IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, *a lawful permanent resident of the U.S.*; MIRNA S., *a lawful permanent resident of the U.S.*; and VICENTA S., *a U.S. citizen*,	)	No. 1:20-cv-01419-APM
Plaintiffs,	)	
v.	)	
DONALD J. TRUMP, *President of the United States of America, et al.*,	)	
Defendants.	)	

BRIEF OF IMMIGRATION REFORM LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTIONS FOR TEMPORARY RESTRAINING ORDER AND CLASS CERTIFICATION

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Lawrence J. Joseph, , D.C. Bar No. 464777
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

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Consistent with FED. R. APP. P. 29(a)(4)(A) and Local Rule 7(o)(5), I, the undersigned counsel of record for *amicus curiae* Immigration Reform Law Institute ("IRLI") certify that, to the best of my knowledge and belief: (1) IRLI has no parent corporation; and (2) no publicly traded company owns stock in IRLI. These representations are made in order that judges of this Court may determine the need for recusal.

Dated: June 12, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, , D.C. Bar No. 464777
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Immigration Law Reform Institute ("IRLI") seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.[1] IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

INTRODUCTION

Several individuals (collectively, "Plaintiffs") have sued offices and officers of the federal government (collectively, the "Government") over a presidential proclamation — *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, 85 Fed. Reg. 23,441 (Apr. 27, 2020) (the "Proclamation") — that, as relevant here, restricts the State Department's emergency consular services abroad. That restriction during the COVID-19 pandemic has the effect of making it more difficult for Plaintiffs to complete the visa-application process for their relatives abroad – known as "beneficiaries" under immigration law – whom Plaintiffs wish to sponsor to immigrate here. The urgency of this litigation derives from Plaintiffs' desire that the beneficiaries obtain a visa

[1] Consistent with FED. R. APP. P. 29(a)(4)(E) and Local Rule 7(o)(5), counsel for movant and *amicus curiae* authored the motion and brief in whole, and no counsel for a party authored the motion or brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motion or brief.

before the beneficiaries reach their twenty-first birthday, after which the beneficiaries will "age out" of favorable immigration treatment as "minors." Plaintiffs have moved this Court to issue a temporary restraining order ("TRO") and to certify a class of U.S.-based sponsors of aliens abroad who may age out during the term of the Proclamation. *See* Pls.' TRO Memo. (ECF #21); Pls.' Class-Cert. Memo. (ECF #20).

STATEMENT OF FACTS

Amicus IRLI adopts the facts as stated by the Government. *See* Gov't TRO Memo. at 4-14 (ECF #30); Gov't Class-Cert. Memo. at 6-13 (ECF #32).

I. PLAINTIFFS DO NOT MEET THE CRITERIA FOR A TRO.

To warrant a TRO, Plaintiffs must meet the four-factor test of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008):

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Id. Because Plaintiffs cannot meet that test, the Court should deny interim relief.

A. Plaintiffs are unlikely to prevail on the merits.

The first — and most important — *Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. As explained in this section, each of Plaintiffs' merits arguments fails to establish a likelihood of Plaintiffs' prevailing on the merits.

1. The Proclamation rationally responds to the COVID-19 pandemic.

Plaintiffs argue that the Proclamation is irrational for a variety of reasons, *see* Pls.' TRO Memo. at 24-32, but none of those reasons overcomes the initial presumption that the Government acted validly. *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). In using the terms "arbitrary" and "capricious" for purposes of judicial review of agency action, 5 U.S.C. § 706(2)(A), the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), sets a high bar for

APA plaintiffs. First, arbitrary-and-capricious review is not *de novo* review where a judge sets policy: "judges ought to refrain from substituting their own interstitial lawmaking for that of an agency." *City of Arlington v. FCC*, 569 U.S. 290, 304-05 (2013) (interior quotation marks omitted). Second, leaving aside the possibility that the APA's arbitrary-and-capricious review requires *less* than a rational basis, it requires *no more*: "we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974).[2] The Proclamation's preference for the Nation's workforce over immigrants not only qualifies as rational but also readily comports with federal immigration law, even without the emergency aspect of the COVID-19 pandemic.

