 at 24.

III. CONCLUSION

Plaintiffs have demonstrated that certification is appropriate and warranted in this case. Accordingly, they respectfully request that this Court grant their motion and certify the proposed classes and subclasses.

[7] Defendants also purport to assign significance to EOIR's issuance of "rejection" notices when it rejects an asylum application because no NTA has been filed in the applicant's case. *See* Dkt. 29 at 14-15. But being issued a rejection notice is not the equivalent of being provided with a mechanism through which to timely apply for asylum: it is the exact opposite. Additionally, the statutory and regulatory provisions pursuant to which immigration judges can consider late-filed asylum applications do not mention the situation in which class members who may receive "rejected filing" notices find themselves. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. §§ 208.4(a)(4)-(5). Indeed, absent from that list is any reference to persons unable to timely apply for asylum because Defendants have issued them NTAs or processed them for credible fear interviews but then failed to timely initiate removal proceedings against them. *See* 8 C.F.R. §§208.4(a)(4)-(5).

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Dated this 21st day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

Executed in Seattle, Washington, on December 21, 2016.

s/ Glenda M. Aldana Madrid

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