UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROBERTO CARLOS RODRIGUEZ GUERRA; [redacted]; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

PAUL PERRY, *et al.*

Defendants.

Case No. 1:23-cv-1151

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This case challenges, on a class-wide level, the Washington ICE Field Office's ("WAS ICE") practice of detaining non-citizens after they win immigration relief preventing deportation to their home countries. The actions of Defendants have caused arbitrary and unlawful detention for the named Plaintiffs and the proposed class. Plaintiffs' claims will remain unresolved, and Defendants' challenged conduct will continue to deprive proposed class members of their liberty, unless this Court addresses Plaintiffs' claims through class-wide relief. Plaintiffs, on behalf of themselves and all others similarly situated, therefore respectfully request that this Court certify a class to remedy the systemic violation of their rights.

Plaintiffs seek to represent a class of non-citizens who are, or will be, civilly detained within the area of responsibility of WAS ICE and who have been granted asylum, withholding of

removal ("withholding") under the Immigration and Nationality Act ("INA"), or relief under the Convention Against Torture ("CAT relief"). This proposed class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(2) or (b)(1).

First, the class is so numerous that joinder of all members is impracticable. In addition to the 13 non-citizens currently detained in Virginia after being granted asylum, withholding, or CAT relief, approximately 40 non-citizens have been detained in Virginia under these circumstances in the last two years. Dkt. No. 52-13 at ¶ 6. The fact that the class is transient and difficult to quantify precisely at any given time further illustrates the impracticability of joinder.

Second, the proposed class is bound by common questions of law and fact that are appropriate for class treatment, including whether WAS ICE is complying with ICE's national policy (hereinafter "the ICE Policy") instructing ICE field offices to release class members promptly from custody barring "exceptional circumstances," and whether this non-compliance violates the Administrative Procedure Act ("APA") and/or the Due Process Clause of the U.S. Constitution. Determining these questions class-wide will efficiently resolve issues that cut to the core of each class member's claims in one fell stroke.

Third, Plaintiffs are proper class representatives because their claims are typical of the proposed class and because they, along with their counsel, will fairly and adequately protect the interests of the proposed class. *Finally*, the proposed class satisfies Rule 23(b)(2) because Defendants are subjecting the proposed class members to a common practice, namely, detaining all class members following a grant of asylum, withholding, or CAT relief without reviewing their custody in accordance with ICE Policy. Alternatively, the proposed class satisfies Rule 23(b)(1) because the prosecution of separate actions by individual class members would create a risk of

inconsistent adjudications and incompatible standards of conduct for Defendants.

PROPOSED CLASS DEFINITION

All persons who, now or at any time in the future, are held in civil immigration detention within the area of responsibility of WAS ICE and who have a grant of asylum, INA withholding, or CAT relief from an Immigration Judge that is either final or pending ICE's appeal.

ARGUMENT

Plaintiffs seek certification of the proposed class described above under Federal Rule of Civil Procedure 23. "By its terms, [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Class certification is thus appropriate where the proposed class satisfies the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and at least one of the categories of Rule 23(b). Fed. R. Civ. P. 23(a)–(b).

As set forth below, the proposed class meets all the requirements of Rule 23(a). In addition, the proposed class satisfies Rule 23(b)(2)'s requirement that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, Plaintiffs seek only declaratory relief and, absent class certification, proposed class members will lack adequate redress for Defendants' unlawful deprivation of their liberty. Alternatively, certification is also appropriate under Rule 23(b)(1) because separate actions by class members would risk inconsistent outcomes and incompatible standards of conduct for Defendants.

Applying the factors and standards of Rule 23(a) and (b), this Court and courts across the country have repeatedly certified similar classes of detained non-citizens seeking injunctive and declaratory relief from unlawful practices that deprived them of their freedom. *See, e.g., Diaz v. Hott*, 297 F. Supp. 3d 618, 628 (E.D. Va. 2018), *rev'd on jurisdictional grounds sub nom, Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021) (certifying class of detained non-citizens seeking eligibility for immigration bond hearings); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 334 (D.D.C. 2018) (provisionally certifying class of detained non-citizens challenging ICE's failure to comply with parole policy); *Brito v. Barr*, 395 F. Supp. 3d 135, 149 (D. Mass. 2019), *aff'd as to class-wide declaratory relief and rev'd as to class-wide injunctive relief sub nom*, *Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021) (certifying a class of detained non-citizens challenging the allocation of the burden of proof and other procedures at immigration bond hearings). Plaintiffs urge this Court to do the same.

