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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AUDLEY BARRINGTON LYON, JR., et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, JOHN SANDWEG, et al.,

Defendants.

Case No.: 13-cv-05878-EMC

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing:
Date: February 27, 2014
Time: 1:30 pm
Location: Courtroom 5
Judge: Edward M. Chen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD, please take notice that pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, Plaintiffs move that the Court certify this case to proceed as a class action and respectfully request a hearing on this Motion on February 27, 2014[1] at 1:30PM at 450 Golden Gate Avenue, San Francisco, California, in the San Francisco Courthouse, Courtroom 5, before the Honorable Edward M. Chen.

The class is defined as follows: All current and future immigration detainees who are or will be held by ICE in Contra Costa, Sacramento, and Yuba Counties.

Plaintiffs further request that this Court appoint Plaintiffs' counsel to serve as class counsel.

Plaintiffs move for certification because the above-defined Plaintiff class members are so numerous that joinder would be impracticable, there are common questions of law and fact among the class members, the claims of the individual Plaintiffs are typical of those of the class, and the Plaintiffs and their counsel will fairly and adequately represent the class interests. Additionally, Defendants have acted or refused to act on grounds applicable to the entire class, rendering declaratory and injunctive relief appropriate to the class as a whole.

Plaintiffs base this Motion upon the Complaint, the accompanying Memorandum of Points and Authorities in Support of Class Certification and Appointment of Class Counsel, Declarations filed in support of the Motion, the other papers and pleadings filed in this action and any argument presented to the Court.

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

Through this motion, Plaintiffs request that the Court certify as a class the aforementioned individuals. Plaintiffs further request that they be named as representative plaintiffs for the Proposed Class, and that their counsel be appointed as class counsel.

[1] Plaintiffs and other members of the Proposed Class comprise an inherently transitory class and have accordingly filed this motion shortly after filing their complaint. Because Defendants have not yet appeared in this case, Plaintiffs have noticed the motion hearing date to accommodate Defendants time to appear.

I. INTRODUCTION

Immigration detainees need access to telephones in order to effectuate their constitutional and statutory rights in their immigration proceedings. This case challenges the federal government's systematic denial of such access.

Proposed class members ("Plaintiffs") are immigrants held in the custody of Immigration and Customs Enforcement ("ICE") in facilities located in Contra Costa, Sacramento and Yuba Counties pending deportation proceedings. ICE determines the terms and conditions of Plaintiffs' detention; and as set forth in the Complaint for Injunctive and Declaratory Relief (the "Complaint"), those terms and conditions include patently unreasonable and unconstitutional telephone-use policies, policies that deny or severely restrict Plaintiffs' ability to communicate with the outside world. Because ICE denies Plaintiffs reasonable telephone access, many are unable to obtain or consult with counsel, obtain documents and information necessary to seek relief, or even contact family members who could help. In short, while Plaintiffs are in ICE custody, ICE policies and practices effectively deny Plaintiffs an opportunity to mount a defense to ICE's charges against them.

Unlike criminal defendants, immigrants charged with removal are not entitled to appointed counsel. Unless they can afford to pay for legal representation, they must gather information and evidence, contact witnesses, and evaluate complicated legal questions on their own. Therefore, like *pro se* criminal defendants, when an immigration detainee is "denied communication with the outside world, he [or she is] denied due process." *Milton v. Morris*, 767 F.2d 1443, 1447 (9th Cir. 1985). Here, Defendants' policies deny Plaintiffs their statutory and constitutional rights by depriving them of communication with the outside world. And just as ICE's telephone access policies and practices prevent Plaintiffs from exercising their rights in their immigration cases, they make it difficult for Plaintiffs to challenge ICE's systemic denial of telephone access as individual litigants, making this matter ideal for prosecution as a class action.

Accordingly, in this case, a class action for injunctive and declaratory relief against Defendants is not merely superior to other methods of adjudicating the underlying controversy, it is, as a practical matter, the only method for doing so. The core legal question – whether

Defendants' denial and restriction of telephone access to immigration detainees violates Plaintiffs' statutory and constitutional rights with respect to their immigration proceedings – is common to the entire class. The unconstitutional restrictions on telephone access imposed by ICE are substantially similar across the three facilities where proposed class members are held. And critically, the named Plaintiffs will not remain in ICE custody long enough to prosecute individual claims to a conclusion. Certification of a class consisting of all current and future immigration detainees who are or will be held by ICE in Contra Costa, Sacramento and Yuba Counties thus provides the only viable means to adjudicate the underlying claims.

