UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSE L. VELESACA, on his own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

THOMAS R. DECKER, in his official capacity as New York Field Office Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW ALBENCE, in his official capacity as the Acting Director for U.S. Immigration and Customs Enforcement; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; CHAD WOLF, in his official capacity as Secretary of the U.S. Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; CARL E. DUBOIS, in his official capacity as the Sheriff of Orange County,

Respondents-Defendants.

Case No. 1:20-cv-01803

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

AMY BELSHER
ROBERT HODGSON
CHRISTOPHER DUNN
MEGAN SALLOMI
New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300
abelsher@nyclu.org

Counsel for Petitioners-Plaintiffs

THOMAS SCOTT-RAILTON*
NIJI JAIN
JENN ROLNICK BORCHETTA
The Bronx Defenders
360 E. 161st Street
Bronx, N.Y. 10451
Tel: (718) 838-7878
njain@bronxdefenders.org

Counsel for Petitioners-Plaintiffs

Dated: February 28, 2020
New York, N.Y.

* Law Graduate pending admission, practicing under supervision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

INTRODUCTION

The petitioners move for class certification in this action challenging the unlawful detention of thousands of people arrested for civil immigration offenses in the New York City area who by law are eligible for release. Within 48 hours of such arrests, Immigration and Customs Enforcement ("ICE") is required to make individualized assessments about whether to release people they arrest on bond or recognizance during the pendency of their immigration proceedings. Under their "No-Release Policy," however, local ICE officials are not doing individualized assessments and instead are denying release to virtually everyone, with the result that members of the putative class are incarcerated for weeks or even months before having a meaningful opportunity to seek release on bond before an Immigration Judge. During this time, they suffer loss of liberty, family separation, job loss, potential harm to their health, and a cascading series of hardships flowing from the disruption to their life. The petitioners seek declaratory and injunctive relief striking down the No-Release Policy and guaranteeing putative class members the individualized assessment to which they are entitled.

The proposed class (the "Petitioner Class") consists of all individuals who have been, or will be, arrested under Section 1226(a) of Title 8 of the United States Code by ICE's New York Field Office ("NYFO")[1]—in other words, all those arrested by ICE who are not subject to mandatory detention—and who have been or will be denied release on bond or recognizance pursuant to the No-Release Policy. The petitioner also moves to certify a proposed sub-class consisting of all members of the Petitioner Class with disabilities as defined under the

[1] The New York Field Office is responsible for immigration enforcement in New York City and the following counties: Duchess, Nassau, Putnam, Suffolk, Sullivan, Orange, Rockland, Ulster, and Westchester.

Rehabilitation Act and its implementing regulations (the "Rehabilitation Act Subclass"), 29 U.S.C. § 794; 6 C.F.R. § 15.30.

This case is plainly appropriate for class-wide adjudication. The proposed class consists of a large and transient group of detained people who, by virtue of their indigence and incarceration, are hampered from bringing individual suits against the federal government. The challenged injury—the failure to provide an individualized assessment and subsequent detention—is experienced by all class and subclass members and results from the same No-Release Policy, and the remedy sought would apply to the entire class. The same is true for the proposed Rehabilitation Act Subclass, who all have disabilities, were denied an individualized determination under the No-Release Policy, and are entitled to the same relief under the Rehabilitation Act. 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 Petitioner Class and Rehabilitation Act Subclass.

BACKGROUND

ICE's NYFO arrests several thousand people annually on civil immigration charges and detains them for removal proceedings. *See* Declaration of David Hausman ("Hausman Decl.") ¶ 14. Once arrested, people are initially processed at ICE offices in the Southern District of New York and, like Jose Velesaca, incarcerated thereafter at detention facilities in the greater New York City area while awaiting their first appearance in immigration court. *See* Declaration of Sarah Deri Oshiro ("Oshiro Decl.") ¶¶ 7-8. Putative class and subclass members are detained pursuant to Section 1226(a) of Title 8 of the United States Code ("Section 1226(a)") 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. As alleged below, the NYFO has adopted a policy or practice of unlawfully denying putative class and subclass members the individualized assessment of their eligibility for bond or release to which they are entitled.

