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18 SOUTHERN DISTRICT OF CALIFORNIA
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20 JOSE ORLANDO CANCINO
21 CASTELLAR, ANA MARIA
22 HERNANDEZ AGUAS, MICHAEL
GONZALEZ,

23 Plaintiffs-Petitioners,

24 vs.

25 JOHN F. KELLY, Secretary of
26 Homeland Security, *et al.*,
27

28 Defendants-Respondents.

Case No. 17-cv-00491-BAS-BGS

TIME: TBD

DATE: TBD

CTRM: 4B

DEFENDANTS-RESPONDENTS'
RESPONSE IN OPPOSITION TO
PLAINTIFFS-PETITIONERS MOTION
FOR CLASS CERTIFICATION

**NO ORAL ARGUMENT UNLESS
REQUESTED BY JUDGE**

TABLE OF CONTENTS

TABLE OF AUTHORTIES	iii
I. INTRODUCTION.....	1
II. BACKGROUND.....	1
A. Statutory and Regulatory Background.....	1
1. DHS’s authority to arrest	2
2. Detention of aliens under section 1225.....	3
3. Detention of aliens under section 1226.....	3
4. Removal proceedings before an Immigration Judge	5
B. Overview of Immigration Detention and Scheduling of Hearing in the Southern District of California	6
C. The Named Plaintiffs	7
1. Jose Orlando Cancino Castellar.....	8
2. Ana Maria Hernandez Aguas.....	8
3. Michael Gonzalez	9
III. ARGUMENT	11
A. Statement of the Law	11
B. The Putative Class Fails to Satisfy the Commonality Requirement of Rule 23(a)(2) and Typicality Requirement of Rule 23(a)(3).....	12

1	1. Plaintiffs have failed to meet the commonality requirement	
2	of Rule 23(a)(2).....	14
3	a. Aliens seeking admission	16
4	b. Aliens subject to discretionary detention pending a final	
5	order of removal.....	19
6	c. Criminal aliens	20
7	d. Unaccompanied alien children	21
8		
9	2. Plaintiffs have failed to meet the typicality requirements of	
10	Rule 23(a)(3)	24
11		
12	C. The Proposed Class is Not Entitled to Uniform Relief as a Matter	
13	of Procedural Due Process	26
14	IV. CONCLUSION	26

TABLE OF AUTHORITIES

CASES

<i>Abel v. United States</i> , 362 U.S. 217 (1960)	1
<i>Acevedo-Rojas v. Clark</i> , 2014 WL 6908540 (W.D. Wash. Dec. 8, 2014)	15
<i>Algarin v. Maybelline, LLC</i> , 300 F.R.D. 444 (S.D. Cal. 2014)	12
<i>Am. Immigration Lawyers Ass’n v. Reno</i> , 18 F. Supp. 2d 38 (D.D.C. 1998)	18
<i>Am. Immigration Lawyers Ass’n v. Reno</i> , 199 F.3d 1352 (D.C. Cir. 2000)	18
<i>Armstrong v. Davis</i> , 275 F.3d 849 (9th Cir. 2001)	23
<i>Berger v. Home Depot USA, Inc.</i> , 741 F.3d 1061 (9th Cir. 2014)	12
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	11
<i>Carlson v. Landon</i> , 342 U.S. 524 (1952)	16
<i>Castro v. United States Dep’t of Homeland Sec.</i> , 835 F.3d 422 (3d Cir. 2016)	16, 18
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013)	11
<i>Criollo v. Lynch</i> , 647 F. App’x 731 (9th Cir. 2016)	5
<i>Demore v. Kim</i> , 538 U.S. 510 (2003)	4, 20
<i>DL v. District of Columbia</i> , 302 F.R.D.1 (D.D.C. 2013)	23
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011)	12
<i>Garcia de Rincon v. Dept. of Homeland Sec.</i> , 539 F.3d 1133 (9th Cir. 2008)	19

1	<i>Gayle v. Warden Monmouth Cty. Corr. Inst.</i> ,	
2	838 F.3d 297 (3d Cir. 2016)	21
3	<i>Gen. Tel. Co. of Southwest v. Falcon</i> ,	
4	457 U.S. 147 (1982)	11, 12, 13, 22
5	<i>Giron-Castro v. Asher</i> ,	
6	2014 WL 8397147 (W.D. Wash. Oct. 2, 2014).....	15
7	<i>Hanon v. Dataproducts Corp.</i> ,	
8	976 F.2d 497 (9th Cir. 1992)	13
9	<i>In re Graphics Processing Units Antitrust Litig.</i> ,	
10	253 F.R.D. 478 (N.D. Cal. 2008)	13
11	<i>In re Wireless Facilities, Inc.</i> ,	
12	253 F.R.D. 607 (S.D. Cal. 2008).....	13
13	<i>Kaplan v. Tod</i> ,	
14	267 U.S. 228 (1925)	18
15	<i>Kleindienst v. Mandel</i> ,	
16	408 U.S. 753 (1972)	16
17	<i>Landon v. Plasencia</i> ,	
18	459 U.S. 21 (1982)	18, 25
19	<i>Lujan v. G&G Fire Sprinklers, Inc.</i> ,	
20	532 U.S. 189 (2001)	24
21	<i>Marisol v. Giuliani</i> ,	
22	126 F.3d 372 (2nd Cir. 1997)	23
23	<i>Mathews v. Eldridge</i> ,	
24	424 U.S. 319 (1976)	220, 24, 26
25	<i>Mendoza v. Asher</i> ,	
26	2014 WL 8397145 (W.D. Wash. Sept. 16, 2014)	15
27	<i>Nishimura Ekiu v. United States</i> ,	
28	142 U.S. 651 (1892)	19
	<i>Padilla-Ramirez v. Bible</i> ,	
	2016 WL 1555679 (D. Idaho April 15, 2016).....	15
	<i>Pierre v. Sabol</i> ,	
	2012 WL 1658293 (M.D. Pa. May 11, 2012)	15
	<i>Rodriguez v. Robbins (“Rodriguez II”)</i> ,	
	715 F.3d 1127 (9th Cir. 2013)	3
	<i>Rodriguez v. Robbins (“Rodriguez III”)</i> ,	
	804 F.3d 1060 (9th Cir. 2015)	3, 4

1	<i>Sale v. Haitian Ctrs. Council,</i>	
2	509 U.S. 155 (1993)	18
3	<i>Shaughnessy v. United States ex rel. Mezei,</i>	
4	345 U.S. 206 (1953)	18
5	<i>Tejeda-Mata v. I.N.S.,</i>	
6	626 F.2d 721 (9th Cir. 1980)	2
7	<i>United States ex rel. Knauff v. Shaughnessy,</i>	
8	338 U.S. 537 (1950)	16, 19
9	<i>United States v. Peralta-Sanchez,</i>	
10	847 F.3d 1124 (9th Cir. 2017)	16, 19
11	<i>Utrecht v. Napolitano,</i>	
12	2012 WL 5386618 (D. Neb. Nov. 1, 2012)	15
13	<i>Wal-Mart Stores, Inc. v. Dukes,</i>	
14	564 U.S. 338 (2011)	11, 12, 13, 24
15	<i>Zinser v. Accufix Research Inst., Inc.,</i>	
16	253 F.3d 1180 (9th Cir. 2001)	11
17	ADMINISTRATIVE DECISIONS	
18	<i>Matter of C-B-,</i>	
19	25 I. & N. Dec. 888 (BIA 2012)	5
20	<i>Matter of Joseph,</i>	
21	22 I. & N. Dec. 799 (BIA 1999)	4, 20, 21
22	<i>Matter of Sanchez,</i>	
23	20 I. & N. Dec. 223 (BIA 1990)	4, 19
24	STATUTES	
25	8 U.S.C. § 1182(a)(6)(A)(i)	8, 9
26	8 U.S.C. § 1182(a)(6)(C)	3
27	8 U.S.C. § 1182(a)(7)	3
28	8 U.S.C. § 1182(a)(7)(A)(i)	10
	8 U.S.C. § 1182(b)(5)	3
	8 U.S.C. § 1182(d)(5)	6
	8 U.S.C. § 1187	15
	8 U.S.C. § 1187(c)(2)(E)	23

