

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SERGIO ALBERTO BARCO MERCADO, on his own
behalf and on behalf of others similarly situated,

Plaintiff,

v.

Case No. 25 Civ. 6568

KRISTI NOEM, Secretary of the U.S. Department of
Homeland Security, in her official capacity;
DEPARTMENT OF HOMELAND SECURITY;
TODD LYONS, Acting Director, Immigration and Customs
Enforcement, in his official capacity;
IMMIGRATION AND CUSTOMS ENFORCEMENT;
MARCOS CHARLES, Acting Executive Associate
Director, Immigration and Customs Enforcement,
Enforcement and Removal Operations, in his official
capacity; LADEON FRANCIS, Acting Field Office
Director of New York, Immigration and Customs
Enforcement, in his official capacity;

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION**

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PRELIMINARY STATEMENT

Plaintiff Sergio Alberto Barco Mercado moves for class certification in this action challenging the unconstitutional conditions of confinement and denial of access to counsel on behalf of all individuals being detained and who will be detained in holding rooms at 26 Federal Plaza in New York, NY. Mr. Barco Mercado is among thousands of individuals who have been detained and held at 26 Federal Plaza in recent months following the government's aggressive escalation in arrests and detention of immigrants throughout New York City. Individuals are being civilly detained at 26 Fed in overcrowded rooms, without beds, sufficient food, hygiene products, or access to medical treatment, and without any means to communicate confidentially with counsel, either in person or by telephone.

The proposed class consists of "all immigration detainees who are detained and those who will be detained in the future by U.S. Immigration and Customs Enforcement ("ICE") at 26 Federal Plaza, New York NY ("26 Fed")." This case is appropriate for class-wide adjudication. The proposed class consists of thousands of individuals, a numerous and transient group including many people who do not speak English well and who are unable to bring individual litigation because they lack sufficient resources, financial or otherwise. Moreover, because of the categorical denial of confidential access to attorneys, class members' access to legal representation and services is further obstructed. As a result of Defendants' policies and practices, putative members have all been denied the ability to have confidential conversations with counsel; they have all been denied beds and have been forced to sleep on the concrete floor; they have all been denied meals every six hours; they have all been denied the ability to bathe, and they have all been denied basic hygiene products. Plaintiff's claims are typical of those of the proposed class because he is detained at 26 Fed and subjected to the punitive conditions of

confinement and denial of access to counsel that are challenged here, in violation of his constitutional rights, and he will fairly and adequately represent the class. Further, proposed class counsel are qualified and experienced in class action, civil rights, and immigrants' rights litigation. For all of these reasons and others set forth below, class certification is the appropriate mechanism for achieving a just and efficient resolution of this litigation, and Plaintiff respectfully requests that the Court certify the proposed Class.

FACTUAL BACKGROUND

Conditions at 26 Fed

All members of the proposed class are being subjected to unlawful and degrading conditions. Defendants are forcing dozens and sometimes nearly a hundred detained individuals into a single hold room at a time, causing extreme overcrowding. *See* Declaration of Hugo Sanchez Trillos ("Sanchez Decl.") ¶ 8 (estimating as many as 90 people packed into a room of approximately 20 square meters);¹ Declaration of Marlon Garcia Morales ("Garcia Decl.") at ¶ 8 (noting some rooms had 70 or 80 people); Declaration of Daniel Quevedo ("Quevedo Decl.") ¶ 4 (estimating 70 men packed into the room); Declaration of Ibrahima Barry ("Barry Decl.") ¶ 5 (estimating 50 men in the room).

Each of the 26 Fed Hold Rooms contains one or two open toilets that are visible to the room; there is no privacy for those who need to use it. Declaration of Geovani Maradiaga Ochoa ("Maradiaga Decl.") ¶¶ 14, 18; Sanchez Decl. ¶ 13; Barry Decl. ¶ 6; Declaration of Carlos Lopez Benitez ("Lopez Benitez Decl.") ¶ 12. Individuals have no opportunity to bathe, and they must wear the same clothes, including underwear, for the duration of their detention even if they

¹ All references to declarations and exhibits refer to the declarations and exhibits filed on ECF on August 8, 2025 in Support of the Emergency Motion for a Temporary Restraining Order, ECF Nos. 11-32.

