

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
McALLEN DIVISION

AMALIA RAMIREZ CASTELANO, <i>et al.</i> ,	)	
on their own behalf, and on behalf of all others	)	
similarly situated,	)	CA M-08-057
	)	
PLAINTIFFS-PETITIONERS,	)	(Class Action)
	)	
v.	)	
	)	
HILLARY RODHAM CLINTON, Secretary of State,	)	
<i>et al.</i> ,	)	
	)	
DEFENDANTS-RESPONDENTS.	)	

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**EMERGENCY JOINT MOTION FOR EXPEDITED PRELIMINARY APPROVAL OF  
THE CLASS ACTION SETTLEMENT AGREEMENT AND EXPEDITED FAIRNESS  
HEARING AND MOTION FOR CLASS CERTIFICATION FOR  
SETTLEMENT PURPOSES ONLY**

This Emergency Joint Motion for Expedited Preliminary Approval of the Class Action Settlement Agreement and Expedited Fairness Hearing and Motion for Class Certification for Settlement Purposes Only is respectfully filed, through counsel, by Plaintiffs Amalia Ramirez Castelano, Sofia Elizabeth Lopez, and J.S., a minor by and through his next friend Sonia Raquel Cantu-Sanchez (collectively, “Plaintiffs”), on behalf of themselves and a putative class of all others similarly situated, and Defendants Hillary Rodham Clinton, Secretary of State; Patrick F. Kennedy, Under Secretary for Management; Janice Jacobs, Assistant Secretary of State for Consular Affairs; Florence Fultz, Managing Director, Passport Services Directorate; and the United States of America (collectively, “Defendants”). The parties respectfully request that the Court:

- (a) Grant preliminary approval of the proposed settlement agreement (attached hereto as Exhibit 1);

- (b) Conditionally certify the class for settlement purposes, subject to final certification in connection with final approval of the settlement;
- (c) Approve the form and method of notifying the class of the proposed settlement;
- (d) Set an expedited schedule for the Fairness Hearing and other appropriate dates and
- (e) After the hearing, certify the class and grant final approval to the settlement.

Further, the parties respectfully request that the Court expedite its preliminary approval of the settlement and schedule a Fairness Hearing as soon as practical, in view of the exigent circumstances surrounding this matter. Members of the proposed settlement class seek to immediately re-apply for their passports, which have now become a necessity for them to cross the US-Mexico land border, as the final phase of the Western Hemisphere Travel Initiative (“WHTI”) went into effect June 1, 2009. Prompt approval of the settlement will help mitigate the effects of WHTI on the proposed class. Accordingly, the public interest would be served best by prompt approval of the parties’ settlement.

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**MEMORANDUM IN SUPPORT OF THE EMERGENCY JOINT MOTION FOR  
EXPEDITED PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT  
AGREEMENT AND EXPEDITED FAIRNESS HEARING AND  
MOTION FOR CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY**

Plaintiffs and Defendants jointly submit this Memorandum in Support of the Emergency Joint Motion for Expedited Preliminary Approval of the Class Action Settlement Agreement and Expedited Fairness Hearing and Motion for Class Certification for Settlement Purposes Only. For the reasons articulated in the motion and this supporting memorandum, the parties respectfully request that the Court promptly grant preliminary approval of the settlement agreement, preliminary certification of the proposed settlement class, approval of class notice procedures, and an order establishing dates for a Fairness Hearing. The parties further request that the Court certify the proposed settlement class for settlement purposes only pursuant to Federal Rule of Civil Procedure 23.

Finally, the parties respectfully request that the Court expedite its preliminary approval of the settlement and schedule the Fairness Hearing as soon as practical, in view of the exigent circumstances surrounding this matter. Members of the proposed settlement class seek to

immediately re-apply for their passports, which have now become a necessity for them to cross the US-Mexico land border, as the final phase of the Western Hemisphere Travel Initiative (“WHTI”) went into effect June 1, 2009. Prompt approval of the settlement will help mitigate the effects of WHTI on the proposed class.