1	8 U.S.C. § 1225.....	1, 16
2	8 U.S.C. § 1225(a)(1).....	16
3	8 U.S.C. § 1225(b)	3, <i>passim</i>
4	8 U.S.C. § 1225(b)(1).....	17
5	8 U.S.C. § 1225(b)(1)(A)(i)	3, 17
6	8 U.S.C. § 1225(b)(1)(A)(ii)	3, 17
7	8 U.S.C. § 1225(b)(1)(A)(iii)(II).....	16
8	8 U.S.C. § 1225(b)(1)(B)	3
9	8 U.S.C. § 1225(b)(1)(B)(ii)	4, 5, 14, 17
10	8 U.S.C. § 1225(b)(1)(B)(iii)	3
11	8 U.S.C. § 1225(b)(1)(B)(iii)(III)	17
12	8 U.S.C. § 1225(b)(1)(B)(iii)(IV)	14
13	8 U.S.C. § 1225(b)(2).....	7
14	8 U.S.C. § 1225(b)(2)(A).....	14, 15
15	8 U.S.C. § 1226(a)	3, <i>passim</i>
16	8 U.S.C. § 1226(c)	4, <i>passim</i>
17	8 U.S.C. § 1228.....	2
18	8 U.S.C. § 1228(a)(2).....	23
19	8 U.S.C. § 1228(b)	15
20	8 U.S.C. § 1229a	5, 6, 16
21	8 U.S.C. § 1229a(a)(3).....	5
22	8 U.S.C. § 1229a(b)(4).....	17
23	8 U.S.C. § 1229(b)(1).....	5
24	8 U.S.C. § 1231(a)	15
25	8 U.S.C. § 1232(b)(1).....	22
26	8 U.S.C. § 1232(b)(2).....	21
27	8 U.S.C. § 1232(b)(3).....	22, 23
28		

1	8 U.S.C. § 1252(e)	18
2	8 U.S.C. § 1252(e)(1).....	18
3	8 U.S.C. § 1252(e)(1)(A)	17, 18
4	8 U.S.C. § 1252(e)(1)(B)	17, 18
5	8 U.S.C. § 1357(a)(2).....	2
6	REGULATIONS	
7	8 C.F.R. § 208.30	3
8	8 C.F.R. § 235.3(b)	3
9	8 C.F.R. § 235.3(b)(1).....	16
10	8 C.F.R. § 235.3(b)(4).....	3
11	8 C.F.R. § 235.6(a)(1)(ii)	17
12	8 C.F.R. § 236.1(c)(8)	4, 19
13	8 C.F.R. § 236.1(d)(1).....	4, 19
14	8 C.F.R. § 287.3(a).....	2
15	8 C.F.R. § 287.3(b)	2
16	8 C.F.R. § 287.3(d)	2
17	8 C.F.R. § 1003.19	4, 19
18	8 C.F.R. § 1003.19(h)(1)(ii).....	20
19	8 C.F.R. § 1003.19(h)(2)(i)(B).....	3, 7
20	8 C.F.R. § 1003.19(h)(2)(i)(D)	4
21	8 C.F.R. § 1003.19(h)(2)(ii).....	4
22	8 C.F.R. § 1236.1(d)(1).....	4, 19
23	8 C.F.R. § 1239.1(a).....	5
24	8 C.F.R. § 1240.10(c).....	5
25		
26		
27		
28		

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 23(a).....	1, <i>passim</i>
Fed. R. Civ. P. 23(a)(1).....	11
Fed. R. Civ. P. 23(a)(2).....	14, 15
Fed. R. Civ. P. 23(a)(3).....	14, 15, 22
Fed. R. Civ. P. 23(a)(4).....	11
Federal Rule of Civil Procedure 23(b).....	1, 12
Fed. R. Civ. P. 23(b)(1).....	11
Fed. R. Civ. P. 23(b)(2).....	11, 24, 26
Fed. R. Civ. P. 23(b)(3).....	11

MISCELLANEOUS

Richard A. Nagareda, <i>Class Certification in the Age of Aggregate Proof</i> , 84 N.Y.U. L. Rev. 97 (2009)	12
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I. INTRODUCTION

In this putative class action, Plaintiffs attempt to transfer a criminal standard into the realm of civil immigration detention. Named Plaintiffs Jose Cancino Castellar (“Cancino Castellar”), Ana Maria Hernandez Aguas (“Hernandez Aguas”), and Michael Gonzalez (“Gonzalez”) contend that both the Constitution and the Administrative Procedure Act (“APA”) require that aliens who are detained for removal proceedings must be presented before an immigration judge for a probable cause determination (or an initial hearing in removal proceedings) within 48 hours of arrest. Plaintiffs propose this Court create an unworkable remedy that is not required by law or the Constitution and would have this Court apply it to a broad class of individuals detained under a variety of different immigration statutes. The Court should deny certification of this class as it does not meet the commonality or typicality requirements of Federal Rule of Civil Procedure 23(a); the court cannot grant uniform relief under Rule 23(b) to the diverse members of the proposed class; and the class is not entitled to one size-fits-all relief as a matter of due process.

II. BACKGROUND

A. Statutory and Regulatory Background

For nearly a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings without securing a judicial warrant or judicial review of probable cause of removability. *See Abel v. United States*, 362 U.S. 217, 232-37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). Under the INA, the Department of Homeland Security’s (“DHS”) authority to detain aliens who have not yet been ordered removed¹ stems primarily from two sections of Title 8: section 1225, which governs the detention of inadmissible arriving aliens; and section

¹ Section 1231 of Title 8 governs the detention of aliens who have been ordered removed.

1 1226, which allows for the detention of any alien in removal proceedings.² As described
 2 below, the time that any particular alien spends detained prior to appearing before an
 3 immigration judge may vary greatly depending on the statute authorizing detention, and
 4 the facts of each individual alien's case.

5 **1. DHS's authority to arrest**

6 Immigration officials are empowered to perform the warrantless arrest of:

7 [A]ny alien in the United States, if he has reason to believe that the alien so
 8 arrested is in the United States in violation of any such law or regulation and
 9 is likely to escape before a warrant can be obtained for his arrest, but the
 10 alien arrestee shall be taken without unnecessary delay . . . before an officer
 11 of the Service having authority to examine aliens as to their right to enter or
 remain in the United States.

12 8 U.S.C. § 1357(a)(2). "Reason to believe" has been equated with the constitutional
 13 requirement of probable cause. *See Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir.
 14 1980) (internal citations omitted).

15 The regulations implementing this statute explain that "an alien arrested without a
 16 warrant of arrest . . . will be examined by an officer other than the arresting officer." 8
 17 C.F.R. § 287.3(a). "If the examining officer is satisfied that there is prima facie evidence
 18 that the arrested alien . . . is present in the United States in violation of the immigration
 19 laws, the officer will either refer the case to an immigration judge for further inquiry . . . ,
 20 order the alien removed . . . , or take whatever other action may be appropriate or required
 21 under the laws or regulations applicable to the particular case. *Id.* at § 287.3(a)-(b). DHS
 22 ordinarily will make an initial determination within 48 hours of the apprehension whether
 23 the alien will remain in custody, be paroled, be released on bond or released on
 24 recognizance.³ 8 C.F.R. § 287.3(d).

25 ² Some aliens are also detained under 8 U.S.C. § 1228 (providing for expedited removal
 26 of aliens convicted of committing aggravated felonies).

