

1 Timothy P. Fox (CA Bar 157750)
2 *tfox@creeclaw.org*
3 Elizabeth Jordan*
4 *ejordan@creeclaw.org*
5 CIVIL RIGHTS EDUCATION AND
6 ENFORCEMENT CENTER
1245 E. Colfax Avenue, Suite 400
Denver, CO 80218
Tel: (303) 757-7901
Fax: (303) 872-9072

7 Lisa Graybill*
8 *lisa.graybill@splcenter.org*
9 Jared Davidson*
10 *jared.davidson@splcenter.org*
11 SOUTHERN POVERTY LAW
12 CENTER
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Tel: (504) 486-8982
Fax: (504) 486-8947

Stuart Seaborn (CA Bar 198590)
sseaborn@dralegal.org
Melissa Riess (CA Bar 295959)
mriess@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, 4th Floor
Berkeley, California 94704
Tel: (510) 665-8644
Fax: (510) 665-8511

13
14
15 Attorneys for Plaintiffs (continued on next page)

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **EASTERN DIVISION – RIVERSIDE**

19 FAOUR ABDALLAH FRAIHAT, *et al.*,
20 Plaintiffs,

21 v.

22 U.S. IMMIGRATION AND CUSTOMS
23 ENFORCEMENT, *et al.*,

24 Defendants.
25
26
27
28

Case No.: 19-cv-01546-JGB(SHKx)

**Plaintiffs' Reply in Support of
Motion for Class Certification**

William F. Alderman (CA Bar 47381)
walderman@orrick.com
 Jake Routhier (CA Bar 324452)
jrouthier@orrick.com
 ORRICK, HERRINGTON &
 SUTCLIFFE LLP
 405 Howard Street
 San Francisco, CA 94105
 Tel: (415) 773-5700
 Fax: (415) 773-5759

Michael W. Johnson**
mjohnson1@willkie.com
 Dania Bardavid**
dbardavid@willkie.com
 Jessica Blanton**
jblanton@willkie.com
 Joseph Bretschneider**
jbretschneider@willkie.com
 WILLKIE FARR &
 GALLAGHER LLP
 787 Seventh Avenue
 New York, NY 10019
 Tel: (212) 728-8000
 Fax: (212) 728-8111

Maia Fleischman*
maia.fleischman@splcenter.org
 SOUTHERN POVERTY LAW
 CENTER
 2 South Biscayne Boulevard
 Suite 3750
 Miami, FL 33131
 Tel: (786) 347-2056
 Fax: (786) 237-2949

Christina Brandt-Young*
cbrandt-young@dralegal.org
 DISABILITY RIGHTS
 ADVOCATES
 655 Third Avenue, 14th Floor
 New York, NY 10017
 Tel: (212) 644-8644
 Fax: (212) 644-8636

Mark Mermelstein (CA Bar 208005)
mmermelstein@orrick.com
 ORRICK, HERRINGTON &
 SUTCLIFFE LLP
 777 South Figueroa Street
 Suite 3200
 Los Angeles, CA 90017
 Tel: (213) 629-2020
 Fax: (213) 612-2499

Leigh Coutoumanos**
lcoutoumanos@willkie.com
 WILLKIE FARR &
 GALLAGHER LLP
 1875 K Street NW, Suite 100
 Washington, DC 20006
 Tel: (202) 303-1000
 Fax: (202) 303-2000

Shalini Goel Agarwal
 (CA Bar 254540)
shalini.agarwal@splcenter.org
 SOUTHERN POVERTY LAW
 CENTER
 106 East College Avenue
 Suite 1010
 Tallahassee, FL 32301
 Tel: (850) 521-3024
 Fax: (850) 521-3001

Maria del Pilar Gonzalez Morales
 (CA Bar 308550)
pgonzalez@creeclaw.org
 CIVIL RIGHTS EDUCATION
 AND ENFORCEMENT CENTER
 1825 N. Vermont Avenue, #27916
 Los Angeles, CA 90027
 Tel: (805) 813-8896
 Fax: (303) 872-9072

