Bardis Vakili (SBN 247783) (bvakili@aclusandiego.org)
David Loy (SBN 229235) (davidloy@aclusandiego.org)
ACLU FOUNDATION OF SAN DIEGO &
IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 398-4485

Craig E. Countryman (SBN 244601) (countryman@fr.com)
Joanna Fuller (SBN 266406) (jfuller@fr.com)
Aleksandr Gelberg (SBN 279989) (gelberg@fr.com)
Megan A. Chacon (SBN 304912) (chacon@fr.com)
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-4050

Leonard B. Simon (SBN 58310) (lens@rgrdlaw.com)
LAW OFFICES OF LEONARD B. SIMON P.C.
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: (619) 338-4549

Counsel for Plaintiff-Petitioners

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR, ANA MARIA HERNANDEZ AGUAS, MICHAEL GONZALEZ,

Plaintiff-Petitioners,

v.

JOHN F. KELLY, Secretary of Homeland Security; THOMAS HOMAN, Acting Director, U.S. Immigration and Customs Enforcement; KEVIN K. McALEENAN,

Case No. '17CV491 BAS BGS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF-PETITIONERS' MOTION FOR CLASS CERTIFICATION

Date: TBD
Time: TBD
Courtroom: TBD
Judge: TBD

Acting Commissioner, U.S. Customs and Border Protection; GREGORY J. ARCHAMBEAULT, Director, San Diego Field Office, U.S. Immigration and Customs Enforcement; JEFFERSON B. SESSIONS III, Attorney General of the United States; JUAN P. OSUNA, Director, Executive Office for Immigration Review,

Defendant-Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiff-Petitioners bring this class action to prevent the government from continuing to detain numerous individuals for weeks or months without any hearing before a judge or judicial review of probable cause. "Judicial review" in this context means at least review by an immigration judge. This case presents the question whether that policy or practice is unlawful as applied to the entire class. The Court should certify the class under Federal Rule of Civil Procedure 23 and allow the case to proceed through discovery to decision on the merits.

This case meets the four threshold requirements of Rule 23(a). First, the class is numerous under Rule 23(a)(1) because it includes hundreds if not thousands of individuals who are or will be detained in this district. Second, there are common questions under Rule 23(a)(2), because the class members are experiencing the same violation—excessive delays in presentment to an immigration judge and judicial determination of probable cause—and a ruling in Plaintiff-Petitioners' favor would cure the harms caused by languishing in detention without a prompt judicial hearing. Those harms include, but are not limited to, lack of clear notice of the charges against them, impairment of their ability to begin preparing their defense or obtain counsel, inability to seek release on bond or challenge the legal authority for their detention, and prevention of the opportunity to accept voluntary departure. Third, the named Plaintiff-Petitioners present claims typical of the class under Rule 23(a)(3). They have each been detained several weeks without a judicial hearing or judicial review of probable cause. Fourth, the class representatives will fairly and adequately protect the class under Rule 23(a)(4). Class counsel are experienced in civil rights, immigration, and class action cases, and the named Plaintiff-Petitioners have no conflict with the class because they seek the same relief as the class as a whole.

This case also qualifies for certification under Rule 23(b). Defendant-Respondents' failure to provide a prompt hearing or judicial review of probable cause applies 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). That relief would not require this Court to decide any individual immigration matters or direct Defendant-Respondents to reach any particular result in such matters. This case is brought to ensure Defendant-Respondents do not detain individuals without a prompt hearing before an immigration judge, so that those individuals may avail themselves of whatever rights and remedies are available in such a hearing, not to dictate the result of that hearing. The Court need only ensure that due process is respected by the prompt occurrence of such hearings.