27 ³ A custody determination is made within 48 hours of the arrest "except in the event of an
 28 emergency or other extraordinary circumstances in which case a determination will be
 made within an additional reasonable period of time." 8 C.F.R. § 287.3(d)

1 **2. Detention of aliens under section 1225**

2 Section 1225 applies to aliens seeking admission to the United States, including
 3 arriving aliens and those subject to expedited removal 8 U.S.C. § 1225(b); 8 C.F.R. §
 4 235.3(b). If an immigration officer determines that an alien seeking admission lacks valid
 5 documents or is inadmissible due to fraud or misrepresentation, the officer “shall order the
 6 alien removed from the United States without further hearing.” 8 U.S.C.
 7 § 1225(b)(1)(A)(i); *see also* 8 § U.S.C. 1182(a)(6)(C) and (7). If the alien indicates an
 8 intention to apply for asylum or expresses a fear of persecution or torture, an asylum
 9 officer must determine whether the alien has a credible fear. 8 U.S.C. § 1225(b)(1)(A)(ii)
 10 and (B); 8 C.F.R. §§ 208.30, 235.3(b)(4). If such an alien is found to lack (or never
 11 asserts) a credible fear, he “shall be detained” until removed. 8 U.S.C. § 1225(b)(1)(A)(i),
 12 (B)(iii). If he is found to have a credible fear, he “shall be detained for further
 13 consideration of the application for asylum” by an immigration judge. *Id.*
 14 § 1225(b)(1)(B)(ii).⁴

15 **3. Detention of aliens under section 1226**

16 The general detention authority for aliens in removal proceedings is governed by 8
 17 U.S.C. § 1226(a). Under this section, “an alien may be arrested and detained,” on
 18 issuance of a warrant, “pending a decision on whether the alien is to be removed from the
 19 United States.” 8 U.S.C. § 1226(a). Aliens detained under 8 U.S.C. § 1226(a) are
 20 automatically assessed for bond eligibility, and may be released on bond if “the alien. . .
 21 demonstrate[s] to the satisfaction of the officer that such release would not pose a danger
 22

23 ⁴ Immigration judges do not have authority to release aliens arriving at a port of entry on
 24 bond, although these aliens may be eligible for parole, pursuant to 8 U.S.C. § 1182(b)(5).
 25 *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (“[A]n immigration judge may not redetermine
 26 conditions of custody imposed by [DHS] with respect to . . . [a]rriving aliens in removal
 27 proceedings.”); *but see Rodriguez v. Robbins* (“*Rodriguez III*”), 804 F.3d 1060, 1082-84
 28 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (June 20,
 2016) (No. 15-1204), (upholding *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013)
 (“*Rodriguez II*”) and requiring a bond hearing for aliens detained under § 1225(b) at the
 six month mark).

1 to property or persons, and that the alien is likely to appear for any future proceeding.”
 2 8 C.F.R. § 236.1(c)(8). An alien who is denied bond may request a custody
 3 redetermination hearing conducted by an immigration judge at any time before the final
 4 order of removal is issued. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1),
 5 1003.19; *see also Matter of Sanchez*, 20 I. & N. Dec. 223, 225 (BIA 1990).

6 Certain criminal and terrorist aliens are held pursuant to 8 U.S.C. 1226(c),⁵ which
 7 prohibits their release during their removal proceedings. Congress enacted this mandate
 8 “justifiably concerned that deportable criminal aliens who are not detained continue to
 9 engage in crime and fail to appear for their removal hearings in large numbers.” *Demore*
 10 *v. Kim*, 538 U.S. 510, 513 (2003). An individual detained under § 1226(c) may ask an
 11 immigration judge to reconsider whether the mandatory detention provision applies to
 12 him. *See* 8 C.F.R. § 1003.19(h)(2)(ii). At this hearing, called a “Joseph hearing,” a
 13 detainee “may avoid mandatory detention by demonstrating that he is not an alien, was not
 14 convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to
 15 establish that he is in fact subject to mandatory detention.” *Demore*, 538 U.S. at 514 n. 3;
 16 *see also Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Immigration judges,
 17 however, do not have authority to release aliens detained under § 1226(c) on bond. *See*
 18 8 C.F.R. § 1003.19(h)(2)(i)(D) (“[A]n immigration judge may not redetermine conditions
 19 of custody imposed by [DHS] with respect to . . . [a]liens in removal proceedings subject
 20 to section 236(c)(1) of the Act”); *but see Rodriguez III*, 804 F.3d at 1079-81
 21 (upholding *Rodriguez II* and requiring a bond hearing for aliens detained under § 1226(c)
 22 at the six month mark).

23
 24
 25
 26 ⁵ None of the named plaintiffs are detained under 8 U.S.C. § 1226(c). However,
 27 Plaintiffs’ proposed class includes “all individuals . . . other than those with final removal
 28 orders, who are or will be detained by DHS more than 48 hours without a hearing before
 an immigration judge . . .” Compl., at ¶ 68.

4. *Removal proceedings before an Immigration Judge*

With certain exceptions, such as expedited removal proceedings, removal proceedings under section 240 of the INA, 8 U.S.C. § 1229a, provide the “sole and exclusive procedure” for determining whether an alien may be removed from the United States. 8 U.S.C. § 1229a(a)(3). Every removal proceeding conducted under this section is commenced by DHS’s filing of a notice to appear (“NTA”) with the immigration court, which is part of the U.S. Department of Justice Executive Office for Immigration Review (“EOIR”). 8 C.F.R. § 1239.1(a).

The first removal hearing in immigration court is referred to as the “initial master calendar hearing.” By statute, “in order to allow the alien time to obtain representation . . . the first hearing date in proceedings under section 240 . . . shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests an earlier hearing date.” 8 U.S.C. § 1229(b)(1). Likewise, if an alien is *pro se* and requests more time to obtain the assistance of an attorney at the initial master calendar hearing, the immigration judge must grant a continuance. *Matter of C-B-*, 25 I. & N. Dec. 888, 889 (BIA 2012); cf. *Criollo v. Lynch*, 647 F. App’x 731, 732 (9th Cir. 2016) (agreeing with the BIA’s holding in *Matter of C-B-* that an immigration judge must advise a respondent of forms of relief to which he is eligible, such as voluntary departure). “The immigration judge shall require the [alien] to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein.” 8 C.F.R. § 1240.10(c). When an “immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.” *Id.* A separate hearing called a merits hearing is conducted to determine any issues of removability and to hear any application for relief or protection from removal filed by the alien.

B. Overview of Immigration Detention and Scheduling of Hearing in the Southern District of California

In the Southern District of California, when an alien is apprehended between ports of entry or encountered at a port of entry by U.S. Customs and Border Protection (“CBP”), he or she is inspected, which includes a determination of alienage and an initial determination of admissibility. This inspection normally occurs at a Border Patrol station or a port of entry. There are three Border Patrol Sectors operating within the jurisdiction of the Southern District of California: San Diego Sector (comprised of eight Border Patrol stations), El Centro Sector (comprised of three Border Patrol stations), and Yuma Sector (comprised of three Border Patrol stations). See <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors> (last visited May 22, 2017). There are also several ports of entry: San Diego, San Ysidro, Otay Mesa, Tecate, Calexico, and Andrade. See <https://www.cbp.gov/contact/ports/ca> (last visited May 22, 2017). Aliens who are determined to be inadmissible are normally placed in appropriate proceedings, such as removal proceedings under 8 U.S.C. § 1229a or expedited removal under 8 U.S.C. § 1225(b).⁶ Those who cannot be immediately repatriated are transferred from CBP to U.S. Immigration and Customs Enforcement (“ICE”), Enforcement and Removal Operations (“ERO”), as expeditiously as possible. See U.S. Customs and Border Protection National Standards on Transport, Escort, Detention, and Search at Section 1.8, available at https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005_1.pdf.

Most aliens detained in the Southern District of California are detained at the Otay Mesa Regional Detention Facility or the Imperial Regional Detention Facility.⁷ At the discretion of ERO, some aliens may be transferred to detention facilities outside the

⁶ In certain cases an individual may be paroled consistent with 8 U.S.C. § 1182(d)(5) to the custody of state, local or federal entities for criminal prosecution.

⁷ None of the named plaintiffs are (or ever were) detained at the Imperial Regional Detention Facility.

1 Southern District of California. The Otay Mesa Immigration Court has jurisdiction over
 2 aliens detained at the Otay Mesa Regional Detention Facility, prioritizes cases involving
 3 detained aliens to avoid lengthy detention pending removal proceedings. See Dep't of
 4 Justice, Administrative Review and Appeals: FY 2017 Performance Budget,
 5 Congressional Budget Submission 19 (EOIR Budget Request).

