UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Bassam Yusuf KHOURY; Alvin RODRIGUEZ MOYA; Pablo CARRERA ZAVALA, on behalf of themselves as individuals and on behalf of others similarly situated, Plaintiff-Petitioners, v. Nathalie ASHER, Field Office Director, ICE; Lowell CLARK, Warden, NWDC; Juan P. OSUNA, Director of EOIR; Eric H. HOLDER, Jr., Attorney General of the United States; Janet NAPOLITANO, Secretary of the Department of Homeland Security; and the UNITED STATES OF AMERICA, Defendants-Respondents.	Civil Action No. PLAINTIFFS-PETITIONERS' MOTION FOR CLASS CERTIFICATION Noted For Consideration On: August 23, 2013 Oral Argument Requested

I. MOTION AND PROPOSED CLASS DEFINITION

Plaintiffs-Petitioners ("Plaintiffs") bring this action to challenge Defendants-Respondents' ("Defendants") unlawful policies and practices applying the mandatory detention provision under the Immigration and Nationality Act (INA) § 236(c), 8 U.S.C. § 1226(c), to Plaintiffs and others similarly situated. Despite the plain language of the statute specifying that the mandatory detention

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FAX (206) 587-4025

provision at § 1226(c) applies to those who have been taken into custody "when the alien is released," Defendants, relying on the Board of Immigration Appeals' (BIA) decision in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001) ("*Rojas*"), have imposed the mandatory detention provision on Plaintiffs and proposed class members even if they were not taken into immigration custody "when . . . released" for an enumerated offense. Thus, they have applied mandatory detention to individuals *any time after* their release from criminal custody for a predicate offense—even if that release took place as long as nearly 15 years ago, when the statute went into effect.

This misinterpretation of the statute deprives Plaintiffs and other similarly situated of the opportunity to seek release under conditional parole or by posting a bond, pursuant to the general detention statute at INA § 236(a), 8 U.S.C. § 1226(a). Instead, Defendants refuse to even evaluate whether Plaintiffs and others similarly situated present a flight risk or a threat to the community. Defendants' policies and practices create prolonged suffering for Plaintiffs and proposed class members who are separated from their family members, home and work. Consequently, Plaintiffs are forced to languish in immigration detention for months or even years, while their civil cases are resolved.

Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move this Court to certify the following class with all named Plaintiffs being appointed class representatives:

> All individuals in the Western District of Washington who are or will be subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody at the time of their release from criminal custody for an offense referenced in § 1226(c)(1).

The class consists of members who have been subjected to specific policies and practices of Defendants, which putative class members challenge as violating their statutory and regulatory rights to seek release under bond or conditional parole while in civil removal proceedings, and their

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constitutional right to not be deprived of liberty without due process of law. But for Defendants' unlawful policies and practices, Plaintiffs and proposed class members would be eligible to seek release under bond or conditional parole while their civil immigration cases are pending. Plaintiffs seek certification of a class under Rule 23(b)(2) in order to obtain class-wide injunctive relief, requiring that the mandatory detention statute not be applied to individuals who were not taken into immigration custody directly from criminal custody upon being released for an enumerated offense under 8 U.S.C. § 1226(c)(1).

II. BACKGROUND

Plaintiffs are all persons who have been detained in the Western District of Washington at the NWDC while in civil removal proceedings under the Immigration and Nationality Act, and have been denied the opportunity to demonstrate that they should be released under bond or conditional parole because they do not present a flight risk or a danger to the community. This case concerns the proper reading of the statute that governs the arrest and detention of noncitizens pending their removal proceedings, 8 U.S.C. § 1226. The statute provides that "on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision [on removal]." 8 U.S.C. § 1226(a). Individuals are generally entitled to seek release on bond or their own recognizance, "*[e]xcept as provided in subsection (c)*." *Id*. (emphasis added). Section 1226(c) is thus an exception to the Attorney General's general authority to detain and release noncitizens pending removal proceedings.