## STATEMENT OF FACTS

### A. Nature of the Case

Plaintiffs, on behalf of themselves and those who are similarly situated, alleged that Defendants engaged in a policy, pattern, and practice of applying heightened scrutiny to a class of passport applicants whose births in Southwest border states were attended by midwives or birth attendants, or whose citizenship was claimed through a parent whose birth in a Southwestern border state was attended by a midwife or birth attendant. *See* Sec. Am. Compl. ¶ 5. Plaintiffs alleged that these passport applicants were subjected to excessive demands for documentation of birth in the United States that went beyond what other applicants were required to submit. *See id.* ¶ 7. Plaintiffs further alleged that, even after applicants responded to the demands for additional information, the State Department, without a proper individualized, evidence-based adjudication of the merits of each application, deemed their applications “filed without further action” or otherwise abandoned and closed and refused to issue them passports. *See id.* ¶ 8.

Based on these allegations, Plaintiffs, on behalf of themselves and those who are similarly situated, asserted claims under the Fifth Amendment for violations of due process and equal protection, and the Administrative Procedure Act, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201-02. *See* Sec. Am. Compl. ¶¶ 196-211. In their Second Amended Complaint, filed September 16, 2008, Plaintiffs sought declaratory, injunctive, and mandamus relief on behalf of

themselves and a proposed class. *See id.* at 53-54 (Prayer for Relief). Though Plaintiffs also raised claims individually under 8 U.S.C. § 1503(a) (*Id.* ¶¶ 212-13), Plaintiffs recently moved to sever these claims. *See* D.E. 88.

Defendants answered the Second Amended Complaint, denying these allegations and asserting numerous defenses.

### **B. Proposed Settlement Agreement**

After several months of negotiations, the parties reached a settlement that will dispose of this action. The terms of the parties' settlement are embodied in the Stipulation and Agreement of Settlement and Release (the "Settlement Agreement"). *See* Exhibit 1. The settlement confers significant benefits on the Plaintiffs and all Class Members.<sup>1</sup> The key terms of the Settlement Agreement include the following:

- Class Members who did not receive a passport may re-apply without paying the passport application fee again, as long as they complete a claim submission process within the proper deadlines. They may also avoid the \$25 passport execution fee if they re-apply at a Passport Agency/Center or at one of the five temporary mobile units the State Department agreed to provide in southern Texas. *Id.* ¶¶ 30-33;
- The State Department will revise and reinforce its standards for maintaining and using a list of midwives and birth attendants convicted or suspected of engaging in birth certificate fraud in the passport application review process. *Id.* ¶ 53;
- The State Department will no longer send "filed without further action" letters or designate passport applications as "abandoned" or otherwise closed. As part of a

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<sup>1</sup> Unless otherwise noted, capitalized terms have the same meaning as defined in the Settlement Agreement.

series of new procedures designed for Class Members and others, Class Members' passport applications will either be approved and a passport issued, or denied by the Department, unless withdrawn in writing by the Class Member. *Id.* ¶ 25;

- The State Department will improve its procedures for communicating with Class Members when requesting additional information, and in those instances where an application is being denied. *Id.* §§ C & D;
- The State Department will provide additional training to its personnel to explain, communicate, and reinforce adherence to the appropriate standards and policies for reviewing passport applications. *Id.* ¶¶ 54-57;
- The State Department will establish a review process so that Class Member re-applications will be initially reviewed by a senior-level employee specially trained by the Department. In those instances where a passport is not issued at this stage, a three-member panel made up of senior-level employees will then review the entire application and make the decision to approve the application and issue a passport or deny the application. *Id.* ¶¶ 34-47; and
- Class Members who are denied passports will have an additional sixty days to respond to the specific reasons for the denial of their application. The three-member panel will review any such responses and additional information before making a final decision. *Id.* ¶¶ 45.

In addition to these terms, the Settlement Agreement provides that, in consideration of the other provisions in the agreement, Class Members release all Defendants from all Settled Claims, as defined in paragraph 13 of the Settlement Agreement, and with no admission of wrongdoing by the Defendants. *See Id.* ¶¶ 16-17 & 88. It further provides for the payment of

attorneys' fees in the amount of \$150,000.00 and establishes procedures for notifying Class Members of the proposed settlement. *Id.* ¶ 77-80, 89.

The proposed settlement class is defined in paragraph 2 of the Settlement Agreement. *See id.* ¶ 2. Specifically, the proposed class is defined to include any individual who:

- (1) filed an application, domestically, for a U.S. passport between April 8, 2003 and the Effective Date of Settlement;
- (2) submitted a birth certificate indicating a domestic, non-institutional birth that was certified, filed, or registered by a midwife or other birth attendant within Texas; and
- (3) were either (a) issued a letter stating that their application was filed without further action, abandoned, or closed or (b) were not sent a decision on their application and filed such application prior to September 15, 2008.