II. BACKGROUND

A. The Proposed Class Consists of Immigrants Who Are Trying to Defend Themselves While Incarcerated

Immigrants facing charges of removal have rights under the Fifth Amendment's Due Process Clause, the Immigration and Nationality Act (the "Act") and the Petition Clause of the First Amendment to (among other things): (1) retain and be represented by counsel in connection with deportation proceedings instituted by Defendants; (2) have a fair hearing on removal charges; (3) gather and present evidence in connection with the removal hearing; and (4) petition government agencies for visas, immigration benefits and documents necessary to obtain various forms of relief from removal such that they can remain in the United States. *Id.* ¶¶ 94-95, 99-100, 104.

Plaintiffs are immigrants detained by ICE in geographic isolation at the Yuba County Jail in Marysville (the "Yuba Facility"); the Rio Cosumnes Correctional Center in Elk Grove, located in Sacramento County (the "Elk Grove Facility"); and the West County Detention Facility in Richmond, located in Contra Costa County (the "Richmond Facility," and together with the Yuba Facility and Elk Grove Facility, the "Facilities").[2] All class members have, have had, or likely will have immigration proceedings before the San Francisco Immigration Court, which is located

[2] *See* Compl. ¶¶ 83-84; Declaration of Audley Barrington Lyon, Jr. ("Lyon Decl."), ¶5; Declaration of Edgar Cornelio ("Cornelio Decl."), ¶ 3; Declaration of Jose Elizandro Astorga-Cervantes ("Astorga-Cervantes Decl."), ¶ 4; Declaration of Lourdes Hernandez-Trujillo ("Hernandez-Trujillo Decl."), ¶ 4.

in the city of San Francisco. *See* Compl. ¶ 37. While most attorneys who represent detained immigrants are based in or near San Francisco, two of the three Facilities are several hours drive away from San Francisco. *Id.* Many proposed class members are also geographically isolated from family members. *Id.* ¶¶ 34-35. Given Plaintiffs' lack of appointed counsel and their geographic isolation, telephone access is a critical lifeline to the outside world.

B. Defendants' Policies Severely Restrict Proposed Class Members' Access to Telephones

Proposed class members cannot receive incoming telephone calls in any of the Facilities. Compl. ¶ 47; Vincent Decl., ¶ 3; Lee Decl., ¶ 7. To make an outgoing call, they must either: (1) place a collect call, in which the recipient agrees to accept the charges for the call; (2) have a family member or friend contact the telephone service provider to establish a prepaid account, which funds their calls to a specific telephone number, or (3) in the Yuba and Elk Grove Facilities, use their own money to purchase a calling card. Compl. ¶ 42. Telephone rates are unreasonably – and often prohibitively – expensive, and there is no system for accommodating indigent detainees who need to use the telephone to work on their immigration cases. Compl. ¶ 46. Hernandez-Trujillo Decl., ¶¶ 10, 15; Astorga-Cervantes Decl., ¶ 7; Lyon Decl., ¶ 9; Lee Decl., ¶¶ 5-6.[3]

Significantly, even if a person can arrange and afford to make a call, a call from the Facilities may be completed only if a live person answers the telephone and accepts the call. *Id.* ¶ 43. If a recorded greeting begins to play, the call cannot be completed. *Id.* This means that Plaintiffs cannot leave voicemail messages or complete calls to offices that use voicemail trees, *i.e.*, automated systems that require selection of options to reach a live person. Compl. ¶ 43; Hernandez-Trujillo Decl., ¶¶ 16-17. Even when detainees are able to complete a call, it is automatically disconnected after 15 minutes, so detainees must initiate a new call (and pay another connection fee) to continue the communication. Compl. ¶ 46; Vincent Decl., ¶ 6; Lee Decl., ¶¶ 6-7.

[3] In the Richmond Facility, for example, in-state, long-distance calls cost $3.00 to connect plus $0.25 per minute, totaling $5.50 for a ten-minute call, making them prohibitively expensive for many members of the class. Compl. ¶ 46; Lee Decl., ¶ 6.