ICE's Initial Custody Determination Process

Putative class and subclass members are eligible to be considered for release during the pendency of their removal proceedings pursuant to Section 1226(a)(2), which provides that, "pending a decision on whether the alien is to be removed from the United States . . .. The Attorney General . . . may release the alien on . . . (A) bond of at least $1,500 . . . or (B) conditional parole." 8 U.S.C. § 1226(a)(2). Implementing regulations delegate the Attorney General's authority to grant bond or conditional parole to ICE officers, and, within 48 hours of detention, the officer must make a determination about the appropriateness of release based on two factors: whether "such release would not pose a danger to property or persons, and [whether] the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8); *see also* 8 C.F.R. § 287.3(d). These determinations must be individualized. *See id*. Additionally, ICE must ensure it administers its activities consistently with federal protections for individuals with disabilities under the Rehabilitation Act and the Department of Homeland Security's own implementing regulations. *See* 29 U.S.C. § 794; 6 C.F.R. § 15.30.

In 2013, ICE implemented an algorithmic risk classification assessment tool to assist its officers to make these initial custody determinations. *See* Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era* at 6, Connecticut Public Interest Law

Journal (Nov. 2016) (attached as Exhibit 1 to the Declaration of Robert Hodgson ("Hodgson Decl.")). ICE officers input information about the arrested person into the tool, which was originally programmed to generate one of four recommendations: (1) detain without bond, (2) detain with eligibility for bond, (3) defer the decision to the ICE supervisor, or (4) release. *Id.* at ¶ 14. ICE officers and supervisors then determine whether to affirm or override this recommendation. Declaration of Assistant Field Office Director Yvette Tay-Taylor, ¶ 10, *Vazquez-Perez v. Decker*, No. 1:18-CV-10683 (Jan. 28, 2019), ECF No. 69 (attached as Exhibit 2 to Hodgson Decl.).

Anyone who is not released after an ICE arrest remains incarcerated at a minimum until their first appearance before an Immigration Judge, at which point they may request a custody redetermination from the immigration court. 8 C.F.R. § 1003.19(a). At the Varick Street Immigration Court, where people detained by the NYFO appear, the average time between an arrest and initial hearing is several weeks; but such wait times fluctuate and as recently as late 2018 the average wait time was nearly three months. *See, e.g.*, Declaration of David Hausman, *Vazquez-Perez v. Decker*, No. 1:18-CV-10683 (Dec. 5, 2018), ECF No. 53-7 (attached as Exhibit 19 to Hodgson Decl.).

In addition, for most people these initial hearings do not offer a meaningful opportunity to apply for bond, especially for those who are not represented by counsel prior to the hearing. There are a number of reasons why this is. Assembling a bond application is factually and legally complex, as well as time-intensive, almost always involving letters of support and an initial application for immigration relief with supporting evidence. The government does not provide people in detention with information about the materials they would need to submit for a bond application nor how they might do so. For the many people who do not have counsel until

this initial hearing, it is quite logistically difficult to collect the supporting materials necessary, some of which may be outside of the country, while being held in jail. Moreover, ICE often does not provide relevant evidence supporting its charges until the initial hearing. These hearings are held by videoconference, which presents numerous challenges for the detained person's ability to submit an application and participate in a bond hearing, as well as for a lawyer who has not been able to meet with a client prior to the hearing. Finally, a significant number of people in immigration detention speak little or no English, which is a further challenge to preparing the necessary documents and participating in the hearing. *See* Oshiro Decl. ¶¶ 11-25.

Approximately 40% of people in immigration detention appearing at the Varick Street Immigration Court are ultimately released on bond because the court determines that they are neither a flight risk nor a danger to the community. *See* Immigration Court Bond Hearings and Related Case Decisions through January 2020, TRAC Immigration (attached as Exhibit 3 to Hodgson Decl.).