remain at 26 Fed for a week, two weeks, or longer; Defendants also deny them access to basic hygiene items, such as soap, clean clothes, toothbrushes, and menstrual products. Sanchez Decl. ¶¶ 12–13 (“We were not given soap or any way to bathe or clean ourselves. We were not given toothpaste or toothbrushes. I was in the same clothes for the entire 18 days, including underwear.”); Declaration of Joselyn Chipantiza (“Chipantiza Decl.”) ¶ 6 (“I was in the same clothes the whole time. I could not bathe or brush my teeth the entire time I was there.”); Quevedo Decl. ¶ 4 (“We did not have a way to shower or clean ourselves in any capacity.”); Garcia Decl. ¶ 6 (“We were not given a toothbrush, changes of clothes or any means to wash.”); Maradiaga Decl. ¶ 18 (“For six days, I was not allowed to brush my teeth or shower. I felt so dirty.”); Barry Decl. ¶ 6 (“We were not allowed to bathe, to change our clothes, or to brush our teeth.”); Lopez Benitez Decl. ¶ 12.

Due to these extremely unsanitary conditions, the hold rooms smell terrible. *See* Sanchez Decl. ¶ 13 (“Inside the holding areas . . . smells awful” because “[a]ll of these people have not bathed” and “[t]he toilets are also in the same area”); Chipantiza Decl. ¶ 5 (“The room smelled terrible because no one had bathed. There was a bathroom in that room that smelled of urine and feces.”); Quevedo Decl. ¶ 4 (“There was an intense smell of sweat, urine and feces.”); Garcia Decl. ¶ 6 (“it smells terrible”); Maradiaga Decl. ¶ 14 (“There was also a horrific stench in the room.”); Barry Decl. ¶ 7 (the room smelled “terrible”).

Defendants also fail to provide individuals detained at 26 Fed with adequate meals at all, much less every six hours as required under the Policy, which governs conditions of confinement at Field Office Hold Rooms, including 26 Fed. Ex. 1, attached to the Declaration of Heather Gregorio, filed at ECF Doc. No. 11 (“Ex. 1”), § 4.1.1.2. In place of actual meals, Defendants provide detained people with small rations of food only twice a day, such as military “meals

ready to eat” (“MREs”). Maradiaga Decl. ¶ 15 (“The food we got was like the packets that soldiers get where you put hot water on the sides to try to warm up the meal.”); Barry Decl. ¶ 9 (“We sometimes received food only once a day; at most, we received food only twice a day. The food seemed to be military style, meaning it was pre-packaged.”); Lopez Decl. ¶ 11 (“The food they gave us looked like dog food. I did not think it was edible It was disgusting.”). Mr. Quevedo stated that what they received to eat was “slop” and “worse than animal food.” Quevedo Decl. ¶ 5. Mr. Sanchez stated that he received small, processed meals in plastic bags at 8 a.m. and again at 8 p.m., with nothing in between, noting that he was “always hungry” and ultimately lost 24 pounds during the period he was detained. Sanchez Decl. ¶¶ 14, 26; *see also* Lopez Decl. ¶ 11 (“We got food twice a day, at 8 a.m. and 8 p.m.”). Mr. Garcia said that the food was “inedible,” and that he could not eat it during the five days he was detained; he too lost significant weight. Garcia Decl. ¶ 9. Mr. Maradiaga stated that the portions were so small that he was usually still hungry after he ate, Maradiaga Decl. ¶ 15, and Mr. Barry stated that “[i]t was not enough food and I often felt hungry,” Barry Decl. ¶ 9. Ms. Chipantiza recalled receiving only one small snack for the whole day. Chipantiza Decl. ¶ 7.

Nor do Defendants provide individuals detained at 26 Fed with adequate conditions for sleep. Because the Hold Rooms are designed to hold only a few people for short periods of time and have no beds, detained people in the overcrowded cells have been forced to sleep on the bare concrete floor with only aluminum blankets, sometimes next to toilets, with the lights remaining on throughout the night. Quevedo Decl. ¶ 4; Sanchez Decl. ¶ 11; Chipantiza Decl. ¶ 5; Garcia Decl. ¶ 5; Maradiaga Decl. ¶ 12; Lopez Benitez Decl. ¶ 10. Many are unable to sleep because of the pain of sleeping on hard concrete and awaken regularly, Sanchez Decl. ¶ 11, and some have lasting back pain from the experience, Quevedo Decl. ¶ 12. It was also noisy throughout the

night, with people coming in and out and guards yelling. Maradiaga Decl. ¶ 13. Sometimes the rooms are too crowded to even allow the detained persons to lie flat to sleep, so they have to try to sleep sitting up. Sanchez Decl. ¶ 8; Chipantiza Decl. ¶ 5; Garcia Decl. ¶ 5.

