UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Uriel VAZQUEZ PEREZ, on his own behalf and on behalf of others similarly situated,

Petitioner-Plaintiff,

v.

Thomas DECKER, in his official capacity as New York Field Office Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; Ronald D. VITIELLO, in his official capacity as the Acting Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; Kirstjen NIELSEN, in her official capacity as Secretary of the U.S. DEPARTMENT OF HOMELAND SECURITY; James McHENRY, in his official capacity as Director of the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Matthew G. WHITAKER, in his official capacity as the Acting Attorney General of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE; the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and Carl E. DUBOIS as Sheriff of Orange County and the official in charge of the Orange County Correctional Facility,

Respondents-Defendants.

Case No. 18-cv-10683

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

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INTRODUCTION

The Petitioners move for class certification in this action challenging the government's policy and practice of detaining hundreds of people on civil immigration charges for months before affording them an initial hearing with an immigration judge. In so doing, the government deprives these detainees of the protections against unlawful and unnecessary detention that immigration law makes available once an individual appears at their initial hearing. During this extended detention without meaningful process, immigrant New Yorkers suffer loss of liberty, family separation, and a cascading series of hardships flowing from the disruption to their life. The Petitioners seek declaratory and injunctive relief remedying this unconstitutional delay.

The proposed class consists of all individuals who have been, or will be, arrested by ICE's New York Field Office ("NYFO") and detained under Section 1226 of Title 8 of the United States Code for removal proceedings before an immigration judge and who have not been provided an initial hearing before an immigration judge. This case is plainly appropriate for class-wide adjudication. The proposed class consists of a large and transient group of detainees who, by virtue of their indigence and incarceration, are hampered from bringing individual suits against the federal government. The challenged delay in being presented before an immigration judge is experienced by all class members and results from the same government policies and practices, and the remedy sought would apply to the entire class. Finally, proposed class counsel are qualified and experienced in class action, civil rights, and immigrants' rights litigation. For all these reasons and other reasons set forth below class certification is the appropriate mechanism for achieving a just and efficient resolution of this litigation, and the Petitioners respectfully request that the Court certify the proposed class.

BACKGROUND

ICE's NYFO arrests over a thousand individuals annually on civil immigration charges and detains them for removal proceedings. *See* Declaration of Robert Hodgson ("Hodgson Decl."), Ex. A at ¶ 5 (Declaration of David Hausman ("Hausman Decl.")).[1] These individuals are initially processed at ICE offices in the Southern District of New York and, like Mr. Vazquez Perez, incarcerated thereafter at detention facilities in the greater New York City area. *See* Hodgson Decl., Ex. B at ¶ 13 (Declaration of Andrea Saenz ("Saenz Decl.")). Putative class members are detained pursuant to Section 1226 of Title 8 of the United States Code ("Section 1226") while awaiting their first appearance in immigration court. Under the Immigration and Nationality Act ("INA") and its implementing regulations, ICE, a subcomponent of the U.S. Department of Homeland Security, serves as the arresting, jailing, and prosecuting agency in removal proceedings. The immigration courts, under a subcomponent of the Department of Justice called the Executive Office for Immigration Review ("EOIR"), serve as the adjudicating agency, with responsibility for reviewing ICE's initial custody determinations and for assessing whether an individual is subject to removal.

Importance of the Initial Appearance Before an Immigration Judge

Members of the putative class are entitled to contest their deportation from the United States through proceedings in an immigration court before an immigration judge ("IJ"). Jurisdiction with the immigration court vests when ICE files a Notice to Appear ("NTA") with the court. 8 C.F.R. §§ 1003.14(a), 1239.1(a); *see also* 8 C.F.R. § 239.1.

