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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MONY PREAP, EDUARDO VEGA PADILLA, and JUAN LOZANO MAGDALENO,

Plaintiffs-Petitioners,

v.

RAND BEERS, Secretary, United States Department of Homeland Security; ERIC H. HOLDER, JR., United States Attorney General; TIMOTHY S. AITKEN, Field Office Director, San Francisco Field Office, United States Bureau of Immigration and

Case No. 4:13-cv-05754-YGR

MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 18, 2014
Time: 2:00 p.m.
Ctrm: 5
Judge: Hon. Yvonne Gonzalez Rogers

Date Filed: December 12, 2013

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on February 18, 2014[1] at 2:00 p.m. at 1301 Clay Street; Oakland, California, in the Ronald V. Dellums Federal Building, Courtroom 5, Second Floor, before the Honorable Yvonne Gonzalez Rogers, Plaintiffs-Petitioners will, and hereby do move the Court, pursuant to Fed. R. Civ. P. 23, for an order certifying the class described in the accompanying memorandum of points and authorities. Plaintiffs-Petitioners will also move the Court to appoint the law firm of Keker & Van Nest LLP, Asian Americans Advancing Justice – Asian Law Caucus, and American Civil Liberties Union Foundation of Northern California as class counsel. Plaintiffs-Petitioners' motion is based on this submission, the accompanying declarations and exhibits, the pleadings and other documents on file in this case, and any argument presented to the Court.

RELIEF REQUESTED (CIVIL L.R. 7-2(B)(3))

Through this motion, Plaintiffs-Petitioners request that the Court certify as a class the individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 1226(c) and who were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense (the "Proposed Class"). Plaintiffs-Petitioners further request that they be named as representative plaintiffs for the Proposed Class, and that their counsel be appointed as class counsel.

[1] Plaintiffs-Petitioners and other members of their proposed class comprise an inherently transitory class and have accordingly filed this motion shortly after filing their complaint. Because Defendants-Respondents have not yet appeared in this case, the Plaintiffs-Petitioners have noticed the motion hearing date to accommodate Defendants-Respondents' time to appear. Plaintiffs would be amenable to a modest adjustment to the briefing schedule for this motion if they and Defendants-Respondents may obtain leave of the Court to do so under Standing Order Rule 3. Plaintiffs propose to do so by stipulation with the Defendants-Respondents after they have appeared.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Immigration and Nationality Act (INA) § 236(c), 8 U.S.C. § 1226 ("Section 1226") governs the Attorney General's[2] authority to detain noncitizens while deportation proceedings against them are pending. Under Section 1226, noncitizens who are detained pending their proceedings are typically afforded individualized bond hearings where they may attempt to prove that their release would not create a risk of flight or a danger to the public. The statute at issue here creates an exception to this framework. Section 1226(c) defines a category of individuals ineligible for bond hearings, and for whom continued, uninterrupted detention is mandatory. These noncitizens remain in detention for months on end, and are not allowed to plead for their release to a neutral arbiter. Although categorical, mandatory detention is an extraordinary legal concept with few, if any, parallels in our justice system, the express terms of Section 1226(c) are actually quite limited. On its face, the statute applies only to a narrow category of individuals—noncitizens who are taken into custody by the Government immediately upon their release from criminal custody for specific triggering offenses enumerated in Section 1226(c)(1) ("Section 1226(c)(1) offenses").

This case involves a class of noncitizens who were not in custody for Section 1226(c)(1) offenses when they were apprehended by immigration authorities, but are nonetheless being held in mandatory detention under Section 1226(c). Their offenses include crimes that occurred many years ago, some of which were never severe enough to warrant incarceration in the criminal justice system. Many individuals in this class have clear and compelling records of rehabilitation and redemption. They and their loved ones anguish over their draconian, excessive and unnecessary—yet uncontestable—imprisonment during the pendency of deportation proceedings. And for all of the individuals in this class, the opportunity to prepare a case against removal is severely undermined by the isolating circumstances of their unconditional detention.

[2] For convenience unless the context requires more specificity, the Secretary of the Department of Homeland Security, the Attorney General and all other named defendants will be referred to below as the "Government."