Section 1226(c)(1) provides:

> (c) Detention of criminal aliens.
> (1) Custody. The Attorney General shall take into custody any alien who—
> (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

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> (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least one year, or
> (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation and without regard to whether the alien may be arrested or imprisoned again for the same offense.

Id. (emphasis added). Section 1226(c)(2) further states that the Attorney General is prohibited from releasing certain noncitizens "described in paragraph [1226(c)(1)]" except in limited circumstances. As evident above, the "when . . . released" clause is a part of the description of the individuals who are taken into custody pursuant to Section 1226(c)(1). Section 1226(c)(2) then prohibits the release of persons defined under 1226(c)(1) from custody during immigration removal proceedings except in certain limited circumstances.

Read in its entirety, 8 U.S.C. § 1226 thus provides DHS and the Attorney General with the authority to arrest, detain, and release immigrants pending removal proceedings, except for a specified class of noncitizens whom DHS detains at the time they are released from custody for certain enumerated criminal offenses. Those individuals, described in § 1226(c)(1), are subject to mandatory, no-bond detention pending their removal proceedings, which may last months or even years.

Despite the plain language of the statute specifying that the mandatory detention provision at § 1226(c) applies to those who have been taken into custody "when the alien is released", Defendants, relying on the Board of Immigration Appeals' (BIA) decision in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001) ("*Rojas*"), have imposed the mandatory detention provision on Plaintiffs and proposed class members even if they were not taken into immigration custody "when . . . released" for an enumerated offense. Thus, they have applied mandatory detention to individuals *any time after* their release from criminal custody

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for a predicate offense—even if that release took place as long as nearly 15 years ago, when the statute went into effect. This includes individuals like Plaintiffs who were released upon the completion of the sentence for the enumerated offense, and returned to their families, homes and communities, only to be subsequently arrested by Defendants, often years later, and informed that Defendants would not provide them an opportunity to seek release on bond or their own recognizance.

Defendants' policies and practices unlawfully applying the mandatory detention provision to persons who were not immediately taken into custody when released for an enumerated offense sparked a long series of litigation before this court. This Court has repeatedly and uniformly rejected Defendants' polices and practices, based upon the plain language of the statute: "the clear language of the statute indicates that the mandatory detention of aliens 'when' they are released requires that they be detained at the time of release." *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (J. Lasnik) (internal quotation marks and citation omitted); *see also, e.g., Castillo v. ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1238 (W.D. Wash. 2012) (J. Pechman) ("[T]his Court has repeatedly held that Congress intended mandatory detention to apply only to those aliens taken into immigration custody *immediately* after their release from state custody." (emphasis added)); *Gomez-Ramirez v. Asher*, 2013 WL 2458756, at *4 (W.D. Wash. June 5, 2013) (J. Jones); *Deluis-Morelos v. ICE Field Office Director*, 2013 WL 1914390, at *6 (W.D. Wash. May 8, 2013) (J. Robart); *Martinez-Cardenas v. Napolitano*, 2013 WL 1990848, *3 (W.D. Wash. Mar. 25, 2013) (J. Martinez); *Bromfield v. Clark,* 2007 WL 527511, at *5 (W.D. Wash. Feb. 14, 2007) (J. Martinez); *Roque v. Chertoff*, 2006 WL 1663620, at *4 (W.D.

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Wash. June 12, 2006) (J. Zilly); *accord Pastor-Camarena v. Smith,* 977 F. Supp. 1415, 1417 (W.D. Wash. 1997) (J. Dwyer) (same, for transition rule for 1226(c)), IIRIRA § 303(b)(3)).