The initial master calendar hearing ("MCH") is the first opportunity for individuals in removal proceedings to avail themselves of several procedural protections, including: (a) a

[1] "Ex." Refers to exhibits annexed to the Hodgson Decl.

description of the nature of the proceeding and the allegations and charges in the NTA in plain "non-technical language," 8 C.F.R. § 1240.10(a)(6); (b) notification of a detainee's right to be represented and of available *pro bono* legal services, 8 C.F.R. §§ 1240.10(a)(1), (2); (c) assistance in identifying defenses to deportation, 8 C.F.R. § 1240.11(a)(2); (d) notification of a detainee's rights to examine and object to the evidence against them, cross examine government witnesses, and present evidence on their own behalf, 8 C.F.R. § 1240.10(a)(4)); and (e) a determination if there are "any indicia of incompetency" that would trigger the IJ's obligation to "take measures to determine whether a[n] [individual] is competent to participate in proceedings" and explore necessary safeguards. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 480 (BIA 2011). The first appearance also allows the IJ to ensure that the NTA was served and to review it for facial defects. *See* Hodgson Decl., Ex. C (*EOIR IJ Benchbook, Tools – Guides – Introduction to the Master Calendar*) at 2-3 (noting that the "NTA is not prepared by lawyers and there will be errors," providing guidance to evaluate proper service of the NTA, and describing how to address "NTA shortcomings").

In New York, the first hearing is also the point at which the majority of detainees first obtain access to counsel, as New York City has created a public defender system that provides free deportation defense representation to all indigent detained individuals who are unrepresented. *See* Hodgson Decl., Ex. B at ¶¶ 1, 7-10 (Saenz Decl.) (describing the New York Immigrant Family Unity Project ("NYIFUP")). The initial appearance is the first time detainees and their representatives—including newly-appointed or soon-to-be-appointed NYIFUP attorneys—may see the evidence against them. *Id.* ¶ 17. In addition, as a practical matter, only upon appearing for an initial hearing before the immigration court can detainees move to terminate their proceedings if they are not in fact removable. *Id.* ¶¶ 18, 26. In the past five years,

approximately nine percent of respondents appearing at the Varick Court ultimately had their cases terminated by an immigration judge. Hodgson Decl., Ex. A, at ¶ 12 (Hausman Decl.). This included several U.S. citizens who spent months detained by ICE before seeing an immigration judge. *See* Hodgson Decl., Ex. D (Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, New Yorker, Mar. 21, 2018). For individuals who wish to apply for other forms of relief from removal, such as asylum or adjustment of status, the initial appearance begins the often-lengthy process of applying for relief. *See* Hodgson Decl., Ex. B at ¶¶ 18, 26-30 (Saenz Decl.). For those who do not wish to contest removal, the first appearance is the first opportunity to accept an order of removal or request voluntary departure. *Id.* ¶ 28. And for those detainees with limited English proficiency, the initial appearance is often their first opportunity to have key documents explained to them in a language they can understand. *See id.* at ¶¶ 15, 27.

Finally, the initial court appearance is the first opportunity to seek release on bond from an immigration judge. *See id.* at ¶¶ 21-22. One recent report found that approximately 40% of detainees appearing at the Varick Court are ultimately granted bond because the court determines they are neither a flight risk nor a danger to the community. *See* Hodgson Decl., Ex. E at 50 (Jennifer Stave, et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, Vera Institute of Justice, Nov. 2017 ("Vera Evaluation") (reporting on 1,530 cases between 2013 and 2016)); *see also* Hodgson Decl., Ex. B at ¶ 19 (Saenz Decl.) (stating that 40% of Brooklyn Defender Services clients received bond between 2015 and 2018).