Detained individuals also are subjected to extreme temperatures. Some 26 Fed Hold Rooms have been kept extremely cold such that detainees cannot get warm, especially while sleeping on the cold concrete floor while being denied adequate clothing or blankets beyond a single aluminum blanket per person. *See* Chipantiza Decl. ¶ 8; Garcia Decl. ¶ 5 (calling the hold room the “hielera,” or icebox); Maradiaga Decl. ¶ 12; Lopez Benitez Decl. ¶ 13 (noting he was “freezing”). In other hold rooms, individuals have been subjected to uncomfortably hot conditions, as Defendants have turned off the air conditioning for several hours at a time, despite the crowded conditions. Sanchez Decl. ¶ 16; Maradiaga Decl. ¶ 12; Barry Decl. ¶ 7 (“The room was terribly hot . . .”).

Defendants have denied putative class members access to prescribed or needed medications, in violation of the Policy, Ex. 1, § 5.7.2, putting individuals at risk of exacerbated medical problems or the emergence of new medical problems. *See, e.g.*, Chipantiza Decl. ¶ 7; Declaration of Mei Zhou (“Zhou Decl.”) ¶¶ 12, 17-18.

Media reports have confirmed these conditions. A *New York Times* article published on July 22, 2025, included a video of the inhumane conditions in a 26 Fed holding room, recorded by a detained immigrant who was held there the week before.² This is a screenshot taken from video embedded in New York Times article:

² Luis Ferré-Sadurní, *Video Taken by Migrant Shows Overcrowded ICE Holding Cell in Manhattan*, N.Y. Times, July 22, 2025, available at <https://www.nytimes.com/2025/07/22/nyregion/video-immigration-holding-cells-overcrowded-unsanitary.html>, attached as Exhibit 5 to the Gregorio Decl.; *see e.g.*, Alice Gainer, *Video Shows*



Gothamist has reported on the same conditions and long durations of confinement, citing ongoing litigation and statements by members of Congress.³

Conditions Inside NYC's ICE Processing Center at 26 Federal Plaza, CBS News (July 23, 2025), available at <https://www.cbsnews.com/newyork/news/nyc-ice-processing-center-26-federal-plaza-video/>, attached as Exhibit 6 to the Gregorio Decl.; Joe Torres, *NYC Leaders Call for Inspection After Video Shows Poor Conditions at Federal Plaza Detention Center*, ABC News (July 23, 2025), available at <https://abc7ny.com/post/nyc-leaders-call-inspection-video-shows-poor-conditions-26-federal-plaza-detention-center-manhattan/17262378/>, attached as Exhibit 7 to the Gregorio Decl.

³ Arya Sundaram, *'They're Killing Us': Immigrants Complain of Inhumane Conditions Inside NYC Holding Site*, *Gothamist* (July 9, 2025), available at <https://gothamist.com/news/theyre-killing-us-immigrants-complain-of-inhumane-conditions-inside-nyc-holding-site>, attached as Exhibit 8 to the Gregorio Decl.

Meanwhile, Defendants continue to blatantly deny these well-documented violations. Tricia McLaughlin, DHS Assistant Secretary for Public Affairs, stated that “[a]ny claim that there is overcrowding or subprime conditions [at 26 Fed] is categorically false. All detainees are provided with proper meals, medical treatment, and have opportunities to communicate with their family members and lawyers.”⁴

Upon information and belief, Mr. Barco Mercado is being subjected to all of these egregious conditions of confinement and will continue to be subjected to them in the coming days.

Attorney Access at 26 Fed

People detained at 26 Fed are denied the ability to communicate with their attorneys. They are not permitted to meet in person or to speak confidentially on the phone with counsel. *See* Chipantiza Decl. ¶¶ 10–11 (“I asked to speak with an attorney but was told by ICE officers that was not allowed until my hearing.”); Maradiaga Decl. ¶¶ 9–11 (noting he was never given the opportunity to speak with his lawyer). Attorney Karla Ostolaza called the number provided for 26 Fed and was told “they do not schedule legal calls because they are a holding facility, not a detention center.” Declaration of Karla Ostolaza (“Ostolaza Decl.”) ¶ 8. She was told that she would have to wait until the people she was trying to reach were transferred to a detention center. *Id.*

The only way that individuals detained at 26 Fed can communicate with the outside world at all is via a non-confidential phone line. Sometimes the detained immigrants are denied the ability to make any calls at all for several days at a time, and an officer told one detained individual that they were not obligated to provide any calls apart from on the day they were initially detained. Sanchez Decl. ¶¶ 18–19. When the detained immigrants are permitted to