I. The Proposed Class Meets the Requirements of Rule 23(a)

"[F]ederal courts should give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (internal quotation marks omitted). Rule 23(a) provides that a class may be certified if it meets four requirements: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Plaintiffs' proposed class clears the bar on each of these counts.

A. The Class Is So Numerous as to Render Joinder Impracticable

The proposed class satisfies the requirement that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No specified number is needed to maintain a class action under Fed. R. Civ. P. 23; [rather,] application of the rule is to be considered in light of the particular circumstances of the case . . . ." *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). Indeed, the numerosity requirement is relaxed where, as here, Plaintiffs seek only declaratory relief. *See Doe v. Heckler*, 576 F. Supp. 463, 467 (D. Md. 1983) ("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 . . . ." (quoting *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975))) (internal quotation and alteration marks omitted). At bottom, this proposed class satisfies Rule 23(a) because it is large enough currently to render joinder impracticable, and moreover, the future entry of additional class members makes joinder of every member nearly impossible.

Courts have found the numerosity requirement satisfied even when relatively few class members are involved. *Cypress*, 375 F.2d at 653 (affirming that class of 18 was sufficiently numerous); *Doe 1 v. Shenandoah Valley Juvenile Ctr. Comm'n*, No. 5:17-cv-97, 2018 WL 10593355, at *1 (W.D. Va. June 27, 2018) (finding numerosity satisfied based on an "assertion that there [were] approximately '30 unaccompanied immigrant minors under detention'"); *Dale Elecs., Inc. v. R. C. L. Elecs., Inc.*, 53 F.R.D. 531, 534 (D.N.H. 1971) (finding that class of 13 members was numerous in part because "it is not numbers alone, but whether or not the numbers make joinder impracticable that is the test").

Furthermore, "[i]t is not required that the exact size of a class be established" to demonstrate numerosity. *Harris v. Rainey*, 299 F.R.D. 486, 489 (W.D. Va. 2014). Rather, "[i]n making this

determination, the court is entitled to make common sense assumptions" based on the evidence before it. *Hewlett v. Premier Salons Int'l Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997) (internal quotation marks omitted); *see also* 1 William B. Rubenstein, *Newberg on Class Actions* § 3:13 (5th ed. 2019) ("Generally, a plaintiff must show enough evidence of the class's size to enable the court to make commonsense assumptions regarding the number of putative class members.").

Indeed, courts have repeatedly held that the guaranteed presence of future unidentified class members renders joinder inherently impracticable. *See, e.g.*, *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014), *rev'd on other grounds*, 819 F.3d 486 (1st Cir. 2016) ("[W]hen a party seeks only declaratory or injunctive relief, . . . the inclusion of future members increases the impracticability of joinder"); *Ali v. Ashcroft*, 213 F.R.D. 390, 408-09 (W.D. Wash. 2003) ("[W]here 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.") (internal quotations omitted); *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.").

Based on these joinder theories, courts have certified relatively small classes of detained persons where the class was likely to grow in the future with additional non-citizens entering detention. *See, e.g., Gonzalez v. Sessions*, 325 F.R.D. 616, 622 (N.D. Cal. 2018) (finding sufficient numerosity where "Plaintiffs estimate this number will grow each day as the government places additional individuals in custody who will later reach six months of detention under § 1231(a)(6)"). Courts have been particularly inclined to certify classes of detained persons that are transient in nature, with additional persons not only entering the class but also leaving it

soon thereafter. *See, e.g., Reid*, 297 F.R.D. at 189 (finding that "the transient nature of the proposed class" favored certification); *Scott v. Clarke*, 61 F. Supp. 3d 569, 584 (W.D. Va. 2014) (citing "the fluidity of prison populations" as favoring certification); *Braggs v. Dunn*, 317 F.R.D. 634, 653 (M.D. Ala. 2016) (collecting cases on the connection between transiency and numerosity).

The transient nature of a class is further enhanced and weighs even more strongly in favor of class certification, where the exact number of detained persons in the class at any given time "is not easily identifiable" due to the nature of detention, lack of counsel, lack of English literacy, and other factors. *Reid*, 297 F.R.D. at 189 (finding numerosity where "many [class members] do not speak English, a majority do not have counsel, and most are unlikely even to know that they are members of the proposed class"); *see also Brito*, 395 F. Supp. 3d at 144 n.3 (finding numerosity given that "the inability of many [non-citizens] to speak English and secure counsel render joinder impracticable").