ICE Arrest, Detention, and Processing Prior to Initial Appearance

Prior to their initial appearance, putative class members have no meaningful way to challenge the necessity or legality of their extended incarceration. ICE does not obtain a judicial

warrant prior to making civil immigration arrests, acting instead pursuant to an ICE administrative "warrant," 8 U.S.C. § 1226(a) (establishing arrest authority pursuant to agency-issued warrant), or no warrant at all, 8 U.S.C. § 1357(a)(2) (establishing warrantless arrest authority). Current ICE regulations authorize dozens of different types of officials, including line "immigration enforcement agents," to issue ICE warrants, 8 C.F.R. § 287.5(e)(2), and warrantless arrests can be made if an ICE officer has "reason to believe" that the noncitizen is violating U.S. immigration law and "is likely to escape before a warrant can be obtained," 8 U.S.C. § 1357(a)(2). ICE's NYFO generally detains and processes individuals at ICE offices in Manhattan. Hodgson Decl., Ex. B at ¶ 13 (Saenz Decl.). Thereafter, detainees are housed at county jails in Hudson, Bergen, and Orange Counties, *id.*, under the continued custody and control of the ICE NYFO, *see Calderon v. Sessions*, 330 F. Supp. 3d 944 (S.D.N.Y. 2018) (detainees at Hudson County Jail remain in the legal custody of ICE because the jail "is merely providing service to ICE, pursuant to an Inter-Governmental Service Agreement ("IGSA")" and "ICE is in complete control of detainees' admission and release").

Following an arrest, regulations require ICE to determine whether to refer the person to an immigration court for removal proceedings. 8 C.F.R. §§ 236.1(b)(1), 287.3(b), 287.3(d); *see also* 8 U.S.C. § 1229a(a)(1). This charging decision is memorialized in a Notice to Appear ("NTA"), which is served on the detainee and—at some point after detention—filed with the court. Hodgson Decl., Ex. B at ¶ 23 (Saenz Decl.).

Within forty-eight hours of detention, ICE is also required to make its own custody determination, which will dictate whether a person is released directly by ICE or if they will remain detained until seeing an immigration judge. *See* 8 C.F.R. §§ 287.3(d), 236.1(c)(8). In

practice, ICE's NYFO has universally refused to set bond for individuals detained under 8 U.S.C. § 1226 for several years. Hodgson Decl., Ex. B at ¶ 14 (Saenz Decl.).

The Growing Length of Delays Prior to the Initial Hearing

Currently, putative class members are likely to spend nearly three months in jail before their first hearing in immigration court. Hodgson Decl., Ex. A at ¶¶ 5-6 (Hausman Decl.). For individuals facing removal at the Varick Immigration Court, as all putative class members are, the median wait time for an initial appearance increased steadily in recent years before spiking precipitously throughout 2018. *See id.* at ¶ 5. According to the government's own data, in 2014, the median wait time for immigration detainees between arrest and their initial appearance before an IJ at the Varick Court was eleven days. *Id.* By March 2018, the median wait time had risen to forty-four days. *Id.* Four months later, in July 2018, it had risen to eighty days. *Id.*

Detainees have no effective means to expedite their first appearance before the immigration court. *See* Hodgson Decl., Ex. B at ¶ 24 (Saenz Decl.). Although the NTA contains a signature line allowing a detainee to request an "immediate hearing," thereby waiving the default requirement that a first hearing take place at least ten days after service of the NTA to afford detainees time to obtain counsel, *see* 8 U.S.C. § 1229(b)(1), signing this request appears to have no impact on the period people are detained, *see See* Hodgson Decl., Ex. B at ¶ 24 (Saenz Decl.). Similarly, detainees have the option to check a box requesting a custody review on ICE's Form I-286 Notice of Custody Determination, but doing so does not affect when an initial court appearance is scheduled. *See id.* at ¶ 21.

Harsh Conditions of Confinement

In addition to preventing individuals from commencing their cases and seeking various forms of relief sooner, prolonged confinement before an initial appearance inflicts other

significant harm on putative class members and their families. *See* Hodgson Decl., Ex. F (Dep't. of Homeland Security, Office of Inspector General, *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) (reporting invasive procedures, substandard care, and mistreatment in ICE detention facilities, e.g., indiscriminate strip searches, long waits for medical care and hygiene products, and, in one case, a multiday lockdown for sharing a cup of coffee). Hudson County Jail, where many putative class members are held, has reported six inmate deaths since June 2017 alone, including four suicides. *See* Hodgson Decl., Ex. G (Monsy Alvarado, *After Latest Suicide, Hudson County Takes Steps to Terminate Jail's Medical Provider*, northjersey.com, Mar. 26, 2018).