The central question presented here is whether the Government's mandatory detention power extends to this class of noncitizens. Relying on a strained interpretation of Section 1226(c), the Government claims that it does. Throughout the state of California, the Government routinely tracks down and detains thousands of noncitizens with records of past criminal conviction, locking them up without notice, severing their established social ties, and initiating lengthy removal proceedings against them without providing any way for these individuals to challenge their detention while they try to fight from behind bars for the right to stay in this country. To justify this breathtakingly coercive power—faced with it, some detainees simply give up and agree to deportation without ever knowing that they were not, in fact, deportable—the Government must ignore, and is ignoring, the express terms of Section 1226(c)(1). That statute, on its face, exposes noncitizens to mandatory detention only ***"when [they are] released"*** from custody for a Section 1226(c)(1) offense.

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Jose Magdaleno (the "Named Plaintiffs") seek a ruling in this case that the Government's application of Section 1226(c) is unlawful and unconstitutional. On behalf of themselves and all of those similarly situated in the state of California, the Named Plaintiffs respectfully request that this Court certify their proposed class of plaintiffs and approve their counsel as counsel for the class.

II. STATEMENT OF FACTS

A. Board of Immigration Appeal's decision in *Matter of Rojas*

Section 1226 controls the Government's authority to detain noncitizens while their deportation proceedings are pending. Section 1226(a) gives the Government discretion to release an individual on his own recognizance or on a bond if it determines that release would not create a risk or flight or a danger to the community. 8 U.S.C. § 1226(a). If the Government decides not to release an individual or conditions release upon a bond amount the individual is unwilling or unable to pay, the individual is entitled to have the Government's decision reviewed by an Immigration Judge at a bond redetermination hearing. At that hearing, the individual has the opportunity to demonstrate that he should be released. *See* 8 C.F.R. §§ 1003.19, 1236.1(d)(1) (2013).

Section 1226(c) is an exception to the system created by Section 1226(a). It defines a category of individuals to whom the individualized determinations of Section 1226(a) are not afforded. It applies to noncitizens described in paragraph (1):

> (1) Custody
>
> The Attorney General shall take into custody ***any alien who***--
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,
> >
> > (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) ["Multiple criminal convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearms offenses"], or (D) ["Miscellaneous crimes"] of this title,
> >
> > (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral turpitude"] of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under section 1182(a)(3)(B) ["Terrorist activities"] of this title or deportable under section 1227(a)(4)(B) ["Terrorist activities"] of this title,
>
> ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c) (emphasis added). Section 1226(c)(2) further states that the Government is prohibited from releasing certain noncitizens "described in paragraph [1226(c)(1)]" except in limited circumstances. 8 U.S.C. § 1226(c)(2). On its face, Section 1226(c)(1) covers only individuals who are taken into custody by immigration authorities *immediately upon* the individual's release from criminal custody for a crime described by Section 1226(c)(1), subsections (A)-(D).

Read in its entirety, 8 U.S.C. § 1226 provides the Government with discretionary authority to arrest, detain, and release immigrants pending removal proceedings, except for a specified class of noncitizens whom the Government must detain at the time they are released from custody. Despite the tightly circumscribed scope of Section 1226(c) —which is evident from the plain language and the structure of the statute—the Board of Immigration Appeals (the "BIA"), in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), construed Section 1226(c) to require mandatory detention for individuals who were *not* taken into immigration custody "when . . . released" from

custody for a Section 1226(c)(1) offense. The BIA instead decided that the "when [] released" language does not limit the class of the individuals subject to mandatory detention, but instead merely describes the Attorney General's duty to act promptly. 23 I&N at 121. In effect, in *Rojas* the BIA impermissibly excised the "when . . . released" statutory language from Section 1226(c)(1) in determining which individuals are "described in paragraph [c](1)" and subject to mandatory detention.

The absence of any textual support for the BIA's interpretation in Section 1226(c) is a glaring error, but the effect of the BIA's construction of the statute is even more disturbing. The BIA's decision in *Rojas* dramatically expands the reach of Section 1226(c), exposing people who are living free to mandatory detention, thereby depriving them of basic procedural protections. What the Government is doing with mandatory detention in California under color of *Rojas* exceeds its statutory authority and violates the due process rights of those who are wrongfully detained. The construction of Section 1226(c) that the Named Plaintiffs will advance in this case is the only correct and reasonable reading of the statute, and the Named Plaintiffs will ask that the Court to adopt it for that reason alone, but the Court should also adopt it to avoid the more fundamental questions of due process that *Rojas* raises.