Here, Plaintiffs' counsel is aware of 13 non-citizens who are currently detained by WAS ICE with a grant of asylum, withholding, or CAT relief. Dkt No. 52-13 at ¶ 6.[1] Several of the factors described above weigh in favor of numerosity. First, there are likely more non-citizens currently detained in this posture of whom Plaintiffs' counsel is not aware because they are detained, do not speak English, and are likely unrepresented.[2]

[1] In between the filing of the Motion for Leave to File Amended Complaint, Dkt. No. 47, and the filing of this motion, Plaintiffs' counsel learned that one class member was released from custody and that another individual entered the class.

[2] Defendants' counsel recently provided Plaintiffs' counsel with documents on proposed class members as part of the administrative record. *See* Dkt. No. 46. These documents included a few class members of whom Plaintiffs' counsel was not previously aware. Now that the proposed class definition additionally includes non-citizens with non-final relief grants, there are likely more class members of whom Plaintiffs' counsel will not be aware unless notified by Defendants.

Second, the class is very likely to grow, both in the short term and in the long term. Plaintiffs' counsel is aware of at least five non-citizens detained in Virginia who may enter the class in the next few months because they recently had, or will have in the next 30 days, merits hearings at which they are seeking fear-based relief. Dkt No. 52-13 at ¶ 12. An average of three people detained in Virginia win asylum, withholding, or CAT relief each month. *Id*. Moreover, based on Plaintiffs' and Defendants' records indicating that approximately 40 non-citizens—not including current class members—have been detained by WAS ICE past a grant of asylum, withholding, or CAT relief and then subsequently released since the beginning of 2022, *id.* at ¶ 6, it can be reasonably inferred that at least 40 non-citizens will enter the class over the course of the next two years. With the number of non-citizens detained in Virginia and the number of non-citizens being granted withholding or CAT relief in Virginia's immigration courts both gradually increasing, *id.* at ¶ 11-12, the number of non-citizens who will enter the class in the future is likely to be even higher.

Third, a principal reason that there are relatively few non-citizens currently in the class is its transient nature, which renders joinder impracticable. Most non-citizens are in the class for approximately three months, after which Defendants release them from custody.[3] Indeed, at least five class members have been released from custody following the filing of individual habeas actions in the last year. *See Castillo Torres v. Perry*, 1:23-cv-1469 (E.D. Va. 2023) (resulting in the release of a then-class member in November 2023); *Rios Castro et al. v. Crawford*, 1:23-cv-1011 (E.D. Va. 2023) (resulting in the release of three then-class members in August 2023); *Hernandez Preza v. Perry*, 1:23-cv-200 (E.D. Va. 2023) (resulting in the release of a then-class

[3] For instance, four of the eight proposed class members for whom Defendants provided information to Plaintiffs have been released. Meanwhile, the documents did not initially include information on three class members who entered the class in the last month.

member in February 2023). Defendants voluntarily released those petitioners before their claims could be decided. Such repetitive individual litigation will continue to occur unless a class is certified.

B. There Are Questions Common to the Class

Rule 23(a)(2) allows a class action where the claims "depend upon a common contention" that is "capable of class-wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "A single common question will suffice, but it must be of such a nature that its determination will resolve an issue that is central to the validity of each one of the claims in one stroke." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014) (internal quotations & citations omitted). One way to establish commonality is to "identify a unified common policy, practice, or course of conduct that is the source of [the plaintiffs'] alleged injury." *Dockery v. Fisher*, 253 F. Supp. 3d 832, 848 (S.D. Miss 2015); *see also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 598 (N.D. Cal. 2015) ("It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole.").

Here, Plaintiffs and proposed class members have been and will continue to be subjected to WAS ICE's practice of detaining them after they win asylum, withholding, or CAT relief without making an individualized determination in accordance with the ICE Policy whether their continued detention is justified by "exceptional circumstances." All class members "have suffered the same injury," namely months of arbitrary detention, because of this practice. *Wal-Mart*, 564 U.S. at 350 (internal quotations omitted); *see e.g.*, Dkt. No. 52-4, at ¶¶ 9-10 (Ex. D1, Plaintiff Rodriguez Guerra Declaration: "I thought I would be released from detention after I won my case, but that did not happen. ICE appealed and I waited months while the appeal was pending. Then, when the appeal was denied, ICE still said they were going to keep detaining me while they looked for other