Excluded from the proposed class are any individuals who:

- (1) were issued a passport;
- (2) were issued a passport denial letter;
- (3) have a pending application which was filed on or after September 15, 2008;
- (4) re-file passport applications overseas;
- (5) previously dismissed lawsuits, with prejudice, brought under 8 U.S.C. § 1503, or had judgment entered against them in § 1503 proceedings; or
- (6) had applications filed without further action based on one of the following reasons: insufficient/no photograph; insufficient/no signature; insufficient/no fees; insufficient/no identification; incomplete application form; failure to apply in person at a passport agency/center or acceptance facility; delayed birth certificate; 22 C.F.R. § 51.60; or 22 C.F.R. § 51.61.

See Ex. 1 ¶ 2.

Pursuant to Rule 23(e)(3), the parties hereby notify the Court that, other than as stated in the Settlement Agreement, there are no agreements requiring disclosure that were “made in connection with the propos[ed settlement].” See Fed. R. Civ. P. 23(e)(3).

### **C. Proposed Notice to the Class**

Notice of the proposed settlement is to be provided to Class Members by publication. See Ex. 1 ¶ 77. The proposed notice form (the “Notice”) is attached as Exhibit E to the Settlement Agreement. The Notice contains a summary of the terms of the settlement, a description of the proposed class and who may qualify as a Class Member, instructions on how to obtain further information about the settlement, and procedures for objecting and appearing at the fairness hearing. Notice will be prominently displayed at all regional passport agencies and centers, posted on the State Department’s website, distributed to local community groups, and disseminated to all Post Office locations and passport acceptance facilities in Texas that process passport applications. *Id.* ¶ 79.

## **ARGUMENT**

### **I. Standard of Review**

Settlements are “highly favored” and “will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.” *Miller v. Republic Nat’l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (quoting *Pearson v. Ecological Sci. Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)). The public policy favoring settlement agreements is particularly strong in complex class action litigation, where voluntary pretrial settlements obviate the need for expensive and time-consuming litigation. See *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985); *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983).



When considering whether to grant preliminary approval to a class action settlement, the Court's role is to review the proposal preliminarily to determine whether it suffers any obvious defects that would preclude final approval and is otherwise sufficient to warrant public notice and a hearing. *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 427 n.2 (E.D. Tex. 2002); Manual for Complex Litigation Fourth §§ 13.14, 21.633 (2004) (explaining that class notice under Rule 23(c)(2) and settlement notice under Rule 23(e) may be combined). "If the proposed settlement discloses no reason to doubt its fairness, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, does not grant excessive compensation to attorneys, and appears to fall within the range of possible approval, the court should grant preliminary approval." *In re OCA, Inc. Sec. & Derivs. Litig.*, No. 05-2165, 2008 WL 4681369, at \*11 (E.D. La. Oct. 17, 2008).

After the Court has conditionally certified the settlement class, the Court must ensure that the settlement class is properly certified under Rule 23. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (holding that courts must certify settlement classes according to Rule 23 standards). Specifically, the Court must make findings on the record that the class satisfies all four prerequisites of Rule 23(a) and one or more of the provisions of Rule 23(b). *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 441 (W.D. Tex. 1999). The Court must consider the proposed settlement when deciding certification issues, as the settlement is relevant to the question of whether the class should be certified. *Amchem Prods.*, 521 U.S. at 619-20.

The parties respectfully submit that the proposed settlement class satisfies these requirements. The Court should therefore conditionally certify the class so that notice may be

sent and a fairness hearing scheduled before the Court issues a final order approving the settlement, issuing a ruling on class certification, and entering the appropriate judgment.

## **II. The Proposed Settlement Is Fair, Reasonable, and Adequate**

The Court should preliminarily approve the Settlement Agreement because the terms of the settlement are fair, reasonable, and beyond adequate. While the Court has discretion in evaluating preliminarily the settlement's fairness and reasonableness, courts are generally guided at this stage by the same factors that govern final approval of class action settlements: (1) the potential "existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of [the] plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members." *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). These factors weigh in favor of the proposed settlement agreement in this case.

