UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAISA YAKUBOVA, EMMA UNGURYAN,
BELLA VESNOVSKAYA, DAVID VESNOVSKIY,
VYACHESLAV VOLOSIKOV, and SHEHATA AWAD IBRAHIM,
on behalf of themselves and all others similarly situated,

Plaintiffs,

06 Civ. 3203
(ECF CASE)

- against -

MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security, EMILIO GONZALEZ, in his official capacity as the Director of the United States Citizenship and Immigration Services, MARY ANN GANTNER, in her official capacity as District Director of the New York City District of the United States Citizenship and Immigration Services, ALBERTO GONZALES, in his official capacity as Attorney General of the United States, and ROBERT S. MUELLER, in his official capacity as the Director of the Federal Bureau of Investigation,

Defendants.
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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND CLASS CERTIFICATION

PRELIMINARY STATEMENT

Plaintiffs bring this class action for declaratory and injunctive relief against Defendants MICHAEL CHERTOFF, EMILIO GONZALEZ, MARY ANN GANTNER, ALBERTO R. GONZALES and ROBERT S. MUELLER pursuant to 5 U.S.C. § 706(1) and 8 U.S.C. § 1447(b), to redress and enjoin (1) the wrongful failure of Defendants CHERTOFF, GONZALEZ,

and GANTER ("USCIS Defendants") and Defendant GONZALES to grant or deny proposed class members' applications for naturalization within 120 days of their initial examinations in violation of 8 U.S.C. § 1447(b) and 8 C.F.R. § 335.3, and within a reasonable time in violation of 5 U.S.C. § 555(b); (2) the wrongful failure of Defendants MUELLER and GONZALES to complete all background checks that are necessary for the adjudication of proposed class members' naturalization applications, for which the Federal Bureau of Investigation ("FBI") is responsible, within a reasonable time in violation of 5 U.S.C. § 555(b); and (3) the wrongful failure of Defendants CHERTOFF, GONZALEZ, GANTNER, GONZALES and MUELLER ("all Defendants") to collectively take all steps necessary to adjudicate proposed class members' applications for naturalization within a reasonable time in violation of 5 U.S.C. § 555(b).

Plaintiffs submit this memorandum of law in support of their motion for a preliminary injunction (1) immediately remanding the naturalization applications of the Named Plaintiffs and other members of the proposed class identified in Paragraph 65 of the complaint (hereinafter collectively "identified class members") to USCIS Defendants and Defendant GONZALES; (2) ordering Defendants GONZALES and MUELLER within twenty-five days of the remand to complete all background checks for which the FBI is responsible that are necessary to adjudicate the naturalization applications of identified class members; (3) ordering all Defendants collectively within thirty-five days of the remand to complete all steps necessary to adjudicate the naturalization applications of identified class members; and (4) ordering USCIS Defendants and Defendant GONZALES to grant or deny the naturalization applications of identified class members within forty-five days of the remand, and in support of their motion for class certification.

STATUTORY AND REGULATORY SCHEME

A. IMMIGRATION AND NATIONALITY ACT

The federal Constitution grants Congress the power to "establish a Uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. In the Immigration Act of 1990, Congress vested the Attorney General with "sole authority to naturalize persons as citizens of the United States." 8 U.S.C. § 1421(a). The Attorney General has delegated the authority to administer and enforce the Immigration and Nationality Act and all other laws relating to immigration, naturalization and nationality to the Director of United States Citizenship and Immigration Services ("USCIS"). 6 U.S.C. § 271(b); 8 U.S.C. § 1103(a) (1); 8 C.F.R. § 100.2(a); 28 C.F.R. 0.105.[1]

In order to apply for naturalization, a lawful permanent resident must file an application for naturalization with USCIS. 8 U.S.C. § 1445(a) (b); 8 C.F.R. §§, 316.4, 334.1, 334.2. A USCIS immigration officer must conduct an examination of the applicant for naturalization. 8 U.S.C. § 1446(a); 8 C.F.R. §§ 335.2, 332.1. The immigration officer must then determine whether the application should be granted or denied, with reasons therefore. 8 U.S.C. § 1446(d).

Subsequent to the filing of an application for naturalization and before a person may be naturalized, USCIS must conduct a background investigation of the applicant. 8 U.S.C. § 1446(a); 8 C.F.R. §§ 335.1, 335.2. Since 1997, Congress has also required that a complete FBI criminal background investigation be conducted on each applicant for citizenship. Pub.L. 105-119, Title I, 111 Stat. 2440, 2448- 49 (1997); 8 C.F.R. § 335.2(b).

[1] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist and its principal functions were transferred to the newly created USCIS within the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §471, 116 Stat. 2135, 2205 (codified at 6 U.S.C. § 291(a)). Authority and responsibility to administer and enforce all laws pertaining to immigration, including the adjudication of naturalization applications, was transferred from the Commissioner of the INS to the Director of the USICS. See 6 U.S.C. § 271(b)(2).

USCIS shall grant naturalization applications if applicants have met all requirements for naturalization. 8 C.F.R. § 335.3(a). A decision to grant or deny the naturalization application must take place "at the time of the initial examination or within 120-days after the date of the initial examination." 8 C.F.R. § 335.3(a). USCIS may conduct a reexamination to afford the applicant an opportunity to overcome any deficiencies on the application that may arise during the examination. 8 C.F.R. § 335.3(b). A reexamination on the continued case must be scheduled within 120 days after the initial examination. 8 C.F.R. § 335.3(b).

If USCIS fails to make a determination on a naturalization application within 120 days of an initial examination, the applicant may appeal to the district court in the district in which he or she resides for a hearing, pursuant to 8 U.S.C. § 1447(b) and 8 C.F.R. § 310.5.

8 U.S.C. § 1447(b), provides that:

> If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

8 C.F.R. § 310.5 states "[a]n applicant for naturalization may seek judicial review of a pending application for naturalization in those instances where the Service fails to make a determination under section 335 of the Act within 120 days after an examination is conducted under part 335 of this chapter." 8 C.F.R. § 310.5.

8 U.S.C. § 1571 directs that "it is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application... ." 8 U.S.C. § 1571. The term "immigration benefit application" means

any application or petition to confer, certify, change, adjust, or extend any status granted under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.], including naturalization. 8 U.S.C. § 1572.

"The Attorney General shall take such measures as may be necessary to-- (1) reduce the backlog in the processing of immigration benefit applications, with the objective of the total elimination of the backlog 1 year after November 25, 2002; (2) make such other improvements in the processing of immigration benefit applications as may be necessary to ensure that a backlog does not develop after such date; and (3) make such improvements in infrastructure as may be necessary to effectively provide immigration services." 8 U.S.C. § 1573.

B. THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act ("APA") directs agencies to conclude matters presented to them "within a reasonable time." 5 U.S.C. § 555(b). When an agency fails to conclude a matter presented to it within a reasonable time, the APA grants judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "Agency action" is defined by the APA as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

STATEMENT OF FACTS

A. Background

USCIS Defendants and Defendant GONZALES have a custom and practice of failing to grant or deny proposed class members' applications for naturalization within 120 days of their initial examinations, and of unlawfully withholding and unreasonably delaying the adjudication of proposed class members' applications for naturalization. Defendants GONZALES and

MUELLER have a custom and practice of failing to complete within a reasonable time the background checks that are necessary for adjudication of proposed class members' naturalization applications, for which the FBI is responsible. Collectively, all Defendants have a custom and practice of failing to take all steps necessary to adjudicate proposed class members' applications for naturalization within 120 days of the date of their initial examinations.

As a result, proposed class members routinely wait six months or longer after the date of their initial examinations to receive a determination on their naturalization applications. When inquiries are made regarding the status of proposed class members' naturalization applications, USCIS Defendants routinely respond that the naturalization application cannot be determined because of pending "security checks" and/or "name checks" and/or "agency checks" and/or "background checks".

Plaintiffs' Counsel have identified and listed over 100 members of the proposed class, in addition to the Named Plaintiffs, whose pending naturalization applications have not been adjudicated within 120 days of the date of their initial examinations. (Complaint ¶65).

This delay causes them substantial and irreparable harm.

B. Individual Plaintiffs

RAISA YAKUBOVA

RAISA YAKUBOVA ("Ms. YAKUBOVA") is a lawful permanent resident of the United States and native of Uzbekistan. (Yakubova Decl. ¶ 2). She immigrated to the United States as a refugee on November 27, 1998. (Yakubova Dec. ¶ 3). Ms. YAKUBOVA suffers from high blood pressure, kidney problems, arthritis and depression, and was entitled to receive SSI benefits from the date of her arrival. (Yakubova Decl. ¶ 5). Ms. YAKUBOVA submitted

an application for naturalization to USCIS on February 13, 2004, after five years of lawful permanent residency. (Yakubova Decl. ¶ 6).

On April 21, 2005, Ms. YAKUBOVA had her initial examination in connection with her naturalization application at USCIS. (Yakubova Decl. ¶ 7). The Service Officer informed Ms. YAKUBOVA that she had passed all of the relevant examinations and congratulated her. (Yakubova Decl. ¶ 8). The Service Officer further advised Ms. YAKUBOVA that she would be scheduled for an oath ceremony. (Yakubova Decl. ¶ 8).

Well over a year has passed since Ms. YAKUBOVA's examination and her naturalization application has not yet been granted or denied. (Yakubova Decl. ¶ 16). In July of 2005, Ms. YAKUBOVA contacted USCIS and inquired about the status of her application. (Yakubova Decl. ¶ 10). By letter dated July 28, 2005, USCIS informed Ms. YAKUBOVA that her application was "pending required agency checks." (Yakubova Decl. ¶ 11). In November of 2005, Ms. YAKUBOVA contacted U.S. Representative Anthony David Weiner and asked him to make an inquiry to USCIS about the status of her naturalization application. (Yakubova Decl. ¶ 12). On November 28, 2005, Representative Weiner received a memorandum from the U.S. Department of Homeland Security that said "applicant's case is currently pending security agency checks." (Yakubova Decl. ¶ 12). Also in November of 2005, Ms. YAKUBOVA again personally contacted USCIS about her application. (Yakubova Decl. ¶ 13). In a letter dated December 3, 2005, USCIS informed Ms. YAKUBOVA that "the processing of your case has been delayed. We are currently awaiting the results of required security checks. . ." (Yakubova Decl. ¶ 13). In February of 2006, a representative contacted USCIS on Ms. YAKUBOVA's behalf about her application. (Yakubova Decl. ¶ 14). By letter dated February 10, 2006, USCIS

informed her representative that "we have to perform additional review on this case and this has caused a longer processing time." (Yakubova Decl. ¶ 14). In March of 2006, another representative contacted USCIS on Ms. YAKUBOVA's behalf about her application. (Yakubova Decl. ¶ 15). By letter dated May 4, 2006, USCIS informed her representative that "the processing of your case has been delayed. A check of our records establishes that your case is not yet ready for decision, as the required investigation into your background remains open." (Yakubova Decl. ¶ 15). On June 21, 2006 USCIS sent Ms. YAKUBOVA a notice scheduling her for a fingerprinting appointment, stating "[t]o continue processing your N-400 application, INS must send your fingerprints to the Federal Bureau of Investigation." (Complaint ¶53). Ms. YAKUBOVA had already submitted her fingerprints to USCIS as required prior to her initial examination on June 3, 2004**.** (Complaint ¶53). It appears that Ms. YAKUBOVA has been scheduled for fingerprinting for a second time because her first set of fingerprints have expired due to Defendants' delay in processing her naturalization application.

Ms. YAKUBOVA has been and continues to be substantially injured by this delay. In December of 2005, Ms. YAKUBOVA lost her SSI benefits because refugees are only entitled to receive SSI benefits for seven years, although she had applied for citizenship over nineteen months prior. (Yakubova Decl. ¶ 17).[2] As a result, Ms. YAKUBOVA's depression is

[2] The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), among other things, limits the eligibility of certain categories of aliens to receive the benefits of certain federal programs, including SSI and "supplementary payments pursuant to an agreement for Federal administration. . ."8 USC § 1612(a) (3). PRWORA dictates that humanitarian-based immigrants, arriving in the United States after August 22, 1996, are only eligible to receive SSI for seven years. 8 USC § 1612(a) (2) (A). "Humanitarian-based immigrants" are refugees, asylees, and persons granted withholding of deportation, all of whom are granted indefinite residency in the United States because they face persecution in their home country. 8 USC § 1612(a) (2) (A); 8 U.S.C.A. § 1157; 8 U.S.C.A. § 1158.

becoming more and more severe and her general health condition has deteriorated. (Yakubova Decl. ¶ 20). Her kidney problems and hypertension have continued to worsen. (Yakubova Decl. ¶ 20). Ms. YAKUBOVA has begun to lose hope that she will ever become a citizen. (Yakubova Decl. ¶ 21). Ms. YAKUBOVA's life has been substantially stalled.

EMMA UNGURYAN

EMMA UNGURYAN ("Ms. UNGURYAN") is a 63-year-old lawful permanent resident of the United States and native of Ukraine. (Unguryan Decl. ¶¶ 1, 2). She immigrated to the United States on February 11, 1998, and was granted refugee status because in Ukraine, Ms. UNGURYAN was persecuted because she is Jewish. (Unguryan Decl. ¶ 2). Ms. UNGURYAN is a Holocaust survivor. (Unguryan Decl. ¶ 2). During 2002, Ms. UNGURYAN fell ill and became entitled to receive SSI benefits. (Unguryan Decl. ¶4). Ms. UNGURYAN submitted an application for naturalization to USCIS on January 12, 2004, after five years of lawful permanent residency. (Unguryan Decl. ¶ 5, 6). At that time, she requested a "Disability Exception" from the requirement that all applicants demonstrate English language ability and knowledge of United States history and government. (Unguryan Decl. ¶ 7). On October 13, 2004, Ms. UNGURYAN was examined by a Service Officer at USCIS in relation to her naturalization applications. (Unguryan Decl. ¶ 8). The Service Officer informed her at that interview that her request for a Disability Exception had been granted and that she would receive a letter via mail advising her of the time, date and location of her oath ceremony. (Unguryan Decl. ¶ 9). Over nineteen months have passed since the date of Ms. UNGURYAN's initial examination, and USCIS has not contacted her regarding the status of her naturalization application. (Unguryan Decl. ¶ 11).