These unreasonable restrictions on making telephone calls are compounded by the circumstances of Plaintiffs' incarceration. At each of the Facilities, many members of the proposed class spend up to 22 hours a day confined to their cells, and may only make telephone calls during "free time," which occurs at inconsistent hours and often early in the morning or at night. Compl. ¶ 44; Hernandez-Trujillo Decl., ¶¶ 9, 16. Thus, they cannot arrange to call people at particular times and, when their free time occurs outside of business hours, they are unable to reach law offices or any other offices. Compl. ¶ 44*;* Lee Decl., ¶ 7. Further, because the only telephones that proposed class members may use are located in the common areas of each housing unit, Plaintiffs have zero privacy when making privileged calls to current or prospective attorneys, which are often about sensitive topics. *Id.* ¶ 45; Vincent Decl., ¶ 6.

C. The Proposed Class Suffers Prejudice and Injury As a Result of Defendants' Unconstitutional Phone Policies

By denying and severely restricting telephone access, Defendants' policies severely and unconstitutionally deprive Plaintiffs and members of the proposed class from seeking release from immigration custody or relief from deportation under the immigration laws, in a number of ways.

First, Defendants' policies make it extremely difficult, if not impossible, to secure private counsel from within detention facilities. *See, e.g.*, Hernandez-Trujillo Decl., ¶¶ 8-13; Cornelio Decl., ¶ 7; Astorga-Cervantes Decl., ¶ 12; Vincent Decl., ¶ 4; Lee Decl., ¶ 9. Some Plaintiffs are confined to their cells for most of the business day, and many lack sufficient funds to make calls. Compl. ¶ 52; Hernandez-Trujillo Decl., ¶¶ 9-10; Cornelio Decl., ¶ 7; Astorga-Cervantes Decl., ¶ 7. Those who are able to access the telephones during business hours and pay for calls are stymied by the inability to leave voicemail messages and navigate voicemail trees, and it is impossible for the attorneys to call or arrange calls to follow up on detainees' requests for representation. Compl. ¶ 52; Hernandez-Trujillo Decl., ¶¶ 16-17; Vincent Decl., ¶ 3; Lee Decl., ¶ 7. In addition, Defendants' telephone restrictions make representation of detained immigrants extremely burdensome for immigration attorneys, which limits the pool of counsel available to Plaintiffs. *See* Vincent Decl. ¶¶ 4-6 (legal organization limits representation of

detained immigrants due to telephone restrictions in immigration detention).

Second, even when detainees secure counsel, Defendants' policies severely undercut the effectiveness of the representation. Compl. ¶ 55; Hernandez-Trujillo Decl., ¶¶ 16-17; Vincent Decl., ¶¶ 3-7; Lee Decl., ¶¶ 5-8. As noted, ICE detainees cannot receive calls from their attorneys. Detainees must navigate serious structural obstacles to call their attorneys and suffer a total lack of privacy for all attorney calls. Their only alternative means of communication are in person or through the mail. But again: most detainees are incarcerated hours away from their attorneys, who are generally located near the Immigration Court in San Francisco (Lee Decl., ¶ 8) and legal correspondence can take a week in each direction. Compl. ¶ 55. In addition, many members of the proposed class cannot communicate by mail because they cannot read or write. *Id.* As a result of Defendants' policies and practices, immigration attorneys are simply unable to complete routine and necessary tasks such as drafting declarations and petitions for relief. *See* Lee Decl., ¶ 8; Vincent Decl. ¶ 6.

Third, Defendants' policies prevent those who must represent themselves in removal proceedings from obtaining and presenting evidence necessary to seek release from custody or relief from deportation. Detained immigrants who are unable to contest ICE's charges of removability may be eligible for various forms of relief from removal, including cancellation of removal and specialized visas. Compl. ¶ 57. To obtain these types of relief, Plaintiffs must communicate with government agencies and other third parties to obtain police reports, hospital records, law enforcement certifications, affidavits, documents and witnesses. *Id.* Defendants' severe obstacles to placing telephone calls prevent Plaintiffs from reaching such offices. *Id.* ¶¶ 57-58; Hernandez-Trujillo Decl., ¶ 18; Cornelio Decl., ¶ 11; Astorga-Cervantes Decl., ¶ 10; Lyon Decl., ¶ 7-12.