### **A. There Is No Fraud or Collusion Behind the Settlement**

The Settlement Agreement was negotiated between the parties at arm's length, and there is no suggestion of fraud or collusion. "As a general principle, 'the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.'" *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 621 (S.D. Cal. 2005) (citing A. Conte and H. Newberg, *Newberg on Class Actions* § 11.51 (4th ed. 2002) at 158-59). This case has been vigorously contested by both sides. The parties engaged in extensive briefing and discovery and have negotiated at arm's length a resolution of the action, which resulted in the Settlement Agreement. Furthermore, because Plaintiffs sued the federal government and other federal defendants for declaratory and injunctive relief and do not

seek monetary damages, and any attorneys' fees awarded must be separately approved by the court, there is no danger that Plaintiffs colluded with the government defendants to sacrifice the interests of Class Members for their own monetary gain.

As this Settlement Agreement was the result of the fair functioning of the adversarial process, the first factor clearly supports preliminary approval.

**B. The Complexity, Expense, and Likely Duration of Litigation Favors Settlement**

This action presents several complex factual and legal issues that favor resolution of this litigation through a class-wide settlement. Early settlement in civil rights actions for injunctive relief is generally favored because it avoids potentially protracted litigation involving remedial decrees and reduces transaction costs. *See Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004).

Plaintiffs' counsel have undertaken significant factual and legal investigation to develop the claims here, and full prosecution of a class action through trial would generate massive costs for both sides. Moreover, this litigation has already lasted almost a year and a half, and without a settlement it could last many more months (and possibly years if there are appeals). Obtaining timely relief is particularly important to Class Members now that the final phase of WHTI is in effect. WHTI requires every American to have a valid U.S. passport or passport card or other designated document to enter the United States. If the Settlement Agreement is approved, Class Members will have the opportunity to re-apply without additional costs and potentially receive passports enabling them to cross the U.S.-Mexico land border and travel internationally.

In sum, the Settlement Agreement allows both sides to obtain an expeditious resolution of this case, saves the parties the needless expense of continued litigation, and provides benefits to Class Members. Accordingly, this factor weighs in favor of approving the settlement.

**C. Proceedings Are Advanced Sufficiently to Warrant Settlement**

The Court should approve a settlement agreement if a case has advanced far enough to enable the parties to assess the strength of their litigating positions. *See In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 241 (5th Cir. 1982) (suggesting settlements should be approved unless “the record shows unmistakably that the settlement was the product of uneducated guesswork”). In this case, there has been formal discovery exchanged on both sides, and the parties have had extensive discussions about the issues as part of their settlement negotiations. Critical legal issues in the case also have been litigated in pretrial motions to dismiss. Accordingly, both sides are well-informed about their case and in a position to negotiate a fair settlement. Consequently, this factor warrants preliminary approval of the settlement.

**D. The Probability of Success on the Merits Favors Settlement**

“[A]bsent fraud or collusion, the most important factor [in evaluating settlements] is the probability of the plaintiffs’ success on the merits.” *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). This factor requires the Court to assess whether, in light of the inherent risks of litigation, the proposed settlement is reasonable. *Reed*, 703 F.2d at 172. Plaintiffs believe that the evidence would allow them to prove one or more violations of the Due Process clause, the Equal Protection clause, violation of the Administrative Procedure Act, or a right to Mandamus. While Plaintiffs believe they have a strong case, however, they also recognize the potential legal and factual defenses asserted by Defendants in the case. Accordingly, Plaintiffs believe a negotiated settlement that provides immediate relief is favorable to an uncertain recovery in the future. Similarly, Defendants have asserted numerous defenses and have not admitted or conceded any wrongdoing, but they also recognize the risks inherent in proceeding to trial.

**E. The Range of Possible Recovery Strongly Favors Settlement**

The benefits for the Plaintiffs and Class Members are well in line with the range of possible recovery. In an action for declaratory and injunctive relief, the range of possible recovery is generally limited by the specific forms of relief requested in the complaint. *See Ault v. Walt Disney World Co.*, 254 F.R.D. 680, 688 (M.D. Fla. 2009). The Settlement Agreement provides the settlement class with the most important relief sought by the Second Amended Complaint. Specifically, in the Settlement Agreement Defendants agree to implement or modify various policies and procedures and to re-adjudicate Plaintiffs' and Class Members' passport applications under these new procedures without payment of an additional application fee. Defendants also agreed to apply virtually all of the new procedures to future passport applicants who may share some similar circumstances as Class Members.