Many Section 1226 detainees have lived in the U.S. for many years, and according to a recent report approximately half of those with cases in the New York immigration court, like the putative class members here, are being kept from their children while detained. *See* Hodgson Decl., Ex. E at 19-20 (Vera Evaluation) (reporting that, on average, NYIFUP clients had been living in the U.S. for 16 years and that 47% of NYIFUP clients had children living with them in the United States). Two thirds of those identified in the same report were employed at the time of their arrest, and many were the primary breadwinner for their families, *see id.* at 17—as long as they remain detained, they and their families are denied that vital employment income.

Obstacles to Class Members' Ability to Prosecute Individual Lawsuits

Immigration detainees who have yet to see an immigration judge for the first time also face systemic barriers to vindicating their rights before a court. For example, most putative class members are unrepresented during the period prior to their initial appearance. *See* Hodgson Decl., Ex. E at 17 n.34 (Vera Evaluation) (explaining that between 50%-64% of individuals appearing at Varick Street were represented by NYIFUP, which means they were unrepresented

prior to their first MCH). A large percentage of detainees do not speak, read, or write English. *See id.* at 20 (stating that English is not primary language for 69% of NYFO detainees); Hodgson Decl., Ex. B. at ¶ 11 (Saenz Decl.).

Putative Class Representative Uriel Vazquez Perez

Putative class representative Uriel Vazquez Perez is currently in the custody of the NYFO. Hodgson Decl., Ex. H at ¶ 3 (Declaration of Uriel Vazquez Perez ("Vazquez Perez Decl.")). ICE took custody of Mr. Vazquez Perez on October 30, 2018. *See id.* at ¶ 2. He is eligible for *pro bono* counsel through NYIFUP and, like all members of the putative class, he is awaiting his initial appearance before an IJ; he is eager to see an IJ as soon as possible in order in order to pursue all legal options in his immigration case and for release from detention. *See id.* at ¶¶ 4-6.

ARGUMENT

The Petitioners move for certification of a class defined as follows:

> **All individuals who are, have been, or will be arrested by ICE's NYFO and detained under 8 U.S.C. § 1226 for removal proceedings before an immigration judge, and who have not been provided an initial hearing before an immigration judge.**

The Court should certify the proposed class because it meets the requirements of Rules 23(a) and 23(b)(2). Specifically, Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law and fact are 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). Rule 23(b)(2) is satisfied by a showing that defendants have "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).

As the Second Circuit has explained, district courts must give these requirements "liberal rather than restrictive construction" and "adopt a standard of flexibility." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal quotation marks and citation omitted). District courts are afforded broad discretion in certifying a class. *See Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001). The class also meets the requirements of Rule 23(b)(1), which permits class certification where separate actions could "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). In addition, the proposed class qualifies as a representative habeas class pursuant to *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974).

Courts have routinely granted class certification under circumstances similar to this case. Generally, courts in this circuit recognize that class actions are particularly appropriate in litigation involving detained persons because "[p]risoners . . . come and go from institutions for a variety of reasons . . . [n]evertheless, the underlying claims tend to remain." *Clarkson v. Coughlin*, 145 F.R.D. 339, 346 (S.D.N.Y. 1993) (internal quotation marks and citation omitted). More specifically, courts have certified classes in immigration cases involving challenges to immigration detention, including as recently as June 2018. *See L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 617 (S.D.N.Y. 2018) (certifying class of detained immigrant children challenging delays in their release from detention); *see also Abdi v. Duke*, 323 F.R.D. 131, 145 (W.D.N.Y. 2017) (certifying class of detained immigrants challenging denial of parole and extended lengths of detention without bond hearing); *Bertrand v. Sava*, 535 F. Supp. 1020, 1024-25 (S.D.N.Y. 1982) (certifying class of detained Haitian asylum seekers challenging their continued custody without fair access to release on parole), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982).