This Circuit's competitor-standing decisions explicitly recognize immigration law's concern for the U.S. workforce *vis-à-vis* immigrants. *Mendoza v. Perez*, 754 F.3d 1002, 1017 (D.C. Cir. 2014). Citing authority from both this Circuit and the Ninth Circuit, *Mendoza* explained that the "legislative history of the INA (as initially passed) clearly evinces a congressional purpose to keep American labor stalwart in the face of foreign competition in the United States" and that a "primary purpose of the immigration laws, with their quotas and certification procedures, is to protect American laborers." *Id.* (interior quotation marks and alterations omitted). While the Government acted here with respect to an emergency under the National Emergencies Act, 50 U.S.C. §§ 1601-1651 ("NEA"), immigration law supports the rationality of the Government's action to protect our workers from foreign competition.

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[2] Congress ratified this view by amending the APA in 1976, while leaving that issue unchanged. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

As indicated, moreover, the Proclamation is a facet of the Government's response under the NEA to the COVID-19 pandemic. *See* 85 Fed. Reg. at 23,441 (Proclamation invokes the declared NEA emergency for COVID-19 as the Proclamation's rationale). As such, Plaintiffs ask this Court to act in an area that the NEA leaves to Congress and the President, under "a textually demonstrable constitutional commitment of the issue to a coordinate political department" with "a lack of judicially discoverable and manageable standards for resolving [the case]." *Vieth v. Jubelirer,* 541 U.S. 267, 277-78 (2004) (interior quotation marks omitted). As the only unelected branch of government, courts are the *least* fit to answer such questions: "making judges supreme arbiters in political controversies … [would] dethrone [the people] and [make them] lose one of their … invaluable birthrights." *Luther v. Borden,* 48 U.S. 1, 52-53 (1849). Whatever sympathy Plaintiffs elicit, the relief that they request belongs to the political branches to consider.

The NEA provides the President with unfettered discretion to *declare* an emergency, subject only to the power of Congress to *terminate* an emergency:

> As a firm believer in a strong Presidency and Executive flexibility, I could not support this bill if it would impair any of the rightful constitutional powers of the President. [The bill] will have no impact on the flexibility to declare a national emergency and to quickly respond if the necessity arises.

121 CONG. REC. 27,632, 27,636 (Sept. 4, 1975) (Rep. Hutchinson), *reprinted in* S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 252-53 (1976) (hereinafter, "NEA Source Book"); 121 CONG. REC. 27,632, 27,645 (Sept. 4, 1975) (Red. Drinan), *reprinted in* NEA Source Book, at 279 ("H.R. 3884 [has] no standard really, whatsoever, when and why the President can proclaim a national emergency"). Consistent with the statutory text, 50 U.S.C. § 1621(a), a President has full discretion to declare an emergency in the first instance.

As enacted, the NEA relied on congressional oversight,[3] 121 CONG. REC. 27,632, 27,636 (Sept. 4, 1975) (Rep. Moorhead), *reprinted in* NEA Source Book, at 254 ("Congress would assume the major role of reviewing and overseeing the conduct of the Executive branch in a national emergency situation"), not on judicial review:

> Unlike inherent Presidential powers which can be reviewed by the Supreme Court, emergency powers are specific legal delegations of authority to a President. The Supreme Court has generally given deference to such delegations of authority. The laws are viewed as persuasive evidence of Congressional intent that the President should be permitted special latitude during crises. Thus, *unless the Congress itself imposes controls, emergency powers shall remain largely unchecked*.

120 CONG. REC. 29,975, 29,983 (Aug. 22, 1974) (Sen. Pearson), *reprinted in* NEA Source Book, at 84-85 (emphasis added). *Amicus* IRLI respectfully submits that this Court should not entertain arguments on the President's priorities for dealing with emergencies. It falls exclusively to Congress and legislative processes to terminate or amend an emergency declared by the President. The NEA does not authorize this Court to review or to supplement the President's response to an emergency.

For all the foregoing reasons, the Proclamation's core directive as applied here is entirely rational and, thus, neither arbitrary nor capricious. The following subsections address additional arguments that Plaintiffs make on the merits.