Fourth, Defendants' restriction of telephone access to members of the proposed class substantially prolongs their incarceration pending removal hearings. *Id.* ¶ 59; Cornelio Decl., ¶ 8; Hernandez-Trujillo Decl., ¶¶ 12-13. At master calendar hearings, detainees are forced to ask the immigration judge for multiple continuances to find counsel, to prepare their cases, or simply to obtain legal advice that permits them to make an informed decision whether to fight

removal or seek relief from deportation, because Defendants' telephone access restrictions prevent them from contacting the outside world. Cornelio Decl., ¶ 8; Hernandez-Trujillo Decl., ¶¶ 12-13. The prolonged periods of incarceration resulting from Defendants' restriction and denial of telephone access to immigrants held in ICE custody deprives Plaintiffs of their freedom, not as punishment for conviction of a crime, but rather because Defendants' policies and practices prevent Plaintiffs from exercising their statutory and constitutional rights. Compl. ¶ 60; ¶¶ 6, 59, 71, 81; Cornelio Decl., ¶ 8; Hernandez-Trujillo Decl., ¶¶ 12-13. The hopeless state of this prolonged detention even leads to the unnecessary deportation of some members of the proposed class. Compl. ¶ 5.

D. The Named Plaintiffs

Plaintiff Audley Barrington Lyon, Jr. is in ICE custody at the Richmond Facility and has removal proceedings pending in the San Francisco Immigration Court. Lyon Decl., ¶ 5. He is seeking a U visa as a victim of and witness to a crime under 8 U.S.C. § 1101(a)(15)(U) and may seek cancellation of removal under 8 U.S.C. 1229b. *Id.*, ¶ 6; Compl. ¶¶ 11, 62. Defendants' restrictions on telephone access in immigration detention have harmed Mr. Lyon by, *inter alia*, interfering with his ability to obtain information and documents necessary to support his U visa application. Lyon Decl., ¶¶ 7-13; Compl. ¶¶ 63-67.

Plaintiff Edgar Cornelio is in ICE custody at the Richmond Facility and has removal proceedings pending in the San Francisco Immigration Court. Cornelio Decl., ¶ 3. He is seeking relief from removal in the form of asylum under 8 U.S.C. § 1158 because he faces persecution by gangs if deported to Guatemala. *Id.*, ¶ 5; Compl. ¶¶ 12, 69. Defendants' restrictions on telephone access have harmed Mr. Cornelio by, *inter alia*, interfering with his ability to consult with or retain an attorney and his ability to gather information and evidence to support his asylum petition. Cornelio Decl., ¶¶ 6-11; Compl. ¶¶ 70-72.

Plaintiff José Elizandro Astorga-Cervantes is in ICE custody at the Elk Grove Facility. Astorga-Cervantes Decl., ¶ 4. Plaintiff Astorga-Cervantes intends to seek release from custody by demonstrating to an immigration judge or ICE that he does not pose a risk of flight or a danger to society. *Id.*, ¶ 9; Compl. ¶ 74. He also intends to apply for relief from removal under former §

212(c) of the Immigration and Nationality Act. Compl. ¶ 74. Defendants' restrictions on telephone access have harmed him and will continue to harm him by preventing him from contacting attorneys for legal advice or representation and impeding his ability to gather information and evidence in support of his release from custody and § 212(c) waiver of inadmissibility. *Id.* ¶¶ 75-76; Astorga-Cervantes Decl., ¶¶ 6-8, 10-13.

Plaintiff Lourdes Hernandez-Trujillo is in ICE custody at the Yuba Facility and has removal proceedings pending in the San Francisco Immigration Court. Hernandez-Trujillo Decl., ¶¶ 4, 6. She is seeking relief from deportation and is applying for a U Visa as a victim of and witness to a violent crime under 8 U.S.C. § 1101(a)(15)(U), and for protection relief under 8 U.S.C. § 1231(b)(3) based on abuse and fear of abuse by her ex-husband if she is returned to Mexico. *Id.*, ¶¶ 6-7; Compl. ¶ 78. Ms. Hernandez-Trujillo has been transferred between facilities during her incarceration, and restrictions on telephone access have harmed her, both by extending her pre-hearing detention by several months and by interfering with her ability to consult with counsel. Hernandez-Trujillo Decl., ¶¶ 5, 8-18; Compl. ¶¶ 79-82.