Notably, not once have Defendants ever sought appeal of any of this Court's decisions rejecting their arguments. Instead, for several years Defendants acquiesced to this Court's holdings, operating under a local directive clarifying that persons who were not immediately taken into immigration custody when released from criminal custody for an enumerated offense under § 1226(c)(1) were entitled to seek release under a bond or conditional parole. *See* Exhibits D, E (Attorney Declarations). However, in sometime around the beginning of 2012, Defendants determined that they would no longer abide by this Court's prior determinations, and instead, determined that they would apply the Board's interpretation in *Matter of Rojas*. Since that time, this Court has again repeatedly rejected Defendants' position, and again, Defendants have determined not to appeal *any* of this Court's decisions in this matter. However, Defendants continue to apply their repeatedly-rejected interpretation of the statute to any person locked up who does not have the time or resources to file for habeas relief in this Court.

Thus, this case is ideally suited for class certification as the government has uniform policies and practices precluding Plaintiffs and others similarly situated from obtaining release from immigration detention, instead forcing them to suffer prolonged periods of separation from their families, homes, and employment, based on the unlawful application of the mandatory detention prevision at § 1226(c). These policies and practices violate the Immigration and Nationality Act (INA) and binding federal regulations, the Administrative Procedure Act (APA), and the Fifth Amendment to the United States Constitution.

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The core issues are pure questions of law well suited for resolution on a class wide basis. *See e.g., Unthaksinkun v. Porter*, 2011 U.S. Dist. LEXIS 111099, at *38 (W.D. Wash. Sept. 28, 2011) (finding that, because all class members were subject to the same process, the court's ruling as to the legal sufficiency of the process would apply to all). On behalf of themselves and others similarly situated, Plaintiffs seek class certification to obtain declaratory and injunctive relief requiring DHS and Executive Office of Immigration Review ("EOIR") to conform their policies and practices to the applicable statute and regulations, consistent with applicable due process requirements, so that Plaintiffs and proposed class members are not unlawfully prevented from seeking release under bond or on their own recognizance. Plaintiffs do not ask this Court to order their release. Rather, they ask only that the Court determine whether Defendants' policies and procedures are unlawful, and order Defendants to apply legally proper procedures to Plaintiffs and proposed class members, thereby providing them an opportunity to seek release under bond or their own recognizance.

III. CLASS CERTIFICATION

Upon a showing that the requirements of Rule 23(a) and (b)(2) were met, numerous district courts within the Ninth Circuit have certified classes of noncitizens who challenge immigration policies and practices. *See*, *e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (affirming preliminary injunctive relief for certified class of immigration detainees); *Roshandel v. Chertoff*, 554 F.Supp.2d 1194 (W.D. Wash. 2008) (certifying district-wide class of delayed naturalization cases); *Santillan v. Ashcroft*, 2004 U.S. Dist. LEXIS 20824, at *40 (N.D. Cal. 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Ali v. Ashcroft,* 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd,* 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds,* 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Walters v. Reno*, 1996 WL 897662,

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No. 94-1204 (W.D. Wash. 1996), *aff'd* 145 F.3d 1032 (9th Cir. 1998), *cert. denied, Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998) *aff'd,* 219 F.3d 1087 (9th Cir. 2000) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Gonzales v. U.S. Dept. of Homeland Sec.*, 239 F.R.D. 620, 628 (W.D. Wash. 2006) (certifying Ninth Circuit wide class challenging USCIS policy contradicting binding precedent), *preliminary injunction vacated*, 508 F.3d 1227 (9th Cir. 2007) (establishing new rule and vacating preliminary injunction but no challenge made to class certification); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding district court had jurisdiction to grant injunctive relief in certified class action challenging unlawful immigration directives issued by EOIR); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district court's denial of class certification in case challenging inadequate notice and standards in INS vehicle forfeiture procedure).