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[3] In *INS v. Chadha,* 462 U.S. 919, 946 (1983), the Supreme Court rejected the one-house veto provisions of former 8 U.S.C. § 1254(c)(2) (1982) for failing to meet the constitutional requirements of bicameralism and presentment. Following *Chadha*, Congress amended the NEA to replace *concurrent* resolutions with *joint* resolutions, PUB. L. NO. 99-93, § 801, 99 Stat. 405, 448 (1985); H.R. REP. NO. 99-240, at 86 (1985) (Conf. Rep.) ("Senate amendment amends the National Emergencies Act to stipulate that a national emergency may be terminated by joint resolution of the Congress," and "Conference Substitute is identical to the Senate amendment").

2. Plaintiffs cannot enforce a purported congressional *policy* beyond the *law* that Congress enacted.

Plaintiffs claim that the Proclamation and its implementing administrative actions violate the "Congressional policy to preserve the unity of families with minor children." *See* Pls.' TRO Memo. at 24. Yet Plaintiffs admit that "Congress enacted the Child Status Protection Act ("CSPA") in 2002" to address the aging-out issue. *Id.* at 6. As Plaintiffs explain, the CSPA added protections primarily for *citizen* sponsors but also for lawful permanent residents in some instances. *See id.* Insofar as Plaintiffs do not seek to avail themselves of the CSPA's protections, it appears that Congress enacted a law to address this situation, but that law does not aid Plaintiffs. Under that circumstance, Plaintiffs are *decidedly not* seeking to enforce "Congressional policy," which in this case refers to the *law* that Congress enacted. To the contrary, Plaintiffs ask this Court to amend that law to provide Plaintiffs a benefit that Congress elected not to provide. Plaintiffs are unlikely to prevail on their "Congressional policy" argument.

3. Plaintiffs cannot reasonably rely on the FAM or agency policy.

Plaintiffs claim that the Proclamation and its implementing actions violate their reasonable reliance on the State Department's Foreign Affairs Manual ("FAM"). *See* Pls.' TRO Memo. at 26-27. As explained below, the FAM does not qualify as a document on which Plaintiffs could reasonably rely *vis-à-vis* a national emergency like the COVID-19 pandemic. The FAM creates no vested rights, is subject to change without notice, and exists – as its first section states – subject to the constitutional authority of the President. 1 FAM 011 ("the President exercises primary authority and responsibility for the formulation and execution of foreign policy"); 1 FAM 011.2 ("Department of State exists to assist the President, through the Secretary of State, in formulating and executing the foreign policy and relations of the United States of America"). While the FAM might provide the public a good guess as to how the State Department will process an application

on a normal day, it provides no guidance on how the State Department will act when directed by the President to act differently in an emergency.

The State Department's substantive regulations make clear that the FAM governs "matters relating to Department management and personnel " as intra-agency guidance:

> The Department articulates official guidance, including procedures and policies, *on matters relating to Department management and personnel* in the Foreign Affairs Manual (FAM) and the Foreign Affairs Handbook (FAH) series. Some of these directives are promulgated pursuant to statute, such as the Secretary of State's authority to prescribe regulations for the Foreign Service as provided in Section 206 of the Foreign Service Act of 1980, as amended, 22 U.S.C. 3926. The FAMs and FAHs that are publicly available are located on the Department's public website, at https://fam.state.gov/.

22 C.F.R. § 5.5 (emphasis added); *see also* 83 Fed. Reg. 50,823, 50,824 (2018) (describing the "Foreign Affairs Manual and the Foreign Affairs Handbook" as "a collection of directives that provide procedures and policies *on matters relating to Department management and personnel*") (emphasis added). These intra-agency documents – which can be changed at will – do not bind the Government and they certainly do not create enforceable rights or even reasonable expectations. Instead, the State Department's substantive regulations are listed in 22 C.F.R. § 5.4(b). The FAM neither binds the Government nor confers any relevant rights on Plaintiffs.

The APA's notice-and-comment rulemaking procedures do not apply to "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Indeed, agencies arguably issue such intra-agency "rules" under 5 U.S.C. § 301, not the APA rulemaking provisions at 5 U.S.C. § 553. In any event, an agency need not provide a "reasoned explanation" for changes to its internal rules, and federal courts lack authority to set procedural hurdles for agencies, beyond the requirements that Congress imposed in the APA: "courts lack authority to impose upon an agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Perez*

v. Mortg. Bankers Ass'n, 575 U.S. 92, 102 (2015) (interior quotation marks and alterations omitted); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 514-15 (2009); *cf. City of Arlington*, 569 U.S. at 304-05 (the APA does not authorize judges to substitute their own judgment for an agency's judgment). And yet that is what Plaintiffs ask this Court to do.