countries to deport me to"); Dkt. No. 52-5, at ¶¶ 9-10 (Ex. E1, Plaintiff [redacted] Declaration); Dkt. No. 52-6, at ¶¶ 7-10 (Ex. F1, Plaintiff [redacted] Declaration); Dkt. No. 52-7, at ¶¶ 8-9 (Ex. G1, Plaintiff [redacted] Declaration); Dkt. No. 52-8, at ¶¶ 7-8 (Ex. H1, Plaintiff [redacted] Declaration); Dkt. No. 52-9, at ¶¶ 9-10 (Ex. I1, Plaintiff [redacted] Declaration); Dkt. No. 52-10, at ¶¶ 7-9 (Ex. J1, Plaintiff [redacted] Declaration); Dkt. No. 52-11, at ¶¶ 8-9 (Ex. K1, Plaintiff [redacted] Declaration); Dkt. No. 52-12, at ¶¶ 9-11 (Ex. L1, Plaintiff [redacted] Declaration). Plaintiffs seek a class-wide declaration that WAS ICE's practice violates the ICE Policy, and thereby violates the APA and due process. Such a declaration will "resolve an issue that is central to the validity" of each class member's claims and provide "answers to common questions." *Id.* at 350, 356.

The questions of law and fact that are common to all class members include:

1. Whether WAS ICE has a practice or policy of detaining non-citizens after a grant of asylum, withholding, or CAT relief without an individualized determination of whether their detention is justified.
2. Whether such a practice or policy violates ICE's long-standing policy favoring the release of non-citizens granted asylum, withholding, or CAT relief absent "exceptional circumstances."
3. Whether such a departure from ICE's long-standing policy violates the Administrative Procedure Act and/or the Due Process Clause.

Courts have certified similar classes of detained non-citizens where the precise factual scenarios varied among class members, yet a common experience united them. *See Diaz*, 297 F.Supp.3d at 627 (finding commonality despite variations in the types of bond hearings available to the detained non-citizen class members because "the core legal question raised by the petition

is the same across all class members"); *Damus*, 313 F.Supp.3d at 333 (finding commonality despite purported differences in ICE's reasons for denying parole to class members because "the specific facts of each [parole] denial matter not if Plaintiffs are correct in their claim that the Directive is no longer in force overall").

Like in *Damus*, Plaintiffs have made a preliminary showing, through Plaintiffs' experiences, the experience of non-Plaintiff proposed class members, and data and examples indicating the same experience for approximately 40 other non-citizens, that WAS ICE has a practice of detaining class members without reviewing their custody in accordance with the ICE Policy. *See* Dkt. No. 52-14 at 15 (noting that non-citizen client with final relief grant "will be released in accordance to policy, close to or on day 90"); Dkt. No. 52-8 at 14 (stating that Mr. Perla Vasquez "will remain detained pending [any appeal]" prior to ICE deciding whether to appeal); *see also Damus*, 313 F.Supp.3d at 332 ("Plaintiffs here have provided ample evidence that . . . indicates a likely departure from the policies and processes mandated by the Parole Directive."). Indeed, even ICE Headquarters appears to believe that, in at least one instance, WAS ICE's practice deviated from the ICE policy. *See* Dkt. No. 52-5 at 40 ("Field Office should have released prior to day 90"). A class action lawsuit is necessary to confirm the nature and scope of this practice and to determine whether it violates the ICE Policy and, accordingly, the APA and due process.

Any minor factual variations among proposed class members are secondary to the common questions detailed above and do not defeat the commonality requirement. See *DiFelice v. U.S. Airways, Inc*., 235 F.R.D. 70, 78 (E.D. Va. 2006) ("Minor differences in the underlying facts of individual class members' cases do not defeat a showing of commonality where there are common questions of law."); *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) ("[T]he commonality requirement does not require that all class members share identical factual

histories."). All class members have active grants of relief preventing their removal to their home countries, and the exact type and finality of the relief they won—whether asylum, INA withholding, or CAT relief and whether final or on appeal—is not relevant to their legal claims nor does it inhibit resolution of the common questions. The ICE Policy that WAS ICE is refusing to follow does not differentiate between individuals based on these factors, and it applies to all proposed class members with equal force. *See* Dkt. No. 49-1 at ICE-0000147.1 ("This policy applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period."). Similarly, proposed class members have been detained for varying lengths of time, and ICE may have different purported reasons for continuing to detain each class member, but whether ICE is reviewing class members' continued detention in accordance with the ICE Policy is a common question unaffected by those distinctions.