This Court should therefore certify the class as numerous other courts have done in similar actions brought by immigration detainees. *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1126 (9th Cir. 2010) (finding "that the proposed class [of noncitizens challenging prolonged detention without a bond hearing] meets the requirements of Rule 23(b)(2)"); *Preap v. Johnson*, 303 F.R.D. 566, 587 (N.D. Cal. 2014) (certifying class of noncitizens challenging mandatory detention without a bond hearing under Rule 23(b)(2)); *Rivera v. Holder*, 307 F.R.D. 539, 551 (W.D. Wash. 2015) (certifying class of noncitizens under Rule 23(b)(2) challenging failure to consider requests for conditional parole); *Garcia v. Johnson*, No. 14–cv–01775–YGR, 2014 WL 6657591, at *1 (N.D. Cal. Nov. 21, 2014) (certifying class of noncitizens challenging practice of not providing "reasonable fear" determinations within ten days of referral of case to an asylum officer); *Franco-Gonzalez v. Napolitano*, CV 10–02211 DMG (DTBx), 2011 WL 11705815, at *16 (C.D. Cal. Nov. 21, 2011) (certifying class of detained noncitizens challenging failure to appoint counsel for individuals found incompetent to represent themselves due to a mental illness or disability). Like those cases, and other civil rights cases, this case presents a common issue that can be resolved for many plaintiffs in one proceeding. To fight the issue one case at a time makes no sense. As a result, this is a classic case for class certification.

STATUTORY AND FACTUAL BACKGROUND

A. Statutory background

Some context on immigration law and detention practices provides needed background. To remove an allegedly deportable or inadmissible noncitizen from the United States, the government must, with some exceptions, initiate a removal proceeding before an immigration judge. 8 U.S.C. § 1229a(a). The government begins a removal proceeding by filing a Notice to Appear with the immigration court. *See* 8 C.F.R. §§ 2.1, 239.1(a), 1239.1. The Notice to Appear is a charging document that identifies a statutory section under which the government seeks to remove a person from the country. The federal agencies tasked with initiating removal proceedings are U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). *See* 8 C.F.R. § 239.1. These components of Department of Homeland Security (DHS) may seize an individual either (1) after they have issued a Notice to Appear, pursuant to a warrant of arrest, or (2) up to 48 hours before issuing the Notice to Appear. *See* 8 U.S.C. § 1357(a)(2), 8 C.F.R. §§ 287.3(d), 1236.1(b)(1).

In removal proceedings, an immigration detainee's first hearing before an immigration judge, like a first appearance in criminal court, is crucial to his or her case. At the initial hearing, the judge explains the nature of the removal hearing, the contents of the Notice to Appear "in non-technical language," the right to representation at his or her own expense and the availability of *pro bono* legal services. *See* 8 C.F.R. § 1240.10(a). The immigration judge explains those things in the alleged noncitizen's native language, with aid of an interpreter. Immigration Court Practice Manual, *available at* https://www.justice.gov/eoir/office-chief-immigration-judge-0, Chapter 4.15(f) ("If necessary, an interpreter is provided to an alien whose command of the English language is inadequate to fully understand and participate in the hearing.").

The first hearing serves several other important purposes. It allows detainees to request the evidence the government intends to use against them. *Dent v. Holder*, 627

F.3d 365, 374 (9th Cir. 2010); 8 U.S.C. § 1229a(c)(2)(B). It helps detainees get access to *pro bono* counsel, because, after appearing *pro se* at the first hearing, their names are placed on a list of unrepresented detainees who have had at least one hearing that is maintained by the Executive Office for Immigration Review, which may be circulated to *pro bono* organizations. (Compl. at ¶ 3 n.4.) The initial hearing provides the government's lawyers and the immigration judge their first opportunity to speak with and observe detainees who may be eligible for appointed counsel as a result of incapacity due to mental health. *See Franco-Gonzalez v. Holder*, CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *8 (C.D. Cal. Apr. 23, 2013). The initial hearing also provides an important opportunity for detainees eligible for a bond hearing to request one with the aid of an interpreter in their native language. 8 C.F.R. §§ 1003.19(b), (c) (stating that bond hearings may be requested "orally [in court], in writing, or, at the discretion of the Immigration Judge, by telephone . . . to the Immigration Court having jurisdiction over the place of detention"); 8 C.F.R. § 1003.33 (requiring immigration court documents to be filed in the English language); Immigration Court Practice Manual, Chapter 4.15(f). Many detainees are eligible to be released on bond, including asylum seekers and others with no relevant criminal history. *See* 8 U.S.C. § 1235(a); *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

B. Factual background

When individuals are detained for removal proceedings in this district, ICE incarcerates them at two locations—the Otay Detention Facility and the Imperial Regional Detention Facility. U.S. Customs and Border Protection (CBP) confines detainees in several purportedly "short term" detention facilities throughout the Southern District, though detainees often remain in CBP custody for many days or weeks.

