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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARFIELD GAYLE, *et al.*, Plaintiffs, v. JANET NAPOLITANO, *et al.*, Defendants.	***ORAL ARGUMENT REQUESTED*** No. 3:12-cv-02806-FLW

BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

RULES

PRELIMINARY STATEMENT

Plaintiffs Garfield Gayle, Sheldon Francois, and Neville Sukhu bring this action on behalf of the class of all individuals who, like them, are or will be detained within the State of New Jersey pursuant to the mandatory detention provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c). These individuals are held without even the possibility of bail or a bail hearing for the duration of their immigration removal cases, including during administrative appeals to the Board of Immigration Appeals ("BIA") and judicial review by the United States Court of Appeals.

This class action challenges the standard and procedures that the government uses to determine whether an immigrant may be detained without a bond hearing under this harsh provision of the immigration law, and to which every member of the proposed class is subject. Based upon the decision of the BIA in *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), the government claims the authority to subject every putative class member to mandatory detention whenever it charges a ground for removal designated in the statute, unless an Immigration Judge determines that the government is "substantially unlikely" to prevail on the charges. That is, under *Matter of Joseph*, members of the proposed class bear the burden of affirmatively demonstrating that the government's charges are meritless. Moreover, under current government policy, they must be detained even if they have a substantial challenge to the government's charges of removability or a substantial claim for discretionary relief that would entitle them to remain lawfully within the United States. This violates both the governing statute and the Due Process Clause of the Constitution.

This class action also challenges the procedures by which the government has implemented so-called *Joseph* hearings. Specifically, the government has no policy to provide notice to individuals detained pursuant to 8 U.S.C. § 1226(c) of their right to request a *Joseph*

hearing. To the contrary, the standard-form Notice of Custody Determination (Form I-286) used by the immigration authorities, which advises immigrant detainees of the government's decision with respect to their detention and purports to notify detainees of their rights, is affirmatively misleading, stating that individuals subject to mandatory detention "may not request a review of this determination by an immigration judge." *See* Declaration of Michael Tan, Ex. E ("Tan Decl.") (Form I-286 provided to plaintiff Francois); *id.* Ex. F (Deposition of Wesley Lee, Assistant Field Office Director, Los Angeles Field Office of U.S. Immigration and Customs Enforcement, at 208:18-209:4 and 243:16-22, *Rodriguez v. Robbins*, No. 2:07-cv-03239-TJH-RNB (C.D. Cal. deposition filed June 25, 2012) (confirming notice policy)). Moreover, even if an immigrant is informed of the available procedure and is able to demand a bond hearing, the Immigration Court generally does not make or maintain a contemporaneous record of the proceedings, either by transcript, audiotape, or otherwise, thereby frustrating the ability of potential class members to meaningfully appeal adverse determinations. *See* U.S. Dep't of Justice, Exec. Office for Immig. Rev., Immigration Court Practice Manual, § 9.3(e)(iii) & (vii) (2008), http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%209.pdf (providing that "[b]ond hearings are generally not recorded;" that the Immigration Judge's bond determinations, which are rendered orally, are not transcribed; and that a written memorandum decision is prepared only if a detainee appeals); *see also Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977) (holding that "[t]here is no right to a transcript of a bond redetermination hearing"). These deficiencies likewise violate the statute and the Constitution.

Accordingly, plaintiffs seek certification of a class under Rule 23(b)(2) of individuals in New Jersey who are or will be detained pursuant to 8 U.S.C. § 1226(c) in order to obtain class-wide declaratory and injunctive relief, requiring (1) that the mandatory detention statute,

§ 1226(c), not be applied to individuals who have a substantial challenge to the government's charge of removability, including a substantial claim for discretionary relief; (2) that adequate notice be provided of the right to a hearing before an Immigration Judge to challenge whether the class member is properly detained under § 1226(c); (3) that at such a hearing the government bears the burden of making a *prima facie* showing of deportability or inadmissibility on grounds that trigger mandatory detention under the statute, and the class member has the opportunity to demonstrate that he or she has a substantial challenge to the government's charges of removability, or a substantial claim for discretionary relief that would render the individual non removable on the government's charges; and (4) that a contemporaneous record of any such hearings be made and maintained.