C. Plaintiffs' Claims Are Typical of the Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Typicality does not "require[] that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned," but "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter v. Microsoft Corp*., 436 F.3d 461, 466-67 (4th Cir. 2006). While they are two separate elements of a class, typicality and commonality "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Here, Plaintiffs' claims are typical of the class for many of the same reasons that the class meets the commonality requirement. Plaintiffs raise the same legal claims that current and future class members could raise and have raised, namely that their continued detention without a custody determination under the ICE Policy violates the APA and due process. *See Garcia Portillo v.*

Crawford, 1:24-cv-297 (E.D. Va. 2024) (pending); *Castillo Torres v. Perry*, 1:23-cv-1469 (E.D. Va. 2023) (dismissed as moot); *Rios Castro, et al. v. Crawford*, 1:23-cv-1011 (E.D. Va. 2023) (dismissed as moot). Plaintiffs have suffered the same injury as proposed class members—continued detention after winning relief from deportation—and they seek the same relief—a declaration that such continued detention without proper custody determinations is unlawful. *See generally* Putative Class Information.[4]

While the Plaintiffs, like other proposed class members, entered the class through different routes, they all share an experience relevant to their common legal claims: they are, or were, detained for some period after they were granted asylum, withholding, or CAT relief. Moreover, they have not had, or did not have while detained, their custody reviewed in accordance with the ICE Policy. *See Damus*, 313 F.Supp.3d at 334 ("Although the specific details of each named Plaintiff's parole adjudication may vary, the crux of their allegations is typical of the claims of the proposed class that the Government is no longer providing asylum-seekers with the individualized determinations and opportunities for release required under the Directive."). For example, one non-Plaintiff class member won CAT relief in July 2023 and remained detained more than eight months later, with his custody review in December having been denied under 8 C.F.R. § 241.4 for unspecified reasons. *See* Putative Class Information at 398. Therefore, Plaintiffs' pursuit of a declaration from this Court that class members are entitled to such custody determinations under the ICE Policy will "advance the interests of the absent class members." *Deiter*, 436 F.3d at 466–67.

[4] Defendants' counsel provided this information to the Court's chambers but did not file it directly on the docket. Dkt. No. 46.

D. Plaintiffs and Their Counsel Are Adequate Representatives for the Class

The named Plaintiffs and their counsel will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement is satisfied if: "(1) the named plaintiffs' interests are not opposed to those of other class members, and (2) the plaintiffs' attorneys are qualified, experienced and able to conduct the litigation." *Cuthie v. Fleet Reserve Ass'n*, 743 F. Supp. 2d 486, 499 (D. Md. 2010) (citation omitted).

The interests of the named Plaintiffs will not conflict with the interests of any of the class members; rather, as explained above, their interests are aligned. For a conflict of interest between a named plaintiff and class members to defeat the adequacy requirement, that conflict must be "fundamental." *Ward v. Dixie Nat'l Life Ins.*, 595 F.3d 164, 180 (4th Cir. 2010) (citation omitted). "A conflict is not fundamental when . . . all class members share common objectives[,] the same factual and legal positions [and] have the same interest in establishing the liability of [defendants]." *Id.* at 180 (alterations in original) (internal quotation marks omitted). Here, there is no fundamental conflict of interest, either now or that could plausibly arise in the future. Plaintiffs do not seek monetary damages, but rather declaratory relief that would benefit all class members. Plaintiffs have attested to their understanding and commitment to pursue the claims of the class. *See e.g.*, Dkt. No. 52-4, at ¶ 18 (Ex. D1, Plaintiff Rodriguez Guerra Declaration); Dkt. No. 52-5, at ¶ 16

[redacted]

All nine Plaintiffs are adequate representatives of the class. While four Plaintiffs have been released from custody after initiating and joining this action, the "inherently transitory" exception allows them to remain class representatives.[5] This doctrine, which also resolves any questions of mootness, applies when "the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Genesis*, 569 U.S. at 76. The "inherently transitory" exception is often applied to cases involving detention where "[i]t is by no means certain that any given individual, named as plaintiff, would be in . . . custody long enough for a district judge to certify the class." *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