6 When ICE detains an alien pursuant to 8 U.S.C. § 1226(a), pending removal, ICE
 7 provides the alien with a Form I-286, Notice of Custody Determination. The Form I-286
 8 contains a check-box for the alien to request a bond hearing before an immigration judge.
 9 DHS ordinarily files the Form I-286 at the Immigration Court simultaneously with the
 10 NTA. The Otay Mesa Immigration Court automatically schedules a bond hearing for any
 11 such alien who has checked the box on the Form I-286 requesting such a hearing. Bond
 12 hearings are not scheduled for arriving aliens detained under 8 U.S.C. § 1225(b), however,
 13 because an immigration judge has no jurisdiction to hold a bond hearing for such aliens.
 14 See 8 C.F.R. § 1003.19(h)(2)(i)(B).

15 **C. The Named Plaintiffs**⁸

16 Since the filing of this lawsuit, Cancino Castellar and Hernandez Aguas, both of
 17 whom DHS detained under section 1226(a), were released from detention on bond after an
 18 immigration judge completed a custody redetermination. Hernandez Aguas was released
 19 on March 14, 2017, and Cancino Castellar was released on March 28, 2017. Michael
 20 Gonzalez remains detained as an arriving alien applying for admission, pursuant to 8
 21 U.S.C. § 1225(b)(2). Accordingly, he is ineligible for release on bond, or for a custody
 22 redetermination hearing before an immigration judge. The distinctions between the
 23 statutes authorizing the detention of the named Plaintiffs are one of the many reasons class
 24 certification is not appropriate here.

27 ⁸ All references to exhibits are to those exhibits filed with the Memorandum in
 28 Support of Defendants' Motion to Dismiss. ECF No. 28-2.

1 **1. Jose Orlando Cancino Castellar**

2 Cancino Castellar is a native and citizen of Mexico. Complaint (“Compl.”), ECF
 3 No. 1 at ¶ 9. On February 17, 2017, he was taken into ICE custody. *Id.* at ¶ 47. He was
 4 detained in the Otay Mesa Regional Detention Facility on February 18, 2017.⁹ *Id.* On
 5 February 21, 2017, DHS executed a warrant for arrest and issued a notice of custody
 6 determination (Form I-286), on which Cancino Castellar marked the box to request an
 7 Immigration Judge (“IJ”) custody review. *Id.*; *see also* Exhibit (“Exh.”) D, Form I-286.
 8 Also on February 21, 2017, ICE issued an NTA charging Cancino Castellar with
 9 removability as an alien present in the United States without being admitted or paroled,
 10 under 8 U.S.C. § 1182(a)(6)(A)(i). Exh. A, NTA. Cancino Castellar also signed a
 11 “Detainee Calendar Screening Questionnaire” indicating, among other things, that he
 12 speaks English, that he received a copy of the NTA, that he was not afraid to return to his
 13 home country, that he was not a permanent or temporary resident of the United States, and
 14 that he did not have a pending petition for legal status. Exh. B, Questionnaire. ICE filed
 15 the NTA with the immigration court on February 24, 2017. Exh. A, NTA.

16 On March 8, 2017, before this lawsuit was filed, the Otay Mesa Immigration Court
 17 scheduled his initial master calendar hearing, which was held on March 23, 2017. Exh. C,
 18 Notice of Hearing. He had a bond hearing on March 27, 2017 and was released on bond
 19 on March 28, 2017. Exh. E, Proof of Release.

20 **2. Ana Maria Hernandez Aguas**

21 Hernandez Aguas is a native and citizen of Mexico. Compl., at ¶ 10. On February
 22 7, 2017, CBP took Hernandez Aguas into custody. *Id.* at ¶ 48; Exh. F, Warrant for Arrest.
 23 CBP executed a warrant for her arrest and issued an I-286, on which Hernandez Aguas
 24 marked the box to request an immigration judge custody review. Exh. F, Warrant; Exh G,
 25 I-286. She also signed a “Detainee Calendar Screening Questionnaire” on that date

26 _____
 27 ⁹ Cancino Castellar was held at Otay Mesa as a “Room and Board” from Friday Feb. 17
 28 through Tuesday Feb. 21 because it was a holiday weekend. He was processed with a
 NTA on the first business day following apprehension, Feb 21, 2017. Exh. A, NTA.

1 indicating, among other things, that she wanted time to obtain an attorney. Exh. H,
 2 Detainee Questionnaire. On February 7, 2017, she was issued an NTA, which charged her
 3 with removability as an alien present in the United States without being admitted or
 4 paroled, under 8 U.S.C. § 1182(a)(6)(A)(i). Exh I, NTA. The NTA was filed with the
 5 immigration court on February 21, 2017. *Id.*

6 Hernandez Aguas was detained in Chula Vista, California, until February 12, 2017.
 7 Compl., at ¶ 48. On February 12, 2017, Hernandez Aguas was transferred to San Luis,
 8 Arizona. *Id.* There, a DHS officer completed a second “Detainee Calendar Screening
 9 Questionnaire” that indicated, among other things, that Hernandez received a copy of the
 10 NTA, again wanted time to obtain an attorney, was not a permanent resident of the United
 11 States, and did not have a pending petition for legal status. Exh. K, Detainee
 12 Questionnaire. Hernandez Aguas was transferred to Otay Mesa Regional Detention
 13 Facility on February 15, 2017. Compl., at ¶ 48. On February 16, 2017, the immigration
 14 court issued a notice scheduling a custody redetermination hearing to be held on March
 15 13, 2017. *Id.*

16 At the custody determination hearing on March 13, 2017, the immigration judge
 17 granted Hernandez Aguas’s request for bond in the amount of \$2,500. Exh L, Bond
 18 Order. She was released from custody on March 14, 2017. Exh. M, Notice of Release.
 19 Hernandez Aguas’s next removal proceeding is scheduled for July 19, 2017. Exh V,
 20 Hearing Notice.

21 **3. Michael Gonzalez**

22 Michael Gonzalez claims to be a United States citizen, which DHS disputes.¹⁰
 23

24 ¹⁰ On June 13, 1989, Gonzalez was convicted of a violation of 8 U.S.C. § 1326 in the
 25 Eastern District of California in case number CR-S-89-080-EJG under the name Michael
 26 Gonzalez Banuelos. Exh. P, 1989 Conviction. On September 21, 1992, he was again
 27 convicted of the same, illegal re-entry, in the Eastern District of New York in case number
 28 92CR 00101-001-S under the name Fernando Hernandez Valdivia, a/k/a/ Michael
 Gonzalez Banuelos. Exh. Q, 1992 Conviction.

1 Compl., at ¶ 49. He was most recently encountered as an arriving alien on November 17,
2 2016, at the San Ysidro port of entry. *Id.* Gonzalez expressed a fear of persecution in
3 Mexico. *Id.* CBP served him with an I-860 Notice and Order of Expedited Removal on
4 November 18, 2016. Exh. N, I-860. On November 23, 2016, Gonzalez was detained at
5 the Otay Mesa Regional Detention Facility. Compl., at ¶ 49.

6 On December 16, 2016, a USCIS officer found that Gonzalez had a credible fear.
7 Compl., at ¶ 49. On January 9, 2017, ICE revoked Gonzalez's order of expedited removal
8 and served him with a NTA, charging him as removable as an immigrant not in possession
9 of a valid visa or entry document, under 8 U.S.C. § 1182(a)(7)(A)(i). Exh. O, NTA. The
10 NTA was filed with the immigration court on January 19, 2017. *Id.*

11 Gonzalez's initial master calendar hearing on March 14, 2017, was continued so
12 Gonzalez could obtain counsel. Exh. R, Transcript of 3/14/2017 Hearing, at 3-7 (102:7-
13 106:16). At a second master calendar hearing on March 27, 2017, Gonzalez represented
14 himself. Exh. S, Transcript of 3/27/17 Hearing, at 2-3 (107:15- 108:13). Gonzalez
15 claimed to be a United States citizen, and DHS requested additional time to obtain an
16 original birth certificate from Jalisco, Mexico. *Id.* at 4 (110:22). At the March 27, 2017
17 hearing, the immigration judge noted Gonzalez's multiple prior removal proceedings as
18 well as at least two prior convictions and jail time for illegal reentry. *Id.* at 7 (124:10-
19 124:20). At DHS's request, the immigration judge continued the case to April 6, 2017.
20 *Id.* at 5-6 (115:15, 119:1-119:12). At the April 6, 2017 hearing, the immigration judge
21 rejected Gonzalez's claim to U.S. citizenship, based on his prior convictions in federal
22 court for illegal reentry and a certified document from the El Paso, Texas, Clerk's office
23 stating that it had no record of him being born in El Paso, Texas. Exh. T, Transcript of
24 4/6/17 Hearing, at 4 (149:21-149:24 (referring to 142:15-143:4)). The immigration judge
25 sustained the removal charges against Gonzalez. *Id.* He is scheduled for an individual
26 merits hearing on his application for relief on July 24, 2017, at the Otay Mesa immigration
27 court. Exh. U, Hearing Notice.