Attorneys for Plaintiffs (continued from previous page)

*Admitted Pro Hac Vice

**Pro Hac Vice Application Forthcoming

TABLE OF CONTENTS

I.	Introduction	1
II.	Argument.....	2
A.	Plaintiffs satisfy the Rule 23(a) Requirements.	2
1.	The classes are sufficiently numerous.	2
2.	Plaintiffs’ claims that ICE has failed in its Constitutional and Section 504 obligations raise common issues of law and fact.....	3
3.	Plaintiffs’ injuries and the process-based relief they seek are typical of the class.	5
4.	Plaintiffs have no conflict of interest with absent class members and will zealously prosecute the case, adequately representing the interests of the class.	8
B.	Plaintiffs satisfy the requirements for a Rule 23(b)(2) class.	9
C.	Defendants’ proposed revisions to the class definitions are unnecessary.....	11
III.	Conclusion.....	12

TABLE OF AUTHORITIES

Cases

<i>Anderson v. California Dep’t of Corrs. & Rehab.</i> , No. 15-CV-02013-MEJ, 2016 WL 7013246 (N.D. Cal. Dec. 1, 2016)	11
<i>Armstrong v. Davis</i> , 275 F.3d 849 (9th Cir. 2001)	passim
<i>Arroyo v. United States Dep’t of Homeland Sec.</i> , No. SACV 19-815 JGB (SHKX), 2019 WL 2912848 (C.D. Cal. June 20, 2019).....	2, 5, 8
<i>B.K. by next friend Tinsley v. Snyder</i> , 922 F.3d 957 (9th Cir. 2019).....	passim
<i>Cervantez v. Celestica Corp.</i> , 253 F.R.D. 562 (C.D. Cal. 2008).....	3
<i>Doe v. Wolf</i> , No. 19-CV-2119-DMS (AGS), --- F.Supp.3d ---, 2020 WL 209919 (S.D. Cal. Jan. 14, 2020).....	7
<i>E. Bay Sanctuary Covenant v. Trump</i> , 950 F.3d 1242 (9th Cir. 2020).....	10
<i>Faust v. B. K.</i> , No. 19-765, 2020 WL 1325853 (U.S. Mar. 23, 2020).....	2
<i>Inland Empire-Immigrant Youth Collective v. Nielsen</i> , No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018).....	3
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	2
<i>Newton v. Thomason</i> , 22 F.3d 1455 (9th Cir. 1994).....	8
<i>Parsons v. Ryan</i> , 754 F.3d 657 (9th Cir. 2014)	passim
<i>Pitts v. Terrible Herbst, Inc.</i> , 653 F.3d 1081 (9th Cir. 2011).....	7
<i>Pride v. Correa</i> , 719 F.3d 1130 (9th Cir. 2013)	10, 11
<i>Sueoka v. United States</i> , 101 F. App’x 649 (9th Cir. 2004).....	3

Rules

Fed. R. Civ. P. 23(b)(2).....	9
-------------------------------	---

I. INTRODUCTION

Named Plaintiffs¹ moved for provisional certification of two subclasses of detained persons who face immediate risk if exposed to COVID-19 based on the inadequacy of Defendants’ system-wide policies. In opposing provisional certification, Defendants describe centralized, system-wide procedures they allege to have implemented to address COVID-19 in all Detention Facilities, nationwide. *See, e.g.*, Defendants’ Opposition to Plaintiffs’ Motion for Class Certification (“Defts’ Opp.”), ECF 94 at 8-10² (“ICE has taken a nationwide approach” to its COVID-19 guidance and planning). Whatever the merits of these procedures – addressed in the parties’ briefing on Plaintiffs’ Motion for a Preliminary Injunction – the fact that Defendants purport to be addressing COVID-19 on a system-wide basis demonstrates that class certification is appropriate.

Indeed, the question of whether Defendants’ system-wide approach is sufficient, in light of the immediate risks facing all persons who have identified Risk Factors³, is a common question that can be answered without any need to inquire into the individual circumstances of any putative class members.