III. ARGUMENT

Federal Rule of Civil Procedure 23 governs class actions in federal court, and a plaintiff whose suit meets the requirements of that Rule has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1437 (2010). To meet these requirements, the "suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Id.* (citing Rule 23).

Plaintiffs seek to represent a class of "All current and future adult immigration detainees who are or will be held by ICE in Contra Costa County, Sacramento County, or Yuba County." Compl. ¶ 83.[4] This class easily meets all of Rule 23's requirements. First, the proposed class

[4] The proposed class is defined with reference to the counties in which the Facilities are located because it is the counties – rather than individual jail facilities – that have contracts with ICE, and detainees are sometimes transferred between different facilities within the same county. ICE maintains records of all detainees in its custody, including all adult detainees within the Elk Grove, Yuba and Richmond Facilities, so there can be no confusion about who is and who is not a class member.

satisfies all of the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Second, the action is maintainable under Rule 23(b)(2), which allows class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Declaratory and injunctive relief is appropriate to the proposed class. *Id.*

A. The Proposed Class Satisfies the Requirements of Rule 23(a)

1. The Proposed Class Is So Numerous That Joinder Is Impracticable

To meet Rule 23(a)(1)'s "numerosity" requirement, a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). A class with 40 or more members raises a presumption that the numerosity requirement has been satisfied. William B. Rubenstein et. al., *Newberg on Class Actions*, § 3.12 at 198 (5th ed. 2011).

Plaintiffs easily meet Rule 23(a)(1)'s numerosity requirement. The Facilities hold a combined total of 500 to 600 immigration detainees on an average day. Over the twelve-month period ending November 2013, the San Francisco Immigration Court had 2,152 proceedings for detained immigrants.[5]

Moreover, the Defendants' policies, practices and omissions 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 v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986). A class action is therefore the only practical vehicle for adjudicating this controversy. As members of this inherently-transitory class are released on bond, are transferred to other immigration detention facilities, voluntarily depart, are removed, or are permitted to stay in the United States, the composition of the proposed class will fluctuate. *See, e.g.*, *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). Indeed, in prison and jail

[5] TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts By Nationality, Geographic Location, Year and Type of Charge*, fiscal year ending November 2013, Hearings at San Francisco Detained, (Dec. 18, 2013), http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php.

conditions cases, federal courts routinely find the "impracticability of joinder" requirement satisfied because of the impossibility of identifying future class members and the risk of mootness. *See, e.g., Stewart v. Winter*, 669 F.2d 328, 334 (5th Cir. 1982) ("class certification ensures the presence of a continuing class of Plaintiffs with a live dispute against prison authorities"); *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current and future prisoners seeking injunctive relief; "[a]s members in futuro, they are necessarily unidentifiable, and therefore joinder is clearly impracticable.").[6]

Further, joinder is impracticable if it is reasonable to conclude that the class members would be unable to file individual actions to vindicate their rights. *See, e.g., Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (certifying class of migrant workers and citing class members' lack of sophistication, limited knowledge of the legal system, limited or non-existent English skills, and fear of retaliation). Given the challenges facing immigration detainees, not the least of which is their intense isolation in detention, that is unquestionably the case here.[7]

2. Questions of Law and Fact are Common to All Members of the Proposed Class

Rule 23(a)(2) requires that there be questions of either "law or fact" common to all members of the proposed class. Fed. R. Civ. P. 23(a)(2). A "single issue common to the class" satisfies this requirement. *Kincaid v. City of Fresno*, 244 F.R.D. 597, 602 (E.D. Cal. 2007); *see Meyer v. Portfolio Recover Associates, LLC* 707 F.3d 1036, 1041-42 (9th Cir. 2012) *quoting*

[6] *See also Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) ("[T]he fluid nature of a plaintiff class—as in the prison-litigation context—counsels in favor of certification of all present and future members."); *Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y 1999) (fluidity of class of criminal Defendants makes certification particularly appropriate); *Dean v. Coughlin*, 107 F.R.D. 331, 332 (S.D.N.Y. 1985) ("the fluid composition of a prison population is particularly well-suited for class status"); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (certifying class of prisoners "in light of the fact that the inmate population at these facilities is constantly revolving").