Here, four Plaintiffs have already been released, and one or more Plaintiffs may be released before the Court rules on this motion. But each named Plaintiff was or will be released *after* filing a class complaint. Mr. Rodriguez Guerra initiated this action as the sole Plaintiff. He filed the First Amended Petition for a Writ of Habeas Corpus and Class Action Complaint for Declaratory Relief on September 7, 2023. Dkt. No. 3. He was then released from ICE custody on September [redacted] Dkt. No. 29 at ¶ 43. Three more Plaintiffs—[redacted]—then joined Mr. Rodriguez Guerra in filing the Second Amended Petition for a Writ of Habeas Corpus and Class Action Complaint for Declaratory Relief on December 12, 2023. Dkt. No. 24. Those three Plaintiffs were subsequently released by ICE: [redacted]

[5] Specifically, Plaintiffs Rodriguez Guerra, [redacted]

[redacted] Now, the five newest Plaintiffs—[redacted]—have joined the case through the Third Amended Complaint filed shortly before this motion. Dkt. No. 52. Therefore, each named Plaintiff's claims are live or were live at the time they made them on behalf of a class of similarly situated persons.

Plaintiffs' counsel will also adequately protect and advance the interests of the class. "The adequacy of counsel prong of Rule 23(a)(4) asks whether counsel are qualified, experienced and generally able to conduct the litigation and whether counsel will vigorously prosecute the interests of the class." 1 *Newberg on Class Actions* § 3:72 (5th ed.) (internal citations and quotations omitted). Counsel is considered qualified when they have experience with previous class actions or cases involving the same field of law. *See, e.g.*, *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979). The representatives for the named Plaintiffs seeking to represent the class are Capital Area Immigrants' Rights ("CAIR") Coalition, the National Immigration Project of the National Lawyers Guild ("NIPNLG"), and the American Civil Liberties Union of Virginia ("ACLU"). Collectively, counsel has substantial experience with, and a demonstrated commitment to, the representation of detained non-citizens, including through habeas litigation and class actions. Ex. A, Declarations in Support of Plaintiffs' Motion for Class Certification. Moreover, Class Counsel has already devoted significant resources to this matter and has sufficient resources to litigate this matter to completion.

For the same reasons, Class Counsel also satisfy the requirements of Rule 23(g).[6] *See* Fed. R. Civ. P. 23(g) (providing that, in appointing class counsel, the court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions . . . and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class"); *see also Bell v. Brockett*, 922 F.3d 502, 512 (4th Cir. 2019) ("In applying Rule 23(g), courts must consider the four mandatory factors and may consider other permissive factors in assessing the adequacy of class counsel."). Thus, Plaintiffs satisfy the Rule 23(a) and (g) factors.

II. The Proposed Class Meets the Requirements of Rule 23(b)(2) and/or (b)(1)

In addition to meeting the four requirements of Rule 23(a), a "class action must fall within one of the three categories enumerated in Rule 23(b)." *Adair*, 764 F.3d at 357 (quoting *Gunnells*, 348 F.3d at 423). Here, Plaintiffs primarily seek certification under Rule 23(b)(2), which "authorizes class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(2)).

A. Certification is Proper under (b)(2)

Rule 23(b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360. The Rule was designed especially for civil rights cases seeking broad injunctive or declaratory relief from patterns of discrimination or arbitrary conduct. *See id.* at 361 (explaining that "'[c]ivil rights cases against parties charged

[6] *See* Rubenstein, *supra,* § 3:72 (noting that Congress in 2003 "adopted Rule 23(g) that creates an explicit textual mooring for the class counsel analysis[,] but most courts continue to employ the substantive standards generated under Rule 23(a)(4) prior to Rule 23(g)'s adoption in their analysis of counsel's adequacy"); Fed. R. Civ. P. 23(g) Comm. (explaining that Rule 23(g) was meant to "build[] on" previous judicial experience in evaluating adequacy under Rule 23(a)(4)).

with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture" (quoting *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613 (1997)); *Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 330 n.24 (4th Cir. 2006) (explaining that (b)(2) "was created to facilitate civil rights class actions"); Advisory Committee's Note, 28 U.S.C. App., pp. 1260–61 (1964 ed., Supp. II) (citing foundational cases that inspired (b)(2)).