Like the above cases, the instant action satisfies the requirements for class certification under Rule 23(a) and (b)(2). Each of these requirements is discussed below. Where the class certification determination is intertwined with the merits of the action, Plaintiffs address both. While Plaintiffs demonstrate that they meet the class certification requirements under the required "rigorous analysis," *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2551 (2011) (internal quotations and citations omitted), such analysis does not "equate with an in-depth examination of the underlying merits" of the case. *Ellis v. Costco*, 657 F.3d 970, 983 n.8 (9th Cir. 2011) (explaining that a court need only examine the merits to determine whether common questions exist and not to determine whether class members can actually prevail on the merits).[1]

[1] In the alternative, Plaintiff-Petitioners seek certification of a habeas corpus class of detainees in the NWDC. It is well-established that, in appropriate circumstances, a habeas corpus petition may

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A. THIS ACTION SATISFIES THE CLASS CERTIFICATION REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(a).

1. The Proposed Class Members Are So Numerous That Joinder Is Impracticable.

Rule 23(a)(1) requires that the class be "so numerous that joinder is impracticable." "[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). No fixed number of class members is required. *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D.

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proceed on a representative or class-wide basis. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 404 (1980) (holding that class representative could appeal denial of nationwide class certification of habeas and declaratory judgment claims); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus"); *Ali v. Ashcroft*, 346 F.3d 873, 886-91 (9th Cir. 2003) (affirming certification of nationwide habeas and declaratory class), *overruled on other grounds by Jama v. ICE*, 543 U.S. 335 (2005); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (holding that "under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions, holding multiple hearings, and writing multiple opinions"); *Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 620 (E.D. Pa. 1996) (certifying habeas class action challenging state's status under Antiterrorism and Effective Death Penalty Act). *See also Yang You Yi v. Reno*, 852 F. Supp. 316, 326 (M.D. Pa. 1994) (noting that "class-wide habeas relief may be appropriate in some circumstances."). The authority for such a proceeding is found in Federal Rule of Civil Procedure 81(a)(4), which provides that the Federal Rules of Civil Procedure are applicable to proceedings for habeas corpus to the extent that the practice in such proceedings "is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has previously conformed to the practice in civil actions." Accordingly, the courts have held that even if Rule 23 is technically inapplicable to habeas corpus proceedings, courts should look to Rule 23 and apply an analogous procedure. *See, e.g.*, *Ali*, 346 F.3d at 891 (rejecting argument that Rule 23 requirements could not be used for guidance in determining whether a habeas representative action was appropriate); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-27 (2d Cir. 1974) (citing *Harris v. Nelson*, 394 U.S. 286, 294 (1969)) (finding in habeas action "compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure"); *United States v. Sielaff*, 546 F.2d 218, 221-22 (7th Cir. 1976); *Bijeol v. Benson*, 513 F.2d 965, 967-68 (7th Cir. 1975); *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 929 n.5 (N.D. Ga. 1982) (noting that "a number of circuit courts have upheld the notion of class certification in habeas cases, whether certification is accomplished under Fed. R. Civ. P. 23, or by analogy to Rule 23."); *accord* William B. Rubenstein, Newberg on Class Actions § 25.28 (4th ed. 2012).

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Haw. 1995) ("There is no magic number for determining when too many parties make joinder impracticable. Courts have certified classes with as few as thirteen members, and have denied certification of classes with over three hundred members." (citations omitted)). "Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such situation." W. Rubenstein & A. Conte, 1 Newberg on Class Actions § 3:11 (5th ed. 2013). "Thus, Rule 23(a)(1) is an impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due process, judicial economy, and the ability of claimants to institute suits." *Id.* Where it is a close question, the Court should certify the class. *Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998) ("where the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1)").

Determining whether plaintiffs meet the test "requires examination of the specific facts of each case and imposes no absolute limitations." *Troy v. Kehe Food Distributors,* 276 F.R.D. 642, 652 (W.D. Wash. 2011) (citing *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Thus, courts have found impracticability of joinder when relatively few class members are involved. *See Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763, 765-66 (9th Cir. 1971) (finding 17 class members sufficient); *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674-76 (W.D.Wash. 2010) (certifying class with 27 known members).

