UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ISAAC KIGONDU KINITI, Plaintiff, vs. JULIE L. MEYERS, et al., Defendants.	CASE NO. 05cv1013 DMS (PCL) **ORDER GRANTING MOTION FOR CLASS CERTIFICATION**

This matter comes before the Court on Plaintiffs' motion for class certification. Defendants have submitted oppositions to the motion, and Plaintiffs have submitted a reply. Additionally, at oral argument on July 6, 2007, the Court ordered the parties to submit supplemental briefing regarding the applicability of 8 U.S.C. § 1252(f)(1) and whether differences in the immigration status of class members present a barrier to class certification. Having considered the papers submitted, including the supplemental briefing and the arguments of counsel, the Court GRANTS Plaintiffs' motion for class certification.

I.

BACKGROUND

The facts of this case are well known to the parties. Therefore, the Court sets forth only those facts relevant to the present motion. Plaintiffs have filed suit alleging serious overcrowding at the San Diego Correctional Facility (SDCF) dating back to at least November 2004. Plaintiffs include Isaac Kigondu Kiniti, Sylvester Owino, and Hernan Ismael Delgado. Delgado, however, was transferred

from SDCF to El Centro, California on February 16, 2007, where he is currently housed.

The SAC alleges a violation of the Due Process Clause under the Fifth Amendment of the United States Constitution due to "chronic and severe overcrowding." It alleges:

> Defendants' policies, practices, acts, and omissions with respect to chronic and severe overcrowding at SDCF – including but not limited to the triple-celling of immigration detainees and the housing of additional detainees in common day room spaces – deprive plaintiffs of adequate shelter, reasonable safety, and basic human needs, and place them at unreasonable, continuing and foreseeable risk of, *inter alia*, increased violence, illness, mental suffering, and deteriorating health.

SAC at ¶ 111. According to the SAC, "triple-celling" occurs when three detainees are housed in a cell designed for two. When this happens, a plastic "boat" containing a thin sleeping mat is placed on the floor for the third detainee to sleep on. *Id.* at ¶ 54. Plaintiffs allege this practice affects about 675 of the approximately 1000 detainees at SDCF. *Id.* at ¶2. In addition to triple-celling, some detainees are housed in "makeshift beds placed in the common day room space." *Id.* at ¶ 41. Holding cells and administrative segregation units are also overcrowded. *Id.* at ¶¶ 75-79. "A typical holding cell" provides just enough space for 12 detainees to sleep side-by-side on the floor "like sardines." *Id.* at ¶76. Administrative segregation is used to house "overflow detainees" and "detainees who refuse to be triple-celled." *Id. at* ¶ 78. Segregated detainees are confined in their cells for 23 to 24 hours per day and are required to eat all meals in their cells. *Id.* at ¶ 79. They are provided only one hour out-of-cell for exercise, five days per week, in a small cement yard surrounded by a chainlink fence. *Id.*

Based upon these allegations, the SAC seeks judgment: (1) declaring that such policies "violate plaintiffs' rights under the Constitution," and (2) enjoining Defendants "from subjecting plaintiffs to the unconstitutional conditions." *Id.*, "Prayer for Relief" (c)(d).

II.

LEGAL STANDARDS

A. Standing and Ripeness

The requirements of Article III standing are well-established: A plaintiff must show: (1) he has suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable

decision. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). Article III standing requires the plaintiff to establish standing for each and every challenge and form of relief he seeks. *Id.*

The "[r]ipeness doctrine protects against premature adjudication of suits in which declaratory relief is sought," *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (en banc), in order to prevent "entanglement in theoretical or abstract disagreements that do not yet have a concrete impact on the parties." *18 Unnamed "John Smith" Prisoners v. Meese*, 871 F.2d 881, 883 (9th Cir. 1989). "In 'measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness injury merges almost completely with standing.'" *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002). "As a prudential matter, we will not consider a claim to be ripe for judicial resolution 'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.*

B. Class Certification

A district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and 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." *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1224 (9th Cir. 2007) (citing Fed.R.Civ.P. 23(a)). "The district court must also find that at least one of the following three conditions are satisfied: (1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* (citing Fed.R.Civ.P. 23(b)). The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *Id.*

III.