Contrary to Defendants’ mischaracterizations, Plaintiffs do not seek any individualized relief through their motion for emergency preliminary injunction. Rather, Plaintiffs seek a process for identifying and assessing needs for COVID-19 precautions for persons with Risk Factors as well as a process to ensure

¹ Faour Fraihat, Alex Hernandez, Martin Munoz, Aristoteles Sanchez Martinez, and Jimmy Sudney.

² All page number citations to ECF documents are to the number printed in the ECF stamp at the top of the page.

³ Risk Factors include: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; or HIV/AIDS. Declaration of Carlos Franco-Paredes, ECF 81-12 at 4-5 (defining “Risk Factors”).

1 implementation of those precautions. *See* Plaintiffs’ Memorandum in Support of
 2 Emergency Motion for Preliminary Injunction (“PI Motion”), ECF 81-1 at 10.
 3 Defendants can implement these processes through their control and oversight of
 4 their Detention System without the need to delve into the circumstance of any
 5 individual class members. Such process-based remedies have repeatedly been
 6 found appropriate in multi-facility and systemic cases. *See, e.g., Armstrong v.*
 7 *Davis*, 275 F.3d 849, 870-72 (9th Cir. 2001), *overruled on other grounds by*
 8 *Johnson v. California*, 543 U.S. 499, 504–05 (2005); *Parsons v. Ryan*, 754 F.3d
 9 657, 688 (9th Cir. 2014); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 971
 10 (9th Cir. 2019), *cert. denied sub nom. Faust v. B. K.*, No. 19-765, 2020 WL
 11 1325853 (U.S. Mar. 23, 2020).

12 Based on the common questions raised by Defendants’ admittedly systemic
 13 policies and the urgency of the class-wide issues presented by this pandemic,
 14 Plaintiffs respectfully request immediate provisional certification of the proposed
 15 subclasses.

16 **II. ARGUMENT**

17 **A. Plaintiffs satisfy the Rule 23(a) Requirements.**

18 **1. The subclasses are sufficiently numerous.**

19 As Defendants themselves concede, the putative subclasses “could consist of
 20 several thousand detainees,” easily satisfying the 40-person threshold for
 21 numerosity. *See* Defendants’ Opposition to Plaintiffs’ Motion for Emergency
 22 Preliminary Injunction, ECF 95 at 11; *see also Arroyo v. United States Dep’t of*
 23 *Homeland Sec.*, No. SACV 19-815 JGB (SHKX), 2019 WL 2912848, at *9 (C.D.
 24 Cal. June 20, 2019) (subclass of at least 40 satisfied numerosity). Plaintiffs also
 25 demonstrated numerosity with evidence indicating that the subclasses number in
 26 the thousands, evidence which Defendants did not address. Plaintiffs’
 27 Memorandum in Support of Motion for Class Certification, ECF 83-1 at 12-13.

28 Further, in actions for prospective injunctive relief, it is not necessary to

1 know the exact size of the class in order to determine if it is sufficiently numerous,
 2 so long as it satisfies the threshold requirement. In cases where “only injunctive or
 3 declaratory relief is sought . . . the numerosity requirement is relaxed so that even
 4 speculative or conclusory allegations regarding numerosity are sufficient to permit
 5 class certification.” *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir. 2004)
 6 (quotation omitted). Numerosity is satisfied when “general knowledge and
 7 common sense indicate that [the class] is large.” *Inland Empire-Immigrant Youth*
 8 *Collective v. Nielsen*, No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408, at *7
 9 (C.D. Cal. Feb. 26, 2018) (*quoting Cervantez v. Celestica Corp.*, 253 F.R.D. 562,
 10 569 (C.D. Cal. 2008)).