In this district, DHS's current practice is to seize and imprison detainees for weeks or months before presenting them to an immigration judge for an initial hearing or obtaining any judicial decision whether probable cause justifies their detention. (Compl. at ¶ 58; Decl. of Bardis Vakili ("Vakili Decl.") at ¶ 4.) Plaintiff-Petitioners' experiences are typical. Plaintiff-Petitioner Jose Orlando Cancino Castellar was seized on or about February 17, 2017 and has been detained ever since without a hearing. (Ex. 1[1] at ¶ 5.) Plaintiff-Petitioner Ana Maria Hernandez Aguas was seized on February 7, 2017 and has been detained ever since without a hearing. (Ex. 2.1[2] at ¶ 4; Ex. 2.2[3] at ¶ 4.) Plaintiff-Petitioner Michael Gonzalez was seized on November 17, 2016 and has been detained ever since without a hearing. (Ex. 3[4] at ¶ 4.) None has been presented yet to an immigration judge, and no judge has determined whether probable cause exists to justify their incarceration. (Ex. 1 at ¶ 8; Ex. 2.1 at ¶ 9; Ex. 2.2 at ¶ 9; Ex. 3 at ¶ 10.)

The named Plaintiff-Petitioners' cases exemplify the harms caused by excessive delays in holding an initial hearing. As a practical matter, the initial hearing is often the first time detainees are told why they are being held in a language they can understand and with nontechnical terms. 8 C.F.R. § 1240.10(a). Although the detainee may receive a copy of the Notice to Appear earlier, it is in English, which many detainees cannot read, and it is written in legalese, with references to statutory sections that most English-speaking non-lawyers cannot follow. The Plaintiff-Petitioner Jose Orlando Cancino Castellar's Notice to Appear reflects the boilerplate legalese in these documents. (Ex. 1 at ¶ 7, Ex. A.) Plaintiff-Petitioner Ana Maria Hernandez Aguas has not even received a Notice to Appear. (Ex. 2.1 at ¶ 11; Ex. 2.2 at ¶ 11.) Thus detainees

---

[1] All Exhibits cited herein are Exhibits to the Declaration of Bardis Vakili filed concurrently herewith. In particular, Exhibit 1 is the Declaration of Plaintiff-Petitioner Jose Orlando Cancino Castellar.

[2] Exhibit 2.1 is the Declaration of Plaintiff-Petitioner Ana Maria Hernandez Aguas.

[3] Exhibit 2.2 is the English Translation of the Declaration of Plaintiff-Petitioner Ana Maria Hernandez Aguas.

[4] Exhibit 3 is the Declaration of Plaintiff-Petitioner Michael Gonzalez.

like Plaintiff-Petitioners can languish in lockup for weeks with no idea of the charges against them or how to defend themselves.

For example, individuals fleeing from persecution, such as Plaintiff-Petitioner Michael Gonzalez, might not know they can remain in the United States by obtaining asylum, withholding of removal, or protection under the Convention Against Torture, and likely will not know what types of evidence they need to support such a claim. *See* 8 C.F.R. § 1208.13. Someone such as Plaintiff-Petitioner Michael Gonzalez who claims to be an American citizen likely does not know the evidence needed to prove that claim, an issue on which an immigration judge must provide information. *See, e.g.*, *Agyeman v. I.N.S.*, 296 F.3d 871, 883-84 (9th Cir. 2002) (explaining that the immigration judge "has a duty to fully develop the record when an alien proceeds pro se by probing into relevant facts and by providing appropriate guidance as to how the alien may prove his application for relief"). Likewise, individuals with a spouse or child who is a U.S. citizen or permanent resident, such as Plaintiff-Petitioner Ana Maria Hernandez Aguas, might not know they can seek to remain in the United States by applying for cancellation of removal. 8 U.S.C. § 1229b(b)(1).