Moreover, in certifying classes of noncitizens, courts have taken notice of circumstances in which "INS [now DHS] is uniquely positioned to ascertain class membership." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (requiring Defendants to provide notice to class members). Where DHS has control of the information proving the practicability of joinder and does

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not make such information available, it would be improper to allow the agency to defeat class certification on numerosity grounds. In this case, Defendants are knowledgeable as to the size of the proposed class as they are uniquely positioned to know the number of persons currently in the Western District of Washington who were determined by ICE and/or EOIR to be subject to the mandatory detention provision even though they were not taken into immigration custody "when . . . released" for an enumerated offense under § 1226(c)(1).

The attached attorney declarations demonstrate Plaintiffs' counsel's personal awareness of approximately thirty cases of persons *currently* detained at the NWDC who satisfy the proposed class definition. *See* Exhs. A, B, C, D (Attorney Declarations). This number does not reflect close to the complete picture as about ninety percent of the approximately 1300 persons detained at the NWDC do not have attorneys. Even for those that do have attorneys, Plaintiffs' counsel are able to only identify and contact a sampling of the detainees' attorneys, particularly since access to court records of these cases is restricted. Fed. R. Civ. P. 5.2(c) (limiting remote PACER access of immigration case filings to the parties and their attorneys). For those without attorneys, Plaintiffs' counsel are only able to get information from those who affirmatively seek out assistance from the Northwest Immigrant Rights Project. Because these declarations represent only a small sample of attorneys representing clients in the NWDC, and the declaration from Betsy Tao represents only a small sample of the unrepresented individuals in the NWDC, it is reasonable to assume that these numbers do not represent all the proposed class members. *See Ali*, 213 F.R.D. at 408 (" . . . the Court does not need to know the exact size of the putative class, 'so long as general knowledge and common sense indicate that it is large'" (citing *Perez-Funez,* 611 F. Supp. at 995)); Newberg on Class Actions § 3:13 ("it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members").

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Joinder is also inherently impractical because of the unnamed, unknown future class members who will be subjected to Defendants' unlawful, mandatory detention policy. *Ali*, 213 F.R.D. at 408-09 (citations omitted) ("'where the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met,' regardless of class size."); *see also Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable."); *Smith v. Heckler*, 595 F.Supp. 1173, 1186 (E.D. Cal.1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured"). Future unnamed, unknown class members will be unlawfully detained under Defendants' policies are as they are taken into custody. The impracticability of joining future class members is particularly relevant with inherently revolving detainee populations, such as those at the NWDC. *See J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D.La. 2009) ("The mere fact that the population of the [Youth Study Center] is constantly revolving during the pendency of litigation renders any joinder impractical."); *Clarkson v. Coughlin*, 145 F.R.D. 339 (S.D. N.Y. 1993) (certifying classes of male and female deaf and hearing-impaired inmates even though only seven deaf or hearing impaired female inmates were identified, in part because the composition of the prison population is inherently fluid).

In addition to class size and future class members, factors that inform impracticability include: (1) geographical diversity of class members; (2) the ability of individual claimants to institute separate suits; and (3) the type of review sought. *Jordan v. Co. of Los Angeles,* 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds,* 459 U.S. 810 (1982); *see also Matyasovszky v. Housing Auth. of the City of Bridgeport*, 226 F.R.D. 35, 40 (D. Conn. 2005) ("when making a determination of joinder impracticability, relevant considerations include judicial economy arising

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from the avoidance of a multiplicity of actions, geographic dispersions of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members") (citing *Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993)); *see also McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (considering judicial economy; the class members' geographic dispersion; their financial resources; the ability of the members to file individual suits; and requests for prospective relief that may have an effect on future class members).

Application of these factors shows impracticability of joinder in the present case. Most importantly, joinder is impracticable when proposed class members, by reason of such factors as financial inability, lack of representation, fear of challenging the government, and lack of understanding that a cause of action exists, are unable to pursue their claims individually. *Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals . . . who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf." (internal citation omitted)); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that poor, elderly plaintiffs dispersed over a wide geographic area could not bring multiple lawsuits without great hardship).