ICE's No-Release Policy

ICE has adopted a policy or practice of not conducting individualized custody determinations and instead detaining virtually everyone regardless of whether they present a flight or safety risk or suffer from a disability. The adoption of this No-Release Policy followed the agency's manipulations of its risk-assessment tool. ICE began to radically alter its custody determination process in 2015, when it modified the tool's algorithm so that it could no longer recommend people be given the opportunity for release on bond. *See* Hausman Decl. ¶ 17. In mid-2017, ICE similarly removed the tool's ability to recommend the release of people on their own recognizance. *Id.* ¶ 18. As a result, the algorithm can now only generate one substantive recommendation: detention without bond. While ICE officers and supervisors ostensibly

retained the ability to accept or reject the tool's recommendations, in 2017 the NYFO implemented a local policy to make final determinations that are consistent with the recalibrated tool and deny bond or release to virtually everyone it processes.

Together, these changes result in people being detained at an astoundingly high rate; almost no one is released, even as the percentage of people arrested who have a criminal history has gone down. Pursuant to the No-Release Policy, ICE officers in the NYFO no longer conduct individualized custody determinations in favor of a blanket detention policy applying to all individuals regardless of whether they satisfy the requirements for release. According to data obtained by the New York Civil Liberties Union under the Freedom of Information Act, in the first nine months of 2019, ICE detained 98% of all people it arrested compared to 60% in 2014. Hausman Decl. ¶ 14. Indeed, the NYFO denies release even to people whom the risk assessment tool has classified as a low risk of both flight and danger to the community (the "low-low population"). *Id.* ¶¶ 11-13. After the manipulation of the risk assessment tool in mid-2017, ICE has detained about 97% of this low-low population. *Id.* ¶ 14. The result is that hundreds of people for whom detention serves no legitimate purpose are being deprived of their liberty.

Compounding the harms of the No-Release Policy, the Trump Administration simultaneously executed its "zero tolerance" policy, rescinding the Obama Administration's immigration enforcement priorities—which focused on apprehending people with criminal histories and those who present a national security, border security, or public safety threat—and stating that it would "no longer exempt classes or categories of removable aliens from potential enforcement." Memorandum from Sec. of Homeland Security John Kelly to U.S. Immigration Officials (Feb. 20, 2017) at 2 (attached as Exhibit 4 to Hodgson Decl.). By the end of 2018, the number of people without criminal convictions arrested by ICE in the New York City area had

skyrocketed by 414% compared to 2016. NYC Mayor's Office of Immigrant Affairs, 2019 *Fact Sheet: ICE Enforcement in New York City* (attached as Exhibit 5 to Hodgson Decl.). The percentage of people without criminal convictions constituted an even larger portion of overall arrests in 2019: 36% versus 14% in 2016. NYC Mayor's Office of Immigrant Affairs, 2020 *Fact Sheet: ICE Enforcement in New York City* at 2 (attached as Exhibit 6 to Hodgson Decl.). Consequently, the NYFO is now detaining record levels of people without considering them for release, large numbers of whom even ICE believes present no danger to the community or risk of flight. *Id.*

Significant and Ongoing Harms of Detention

Without an opportunity to be considered for release by ICE, putative class and subclass members languish in harsh jail conditions for weeks or months before they have any opportunity to challenge the necessity or legality of their incarceration. ICE's NYFO generally detains and processes individuals at ICE offices in Manhattan, and then moves them to county jails in neighboring counties, Oshiro Decl. ¶¶ 6-7, under the continued custody and control of the ICE NYFO.[2]

This period of confinement before someone can seek bond in immigration court inflicts significant harm on putative class and subclass members and their families. *See* Dep't. of Homeland Security, Office of Inspector General, *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) ("OIG Report") (reporting invasive procedures, substandard care, long waits for medical care and hygiene products, and mistreatment in ICE detention facilities, e.g., indiscriminate strip searches and, in one case, a

[2] *See Calderon v. Sessions*, 330 F. Supp. 3d 944 (S.D.N.Y. 2018) (people detained 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").