B. Representative plaintiffs

1. Mony Preap

Mony Preap is 32 years old. He came to the United States as an infant in 1981 as a refugee from Cambodia. *See* Ex. A (Declaration of M. Preap) ¶ 2. In 2006, Mr. Preap was released from custody for a Section 1226(c)(1) offense. *Id.* ¶ 7. In September of 2013, Mr. Preap was taken into immigration custody as the Government initiated removal proceedings against him.[3] Mr. Preap is a lawful permanent resident of the United States, a status he has enjoyed since he entered. *Id.* ¶ 2. He is the single father of an 11-year-old son. *Id.* ¶ 4. Before his detention, Mr. Preap lived with and was the primary caretaker of his son and his elderly mother, who has breast cancer and requires extensive care. *Id.*

[3] Mr. Preap was transferred into immigration detention from custody for a non-Section 1226(c)(1) offense. Ex. A ¶¶ 3, 7.

Mr. Preap is currently being held at West County Detention Facility in Richmond, California under Section 1226(c). *Id.* ¶ 3.

2. Eduardo Vega Padilla

Eduardo Vega Padilla is 48 years old. *See* Ex. B (Declaration of E. Padilla) ¶ 2. He came from Mexico as an infant in 1966, and became a legal permanent resident before he turned two. *Id.* He completed a six-month sentence for a Section 1226(c)(1) offense in 2002. *Id.* ¶ 7. Eleven years later—after a period of redemption, quiet enjoyment of civilian life, and caretaking for loved ones—ICE officials appeared at Mr. Padilla's front door. *Id.* ¶ 4. They asked him to accompany them to the immigration office, which Mr. Padilla did, voluntarily. *Id.* He was then handcuffed and taken into immigration custody, where he has remained for the past four months. *Id.*

Mr. Padilla's entire family resides in the United States. *Id.* ¶ 3. His family members include an elderly mother, three siblings, five children, and seven grandchildren. *Id.* All of them are United States citizens. *Id.* His last grandchild was born while Mr. Padilla was in detention. *See id.* ¶ 5. Prior to his detention, Mr. Padilla lived with and cared for his elderly mother, his youngest daughter, and grandson. *Id.* ¶ 3. He ran a small business, making a living by repairing electronics and automotive parts, and doing remodeling work. *Id.* ¶ 5.

Mr. Padilla is currently being held at Rio Cosumnes Correctional Center in Elk Grove, California under Section 1226(c). *Id.* ¶ 4.

3. Juan Magdaleno

Juan Magdaleno is 57 years old. *See* Ex. C (Declaration of J. Magdaleno) ¶ 2. He has lived in the United States as a lawful permanent resident since 1974, when he came here from Mexico as a teenager. *Id.* He was released from custody for a Section 1226(c)(1) offense in January 2008. *Id.* ¶ 10. In July of 2013, he was detained by the Government at his home. *Id.* ¶ 3. Prior to being taken into immigration detention, Mr. Magdaleno lived with his wife, two of his four children, his son-in-law, and his grandchild, all of whom are United States citizens. *Id.* ¶ 4. He is very close to his family. *Id.* ¶¶ 4, 6. Last month, one of his daughters got married. *Id.* ¶ 6. Although he was unable to attend because he was in immigration detention, his family arranged

to have him call and make a speech at the reception over the speaker system. *Id.* Before he was detained, Mr. Magdaleno took care of four of his grandchildren every day, taking them to school, picking them up and watching them after school until their parents returned from work. *Id.* Because of his detention, one of his daughters has had to close her nail salon early each day to watch her children. *Id.*

Mr. Magdaleno is currently being held West County Detention Facility in Richmond, California under Section 1226(c). *Id.* ¶ 3.

III. STATEMENT OF THE ISSUES TO BE DECIDED

Named Plaintiffs suffer the Government's unlawful and unconstitutional detention practices along with many others in the California immigration detention population. Like Mr. Preap, Mr. Padilla, and Mr. Magdaleno, these other individuals were released from custody for an offense enumerated by Section 1226(c)(1), and the Government did not detain them for immigration-enforcement purposes until sometime after they were released. Nevertheless, the Government has now subjected them to mandatory detention under Section 1226(c) and *Rojas*. As a result, hundreds, if not thousands, of individuals in California have been or will be uniformly denied the individualized determinations for which Section 1226 otherwise provides. As Named Plaintiffs seek the very same relief that those potential claimants would themselves seek—declaratory and injunctive relief to stop the Government's illegal and unconstitutional application of the law—this action is ripe for class certification.