Most of the detained noncitizens appearing in immigration court are unrepresented. *See* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 542 n.8 (2009) (citations omitted). The proposed class members are, by definition, detained, and not currently able to work to support themselves or their family. The vast majority do not have the resources to retain legal

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counsel, and free legal services are limited. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) (". . . in . . . deportation proceeding[s], . . . we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and … often do not even understand the tongue in which they are accused."). Equity favors certification where class members lack the financial ability to afford legal assistance. *Lynch v. Rank,* 604 F. Supp. 30, 38 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984) (certifying class of poor and disabled plaintiffs represented by public interest law groups).

Judicial economy also favors certification. As noted above, in cases spanning over 15 years, nearly every one of the Judges in the Western District of Washington – from the Chief, the active, the senior, as well as in the case of Judge Dwyer, a former member of the bench – has made the same legal ruling on the "when released" issue. However, since the agency has not appealed these decisions, nor followed them outside of the individual cases presented to this Court, detained individuals are forced to individually litigate each case. This is a waste of judicial resources. *See Abdalla v. Mukasey,* 2008 WL 3540201, at *2 (W.D. Wash. Aug. 11, 2008) ("Government counsel has largely chosen to rely on the same arguments and evidence that the court has already rejected. In each such case, the court must devote resources to poring over Government counsel's brief and supporting evidence to determine if counsel has acknowledged the court's prior rulings, and if counsel has made any effort to offer new evidence or argument to warrant a different result. To date, that expenditure of resources has been mostly fruitless.") (delayed naturalization litigation).

In addition, where, as here, injunctive or declaratory relief is sought, the requirements of Rule 23 are more flexible. *See Goodnight v. Shalala*, 837 F. Supp. 1564, 1582 (D. Utah 1993). In particular, smaller classes are less objectionable and the plaintiffs' burden to identify class members is substantially reduced. *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984) (citing *Horn v.*

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Associated Wholesale Grocers, Inc., 555 F.2d 270, 276 (10th Cir. 1977) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975)); *Doe v. Charleston Area Medical Ctr*., 529 F.2d 638, 645 (4th Cir. 1975) ("Where 'the only relief sought for the class is injunctive and declaratory in nature . . .' even 'speculative and conclusory representations' as to the size of the class suffice as to the requirement of many." (citation omitted)). Plaintiffs here challenge DHS' unlawful policies and practices and are seeking declaratory and injunctive relief. Because Plaintiffs satisfy the stricter numerosity requirement of Rule 23(a)(1), *a fortiori*, they meet the requirements of the rule when liberally construed. While Defendants are in possession of the precise number of proposed class members, Plaintiffs have demonstrated that the number of current and potential future class members, and the impracticability of joining the current and future detainees held under this policy, makes class certification appropriate as the class is "so numerous that joinder is impracticable." Fed. R. Civ. Proc. 23(a).

2. The Class Presents Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, "[a]ll questions of fact and law need not be common." *Ellis*, 657 F.3d at 981 (quoting *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the contrary, one shared legal issue can be sufficient. *See, e.g., Walters*, 145 F.3d at 1046 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement asks us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551. In determining that a common question of law exists,

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SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

the putative class members' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Thus, "[w]hat matters to class certification is not the raising of common 'questions' . . . but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal citation and quotation marks omitted).

Here, Plaintiffs and the proposed class members all suffer from the same injury caused by the uniform policies and practices of Defendants denying them an opportunity to seek release on bond or conditional parole. The class limits membership to persons detained in the Western District of Washington who have been or will be harmed by the application of one of the challenged policies and practices to their cases. Consequently, the common question of law for each is whether the policy and practice violates the relevant statute and Constitution. Should Plaintiffs prevail, all who fall within the class and subclasses will benefit, in that they will be entitled to an individualized bond hearing. Thus, a common answer as to the legality of each challenged policy and practice "will drive the resolution of the litigation." *Ellis*, 657 F.3d at 981 (citing *Wal-Mart*, 131 S. Ct. at 2551).