Ms. UNGURYAN has been and continues to be substantially injured by this delay. In February 2005, Ms. UNGURYAN lost her SSI benefits because she was not a U.S. citizen, even though she had submitted her naturalization application over a year earlier in January of 2004. (Unguryan Decl. ¶ 16). Although she receives cash public assistance, it has become impossible for Ms. UNGURYAN to survive financially, and she has become dependent upon her daughter for basic life necessities. (Unguryan Decl. ¶ 17).

Over the past nineteen months, Ms. UNGURYAN has been increasingly anxious and worried about her immigration status. (Unguryan Decl. ¶ 19). Her blood pressure has become more unstable and her insomnia has worsened. (Unguryan Decl. ¶ 19). She has become very depressed. (Unguryan Decl. ¶ 19). Ms. UNGURYAN's life has been substantially stalled.

BELLA VESNOVSKAYA & DAVID VESNOVSKIY

BELLA VESNOVSKAYA ("Ms. VESNOVSKAYA") is a 68-year-old lawful permanent resident of the United States and native of Russia. (Vesnovskaya Decl. ¶¶ 1, 2). DAVID VESNOVSKIY ("Mr. VESNOVSKIY") is a 72-year-old lawful permanent resident of the United States and native of Russia. (Vesnovskiy Decl. ¶¶ 1, 2). Mr. VESNOVSKIY and Ms. VESNOVSKAYA have been married for 47 years, and emigrated together from Novosibirsk, Russia to the United States as refugees on October 1, 1999. (Vesnovskiy Decl. ¶ 3; Vesnovskaya Decl. ¶¶ 1, 3). They were granted refugee status because in their country of origin they faced substantial persecution because they are Jewish. (Vesnovskiy Decl. ¶ 4; Vesnovskaya Decl. ¶¶ 4, 5). Mr. VESNOVSKIY suffers from multiple medical problems, and was entitled to receive SSI benefits from the date of his arrival. (Vesnovskiy Decl. ¶¶ 7, 8). Ms. VESNOVSKAYA was entitled to receive SSI benefits from her sixty-fifth birthday, in 2001. (Vesnovskaya Decl. ¶

7). On December 13, 2004, after five years of lawful permanent residence in the United States, Mr. VESNOVSKIY and Ms. VESNOVSKAYA applied for naturalization. (Vesnovskiy Decl. ¶ 9; Vesnovskaya Decl. ¶ 8). At that time, Mr. VESNOVSKIY requested a "Disability Exception" from the requirement that all applicants demonstrate English language ability and knowledge of United States history and government. (Vesnovskiy Decl. ¶ 9). While Ms. VESNOVSKAYA is also disabled, she did not apply for a Disability Exception because she had spent a significant amount of time learning English and wanted to take and pass the naturalization exam. (Vesnovskaya Decl. ¶ 9).

On November 17, 2005, Ms. VESNOVSKAYA was examined by a Service Officer at USCIS, and was informed by that Service Officer that she had passed the naturalization exam. (Vesnovskaya Decl. ¶10). On November 18, 2005, Mr. VESNOVSKIY was examined by a Service Officer at USCIS and was informed that USCIS had granted his request for a Disability Exception. (Vesnovskiy Decl. ¶ 10). At that time, he received a "Congratulations!" letter stating "[y]our application has been recommended for approval, At the time, it appears that you have established your eligibility for naturalization. If final approval is granted, you will be notified when and where to report for the Oath Ceremony." (Vesnovskiy Decl., Exhibit A).

Since that time, neither Mr. VESNOVSKIY nor Ms. VESNOVSKAYA have been scheduled for the oath administration ceremony, and they have not been notified as to whether their naturalization applications were granted or denied. (Vesnovskiy Decl. ¶ 11; Vesnovskaya Decl. ¶ 13). In February of 2006, Mr. VESNOVSKIY and Ms. VESNOVSKAYA's assemblyman, William Colton, made an inquiry to the USCIS about the status of their applications. (Vesnovskaya Decl. ¶ 12). He received a memorandum dated March 9, 2006 that

stated, "please be advised that according to USCIS records, applicants' cases are currently pending security agency checks." (Vesnovskaya Decl., Exhibit B).

Both Mr. VESNOVSKIY and Ms. VESNOVSKAYA have been and are being substantially injured by Defendants' failure to process their naturalization applications in a timely manner. They will be further irreparably injured if their applications are not processed and adjudicated in the immediate future, as Mr. VESNOVSKIY and Ms. VESNOVSKAYA will both lose their life sustaining SSI benefits on October 1, 2006. (Vesnovskiy Decl. ¶ 12; Vesnovskaya Decl. ¶ 14). If they both lose their benefits, they will face a loss of over $500 per month. (Vesnovskiy Decl. ¶ 14; Vesnovskaya Decl. ¶ 14). They will no longer be able to afford their rent and will be in danger of becoming homeless. (Vesnovskiy Decl. ¶ 14; Vesnovskaya Decl. ¶ 15). This looming deadline causes Mr. VESNOVSKIY and Ms. VESNOVSKAYA extreme anxiety and stress. (Vesnovskiy Decl. ¶ 14; Vesnovskaya Decl. ¶ 15). Mr. VESNOVSKIY's existing medical conditions have been greatly exacerbated by the stress of waiting for a decision on his naturalization application. (Vesnovskiy Decl. ¶ 17). He has begun to suffer memory loss, does not sleep well, and gets tired very quickly. (Vesnovskiy Decl. ¶ 17). Ms. VESNOVSKAYA has been increasingly anxious about the determination and now has trouble sleeping. (Vesnovskaya Decl. ¶ 16). Her depression has worsened and she feels increasingly despondent. (Vesnovskaya Decl. ¶ 16).

Additionally, Mr. VESNOVSKIY and Ms. VESNOVSKAYA are afraid to take a vacation for even a short period because they fear missing their swearing in ceremonies. (Vesnovskiy Decl. ¶ 15; Vesnovskaya Decl. ¶ 17). They are not able to travel and see their daughter and her husband and their grandchildren who live in Israel. (Vesnovskiy Decl. ¶ 15;

Vesnovskaya Decl. ¶ 18). This summer, their granddaughter is scheduled to start the Army service that is mandated in Israel for all Israeli citizens and their daughter offered to pay for plane tickets for Mr. VESNOVSKIY and Ms. VESNOVSKAYA to fly to Israel. (Vesnovskiy Decl. ¶ 15; Vesnovskaya Decl. ¶ 18). Mr. VESNOVSKIY and Ms. VESNOVSKAYA are heartbroken that they cannot see their granddaughter before she begins her service, but will not risk missing their opportunity to become citizens of the United States. (Vesnovskaya Decl. ¶ 18). Mr. VESNOVSKIY and Ms. VESNOVSKAYA's lives have been substantially stalled.