ARGUMENT

I. THE CLASS SHOULD BE CERTIFIED BECAUSE PLAINTIFFS MEET THE REQUIREMENTS OF RULE 23(A) AND RULE 23(B)(2).

Class certification is appropriate where plaintiffs establish that they meet all four requirements of Federal Rule of Civil Procedure 23(a) — numerosity, commonality, typicality, and adequacy — and at least one subpart of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2009) ("Class certification requires a finding that each of the requirements of Rule 23 has been met."). As the Supreme Court recently stated, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, __ U.S. __, 130 S. Ct. 1431, 1437 (2010). In this case, the Class satisfies both Rule 23(a) and Rule 23(b)(2), the latter of which "permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or

refused to act on grounds generally applicable to the class.'" *Amchem Prods.*, 521 U.S. at 614 (internal citations omitted); *accord Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).[1]

A. The Class Is So Numerous that Joinder of All Members Is Impracticable

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Impracticability is not synonymous with impossibility, but rather means "that the difficulty or inconvenience of joining all members of the class calls for class certification." *Lerch v. Citizens First Bancorp.*, Inc., 144 F.R.D. 247, 250 (D.N.J. 1992) (internal citation omitted); *see also Marcus v. BMW of N. Am.*, 687 F.3d 583, 594-95 (3d Cir. 2012). "There is no minimum number of members needed for a suit to proceed as a class action." *Id.* at 595. The United States Court of Appeals for the Third Circuit, however, has stated that "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of

[1] In the alternative, Plaintiff-Petitioners seek certification of a habeas corpus class of detainees in the District of New Jersey. A habeas corpus petition typically involves a claim for only individual relief. However, it is well-established that, in appropriate circumstances, a habeas corpus petition may proceed on a representative or class-wide basis. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 404 (1980) (holding that class representative could appeal denial of nationwide class certification of habeas and declaratory judgment claims); *Ali v. Ashcroft*, 346 F.3d 873, 886-91 (9th Cir. 2003) (affirming certification of nationwide habeas and declaratory class), *overruled on other grounds by Jama v. ICE*, 543 U.S. 335 (2005); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (holding that "under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions, holding multiple hearings, and writing multiple opinions"); *Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 620 (E.D. Pa. 1996) (certifying habeas class action challenging state's status under Antiterrorism and Effective Death Penalty Act). *See also Yang You Yi v. Reno*, 852 F. Supp. 316, 326 (M.D. Pa. 1994) (noting that "class-wide habeas relief may be appropriate in some circumstances."). The authority for such a proceeding is found by the Courts in Federal Rule of Civil Procedure 81(a)(4), which provides that the Federal Rules of Civil Procedure are applicable to proceedings for habeas corpus to the extent that the practice in such proceedings "is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has previously conformed to the practice in civil actions." Accordingly, the courts have held that even if Rule 23 is technically inapplicable to habeas corpus proceedings, courts should look to Rule 23 and apply an analogous procedure. *See, e.g.*, *Ali*, 346 F.3d at 891 (rejecting argument that Rule 23 requirements could not be used for guidance in determining whether a habeas representative action was appropriate); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-27 (2d Cir. 1974) (citing *Harris v. Nelson*, 394 U.S. 286, 294 (1969)) (finding in habeas action "compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure"); *United States v. Sielaff*, 546 F.2d 218, 221-22 (7th Cir. 1976); *Bijeol v. Benson*, 513 F.2d 965, 967-68 (7th Cir. 1975); *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 929 n.5 (N.D. Ga. 1982) (noting that "a number of circuit courts have upheld the notion of class certification in habeas cases, whether certification is accomplished under Fed. R. Civ. P. 23, or by analogy to Rule 23."); *accord* William B. Rubenstein, Newberg on Class Actions § 25.28 (4th ed. 2012).

Rule 23(a) has been met." *Id.* (quoting *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001)); *see also McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 455 (D.N.J. 2008) ("When dealing with a class that numbers in the hundreds, joinder will most often be impracticable.") (citation omitted). Moreover, "[t]he requirements of Rule 23(a), and particularly, the numerosity requirement, may be more liberally construed in civil rights cases in which injunctive relief is sought." *Osgood v. Harrah's Entertainment, Inc.*, 202 F.R.D. 115, 122 (D.N.J. 2001). *See also Weiss v. York Hosp.*, 745 F.2d 786, 808 (3d. Cir. 1984); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001).