11 Impracticability of joinder of the thousands of individuals in Defendants’
 12 custody who are at risk from COVID-19 also militates strongly in favor of
 13 certification of a class. Requiring all such individuals to file claims regarding the
 14 precautionary measures at issue would undoubtedly clog the Court system.
 15 Moreover, it is unlikely that all people in detention with Risk Factors will be able
 16 to secure their own counsel, particularly in light of restricted attorney visits and the
 17 nationwide shelter-in-place. *See, e.g.*, Declaration of Anne Rios, ECF 81-13 ¶¶ 10-
 18 12, 19-21; Declaration of Frances L. Conlin, ECF 81-9 ¶ 4.

19 2. Plaintiffs’ claims that ICE has failed in its Constitutional and
 20 Section 504 obligations raise common issues of law and fact.

21 Plaintiffs challenge the lack of adequate procedures ICE has in place to
 22 ensure that Detention Facilities appropriately identify, assess, and implement
 23 precautionary measures to protect people in detention with Risk Factors that make
 24 them susceptible to severe illness or death if exposed to COVID-19. They seek an
 25 injunction requiring ICE to adopt such measures throughout its Detention
 26 Facilities.

27 Defendants’ brief describes a system-wide approach to COVID-19. Defts’
 28 Opp., ECF 94 at 8-10. It is the adequacy of this system-wide approach that

1 Plaintiffs challenge, not—as Defendants repeatedly insist—the outcome for any
2 particular individual. Thus, whether Defendants’ *system-wide approach* is
3 sufficient to ensure that people in Detention Facilities with Risk Factors are not at
4 risk of irreparable harm or placed in conditions that are unnecessarily dangerous
5 are common questions, which can be answered without the need to analyze the
6 individual circumstances of any particular subclass member. Similarly, the
7 question of whether Defendants have *a sufficient process* in place to ensure the
8 COVID-19-related needs of people whose disabilities place them at heightened
9 risk if exposed to the virus are identified and accommodated can be answered by
10 addressing Defendants’ policies and practices—without a need to dive into the
11 specific facts or health conditions of subclass members.

12 Further, it is well-established that in cases such as this one, which challenge
13 systemic policies and seek systemic relief, commonality is satisfied even where
14 there are “individual factual differences among class members.” *Parsons*, 754 F.3d
15 at 681-82 (internal quotation omitted). As in *Parsons*—controlling Circuit
16 precedent that Defendants do not cite, much less distinguish—Plaintiffs here “[do]
17 not allege that the care provided on any particular occasion to any particular inmate
18 (or group of inmates) was insufficient, but rather that [defendants’] policies and
19 practices of . . . systemic application expose all [individuals in defendants’]
20 custody to a substantial risk of serious harm.” *Id.* at 676.

21 The members of the putative class share a heightened vulnerability to
22 COVID-19, and have in common the need for a process that identifies them and
23 ensures that appropriate precautionary measures are taken, irrespective of which
24 Risk Factor or disabling condition they may have. Similar to the plaintiffs in the
25 *Armstrong* litigation who challenged the adequacy of the state’s *process* for
26 accommodating the needs of persons with disabilities in parole proceedings at
27 facilities spread throughout the state, “individual factual differences among the
28 individual litigants or groups of litigants” does not justify requiring Plaintiffs and

1 members of the putative class, “all of whom suffer similar harm from the Board's
 2 failure to accommodate their disabilities, to prosecute separate actions.” *See*
 3 *Armstrong*, 275 F.3d at 868; *see also Parsons* 754 F.3d at 678 (challenged
 4 common policies and practices are “ ... the ‘glue’ that holds together the putative
 5 class and the putative subclass . . . That inquiry does not require us to determine
 6 the effect of those policies and practices upon any individual class member (or
 7 class members) or to undertake any other kind of individualized determination.”);
 8 *B.K.*, 922 F.3d at 968-69 (Due Process challenge to policies and procedures of state
 9 foster care agency was proper for class treatment where all class members were
 10 subjected to the challenged policies and procedures.)