VYACHESLAV VOLOSIKOV

VYACHESLAV VOLOSIKOV ("Mr. VOLOSIKOV") is a 71-year-old lawful permanent resident of the United States and native of Russia. (Volosikov Decl. ¶¶ 1, 2). He immigrated to the United States on November 19, 1999, as a "Lautenberg parolee" (a parolee in the public interest). (Volosikov Decl. ¶ 3). Mr. VOLOSIKOV is severely disabled and suffers from a variety of illnesses. (Volosikov Decl. ¶ 5). Mr. VOLOSIKOV submitted an application for naturalization to USCIS on November 17, 2004, after five years of lawful permanent residency. (Volosikov Decl. ¶ 6). At that time, he requested a "Disability Exception" from the requirement that all applicants demonstrate English language ability and knowledge of United States history and government. (Volosikov Decl. ¶ 6). On November 10, 2005, Mr. VOLOSIKOV was examined by a Service Officer at USCIS. (Volosikov Decl. ¶ 6). That Service Officer informed him at that examination that his request for a Disability Exception had been granted. (Volosikov Decl. ¶ 7). The Service Officer further informed Mr. VOLOSIKOV that he had to submit a "Good Conduct Certificate" because the results of his fingerprints were not acceptable. (Volosikov Decl. ¶ 7). On December 1, 2005, Mr. VOLOSIKOV's attorneys

sent the required "Good Conduct Certificate" to the USCIS by certified mail. (Volosikov Decl., Exhibit D).

Since that day over six months ago, Mr. VOLOSIKOV has not been contacted by USCIS Defendants, he has not been scheduled for the oath ceremony, and he has not been notified as to whether his application was granted or denied. (Volosikov Decl. ¶ 9). The delay is causing Mr. VOLOSIKOV severe anxiety and depression. (Volosikov Decl. ¶ 14). He cannot sleep at all, and sleep medication does not help him. (Volosikov Decl. ¶ 14). Additionally, Mr. VOLOSIKOV has recently developed angina and his doctors have told him that he needs a catheterization procedure to treat it. (Volosikov Decl. ¶ 15). However, he will not undergo this serious procedure for fear that while he is incapacitated, his invitation to take the naturalization oath will come and he will miss his long awaited opportunity. (Volosikov Decl. ¶ 15). Mr. VOLOSIKOV's life has been substantially stalled.

Mr. VOLOSIKOV is further harmed because he may not be able to vote in upcoming elections. (Volosikov Decl. ¶ 17). A journalist from a Russian weekly newspaper called *Vechriniy New York* has decided to run for a city council position in the upcoming election for Mr. VOLOSIKOV's district. (Volosikov Decl. ¶ 17). The candidate is a very famous journalist in the Russian community and Mr. VOLOSIKOV strongly supports his position. (Volosikov Decl. ¶ 17). Mr. VOLOSIKOV follows local and national politics in the United States very closely, and is deeply upset that he has not been able to and may not be able to participate as a citizen. (Volosikov Decl. ¶¶ 17, 18).

SHEHATA AWAD IBRAHIM

SHEHATA AWAD IBRAHIM ("Mr. IBRAHIM") is an 80-year-old lawful permanent resident of the United States and native of Egypt. (Ibrahim Decl. ¶¶ 1, 2). He immigrated to the United States on September 13, 1996. (Ibrahim Decl. ¶ 3). Mr. IBRAHIM suffers from the early stages of Alzheimer's disease, and has very poor vision and hearing. (Ibrahim Decl. ¶ 5). Mr. IBRAHIM submitted an application for naturalization to USCIS on April 28, 2004. (Ibrahim Decl. ¶ 6). At that time, he requested a "Disability Exception" from the requirement that all applicants demonstrate English language ability and knowledge of United States history and government. (Ibrahim Decl. ¶ 6). During his initial examination for naturalization, his interviewer told him that he did not have the correct medical documentation to be granted a "Disability Exception" and gave him the proper form to fill out. (Ibrahim Decl. ¶ 7). Mr. IBRAHIM then resubmitted his request for a "Disability Exception." (Ibrahim Decl. ¶ 8). On October 27, 2005, Mr. IBRAHIM was examined with regard to his naturalization application by a Service Officer at USCIS. (Ibrahim Decl. ¶¶ 9, 10). The Service Officer informed him at that interview that his request for a Disability Exception had now been granted. (Ibrahim Decl. ¶ 10). Mr. IBRAHIM was then advised that an invitation letter to participate in an oath ceremony would be mailed to him. (Ibrahim Decl. ¶ 11).

Over 7 months have elapsed since his examination but Mr. IBRAHIM has not been scheduled for the oath ceremony as promised. (Ibrahim Decl. ¶ 12). Mr. IBRAHIM has been and continues to be substantially injured by this delay. Mr. IBRAHIM has been subjected to great anxiety waiting for his application to be adjudicated. (Ibrahim Decl. ¶ 14). This anxiety is causing him to suffer insomnia and depression. (Ibrahim Decl. ¶ 14). Additionally, as an Arab

who is not a citizen of the United States, in the current political and social climate Mr. IBRAHIM feels scrutinized and uncomfortable. (Ibrahim Decl. ¶ 15). Mr. IBRAHIM despairs that he will not become a citizen of the United States while he is still able to participate effectively. (Ibrahim Decl. ¶ 16). Mr. IBRAHIM's life has been substantially stalled.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

Plaintiffs are entitled to a preliminary injunction (1) immediately remanding the naturalization applications of the identified class members to USCIS Defendants and Defendant GONZALES; (2) ordering Defendants GONZALES and MUELLER within twenty-five days of the remand to complete all criminal background checks for which the FBI is responsible that are necessary to adjudicate the naturalization applications of identified class members; (3) ordering all Defendants collectively within thirty-five days of the remand to complete all steps necessary to adjudicate the naturalization applications of identified class members; and (4) ordering USCIS Defendants and Defendant GONZALES to adjudicate the naturalization applications of identified class members within forty-five days of the remand.

Plaintiffs satisfy the test established by courts in this Circuit for the granting of preliminary injunctive relief by showing (1) a threat of irreparable injury; (2) either a probability of success on the merits or sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation; and (3) a balance of hardships tipping decidedly in their favor. Tunick v. Safir, 209 F.3d 67, 70 (2d Cir. 2000); Time Warner Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 923 (2d Cir. 1997). Plaintiffs have suffered and continue to

suffer irreparable injury because they are being unlawfully deprived of the many unique benefits of citizenship, including the right to vote and to receive life sustaining federal SSI benefits.