The Named Plaintiffs respectfully request that the Court decide the following issues:

1. That a class should be certified under Federal Rule of Civil Procedure 23(a) and (b)(2) that consists of all individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 1226(c) and who were not or will not have been taken into

custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense; [4]

2. That Mony Preap, Eduardo Vega Padilla, and Juan Magdaleno are appropriate class representatives of the Proposed Class; and

3. That Keker & Van Nest (KVN), Asian Americans Advancing Justice – Asian Law Caucus (AAAJ-ALC), and American Civil Liberties Union Foundation of Northern California (ACLU-NC) are qualified counsel for the Proposed Class.

IV. ARGUMENT

A. The Proposed Class satisfies all requirements of Rule 23(a).

1. The number of current and future proposed class members renders joinder impracticable.

To meet Rule 23(a)(1)'s numerosity requirement, plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not allege the exact number or specific identity of class members[5] "so long as 'general knowledge and common sense indicate that it is large.'" *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 598 (N.D. Cal. 1986) (citing *Perez-Funez v. INS*, 611 F.Supp. 990, 995 (C.D.Cal 1984)). For that reason, Rule 23(a)'s numerosity requirement does not impose absolute numerical limitations, but rather entails an examination of the specific facts of each case. *General Tel. Co.*

[4] In the alternative, Plaintiff-Petitioners seek certification of a habeas corpus class of detainees in the State of California pursuant to Federal Rule of Civil Procedure 81(a)(4). It is well-established that, in appropriate circumstances, a petition for habeas relief 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); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus"); *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.").

[5] 1 William B. Rubenstein, *Newberg on Class Actions* § 3.13 (5th ed. 2011).

of the Northwest v. EEOC, 446 U.S. 318, 329 (1980); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). For example, this court has certified a class of 27 members. *Tietz v. Bowen*, 695 F. Supp. 441, 445 (N.D. Cal. 1987); *aff'd*, 892 F.2d 1046 (9th Cir. 1990). Plaintiffs easily meet Rule 23's numerosity requirement.

On any given day, the Government holds an estimated 3,500 individuals in immigration detention in the state of California. Over the twelve-month period ending November 2013, the Government held an estimated 4,410 individuals in mandatory detention in California.[6] Proposed class counsel identified twenty individuals as members of the proposed class in select facilities over only a four-month period. *See* Ex. E (Decl. of A. Pennington) ¶¶ 4-26. Another three likely members of the proposed class were identified over the course of only one week in facilities near Los Angeles. *See* Ex. E (Decl. of J. Pollock) ¶¶ 4-6.[7] The identified individuals represent only a small fraction of the estimated number of class members, as identified individuals are more likely than the population in immigration detention to have counsel, more likely to have affirmatively sought out assistance from AAAJ-ALC or through legal orientation programs, and less likely to have language or other barriers that interfere with their ability to seek out assistance. Ex. D ¶¶ 4-5, 26.[8] The number of current class members therefore, is assuredly large.

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[6] TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts by Nationality, Geographic Location, Year and Type of Charge*, fiscal year ending November 2013, criminal charges in California, (Dec. 16, 2013), http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php. Additionally, immigration detainers placed on individuals by the Government are oftentimes based on stale offenses. *See* TRAC Immigration, *Few ICE Detainers Target Serious Criminals* (Dec. 16, 2013), http://trac.syr.edu/immigration/reports/330/ (reporting that for over 80% of immigration detainers issued by the Government to state and local prisons and jails in the state of California, the most serious conviction serving as the basis for the detainer was over a year old, and for almost 50% of the detainers, the most serious conviction was over 5 years old). Thus, one of the primary mechanisms for identifying individuals for removal proceedings (and by extension, detention), depends on old qualifying offenses to justify mandatory detention.

[7] These twenty-three individuals were identified through observing immigration court hearings, visiting detention facilities, giving legal orientation programs, and being in contact with a handful of practitioners representing immigration detainees. Ex. D ¶ 26; Ex. E ¶¶ 4-6.