[7] Rule 23(a)(1)'s numerosity requirement is also satisfied because when Plaintiffs seek declaratory and injunctive relief even speculative allegations regarding numerosity suffice to permit class certification. 5 Moore's Federal Practice § 23.22[3]. In circumstances such as these, it may be possible to infer impracticability. *Jordan v. County of L.A.*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). Plaintiffs have presented much more than speculative allegations here.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."). The dispositive question in determining whether commonality is met is whether "a classwide proceeding [will] generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). Class certification is appropriate when common relief is sought on a classwide basis to remedy a common wrong. *See, e.g.*, *Parra v. Bashas', Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008) (commonality requirement met where plaintiffs sought common legal remedy for common wrong). Indeed, "class suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles Alan Wright, *et. al*. *Federal Practice & Procedure* § 1763 (3d ed. 2011) (citing *Inmates of the Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 24 (2d Cir. 1971) (class action by prison inmates was proper for injunctive relief against brutality or the threat of it) (emphasis added). A case where proposed class members allege common causes and common effects will likely satisfy the Rule 23(a)(2) requirement. *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 531 (N.D. Cal. 2012). For civil rights suits such as this one, "individual factual differences among class members pose no obstacle to commonality." *Rosas v. Baca*, No. 12-00428, 2012 WL 2061694 (C.D. Cal. June 7, 2012) (certifying a class where plaintiff inmates alleged instances of deputy-on-inmate and inmate-on-inmate altercations as examples of deficiencies in the jail management system and rejecting defendants' arguments that the class failed the commonality requirement because most class members had not been harmed).

Here the Complaint seeks injunctive and declaratory relief based on defendants' common course of conduct, which inflicts a common injury that can only be remedied by classwide relief. All members of the proposed class are held in ICE custody while awaiting deportation proceedings, under contracts that ICE negotiates with the counties in whose facilities they are incarcerated and detention standards promulgated and administered by Defendants, including

standards regarding telephone access. Plaintiffs and the other members of the proposed class share a common injury: deprivation of the telephone access necessary to exercise their constitutional and statutory rights in connection with removal proceedings initiated by ICE. Ultimately these class members all seek the same remedy for the same reasons: a minimum level of acceptable telephone access that applies to all three Facilities so that class members can access legal counsel and gather evidence in support of their positions.

a. All Members of the Proposed Class Are Subjected to Substantially Similar Restrictions on Telephone Access.

All detained immigrants in the Elk Grove, Yuba, and Richmond Facilities (and thus, all proposed class members) are confronted with the following obstacles to communicating with the outside world in order to seek counsel or represent themselves in their immigration proceedings:

- Telephone rates are unreasonably – and for many, prohibitively – expensive. Compl. ¶ 46; Hernandez-Trujillo Decl. ¶ 10, 15; Lyon Decl. ¶ 8; Cornelio Decl. ¶ 7; Astorga-Cervantes Decl. ¶ 7.
- Calls cannot be completed unless a live person answers the telephone and agrees to accept the call, precluding calls to offices with voicemail trees and making it impossible to leave a message if the call reaches an outgoing voicemail message. Compl. ¶ 43; Hernandez-Trujillo Decl. ¶¶ 16-17.
- Calls are automatically disconnected after 15 minutes. Compl. ¶ 46; Vincent ¶ 6.
- Calls may only be placed from public settings, making confidential attorney-client conversations impossible. Compl. ¶ 45.
- Detainees cannot receive calls from counsel or anyone else. Compl. ¶ 47.
- The telephone system allows calls to be placed in three ways: 1) if the answering person agrees to accept a collect call, 2) if the call is made to a number that has been set up with a prepaid account to accept calls from the Facility, or 3) (in the Yuba and Elk Grove

Facilities only) if the detainee is able to purchase a calling card.[8]

There is a small subset of relevant facts that differ between Facilities and within Facilities for various members of the proposed class, namely:

- At the Richmond Facility, proposed class members cannot purchase calling cards. Lyon Decl. ¶ 8; Cornelio Decl. ¶ 7.
- At the Richmond Facility, proposed class members cannot make international calls. Cornelio Decl. ¶ 10.
- Within each Facility, some members of the proposed class are confined to their cells for much of the time, leaving limited hours during which they can use the telephone at all, and those hours often are restricted to times of day that make it difficult or impossible to successfully reach legal or government offices. Compl. ¶ 44; Hernandez-Trujillo Decl. ¶ 8-9.