Plaintiffs are likely to succeed on the merits because Defendants have failed to complete all steps necessary to adjudicate Plaintiffs' naturalization applications within a reasonable period, and USCIS Defendants and Defendant GONZALES have failed to adjudicate Plaintiffs' naturalization applications within 120 days of their initial examinations and within a reasonable time, in violation of federal law and regulations. Finally, the balance of hardships tips decidedly in Plaintiffs' favor, as Plaintiffs have been and continue to be denied all of the benefits of citizenship while Defendants unlawfully fail to comply with statutory and regulatory mandates that they make determinations within the legally required time frame.

A. Identified Class Members Are Suffering Irreparable Harm

The Second Circuit has noted that the finding of irreparable harm is perhaps the single most important factor necessary to the proper issuance of a preliminary injunction. Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985). Irreparable harm is defined as an "injury for which a monetary award cannot be adequate compensation." Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

A monetary award cannot redress the injury Plaintiffs suffer as a result of being deprived of citizenship. Many of Plaintiffs are elderly and/or infirm. Delays in the provisions of any benefits thus cause them particular injury, as they despair of living long enough or being well enough to enjoy entitlements not granted promptly. They are being denied, *inter alia,* the right to vote, the right to obtain United States passports, the right to file visa petitions for immediate

relatives as U.S. citizens, the protection of the United States government when outside the United States and the right to life sustaining federal benefits.

Preventing injury such as that suffered by Plaintiffs was, in fact, one of the reasons that Congress enacted 8 U.S.C. 1447(b). See, Zaranska v. U.S. Dept. of Homeland Security, 400 F.Supp.2d 500, 510-511 (E.D.N.Y. 2005). This court, in reviewing the House Judiciary Committee Report regarding the enactment of section 1447(b), quoted the Congressional observation that "[n]aturalization is an act of great personal consequence to American Immigrants, involving major reorganizations in their sense of identity and offering a new beginning for many" and the Congressional observation that "citizenship is the most valued governmental benefit of this land." Zaranska, 400 F.Supp.2d at 510-511 (citing H.R.Rep. No. 101-187, at 8, 12-13 (1989); 135 Cong. Rec. H4539-02, H4542 (statements of Rep. Morrison and Smith)).

In Campos v. I.N.S., 70 F.Supp.2d 1296, 1300 (S.D.Fla. 1998), a class of legal permanent residents ("LPRs") who had submitted naturalization applications brought an action against the Immigration and Naturalization Service ("INS"), challenging the INS' practices in its Miami District for evaluating requests for medical waivers of the English language and civics components of the naturalization exam. The Campos plaintiffs argued that if a preliminary injunction were not granted, they would be irreparably harmed in that they would "lose the opportunity to vote, receive benefits, or otherwise fully participate in our democracy as United States citizens." Id. at 1309. The court agreed, holding that "[t]he law is well established that denial of the opportunity to vote is irreparable injury per se," and that the "plaintiffs have demonstrated irreparable injury because they have shown that in light of their advanced age and

infirmities, it is likely that the plaintiffs may not survive the lengthy administrative appeals process and they may also be deprived of an opportunity to be heard on the issues presented by the class complaint." Id. at 1309-1310. So too in the instant case, wherein many members of proposed Plaintiff class are elderly and/or infirm, and may be deprived of the opportunity to become citizens altogether but for this Court's grant of the requested preliminary relief.

The Campos court also noted that, as in the case at bar, "[a]lthough not relied on by the court in determining whether this preliminary injunction should be granted, there is evidence in the record that shows that some of the applicants have been receiving life-sustaining supplemental income benefits which will, or have been discontinued. The court is concerned that the loss of these benefits will place the plaintiffs in jeopardy." 70 F.Supp.2d at 1309. Such jeopardy also exists in this case, where a future monetary award cannot possibly redress Plaintiffs' current and imminent loss of their life sustaining SSI benefits.

Courts consistently find the loss of life sustaining welfare benefits, even for a short period, to constitute irreparable injury. For instance, in Abreu v. Callahan, 971 F.Supp. 799, 803 (S.D.N.Y. 1997), the City of New York and a class of LPRs who would be rendered ineligible to receive SSI and food stamps by the newly enacted Welfare Reform Act brought an action alleging that the application of the Welfare Reform Act to them violated their equal protection rights, and sought a preliminary injunction against its enforcement. The court, in finding that the plaintiff class satisfied the threat of irreparable harm standard, stated:

> Here, the threat of irreparable injury is manifest. Persons who establish eligibility for SSI benefits and food stamps are living at society's edge, well below the poverty line. While welfare benefits are money or money's equivalent, their denial almost universally has been regarded as irreparable injury because welfare recipients depend upon them not merely as a convenient medium of exchange, but to sustain life.

Abreu, 971 F.Supp. at 821; See also, Cullins v. Bowen, No. 84 CIV. 5094 (CBM), 1987 WL 10737, *5 (S.D.N.Y. May 06, 1987) (finding "the economic straits of the plaintiff class, which are by definition desperate, compel a finding that plaintiffs meet the 'irreparable harm' prong of this test."); Laboratories, Inc. v. I.N.S, 523 F.2d 79, 81 (2d Cir. 1975) ("substantial loss of income" may constitute irreparable harm justifying a preliminary injunction); Becker v. Toia, 439 F. Supp. 324, 336 (S.D.N.Y. 1977) (requirement that select Medicaid recipients make co-payments not to exceed 50 cents causes irreparable harm).

B. Plaintiffs Are Likely to Prevail on The Merits

i. Plaintiffs Are Likely to Prevail on the Merits Of Their Claim that USCIS Defendants and Defendant GONZALES Have Violated 8 U.S.C. §1447(b) and 8 C.F.R. § 335.3

Plaintiffs are likely to prevail on their claim that USCIS Defendants and Defendant GONZALES' failure to adjudicate Plaintiffs' applications for naturalization within 120 days of their initial examinations violates 8 U.S.C. §1447(b) and 8 C.F.R. § 335.3.

Plaintiffs are all individuals who have submitted or will submit applications to be naturalized to the USCIS and who have not received or will not receive determinations on their applications within 120 days of their initial examinations, as required by 8 C.F.R. § 335.3. When USCIS fails to make a determination on a naturalization application within 120 days of the applicant's initial examination, the applicant can seek relief in federal court under 8 U.S.C. § 1447(b). Courts, in proceedings pursuant to 8 U.S.C. § 1447 (b), routinely grant the very relief Plaintiffs seek herein, remanding the applications with instructions for timely adjudication. See e.g., Al-Kudsi v. Gonzales, No. CV 05-1584-PK, 2006 WL 752556. *2-3 (D.Or. Mar 22, 2006) (because "more than 120 days ha[d] expired since the date of Al-Kudsi's examination without a

ruling on his application by CIS," court remanded application and ordered it adjudicated within "ninety days of the date of this Opinion"); Essa v. U.S.C.I.S., No. CIV051449 (DSD/JJG), 2005 WL 3440827, *3 (D.Minn. Dec 14, 2005) (because applications for naturalization had not been adjudicated within 120 days of initial examinations, court remanded applications to USCIS); El-Daour v. Chertoff, 417 F.Supp.2d 679, 683-684 (W.D.Pa. 2005) (because "CIS did not process El-Daour's application within 120 days of his examination," court ordered "a remand of this action to the CIS under 8 U.S.C. § 1447(b)"). Castracani v. Chertoff, 377 F.Supp.2d 71, 74-75 (D.D.C. 2005) (because "well over the 120 days" had elapsed "between Castracani's naturalization examination and the filing of this action," court remanded the application to the Department of Homeland Security); Sweilem v. U.S.C.I.S., No. 1:05 CV 125, 2005 WL 1123582, *4-5 (N.D.Ohio May 10, 2005) (because application for naturalization had not been adjudicated within 120 days of initial examination, court remanded application to the USCIS).