11 Defendants’ claims that commonality is defeated because Plaintiffs are held
 12 in different facilities, or that their immigration proceedings are at different stages,
 13 or that they are held pursuant to different statutory authority, are even further
 14 afield. None of these differences changes the fact that all of the Plaintiffs and
 15 putative class members are subject to *ICE*’s inadequate response to COVID-19,
 16 and therefore suffer the same risk of harm from exposure to COVID-19.

17 3. Plaintiffs’ injuries and the process-based relief they seek are
 18 typical of the class.

19 Whether a named plaintiff’s claims are typical depends on “whether other
 20 members have the same or similar injury, whether the action is based on conduct
 21 which is not unique to the named plaintiffs, and whether other class members have
 22 been injured by the same course of conduct.” *Parsons*, 754 F.3d at 685 (internal
 23 citation omitted); *see also Arroyo*, 2019 WL 2912848, at *10 (same). The Named
 24 Plaintiffs’ claims are “typical” if they are “reasonably coextensive with those of
 25 absent class members; they need not be substantially identical.” *Parsons*, 754 F.3d
 26 at 685.

27 Here, Defendants have failed to refute the fact that, similar to members of
 28 High Risk subclass, the proposed class representatives all have at least one Risk

Factor placing them at heightened risk of severe illness or death if exposed to COVID-19—and therefore all are similarly impacted by Defendants’ system-wide approach to this pandemic. Declaration of Alex Hernandez, ECF 83-7 ¶ 2; Declaration of Aristoteles Sanchez Martinez, ECF 83-8 ¶¶ 2-3; Declaration of Faour Fraihat, ECF 83-9 ¶ 4; Declaration of Jimmy Sudney, ECF 81-10 ¶¶ 4-5, 7; Declaration of Martin Munoz, ECF 83-11 ¶ 2 (describing medical conditions and disabilities). Defendants also fail to refute the fact that the proposed representatives of the Disability subclass, similar to members of that subclass, have disabilities under Section 504 of the Rehabilitation Act that place them at heightened risk if exposed to COVID-19, and are similarly impacted by Defendants’ approach to the pandemic. *Id.* Named Plaintiffs have thus all alleged an injury—exposure to a substantial risk of serious harm and denial of meaningful access to ICE’s programs as a result of the challenged ICE procedure—which is the “result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims.” *Parsons*, 754 F.3d at 685; *see also B.K.*, 922 F.3d at 970.

That Named Plaintiffs have different Risk Factors and disabilities does not affect this typicality analysis. The CDC guidelines and medical expert testimony recommend the same set of precautionary measures for all individuals with heightened vulnerability. Named Plaintiffs’ injuries need not be identical to each other or those of the class; unnamed class members need only “have injuries similar to those of the named plaintiffs and . . . result from the same, injurious course of conduct.” *Armstrong*, 275 F.3d at 869. In *Armstrong*, the court held that the injuries experienced by the plaintiffs, people with disabilities who were subject to Parole Board procedures throughout the state, were typical of those of a class of individuals even though the class included individuals with a wide range of disabilities who were affected by the procedures in different ways. *Id.*

Defendants’ recycled commonality arguments—that determination of

1 whether individuals will be eligible for release requires individualized factual
2 analysis—are unavailing here for the same reasons they fail as to commonality:
3 first, a named plaintiff’s injuries need not be identical to those of all members of
4 the class (although here they are), so long as they are “reasonably coextensive with
5 those of absent class members.” *Parsons*, 754 F.3d at 685. Moreover, the factual
6 differences between Named Plaintiffs and the members of the class may be
7 relevant for an individualized determination of eligibility for release, but that is not
8 the relief sought here. Defendants fail to explain how the potential differences they
9 identify between Named Plaintiffs and the putative class members cause their
10 claims and the relief they seek to differ from those of the class.