⁴ *Id.*

make calls, the calls are limited to a few minutes, and the ICE officers hurry them if they take longer. Chipantiza Decl. ¶ 9 (noting calls were one or two minutes each); Quevedo Decl. ¶ 6 (stating he was only able to call his family five times during nine days for one or two minutes each time); Garcia Decl. ¶ 7 (noting calls were only for a few minutes, and that the guards “would yell at us to hurry up”); Barry Decl. ¶ 10 (“We were allowed to make one 5-minute phone call every few days.”). Defendants permit phone calls at irregular intervals and often only late or in the middle of the night. Sanchez Decl. ¶ 17 (“[T]he calls took place late in the day, after business hours . . . one time I was not given a turn to call until 1:30 a.m.”).

All calls are monitored and are not confidential. The guards require the detained individuals to provide information such as the name, address, and/or phone number of the person they are calling and stand next to them during the brief conversation, sometimes requiring the call to be put on speakerphone. Sanchez Decl. ¶ 17; Chipantiza Decl. ¶ 9; Quevedo Decl. ¶ 6; Garcia Decl. ¶ 8. Thus, even if individuals attempt to call a lawyer, they will not be able to have a confidential legal conversation. Declaration of Melissa Lim Chua (“Chua Decl.”), ¶ 19.

The ICE Online Detainee Locator, which attorneys typically rely on to locate and schedule client communication, often does not accurately list an individual’s location when an individual is detained at 26 Fed. Instead of a location, the website lists “Call Field Office,” but when attorneys call the listed number they generally cannot get through or are told they cannot schedule a call. Declaration of David Jimenez, Esq. (“Jimenez Decl.”) ¶ 10; Declaration of Sarah Borsody (“Borsody Decl.”) ¶ 10; Declaration of Mei Zhou (“Zhou Decl.”), ¶ 8; Declaration of Lauren Reiff (“Reiff Decl.”), ¶ 8; Ostolaza Decl. ¶¶ 7-8. Calls to other New York ICE ERO phone numbers likewise generally are not answered or returned. Jimenez Decl. ¶ 12. Attorneys who email ICE to ask about the location of their client often receive no response, are

told to use the ICE Online Detainee Locator System, or are told that their client is “in transit” and cannot be communicated with, even for multiple days. *Id.* ¶¶ 11, 17–18, 19–21; Borsody Decl. ¶ 10; Declaration of Rebecca Press ¶ 9; Declaration of Dominique Davila, ¶ 6; Reiff Decl. ¶ 11; Declaration of Lauren Kostas (“Kostas Decl.”), ¶ 10; Declaration of Leah Wissow, ¶ 12. Ms. Borsody was informed that a legal call would be facilitated, but one was never scheduled despite multiple follow-ups, and she only received one missed call from the facility after 8 p.m. on a Saturday that she was not able to answer. Borsody Decl. ¶ 11–14.

Defendants do not allow individuals detained in the Hold Rooms to receive visitors and do not provide access to attorneys. Attorneys are unable to visit their clients at all. Guards told Declarant Hugo Sanchez that “even lawyers cannot come here.” Sanchez Decl. ¶ 12. When Mr. Jimenez went to 26 Fed on both July 7 and July 8 to try to see his client Mr. Maradiaga, gain information about his case, and file an ICE Stay on Mr. Maradiaga’s behalf, he was turned away twice and given shifting explanations for why he could not file the stay request. Jimenez Decl. ¶¶ 14–15; *see also* Barry Decl. ¶ 10 (“[i]n-person visits were prohibited”).

Like other legal service providers, attorneys at New York Legal Assistance Group (“NYLAG”) have experienced significant barriers to communicating with their clients. Even though NYLAG has represented numerous individuals who have been held at 26 Fed and NYLAG attorneys have reached out to DHS while the individual has been detained there, to date the attorneys have been unable to have a confidential legal call with even a single one of them during their detention. Chua Decl. ¶ 14. NYLAG attorneys have been unable to speak confidentially with clients detained at 26 Fed since the end of May 2025. *Id.* ¶ 18. On the rare occasions attorneys have had non-confidential phone calls with clients, it has been because detainees have called NYLAG on non-confidential phone calls, which last approximately five

minutes. ICE has never permitted NYLAG to make an incoming call to a detainee held at the facility, even if the individual has been held in custody for multiple days, or if the immigrant has medical needs. *Id.*