Plaintiffs are likely to prevail on the merits of their claim that USCIS Defendants and Defendant GONZALES' custom and practice of failing to make a determination on Plaintiffs' naturalization applications within 120 days of their initial examinations violates 8 C.F.R. § 335.3, and on their request for remand of their applications for naturalization with instructions for immediate adjudication, pursuant to 8 U.S.C. § 1447(b).

ii. Plaintiffs Are Likely to Prevail on the Merits Of Their Claim that USCIS Defendants and Defendant GONZALES Have "Unlawfully Withheld" and "Unreasonably Delayed" the Adjudication of Their Applications in Violation of the APA

The APA provides judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); see also Brock v. Pierce County, 476 U.S. 253, 260 n.7, 106 S.Ct. 1834, 1839 n.7 (1986) (noting that the APA permits district court to compel

agency action). This court should compel USCIS Defendants and Defendant GONZALES to make determinations granting or denying Plaintiffs' naturalization applications within a set time as such determinations have been "unlawfully withheld" or, at a minimum, "unreasonably delayed."

An action is "unlawfully withheld" when an agency fails to meet a clear deadline prescribed by Congress. Forest Guardians v. Babbitt, 164 F.3d 1261, 1272 (10th Cir. 1998). The Tenth Circuit, in Forest Guardians, held that "when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency ***must act*** by the deadline. If it withholds such timely action, a reviewing ***court must compel the action unlawfully withheld.***" (Emphasis added). Forest Guardians, 164 F.3d at 1272; See also, Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1178 (9th Cir. 2002) (holding "[t]he Service's failure to complete the listing determinations within the mandated time frame *compelled* the court to grant injunctive relief. The court had *no discretion* to consider the Service's stated priorities") (Emphasis added).

This Court is therefore compelled to grant the injunctive relief requested. Congress, in enacting 8 U.S.C. 1447(b), set a clear "specific deadline" within which the USCIS is to adjudicate applications. Forest Guardians, 164 F.3d at1272. USCIS clearly understands this statute to create a specific deadline: the regulation created by USCIS itself implementing this statute states "a decision to grant or deny the application shall be made at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization." 8 C.F.R. § 335.3. Thus, USCIS Defendants and Defendant GONZALES do not have any "discretion," and "must act by the [120 day] deadline." Forest Guardians, 164 F.3d at

1272. As the USCIS Defendants and Defendant GONZALES have withheld "such timely action," this court "*must compel*" them to take the "action unlawfully withheld." Id. (emphasis added).

At minimum, this Court should hold that Defendants have unreasonably delayed in the adjudication of Plaintiffs' naturalization applications. Agency action is "unreasonably delayed" when an agency fails to act within a reasonable time even when the governing statute does not require action by a date certain. The USCIS, like other government agencies, is governed by the APA's general rule that it conclude matters presented to it "within a reasonable amount of time." Patel v. I.N.S., No. 98CV1937 JCH, 2000 WL 298921, at *2 (E.D.Mo. Jan 20, 2000). "A contrary position would permit the [USCIS] to delay indefinitely. Congress could not have intended to authorize potentially interminable delays." Yu v. Brown, 36 F.Supp.2d 922, 932 (D.N.M. Jan 28, 1999) (quoting Agbemaple v. I.N.S., No. 97 C 8547, 1998 WL 292441, at *2 (N.D.Ill. May 18, 1998).

The elements of a claim for unreasonable delay under 5 U.S.C. § 706(1) are (1) a discrete, ministerial duty; (2) a delay in carrying out that duty; and (3) a determination that the delay was unlawful or unreasonable in light of prejudice to one of the parties. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62-66, 124 S.Ct. 2373, 2378-80 (2004). USCIS Defendants and Defendant GONZALES clearly have a discrete, ministerial duty to adjudicate applications for naturalization. See, 8 U.S.C.A. § 1446; Yu, 36 F.Supp.2d at 931 ("All other courts. . . have held that INS has a non-discretionary duty to process. . . immigration applications."). Likewise, Defendants have unquestionably delayed in the processing of proposed class members' naturalization applications -- proposed class members routinely wait

six months or longer after the date of their initial examinations to receive a determination on their naturalization applications, and two of the named plaintiffs have waited over one year since their initial examinations without being contacted by USCIS Defendants and Defendant GONZALES. See e.g., Declaration of Emma Unguryan (19-month delay); Declaration of Raisa Yakubova (13-month delay).

In determining whether an agency delay is unreasonable, courts are guided by the following considerations, described by the District of Columbia Circuit in the case of Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 80 (D.C.Cir.1984) known as the "TRAC factors"

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Tummino v. Von Eschenbach, --- F.Supp.2d ----, 2006 WL 963876, *14-15 (E.D.N.Y. Feb 24, 2006) (NO. CV 05-366 ERK/VVP) ((quoting Telecommunications Research & Action Ctr. v.

FCC, 750 F.2d 70, 80 (D.C.Cir.1984)); see also Natural Resources Defense Council, Inc. v. Thomas, 689 F.Supp. 246, 260 (S.D.N.Y. 1988), aff'd, 885 F.2d 1067 (2d Cir. 1989). Federal courts consistently employ the TRAC factors to determine whether agency inaction in the immigration context is unreasonable. See e.g., Santillan v. Gonzales, 388 F.Supp.2d 1065, 1073 (N.D.Cal. 2005); Yu, 36 F.Supp.2d at 934. A review of the TRAC factors implicated in the instant matter dictate that this Court should find the present delay in the adjudication of Plaintiffs' applications "unreasonable."

If not providing a specific deadline (*see supra* at 22), at minimum, the statute and regulation relied on herein, form a guide by which to judge the reasonableness of the length of USCIS Defendants and Defendant GONZALES' delays. Congress provided a clear timetable in enacting 8 U.S.C. § 1447(b), indicating that after an applicant has an initial examination, USCIS Defendants and Defendant GONZALES shall take all steps necessary to adjudicate and shall adjudicate that application for naturalization within 120 days. USCIS' own regulation mandates that a "decision to grant or deny the application shall be made at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization." 8 C.F.R. § 335.3. A fundamental principle of federal law is that a federal agency must follow its own rules. Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074 (1974) ("[W]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."). These statutory and regulatory directives, at minimum, establish a clear guideline by which to measure the reasonableness of USCIS Defendants and Defendant GONZALES' delay.