The excessive delays in holding an initial hearing impair the rights of individuals as they remain in detention for weeks or months without a custody or bond hearing before a judge. Plaintiff-Petitioner Jose Orlando Cancino Castellar checked a box on his custody forms indicating he wanted "an immigration judge review this [ICE] custody determination" (Ex. 1 at ¶ 7, Ex. A), but none was automatically scheduled and, under Defendant-Respondents' practice, none will be until he appears before an immigration judge and requests it. Although Defendant-Respondents' regulations theoretically permit detainees to request a bond hearing sooner by contacting the immigration court (8 C.F.R. §§ 1003.19(b), (c)), none of them are told that this is an option before their first hearing, and even if they somehow request a hearing, it is not held promptly. (*See* Compl. at ¶ 31.) For example, Plaintiff-Petitioner Ana Maria

Hernandez Aguas only knew of and was able to seek a bond hearing because she has immigration counsel, but even with the aid of counsel, the earliest bond hearing she could secure was for March 13, 2017, five weeks after her arrest. (Ex. 2.1 at ¶ 10; Ex. 2.2 at ¶ 10.) In theory, the immigration court must schedule the bond hearing at "the earliest possible date," EOIR Practice Manual §9.3(d), but under Defendant-Respondents' current practices, detainees languish for weeks and frequently months before seeing an immigration judge for a bond hearing, even if one is requested before the initial hearing. Plaintiff-Petitioners seek to end these practices and the serious harms they impose on detainees and their families.

ARGUMENT

To qualify as a class action, a case must meet the requirements of Rule 23(a) for numerosity, commonality, typicality, and adequacy, and also fit into one of the categories described in Rule 23(b)(2). A plaintiff whose suit satisfies those requirements has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

Plaintiff-Petitioners seek to represent a class defined as:

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

(Compl. at ¶ 68.) The class meets all the requirements of Rule 23(a), and this case squarely fits within Rule 23(b)(2).

C. The Proposed Class Satisfies Rule 23(a)'s requirements.

1. Numerosity: The proposed class consists of hundreds of immigration detainees.

To qualify for certification, a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Franco-Gonzalez*, 2011 WL 11705815, at *6. No fixed number of class members is required to meet Rule 23(a)(1). *See Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984). Instead, the numerosity requirement "is based on considerations of due process, judicial economy, and the ability of claimants to institute suits." William B. Rubenstein, *Newberg on Class Actions*, § 3:11 (5th ed. 2014). The proposed class here plainly meets these requirements.

The class includes hundreds of people. The class includes individuals detained at the two ICE detention centers—the Otay Detention Facility and the Imperial Regional Detention Facility—located in the Southern District, which collectively have the capacity to hold over 1,500 noncitizens, as well as several CBP detention centers throughout the District. (*See* Vakili Decl. at ¶ 5.) At any given time, it is evident that many of those individuals are detained without presentment to a judge or judicial review of probable cause. The "exact size of the class need not be known so long as general knowledge and common sense indicate that it is large," which is the case here. *Perez-Funez*, 611 F. Supp. at 995; *cf. Rivera*, 307 F.R.D. at 550 (class of more than forty current immigrant detainees sufficient); *Franco-Gonzalez*, 2011 WL 11705815, at *9 (class of fifty-five immigrant detainees sufficient). In addition, the class is transitory and includes individuals who will be detained, making joinder of those individuals impracticable. *See, e.g.*, *Lyon v. U.S. Immigration & Customs Enforcement*, 300 F.R.D. 628, 635-36 (N.D. Cal. 2014); *J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009); *Ali v. Ashcroft*, 213 F.R.D. 390, 408-09 (W.D. Wash. 2003); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001); *Clarkson v. Coughlin*, 145 F.R.D. 339, 348 (S.D.N.Y. 1993). The proposed class thus satisfies the numerosity requirement of Rule 23(a)(1).