I. THE PROPOSED CLASS SATISFIES RULE 23(a).

A. The Proposed Class Is Sufficiently Numerous.

The Petitioners' proposed class satisfies the requirement that it be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In the Second Circuit, a class with forty or more members is presumed to meet this condition, *see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), and there is no requirement to establish a precise number of class members, particularly where such a number is in the exclusive control of the government, *see Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (holding that plaintiffs need not define exact size of class or the identity of its members to obtain class certification, and instead may "show some evidence of or reasonably estimate the number of class members" (internal citations omitted)). Moreover, the inquiry into joinder goes beyond "mere numbers" and requires consideration of "all the circumstances surrounding a case." *Id.* at 936. Other factors that may make a class "superior to joinder" include "(i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members." *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014) (citing *Robidoux*, 987 F.2d at 936).

The proposed class is sufficiently numerous. The NYFO arrests over 1,000 people annually and places them in proceedings before the Varick Court. *See* Hodgson Decl., Ex. A at ¶ 5 (Hausman Decl.); *see also* Hodgson Decl., Ex. B at ¶ 4 (Saenz Decl.) (stating that Brooklyn Defender Services alone has litigated over 570 detained removal and bond cases before the Varick Court since 2016). Based on an analysis of the government's own data, between May and July of 2018 over 440 initial hearings took place before the Varick Street Court. Hausman Decl.

¶ 6 (Ex. A to Hodgson Decl.); *see also* Hodgson Decl., Ex. B ¶¶ 4, 9 (Saenz Decl.) (stating that at any given time Brooklyn Defender Services, which represents only one-third of NYIFUP clients at Varick Street, has 80-100 detained clients with cases there). The class also includes additional future detainees who will flow into the class as the NYFO arrests new individuals. Recognizing the transient nature of detained populations—and that "the past is telling of the future"—courts include "future class members to satisfy the numerosity requirement." *Chief Goes Out v. Missoula County*, 12-cv-155, 2013 WL 139938, at *3–*4 (D. Mont. Jan. 10, 2013); *see also Jane B. by Martin v. New York City Dep't of Soc. Servs*., 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (finding a class consisting of an estimated 48 to 60 juveniles residing in two facilities to be sufficiently numerous and noting the putative class included "an undetermined number of girls who will reside" there in the future).

Not only is the proposed class presumptively proper because of its size, joinder of all putative class members' claims is impracticable for additional reasons. This class includes people with limited English proficiency who are indigent and often unfamiliar with the U.S. judicial system, *see* Hodgson Decl., Ex. E at 20 (Vera Evaluation); Hodgson Decl., Ex. B at ¶¶ 11, 18 (Saenz Decl), and courts have recognized that joinder is impracticable under such circumstances. *See Gortat v. Capala Bros., Inc.*, 07-cv-3629, 2012 WL 1116495, at *3 (E.D.N.Y. Apr. 3, 2012) (joinder impracticable for class of 28 "immigrant laborers who speak little English" and lacked financial resources), *aff'd*, 568 Fed. Appx. 78 (2d Cir. 2014); *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) (finding joinder impracticable where many class members "do not speak English . . . and most are unlikely even to know that they are members of the proposed class"), *enforcement granted*, 64 F. Supp. 3d 271 (D. Mass. 2014). Compounding these disadvantages is the fluidity of a class of detainees and the inherent difficulties that