Under (b)(2), courts have repeatedly certified classes of detained non-citizens challenging systemic detention practices. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (finding class certification proper under (b)(2) where detained non-citizens challenged "practice of prolonged detention . . . without providing a bond hearing and [sought] as relief a bond hearing with the burden placed on the government"); *Diaz*, 297 F. Supp. 3d at 627-28 (certifying class under (b)(2) where class challenged Government's interpretation of INA finding them ineligible for bond); *Damus*, 313 F. Supp. 3d at 334 (provisionally certifying class under (b)(2) where class sought to "address an alleged systematic harm—the failure of the Field Offices to comply with the [Parole] Directive").

Here, the proposed class challenges WAS ICE's policy or practice of detaining class members after they win relief from removal without reviewing their custody in accordance with the ICE Policy. Specifically, Plaintiffs allege that WAS ICE is not making individualized determinations about whether each class members' post-relief detention is justified by "exceptional circumstances," nor is the WAS ICE Field Office Director approving the continued detention of each class member, as required by the Policy. *See* Dkt. No. 49-1 at 6, 147-147.1. Plaintiffs seek a class-wide declaration that WAS ICE has a policy or practice inconsistent with the ICE Policy and that such noncompliance violates the APA and/or the Due Process Clause.

While each class member could theoretically make this claim individually, such individual litigation would not demonstrate the alleged pattern as adequately and efficiently as would class-wide litigation. *See Wal-Mart*, 564 U.S. at 361 (noting that certification under (b)(2) is proper when "the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to none of them"). Furthermore, the declaration sought by Plaintiffs would "benefit[] all [class] members at once." *Id.* at 362. It would clarify the scope and applicability of the ICE Policy and inform WAS ICE of its duty to comply with that policy going forward by providing class members with individualized custody determinations under the "exceptional circumstances" standard with oversight by the Field Office Director. *See Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (observing that declaratory relief is proper when "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding").

B. In the Alternative, Certification is Proper under (b)(1)

As an alternative to Rule 23(b)(2), the Court can also properly certify the proposed class under Rule 23(b)(1), which permits class certification where "prosecuting separate action by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class . . ." Fed. R. Civ. P. 23(b)(1)(A). Certification under Rule 23(b)(1)(A) "is appropriate when the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class." *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 James W. Moore et al., Moore's Federal Practice § 23.41[4] (3d ed. 2000)).

Plaintiffs satisfy this standard. If class members were required to initiate separate actions containing the same allegations as made here by Plaintiffs against Defendants, and one or more individual claims was adjudicated before the plaintiff was released, such adjudication may result in inconsistent standards concerning the same ICE policy. This risk is not merely hypothetical, but distinctly possible given the number of individual habeas petitioners who are currently challenging and have recently challenged their detention by WAS ICE after winning asylum, INA withholding, or CAT relief. *See Garcia Portillo v. Crawford,* 1:24-cv-297 (E.D. Va. 2024) (pending); *Castillo Torres v. Perry*, 1:23-cv-1469 (E.D. Va. 2023) (dismissed as moot); *Rios Castro, et al. v. Crawford*, 1:23-cv-1011 (E.D. Va. 2023) (dismissed as moot). To avoid such incoherent outcomes, it is necessary to certify the proposed class and adjudicate the members' common claims together. Plaintiffs seek declaratory relief applicable to all class members, and certification pursuant to Rule 23(b)(1) is therefore appropriate.

CONCLUSION

Plaintiffs raise claims that will very likely evade review absent class certification. Such evasion of review is particularly concerning, and worthy of this Court's intervention, because Defendants wield the power to perpetuate it. Every time Plaintiffs' counsel has challenged the continued detention of former class members in individual or group habeas actions, Defendants have released the petitioner(s) before the case could be adjudicated. Yet the practice driving this continued detention continues unabated. This reality, along with the practical challenges of detention, the lack of counsel amongst most detained non-citizens, and the fact that most class members do not speak English, mean that an individual class member, acting alone, would likely never be able to secure the declaratory judgment sought by Plaintiffs. Thus, class certification is not only appropriate, but it is the *only* mechanism through which Plaintiffs' claims can be

adjudicated, and this pressing issue can be resolved once and for all. Plaintiffs, therefore, respectfully request that this Court grant the motion for class certification, name the nine Plaintiffs as class representatives, and appoint the undersigned as class counsel.

Dated: April 2, 2024

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I, Sophia Gregg, hereby certify that on this date, I uploaded a copy of the Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and any attachments using the CM/ECF system, which will cause notice to be served electronically to all parties.

Date: April 2, 2024

/s/
Sophia Gregg

Pro Bono Counsel for Plaintiffs