As noted above, Mr. Santamaria repeatedly tried to contact Mr. Barco Mercado after he was detained, including going to 26 Fed in person and calling the listed number. Santamaria Decl. ¶¶ 4-7. He was turned away and told that he could not visit his client or set up a call with him. *Id.*

Other comparable detention facilities in New York, Rikers Island and Metropolitan Detention Center, provide attorneys a minimum level of confidential visitation and communication with individuals in pretrial detention. At those facilities, in-person confidential legal visits are available seven days per week, including weekend and holidays, and do not require advanced scheduling. Declaration of Noam Biale (“Biale Decl.”) ¶¶ 6-8; Declaration of Sergio De La Pava (“De La Pava Decl.”) ¶¶ 6-8. Legal calls and videoconferences can also be scheduled Monday through Friday. Biale Decl. ¶ 10; De La Pava Decl. ¶¶ 10.

Defendants’ Policies

DHS and ICE have adopted written policies that govern the conditions at ICE ERO holding facilities located within Field Offices, including at 26 Fed.

On January 31, 2024, ICE issued Directive 11087.2, which is titled “Operations of ERO Holding Facilities” (the “ICE Hold Room Policy,” or the “Policy”), attached as Exhibit 1 (“Ex. 1”) to the Declaration of Heather Gregorio in Supp. Of Pls.’ Mot. for a TRO (“Gregorio Decl.”). The stated “Purpose/Background” of the Policy is to provide ICE officers who staff the Field Offices “with policy and procedures for operating holding facilities located within their respective field offices.” Ex. 1, § 1.1.

The Policy defines a “holding facility” as “[a] facility that contains hold rooms that are primarily used for the short-term confinement of individuals who have recently been detained or are being transferred to or from a court, detention facility, or other holding facility, or other agency.” *Id.* § 3.2. It notes that “short-term is defined as a period ***not to exceed 12 hours***, absent exceptional circumstances.” *Id.* § 3.2 n.3 (emphasis added). This 12-hour limit was recently extended to 72 hours at facilities nationwide by an ICE-issued waiver. *See* Ex. 4 to Gregorio Declaration. The Policy defines a “hold room” as “a holding cell, cell block, or other secure enclosure within a holding facility.” Ex. 1, § 3.3.

The Policy states that the Executive Associate Director for ERO—here Defendant Charles—“is responsible for ensuring compliance with the provisions of this Directive within ERO.” *Id.* § 4.1.

The Policy states that Field Office Directors (FODs)—here Defendant Francis—“are responsible for ensuring that field office personnel follow the procedures in this Directive for operating holding facilities located within their respective field offices.” *Id.* § 4.3.

The Policy provides that “ERO Officers are responsible for,” *inter alia*:

- a. “Ensuring that detainees are provided a meal at least every six hours,” *id.*, § 4.1.1.2; and
- b. “Ensuring that hold rooms are safe, clean, equipped with restroom facilities, and clear of objects that could be used as weapons against ERO personnel, contractors, or detainees,” *id.* § 4.4.1.3.

With respect to “Procedures and Requirements,” the Policy provides the following “Procedures for ERO Officers”:

- a. “[E]mpty holding facilities upon the conclusion of daily operations in those field office locations operating on a daily schedule . . . absent exceptional circumstances, no detainee should be housed in a holding facility for longer than 12 hours,” *id.*, § 5.1.1;

- b. “If the hold room is not equipped with restroom facilities, ERO officers should position themselves within direct sight or earshot of the hold room so that detainees may request and have regular access to restroom facilities,” *id.* § 5.2.3).
- c. “Allow detainees to keep personal inhaled medication on their person and have access to other prescribed medication as necessary,” *id.* § 5.7.2; and
- d. Make a detention log for every detainee brought into custody regardless of purpose,” recording, *inter alia*, (j) time in, (k) mealtime, and (l) time out, *id.* § 5.8.1.

Defendants Have Caused Significant Harm

The Plaintiff and putative Class members have been substantially harmed by Defendants’ unconstitutional practices. They have all suffered pain and hunger, the risk of medical problems caused by the unsanitary physical conditions, and psychological and emotional harm. Defendants have denied the Plaintiff and putative Class members the ability to access legal counsel, which further harmed their ability to properly prepare for their legal proceedings and has put them at risk of removal from the country without representation or other negative legal consequence. *See, e.g.*, Jimenez Decl. ¶ 32 (due to lack of attorney-client communication at 26 Fed, detained client, Mr. Maradiaga, was ultimately removed from the United States despite his meritorious legal claims that may have provided a pathway for him to remain in the country with his U.S. citizen wife and young children).