Plaintiffs easily satisfy these requirements because the population of individuals being mandatorily detained in New Jersey pursuant to § 1226(c) numbers in the hundreds. Indeed, data from U.S. Immigration and Customs Enforcement (ICE), gathered through a request under the Freedom of Information Act (FOIA), Tan Dec. ¶¶ 3-5, Exs. A-C, and summarized in a chart appended to the Declaration of Michael Tan, *id.* ¶ 6, Ex. D, disclose the number of individuals subject to mandatory detention in both ICE's Newark Area of Responsibility (which includes three detention facilities in New Jersey) and ICE's New York City Area of Responsibility (which includes four detention facilities, three of which are in New Jersey and one of which is in Goshen, New York), *id.* ¶¶ 7-10. More specifically, the data show that on any given day anywhere from 149 to 266 individuals were subject to mandatory immigration detention in the Newark Area of Responsibility — *i.e.*, were held in New Jersey detention facilities. *Id.* ¶ 9, Ex. D. An additional 191 to 259 individuals were subject to mandatory detention in the New York City Area of Responsibility. *Id.* ¶ 10, Ex. D. Together, this means that there were anywhere between 342 and 519 class members in both Areas of Responsibility. *Id.* ¶ 11. Some of these individuals are held in Goshen, New York; the data do not specify precisely how many. But a

very conservative calculation of the number of mandatory detainees in New Jersey suggests that there are well over 200 mandatory detainees in New Jersey at any given time, and therefore well over 200 class members, even without counting individuals who will enter the class in the future. *Id.* ¶¶ 12-13; *see Gurmankin v. Costanzo*, 626 F.2d 1132, 1135 (3d Cir. 1980) (in assessing numerosity, district court may consider "number of persons [in proposed class] who have been affected in the past or may be affected in the future"). This easily satisfies the numerosity requirement of Rule 23(a)(1). *See Marcus*, 687 F.3d at 594-95.

Moreover, each and every class member is, by definition, imprisoned in a detention facility, and the class members are spread among no fewer than six separate facilities throughout New Jersey. It would be enormously "administratively burdensome [to conduct an] action with all interested parties compelled to join and be present," precisely the problem that class certification — and the "numerosity" requirement of Rule 23(a)(1) in particular — is intended to address. *Marcus*, 687 F.3d at 595. Certification of this class would also serve another objective of the "numerosity" requirement by "creat[ing] greater access to judicial relief . . . for those persons with claims that would be uneconomical to litigate individually" because of the significant obstacles inherent in the representation of detainees, especially where, as here, the detainees have no right to appointed counsel. *Id.*

Plaintiffs easily satisfy the requirement of Rule 23(a)(1). The motion for class certification should therefore be granted.

B. There Are Common Questions of Both Law and Fact

Plaintiffs also satisfy the requirement of Federal Rule of Civil Procedure 23(a)(2) that they share "questions of law or fact common to the class." This requirement of commonality is "not a high bar," as it is satisfied upon showing that the "named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Chiang*, 385 F.3d 256,

265 (3d Cir. 2004) (quoting *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 184 (3d Cir. 2001)); *see also Wal-Mart*, 131 S. Ct. at 2556 ("For purposes of Rule 23(a)(2), even a single common question will do.") (internal quotations and alterations omitted). "A finding of commonality does not require that all class members share identical claims, and indeed 'factual differences among the claims of the putative class members do not defeat certification.'" *In Re Prudential Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 310 (3d Cir. 1998) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)). Rather, class members must show only that they "are subject to the same harm," or that the "defendant [is] engaging in a common course of conduct toward them." *Baby Neal*, 43 F.3d at 56–57. Most recently, the Supreme Court summarized Rule 23(a)(2) as requiring that "[proposed class members'] claims must depend upon a common contention" and that the "common contention must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct at 2551.

Here, the "common contentions" of all individuals detained under § 1226(c) are plain: all putative class members are all subject to detention without bail pursuant to the standard set forth in *Matter of Joseph*, which plaintiffs contend is unlawful. In addition, pursuant to the government's policy of providing misleading information in the Notice of Custody Determination, which states that there is no right to review of mandatory detention, members of the proposed class are denied adequate notice of their entitlement to a hearing, *see* Tan Decl. Exs. E-F; all have been detained without the government having been required to bear its burden of making out a *prime facie* showing of removability or inadmissibility on one of the grounds designated under the mandatory detention statute; and none have been provided with an

opportunity, in the context of a detention hearing, to establish that they have substantial challenges to the government's charges of removability or claims for discretionary relief that would allow them to remain in the United States, *see Matter of Joseph*, 22 I&N Dec. 799. Moreover, they are all subject to *Joseph* hearings that are procedurally deficient for lack of a contemporaneous record of proceedings. In other words, all individuals detained under § 1226(c) suffer the same harm: mandatory detention under an improper standard which does not require a determination as to whether they have a substantial challenge to removal, and without having been afforded lawful process for determining whether detention under § 1226(c) is appropriate.