2. <u>Commonality</u>: Several common questions of law and fact exist among the class members.

Commonality exists when "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "[P]laintiffs' claims must depend on a common contention, such that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Parsons v. Ryan*, 754 F.3d

657, 675 (9th Cir. 2014) (internal quotations and citations omitted). Plaintiff-Petitioners "need not show, however, that every question in the case, or even a preponderance of questions is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement." *Id.* The commonality requirement "has been construed permissively." *Preap*, 303 F.R.D. at 585.

This case presents several questions common to the entire class, such as:

- how long class members are detained before presentment to a judge, and why such delays occur;
- how long class members are detained before any judicial review of the question whether probable cause justifies their detention, and why such delays occur; whether the delays in judicial presentment violate the procedural component of the Due Process Clause of the Fifth Amendment;
- whether the delays in judicial presentment violate the substantive component of the Due Process Clause of the Fifth Amendment;
- whether failure to provide class members with a prompt judicial review with respect to probable cause violates the Fourth Amendment;
- whether the delays in judicial presentment to which class members are subject violate the Administrative Procedure Act; and
- whether failure to provide class members with prompt judicial review with respect to probable cause violates the Administrative Procedure Act.

Each of those questions is "capable of classwide resolution" with "common *answers* apt to drive the resolution of the litigation," because they seek the enforcement of "a constitutional floor equally applicable" to everyone in the class. *Lyon v. U.S. Immigration & Customs Enf't*, 308 F.R.D. 203, 211-12 (N.D. Cal. 2015) (emphasis in original). This case resembles others that meet the commonality requirement in the context of immigration detention. *See, e.g.*, *Rodriguez*, 591 F.3d at 1123 (commonality satisfied by a class of immigration detainees where there was a common legal question regarding whether prolonged detention without a bond hearing was permissible); *Rivera*, 307 F.R.D. at 550-51 (commonality satisfied where class members "share common questions of law and fact . . . concerning whether they received or will receive a bond hearing that does not comply with the law"); *cf. LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact). This action therefore satisfies the commonality requirement of Rule 23(a)(2).

3. Typicality: Plaintiff-Petitioners' claims are typical of, if not identical to, those of other class members.

Typicality exists if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under this permissive standard, "representative claims are 'typical' if they are reasonably coextensive with those of the absent class members; they need not be substantially identical." *Parsons*, 754 F.3d at 685. "The test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Id.*

The representative Plaintiff-Petitioners meet that standard. The conduct at issue is the same with respect to all class members—detaining them for weeks or months before they appear before an immigration judge or receive judicial review of probable cause. Moreover, all class members suffer the same general harms that accompany delay of the first hearing—*e.g.*, they are not apprised of the charges against them, they are unable to prepare a defense or indicate that they wish to voluntarily depart, and they are unable to request and obtain a prompt bond hearing or challenge the authority for their detention.

The representative Plaintiff-Petitioners fit this pattern. Plaintiff-Petitioner Jose Orlando Cancino Castellar has been detained for at least 20 days yet has not appeared before, or received a probable cause determination from, a judge, and Defendant-Respondents have still not scheduled him for an initial hearing. (Ex. 1 at ¶¶ 5-8.) Whenever one is finally scheduled, it will likely be calendared for several weeks after he receives notice. (*See* Vakili Decl. at ¶ 4.) A senior in high school, he has been unable to complete school because he has been unable to obtain a hearing to pursue his release. (Ex. 1 at ¶¶ 4, 8-10.) Although he checked a box on a form indicating he would like an immigration judge to review his custody determination, he has not been scheduled for, much less received, a bond hearing, and Defendant-Respondents have not informed him how he can obtain one. (*Id.* at ¶¶ 8-10.)