Plaintiff Sergio Alberto Barco Mercado was taken into custody at 26 Fed on August 8, 2025 after a scheduled court appearance. He is currently being subjected to the above-described conditions of confinement. When his attorney attempted to contact him after he was detained, he was refused access to his client.

ARGUMENT

Plaintiff moves for certification of the following class: “all immigration detainees who are detained and those who will be detained in the future by U.S. Immigration and Customs Enforcement at 26 Federal Plaza, New York, NY.” Pl.’s Mot. for Class Cert.

Under Rule 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 23(b)(2) requires the court to find that the 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).

In this Circuit, district courts must give these requirements “liberal rather than restrictive construction.” *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal quotation marks and citations omitted). District courts have broad discretion in certifying a class because “the district court is often in the best position to assess the propriety of the class.” *Sumitomo Copper Litig. v. Credit Lyonnais Rouse Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001).

Generally, courts in this Circuit recognize that class actions are particularly appropriate in litigation involving detained persons because “[p]risoners . . . come and go from institutions for a variety of reasons . . . [n]evertheless, the underlying claims tend to remain.” *Clarkson v. Coughlin*, 145 F.R.D. 339, 346 (S.D.N.Y. 1993) (internal quotation marks and citation omitted). Courts in this Circuit routinely certify classes of immigration detainees challenging their

detention. *See, e.g., Vazquez Perez v. Decker*, No. 18 Civ. 10683 (AJN), 2020 WL 7028637 (S.D.N.Y. Nov. 30, 2020) (certifying class of detained immigrants challenging detention for removal proceedings without prompt hearing before immigration judge); *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 617 (S.D.N.Y. 2018) (certifying class of detained immigrant children challenging delays in their release from detention); *Abdi v. Duke*, 323 F.R.D. 131, 145 (W.D.N.Y. 2017) (certifying class of detained immigrants challenging denial of parole); *Bertrand v. Sava*, 535 F. Supp. 1020, 1024-25 (S.D.N.Y. 1982) (certifying class of detained Haitian asylum seekers challenging their continued custody without fair access to release on parole), *rev'd on other grounds*, 684 F. 2d 204 (2d Cir. 1982).

I. PLAINTIFF MEETS THE REQUIREMENTS OF RULE 23(a)

A. The Proposed Class Is Sufficiently Numerous

The Court should certify the proposed class because it “is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a). “[N]umerosity is presumed at a level of 40 members.” *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). There is no requirement that plaintiff establish a precise number of class members. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (holding that the plaintiffs need not define the exact size or identity of class members to obtain class certification, but instead “must show some evidence of or reasonably estimate the number of class members”) (internal citations omitted).

Moreover, the inquiry into joinder goes beyond “mere numbers” and requires consideration of “all the circumstances surrounding a case.” *Id.* at 936. Additional factors that may make a class “superior to joinder” include “(i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members.” *Pa. Pub. Sch. Employees’ Ret.*

Sys. v. Morgan Stanley & Co., 772 F.3d 111, 120 (2d Cir. 2014) (citing *Robidoux*, 987 F.2d at 936).

Here, Plaintiff easily satisfies this requirement because thousands of class members have been detained at 26 Fed since at least the end of May 2025 without access to counsel and for extended periods of time, and the practice is ongoing. Compl. ¶¶ 3, 5; *see also Jane B. by Martin v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (considering future class members to satisfy numerosity requirement and certifying class consisting of an estimated 48-60 juveniles residing in two facilities in part by including “an undetermined number of girls who will reside” there in the future).

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

The proposed class also satisfies the commonality requirement, the purpose of which is to test “whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). The Rule is satisfied if there is a single issue common to all members of the class, so long as common questions are the “core of the cause of action alleged.” *Ayzelman v. Statewide Credit Servs. Corp.*, 238 F.R.D. 358, 363 (E.D.N.Y. 2006) (internal quotation marks omitted); *see also Johnson v. Nextel Commc’ns Inc.*, 780 F.3d 128, 137-38 (2d Cir. 2015) (commonality requirement satisfied where “resolution [of common issues] will affect all or a significant number of the putative class members.”).