Under *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*MVMA*") and its progeny, courts properly apply this "reasoned-decisionmaking" review to rules for which the APA requires agency analysis. *MVMA* "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance," and the APA "makes no distinction … between initial agency action and subsequent agency action undoing or revising that action." *Fox*, 556 U.S. at 514-15. All that the *MVMA* line of cases requires is "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance." *Id.* at 514 (internal quotations omitted, emphasis in *Fox*). Insofar as Plaintiffs do not argue that the Government's pre-Proclamation policies were *compelled* by some other body of law, that ends the inquiry.

Indeed, the entire FAM is subject to revision or reversal without notice, so any reliance by Plaintiffs was *per se* unreasonable:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

Fed'l Crop. Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). To the extent that Plaintiffs read the FAM to require the Government to maintain its prior mode of operations during an emergency, Plaintiffs simply misunderstood the State Department's ability to bind the Government through the FAM. While Plaintiffs premise their case on a claim of reasonable reliance, moreover, what Plaintiffs actually attempt is to estop the Government. But "equitable estoppel will not lie against

the Government." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-20 (1990). The COVID-19 pandemic has had an unexpected and negative effect on almost the entire Nation, and it had that type of effect on Plaintiffs. That means that Plaintiffs – like everyone else – can curse their fate. It does not mean that Plaintiffs can enforce the FAM.

4. Any vagueness in the Proclamation's "national interest" exception neither aids Plaintiffs nor supports their claims.

Plaintiffs also object to the alleged vagueness of the Proclamation's "national interest" exception. *See* Pls.' TRO Memo. at 31-32. Nothing that Plaintiffs argue makes their beneficiaries' immigration here a matter of national interest, so the exception does not aid Plaintiffs directly. Even if Plaintiffs could strike the exception as vague, moreover, that would not redress their injuries, so the alleged vagueness has no bearing on the TRO or even the Article III case or controversy before this Court.

B. Plaintiffs do not meet the other *Winter* criteria for interim relief.

Given that Plaintiffs are unlikely to prevail on the merits, this Court could deny a TRO without considering the other three *Winter* factors. In any event, each additional *Winter* factor supports denying the TRO.

1. Plaintiffs' irreparable harm is largely self-inflicted harm

The second *Winter* factor concerns the irreparable harm that a plaintiff would suffer, absent interim relied. *Winter,* 555 U.S. at 20. Even injuries that can qualify as cognizable under Article III can nonetheless fail to qualify under the higher bar for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). While the desire to rejoin separated families may satisfy Article III, *see* Pls.' TRO Memo. at 21, that does not automatically qualify Plaintiffs' harms as irreparable. *Geertson Seed*, 561 U.S. at 149-50. To the contrary, Plaintiffs separated their families, not the Government: "self-inflicted wounds are not irreparable injury."

Second City Music, Inc. v. City of Chicago, 333 F.3d 846, 850 (7th Cir. 2003); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("injury … may be discounted by the fact that [a party] brought that injury upon itself"); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). By delaying their visa-application processes to near the end of their beneficiaries' statuses as minors, moreover, Plaintiffs ran the risk of unexpected delays. While none of the parties *caused* the COVID-19 pandemic, the pandemic has negatively affected hundreds of millions of people nationwide. The fact that the COVID-19 pandemic has negatively affected Plaintiffs does not guarantee them equitable relief against the Government.

2. The balance of the equities favors the Government.

The third *Winter* factor — the balance of equities, *Winter,* 555 U.S. at 20 — tips in the Government's favor for two reasons. First, the Government's advantage on the substantive merits tips the equities in its favor. *See* Section I.A, *supra*. Second, Plaintiffs' self-inflicted harm, *see* Section I.B.1, *supra*, undercuts their ability to assert a countervailing form of irreparable harm to the harms to the Government identified below. For these overlapping reasons, the balance of the equities tips decidedly in the Government's favor.