Accordingly, the Settlement Agreement falls within the reasonable range of possible recovery for Plaintiffs, and this fifth factor counsels for preliminary approval of the agreement.

**F. Class Counsel Favors Settlement**

Class counsel is of the opinion that this settlement is a favorable outcome for the class. Class counsel arrived at this conclusion after extensive investigation and negotiations with Defendants' counsel. Class counsel have experience litigating class actions and, based on their expertise, believe that the Settlement provides a favorable result to the class.

Thus, the sixth factor favors preliminary approval of the Settlement Agreement.

**III. The Court Should Approve Parties' Proposed Form and Method of Class Notice**

Rule 23(e)(1) requires that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal." The Court has complete discretion in determining what constitutes reasonable notice of a class settlement under Rule 23(e), in form as

well as method, particularly in a Rule 23(b)(2) class. *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979); 7B Fed. Prac. & Proc. § 1797.6 (2009). “A class settlement notice need only properly identify the plaintiff class and generally describe the terms of the settlement so as to alert members ‘with adverse viewpoints to investigate and to come forward and be heard.’” *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 298 (W.D. Tex. 2007) (citation omitted).

Here, the proposed notice procedures involve posting the Notice at regional passport agencies and centers, displaying the Notice on the State Department’s website, providing the Notice to various organizations in the southern Texas communities that are likely to provide assistance to potential Class Members, and disseminating the Notice to all Post Office locations and passport acceptance facilities in Texas that process passport applications. These notification procedures are specifically tailored to ensure that Class Members will be informed of the settlement and their rights to object. In particular, the parties believe that notice on the Department of State’s website and in Post Offices/acceptance facilities is reasonably calculated to inform Class Members of the settlement, as these are the two most likely locations potential applicants will search for passport-related information.<sup>2/</sup>

The contents of the Notice are adequate to inform Class Members of their rights. The Notice contains a description of the proposed class and instructions to determine whether an individual qualifies, a summary of the litigation and the proposed settlement, a discussion of how to obtain more information, and instructions about how to file an objection. Class notices should generally provide only limited information so as not to confuse or overwhelm Class Members, and a simple summary of the settlement is particularly appropriate in class actions certified under

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<sup>2/</sup> Individual Class Members cannot be readily identified to warrant individual notice by mail, as the State Department does not maintain records in a manner that would enable the affirmative identification of passport applicants who would qualify as Class Members. Such notice also is not required by Rule 23(e) or the U.S. Constitution. *DeHoyos*, 240 F.R.D. at 296.

Rule 23(b)(2). *Id.* at 301. The proposed Notice here provides ample information to enable potential Class Members to determine whether they qualify for relief, what relief the settlement will provide, how to file an objection, and how to obtain more information.<sup>3</sup> The Notice is therefore reasonable and satisfies Rule 23(e)'s requirements.

#### **IV. The Attorneys' Fees and Expenses Provided for by the Settlement Agreement Are Reasonable**

As part of the Settlement Agreement, Defendants have agreed to pay attorneys' fees and costs to Class Counsel. The Court may award reasonable attorneys' fees and nontaxable costs that are authorized by the parties' agreement in a class action settlement. *See* Fed. R. Civ. P. 23(h). The negotiated fee award of \$150,000.00 is entirely reasonable, and fully consistent with the law of this District, given the complexity of this case, the substantial work and time invested to litigate and ultimately negotiate a settlement, and the significant benefits and relief provided to the putative class as a result. The parties thus submit that the award of fees and costs provided by the Settlement Agreement should be preliminarily approved by the Court.

#### **V. The Class Should Be Conditionally and Finally Certified for Purposes of the Settlement**

In preliminarily approving a settlement agreement, the Court "should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Manual for Complex Litigation Fourth* § 21.632. The proposed settlement class easily satisfies these requirements. The Court must also assure itself that the proposed class satisfies Rules 23(a) and (b) in order to finally certify the class and enter final judgment.

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<sup>3</sup> The Notice also informs the Class Members, pursuant to Rule 23(h)(1), of the attorneys' fees that are included as part of the settlement agreement.