11 Further, Plaintiffs who have been released from ICE custody pursuant to
12 individual habeas proceedings or temporary restraining orders since filing of the
13 complaint still satisfy the typicality requirement. “In determining whether
14 Petitioners’ claim is typical of a putative class member’s claim, the Court invokes
15 the relation back doctrine and asks whether typicality was satisfied as of the filing
16 of the complaint.” *Doe v. Wolf*, No. 19-CV-2119-DMS (AGS), --- F.Supp.3d ----,
17 2020 WL 209919, at *9 (S.D. Cal. Jan. 14, 2020) (*citing Pitts v. Terrible Herbst,*
18 *Inc.*, 653 F.3d 1081, 1092 (9th Cir. 2011)) (holding that certification of inherently
19 transitory claims “relates back to the filing of the complaint”). As argued in more
20 detail in Plaintiffs’ concurrently filed Reply in support of their Motion for
21 Preliminary Injunction, Plaintiffs’ claims fall into the well-established exception to
22 mootness for claims which are “inherently transitory” because they are capable of
23 repetition as to other class members but evade review because of the pace of
24 litigation in comparison with other proceedings.

25 Finally, Defendants cite no case law for their contention that a circuit split
26 on an issue of law prohibits a nationwide class under federal law from proceeding.
27 Nor could they. Indeed, if Defendants’ argument holds, then cross-circuit class
28 actions could never proceed where there was any difference of law between

1 circuits that could meaningfully impact the claims—not just underlying
2 constitutional standards but also threshold or key procedural issues, such as
3 mootness. That Defendants’ argument should be rejected for this reason is
4 evidenced by the legions of nationwide class actions concerning federal law—
5 notwithstanding the fact that circuits may be split on certain legal issues. It is well-
6 established that a federal court applies the law of its own Circuit regardless of
7 whether the case may have a connection to another Circuit. *Newton v. Thomason*,
8 22 F.3d 1455, 1460 (9th Cir. 1994). To the extent that venue for this case is proper
9 in this District and Circuit, the existence of a circuit split on a relevant, common
10 issue of law does not defeat typicality.

11 4. Plaintiffs have no conflict of interest with absent class members
12 and will zealously prosecute the case, adequately representing
the interests of the class.

13 A plaintiff shows adequacy by demonstrating that (1) neither they nor their
14 counsel have any conflicts of interest with members of the putative class, and (2)
15 they and their counsel will prosecute the action vigorously on behalf of the class.
16 *Arroyo*, 2019 WL 2912848, at *11. Named Plaintiffs satisfy both elements.
17 Defendants argue that Named Plaintiffs have potential conflicts of interest with
18 other class members because (1) Plaintiffs’ detention at three distinct facilities
19 allegedly undermines their ability to adequately represent people in other facilities
20 across the country; (2) Plaintiffs’ risks do not cover every category of risk factor
21 named by the CDC; and (3) they are detained under different statutory authority.
22 These arguments recycle yet again Defendants’ commonality and typicality
23 arguments without ever identifying a conflict of interest between the Named
24 Plaintiffs and the proposed subclasses.

25 Finally, Defendants argue that an absent member of the class may not want
26 to be released because of “the availability of no-cost medical care at detention
27 facilities.” Defts’ Opp., ECF 94 at 29. Regardless of whether such a person exists,
28 these considerations regarding appropriateness of release as to specific individuals

1 are irrelevant to the adequacy of Named Plaintiffs to represent a class seeking
2 adequate assessment tools and *a process* for implementing necessary precautionary
3 measures. Such a process will apply to all detained people with Risk Factors,
4 regardless of the basis for their detention or the posture of their individual
5 immigration cases.

6 Moreover, the proposed class representatives have committed to prosecute
7 the action on behalf of the class whether or not they are released. *See* Hernandez
8 Decl., ECF 83-7 ¶ 9; Martinez Decl., ECF 83-8 ¶ 20; Fraihat Decl., ECF 83-9 ¶ 13;
9 Sudney Decl., ECF 83-10 ¶ 16; Munoz Decl., ECF 83-11 ¶ 13. Indeed, despite
10 being released, Plaintiffs Fraihat, Sudney, and Munoz have each continued to
11 communicate regularly with their legal team for purposes of litigating this case.
12 Consequently, Defendants’ assertion that Named Plaintiffs will fail to prosecute
13 the action after their release is baseless.