multiday lockdown for sharing a cup of coffee) (attached as Exhibit 7 to Hodgson Decl.). Hudson County Jail, where many putative class and subclass members are held, reported six inmate deaths between June 2017 and March 2018 alone, including four suicides. *See* Monsy Alvarado, *After Latest Suicide, Hudson County Takes Steps to Terminate Jail's Medical Provider*, northjersey.com, Mar. 26, 2018) (attached as Exhibit 8 to Hodgson Decl.). At Bergen County Jail in 2019, a serious mumps outbreak resulted in the quarantine of dozens of immigration detainees. Stephen Rex Brown, *ICE Jail in Bergen County Quarantined*, nydailynews.com, Jun. 11, 2019 (attached as Exhibit 9 to Hodgson Decl.); Doug Criss, *6 Inmates at a New Jersey Jail Came Down With The Mumps*, cnn.com, June. 13, 2019 (attached as Exhibit 10 to Hodgson Decl.), and the Essex County Correctional Facility was the subject of a recent DHS report documenting "serious issues relating to safety, security, and environmental health that require ICE's immediate attention," DHS OIG, *Issues Requiring Action at the Essex County Correctional Facility* at 2, Feb. 13, 2019 (attached as Exhibit 11 to Hodgson Decl.). There have been two inmate deaths at the Essex County Jail since 2018, and over sixty detained people have been placed on suicide watch since 2015. Joe Brandt, *An Inmate Died at the Essex County Jail 4 Days Ago*, nj.com, Mar. 22, 2019 (attached as Exhibit 12 to Hodgson Decl.); Lea Ceasrine, *Dozens of ICE Detainees Have Been Placed on Suicide Watch* at 2, documentedny.com, Apr. 17, 2019) (attached as Exhibit 13 to Hodgson Decl.).

Detention is particularly harmful to people who need medical or mental health care. *See Ailing Justice: New Jersey Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention*, Human Rights First (Feb. 2018), at 1-2, 6-10 (attached as Exhibit 14 to Hodgson Decl.). ICE's New York-area facilities routinely deny people access to vital medical and mental health treatment—including delays in vital surgeries, denials of lifesaving medication

for people with epilepsy and cancer, failure to provide medically-required food to individuals with diabetes resulting in extreme detriment to their health, and refusal to provide basic mental health care for people at risk of suicide—and the adverse effects of these denials continue long after detention has ended and may be permanent. *See id*. These effects are not just physical and mental; unmet medical and mental health needs lead directly to people being unable to participate effectively in their removal proceedings and in bond applications before an Immigration Judge. *See Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, Human Rights Watch & ACLU (2010), at 4, 25-31 (citing research suggesting that "US citizens, particularly those with mental disabilities, have ended up in ICE custody, and that an unknown number of legal permanent residents (LPRs) and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court") (attached as Exhibit 16 to Hodgson Decl.).

Many people arrested under Section 1226 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 City immigration courts, like the putative class and subclass members here, are being kept from their children while detained. *See* 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") at 19-20 (reporting that, on average, indigent people represented through the NYC immigration public defender program had been living in the U.S. for 16 years and that 47% of them had children living with them in the United States) (attached as Exhibit 17 to Hodgson Decl.). Two thirds of those identified in the same report were employed at the time of their arrest, and many were the primary breadwinners

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 and Subclass Members' Ability to Prosecute Individual Lawsuits

Putative class and subclass members—people who have been or will be denied release on bond or recognizance pursuant to the No-Release Policy—face systemic barriers to vindicating their right to an individualized ICE custody determination, which can occur only through individual habeas petitions filed in federal court. A significant percentage of putative class and subclass members are unrepresented during the period of detention prior to their initial appearance, *see* Oshiro Decl. ¶¶ 10; Vera Evaluation at 17 n.34 (explaining that between 50%-64% of individuals appearing at Varick Street were unrepresented prior to their first master calendar hearing), and a large percentage of people in immigration detention do not speak, read, or write English, *see* Vera Evaluation at 20 (stating that English is not primary language for 69% of people detained by the NYFO). And both ICE's own internal memos and a report by the American Civil Liberties Union estimate that around fifteen percent of people in ICE detention have mental health disabilities. Dana Priest & Amy Goldstein, *Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, Wash. Post (May 13, 2008) (attached as Exhibit 18 to Hodgson Decl.); *Deportation by Default* at 3.