**A. The Proposed Settlement Class Satisfies Rule 23(a)'s Requirements**

For purposes of Rule 23(a), the Court must find that: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). Plaintiffs submit that this settlement class complies with Rule 23(a).

**1. Numerosity**

To satisfy the numerosity requirement of Rule 23(a)(1), a plaintiff must show that the class is too numerous to make joinder practicable. *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000). When the size of the class is greater than 100 members, there is a general presumption that joinder is impracticable. *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed. 1992)). In addition, the Court may consider other factors such as the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim. *Id.* at 624-25 (citing *Ziedman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981)).

Here, Plaintiffs contended in their Second Amended Complaint that there are hundreds of potential Class Members. *See* Sec. Am. Compl. ¶ 186. Further factual investigation by Plaintiffs' counsel revealed that the number of potential Class Members may even exceed that number. The number of potential class members satisfies the numerosity requirement and raises a presumption that joinder is impracticable. *Id.* at 624.

Moreover, Class members are not easily identifiable. The State Department does not maintain records in a manner that would enable the Department to affirmatively identify passport



applicants who would qualify as Class Members. Such facts demonstrate the impracticability of joinder.

Accordingly, this settlement class satisfies the numerosity requirement of Rule 23(a).

## **2. Commonality**

“The test for commonality is not demanding and is met ‘where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.’” *Mullen*, 186 F.3d at 625 (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)). That requirement is easily met here because there is at least one issue—the legality of the standards used by Defendants to adjudicate passport applications—whose resolution will affect all of the putative Class Members’ claims. In fact, though the individual facts supporting their claim for citizenship may differ, plaintiffs and putative Class Members allege the same factual assertions supporting each of their class action causes of action.

The resolution of each of these issues will affect the rights or remedies of each putative Class Member.

Thus, the dispositive issues here will be common to all putative Class Members, satisfying Rule 23(a)’s commonality requirement.

## **3. Typicality**

“Like commonality, the test for typicality is not demanding.” *Mullen*, 186 F.3d at 625. The plaintiffs’ claims are typical of the class claims if they are premised on similar legal and remedial theories. *Id.* Here, the named plaintiffs’ claims and the Class Member claims are uniformly predicated on challenging Defendants’ policies and practices as applied to the class. The class action seeks, among other things, injunctive and declaratory relief regarding Defendants’ policies and practices in reviewing and adjudicating putative Class Member

passport applications. Typicality is met as the class claims are premised on identical legal and remedial theories, and are typical across the putative class. *Mullen*, 186 F.3d at 625.

Indeed, to not leave any doubt, the named Plaintiffs' recently moved to sever their individual claims under 8 U.S.C. § 1503(a) from the class action, leaving only claims that are based on the same legal theories as the Class Members' claims. *See* D.E. 88.

For these reasons, this settlement class meets Rule 23(a)'s typicality requirement.

#### **4. Adequacy of Representation**

Rule 23(a)(4) requires that the class representatives, along with their counsel, adequately represent the interests of the class, including absent class members. "Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625-26. Any factual variances between the named plaintiffs' cases and those of putative class members with regard to their passport applications do not affect the alignment of interests so as to render class representation inadequate. *See id.* at 626.

There is no conflict of interest between the named plaintiffs and the Class Members because they have all been subjected to the same policies and practices of the Defendants and will receive the same relief – an opportunity to re-apply for a passport, fee free, under a revised set of policies and procedures. While there may be factual differences in individual cases that result in different outcomes after Class Members complete the re-adjudication process contemplated by the Settlement Agreement, this does not affect the Class Members' interests, which are the same for the named plaintiffs and Class Members alike.

Additionally, counsel for the named plaintiffs can adequately represent the class because they have extensive experience in class action and civil rights litigation. *See id.* at 625 (noting importance of experienced class counsel).

Therefore, the proposed class satisfies the Rule 23(a) criteria for class actions.

**B. The Proposed Class May Be Certified Under Rule 23(b)(2)**

The parties reached a settlement that includes approval of a class for settlement purposes only. Consistent with that, Plaintiffs' now seek to have this settlement class certified pursuant to Fed. R. Civ. P. 23(b)(2). A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In other words, class certification is appropriate under Rule 23(b)(2) "if 'broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury.'" *See LaFlamme v. Carpenters Local Union No. 370 Pension Plan*, 212 F.R.D. 448, 456 (N.D.N.Y. 2003) (internal citations omitted). "The requirement of 23(b)(2) is almost automatically fulfilled in actions where the relief sought is primarily injunctive." *San Antonio Hispanic Police Officers' Org.*, 188 F.R.D. at 444.