detained persons face in litigating their cases. *See Abdi*, 323 F.R.D. at 140 ("'[T]he ability of any one individual member of the class or the subclass to maintain an individual suit will necessarily be limited by the simple reality that they are being detained' as part of the immigration process") (quoting *V.W. by and through Williams v. Conway*, 236 F. Supp. 3d 554, 574 (N.D.N.Y. 2017)); *Dean v. Coughlin*, 107 F.R.D. 331, 332–33 (S.D.N.Y. 1985) (noting that "[t]he fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group affected remain constant") (citations omitted). In addition, a majority of putative class members are unrepresented during the period before their initial appearance and would have difficulty litigating their cases individually. *See* Hodgson Decl., Ex. E at 5, 17 n.34 (Vera Evaluation) (explaining that between 50%-64% of individuals were represented by NYIFUP, which means they were unrepresented prior to their first MCH). Finally, hundreds of individual habeas claims, all turning on the same issue, would be an inefficient use of court resources. *See Odom v. Hazen Transp., Inc.*, 275 F.R.D. 400, 407 (W.D.N.Y. 2011) (certifying class of 16 because it would entail "more efficient use of judicial resources"). In sum, without class-wide adjudication of putative class members' claims, it would be difficult, if not impossible, for class members to vindicate their rights through individual habeas actions.

B. Questions of Law and Fact Are Common to the Proposed Class.

The questions of law and fact raised here are "common to the class," Fed. R. Civ. P. 23(a)(2), because their "resolution will affect all or a significant number of the putative class members." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137–38 (2d Cir. 2015). To satisfy the commonality requirement, a question of law or fact must "resolve an issue that is central to the validity of each one of the claims in one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.

338, 350 (2011). Not every question of law or fact relevant to class members must be the same. *See Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983) (finding denial of class certification improper where proposed class sought review of policy or practice of denying promotion to employees who criticized defendant employer, not review of promotions themselves); *accord Wal-Mart*, 564 U.S. 359 ("[e]ven a single [common] question will do") (internal citation and quotation marks omitted). Rather, the commonality requirement is satisfied when defendants apply a common course of prohibited conduct to the plaintiff class. *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (holding that commonality requirement was met where "plaintiffs allege[d] that their injuries derive[d] from a unitary course of conduct by a single system"); *see also Brown v. Kelly*, 609 F.3d 467, 468 (2d Cir. 2010) ("[W]here plaintiffs were allegedly aggrieved by a single policy of the defendants, and there is strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited.") (internal quotation marks and citation omitted); *Escalera v. N.Y.C. Hous. Auth.,* 425 F.2d 853, 867 (2d Cir. 1970) (holding that commonality requirement was met where plaintiffs were subject to same Housing Authority procedures despite variation in facts giving rise to Authority action against each plaintiff); *Floyd v. City of New York*, 283 F.R.D. 153, 172-75 (S.D.N.Y. 2012) (finding commonality where challenged *Terry* stops were product of NYPD-wide policies); *Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (finding commonality requirement met where putative class members raised "similar question of law," namely whether defendants' conduct violated a regulation and the due process clause).[2]

[2] Recent dicta from the Supreme Court in *Jennings v. Rodriguez* does not counsel against a finding of commonality here. The *Jennings* Court questioned whether class certification in that case remained appropriate where the plaintiffs' sole remaining due process claim might require

The commonality requirement is met in this case. Putative class members are all detained by ICE's NYFO and subject to a common set of procedures, including the process for scheduling and commencing their case before an immigration judge. Common questions of law or fact exist as to all proposed class members, including but not limited to the following: (a) whether the government's policy and practice of failing to promptly provide class members with access to an IJ violates the Due Process Clause; (b) whether the government's policy and practice of failing to provide class members with prompt post-deprivation hearings before a neutral adjudicator violates the Fourth Amendment; and (c) whether the government's policy and practice of unreasonably delaying the first appearance of class members before a judge violates the Administrative Procedure Act. Resolution of the legality of prolonged delays in providing an initial hearing in immigration court will resolve the central issue for the class "in one stroke." *See, e.g.*, *Abdi*, 323 F.R.D. at 131 (in class habeas challenging denial of bond hearings after six months of immigration detention, finding commonality because "conclusion that the [government] is failing to provide required bond hearings would resolve the claims of those individuals"); *see also Barnett v. Bowen*, 794 F.2d 17, 21–23 (2d Cir. 1986) ("[I]t would still be appropriate to define a class to include all applicants who may experience unreasonable delays . . . despite the fact that the point at which delays become unreasonable may vary with the facts and circumstances of individual cases."); *Shepherd v. Rhea*, 2014 WL 5801415, at *3-*4 (S.D.N.Y.