USCIS Defendants and Defendant GONZALES' delay is all the more unreasonable in the instant matter, where many Plaintiffs have lost or will lose life sustaining SSI benefits. The TRAC factors instruct that when human health and welfare are at stake, delays are even less tolerable. See, Santillan v. Gonzales, 388 F.Supp.2d 1065, 1084 (N.D.Cal. 2005) ("[h]ere, where the failure to present documentation precludes lawful employment and obtaining certain state benefits, the effect on the welfare of plaintiffs is obvious and undisputed"). Delays that place the plaintiffs in serious financial jeopardy are likewise unreasonable. See, Air Line Pilots Ass'n, Intern. v. C.A.B., 750 F.2d 81, 86 (D.C.Cir. 1984).

Moreover, Plaintiffs are suffering substantial prejudice due to Defendants' illegal delay**.** As explained more fully *supra*, USCIS Defendants and Defendant GONZALES' delay in adjudicating Plaintiffs' applications has caused Plaintiffs substantial anxiety and fear, deprives Plaintiffs of the substantial benefits of citizenship, including the right to vote, and deprives many Plaintiffs of life sustaining federal benefits. Such deprivation constitutes substantial prejudice.

Thus, Plaintiffs are likely to succeed on the merits of their claim that USCIS Defendants and Defendant GONZALES failed to grant or deny Plaintiffs' naturalization applications within a reasonable time in violation of 5 U.S.C. § 555(b). After all, "the CIS simply does not possess unfettered discretion to relegate aliens to a state of limbo, leaving them to languish there indefinitely. This result is explicitly foreclosed by the APA." Kim v. Ashcroft, 340 F.Supp.2d 384, 393 (S.D.N.Y. 2004); see also, Santillan, 388 F.Supp.2d at 1073 (using the TRAC factors to determine that USCIS' delay in issuing documentation of status to certain LPRs was unreasonable under § 706(1)); Yu, 36 F.Supp.2d at 934 (using the TRAC factors to determine

that a delay of more than one year in processing immigrant benefit application was not reasonable as a matter of law).

iii. Plaintiffs Are Likely to Prevail on the Merits Of Their Claim that Defendants GONZALES and MUELLER Have "Unreasonably Delayed" Completion of Plaintiffs' Criminal Background Checks in Violation of the 5 U.S.C. 555(b)

Plaintiffs are also likely to succeed on their claim that Defendants GONZALES and MUELLER have violated their rights under 5 U.S.C. 555(b) by failing to complete the criminal background checks necessary for adjudication of Plaintiffs' naturalization applications within a reasonable time. Defendants GONZALES and MUELLER are bound by the 5 U.S.C. 555(b) mandate that agencies must conclude matters presented to them within a "reasonable time." See e.g., Basova v. Ashcroft, 373 F.Supp.2d 192, 199 (E.D.N.Y. 2005), vacated on reconsideration on other grounds, 383 F.Supp.2d 390 (E.D.N.Y. 2005).

Plaintiffs clearly satisfy the elements of a claim of unreasonable delay under 5 U.S.C. 706(1). Norton, 542 U.S. at 62-66, 124 S.Ct. at 2378-80. Defendants GONZALES and MUELLER have a clear ministerial duty to complete criminal background investigations on each applicant for citizenship before that applicant can be naturalized. Pub.L. 105-119, Title I, 111 Stat. 2440, 2448- 49 (1997); 8 C.F.R. § 335.2(b); See also, Basova, 373 F.Supp.2d at 199 (finding that the defendants, including the Attorney General and the FBI, had "a non-discretionary duty to issue a decision on the plaintiffs' applications within a reasonable time"). Equally clearly, there has been substantial delay in the completion of such background investigations.

Applying the TRAC factors to Defendants GONZALES and MUELLER's conduct reveals that this delay is entirely unreasonable. Congress has provided clear guidance regarding

the entire time in which it believes applications for immigration benefits should be processed, including the time Defendants GONZALES and MUELLER have to complete the criminal background checks. 8 U.S.C. § 1571 states, "it is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application. . ."

With regard to Plaintiffs' applications, Defendants GONZALES and MUELLER regularly take more than 180 days to complete the criminal background checks, guaranteeing that USCIS Defendants and Defendant GONZALES will not be able to complete the processing of Plaintiffs' naturalization applications within "180 days after the initial filing of the application." See, e.g., Declaration of Raisa Yakubova (had initial examination on 4/21/05 and over a year later, received a letter from USCIS dated 5/4/06 stating "the required investigation into your background remains open"); Declaration of Bella Vesnovskaya (had initial examination on November 17, 2005 and received letter from USCIS dated March 9, 2006 stating that her application was "currently pending security agency checks").

Moreover, as explained in detail *supra,* Defendants GONZALES and MUELLER's delays in completing the criminal background checks, which work to deprive Plaintiffs of the opportunity of becoming citizens, have a considerable impact on Plaintiffs' health and welfare and substantially prejudice them. All of these factors militate towards this Court's finding that the delay in Defendants GONZALES and MUELLER's completion of Plaintiffs' criminal background investigations, thereby delaying the adjudication of Plaintiffs' naturalization applications, is unreasonable.

C. A Balance Of Hardships Tips Decidedly In Plaintiffs' Favor

In the case at bar, Plaintiffs' hardship far outweighs that of Defendants. Plaintiffs have waited well beyond the statutorily prescribed 120 days to be apprised of the determination of their naturalization applications. During that time, Plaintiffs have been denied all of the benefits of citizenship, including the right to vote, and many have lost or are facing the imminent loss of SSI benefits. This deprivation is due solely to Defendants' continued and pronounced failure to make determinations on their naturalization applications within the statutorily and regulatorily prescribed period.

Defendants' burden, adjudicating naturalization applications within the prescribed period, is minimal compared to Plaintiffs' hardship**.** "[D]elays of [a significant] magnitude, particularly when they occur over uncomplicated matters of great importance to the individuals involved, may not be justified merely by assertions of overwork." Dabone v. Thornburgh, 734 F.Supp. 195, 203 (E.D.Pa. 1990); see also, Galvez v. Howerton, 503 F.Supp. 35, 39 (C.D.Cal.1980) (lack of sufficient personnel to process INS application not an acceptable excuse for delays).

In this case, the balance of hardships tips decidedly towards Plaintiffs.

II.

THE PROPOSED PLAINTIFF CLASS SHOULD BE CERTIFIED

The named plaintiffs seek to represent a class defined as follows:

> All persons residing in Kings, Nassau, Queens, Richmond, and Suffolk counties in New York State, who have properly submitted or will properly submit applications to be naturalized as U.S. citizens whose naturalization applications are not adjudicated within 120 days after the date of their initial examinations.

Because the proposed class satisfies the requirements of Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure, and because class certification is essential to the fair and efficient adjudication of this controversy, Plaintiffs' motion for class certification should be granted.