Plaintiffs understand, of course, that the facts in the underlying immigration case of each member of the proposed class vary. But these disparate facts are irrelevant to the common contention asserted here: that the government holds all of them under the unlawful and unconstitutional *Joseph* standard and deficient hearing procedures. And the challenged conduct depends not at all on the underlying facts of their immigration cases, other than that the government has determined that each member of the class will be detained without bail under § 1226(c). Certification of a class in these circumstances is entirely appropriate — classes have been certified in the Third Circuit "in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." *Baby Neal*, 43 F.3d at 57 (citing C. Wright and A. Miller, Federal Practice and Procedure, § 1763 at 219); *see also Stewart*, 275 F.3d at 227 (finding commonality where at least one question of fact or law is common to each member of the prospective class, "despite the differences that undoubtedly exist from case to case").

Moreover, this is not a case in which the disparate facts of individual cases render illusory the class-wide resolution of "an issue that is central to the validity of each one of the claims." *Wal-Mart*, 131 S. Ct. 2550-57 (finding that proposed class of all current and former female employees of Wal-Mart alleging sex-discrimination in employment lacked commonality because there was no "glue holding the alleged *reasons* for the [employment] decisions [at issue] together."). Plaintiffs seek an order requiring the defendants to afford class members a process that would meaningfully assess whether the class members in fact, have a substantial challenge to removal and that allows them to challenge their mandatory detention consistent with the applicable statutes and constitutional protections. They are entitled to this relief irrespective of the facts underlying their particular immigration cases. To be sure, the facts of each class member's case may affect whether, under the lawful process sought, a particular individual is or is not properly detained under § 1226(c). But those facts are not before this Court, and need not be considered in judging the adequacy of the current standards, and process under *Joseph*. That is, it is for an appropriate tribunal to judge the facts of individual cases; plaintiffs request this Court only to correct the unlawful standards and process that the defendants currently employ.

In sum, the proposed plaintiff class satisfies the commonality requirements of Rule 23(a)(2). Their motion for class certification should be granted.

C. The Claims of the Representative Plaintiffs Are Typical of the Claims of the Class as a Whole

Named plaintiffs Gayle, Francois and Sukhu satisfy Rule 23(a)(3)'s requirement that their claims be typical of the class as a whole. The requirement of typicality, like that of commonality, "serve[s] as [a] guidepost for determining whether under the particular circumstances maintenance of a class action is economical and 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." *General Tel. Co. v. Falcon*, 457 U.S. 147, 158 n. 13 (1982). The "independent legal significance" of the typicality inquiry "derives . . . from its ability to 'screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present.'" *Marcus*, 687 F.3d at 598 (quoting 7A Wright & Miller, Federal Practice & Procedure § 1764). *See also Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631–32 (3d Cir. 1996), *aff'd sub nom.*, *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997); *Baby Neal*, 43 F.3d at 57. The typicality inquiry thus "ensure[s] that the interests of the absentees will be adequately represented by the named plaintiffs." *In re Cmty Bank of N. Va & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 393 (3d Cir. 2005) (citing *Falcon*, 457 U.S. at 157 n.13).

"To determine whether a plaintiff is markedly different from the class as a whole" the Court must consider "the attributes of the plaintiff, the class as a whole, and the similarity between the plaintiff and the class." *Marcus*, 687 F.3d at 598. In particular, "(1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class." *Id.* (quoting *In re Schering Plough Co. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009)).

Here, the claims of the named plaintiffs regarding the unlawfulness of the hearings at issue are identical to the claims of the class as a whole. In this regard, and as discussed above, it is immaterial that the factual circumstances underlying their immigration claims may be

substantively different from those of other class members because "[lead] plaintiff[s'] claim[s] arise from the same . . . practice or course of conduct" — *i.e.*, the unlawful *Joseph* hearing process utilized by the government — "that give[] rise to the claims of the class members." *Marcus*, 687 F.3d at 598. *See In re Prudential Ins.*, 148 F.3d at 311 ("Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct."); *Baby Neal*, 43 F.3d at 63 ("[A] claim framed as a violative practice can support a class action embracing a variety of injuries so long as those injuries can all be linked to the practice."); *accord* 1 William B. Rubenstein, Newberg on Class Actions § 3.34 at 278 (5th ed. 2011).