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individualized determinations about each class member's bond hearing. *See* 138 S. Ct. 830, 851-52 (2018). But, as the court recently noted in *L.V.M.* when it certified a class of detained immigrant children challenging delays in their release by raising claims under both the APA and the Due Process Clause—as the putative class members raise here—"the Supreme Court's precaution in *Jennings v. Rodriguez* . . . is not applicable here" both because a statutory challenge under the APA establishes commonality and because a due process challenge to "systemic delay . . . need not entail factual analyses attributable only to individual plaintiffs." *L.V.M.*, 318 F. Supp. 3d at 615.

Nov. 7, 2014) (certifying class challenging "failure to timely process" Housing Authority transfer requests as violative of due process).

C. Mr. Vazquez Perez's Claims Are Typical of the Proposed Class.

Rule 23's requirement that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3), is satisfied where, as here, "it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux*, 987 F. 2d at 936-37. Mr. Vazquez Perez shares with the class claims "based on the common application of certain challenged policies." *Abdi*, 323 F.R.D. at 141 (finding typicality existed when named plaintiff "share[d] claims with the class . . . that are based on the [government's] failure to . . . provide . . . bond hearings after more than six months of detention," and noting that "minor variations in the fact patterns underlying individual claims are not enough to negate typicality") (internal quotation marks and citations omitted). Specifically, absent this Court's intervention, Mr. Vazquez Perez will likely have to wait nearly three months before having a chance to go before an IJ and thereby access crucial procedural protections against the unlawful deprivation of his liberty. *See* Hodgson Decl., Ex. A ¶ 5 (Hausman Decl.) (finding that the most recent government data, from July 2018, revealed a wait time of 80 days). The government's system-wide delay in providing such hearings to the entire putative class renders Mr. Vazquez Perez's claims typical for Rule 23 purposes.

D. Mr. Vazquez Perez Will Fairly and Adequately Represent the Proposed Class.

The fourth and final requirement of Rule 23(a), that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), is twofold: "the proposed class representative must have an interest in vigorously pursuing the claims of the

class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). "Courts that have denied class certification based on the inadequate qualifications of plaintiffs have done so only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit." *In re Frontier Ins. Group, Inc., Sec. Litig.*, 172 F.R.D. 31, 47 (E.D.N.Y. 1997) (internal quotation marks and citation omitted).

Here, Mr. Vazquez Perez has an interest in vigorously pursuing the claims of the class, as those claims overlap with his own claims for relief. *See* Hodgson Decl., Ex. H ¶¶ 6-9 (Vazquez Perez Decl.). He has no interests antagonistic to the interests of other class members, and he has articulated a particular desire for the defendants to afford all similarly-situated detainees a prompt first hearing in immigration court. *See id*.

II. THE PROPOSED CLASS SATISFIES RULE 23(b)(2).

In addition to satisfying the requirements of Rule 23(a), this action warrants certification because "the party opposing the class [] act[s] . . . 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). According to the Supreme Court, civil rights cases are "prime examples" of Rule 23(b)(2) class actions. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Likewise, the Second Circuit has recognized that "'[c]ivil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class . . . fall squarely into the category of [Rule] 23(b)(2) actions.'" *Marisol A.*, 126 F.3d at 378 (quoting *Jeanine B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995)).