14 Because they do not have conflicting interests with other class members, and
15 because they are prosecuting this action vigorously on behalf of the class
16 regardless of whether they are detained, Named Plaintiffs are adequate
17 representatives of the putative subclasses.

18 **B. Plaintiffs satisfy the requirements for a Rule 23(b)(2) class.**

19 Where defendants “acted or refused to act on grounds that apply generally to
20 the class,” certification under Rule 23(b)(2) is appropriate. Fed. R. Civ. P. 23(b)(2).
21 “The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory
22 remedy warranted—the notion that the conduct is such that it can be enjoined or
23 declared unlawful only as to all of the class members or as to none of them.” *B.K.*,
24 922 F.3d at 971 (quotation omitted). The requirements of Rule 23(b)(2) are
25 “unquestionably satisfied when members of a putative class seek uniform
26 injunctive or declaratory relief from policies or practices that are generally
27 applicable to the class as a whole.” *Parsons*, 754 F.3d at 688.

28 In *Parsons*, *B.K.*, and *Armstrong*, the Ninth Circuit affirmed a “single,

1 indivisible injunction ordering state officials to abate” centralized policies and
2 practices placing the class at a substantial risk of serious harm. *Parsons*, 754
3 F.3d at 688; *B.K.*, 922 F.3d at 971; *Armstrong*, 275 F.3d at 873-76. Similarly,
4 Plaintiffs here seek relief from Defendants’ inadequate response—which
5 Defendants themselves characterize as centralized and system-wide—through a
6 single, system-wide process.⁴ Throughout their opposition, Defendants conflate the
7 systemic relief Plaintiffs seek here on behalf of the subclasses with the
8 individualized relief sought by hundreds of individual detained people in separate
9 actions around the country. Contrary to Defendants’ arguments, this case does not
10 require individualized analysis of the factual differences between the named
11 plaintiffs and members of the class. Rather, Plaintiffs call for ICE to implement a
12 procedure to identify individuals at high risk of harm from exposure to COVID-19
13 and assess and implement precautions to protect the health and safety of such
14 individuals (including release, where appropriate), and to bring its protocols
15 regarding COVID-19 into compliance with medical recommendations.

16 A decision in this case regarding the systemic relief sought by the class
17 would not preclude detained individuals, including Named Plaintiffs, from seeking
18 individualized relief, including release, through separate legal actions. *See Pride v.*
19 *Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013) (holding that an individual inmate’s
20 claim for injunctive relief for his individual medical care was not precluded by
21 class action which sought systemic reform relating to same general subject matter);
22 *Parsons*, 754 F.3d at 677-78 (“Since *Plata*, we have relied on this fundamental
23 distinction to hold that where a California prisoner brings an independent claim for
24 injunctive relief solely on his own behalf for specific medical treatment denied to
25

26
27 ⁴ This court has authority to issue an injunction addressing ICE’s detention system
28 as a unit. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283-84 (9th Cir. 2020) (recognizing District Court’s authority “to enjoin unlawful policies on a universal basis” in the immigration context due to the important need for uniformity in immigration policy (quotation omitted)).

1 him, *Plata* does not bar the prisoner's claim for injunctive relief.” (quotation
2 omitted)); *Anderson v. California Dep’t of Corrs. & Rehab.*, No. 15-CV-02013-
3 MEJ, 2016 WL 7013246, at *4 (N.D. Cal. Dec. 1, 2016) (same).

4 **C. Defendants’ proposed revisions to the class definitions are**
5 **unnecessary.**

6 This Court has the power to revise the class definition as it sees fit, but the
7 revisions proposed by Defendants are unnecessary.