However, because immigration detainees are often transferred between Facilities and between housing units within Facilities, all proposed class members may be subjected to these additional restrictions under Defendants' policies and practices. Compl. ¶ 36, 82; Hernandez-Trujillo Decl. ¶ 14.

b. Defendants' Denial of Telephone Access Present Legal Questions Common to the Proposed Class.

Plaintiffs' legal claims on behalf of the proposed class are based on these common facts and raise legal questions that are also common to the proposed class. Plaintiffs assert that Defendants' denial of telephone access violates Plaintiffs' constitutional and statutory rights to access to counsel, a full and fair immigration hearing, and the right to petition the government. Compl. ¶¶ 24-31. Although proposed class members may have a variety of forms of relief in their immigration proceedings, all of them must plead to charges, apply for affirmative relief if

[8] Plaintiffs also have access to a "free call platform," which is inadequate to effectuate the rights asserted in this action. *See* Compl. ¶¶ 41, 54.

any, and gather and present evidence, either to the immigration judge or to some other immigration body. Whether detainees must assess and evaluate potential claims or must prepare documents and evidence for submission to immigration authorities, access to an attorney is critical. Hernandez-Trujillo Decl. ¶ 8; Cornelio Decl. ¶ 8; Astorga-Cervantes Decl. ¶ 11. Thus, one overarching legal question common to the proposed class is whether Defendants' policies and practices of denying telephone access violate Plaintiffs' right to counsel under 8 U.S.C. §§ 1362; 1229a(b)(4)(A) and the Due Process Clause of the Fifth Amendment.

For Plaintiffs that are unable to obtain representation, Defendants' denial and restriction of telephone access precludes them from gathering evidence and information necessary to obtain the full and fair hearing they are entitled to under 8 U.S.C. § 1229a(b)(4)(B) and the Due Process Clause of the Fifth Amendment. Cornelio Decl. ¶ 10. *See e.g. Dent v. Holder* 627 F.3d 365 (9th Cir. 2010) (government's refusal to provide immigrant's file denied him "an opportunity to fully and fairly litigate his removal and his defensive citizenship claim." *Id.* at 374; *see also Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010) (denial of a continuance necessary for an immigrant represented by counsel to obtain evidence violated due process). Defendants' policies and practices with regard to telephone access also prevent Plaintiffs from contacting government offices or other sources to obtain information or documents to support their petitions for visas under the immigration laws – visas that would automatically terminate removal proceedings – in violation of Plaintiffs' right to petition the government under the First Amendment. *See* Lyon Decl. ¶ 7-8, 11.

Whatever particular potential defenses or claims to affirmative relief may be available to proposed class members, Defendants' systematic denial of telephone access prevents them from fully and fairly pursuing relief from deportation. Moreover, the obstacles to obtaining advice of counsel or gathering the information and evidence necessary to pursue relief mean that class members face prolonged detention periods. Cornelio Decl. ¶ 8; Lyon Decl. ¶ 5; Hernandez-Trujillo Decl. ¶ 13.

Whether and to what extent telephone access must be provided in order to effectuate the constitutional and statutory rights of detained immigrants is an issue common to the class, which

satisfies the commonality requirement under Rule 23(a)(2).

c. Plaintiffs request a common remedy in the form of a minimum standard that ensures access to telephones in ICE detention facilities.

The best and perhaps only possible method to resolve the Complaint is via a common remedy reached via class action. Immigrant detainees are frequently transferred from one Facility to another. Compl. ¶ 36; Hernandez-Trujillo Decl. ¶ 14. Due to these frequent transfers, the only way to ensure consistent telephone access is by a universal minimum standard to be implemented across all Facilities. Because the class members all seek the same declaratory and injunctive relief, the commonality requirement under Rule 23(a)(2) is satisfied.

3. The Named Plaintiffs' Claims Are Typical of the Proposed Class They Seek to Represent

The claims asserted by Plaintiffs Lyon, Cornelio, Astorga-Cervantes and Hernandez-Trujillo are "typical of the claims or defenses of the class." 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 v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (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)). "Civil 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.