Moreover, that plaintiffs Gayle and Sukhu have additional challenges to the lawfulness of their detention, as set forth in the Third, Fourth and Fifth Causes of Action alleged in the Complaint, does not defeat a finding of typicality. The typicality requirement acts as a bar to class certification only when "the legal theories of the named representatives *potentially conflict* with those of the absentees." *Georgine*, 83 F.3d at 631 (emphasis added). Here, there is no conflict between the statutory and constitutional claims that all class members share and the other claims that individual class members, including the named plaintiffs, may assert. To the contrary many class members will, like certain of the named plaintiffs, have claims beyond the core allegations of the Complaint, set forth in the First and Second Causes of Action, which allege that the process underlying their detention is unlawful and that they are being improperly held without their challenges to removability having been determined. Those class members who have such alternative claims for relief from detention will not be precluded by this action from asserting those claims in their own cases; and "the [t]he mere fact that some members of

the class may have [such] additional . . . . claims, not asserted by the named plaintiffs, does not preclude a finding of typicality." *In re Cmty. Bank of N. Va.*, 418 F.3d at 303; *see also* Rule 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action [only] with respect to particular issues."). That is, the fact that certain of the named plaintiffs have additional claims, beyond the class-wide challenge to the *Joseph* standard and hearings, does not create a conflict with the rest of the class, who may or may not have such claims in addition to the *Joseph* claims, but who, in any event, are identically situated with regard to the class-wide claims. *See, e.g.*, *Geraghty v. U.S. Parole Comm'n*, 579 F.2d 238, 252-53 (3d Cir. 1978) (stating that district court's observation that "not all of the grounds of action alleged in the complaint are applicable to the class" was an improper basis for denying certification), *vacated on other grounds*, 445 U.S. 388 (1980); *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544 (D.N.J. 1999) ("[T]he fact that Cannon has an additional individual claim against [the defendant] does not detract from her ability to fairly represent the interests of absent class members."); *Kalow & Springut, LLP v. Commence Corp.*, No. 07-cv-3442-FLW, 2011 WL 3625853 (D.N.J. Aug. 15, 2011) (Wolfson, J.) ("[I]t is well settled that a district court can partially certify a class as to a single cause of action within a suit."); *Florence v. Bd. of Chosen Freeholders of County of Burlington*, No. 05-cv-3619, 2008 WL 800970 (D.N.J. Mar. 20, 2008) ("[T]he mere fact that Plaintiff brings additional claims on his own behalf does not render his unlawful strip search claim atypical of the unnamed putative class members' claims."); *Jordan v. Commonwealth Fin. Sys.*, 237 F.R.D. 132, 138 (E.D. Pa. 2006) ("Additional claims by the class representative do not render his claims atypical of the class; instead, the claim need only arise from the same 'practice or course of conduct that gives rise to the claims of the class members' and be '"based on the

same legal theory.'" (quoting *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir.1992)).

The named plaintiffs satisfy the requirements of Rule 23(a)(3). For this reason too, their motion to certify this matter as a class action should be granted.

D. The Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class

Class certification is also appropriate where, as here, the named representative plaintiffs will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement of 23(a)(4) is meant to "to determine [1] that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, . . . and [2] that there is no conflict between the individual's claims and those asserted on behalf of the class." *Larson v. AT&T Mobility*, 687 F.3d 109, 132 (3d Cir. 2012) (quoting *In re Cmty Bank of N. Va.*, 418 F.3d at 291 (alterations in original)). cew

In this case, the named, representative plaintiffs here have both the ability and the incentive to present the claims of the class vigorously. They are, like all class members, detained without bond, and are anxious to return to their lives and to their families. And their chances of winning release on bond — exactly like those of all class members — will markedly increase if their claims on behalf of the class are successful. Having already spent months in detention during the pendency of their immigration cases, they have a strong incentive to vigorously represent the interests of the class, and the ability to do so. Nor are there conflicts between the lead plaintiffs and the other class members. Rather, as discussed above, *supra* § I.C, the named plaintiffs seek precisely the same relief as the class as a whole — an opportunity to challenge their eligibility for mandatory detention pursuant to standards and procedures that comply with the applicable statutes and with the Constitution.

Finally, the proposed class will be represented by adequate counsel. Counsel are expert in immigration law, detainee rights, and class action litigation. They have the motivation and resources to vigorously litigate this case. More to the point, and as explained in greater detail in Section II below, counsel satisfy all of the requirements enumerated in Rule 23(g) for appointment as class counsel. *See Larson*, 687 F.3d at 132 n.36 ("'Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) . . . those questions have, since 2003, been governed by Rule 23(g).'" (quoting *In re Cmty. Bank of N. Va.*, 622 F.3d at 292) (alterations in original)). Accordingly, the adequacy requirements of Rule 23(a)(4) are satisfied.