[8] Immigration records are not readily available to the public, *e.g.*, 8 C.F.R. § 236.6 (2013), which renders it difficult to identify and locate potential class members, further supporting a finding of the impracticability of joinder. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982) (difficulty in identifying or locating class members supported finding of impracticability).

Putting aside the sheer number of existing class members, the Government's unlawful application of Section 1226(c) will continue to injure future class members—individuals who are, by definition, unknown and therefore impossible to join in the present lawsuit. *See Nat'l Ass'n of Radiation Survivors*, 111 F.R.D. at 599. Relatedly, as the individual cases for members of this inherently-transitory class conclude their removal proceedings, voluntarily depart, or are permitted to stay in the United States, the composition of the proposed class will fluctuate. *See Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) (holding that rotating population of detention center established sufficient numerosity to make joinder impracticable).

Joinder of the proposed class members is also impracticable as the current proposed class members, confined to immigration detention yet spread across the State of California, lack regular access to phones and email, and have no access to the internet, and are thus inhibited in their ability to join and actively participate in a lawsuit. *See Jordan*, 669 F.2d at 1319, *vacated on other grounds*, 459 U.S. 810 (1982) (geographic diversity of class members favors impracticability of joinder); *Tietz*, 695 F. Supp. at 445 (same), *aff'd*, 892 F.2d 1046 (9th Cir. 1990).

Moreover, the vast majority of proposed class members lack the resources to bring an individual suit demanding a bond hearing. *Jordan*, 669 F.2d at 1319. While detained, members of the proposed class are unable to work, and consequently do not have the financial resources to pay for counsel. *See* Nina Siulc, et al., Vera Institute of Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program* (2008) (projecting that an estimated 84% of immigrant detainees nationwide do not have lawyers). Moreover, many detainees may lack familiarity with the English language or with the American legal system, rendering it unlikely they would institute separate suits. 5 James W.M. Moore, *Moore's Federal Practice* § 23.22[1][e] (3d ed. 2013).

Finally, where, as here, Named Plaintiffs seek declaratory and injunctive relief, speculative or even conclusory allegations regarding numerosity would suffice to permit class certification. *Sueoka v. United States*, 101 Fed. Appx. 649, 653 (9th Cir. 2004) (citation

omitted)); 5 *Moore's Federal Practice* § 23.22[3]. The Named Plaintiffs have presented much more than speculative allegations here.

Accordingly, the Named Plaintiffs' proposed class easily satisfies Rule 23(a)(2)'s numerosity requirement.

2. The claims of the proposed class members share common questions of law and fact.

To meet Rule 23(b)(2)'s commonality requirement, plaintiffs must "demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Moreover, "'[w]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis in original)). In deciding the issue of commonality, a "court must determine whether the claims of the proposed class 'depend upon a common contention ... 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.'" *Wang v. Chinese Daily News, Inc.*, No. 08-55483, --- F.3d ----, 2013 WL 4712728 (9th Cir. Sept. 3, 2013) (quoting *Wal-Mart*, 131 S. Ct. at 2551). Commonality exists where claims retain a common core of factual or legal issues, even if the circumstances of each particular claim member vary. *Parra v. Bashas', Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008) (holding commonality requirement met where plaintiffs sought common legal remedy for common wrong).

Here, Mr. Preap, Mr. Padilla, and Mr. Magdaleno, along with the other members of the Proposed Class, share both a common injury and a common legal contention central to their claims. *First*, all have suffered the same injury: through the Government's misapplication of Section 1226(c) under *Rojas*, each is subject to mandatory detention and ineligible for a bond hearing, even though each individual was not taken into immigration custody immediately upon release from custody for a Section 1226(c)(1) offense. *See* Ex. A ¶¶ 3-7; Ex. B ¶¶ 3-4, 7; Ex. C ¶¶ 3, 9-10; Ex. E ¶¶ 5-26; Ex. G ¶¶ 3-7; Ex. H (Decl. of D. Rosche) ¶¶ 3-5. As a result, each

proposed class member is denied the opportunity to make his case to an Immigration Judge, who would otherwise make an individualized determination of whether detention is warranted. The Government's practice of following the BIA's *Rojas* decision violates the statute Section 1226 itself, as well as the Fifth Amendment's Due Process guarantees. *Second*, whether Section 1226(c) applies to individuals like those in the Proposed Class forms the central question for each proposed class member's case. This is a question of law, and a question that is dispositive on whether each and every proposed class member is entitled to the relief they seek.