III. ARGUMENT

A. Statement of the Law

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within this exception, Plaintiffs “must affirmatively demonstrate [their] compliance” with Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The burden is on the party seeking certification of a proposed class to demonstrate satisfaction of the elements required under Rule 23(a), including that: (1) there are sufficiently numerous parties (“numerosity”);¹¹ (2) there are questions of law or fact common to the class (“commonality”); (3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class (“typicality”); and (4) the named plaintiffs will fairly and adequately protect the interests of the class (“adequacy of representation”). See Fed. R. Civ. P. 23(a). The Supreme Court has held that “actual, not presumed, conformance with Rule 23(a) [is] indispensable.” *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). In this case, Plaintiffs seek certification under Rule 23(b)(2), which permits class certification where “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). “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined

¹¹ Defendants do not at this time challenge whether the proposed class meets the numerosity requirement of Rule 23(a)(1) or the adequacy requirement of 23(a)(4), but reserve the right to do so in the future should grounds arise for such a challenge.

1 or declared unlawful only as to all of the class members or as to none of them.” *Wal-*
 2 *Mart Stores, Inc.*, 564 U.S. at 360 (internal quotation omitted). If a court is not convinced
 3 that the plaintiff has fully satisfied all of the requirements in both section (a) and (b) of
 4 Rule 23, the class cannot be certified. *Falcon*, 457 U.S. at 160.

5 When reviewing a motion for class certification, a court may “‘probe behind the
 6 pleadings before coming to rest on the certification question,’ and [] certification is proper
 7 only if ‘the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule
 8 23(a) have been satisfied.’” *Wal-Mart Stores, Inc.*, 564 U.S. at 350-51 (quoting *Falcon*,
 9 457 U.S. at 160-61). Moreover, while not a listed requirement of Rule 23, courts have
 10 also recognized that the proposed class must be “adequately defined and clearly
 11 ascertainable before a class action may proceed.” *Algarin v. Maybelline, LLC*, 300 F.R.D.
 12 444, 454 (S.D. Cal. 2014); see *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n. 3
 13 (9th Cir. 2014).

14 **B. The Putative Class Fails to Satisfy the Commonality Requirement of Rule**
 15 **23(a)(2) and Typicality Requirement of Rule 23(a)(3)**

16 Commonality and typicality are not established here where the Plaintiffs propose an
 17 overbroad class of individuals with varying legal rights, interests, and circumstances, who
 18 are subject to different statutory regimes that govern their detention and removal. Under
 19 Rule 23(a)’s commonality requirement, Plaintiffs must show that a court would be able to
 20 fairly and efficiently resolve the issue raised by the class “in one stroke.” *Wal-Mart*
 21 *Stores, Inc.*, 564 U.S. at 350. “What matters to class certification . . . is not the raising of
 22 common ‘questions’ – even in droves – but, rather the capacity of a classwide proceeding
 23 to generate common answers apt to drive the resolution of the litigation.” *Id.* (quoting
 24 Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L.
 25 Rev. 97, 131-32 (2009)). The Court must examine the merits of the claims as necessary to
 26 determine whether there was a “common pattern or practice that could affect the class as a
 27 whole.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011).

1 The typicality requirement seeks to determine “whether the named plaintiff’s claim
 2 and the class claims are so interrelated that the interests of the class members will be fairly
 3 and adequately protected in their absence.” *Falcon*, 457 U.S. at 157 n.13. Thus, “[t]he
 4 purpose of the typicality requirement is to assure that the interest of the named
 5 representative aligns with the interests of class.” *Hanon v. Dataproducts Corp.*, 976 F.2d
 6 497, 508 (9th Cir. 1992) (internal citations omitted). In other words, a “court must ensure
 7 that the named plaintiffs have incentives that align with those of absent class members so
 8 as to assure that the absentees’ ‘interests will be fairly represented’ and that the absentees’
 9 claims will be adequately pursued.” *In re Graphics Processing Units Antitrust Litig.*, 253
 10 F.R.D. 478, 489–90 (N.D. Cal. 2008) (internal citation and quotations omitted); *see also*
 11 *In re Wireless Facilities, Inc.*, 253 F.R.D. 607, 611 (S.D. Cal. 2008) (finding the Rule
 12 23(a)(3) typicality requirement satisfied where “the proof Lead Plaintiff would need to
 13 establish its claims would also prove the claims of the proposed . . . Class.”).

14 Rule 23(a)’s commonality and typicality requirements occasionally merge: “[b]oth
 15 serve as guideposts for determining whether under the particular circumstances
 16 maintenance of a class action is economical and whether the named plaintiff’s claim and
 17 the class claims are so interrelated that the interests of the class members will be fairly and
 18 adequately protected in their absence.” *Wal-Mart, Inc.*, 564 U.S. 349 n.5.

19 Plaintiffs propose a class of:

20 All individuals in the Southern District of California, other than those with
 21 final removal orders, who are or will be detained by DHS more than 48 hours
 22 without a hearing before an Immigration Judge or judicial review of whether
 their detention is justified by probable cause.

23 Compl. ¶ 68; ECF No. 2-1, at 7 (“Mot. for Class Cert.”). Plaintiffs’ proposed class lacks
 24 commonality for the same reason that it lacks typicality: the proposed class includes
 25 individuals with varying factual circumstances, varying legal rights and interests, and
 26 who are subject to different statutory regimes governing their detention and removal,
 27 some of which drastically differ from the circumstances of the named Plaintiffs. Where,
 28

as here, the putative class is comprised of a hodgepodge of legal and factual issues, commonality and typicality are not established. Fed. R. Civ. P. 23(a)(2), (3).

1. Plaintiffs have failed to meet the commonality requirement of Rule 23(a)(2).

Plaintiffs' proposed class includes all individuals who are detained for more than 48 hours, other than those with a final order of removal. Although Plaintiffs argue that several questions are common to the entire class, in fact, these questions demonstrate that this proposed class lacks commonality. See Mot. for Class Cert., at 9. As an initial matter, each of the six purported common issues raised by Plaintiffs relies on the misplaced assumption that if an individual detained by DHS is not brought before an immigration judge within 48 hours, there has been a delay in judicial presentment. See ECF No. 28-1, Memo in Support of Def.'s Mot. to Dismiss, at 17-36. Plaintiffs posit that it is this delay in presentment to an immigration judge violates the Constitution and the Administrative Procedure Act. Mot. for Class Cert., at 9. Yet, the question of when an alien first sees an immigration judge varies based on the multiple statutes of detention within the Immigration and Nationality Act ("INA"), as well as the unique factual circumstances surrounding each alien's detention. Thus, in order to determine whether a particular alien had been delayed in his presentment to an immigration judge, the Court would not only have to determine the statutory basis for that alien's detention, but also whether that specific statute violates the Constitution or the APA. Neither this question, nor its answer, is common to all members of Plaintiffs' proposed class.

Under the INA, an alien without a final order of removal may be detained pursuant to one of several specific statutory provisions including 8 U.S.C. §§ 1225(b)(1)(B)(ii),¹² (b)(1)(B)(iii)(IV),¹³ and (b)(2)(A),¹⁴ 8 U.S.C. §§ 1226(a)¹⁵ and 1226(c).¹⁶ Thus, the

¹² Section 1225(b)(1)(B)(ii) provides that, if an asylum officer determines that an alien in expedited removal proceedings has a credible fear of persecution, the alien "shall be detained for further consideration of the application for asylum."