Although factual variations in individual cases may exist, these are insufficient to defeat commonality. *Califano v. Yamasaki,* 442 U.S. 682, 701 (1979) ("It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."); *Walters*, 145 F.3d at 1046 ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification"). Rather, the legal policies and practices challenged here apply equally to all class members regardless of any other factual differences. For this reason, questions of law are particularly well-suited to resolution on a class-wide basis because "the court must decide only once whether the application" of

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FAX (206) 587-4025

Defendants' policies and practices "does or does not violate" the law. *Troy,* 276 F.R.D. 642, 654; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact). As such, resolution on a class-wide basis also serves a purpose behind the commonality doctrine: practical and efficient case management. *Rodriguez,* 591 F.3d at 1122.

3. The Claims of the Named Plaintiffs are Typical of the Claims of the Members of the Proposed Class.

Rule 23(a)(3) specifies that the claims of the representatives must be "typical of the claims ... of the class." Meeting this requirement usually follows from the presence of common questions of law. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). To establish typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 154. As with commonality, factual differences among class members do not defeat typicality provided there are legal questions common to all class members. *La Duke,* 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Smith v. U. of Wash. Law Sch.,* 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . typicality . . . is usually satisfied, irrespective of varying fact patterns which underlie individual claims." (citation omitted)).

The claims of the named Plaintiffs are typical of the claims of the proposed class. All Plaintiffs represent the proposed class as all have been denied the opportunity to seek release from immigration custody pending the resolution of their lengthy civil proceedings, despite the fact that they were not taken into immigration custody at the time of their release from criminal custody for an offense referenced in § 1226(c)(1). *See* Exhs. F, G, H (Immigration Records demonstrating

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TELEPHONE (206) 957- 8611
FAX (206) 587-4025

Plaintiffs subject to mandatory detention under § 1226(c)). Thus Plaintiffs, like all members of the proposed class, seek declaratory and injunctive relief from this Court clarifying that they are not subject to § 1226(c), and consequently, ICE and if needed, EOIR, must determine whether they should be released on bond or conditional parole.

Because the named Plaintiffs and the proposed class are united in their interest and injury and raise common legal claims, the element of typicality is met.

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class and Counsel are Qualified to Litigate this Action.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citation omitted).

a. *Named Plaintiffs*

The named Plaintiffs will fairly and adequately protect the interests of the proposed class because they seek relief on behalf of the class as a whole and have no interest antagonistic to other members of the class. Their mutual goal is to declare Defendants' challenged policies and practices unlawful and to enjoin further violations. The interest of the class representatives are not antagonistic to those of the proposed class members, but in fact coincide.

All of the Plaintiffs are persons detained at the NWDC while in civil removal proceedings, who have been unlawfully declared to be subject to the mandatory detention provision even though they were not taken into immigration custody upon the release from criminal custody for an offense enumerated under § 1226(c). *See* Exhs. F, G, H. All Plaintiffs contend that Defendants' policies and practices interpreting and applying the mandatory detention provision to them violate the statute and

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implementing regulations, and the U.S. Constitution and all seek a bond hearing under § 1226(a). Thus, in each case their respective goals are the same.

b. *Counsel*

The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984), *amended on rehearing*, 763 F.2d 1098 (9th Cir. 1985); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979), *aff'd without opinion*, 609 F.2d 505 (4th Cir. 1979).

Plaintiffs are represented by Northwest Immigrant Rights Project, the ACLU Immigrants' Rights Project, the ACLU of Washington State, and a private law firm that specializes in immigration litigation. Counsel are able and experienced in protecting the interests of noncitizens and, among them, have considerable experience in handling complex and class action litigation, including litigation on behalf of immigration detainees. *See* Exh. I (Declarations of Matt Adams, Chris Strawn, Sarah Dunne, Robert Pauw, and Devin Theriot-Orr). Counsel are able to demonstrate that they are counsel of record in numerous cases focusing on immigration law that successfully obtained class certification and class relief. In sum, Plaintiffs' counsel will vigorously represent both the named and absent class members.

B. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the requirements of Rule 23(b) for a class action to be certified. This action meets the requirements of Rule 23(b)(2), namely "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

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SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

declaratory relief with respect to the class as a whole." Plaintiffs challenge—and seek declaratory and injunctive relief from—systemic policies and practices that deny them the right to seek release from immigration custody, creating tremendous hardship as they are forced to sit in detention separated from their families, homes and employment for months and sometimes even years. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (finding certification under Rule 23(b)(2) appropriate "where the primary relief sought is declaratory or injunctive.").

In this case, Defendants have created and applied policies and practices that deny the same relief to all proposed class members. The class describes a group of persons detained at the NWDC who have been or will be subjected to Defendants' unlawful policies and practices denying them their statutory and regulatory right to seek release from immigration custody pending resolution of their removal cases, a benefit for which they would otherwise be eligible. 8 U.S.C. § 1226; 8 C.F.R. § 236.1; 8 C.F.R. § 1236.1.

The fact that Defendants' polices and practices are predicated upon the BIA's decision in *Rojas* further demonstrates that Defendants have acted "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." Hence, the first requirement of Rule 23(b)(2) is met.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant this motion and enter the attached order certifying this challenge to mandatory, no-bond detention as a class action and defining the class as set forth in Section I of this Motion.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

Dated this 1st day of August, 2013.

Respectfully submitted,

s/ Matt Adams

Matt Adams, WSBA No. 28287
Christopher Strawn, WSBA No. 32243
NORTHWEST IMMIGRANT
RIGHTS PROJECT
615 2nd Avenue, Suite 400
Seattle, WA 98104
(206) 587-4009 ext. 111
(206) 587-4025 (Fax)
matt@nwirp.org
chris@nwirp.org

Robert Pauw
Devin Theriott-Orr
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98104
(206) 224-8790
(206) 689-2270 (Fax)
rpauw@ghp-law.net

Betsy Tao
NORTHWEST IMMIGRANT
RIGHTS PROJECT
1331 G Street NW, Suite 200
Tacoma, WA 98402
(206) 957-8647
(206) 383-0111 (Fax)
betsy@nwirp.org

Sarah Dunne
ACLU OF WASHINGTON
99 Chauncy Street, Suite 500
Seattle, WA 98104
(206) 357-0700 x. 331
(617) 357-0777 (Fax)
sarah@aclu-wa.org

Michael Tan
ACLU IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94709
(415) 343-0779
(415) 395-0950 (Fax)
mtan@aclu.org

Judy Rabinovitz
Sarah Mehta
ACLU IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th floor
New York, NY 10004
(212) 549-2618
(212) 549-2654 (Fax)
jrabinovitz@aclu.org
smehta@aclu.org

CERTIFICATE OF SERVICE

RE: *Bassam Yusuf Khoury, et al., v. U.S. Immigration & Customs Enforcement, et al.*
Case No.

I, Matt Adams, am an employee of Northwest Immigrant Rights Project. My business address is 615 Second Ave., Ste. 400, Seattle, Washington, 98104. I hereby certify that on August 1, 2013, I electronically filed the foregoing motion and proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered partiers. In addition I sent two copies by U.S. first class mail postage prepaid, to each of the following:

U.S. Attorney, W.D. Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101

Office of the General Counsel
U.S. Department of Homeland Security
Mail Stop 3650
Washington, DC 20528

Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Executed in Seattle, Washington, on August 1, 2013.

s/ Matt Adams

Matt Adams, WSBA No. 28287
NORTHWEST IMMIGRANT
RIGHTS PROJECT
615 2nd Avenue, Suite 400
Seattle, WA 98104
(206) 587-4009 ext. 111
(206) 587-4025 (Fax)

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025