Accordingly, the Proposed Class satisfies the commonality requirement. Fed. R. Civ. P. 23(a)(2).

3. The claims of the Named Plaintiffs are typical of those of the proposed class members.

Mr. Preap, Mr. Padilla, and Mr. Magdaleno bring claims "typical of the claims or defenses of the class," satisfying Rule 23(a)'s typicality requirement. Fed. R. Civ. P. 23(a)(3). As the Ninth Circuit recently explained, the typicality requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez*, 591 F.3d at 1124 (internal quotation marks omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "The test 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.'" *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 539 (N.D. Cal. 2012) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). As one leading treatise observes, "[c]ivil rights cases that challenge uniform practices or policies that have allegedly injured the class representative as well as other class members satisfy the typicality requirement." 5 *Moore's Federal Practice* § 23.24[8][f]. This case presents no exception.

Here, as explained above, Mr. Preap, Mr. Padilla, and Mr. Magdaleno were each, at some

time in the past, held in custody for an offense enumerated by Section 1226(c)(1).[9] Each was then released from that custody.[10] It was only following some period of time after that release that the Government then took each of them into immigration detention in a California facility and deemed them ineligible for a bond hearing under Section 1226(c). The same holds true for each proposed class member. Because Plaintiffs and members of the proposed class share the same claim and have all been injured by the same practice of the Government's, their interests are co-extensive and aligned. *Hanon*, 976 F.2d at 508. Accordingly, their claims satisfy Rule 23(a)'s typicality requirement.

4. The Named Plaintiffs and their counsel will adequately protect the interests of the Proposed Class.

Finally, Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "In making this determination, courts must consider two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020). "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 (internal quotation marks omitted). The Named Plaintiffs and their counsel easily meet this requirement.

a. Named Plaintiffs

As with all current and future members of the proposed class, the Government keeps Mr. Preap, Mr. Padilla, and Mr. Magdaleno detained in immigration detention facilities in the state of California, and denies them bond hearings, based on the Government's incorrect and unlawful interpretation of Section 1226(c). Mr. Preap, Mr. Padilla, and Mr. Magdaleno seek declaratory and injunctive relief establishing that the Government's application of Section

[9] *See* Ex. A ¶ 7; Ex. B ¶ 7; Ex. C ¶¶ 9-10.

[10] *See* Ex. A ¶ 7; Ex. B ¶ 7; Ex. C ¶ 10.

1226(c) violates the Section 1226 and the Constitution. Because this is the same relief that the proposed class members would also seek, Mr. Preap, Mr. Padilla, and Mr. Magdaleno's interests are entirely aligned with those of the proposed class members. For the same reason, they have no conflict of interest with the proposed class members. Moreover, Mr. Preap, Mr. Padilla, and Mr. Magdaleno are eager to bring this class action on behalf of those similarly situated and will therefore prosecute the action vigorously. *See* Ex. A ¶ 9; Ex. B ¶ 9; Ex. C ¶ 11.

b. Counsel

Class counsel must be "qualified, experienced, and generally able to conduct the proposed litigation." *Abels v. JBC Legal Grp., P.C.*, 227 F.R.D. 541, 545 (N.D. Cal. 2005). KVN, AAAJ-ALC, and ACLU-NC jointly represent the Named Plaintiffs. Together, counsel for the Named Plaintiffs have significant experience in complex and class action litigation, including on civil rights and immigration issues. *See* Ex. D (Decl. of J. Streeter) ¶¶ 2-12; Ex. E (Decl. A. Pennington) ¶¶ 1-26; Ex. F (Decl. J. Mass) ¶¶ 2-5.

Jon Streeter has over thirty years of experience litigating complex actions, including class actions. His associates, Stacy Chen, Betny Townsend, and Theresa Nguyen also have significant experience litigating complex cases. Mr. Streeter has represented many clients pro bono, and has specific experience litigating civil rights issues in a state-wide class action brought under Rule 23 in this District. He and the law firm Keker & Van Nest LLP have undertaken representation of Named Plaintiffs and the proposed class on a pro bono basis.