Putative Class and Subclass Representative Mr. Velesaca

Putative class and subclass representative Mr. Velesaca is currently in the custody of the NYFO at the Orange County Correctional Facility. Declaration of Jose L. Velesaca ("Velesaca Decl.") ¶ 2. ICE took custody of Mr. Velesaca on January 30, 2020. *See id.* ¶ 2. Like all members of the putative class, Mr. Velesaca did not receive an individualized ICE custody determination, did not have an opportunity to be considered for release on recognizance or on an

ICE bond, and did not have the appropriateness of his continued detention considered by ICE in light of his risk of flight, danger to the community, or special vulnerabilities such as a disability. Mr. Velesaca has lived in New York State for over a decade. Velesaca Decl. ¶ 1. He has two young children who are U.S. citizens. *Id.* Several other members of Mr. Velesaca's family are also U.S. citizens or green-card holders living in New York State. *Id*. Mr. Velesaca was the victim of a violent assault and continues to suffer psychological harm as a result. *Id.* ¶¶ 3-6. This includes constantly feeling nervous and anxious in a way that significantly interferes with his daily life, including his sleep. *Id.* ¶¶ 4-5. Mr. Velesaca's continued detention only makes these symptoms worse. *Id.* ¶¶ 5-6. Mr. Velesaca also suffers from diabetes. *Id.* ¶ 7. As such, Mr. Velesaca is a qualified individual with a disability under the Rehabilitation Act and its implementing regulations. *See* 29 U.S.C. § 795(20); 6 C.F.R. § 15.3(d), (e).

ARGUMENT

The petitioners move for certification of the Petitioner Class, defined as follows:

> **All individuals eligible to be considered for bond or release on recognizance under 8 U.S.C. § 1226(a)(1)-(2) by ICE's New York Field Office who have been or will be detained without bond.**

The petitioners also move for certification of the Rehabilitation Act Subclass, defined as follows:

> **All individuals with a disability, as defined by the Rehabilitation Act and its implementing regulations, who are eligible to be considered for bond or release on recognizance under 8 U.S.C. § 1226(a)(1)-(2) by ICE's New York Field Office and who have been or will be detained without bond.**

The Court should certify the proposed class and subclass because they meet 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). In addition, these proposed classes qualify as representative habeas classes 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. *See, e.g.*, *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); *Abdi v. Duke*, 323 F.R.D. 131, 145 (W.D.N.Y. 2017) (certifying class of detained immigrants challenging denial of parole); *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 AND SUBCLASS SATISFY RULE 23(a).

A. The Proposed Class and Subclass Are Sufficiently Numerous.

The proposed class and subclass satisfy the requirement that they 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).

Here, the proposed Petitioner Class is sufficiently numerous. In 2018, the NYFO denied release to more than 1,800 people it considered eligible for release; and in the first nine months of 2019 it denied release to over 760 such individuals. *See* Hausman Decl. ¶ 21. The definition also includes additional people who will flow into the class as the NYFO continues to arrest

more people in the future. 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).

Similarly, the proposed Rehabilitation Act Subclass is sufficiently numerous. Internal ICE memos estimate that about 15% of the individuals it detains have mental health disabilities, which is consistent with reports by other organizations. *See* discussion *supra* at 10. The total number of people with all types of disabilities well exceeds this number.

Not only are the proposed Petitioner Class and Rehabilitation Act Subclass presumptively proper because of their sizes, joinder of all putative class and subclass members' claims is impracticable for additional reasons. This class and subclass include people with limited English proficiency who are indigent and often unfamiliar with the U.S. judicial system, *see* Vera Evaluation at 20, 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). Compounding these disadvantages is the fluidity of a class of detained people and the inherent difficulties that detained people 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 significant percentage of putative class and subclass members are unrepresented during the period before their initial appearance in immigration court and would have difficulty litigating their cases individually. *See* Vera Evaluation at 5, 17 n.34 (explaining that between 50%-64% of individuals were unrepresented prior to their first MCH). Finally, hundreds or thousands 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 and subclass members' claims, it would be difficult, if not impossible, for them to vindicate their rights through individual habeas actions.