¹³ Section 1225(b)(1)(B)(iii)(IV) provides for mandatory detention of aliens in expedited

question of why an alien is detained is a multi-factor inquiry based on the location of the individual's apprehension, the relief he may be seeking, and any criminal or immigration history. The following categories of detained aliens provide a glimpse into the complexities of the various detention statutes, as well as the various classes of aliens that would be included in Plaintiffs' proposed class.¹⁷

removal proceedings pending a final determination of whether the alien has a credible fear of persecution.

¹⁴ Section 1225(b)(2)(A) requires the detention of any arriving alien whom the immigration officer determines is "not clearly and beyond a doubt entitled to be admitted."

¹⁵ Section 1226(a) provides for detention, subject to bond, "pending a decision on whether the alien is to be removed from the United States."

¹⁶ Section 1226(c) requires mandatory detention of certain categories of criminal aliens, and aliens who are deemed national security risks.

¹⁷ This breakdown of categories of aliens covered by the Plaintiffs' proposed class is not exhaustive as it is unclear whether other classes of detained aliens would be included in this class definition. For example, district courts have split as to whether an alien with a reinstated order of removal who is detained while in withholding-only proceedings is detained pursuant to 8 U.S.C. § 1226(a) or 8 U.S.C. § 1231(a) (governing detention of those with final orders of removal). *See, e.g., Padilla-Ramirez v. Bible*, 2016 WL 1555679 at *3-4 (D. Idaho April 15, 2016) (an alien subject to a reinstated removal order and in withholding of removal proceedings is detained under 8 U.S.C. § 1231(a)); *Acevedo-Rojas v. Clark*, 2014 WL 6908540 at *5 (W.D. Wash. Dec. 8, 2014) (same); *Giron-Castro v. Asher*, 2014 WL 8397147 at *2 (W.D. Wash. Oct. 2, 2014) (same); *but see, e.g., Mendoza v. Asher*, 2014 WL 8397145 at *2 (W.D. Wash. Sept. 16, 2014) (an alien who is subject to a reinstated removal order and who has expressed a fear of persecution and instituted withholding of removal proceedings is detained under 8 U.S.C. § 1226(a)); *Utrecht v. Napolitano*, 2012 WL 5386618 at *2 (D. Neb. Nov. 1, 2012) (same); *Pierre v. Sabol*, 2012 WL 1658293 at *4 (M.D. Pa. May 11, 2012) (same). Thus, this Court would first have to determine whether it considers this sub-class of detainees to have a final order of removal in order to define the parameters of the class. Other classes of aliens possibly included in this definition are those removed under 8 U.S.C. § 1228(b) (expedited removal of aggravated felons) and 8 U.S.C. § 1187 (visa waiver program violators). This lack of clarity is yet another reason this Court should deny the motion for class certification.

1 a. Aliens seeking admission

2 The first group of aliens that Plaintiffs’ proposed class captures are aliens seeking
 3 admission to the United States. This is an exceptionally broad category that includes
 4 aliens who are placed in expedited removal proceedings and can be removed from the
 5 country without a hearing before an immigration judge. It also includes aliens who during
 6 the expedited removal process express a fear of persecution and either request a negative
 7 credible fear review by an immigration judge, or, if found to have a credible fear of
 8 persecution, are referred to an immigration judge for removal proceedings under 8 U.S.C.
 9 § 1229a. Expedited removal proceedings under 8 U.S.C. § 1225 are limited to aliens
 10 arriving in the United States, “whether or not at a designated port of arrival;” and “aliens
 11 (1) who are physically present in the U.S. without having been admitted or paroled, (2)
 12 who are found within 100 air miles of the U.S. international land border, and (3) who
 13 cannot establish that they have been physically present in the United States for the
 14 immediately preceding fourteen days.” *United States v. Peralta-Sanchez*, 847 F.3d 1124,
 15 1130 (9th Cir. 2017) (citing 8 U.S.C. §§ 1225(a)(1), (b)(1)(A)(iii)(II); 8 C.F.R.
 16 § 235.3(b)(1); 69 Fed. Reg. at 48880) (internal quotations omitted).

17 For those aliens found inadmissible at a port of entry, as well as those apprehended
 18 between the ports of entry and subject to expedite removal, Congress has plenary power to
 19 define the process provided to such aliens. *See e.g., Kleindienst v. Mandel*, 408 U.S. 753,
 20 766 (1972); *Peralta-Sanchez*, 847 F.3d at 1135-36; *Castro v. United States Dep’t of*
 21 *Homeland Sec.*, 835 F.3d 422, 445-46 (3d Cir. 2016). As the Supreme Court has long
 22 held, in those circumstances, “[w]hatever the procedure authorized by Congress is, it is
 23 due process as far as an alien denied entry is concerned” and “it is not within the province
 24 of any court, unless expressly authorized by law, to review the determination of the
 25 political branch of the Government to exclude a given alien.” *United States ex rel. Knauff*
 26 *v. Shaughnessy*, 338 U.S. 537, 543-44 (1950); *see also Carlson v. Landon*, 342 U.S. 524,
 27 537 (1952) (“The power to expel aliens is essentially a power of the political branches of
 28

1 government, which may be exercised entirely through executive officers, with such
 2 opportunity for judicial review of their action as Congress may see fit to authorize or
 3 permit.”).

4 For aliens subject to expedited removal, Congress has provided that an immigration
 5 officer shall order the alien removed from the United States without a hearing before an
 6 immigration judge unless the alien indicates an intention to apply for asylum or expresses
 7 a fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i). If the alien expresses a fear of
 8 persecution, the alien is referred to an asylum officer for a credible fear interview.
 9 8 U.S.C. § 1225(b)(1)(A)(ii). If the asylum officer finds that the alien does not have a
 10 credible fear, the alien shall be removed subject to a limited opportunity to request review
 11 by an immigration judge of the asylum officer’s negative credible fear determination.
 12 8 U.S.C. § 1225(b)(1)(B)(iii)(III).¹⁸ If the asylum officer finds that the alien has expressed
 13 a credible fear of persecution, the alien is referred to an immigration judge for removal
 14 proceedings. 8 U.S.C. § 1225(b)(1)(B)(ii), 8 C.F.R. § 235.6(a)(1)(ii). With few
 15 exceptions, such aliens are not entitled to a bond hearing and may only be released from
 16 custody subject to DHS’s parole power. *See* fns. 11-13, *supra*.

17 Under Plaintiffs’ expansive class definition, all aliens seeking admission to the
 18 United States, including those who are in expedited removal proceedings, could possibly
 19 be members of the class. This membership, however, is expressly prohibited by 8 U.S.C.
 20 § 1252(e)(1)(A) and (B). Section 1252(e)(1)(A) provides in no uncertain terms that “no
 21 court may enter declaratory, injunctive, or other equitable relief in any action pertaining to
 22 an order to exclude an alien in accordance with section 8 U.S.C. § 1225(b)(1) except as
 23

24 ¹⁸ An alien’s rights during a negative credible fear review hearing are not co-extensive
 25 with the statutory rights provided to aliens in removal proceedings. *Compare* 8 U.S.C.
 26 § 1225(b)(1)(B)(iii)(III), *with* 8 U.S.C. § 1229a(b)(4). Therefore requiring an alien who is
 27 subject to expedited removal proceedings to appear before an immigration judge prior to
 28 DHS making a determination regarding whether the alien expressed a credible fear would
 at best cause confusion, especially for an alien later found to not have a credible fear, and
 worse interfere with timely completion of the credible fear process.

specifically authorized in a subsequent paragraph of this subsection.” 8 U.S.C. § 1252(e)(1)(A). Section 1252(e)(1)(B) prohibits a court from certifying a class under Rule 23 “in any action for which judicial review is authorized under a subsequent paragraph of this section.” 8 U.S.C. § 1252(e)(1). Congress has specifically barred class actions challenging the expedited removal processes or allowing for injunctive relief outside of the stricture of section 1252(e). Thus, this Court should deny Plaintiffs’ motion for class certification as the proposed class cannot include aliens seeking admission and placed in expedited removal proceedings. *See Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1359 (D.C. Cir. 2000).