A. The Proposed Class Is So Numerous That Joinder Of All Members Is Impracticable

Rule 23(a) (1) of the Federal Rules of Civil Procedure requires that the class be "so numerous that joinder of all members is impracticable." Impracticability means difficulty or inconvenience of joinder, not impossibility of joinder. See, Fogarazzao v. Lehman Bros., Inc., 232 F.R.D. 176, 179 (S.D.N.Y. 2005); In re Blech Securities Litigation, 187 F.R.D. 97, 103 (S.D.N.Y. 1999).

Currently, Plaintiffs' counsel has identified over 100 applicants for naturalization residing in Kings, Nassau, Queens, Richmond, and Suffolk counties who have waited far longer than 120 days since their initial examinations for citizenship. See, Complaint ¶65. The Second Circuit has held that "numerosity is presumed at a level of 40 members." Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995). Joinder of such a large number of persons is clearly impracticable. See, McCoy v. Ithaca Hous. Auth., 559 F. Supp. 1351, 1355 (N.D.N.Y. 1983) (stating that a class of 100 to 200 persons "would make joinder clearly impracticable").

In addition, that the exact size of the class and the identity of its members are not known is no barrier to class certification. See, Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement."); Reynolds v. Giuliani, 118 F. Supp.2d 352, 389 (S.D.N.Y. 2000); 1

Herbert B. Newberg, Newberg on Class Actions, § 3.05 (3rd ed. 1992). In addition, the fluidity of the class supports class certification. See, Reynolds, 118 F. Supp.2d at 388.

Furthermore, many Plaintiffs rely upon public benefits for survival, and it is therefore impracticable for them to obtain legal services on an individual basis for their individual claims. See Reynolds, 118 F. Supp.2d at 388 ("Class members' lack of financial resources also makes joinder difficult.") (citing Robidoux, 987 F.2d at 936). This means that their right to be naturalized in a timely manner will not be vindicated without a class action. Since class certification would maximize the available legal resources and provide for uniform redress of Plaintiffs' common grievances against Defendants, it is appropriate in this case.

B. All Questions Of Law Are Common To The Proposed Plaintiff Class

Rule 23(a) (2) of the Federal Rules of Civil Procedure requires that there be questions of law and fact common to the class. The commonality requirement is satisfied when defendants apply a common course of prohibited conduct to the plaintiff class. See, Escalera v. New York City Hous. Auth., 425 F.2d 853, 867 (2d Cir.), cert. denied, 400 U.S. 853 (1970). "[V]ariations in the fact patterns of individual plaintiffs do not vitiate the commonality and typicality claims." Reynolds, 118 F. Supp.2d at 389 (citing Robidoux, 987 F.2d at 937 & Jane B. v. New York City Dept. of Social Services, 117 F.R.D. 64, 70 (S.D.N.Y. 1987)).

The common questions of law here are (1) whether USCIS Defendants and Defendant GONZALES' custom and practice of failing to adjudicate Plaintiffs' applications for naturalization within 120 days of their initial examinations violates 8 C.F.R. § 335.3 and 8 U.S.C. § 1447(b) or within a reasonable time violates 5 U.S.C. § 555(b); (2) whether Defendants GONZALES and MUELLER's custom and practice of failing to complete the criminal

background checks necessary for adjudication of proposed class members' naturalization applications within a reasonable time violates 5 U.S.C. § 555(b); and (3) whether all Defendants' custom and practice of failing to collectively take all steps necessary to adjudicate proposed class members' applications for naturalization within a reasonable time violates 5 U.S.C. § 555(b).

C. The Claims Of The Named Plaintiffs Are Typical Of The Claims Of The Proposed Plaintiff Class

Rule 23(a) (3) of the Federal Rules of Civil Procedure requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class. The typicality requirement is met where, as here, the named plaintiffs' claims arise from the same conduct that gives rise to the claims of other proposed class members and if the claims share the same legal theory. Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 99 (S.D.N.Y. 1981).

The typicality requirement is met here because the claims of both the named plaintiff class representatives and the proposed class arise from the same conduct by Defendants, that is, the failure of USCIS Defendants and Defendant GONZALES to adjudicate their applications for naturalization in a timely manner, the failure of Defendants GONZALES and MUELLER to complete criminal background checks in a timely manner and the failure of all Defendants to collectively take all steps necessary to adjudicate proposed class members' applications for naturalization in a timely manner.

D. The Named Plaintiffs Will Fairly And Adequately Protect The Interests Of The Proposed Plaintiff Class

Rule 23(a) (4) of the Federal Rules of Civil Procedure allows a class action to be maintained if the named plaintiffs fairly and adequately protect the interests of the class. Two

elements are incorporated into this requirement: (1) "the interests of the named plaintiffs cannot be antagonistic to those of the remainder of the class"; and (2) the named plaintiffs and their attorneys must be able to prosecute the action vigorously and competently. Reynolds, 118 F. Supp.2d at 390; accord Brown v. Giuliani, 158 F.R.D. 251, 268 (E.D.N.Y. 1994); Dean v. Coughlin, 107 F.R.D. 331, 334 (S.D.N.Y. 1985). The named plaintiffs in this case meet both elements of Rule 23(a) (4).

First, the interests of the named plaintiffs and the proposed class members are entirely coextensive. The named plaintiffs and the proposed class members seek declaratory and injunctive relief to ensure that their applications for naturalization will be determined in a timely manner. Second, counsel for Plaintiffs and the proposed plaintiff class are experienced in class action litigation in federal and state courts, including matters relating to the naturalization of aliens, and will prosecute this action vigorously and competently. Accordingly, Plaintiffs will fairly and adequately protect the interests of the proposed class.

E. This Action Meets The Requirements Of Rule 23(b) (2) Of The Federal Rules Of Civil Procedure

The proposed class meets the criteria for certification set forth in Rule 23(b) (2) of the Federal Rules of Civil Procedure. First, Defendants' conduct or failure to act is "generally applicable to the class," and second, final injunctive or corresponding declaratory relief is appropriate for the proposed class as a whole. See, Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 120, 114 S.Ct. 1359, 1361 (1994); Parker v. Time Warner Entertainment Co., L.P., 331 F.3d 13, 18 (2d Cir. 2003); 7A Charles A. Wright et al., Federal Practice and Procedure § 1775, at 447-48 (2d ed. 1986).

Defendants' violation of these requirements affects all members of the proposed class. The applicable law and regulations require USCIS Defendants and Defendant GONZALES to determine all applications for naturalization under 8 U.S.C. § 1446 within 120 days of the initial examination, and require all Defendants collectively to take all steps necessary to adjudicate those applications in a reasonable time.

Plaintiffs seek preliminary and class-wide final declaratory and injunctive relief to compel Defendants to adjudicate those applications in a timely fashion. Any order entered by this court would, by its terms, inure to the benefit of all members of the proposed plaintiff class. Class certification is therefore appropriate under Rule 23(b) (2).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that their motions for preliminary injunctive relief and class certification be granted.

Dated: New York, New York
June 28, 2006

Respectfully submitted,

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