DISCUSSION

Defendants argue (1) Plaintiffs lack standing to seek injunctive relief, (Federal Defendants Opposition ("Fed. Opp.") at 3; CCA Defendants Opposition ("CCA Opp.") at 17); (2) the claims of "unnamed, future detainees" are not yet ripe, (Fed. Opp. at 4); and (3) Plaintiffs have not met the requirements of Rule 23. At oral argument, the Federal Defendants argued for the first time that 8 U.S.C. § 1252(f)(1) bars this case from proceeding as an injunctive class action and requested that the Court permit supplemental briefing on this issue. The CCA Defendants also requested that they be allowed to further brief the issue whether the difference in immigration status between class members bars class certification. These issues are addressed below.

A. Standing

Defendants claim Plaintiffs lack standing because they have not "demonstrate[d] actual or potential harm arising out of [D]efendants' alleged conduct." Fed. Opp. at 3. Further, Defendants contend Plaintiffs cannot show the alleged harm "will be repeated." *Id.* at 3-4.

In order to assert a claim on behalf of a class, the named Plaintiffs must demonstrate they have personally sustained an injury which results from a challenged statute or government conduct. *See Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001). Contrary to Defendants' contention, the named Plaintiffs have sufficiently demonstrated at this stage of the litigation that they have standing. Kiniti and Owino declare they were repeatedly triple-celled while detained at SDCF, forced to sleep in a "boat" on the floor of the cell, observed physical altercations as a result of the crowded conditions, and experienced unsanitary conditions (including being "sprayed with urine" while sleeping on a "boat"). Reply, Ex. I, Owino Decl.; Kiniti Decl. ISO Opp. Mt. to Dis. SAC. Plaintiff Delgado alleged in the SAC he was triple-celled for the majority of his 27 months at SDCF and slept on a "boat" for more than six months. SAC at ¶ 18. As a review of the substantive merits of the case at this stage in the litigation is inappropriate, the Court will not evaluate the veracity of the claimed injuries at this time. *See Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975). The detailed allegations of the SAC and supporting declarations are sufficient to establish that the named Plaintiffs (a) have sustained injuries as result of the alleged violations, and (b) have a personal stake in the

action.

In support of their argument that Plaintiffs lack standing to seek injunctive relief, Defendants cite *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In that case, Lyons was stopped at 2 a.m. by Los Angeles police officers based on a burnt out taillight. He was subsequently choked by the police, causing him to lose consciousness and suffer permanent damage to his larynx. Lyons sought an injunction barring the Los Angeles Police Department from using chokeholds except in certain limited circumstances. The Court held that in the absence of a realistic threat of future injury, Lyons could not "demonstrate a case or controversy with the City that would justify the injunctive relief sought." *Id.* at 105.

The Ninth Circuit, however, has distinguished *Lyons* from cases in which, as here, the plaintiff "did nothing illegal to prompt" the defendant's conduct. *Hodgers-Durgin*, 199 F.3d at 1041. In *Hodgers-Durkin*, the court affirmed the district court's finding that the plaintiffs had standing to seek injunctive relief. The plaintiffs, motorists who had been stopped by Border Patrol agents, alleged the defendant engaged in a practice of routinely stopping motorists without reasonable suspicion. In affirming the district court, the Ninth Circuit distinguished *Lyons*, noting that the *Lyons* Court itself "suggested that the stop was prompted by Lyons' misconduct, holding that Lyons had failed to 'demonstrate a case or controversy' because he had not established a 'real and immediate threat that he would again be stopped *for a traffic violation, or for any other offense*.'" *Id.* (emphasis in original.) The court further observed that in *Spencer v. Kemna*, 523 U.S. 1 (1998), the Supreme Court characterized the denial of standing in *Lyons* "as having been based on the plaintiff's ability to avoid engaging in illegal conduct." *Hodgers-Durgin*, 199 F.3d at 1041. Applying the Supreme Court's interpretation of *Lyons*, the Ninth Circuit concluded the motorists had standing to chalenge the Border Patrol's practice. The court explained: "Unlike in *Lyons*, in this case it is uncontested that both plaintiffs engaged in entirely innocent conduct," and, further, that "in this case there is no string of contingencies necessary to produce an injury." *Id.* at 1041-2.