Here, Plaintiffs brought an action for injunctive and declaratory relief to redress Defendants' alleged policy, pattern, and practice of subjecting passport applications from persons along the U.S.-Mexico border whose births were attended by midwives to heightened scrutiny. Because the class action complaint alleges and seeks injunctive and declaratory relief for the alleged mistreatment of the group as a whole, certification under Rule 23(b)(2) is appropriate.

**C. The Class Will Be Adequately Notified**

For classes certified under Rule 23(b)(2), “the court may direct appropriate notice to the class.” Fed. R. Civ. P. 23(c)(2)(A). However, the Court need not provide any notice before certifying a class action under Rule 23(b)(2) unless money damages are sought. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 416-17 (5th Cir. 2004).

Class Members will be notified of the class action both before and after the settlement is given final approval. The Settlement Agreement provides for notice of the proposed settlement to be transmitted to each Post Office and acceptance facility that accepts passport applications in Texas, posted at all regional Passport Agencies and Centers, published on the State Department’s website, and distributed by the State Department to various local community organizations. *See* Ex. 1 ¶ 79.4 In addition, the Settlement Agreement requires notice of the final settlement to be published on the State Department’s website, and distributed by the State Department to various local community organizations. *Id.* ¶ 82. These notices are appropriate under Rule 23(c)(2) and will enable Class Members to obtain the relief they are entitled to under the Settlement Agreement.5

**D. Appointment of Class Counsel**

As part of the class certification process, the Court must appoint class counsel. *See* Fed. R. Civ. P. 23(g). In appointing class counsel, the Court must consider (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in

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4 The parties requested this Court’s approval of the form and method of this notice in their Joint Motion for Expedited Preliminary Approval of the Class Action Settlement Agreement and Expedited Fairness Hearing.

5 In addition, the Department will publish details of the class settlement and availability of the re-adjudication process to all potential Class Members by advertising in both English and Spanish in the Sunday edition of the following newspapers for six (6) weeks: *El Paso Times*, *Diario de El Paso*, *Laredo Morning Times*, *The Brownsville Herald*, *El Nuevo*, and *Del Rio Herald*. *See* Ex. 1 ¶ 59.

handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The parties respectfully request that counsel for the Plaintiffs be appointed as class counsel. Plaintiffs' counsel have undertaken significant work in developing the claims in this litigation, has substantial experience in handling class actions and negotiating settlements, is knowledgeable in this area of the law, and has devoted vast resources to pursuing this litigation. Plaintiffs' counsel are best able to represent the interests of the class and should therefore be appointed class counsel.

#### **VI. WHTI Counsels for Expedited Preliminary Approval and an Expedited Hearing**

The parties desire a swift resolution of this litigation so that relief can be immediately available to Plaintiffs and Class Members. As the Court is well aware, the final phase of WHTI went into effect on June 1, 2009. The need for passports is particularly pressing, especially for adults living near the U.S.-Mexico border who have families, jobs, and other important needs on both sides of the border. Expedited approval of the Settlement Agreement will allow putative Class Members to re-apply, in short order, for passports under the terms of the agreement. Accordingly, the parties respectfully request that the Court promptly provide preliminary approval to the Settlement Agreement and move quickly to establish an expedited schedule for the fairness hearing and final approval of the settlement.

**CONCLUSION**

For the foregoing reasons, the Court should preliminarily approve the Settlement Agreement, conditionally certify the proposed class for purposes of settlement, approve the form and method of the notice to the class, and schedule appropriate dates for a fairness hearing and other proceedings necessary to give final approval to the settlement. Following the fairness hearing, the Court should formally certify the proposed settlement class as defined in the Settlement Agreement pursuant to Federal Rule of Civil Procedure 23 and enter final judgment.

Dated: June 26, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23d day of June, 2009, I electronically filed the foregoing Emergency Joint Motion for Expedited Preliminary Approval of the Class Action Settlement and Expedited Fairness Hearing and Motion for Class Certification for Settlement Purposes Only and Memorandum in Support with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas Widor