Even if this Court disagrees that the statute precludes the inclusion of this group of aliens, the breadth of the class prevents the Plaintiffs from presenting a common question of law. For each class member, Plaintiffs argue that a delayed presentment before an immigration judge violates the Constitution and the APA. Compl., at ¶¶ 75-84. The Supreme Court and the Ninth Circuit, however, have found on multiple occasions that aliens placed in expedited removal proceedings are not entitled to the full panoply of procedural rights enjoyed by other aliens.¹⁹ *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for

¹⁹ Aliens apprehended between the ports of entry and subject to expedited removal also fall within the so-called “entry fiction.” *See Castro*, 835 F.3d at 445-46. That is, although aliens seeking admission into the United States who lack such connections “may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country.” *Am. Immigration Lawyers Ass’n v. Reno*, 18 F. Supp. 2d 38, 59 (D.D.C. 1998). *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 175 (1993) (discussing entry fiction); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (though present in the United States, excluded alien “was still in theory of law at the boundary line and had gained no foothold in the United States”).

the power to admit or exclude aliens is a sovereign prerogative.” (citing *Knauff*, 338 U.S. at 542; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892)); *Peralta-Sanchez*, 847 F.3d at 1139 (finding no due process violation where alien in expedited removal hearing denied counsel); *Garcia de Rincon v. Dept. of Homeland Sec.*, 539 F.3d 1133, 1141 (9th Cir. 2008) (A non-resident alien seeking entry at the border into the United States has no constitutional due process right to challenge her immigration status or to petition for entry into the United States. . . . The Supreme Court has held that the discretion of Congress to determine which and on what basis aliens may enter this country is paramount.”). Thus, these aliens are in a legally distinct posture from other members of the Plaintiffs’ proposed class, and common questions of law do not exist between this category of aliens and others in Plaintiffs’ proposed class.

b. Aliens subject to discretionary detention pending a final order of removal

The proposed class also covers those aliens held in the government’s discretion under 8 U.S.C. § 1226(a). Both Cancino Castellar and Hernandez Aguas were detained pursuant to this statute, which gives the government general authority to detain an alien “pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Aliens detained under § 1226(a) are automatically assessed for bond eligibility, and may be released on bond if “the alien. . . demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien who is denied release (or who thinks the amount set by DHS is too high) may request a custody redetermination hearing conducted by an immigration judge at any time including before the notice to appear has been filed with the immigration court. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19; *see also Matter of Sanchez*, 20 I. & N. Dec. 223.

This subset of detained aliens again raises separate legal and factual issues from aliens detained under different statutes. First, there are various reasons that an alien may

1 be detained under § 1226(a) for any length of time. An individual's time in detention
 2 could be extended due to the alien's own needs, such as a request for additional time to
 3 find counsel or to obtain documentation of claims for relief, or due to operational matters,
 4 such as an apprehension on the Friday before a holiday weekend. Plaintiffs ask this Court
 5 to ignore such factors and simply set a bright-line rule requiring *all aliens* to receive an
 6 initial hearing at 48 hours, relying on the unsupported notion that the Constitution and the
 7 APA requires such. Compl., at 22-23 (Prayer for Relief). To reach this conclusion,
 8 however, the Court would need to assess the constitutionality of immigration detention
 9 under 8 U.S.C. § 1226(a), weighing the private interests of the aliens that will be affected,
 10 with the risk of erroneous deprivation of that interest under the current procedures, and the
 11 interests of the government. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). This
 12 constitutional analysis is a separate inquiry from that required to review the other
 13 detention statutes at issue in this case and the proposed class lacks a common question of
 14 law or fact.

15 c. Criminal aliens

16 Although none of the named plaintiffs are held as criminal aliens, Plaintiffs'
 17 proposed class includes aliens who are mandatorily detained under 8 U.S.C. § 1226(c).
 18 Under this statute, certain criminal aliens are subject to mandatory detention, without a
 19 bond hearing, unlike those noncriminal aliens detained under § 1226(a). If an alien
 20 subject to detention under § 1226(c) claims that he or she is not covered by this provision,
 21 he may request a "Joseph hearing." *Demore*, 538 U.S. at 514 n. 3; *see also Matter of*
 22 *Joseph*, 22 I. & N. Dec. 799 (BIA 1999); 8 C.F.R. § 1003.19(h)(1)(ii) (providing that an
 23 alien may seek a "determination by an immigration judge that the alien is not properly
 24 included" within § 1226(c)). This hearing provides an alien "the opportunity to offer
 25 evidence and legal authority on the question whether the [government] has properly
 26
 27
 28

1 included him within a category that is subject to mandatory detention.” *Matter of Joseph*,
 2 22 I. & N. Dec. at 805.²⁰

3 Aliens detained under § 1226(c) present starkly distinct detention issues from those
 4 detained as aliens seeking admission or non-criminal aliens. Thus, any initial hearing
 5 provided to these aliens would necessarily focus not only on whether the individual is an
 6 alien, but also on whether his predicate crime falls within the categories outlined in
 7 § 1226(c). The facts and analysis necessary to determine whether the constitutional and
 8 statutory rights of those aliens detained pursuant to § 1226(c) have been violated are
 9 distinct from the other classes of detained aliens. By including these individuals in the
 10 proposed class, Plaintiffs are unable to demonstrate that their proposed class shares
 11 common questions of law or fact.

12 d. Unaccompanied alien children

13 Although the named Plaintiffs do not include any minors traveling without a family
 14 member, this class, as defined, would cover unaccompanied alien children (“UAC”) who
 15 have been held for over 48 hours. Congress, however, has enacted a specific statutory
 16 scheme covering the treatment of UACs. In the William Wilberforce Trafficking Victims
 17 Protection Reauthorization Act of 2008 (“TVPRA”), Congress required DHS to notify the
 18 Department of Health and Human Services (“HHS”) within 48 hours upon the
 19 apprehension or discovery of a UAC. 8 U.S.C. § 1232(b)(2). DHS must then transfer the
 20 custody of such child to HHS not later than 72 hours after determining that such alien
 21 child is an unaccompanied child, absent exceptional circumstances. 8 U.S.C. §
 22

23
 24 ²⁰ The allocation of this burden of proof upon the alien is currently the subject of class
 25 action litigation. See *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297 (3d Cir.
 26 2016) (remanding purported class action for analysis of class of “all individuals who are
 27 or will be detained within the State of New Jersey pursuant to . . . 8 U.S.C. § 1226(c), and
 28 who have a substantial challenge to ‘threshold deportability’ or ‘inadmissibility’ on one of
 the statutory grounds that trigger mandatory detention.”).

1 1232(b)(3). At that point, HHS assumes all legal responsibility for the care and custody of
 2 that UAC. *Id.* § 1232(b)(1).

3 These detained minor aliens do not have a shared legal question with other
 4 proposed class members that can be resolved in one stroke. To determine the
 5 constitutionality of their detention, Plaintiffs would need to establish that Congress's
 6 scheme, designed to ensure that UACs are not being trafficked or facing any other harm,
 7 and permitting detention for up to 72 hours, is unconstitutional. This analysis differs from
 8 the various other statutes of detention and cannot be resolved with this class action
 9 litigation.

10 **2. *Plaintiffs have failed to meet the typicality requirements of Rule 23(a)(3).***

11 The same reasoning discussed above regarding the need for individualized
 12 determinations to evaluate Plaintiffs' claims makes clear that Plaintiffs have not and
 13 cannot meet the typicality requirement of Rule 23(a)(3). The typicality requirement seeks
 14 to determine "whether the named plaintiff's claim and the class claims are so interrelated
 15 that the interests of the class members will be fairly and adequately protected in their
 16 absence." *Falcon*, 457 U.S. at 158 n. 13. The named Plaintiffs do not present claims
 17 typical of the proposed class. As discussed in Section III.B.1, *supra*, the proposed class
 18 not only covers aliens seeking admission, such as Gonzalez, and non-criminal aliens, such
 19 as Cancino Castellar and Hernandez Aguas; it also covers other types of detainees such as
 20 criminal aliens and UACs, as well as potentially many other classes of aliens. None of the
 21 Plaintiffs' present claims are typical of those other class members.