E. Class Certification is Appropriate under Rule 23(b)(2)

In addition to satisfying the requirements of Rule 23(a), the proposed Class here satisfies Rule 23(b)(2), which requires a showing that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Importantly, the Class satisfies both of Rule 23(b)(2)'s two enumerated prongs. First, Defendants have acted or refused to act on grounds generally applicable to all members of the Class. Second, the relief sought is injunctive and declaratory in nature.

As mentioned, the government policies that plaintiffs challenge — the unlawful legal standard and inadequate procedures that are utilized in detention hearings under *Matter of Joseph* — apply to all class members simply by virtue of their designation as mandatory detainees under § 1226(c), without regard to the individual circumstances of their cases or any other differences among them. It is plain, therefore, that the government has "acted . . . on grounds generally applicable to the class." Rule 23(b)(2). Indeed, civil rights actions such as this one, which challenge government policies that target a particular class of people are prototypical (b)(2) class

actions. *See Wal-Mart*, 131 S. Ct. at 2557 ("As we observed in *Amchem*, '[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture.") (quoting *Amchem*, 521 U.S. at 614)

Moreover, with regard to the class claims, plaintiffs do not seek any "individualized" relief, such as damages, whatsoever. *See Wal-Mart*, 131 S. Ct. at 2558 (holding that "[p]ermitting the combination of individualized and classwide relief in a (b)(2) class is . . . inconsistent with the structure of Rule 23(b)"). As explained above, plaintiffs seek only an order declaring that the defendants' current standard and procedures governing mandatory detention are unlawful. Ultimately, individualized determinations will have to be made as to whether any given class member is in fact properly detained under § 1226(c), but those determinations are not — with the exception of the additional non-class claims raised by the named plaintiffs in the Third, Fourth and Fifth claims for relief — the subject of this lawsuit, and will not be made by this Court.

The second requirement of Rule 23(b)(2) — that the relief sought be injunctive or declaratory in nature — attempts to ensure that determining the legality of a defendant's behavior with respect to an entire class is appropriate. *See* Advisory Committee's Note to the 1966 Amendment to Rule 23. Class certification under Rule 23(b)(2) does not require that the party opposing the class has acted in a manner that is directed or damaging to each and every class member. "What is important is that the relief sought by the named plaintiffs should benefit the entire class." *Baby Neal*, 43 F.3d at 59. As the Third Circuit has explained, Rule 23(b)(2)'s requirements are "almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58; *see also Stewart*, 275 F.3d at 228; *Barnes v. American Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998); *Weiss*, 745 F.2d at 811. Most recently, the Supreme Court

reiterated this rationale for (b)(2) class actions, stating in *Wal-Mart v. Dukes* that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." 131 S. Ct. at 2557.

In this case, the proposed class seeks only declaratory and injunctive relief. This relief would resolve the claims of each and every class member with respect to the illegality or unconstitutionality of the standard and procedures that have resulted in their detention, and would provide them with an appropriate remedy. Because the proposed class accordingly satisfies all necessary requirements for certification under Rule 23(a) and Rule 23(b)(2), plaintiffs respectfully request that this Court certify the class, designate plaintiffs as class representatives, and appoint plaintiffs' counsel as class counsel pursuant to Rule 23(g).

II. THIS COURT SHOULD APPOINT UNDERSIGNED COUNSEL AS CLASS COUNSEL

Under Rule 23(g)(1), "a court that certifies a class must appoint class counsel." In appointing class counsel, the court must consider four factors set out in Rule 23(g)(1)(A):

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.

Here, the plaintiffs seek appointment of the American Civil Liberties Union's Immigrants' Rights Project (ACLU-IRP), the American Civil Liberties Union of New Jersey (ACLU-NJ), and

the John J. Gibbons Fellowship in Public Interest and Constitutional Law at Gibbons P.C. as counsel for the class. These counsel amply satisfy the requirements set out above.

The ACLU Immigrants' Rights Project has long worked to enforce the constitutional and statutory constraints on the federal government's power to subject noncitizens to administrative immigration detention. The ACLU-IRP has litigated all of the key cases in this area as either counsel of record or *amicus curiae*. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510 (2003) (counsel of record); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (amicus); *Clark v. Martinez*, 543 U.S. 371 (2005) (amicus); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (amicus); *Leslie v. Attorney General of the United States*, 678 F.3d 265 (3rd Cir. 2012) (amicus); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001) (counsel of record); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (counsel of record); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (counsel of record); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (counsel of record); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008) (amicus); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011) (amicus); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (counsel of record). Several of these cases have been class actions brought on behalf of immigration detainees. *See, e.g.*, *Rodriguez v. Hayes*, No. 07-cv-3239 (C.D. Cal. filed May 16, 2007) (counsel of record) (challenging the prolonged detention without bond hearings of noncitizens in the Central District of California); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) (granting class certification); *Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133 (C.D. Cal 2011) (counsel of record) (seeking right to appointed counsel in removal proceedings for mentally disabled immigration detainees); *Alli v. Decker*, 644 F. Supp. 2d 535 (M.D. Pa 2009) (counsel of record) (challenging prolonged mandatory detention of lawful permanent residents in Pennsylvania); *Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011) (holding that the INA did not preclude classwide declaratory relief).