Likewise, Plaintiff-Petitioner Ana Maria Hernandez Aguas has been detained for about 30 days, yet has not been presented to or received a probable cause determination from a judge, and Defendant-Respondents have still not scheduled her for an initial hearing. (Ex. 2.1 at ¶¶ 4-11; Ex. 2.2 at ¶¶ 4-11.) Whenever one is finally scheduled, it will likely be calendared for several weeks after she receives notice. (*See* Vakili Decl. at ¶ 4.) A mother of two U.S. citizen children, she has been unable to see them because she has not had a bond hearing to pursue her release. (Ex. 2.1 at ¶¶ 10-12; Ex. 2.2 at ¶¶ 10-12.) Though her immigration attorney promptly requested one after Plaintiff-Petitioner Ana Maria Hernandez Aguas' initial detention, the earliest available hearing was March 13, 2017, which will be over a month after her initial detention. (Ex. 2.1 at ¶ 10; Ex. 2.2 at ¶ 10.)

Similarly, Plaintiff-Petitioner Michael Gonzales has been detained for over 105 days yet has not been presented to a judge or received a judicial determination of probable cause. (Ex. 3 at ¶¶ 4-10.) When Mr. Gonzalez presented himself at the San Ysidro Port of Entry on or about November 17, 2016, he claimed U.S. citizenship, which CBP does not recognize. (*Id.* at ¶¶ 2-6.) Instead, CBP processed him for an asylum claim when he expressed a fear of removal, as it has done for scores of other class members. (*Id.* at ¶ 7.) Mr. Gonzalez waited approximately four weeks for a credible fear interview from an asylum officer, after which he was referred to immigration court, but he has still not appeared before a judge or received a judicial determination of probable cause. (*Id.* at ¶¶ 7-10.) His initial hearing in immigration court is scheduled for April 5, 2017, meaning he will have been detained for over 130 days before seeing a judge. (*Id.* at ¶ 9.)

Because Plaintiff-Petitioners have been subjected to the same policies or practices as other class members, in alleged violation of the same legal requirements, their claims are typical of those of other class members. *Rodriguez*, 591 F.3d at 1124 (finding that typicality was satisfied where plaintiffs "raise[d] similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings"). This case therefore satisfies the typicality requirement of Rule 23(a)(3).

4. <u>Adequacy</u>: Plaintiff-Petitioners will adequately protect the interests of the proposed class, and their counsel are more than qualified to litigate this action.

Adequacy exists if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Rodriguez*, 591 F.3d at 1125. Those standards are all met here.

Class counsel are qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984). Here, class counsel are attorneys from the ACLU of San Diego and Imperial Counties, Fish & Richardson P.C., and the Law Office of Leonard B. Simon. (*See* Vakili Decl. at ¶ 6.) Collectively, class counsel have extensive relevant experience and sufficient resources to litigate this matter to completion. (*Id.*) Attorneys with the ACLU of San Diego and Imperial Counties have participated as class counsel in immigration-related cases before this Court and others. *See, e.g.*, *Lopez-Venegas v. Johnson*, No. CV 13-03972 JAK (PLAx), ECF No. 104 (C.D. Cal. Feb. 25, 2015) (order approving class settlement); *Franco-Gonzales v. Napolitano*, No. CV 10–02211 DMG (DTBx), 2011 WL 11705815, *1 (C.D. Cal. Nov. 21, 2011) (order certifying class of immigration detainees); *Woods v. Morton*, No. 07-cv-1078 DMS (PCL), ECF. No. 94 (S.D. Cal. June 20, 2011) (order approving class settlement for immigration detainees); *Kiniti v. Meyers*, No. 05-cv-1013 DMS (PCL), ECF No. 112 (S.D. Cal. Aug. 18, 2007) (order certifying class of immigration detainees). Fish & Richardson P.C. has served as *pro bono* counsel in a class action case involving indigent plaintiffs and obtained significant relief on behalf of the class. *See Alford v. County of San Diego*, 151 Cal. App. 4th 16 (2007). Mr. Simon has litigated hundreds of class actions during a forty-year career and taught law school courses on class actions and on complex civil litigation. *See, e.g.*, https://www.rgrdlaw.com/attorneys-Leonard-B-Simon.html (last visited Mar. 9, 2017).