Similarly, Plaintiffs here have no control over when or whether Defendants will resume triple-celling. Rather, the allegations in the SAC, coupled with the evidence presented thus far, indicate Defendants "have repeatedly engaged in the injurious acts in the past, and there is sufficient possibility

that they will engage in them in the near future to satisfy the realistic repetition requirement." *Armstrong*, 275 F.3d at 861. The SAC alleges, and Defendants do not dispute, that Defendants engaged in triple-celling for several years. SAC ¶ 2. Moreover, Defendants continue to assert now as in past motions that triple-celling is not unconstitutional. Fed. Opp. at 9; CCA Mot. to Dis. at 5, n.1; Def. Opp. to Mt. Leave to Amend. at 30. In their motions to dismiss, Defendants acknowledge that they continue to engage in some of the alleged conduct, including housing detainees in the common day room, albeit sporadically. Perry Decl. ISO Mt. to Dis. at ¶ 22. Further, even though triple-celling no longer takes place at SDCF, Defendants have failed to assure this Court that the practice will not resume in the future. June 21, 2007 Order at 6. Given Defendants' position that triple-celling is not unconstitutional (an issue that will be addressed on the merits at a later time in this litigation), as well as the admitted history of triple-celling, the Court concludes Plaintiffs have standing to seek injunctive relief.

B. Ripeness

Defendants argue the claims of "unnamed, future detainees" are unripe. Fed. Opp. at 4. The argument misapprehends the ripeness doctrine, which prohibits courts from deciding theoretical or abstract disagreements. *Meese*, 871 F.2d at 883. The dispute at issue -- concerning conditions of confinement and detainees' due process rights -- is real and concrete rather than speculative and hypothetical. As discussed, Defendants acknowledge they have triple-celled detainees in the past and dispute such conduct is unconstitutional. The case is therefore ripe for review.

The inclusion of unnamed, future detainees who will be affected in the future by the challenged policy is a common characteristic of class actions. *See, e.g. I.N.S. v. Nat'l Ctr. for Immigrant Rights*, 502 U.S. 183 (1991) (addressing merits of class action representing "all those persons who have been or may in the future be denied the right to work pursuant to 8 CFR § 103.6); *Does 1-5 v. Chandler*, 83 F.3d 1150 (9th Cir. 1996) (addressing merits of class consisting of "[a]ll persons who are, have been, or will be identified as 'disabled' under Chapter 346 ..."); *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985) (affirming certification of class consisting of "[a]ll persons who have resided or will reside in particularly described farm housing ..."). To interpret ripeness as Defendants suggest would "preclude claims for injunctive relief on behalf of any 'constantly changing' class, in which

new plaintiffs enter the class by virtue of the passage of time." *Santillan v. Ashcroft*, 2004 WL 2297990, *7 (N.D. Cal. 2004) (citing *Sze v. INS*, 153 F.3d 1005, 1010 (9th Cir. 1998)).

C. Certification

Defendants argue certification is unnecessary and, even if necessary, improper because Plaintiffs have not satisfied the commonality, typicality or adequacy of representation requirements of Rule 23(a).

1. Necessity

Defendants argue certification is unnecessary because the requested relief would apply to all detainees. CCA Opp. at 9. CCA claims "[n]o useful purpose would be served by permitting this case to proceed as a class action," because the "determination of the constitutional question can be made" without the need to certify the class. *Id.* at 10 (citation omitted).

The Court disagrees. Defendants acknowledge that the SDCF population fluctuates on a daily basis and that Plaintiffs, named and unnamed, all risk being deported or transferred to other facilities at any time. In particular, two of the named plaintiffs are no longer before the Court as they have been deported. Given these facts, class certification is necessary because a named plaintiff's claim could be rendered moot (through deportation) before his claim is resolved. *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 867 (5th Cir. 2000) (the substantial risk of mootness creates a necessity for class certification).

2. Rule 23(a)

(a) Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ. P. 23(a)(1). The Court finds this element is met: the SAC proposes a class of over 1000 detainees, including future detainees. Joinder of all these individuals is clearly impracticable, and Defendants do not suggest otherwise.

(b) Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). "Commonality focuses on the relationship of common facts and legal issues among class members." *Dukes*, 474 F.3d at 1225. This rule has been construed permissively. "All

questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* "The commonality test is qualitative rather than quantitative – one significant issue common to the class may be sufficient to warrant certification." *Id.* "Plaintiffs may demonstrate commonality by showing that class members have shared legal issues by divergent facts or that they share a common core of facts but base their claims for relief on different legal theories." *Id.*

The SAC clearly presents at least "one significant issue common" to all class members. It alleges that all detainees at SDCF suffer from a condition of overcrowding stemming from, among other things, Defendants' policy of triple-celling detainees. SAC, ¶ 54. Plaintiffs contend these practices "deprive [them] of adequate shelter, reasonable safety, and basic human needs, and place them at unreasonable, continuing and foreseeable risk of, *inter alia*, increased violence, illness, mental suffering, and deteriorating health." *Id.* at ¶ 111. Factually, the allegations require this Court to determine whether and to what extent practices such as triple-celling took place at SDCF. In addition, the allegations beg the question of how such practices impact the detainee population and whether they violate the detainees' due process rights. These factual questions are common to all detainees, and satisfy Rule 23's commonality requirement.