22 Both Cancino Castellar and Hernandez Aguas were detained as non-criminal aliens
 23 pursuant to 8 U.S.C. § 1226(a), while Gonzalez is currently detained as an arriving alien
 24 under 8 U.S.C. § 1225(b). Not only are the legal questions at issue different between
 25 these class members, they are not typical of the class as a whole. Typicality requires "that
 26 the claims of the class representatives be typical of those of the class, and [is] to be
 27 'satisfied when *each* class member's claim arises from the same course of events, and
 28 each class member makes similar legal arguments to prove the defendant's liability.'"

1 *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol v. Giuliani*, 126
 2 F.3d 372, 376 (2nd Cir. 1997)) (emphasis added). Cancino Castellar, Hernandez Aguas,
 3 and Gonzalez's claims are simply not typical of the constitutional claims of criminal
 4 aliens mandatorily detained under 8 U.S.C. § 1226(c) or other aliens in DHS custody
 5 under the INA's various statutes. See e.g., 8 U.S.C. §§ 1228(a)(2), 1232(b)(3),
 6 1187(c)(2)(E).

7 Although named Plaintiffs present a set of legal circumstances that are different
 8 from each other and different from the other possible circumstances that are included
 9 within this proposed class, Plaintiffs broadly state that because each of the named
 10 Plaintiffs was detained for several weeks before appearing before an immigration judge,
 11 their claims are typical of the class as a whole, Mot. for Class Cert. at 10-12. However,
 12 certifying a class is appropriate only if Plaintiffs establish that the government has acted in
 13 each case for the same reason. See *DL v. District of Columbia*, 302 F.R.D.1, 12 (D.D.C.
 14 2013) (“[C]lass members must have suffered the same injury for the same reason, such as
 15 a uniform policy or practice that is illegal”). Given the various statutory and regulatory
 16 frameworks that play a role in determining when an alien appears before an immigration
 17 judge, Plaintiffs cannot establish that the delay they allege was the result of the same
 18 policy, rather than a result of the legal basis for their detention.²¹

19 Plaintiffs have failed to demonstrate that their proposed class satisfies the
 20 commonality and typically requirements of Rule 23(a), and in the absence of typicality
 21 and commonality, a class action is not appropriate for adjudicating the purported class

22
 23 ²¹ Additionally, Plaintiffs are or were detained at the Otay Mesa Regional Detention
 24 Facility, see Compl., at ¶¶ 9 -11, and their removal proceedings were initiated in the Otay
 25 Mesa Immigration Court, see Exhs. A, Cancino Castellar NTA; I, Hernandez Aguas NTA;
 26 O, Gonzalez NTA. Yet, they seek to represent an overbroad class of all aliens detained in
 27 the Southern District of California, regardless of the detention site and the location of the
 28 immigration court where such individuals' removal proceedings will be initiated. Plaintiffs have failed to satisfy the typicality requirement with respect to other aliens detained in other locations and with proceedings pending at other immigration courts in the Southern District of California.

1 members' claims. It is the burden of the party seeking class certification to affirmatively
 2 demonstrate compliance with Rule 23. *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Plaintiffs
 3 have adequate alternative remedies, such as individual challenges to a specific law or
 4 policy, which can better address the individual legal and factual questions at issue in each
 5 case. Accordingly, the Court should deny Plaintiffs' motion for class certification.

6 **C. The Proposed Class is Not Entitled to Uniform Relief as a Matter of** 7 **Procedural Due Process**

8 The procedural due process claims of all class members are not capable of uniform
 9 resolution and therefore cannot support class treatment under Rule 23(a) and (b)(2).
 10 Plaintiffs claim that procedural due process and the balancing framework entitles all
 11 members of their proposed class to an initial hearing before an immigration judge within
 12 48 hours of their arrest. Compl., at ¶¶ 38-40 (citing *Mathews*, 424 U.S. 319).

13 However, "[t]he very nature of due process negates any concept of inflexible
 14 procedures universally applicable to every imaginable situation." *Lujan v. G&G Fire*
 15 *Sprinklers, Inc.*, 532 U.S. 189, 196 (2001). Indeed, the *Mathews* case reaffirms that "due
 16 process is flexible and calls for such procedural protections as the particular situation
 17 demands." 424 U.S. at 334. In making this determination, Courts must consider: "(1) the
 18 nature of the private interest that will be affected, (2) the comparative risk of an erroneous
 19 deprivation of that interest with and without additional or substitute procedural
 20 safeguards, and (3) the Government's interest, including the function involved and the
 21 fiscal and administrative burden that the additional or substitute procedures would entail."
 22 *Id.* at 335. Each of these factors requires fact-intensive analysis that is not suited to class-
 23 wide resolution in this case.

24 As discussed above, Plaintiffs' overbroad proposed class contains individuals with
 25 varying levels of constitutional interests, including arriving aliens and those seeking
 26 admission subject to expedited removal who are subject to mandatory detention and are
 27 not entitled to procedural due process protections beyond those provided by Congress;
 28

1 aliens who are unlawfully present in the United States presently in section 240 removal
2 proceedings; criminal aliens who are subject to mandatory detention and removal; and,
3 potentially, lawful permanent residents who may have more substantial constitutional
4 rights. *See Plasencia*, 459 U.S. at 32 (“once an alien gains admission to our country and
5 begins to develop the ties that go with permanent residence his constitutional status
6 changes accordingly.”). Quite simply, the various constitutional interests of all aliens
7 included within the proposed class makes it nearly impossible for the Court to order a one-
8 size-fits-all relief under a proper application of the *Mathews* framework.

9 Moreover, the various individual circumstances of aliens detained for more than 48
10 hours does not lend to easy resolution of the second *Mathews* factor which requires the
11 Court to evaluate the procedures in place and the value added by the requirement Plaintiffs
12 seek here—an immigration court hearing within 48 hours of the arrest of any proposed
13 class member. Each detained alien’s individual factual and legal circumstances will vary
14 widely and the benefit of providing an immigration court hearing within 48 hours to all
15 such aliens therefore cannot be determined without examining each alien’s individual
16 situation, including the statutory basis for their detention, removal charges, and eligibility
17 for relief or release on bond.

18 Finally, the different factual and legal circumstances of each member of the
19 proposed class will affect the strength of the government’s interest. Plaintiffs seek an
20 order requiring release of any putative class member who is not brought before an
21 immigration judge within 48 hours of arrest. Compl., at 23, (Prayer for Relief (g)). Such
22 a requirement would interfere with the government’s ability to control the borders
23 effectively and could potentially result in the release of dangerous aliens or aliens who are
24 a flight-risk. For all of these reasons, certification of such an overbroad class is not
25 appropriate where, as here, the Court cannot order one-size-fits-all relief under *Mathews*.
26
27
28

D. The Proposed Class Does Not Satisfy the Requirements of Rule 23(b)(2).

Under Rule 23(b)(2), Plaintiffs must demonstrate 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). To meet this burden, Plaintiffs claim that “Defendants-Respondents are acting on grounds that are generally applicable to the class because they subject all class members to the same policies or practices by detaining them without a prompt hearing before a judge or judicial review of probable cause.” Mot. for Class Cert., at 14. As discussed above, DHS and EOIR are guided by different statutes that have a bearing on the length of time an alien is detained before appearing before an immigration judge, and multiple statutory and individual factors must be taken into account. Despite this lack of a uniform policy, Plaintiffs argue that the Defendants’ pattern and practice violate the Fourth and Fifth Amendments, as well as the APA, because the government does not present all detained aliens to an immigration judge within 48 hours of apprehension. See *generally*, Compl. Plaintiff requests that this Court enjoin the defendants from “engaging in the unlawful policies, practices, acts, and omissions causing these violations.” *Id.* at 23 (Prayer for Relief (f)). The injunctive relief requested by Plaintiffs is not warranted for their proposed class, as each category of detained individuals must demonstrate how their constitutional and statutory rights have been violated by the Defendants’ actions. For all these reasons, Plaintiffs also have failed to satisfy Rule 23(b)(2).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs’ motion for class certification.

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Respectfully Submitted,

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