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

For both the proposed Petitioner Class and Rehabilitation Act Subclass, 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.*, 126 F.3d at 377 (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).

The commonality requirement is met in this case. Putative class and subclass members are all detained by ICE's NYFO and subject to a common policy: the No-Release Policy. Common questions of law or fact exist as to all proposed class members, including but not limited to the following: (a) whether the respondents have instituted a policy or practice of denying bond or release to virtually all immigration detainees processed through ICE's New

York Field Office without conducting individual assessment of their eligibility for release; (b) whether the government's policy or practice violates the INA and its implementing regulations; (c) whether the government's policy or practice violates the Fifth Amendment to the United States Constitution; (d) whether the government's policy or practice violates the APA. For the subclass, common questions of law and fact include all of those listed above, and also whether the government's policy or practice violates the Rehabilitation Act and its implementing regulations.

Resolution of the legality of the No-Release Policy will resolve the central issue for the class and subclass "in one stroke." *See, e.g.*, *Abdi*, 323 F.R.D. at 141. In *Abdi*, a habeas class of detained asylum-seekers alleged that ICE was failing to conduct individualized parole determinations—in a process akin to the ICE custody determinations at issue here— resulting in blanket parole denials that did not reflect the required analysis of flight risk or danger, and the court held that commonality existed because all the "Petitioners seek compliance with certain procedural safeguards when adjudicating parole." *Id.*;[3] *see also Johnson,* 780 F.3d at 137 ("The claims for relief need not be identical for them to be common; rather, Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members.").

[3] While the court in *Abdi* subsequently decertified a separate subclass of detained people seeking to establish the right to a bond hearing before an Immigration Judge after six months of detention—based on intervening Supreme Court case law going to the merits, which led the court to hold that the claims of this "bond subclass" would fail—that decision did not disturb the court's certification of the "parole subclass," which successfully challenged ICE's failure to provide individualized parole determinations for asylum seekers pursuant to ICE's own guidelines. *See Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019). Indeed, in *Abdi v. McAleenan* the court reiterated that its preliminary injunction requiring ICE "to immediately adjudicate or readjudicate the parole applications of all members of the [parole class]. . . in conformance with [its] legal obligations" remains in effect. *Id.* at 471. Here, the putative class seeks a very similar order and is similarly appropriate for class-wide relief.

Finally, regarding the proposed subclass, when a suit is challenging the "failure to take into account the needs of disabled [individuals]" in establishing a policy, courts will certify classes of individuals with varying kinds of disabilities. *Brooklyn Center for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418-19 (S.D.N.Y. 2012) (collecting cases). Thus, even if "class members have diverse disabilities and will not all be affected . . . [in] the same way . . . '[a] court may find a common issue of law even though there exists some factual variation among class members' specific grievances.'" *Id.* (quoting *Stinson v. City of N.Y.*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012)).

C. Mr. Velesaca's Claims Are Typical of the Proposed Class and Subclass.

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. Velesaca shares with the class and subclass 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 follow the ICE Directive" with respect to parole determinations); *see also Robidoux,* 987 F.2d at 936–37 (noting that, even when "variations in the fact patterns underlying individual claims" are present, typicality exists "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented"); *V.W. by and through Williams v. Conway,* 236 F. Supp. 3d 554, 576 (N.D.N.Y. 2017) (typicality requirement satisfied because the claims of the class representative and the class were "based on the common application of certain challenged policies"). Specifically, Mr. Velesaca has been denied bond or release

pursuant to the No-Release Policy, and the government's system-wide application of this policy to the entire putative class renders Mr. Velesaca's claims typical for Rule 23 purposes. Similarly, Mr. Velesaca suffers from both mental and physical disabilities, and as such is typical of the Rehabilitation Act Subclass.