Although a governmental party always suffers injury when a court invalidates its laws or regulations, *Diamond v. Charles*, 476 U.S. 54, 62-63 (1986), more is at stake here. An injunction or TRO would violate principles of democratic self-government, *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1636-37 (2014), on an issue — immigration — that the Constitution vests in the political branches. "'The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government.'" *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). As *Read* explained, waivers of sovereign immunity must be limited to the terms of the waiver to avoid the "crippling interferences" of government-by-lawsuit:

> The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.

Read, 322 U.S. 53-54. This Court should not read the APA's waiver of sovereign immunity beyond the limits of APA review. *See* Section I.A.3, *supra* (Plaintiffs' case outside of APA review); Gov't TRO Memo. at 23-30 (Plaintiffs' case outside APA review and the APA's waiver of sovereign immunity). The spate of nationwide injunctions against the Government during this Administration "is not normal." *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay). It inflicts real injury to the separation of powers and our form of representative democracy.

3. The public interest favors the Government.

The last *Winter* factor — the public interest, *Winter,* 555 U.S. at 20 — also favors the Government. Where the parties dispute the lawfulness of government programs, this public interest can collapse into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). But even a plaintiff likely to prevail on the merits is not automatically entitled to an injunction against the federal government. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"). The public interest is to have the Executive and Legislative Branches decide these policy issues: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944).

Because the voters are supposed to decide these policy issues through their elected representatives, it would be against the public interest for this Court to intervene in federal immigration policy.

II. THE PROPOSED CLASS IS INADEQUATE TO REPRESENT THE INTERESTS OF CLASS MEMBERS WITH YOUNGER BENEFICIARIES.

In addition to seeking a TRO, Plaintiffs also move this Court to certify an injunction class. This Court should deny that motion not only for the reasons argued by the Government, Gov't Class-Cert. Memo. at 17-33, but also because the class is conflicted against itself based on age. As a result, the proposed class counsel have a conflict of interest. Both reasons compel this Court to deny the motion to certify a class.

A. The existing Applicant subclass does not adequately represent class members for the new relief that Plaintiffs seek.

As Plaintiffs admit, immigration law sets limits on the number of visas issued each year, and demand regularly exceeds the supply. *See* Pls.' TRO Memo. at 3-4. Consequently, proposed class members who are about to turn 21 have a direct conflict with younger members. Every 20-year-old member who turns 21 and ages out will necessarily make room for a younger class member to obtain a visa. While competition among class members can be surmountable, it is not surmountable here. The older members – represented by Plaintiffs – want a TRO at all costs, whereas it is in the interests of the younger class members to move for summary judgment on an administrative record.

Under the circumstances, this Court should not certify the proposed class: "The adequacy [of representation] inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig*, 895 F.3d 597, 607-08 (9th Cir. 2018). In injunction class actions like this, conflicts of interest can impair adequate representation, but leave absent class members bound to the final judgment. *Hanlon v.*

Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). For adequacy of representation, therefore, the "adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods*., 521 U.S. at 625. Because the proposed class members just under 21 and younger conflict, this Court would need to create subclasses within the proposed class. *Amchem*, 521 U.S. at 627. The proposed class certification cannot support the TRO.

B. Class counsel are conflicted from representing the competing interests of aging-out applicants and younger applicants.

Under the District of Columbia's Rules of Professional Conduct, some conflicts between clients in the same matter are waivable and some are not. *Compare* D.C. Rules Prof'l Conduct, Rule 1.7(a) *with id.*, Rule 1.7(b)-(c). Without deciding whether this conflict is waivable, the conflict clearly has not been waived, as "waivers are permissible only if the prerequisites of the rule – namely 'full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation' – are satisfied." *Id.*, Comment 31. This Court has the obligation to consider these ethical issues before allowing class counsel to make decisions for their clients and the class:

> Because a claim of counsel's conflict of interest calls into question the integrity of the process in which the allegedly conflicted counsel participates, the court should resolve a motion to disqualify counsel before it turns to the merits of any dispositive motion.

Grimes v. District of Columbia, 794 F.3d 83, 86 (D.C. Cir. 2015). *Amicus* IRLI respectfully submits that it would be premature — and perhaps impossible — to allow the proposed class counsel to proceed with the TRO motion without first resolving the conflicts and necessary subclasses related to the class-certification motion.

CONCLUSION

This Court should deny the TRO and class-certification motions.

Dated: June 12, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, , D.C. Bar No. 464777
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
chajec@irli.org