Moreover, as part of its research and advocacy, ACLU-IRP routinely seeks government records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, regarding the size and characteristics of the immigration detention population, and litigates FOIA enforcement actions. *See* Tan Decl. ¶ 2; *ACLU v. Dep't of Homeland Security*, No. 1:11-cv-03786-RMB (S.D.N.Y. filed June 3, 2011) (counsel of record) (FOIA suit for records related to long-term ICE detention population and ICE administrative custody review process).

The American Civil Liberties Union of New Jersey Foundation has extensive experience litigating class-wide actions in civil rights matters. Most recently, the ACLU-NJ served as class-action counsel in *Jones v. Hayman*, 418 N.J. Super. 291, 13 A.3d 416 (App. Div. 2011), and *Colon v. Passaic County*, No. 08-cv-4439 (D.N.J. filed Sept. 5 2008). In *Jones*, the ACLU-NJ represented a class of female prisoners who were improperly transferred and kept in harsh conditions in a small section of a men's prison. The ACLU-NJ successfully obtained a preliminary injunction against further transfers of women to the men's prison and, after extensive litigation, the State resolved the case by transferring the remaining women back to the women's prison. In *Colon*, the ACLU-NJ served as co-counsel to a class of detainees subjected to unjust conditions of confinement, including significant overcrowding. That action resulted in a comprehension court-approved settlement consisting of five memoranda of understanding, covering medical heath care, mental health care, environmental health, fire safety, and correctional management. *See also, e.g.*, *Sojourner A. v. N.J. Dep't of Human Services*, 177 N.J. 318, 828 A.2d 306 (2003) (ACLU-NJ serving as counsel in a class-action challenge to New Jersey's welfare cap).

The ACLU-NJ Foundation also has extensive experience in cases involving the civil rights of immigrants. Notably, the ACLU-NJ represented both immigrants and landlords in a

successful challenge to the Township of Riverside ordinance that would have imposed sanctions on landlords and tenants who rented to or hired undocumented immigrants. *Riverside Coalition of Business Partners and Landlords, v. Twp. of Riverside*, No. BURL-L-2965-06 (L. Div. filed Oct. 18, 2006). It has also directly represented immigrants in habeas petitions. *See, e.g., Augustovsky, v. Holder,* No. 09-cv-04251 (D.N.J. filed August 18, 2009)*; Joseph v. Avila,* No. 07-cv-2392 (D.N.J. filed May 22, 2007); *Jama v. Chertoff*, No. 06-cv-5185 (D.N.J. filed Oct. 27, 2006). Further, the ACLU-NJ has submitted numerous briefs to the United States Court of Appeals for the Third Circuit as *amicus* in notable immigrants' rights cases. *See, e.g., Bolmer v. Connelly Properties*, 672 F.3d 241 (3d Cir. 2012), *cert. denied*, No. 11-1435, __ S.Ct. __ , 2012 WL 1945620 (Oct. 1, 2012); *Diop v. ICE/Homeland Security,* 656 F.3d 221 (3d Cir. 2011); *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011). *See also State v. Nunez-Valdez*, 200 N.J. 129, 975 A.2d 418 (2009).

Gibbons P.C., which is one of New Jersey's largest and most prestigious law firms, also has substantial experience in prosecuting class actions concerning a wide range of public interest and constitutional issues. Particularly relevant here, Gibbons, through its John J. Gibbons Fellowship in Public Interest and Constitutional Law, has extensive experience litigating class actions brought on behalf of incarcerated populations. *See, e.g., Alves v. Main*, No. 01-cv-789 (D.N.J. filed Feb. 15, 2001) (class action, currently pending approval of settlement, regarding the adequacy of mental health treatment afforded to civilly-committed individuals held under New Jersey's Sexually Violent Predator Act); *Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999) (remanding to district court in class action alleging failure to provide constitutionally adequate treatment to diabetic inmates at the Adult Diagnostic and Treatment Center in Avenel, New Jersey); *Pack v. Beyer*, 1995 WL 775360 (D.N.J. Dec. 22, 1995) (approving settlement of class