Plaintiff-Petitioners Jose Orlando Camino Castellar, Ana Maria Hernandez Aguas, and Michael Gonzalez are adequate class representatives. The Complaint seeks no relief for them beyond the relief sought for the entire class. Accordingly, they have no interests different from or adverse to those of absent class members. (*See, e.g.*, Compl. at ¶¶ 70-74.) Instead, their aim is to secure relief that will protect both themselves and the entire class from the Defendant-Respondents' challenged policies or practices and enjoin the Defendant-Respondents from further violations of the class' rights. (*Id.* at ¶¶ 75-90, Prayer for Relief.) This is a genuinely adverse case involving no collusion with Defendant-Respondents. Accordingly, this case satisfies the adequacy requirement of Rule 23(a)(4).

D. This Case Satisfies Rule 23(b)(2) Because It Seeks to Declare Illegal and Enjoin a Policy or Practice That Applies to the Class as a Whole.

This action warrants certification because "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). "[I]t is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez*, 591 F.3d at 1125 (quotation marks omitted). Indeed, Rule 23(b)(2) "was adopted in order to permit the prosecution of civil rights actions." *Walters v. Reno*, 145 F.3d 1023, 1047 (9th Cir. 1998); *see also Parsons*, 754 F.3d at 686 (noting "the primary role of this provision has always been the certification of civil rights class actions"). It applies specifically to class actions involving immigration detention. *Rodriguez*, 591 F.3d at 1126 (finding that class of non-citizens detained during immigration proceedings met Rule 23(b)(2) because "all class members[] [sought] the exact same relief as a matter of statutory or, in the alternative, constitutional right").

This case meets the requirements of Rule 23(b)(2). Defendant-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. Even at this early stage in the litigation, Plaintiff-Petitioners' evidence establishes that, as a matter of policy or practice, the government does not require detainees to be presented to a judge within any set amount of time, and certainly not promptly. (*See* Exs. 1, 2.1, 2.2, and 3.) Attorneys who work regularly with putative class members confirm the existence of these policies or practices. (Vakili Decl. at ¶ 5 ("Based on my experience and understanding, it can take one to three months for a detainee in the Southern District of California to be first presented to an immigration judge, with slight variations depending on the judge and the detention center. This time period has remained relatively consistent for the last two years.").) As discussed above, the experiences of the named Plaintiff-Petitioners themselves are evidence of these policies or practices.

Therefore, this "action concerns a single policy applicable to the entire class that (if unlawful) subjects class members to unnecessary detention."[5] *Rivera*, 307 F.R.D. at 551. This case satisfies Rule 23(b)(2) because "members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688. In other words, the class should be certified because Plaintiff-Petitioners seek "a single injunction or declaratory judgment [that] would provide relief to each member of the class." *Id.*; *see also Rodriguez*, 591 F.3d at 1126 (certifying class of immigrant detainees under Rule 23(b)(2) where "relief from a single practice is requested by all class members").

CONCLUSION

For the reasons above, Plaintiff-Petitioners respectfully request the Court grant their motion for class certification.

Dated: March 9, 2017

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

By: S/Bardis Vakili
BARDIS VAKILI

Attorney for Plaintiff-Petitioners
Email: bvakili@aclusandiego.org

[5] There is no "ascertainability" requirement for a Rule 23(b)(2) class. *See Shelton v. Bledsoe*, 775 F.3d 554, 560-63 (3d Cir. 2015); *Escalante v. California Physicians' Servs.*, 309 F.R.D. 612, 621 (C.D. Cal. 2015); *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015). In any event, the class meets any such requirement because membership can be "ascertained by reference to objective criteria." *Hernandez v. County of Monterey*, 305 F.R.D. 132, 152 (N.D. Cal. 2015).