The federal defendants argue the commonality element is not met because "there is no casual link between the alleged harms and the defendants' actions," and the SAC "fails to show how any of the alleged harms suffered by the named plaintiffs and the proposed class are specifically caused by defendants' actions." Fed. Opp. at 7-8. Defendants further contend an examination of Plaintiffs' medical records "illustrates a myriad of injuries, ailments or illnesses among the plaintiffs" are "unrelated to any one source of conduct." *Id.* at 8-9. But these contentions misapprehend class certification jurisprudence.

In evaluating a motion for class certification, "[t]he court is bound to take the substantive allegations of the complaint as true." *Blackie*, 524 F.2d at 901 n. 17; *see also Thomas v. Baca*, 231 F.R.D. 397, 399 (C.D. Cal. 2005) (citations omitted). The question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23

are met. *Id.* (citations omitted). Assuming as the Court must that the allegations in the SAC are true, it is clear Plaintiffs have alleged common questions of law and fact. Whether the harms alleged are caused by the practices in question goes to the merits of Plaintiffs' claims.

(c) Typicality

"Although the commonality and typicality requirements of Rule 23(a) tend to merge, each factor serves discrete purpose. Commonality examines the relationship of facts and legal issues common to class members, while typicality focuses on the relationship of facts and issues between the class and its representatives." *Dukes*, 474 F.3d at 1231. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). Under the rule's permissive standard, "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Dukes*, 474 F.3d at 1232. "Some degree of individuality is to be expected in all cases, but that specificity does not necessarily defeat typicality." *Id.*

Plaintiffs argue "the serious harm suffered by the putative named plaintiffs as a result of the chronic and severe overcrowding at SDCF is typical of the type of harm experienced by other class members." Mt. for Cert. at 6. The Court agrees. The SAC alleges all named plaintiffs have been or are currently housed at SDCF. All have experienced some if not all of the allegedly wrongful policies. Plaintiff Kiniti was triple-celled when he sought court permission to amend his complaint. Owino, who arrived at SDCF on November 8, 2005, alleges he was triple-celled for most of his detention at SDCF. SAC, at ¶ 16. Delgado (who was recently transferred to another facility) alleges the same. *Id.* at ¶ 18. Like the named plaintiffs, the SAC alleges all putative class members were subjected to similar treatment and thus, experienced similar harm. *Id.* at ¶¶ 80-82.

Defendants nonetheless argue this element has not been met because "[d]espite their broad nature, plaintiffs' allegations fail to identify even one specific injury that is inextricably tied to the alleged overcrowding or triple-celling at SDCF." Fed. Opp. at 12. Defendants contend the SAC "details isolated incidents" unrelated to the claims of misconduct, and "plaintiffs fail to link the alleged injuries suffered by the named plaintiffs to any ICE policy or practice that was applied to the proffered class as a whole." *Id.* at 12-13. As already discussed, these arguments concern the merits

of Plaintiffs' claim: whether the alleged conduct caused the alleged injuries and, if so, whether the conduct violates the detainees' constitutional rights. Such issues are not appropriately addressed at this stage of the proceeding. Moreover, the argument does not address the typicality requirement.

(d) Adequate Representation

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). "This factor requires: (1) the proposed representative Plaintiffs do not have conflicts of interest with the proposed class; and (2) Plaintiffs are represented by qualified and competent counsel." *Dukes*, 474 F.3d at 1233.

Plaintiffs are represented by able counsel, and there is no conflict between the putative named Plaintiffs' interest and that of the remaining class members. The CCA Defendants contend this element has not been met because "[P]laintiffs have credibility problem, unique background issues that are not representative of the typical immigrant detainees, and likely have individual concerns that are not shared by the rest of the class." CCA Opp. at 14. The differences pointed out by CCA are not relevant to determining whether the named Plaintiffs will adequately protect the interests of the class. These differences or "individual concerns" do not give rise to a conflict of interest between the named Plaintiffs and the class.

3. Rule 23(b)

Certification is appropriate pursuant to Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Mt. for Cert. at 9 (citing Fed.R.Civ.P. 23(b)(2)). The elements of subdivision 23(b)(2) are met.