action regarding treatment of African-American inmates at the New Jersey State Prison held in solitary confinement); *Hairston v. Fauver*, No. 90-cv-1850 (D.N.J. filed May 11, 1990) (settlement approved Dec. 6, 1995 in class action regarding prison conditions and medical treatment at Northern State Prison); *Roe v. Fauver*, No. 88-cv-1225, 1988 U.S. Dist. LEXIS 11328 (D.N.J. Oct. 11, 1988) (denying State's motion for summary judgment in class action on behalf of New Jersey inmates diagnosed with HIV/AIDS). The Gibbons Fellowship has also acted as class counsel in many other civil rights actions. *See, e.g., M.A. v. Newark Public Schools*, 334 F.3d 335 (3d Cir. 2003) (class action challenging inadequate special education programs); *Baby Sparrow v. Waldman*, No. 96-cv-4118 (D.N.J. filed Aug. 28, 1996) (class action successfully settled on December 23, 1996, on behalf of "boarder babies" who were born to addicted mothers, removed at birth, and warehoused in hospitals rather than being placed in foster care). Likewise, the Gibbons Fellowship program has previously litigated a wide range of immigration-related matters. *See, e.g., Clark v. Martinez*, 543 U.S. 371 (2005) (amicus); *Jama v. ICE*, 543 U.S. 335 (2005) (amicus) (contesting deportation of immigrant without consent of the receiving country); *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011) (amicus) (Fourth Amendment challenge to ICE raids of immigrant homes); *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (challenging the secrecy of so-called "special interest" deportation proceedings that were widely deployed following the attacks of September 11, 2001); *Castillo v. Reno*, 178 F.3d 1278 (3d Cir. 1999) (*habeas corpus* action on behalf of detained immigrant); *Kitembo v. Ashcroft*, No. 03-3108 (3d Cir. dismissed Apr. 15, 2011) (appeal from BIA decision challenging procedural deficiencies and other errors in asylum proceeding); *Qatanani v. Dep't of Justice*, No. 12-cv-4042 (D.N.J. filed June 29, 2012) (lawsuit enforcing FOIA request in support of ongoing immigration removal proceedings); *Jama v.*

Chertoff, No. 06-cv-5185 (D.N.J. filed Oct. 27, 2006) (*habeas* petition on behalf of immigrant detained for more than four years); *Jama v. U.S. Immigration & Naturalization Serv.*, 343 F. Supp. 2d 338 (2004) (amicus) (challenging conditions of confinement at immigration detention facility in Elizabeth).

Plaintiffs' counsel have the resources to maintain this litigation, as evidenced by the numerous class actions they have successfully prosecuted in the past. They are also willing to devote significant resources to the prosecution of the case including lead attorneys — Ms. Rabinovitz and Mr. Arulanantham of ACLU-IRP,[2] Mr. Barocas of ACLU-NJ, and Mr. Lustberg of Gibbons P.C. — who each have decades of experience litigating civil rights cases — as well as several other attorneys whose legal practices focus exclusively on public interest litigation or immigration law.[3] Moreover, ACLU-IRP, ACLU-NJ and the law firm of Gibbons P.C. have ample support staff and other resources. Finally, plaintiffs' counsel are undertaking this representation entirely *pro bono*, and will not collect any fees unless they awarded against the defendants by the Court. *See Sheinberg v. Sorensen*, 606 F.3d 130, 133 (3d Cir. 2010) (stating that court, in determining whether to appoint counsel under Rule 23(g), may consider attorney's fee arrangement and may "order the proffered counsel 'to propose terms for attorney's fees and nontaxable costs' and to include provisions for such fees and costs 'in the appointing order.'" (quoting Rule 23(g)(1)(C)-(D)).

Because plaintiffs' counsel have the interest, ability, and resources to represent the Class and will fairly and adequately represent the interests of the class, the Court should appoint them as counsel for the class under Rule 23(g).

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[2] *See Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009) (noting that Ms. Rabinovitz and Mr. Arulanantham have "distinctive knowledge and specialized skill in immigration law and, in particular, constitutional immigration law and litigation involving the rights of detained immigrants").

[3] For instance, Mr. Tan of ACLU-IRP has litigated several key cases — including class actions — on behalf of immigration detainees, and argued *Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011), before the Third Circuit.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court certify a class of all individuals in New Jersey who are or will be detained pursuant to 8 U.S.C. § 1226(c), appoint the named plaintiffs as class representatives, and appoint ACLU-IRP, ACLU-NJ and Gibbons P.C. as class counsel.

Respectfully submitted,

/s/Lawrence S. Lustberg

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