Here the government is acting on grounds generally applicable to the class in that it is consistently subjecting class members to extended detention without affording an initial hearing

in immigration court and the protections attendant thereto. Furthermore, Rule 23(b)(2) applies here because "a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores*, 564 U.S. at 360. Because procedural due process claims that raise broadly applicable questions about whether system-wide procedures adequately protect the group of people who depend on them, they are particularly appropriate for class certification, as recognized in *Mathews v. Eldridge*: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." 424 U.S. 319, 344 (1976). Due process challenges such as the one presented in this case enable courts to answer claims "in one stroke," *Wal-Mart*, 564 U.S. at 350, precisely because they raise questions about generic procedures. In this case, a declaration that extended pre-presentment detention without meaningful process is unlawful, or an injunction ordering the government to take measures to provide class members with a prompt initial hearing before an IJ, would provide relief to the entire class. *See Abdi*, 323 F.R.D. at 144 (finding that Rule 23(b)(2) was satisfied because "ordering individualized bond hearings for detainees who have been confined for longer than six months would . . . apply across-the-board to all proposed subclass members"); *see also L.V.M.*, 318 F. Supp. 3d at 616 (finding Rule 23(b)(2) satisfied because "a single injunction enjoining [a policy that held up the release of detained class members] would eliminate . . . delays" and provide a remedy for the entire class).

III. PROPOSED CLASS COUNSEL ARE ADEQUATE UNDER RULE 23(g).

Proposed class counsel, the New York Civil Liberties Union, The Bronx Defenders, and the Immigration Justice Clinic at Cardozo School of Law are "qualified, experienced and able to conduct the litigation," *Baffa v. Donaldson*, *Lufkin & Jenrette Secs. Corp*, 222 F.3d 52, 60 (2d Cir. 2000), and they satisfy the requirements set forth in Rule 23(g). Proposed class counsel have

done significant work researching the facts and claims in this case including by gathering information from institutional providers of immigration counsel and from former and current clients, and by researching and developing legal theories related to this class action. Hodgson Decl., Ex. I ¶ 8 (Declaration of Christopher Dunn (Nov. 7, 2018)). Beyond this case, counsel have extensive experience in complex federal civil rights litigation seeking systemic reform, *id*. ¶¶ 2-7, and deep knowledge of constitutional and immigration law, having litigated either directly or as *amicus* cases challenging the unlawful detention of immigrants, *see id*. Finally, proposed class counsel have already devoted significant resources to developing and maintaining this litigation, as evidenced by the staffing of this case, and will continue to do so as the case proceeds. *See id*. ¶ 8.

IV. THE PROPOSED CLASS ALSO QUALIFIES AS A REPRESENTATIVE HABEAS CLASS.

The proposed class also qualifies as a representative habeas class pursuant to *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974) (holding that while Rule 23 does not directly apply to a habeas action, district courts have the authority to allow cases to proceed as "a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure"). In *Preiser*, the Second Circuit articulated a test for habeas class certification that is the functional equivalent of Rule 23, requiring that a moving class show (1) that the claims are "applicable on behalf of the entire class, uncluttered by subsidiary issues," *id.* at 1126; (2) that "it is not improbable that more than a few [class members] would otherwise never receive the relief here sought on their behalf," *id.*; and (3) that class certification will achieve judicial economy by avoiding "[t]he considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue," *id.* For the same reasons that class certification is warranted under Rule 23, it is also warranted under *Preiser*. *See Abdi*, 323 F.R.D.

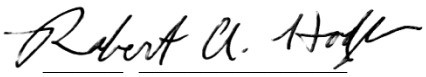
at 136 (certifying class of noncitizen detainees seeking bond hearings after six months of detention and noting that, under *Preiser*, "[c]ourts that have proceeded with class claims in habeas cases have applied the Rule 23 requirements in determining whether to certify the multiparty action"). Further, the second requirement provides a particularly compelling reason to permit a habeas class here: individual class members cannot practically raise these procedural due process claims before their initial appearance, and by the time of their initial appearance the irreparable harm already has been done—i.e., realistically they have no other way of obtaining this relief.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant the motion for class certification, certify the class, appoint Mr. Vazquez Perez representative of the class, and appoint undersigned counsel as counsel for the class.

Dated: November 13, 2018
New York, N.Y.

Respectfully Submitted,



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