Not every question of law or fact relevant to class members must be the same. *See Port Auth. Police Benevolent Ass’n v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983) (finding denial of class certification improper where proposed class sought review of policy or practice of denying promotion to employees who criticized defendant employer, not review of

promotions themselves); *Trief v. Dun and Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992) (“Commonality does not mandate that all class members make identical claims and arguments, only that common issues of fact or law affect all class members.”). Where defendants apply a common course of prohibited conduct to the plaintiff class, the commonality requirement will be met. *Marisol*, 126 F.3d at 377 (holding commonality requirement satisfied where “plaintiffs allege[d] that their injuries derive[d] from a unitary course of conduct by a single system”); *see also Brown v. Kelly*, 609 F.3d 467, 468 (2d Cir. 2010) (“[W]here plaintiffs were allegedly aggrieved by a single policy of the defendants, and there is strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited.”) (internal quotation marks and citation omitted); *Floyd v. City of New York*, 283 F.R.D. 153, 172-75 (S.D.N.Y. 2012) (finding commonality where challenged *Terry* stops were product of NYPD-wide policies); *Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (finding commonality requirement satisfied where putative class members raised “similar question of law,” namely whether the defendants’ conduct violated a resolution and the due process clause).

The commonality requirement is met in this case. Putative class members are all detained by ICE at 26 Fed and are subject to a common policy denying access to counsel and confining them in a transitional holding facility subject to unconstitutional conditions of confinement. Common questions of law or fact exist as to all proposed class members, including but not limited to the following: (a) Whether Defendants’ policy and practice of forcing Plaintiff and the putative Class members to sleep on the concrete floor without beds, failing to provide them with meals every six hours, and failing to allow them to bathe or access basic hygiene products violates the Fifth Amendment to the United States Constitution; and (b) Whether Defendants have instituted a policy or practice of denying individuals detained at 26 Fed access

to counsel, and whether this policy or practice violates the First and Fifth Amendments to the United States Constitution.

Resolution of the lawfulness of defendants’ policy of detaining individuals at 26 Fed for extended periods of time without access to counsel will resolve the central issue for the class “in one stroke.” *See, e.g., Johnson*, 780 F.3d at 137 (quotation marks omitted) (“The claims for relief need not be identical for them to be common; rather, Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members.”).

C. Plaintiff’s Claims Are Typical of the Claims of the Proposed Class

Rule 23’s requirement that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class,” Fed. R. Civ. P. 23(a)(3), is satisfied where, as here, “it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented[.]” *Robidoux*, 987 F. 2d at 936–37; *see also Saldana v. Middletown Car-G-Cam Uni Corp.*, No. 15 CIV. 3651, 2015 WL 12591678, at *3 (S.D.N.Y. Sept. 23, 2015) (Román, J.) (finding typicality satisfied where the plaintiffs’ and class members’ claims arose “from the same factual and legal circumstances”). Plaintiff shares with the Class claims “based on the common application of certain challenged policies.” *V.W. by and through Williams v. Conway*, 236 F. Supp. 3d 554, 576 (N.D.N.Y. 2017); *see also Robideux*, 987 F.2d at 936-37 (noting that even when “variations in the fact patterns underlying individual claims” are present, typicality exists where “it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented”). Specifically, the Plaintiff was detained by ICE at 26 Fed on August 8, 2025, and, upon information and belief, will have no access to counsel and will be subjected to punitive

conditions in violation of his constitutional rights, which renders his claims typical for Rule 23(a) purposes.

D. Plaintiff Will Fairly and Adequately Represent the Class

Rule 23(a)(4)'s adequacy requirement has two parts: "the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); *see also Saldana*, 2015 WL 12591678, at *3 (finding typicality satisfied "because Plaintiffs' interests [were] not antagonistic or at odds with the Class Members' interests"). Courts have denied class certification based on the inadequacy of a named plaintiff's qualifications only in extreme and rare cases "where the putative class representatives display an alarming unfamiliarity with the suit." *In re Frontier Ins. Group, Inc.*, Sec. Litig., 172 F.R.D. 31, 47 (E.D.N.Y. 1997) (internal quotations marks omitted).

Here, Mr. Barco Mercado will fairly and adequately represent the class because he has an interest in vigorously pursuing the claims and has no interests that are antagonistic to the interest of other class members. Declaration of Sergio Alberto Barco Mercado ("Barco Mercado Decl.")

¶ 6. Mr. Barco Mercado averred that he "want[s] to be able to timely communicate with an attorney to find out my rights and options" and "want[s] to have access to basic necessities while in custody, including food; showers; beds; and hygiene products." *Id.* ¶¶ 4-5. He further averred that "[i]f I am taken into custody at 26 Federal Plaza and subjected to the conditions there, I authorize the ACLU, NYCLU, MRNY, and Wang Hecker LLP to file suit on my behalf, and for any others who are also denied access to legal counsel and subjected to inhuman conditions" and that he is "aware of the requirements to serve as a class representative in any such lawsuit and am willing to actively do so to the best of my ability." *Id.* ¶ 6.

II. THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(b)(2)

The proposed class also meets the Rule 23(b)(2) requirement that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). According to the Supreme Court, civil rights cases like this one are “prime examples” of Rule 23(b)(2) class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (“Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of Rule 23(b)(2) class actions].”). Likewise, the Second Circuit has recognized that “[c]ivil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class . . . fall squarely into the category of [Rule] 23(b)(2) actions.” *Marisol*, 126 F.3d at 378 (internal quotation omitted, brackets and ellipses in original).

Certification under Rule 23(b)(2) is also appropriate here because “a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Here, Defendants are acting on grounds generally applicable to the putative Class members because the challenged policies and practices deny rights and protections to all putative Class members. As a result, injunctive and declaratory relief against Defendants would remedy the harms suffered by the class members. *See Goldemberg v. Johnson & Johnson Consumer Companies, Inc.*, 317 F.R.D. 374, 385 (S.D.N.Y. 2016) (stating that class certification under Rule 23(b)(2) is appropriate “where a single injunction would provide relief to each member of the class”) (quoting *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 80 (2d Cir. 2015)).

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

Proposed class counsel, the American Civil Liberties Union Foundation, New York Civil Liberties Union Foundation, Make the Road New York, and Wang Hecker LLP, are “qualified, experienced and able to conduct the litigation,” *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000), and they satisfy the requirements set forth in Rule 23(g).

Specifically, the plaintiff’s attorneys have successfully litigated class action cases in the Southern District of New York and elsewhere against government entities. *See, e.g., Favela Avendaño v. Asher*, No. 2:20-cv-00700, 2021 WL 1056113 (W.D. Wash. Mar. 18, 2021) (class action brought by ICE detainees challenging detention facility’s failure to protect from COVID-19); *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601 (S.D.N.Y. 2018) (certifying class of detained immigrant children challenging unnecessarily prolonged detention); *Peoples v. Annucci*, 180 F. Supp. 3d 294 (S.D.N.Y. 2016) (approving class settlement of action challenging solitary confinement in New York State prisons); *Ligon v. City of New York*, 288 F.R.D. 72 (S.D.N.Y. 2013) (certifying class in challenge to an New York City Police Department stop-and-frisk program); *Miller v. City of New York*, No. 21 Civ. 2616, ECF No. 199 (S.D.N.Y. Dec. 19, 2024) (approving class settlement of action challenging isolated confinement of pretrial detainees at Rikers Island); *McBean v. City of New York*, 02 Civ. 05426, ECF No. 294 (S.D.N.Y. Oct. 22, 2010) (certifying class settlement of action challenging unlawful strip searches of pretrial detainees at Rikers Island). *See also* Gregorio Decl. ¶¶ 6-7, 9-11, 13-14. The plaintiff’s attorneys also have extensive experience in complex federal civil rights litigation seeking systemic reform, *id.* and have deep knowledge of constitutional and immigration law, having litigated directly or as *amicus* cases challenging the unlawful detention of immigrants, *see id.* ¶¶ 9-11. Proposed class counsel have dedicated many hours and financial resources to the

investigation and research of Plaintiff's claims, including by researching and investigating the legal claims in this case; developing the factual record and legal issues underlying this case; performing legal research about potential claims and relief available to the Class; identifying and communicating with individuals with information about the challenged policies and conditions at 26 Fed, notwithstanding the bar to communicating directly with individuals during their detention at 26 Fed; and drafting a detailed complaint as well as this class certification motion and motion for temporary restraining order. Gregorio Decl. ¶ 15. Finally, proposed class counsel have already devoted significant resources to developing and maintaining this litigation, as evidenced by the staffing of this case and the detailed filings that have already been submitted, and will continue to do so as the case proceeds. *See id.* ¶ 16.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant the motion for class certification, appoint Mr. Barco Mercado representatives of the class, and appoint undersigned counsel as class counsel.

DATED: New York, New York
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Attorneys for Plaintiff and proposed Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2025, I will serve by electronic mail this Memorandum of Law in Support of the Motion for Class Certification upon the following counsel:

Jeffrey Oestericher, Jeffrey.Oestericher@usdoj.gov and
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DATED: New York, New York
August 8, 2025

/s/ Heather Gregorio
Heather Gregorio