D. Mr. Velesaca Will Fairly and Adequately Represent the Proposed Class and Subclass.

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. Velesaca has an interest in vigorously pursuing the claims of the class and subclass, as those claims overlap with his own claims for relief. *See* Velesaca Decl. ¶¶ 8-9. He has no interests antagonistic to the interests of other class and subclass members, and he has articulated a particular desire for the government to afford all similarly-situated people the same relief by striking down the policy and ordering the government to provide individual assessments regarding the appropriateness of release based on flight risk, danger to the community, and special vulnerabilities such as disabilities. *See id*.

II. THE PROPOSED CLASS AND SUBCLASS SATISFY RULE 23(b)(2).

In addition to satisfying the requirements of Rule 23(a), this action satisfied those of Rule 23(b)(2) 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 proposed class and subclass by applying the No-Release Policy categorically to deny release or bond to virtually everyone detained pursuant to Section 1226(a). Furthermore, Rule 23(b)(2) applies here because "a single injunction or declaratory judgment"—an order striking down the No-Release Policy—"would provide relief to each member of the class." *Wal-Mart Stores*, 564 U.S. at 360; *see also Abdi*, 323 F.R.D. at 144 (finding that Rule 23(b)(2) was satisfied because ordering the government to conduct individualized parole determinations pursuant to ICE's own directive would provide relief to each member of the class); *V.W.*, 236 F.Supp.3d at 577 (finding 23(b)(2) satisfied where the class sought "an order enjoining defendants from application of the policies and practices resulting in the deprivations at issue"); *L.V.M.*, 318 F. Supp. 3d at 616 (finding Rule 23(b)(2) satisfied because "a single injunction enjoining [a policy that prevented the release of detained children in immigration custody] would eliminate . . . delays" and provide a remedy for the entire class). Similarly, an order requiring ICE to take into account people's disabilities

in individualized custody determinations would provide relief to each member of the Rehabilitation Act Subclass.

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

Proposed class counsel, the New York Civil Liberties Union and The Bronx Defenders, 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 filing a federal Freedom of Information Act lawsuit to gather relevant data, 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. ¶ 7. Beyond this case, counsel have extensive experience in complex federal civil rights litigation seeking systemic reform, *id*. ¶¶ 2-6, and deep knowledge of constitutional and immigration law, having litigated 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*. ¶¶ 2-7.

IV. THE PROPOSED CLASS AND SUBCLASS ALSO QUALIFY AS REPRESENTATIVE HABEAS CLASSES.

The proposed class and subclass also qualify as representative habeas classes 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"), *cert. denied* 95 S.Ct. 1587 (1975). In *Preiser*, the Second Circuit set out 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 detained noncitizens 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 and subclass members are unlawfully detained without a meaningful opportunity to raise these claims prior to their bond hearing in immigration court, which will be weeks or even months after their arrests. By the time of this hearing, the irreparable harm of unjustified detention will already have been done. As a result, these class and subclass members realistically have no other way to obtain the relief sought in this case.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant the motion for class certification, certify the Petitioner Class and Rehabilitation Act Subclass, appoint Jose Velesaca representative of the class and the subclass, and appoint undersigned counsel as counsel for both.

Dated: February 28, 2020
New York, N.Y.

Respectfully Submitted,

/s/ Amy Belsher

AMY BELSHER
ROBERT HODGSON
CHRISTOPHER DUNN
MEGAN SALLOMI
New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, NY 10004
Tel: (212) 607-3300
abelsher@nyclu.org

THOMAS SCOTT-RAILTON*
NIJI JAIN
JENN ROLNICK BORCHETTA
The Bronx Defenders
360 E. 161st Street
Bronx, NY 10451
Tel: (718) 838-7878
njain@bronxdefenders.org

Counsel for Petitioners-Plaintiffs

On the brief: RYAN BREWER

* Law Graduate pending admission, practicing under supervision.