Plaintiffs allege Defendants engaged in conduct that is "generally applicable to the class." According to Plaintiffs, Defendants's policy of triple-celling Plaintiffs, among other things, created a chronic condition of overcrowding that deprived all detainees housed at SDCF personal security, health care, and safety. SAC at ¶ ¶ 41, 42. Plaintiffs seek injunctive and declaratory relief to enjoin these practices. In light of these allegations and the relief sought, the requirements of 23(b)(2) clearly are satisfied.

D. 8 U.S.C. § 1252(f) and Differences In Plaintiffs' Immigration Status

In their supplemental papers, Defendants argue (1) 8 U.S.C. § 1252(f) bars this case from proceeding as an injunctive class action, and (2) di fferences in the im migration status of class members preclude certification. Both arguments are unavailing for the reasons discussed below.

1. 8 U.S.C. § 1252(f)

Defendants contend "the plain language of § 1252(f)(1) divests this Court of subject m atter jurisdiction over [P]laintiffs' motion for certification" because that section limits the authority to enjoin operation of certain detention statutes on a class wide basis to the Supreme Court. Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or identity of the ... parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this sub-chapter [8 U.S.C. §§ 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

In other w ords, according to D efendants, section 1252(f)(1) permits this Court to enjoin the "operation" of certain detention statutes on an individual basis but not on a class wide basis.

Neither the plain l anguage of section 1252(f)(1) nor case law supports Defendants' construction of the statute. Rather, under secti on 1252(f)(1), class wide injunctions are prohibited only if they suspend or restrain the *operation* of certain provisions of immigration law. *See Tefel v. Reno*, 972 F.Supp. 608, 618 (S.D. Fla. 1997) *vacated on other grounds*, 180 F.3d 1286 (11th Cir. 1999) (finding § 1252(f)(1) did not bar injunctive relief for a class because plaintiffs sought not to enjoin the statute but "constitutional violations" and INS "policies and practices."); *Grimaldo v. Reno*, 187 F.R.D. 643, 647-48 (D.Colo. 1999) (finding § 1252(f)(1) inapplicable where plaintiff sought to convert complaint to a class action to "enjoin alleged constitutional violations by the INS in its administration" of § 1226, not the operation of the statute.) In a decision that has been withdrawn on other grounds, the Ninth Circuit held section 1252(f)(1) is inapplicable where the injunctive relief sought pertains not to "the *operation* of § 1231(b) but *violations* of the statute and to 'ensure that the provision is properly implemented.'" *Ali v. Ashcroft*, 346 F.3d 873 886 (9th Cir. 2003) (emphasis in original).

Here, Plaintiffs do not seek to suspend or restrain the operation of any immigration statutes.

Nor do they challenge the Government's interpretation of any such statute. Rather, Plaintiffs claim the manner in which the Government carries out its authority under the relevant statutes violates their substantive due process rights. Thus, Plaintiffs do not seek to suspend the Government's authority to detain and remove aliens; they simply assert that the Government is obligated to carry out its statutory powers in a constitutional manner.

Defendants, however, contend this case "clearly falls" under the scope of section 1252(f)(1) because class wide injunction, if granted, would "curtail[] [the Agency's] managerial discretion" relating to detention and removal of aliens. Fed. Supp. Brief at 5. In particular, Defendants argue the injunction would impact the Agency's decisions regarding where to house detainees and the manner in which they are detained. Defendants' interpretation of section 1252(f)(1) is overly broad, not supported by case law and the text of the statute, and effectively would preclude a court from issuing injunctive relief in any matter that tangentially related to detention of aliens. Accordingly, Defendants' interpretation of the statute is rejected. This case falls outside the jurisdictional restrictions of section 1252(f)(1).

2. Differences In Detainees' Immigration Status

Defendants argue the difference in immigration status of class members bars certification. The proposed class – present and future detainees housed at SDCF – include two categories of detainees: detainees who (1) already have entered the United States, and (2) are detained either before entry in the United States or inside the United States but within 100 air miles of the border. The latter group of aliens is referred to as "expedited removals" or "excludable aliens," as they are deemed not to have effected entry into the country even though they are physically detained here. *See Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir 1995) ("entry fiction" provides that "[a]lthough aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country") (internal quotations and citations omitted), *overruled on other grounds, Xi v. I.N.S.*, 298 F.3d 832 (9th Cir. 2002).