8 First, the Court need not exclude individuals seeking relief including release
9 through separate cases. As demonstrated above, the relief sought in this case is not
10 coextensive with the individualized relief, including release, that hundreds of
11 people in detention throughout the country are currently seeking through habeas
12 petitions and temporary restraining orders. A ruling in this case—which seeks
13 systemic relief—would not preclude their individual claims for relief. *See Pride v.*
14 *Correa*, 719 F.3d at 1137; *Anderson*, 2016 WL 7013246, at *3-*4. Further, it is
15 unclear what it would mean to exclude individuals who have sought individualized
16 relief from the class; the relief sought here is for the system-wide implementation
17 of policies and therefore, all individuals in custody with Risk Factors would by
18 definition be subject to the new policies.

19 Second, Defendants do not explain why individuals who are detained
20 pursuant to provisions requiring mandatory detention should be excluded from the
21 subclasses. All people who have Risk Factors for heightened vulnerability from
22 exposure to COVID-19 benefit from a procedure that identifies them, assesses their
23 need for additional precautions, and implementation of those precautions.

24 Third, the class need not be limited to individuals held in the facilities where
25 the Named Plaintiffs are held. The policies Plaintiffs challenge apply systemwide,
26 as Defendants themselves admit in their opposition. The Named Plaintiffs
27 adequately represent a class of individuals injured by those policies because they
28 are in ICE’s custody.

1 Finally, Plaintiffs seek certification of two subclasses here: those in
2 detention who have Risk Factors causing heightened vulnerability to serious harm
3 from exposure to COVID-19, and those in detention who have disabilities causing
4 heightened vulnerability to serious harm from exposure to COVID-19. Many of the
5 Risk Factors are also qualifying disabilities, such that there is overlap between the
6 Risk Factor subclass and the Disability subclass. However, one of the Risk Factors
7 is age,⁵ which is not on its own a qualifying disability entitling an individual to the
8 protections of Section 504. It is this difference which warrants the establishment of
9 two subclasses, since not all of those with age as a Risk Factor will necessarily
10 have qualifying disabilities under Section 504.

11 **III. CONCLUSION**

12 Plaintiffs and Defendants agree that a system-wide response is needed to
13 address the risks of this pandemic. Plaintiffs challenge the adequacy of
14 Defendants' system-wide response and seek relief that will include the
15 implementation of a process to ensure the protection of those throughout
16 Defendants' detention system whose conditions make them vulnerable to
17 significant harms if exposed to the virus. This emergency challenge and request for
18 relief is thus appropriately addressed on a class basis and this Court should grant
19 the provisional motion for class certification.

20
21
22
23
24
25
26 ⁵ Defendants refer to CDC guidelines, which include people 65 and older in the
27 high risk group. Plaintiffs' medical experts, state that in correctional settings
28 specifically, "the age of 55 is used to identify older patients, because of the
extremely high level of physical and behavioral health problems among this cohort
of people. I believe the age of 55 should be applied to ICE detainees for the same
reason." Declaration of Homer Venters, ECF 81-11 ¶ 13. *See also* Franco-Paredes
Decl., ECF 81-12 at 3-5.

1 DATED: April 9, 2020

2
3 Respectfully submitted,

4 /s/ Timothy P. Fox

5 Timothy P. Fox
6 Elizabeth Jordan
7 Maria del Pilar Gonzalez Morales
8 CIVIL RIGHTS EDUCATION AND
9 ENFORCEMENT CENTER

10 /s/ Stuart Seaborn

11 Stuart Seaborn
12 Christina Brandt-Young
13 Melissa Riess
14 DISABILITY RIGHTS
15 ADVOCATES

16 /s/ William F. Alderman

17 William F. Alderman
18 Mark Mermelstein
19 Jake Routhier
20 ORRICK, HERRINGTON &
21 SUTCLIFFE LLP

/s/ Michael W. Johnson

Michael W. Johnson
Dania Bardavid
Leigh Coutoumanos
Jessica Blanton
Joseph Bretschneider
WILLKIE FARR &
GALLAGHER LLP

/s/ Lisa Graybill

Lisa Graybill
Shalini Goel Agarwal
Jared Davidson
Maia Fleischman
SOUTHERN POVERTY LAW
CENTER

22 Attorneys for Plaintiffs
23
24
25
26
27
28