Julia Harumi Mass and Jingni (Jenny) Zhao represented habeas petitioner Bertha Mejia Espinoza in her successful habeas petition challenging her detention without a bond hearing under the same statute at issue in this case, 8 U.S.C. § 1226. *Espinoza v. Aitken*, 2013 WL 1087492 (N.D. Cal. 2013). Ms. Mass also represents the class certified in civil rights case *De Abadia-Peixoto v. U.S. Department of Homeland Security*. 277 F.R.D. 572 (N.D. Cal. 2011). There, the class certified consisted of "all current and future adult immigration detainees who have or will have proceedings in immigration court in San Francisco." *Id.* at 577.

Alison Pennington and Anoop Prasad of Asian Americans Advancing Justice-Asian Law Caucus represented petitioner Abner Eugenio Dighero-Castaneda in his successful habeas petition

challenging the government's detention of him under Section 1226 as well. *Dighero-Castaneda v. Napolitano*, 2013 WL 1091230 (E.D. Cal. 2013).

None of the proposed counsel has any conflict of interest with members of the proposed class and each is committed to vigorously prosecuting this action.

B. Plaintiffs request that the Court certify their class under Rule 23(b)(2).

Named Plaintiffs request that the Proposed Class be certified under Rule 23(b)(2). Under Rule 23(b)(2), a court looks "at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125. Accordingly, Rule 23(b)(2) has two requirements: (1) that "the party opposing the class has acted or refused to act on grounds that apply generally to the class," such that (2) "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Proposed Class and requested relief meet both requirements.

First, the Government's misapplication of Section 1226(c) subjects the Named Plaintiffs and members of the Proposed Class to detention without the possibility of individualized hearings. The Government's practice by definition applies generally to the Proposed Class, which consists of individuals being unlawfully held without the possibility of release because of the practice. *See IV.A., supra.*

Second, the Named Plaintiffs seek declaratory and injunctive relief to uniformly bar defendants from their unlawful application of Section 1226(c). The requested relief "would provide relief to each member of the class." *Wal-Mart*, 131 S.Ct. at 2557 (explaining also that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture"). If the requested relief is granted, each class member would be entitled to a bond hearing. No individualized determinations need to be made by this Court—the actual grant or denial of bond would be left to the discretionary authority of the Department of Homeland Security or the Attorney General, as provided by Section 1226(a) and its implementing regulations.

C. Keker & Van Nest, AAAJ-ALC, and ACLU-NC respectfully request that the Court appoint them jointly as counsel for the Proposed Class.

Keker & Van Nest, AAAJ-ALC, and ACLU-NC respectfully request that the Court appoint them jointly as counsel for the Proposed Class. As explained above, and as required by Rule 23(g)(1)(A), counsel have significant experience litigating complex cases, including litigating civil rights class actions and the questions of statutory interpretation and Constitutional law on which the Named Plaintiffs' and proposed class members' claims are based. Moreover, counsel have extensive experience litigating claims involving the immigration laws and habeas challenges to detention. *See* Ex. D (Decl. of J. Streeter) ¶¶ 3-12; Ex. E (Decl. of A. Pennington) ¶¶ 2-4, 26; Ex. F (Decl. of J. Mass) ¶¶ 3-6. Collectively, counsel for the Named Plaintiffs have spent extensive time investigating the potential claims in this action, that includes time speaking with the class representatives and investigating the Government's practices. *See* Ex. D ¶ 9; Ex. E ¶¶ 3, 5-26; Ex. F ¶¶ 4-5.

As required by Fed. R. Civ. P. 23(g)(4), and as explained above in Section IV.A.4.b above, *supra*, KVN, AAAJ-ALC, and ACLU-NC will "fairly and adequately represent the interests of the class." Counsel have undertaken to represent Named Plaintiffs and members of the Proposed Class on a pro bono basis, and are committed to devote the required time and financial resources necessary to litigate this case and represent the interests of the Named Plaintiffs and proposed class members.

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V. CONCLUSION

Named Plaintiffs accordingly request that the Court certify their proposed class of plaintiffs and appoint KVN, AAAJ-ALC, and ACLU-NC as class counsel. In the alternative, Named Plaintiffs request class discovery to further demonstrate the ripeness of this action for class certification.

Dated: December 16, 2013

KEKER & VAN NEST LLP

By: */s/ Jon Streeter*
JON STREETER
STACY CHEN

Dated: December 16, 2013

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

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Dated: December 16, 2013

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