The named Plaintiffs are all non-excludable aliens, whereas the proposed class contains both excludable and non-excludable aliens. Defendants argue the two groups have different substantive

constitutional rights, and the Court will have to apply different legal standards in determining whether the detention practices in question violate each group's rights. CCA Supp. Brief at 3. This difference, according to Defendants, prevents Plaintiffs from meeting Rule 23's requirements of adequacy of representation, typicality, and commonality.

As an initial matter, the cases Defendants rely on to support their contention have limited application – holding only that excludable aliens have less *procedural* rights than other aliens. Defendants rely principally on *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987). There, the plaintiffs were sixteen Jamaican nationals who attempted to enter the United States illegally by stowing away aboard a grain barge bound for ports on the Mississippi River. Plaintiffs were discovered, and, subsequently, they sued federal and state officials claiming physical abuse prior to being deported. The language in *Lynch* that Defendants seize upon is the following: "[e]xcludable aliens . . . are situated differently even from illegal aliens who have landed in this country." *Id.* at 1373. The court in *Lynch*, however, strongly suggested that the distinction between excludable and non-excludable aliens relates only to the *process* of deportation: "The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment." *Id.*

Lynch makes clear that the basis of the "entry fiction" is the "overriding concern that the United States, as a sovereign, maintain its right to self-determination." *Lynch*, 810 F.2d at 1373. In other words, the conclusion that excludable aliens have less procedural rights promotes the sovereign interest of the United States in admitting or rejecting outsiders as it sees fit. The interest in self-determination, however, "plays virtually no role" in determining whether the Constitution affords excludable aliens substantive due process rights. *See Id.* at 1374. The *Lynch* court observed it could not "conceive of any national interests" that would justify depriving the plaintiffs of the right to be treated humanely merely because they are excludable aliens. *Id.* "[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." *Id.*

Similarly, in *Wong v. United States*, 373 F.3d 952 (2003), the Ninth Circuit concluded the entry fiction is "best seen [] as a fairly narrow doctrine that primarily determines procedures that the executive branch must follow before turning an immigrant away." *Id.* at 973. Reasoning "the entry fiction does not preclude substantive constitutional protection," *id.* at 971, the court observed the doctrine appears "determinative of the procedural rights of aliens with respect to their applications for admission," and has not been used to "deny all constitutional rights to non-admitted aliens." *Id.* at 973.

Although case law suggests the entry fiction is determinative only of procedural rights, Defendants are correct that no court has explicitly held that excludable aliens enjoy the same bundle of substantive rights as non-excludable aliens. But this Court need not answer that question. Defendants suggest that while both groups of aliens may be entitled to humane treatment, one may be entitled to better treatment than the other. In other words, Defendants essentially contend the Government, consistent with Fifth Amendment due process rights, conceivably may be permitted to triple-cell one group but not the other group. This is because excludable aliens are only entitled to be free from "gross physical abuse" that results in "serious physical harm," CCA Supp. Brief at 4, while non-excludable aliens are entitled "to the 'minimum civilized measure of life's necessity.'" *Id.* But the cases Defendants rely on neither support the claim that the former standard applies to excludable aliens while the latter applies to non-excludable aliens, nor that one standard is more stringent than the other.

Moreover, even assuming the right to humane treatment is governed by different standards, Defendants have not explained in what way any such differences should bar class certification. Defendants suggest the named Plaintiffs, all non-excludable aliens, may not adequately represent those who are excludable. The Court disagrees. Differences in the legal standards to be applied, if any, do not suggest any conflict of interest between the named Plaintiffs and unnamed class members. Rather, if the named Plaintiffs are entitled to an injunction, the unnamed excludable plaintiffs also will benefit.[1] Theoretically, under Defendants' construct, it is only problematic if the named Plaintiffs are *excludable* aliens, and therefore they would not be able to adequately represent the unnamed non-

[1] Defendants after all have argued that certification is unnecessary because the requested relief, if granted, would apply to all detainees. *See* CCA Opp. at 9.

excludable class members, who may be entitled to more rights or better treatment. The purported differences between excludable and non-excludable aliens do not negate any of the requirements of Rule 23.

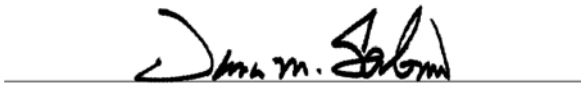
IV.

CONCLUSION

For these reasons, Plaintiffs' motion for class certification is GRANTED.

IT IS SO ORDERED.

DATED: August 17, 2007,



HON. DANA M. SABRAW
United States District Judge

cc: all parties;
Judge Lewis