Plaintiffs Lyon, Cornelio, Astorga-Cervantes and Hernandez-Trujillo present claims typical of the class. Plaintiffs Lyon and Cornelio are both detained at the Richmond Facility.

Plaintiff Astorga-Cervantes is detained in the Elk Grove Facility and Plaintiff Hernandez-Trujillo is detained at the Yuba Facility. Together, the named plaintiffs seek most of the types of relief available to members of the proposed class: Plaintiffs Lyon and Hernandez-Trujillo seek U-visas, Plaintiffs Cornelio and Hernandez-Trujillo have claims for protection relief, and Plaintiff Astorga-Cervantes both seeks release on bond and will ultimately apply for discretionary relief available to long-time residents. Each has been stymied in his or her ability to consult with or obtain counsel and obtain evidence necessary to his or her proceedings. *See* Lyon Decl., ¶¶ 6-13; Cornelio Decl., ¶¶ 7-11; Astorga-Cervantes Decl., ¶¶ 6-13; Hernandez-Trujillo Decl., ¶¶ 8-18. Plaintiffs Hernandez-Trujillo and Cornelio have been given multiple continuances in their removal proceedings, thus prolonging the time they are held in custody. Hernandez-Trujillo Decl., ¶ 12; Cornelio Decl., ¶ 8. While no one person could encompass every particular circumstance facing the proposed class as a whole, the Named Plaintiffs collectively have suffered and continue to suffer injuries from Defendants' policies, practices, and omissions that are reasonably co-extensive with those of absent class members.

Because Plaintiffs and members of the proposed class share the same claims based on the same policies and practices of the Government, their interests are co-extensive and aligned. *Hanon*, 976 F.2d at 508.

4. Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class

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). Plaintiffs and their counsel easily meet this requirement.

a. Named Plaintiffs

There is no divergence of interest or potential antagonism between Plaintiffs and the other class members. Plaintiffs seek injunctive and declaratory relief on behalf of the proposed class as a whole, to remedy practices that are applied to the class as a whole, denying class members' constitutional and statutory rights. Compl. ¶¶ 1, 85. Plaintiffs have affirmed their willingness to undertake the responsibilities of serving as class representatives. Lyon Decl., ¶ 14; Cornelio Decl., ¶ 12; Astorga-Cervantes Decl., ¶ 14; Hernandez-Trujillo Decl., ¶ 19. They have never been class representatives in any other class action. Lyon Decl., ¶ 15; Cornelio Decl., ¶ 13; Astorga-Cervantes Decl., ¶ 15; Hernandez-Trujillo Decl., ¶ 20.

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). The ACLU of Northern California and Orrick Herrington & Sutcliffe represent Plaintiffs jointly. They have many years of experience in litigating complex class actions in federal court, including on civil rights and immigration issues.

Robert P. Varian has over thirty years of experience litigating complex class actions, is a former federal clerk and was recently named one of the "500 Leading Lawyers in America" by *Lawdragon*. *See* Declaration of M. Todd Scott ("Scott Decl."), ¶ 2. M. Todd Scott, Alexander K. Talarides, Christine M. Louie and Alexis Yee-Garcia also have significant experience litigating complex class actions in federal court. *Id.* ¶ 3. Orrick has more than 1,000 attorneys and over two hundred attorneys in just its San Francisco office. *Id.* ¶ 4. Orrick has extensive resources and expertise which alone ensure thorough and vigorous prosecution of this matter. *Id.* ¶¶ 4, 6. Mr. Varian and Orrick have undertaken representation of Plaintiffs and the proposed class on a *pro bono* basis. *Id.* ¶ 5.

Julia Harumi Mass of the American Civil Liberties Union Foundation of Northern California, another of Plaintiffs' counsel, regularly litigates civil rights cases on behalf of Plaintiffs in the Northern District of California. *See* Declaration of Julia Harumi Mass ("Mass

Decl."), ¶¶ 3-5. Ms. Mass has litigated numerous actions against federal agencies, including three cases in which ICE was named as a Defendant. *Id.* ¶ 4. Most recently, she has served as class counsel in the United States District Court for the Northern District of California for a class of immigration detainees with proceedings in the San Francisco immigration court (substantially identical to the proposed class in this case) seeking injunctive and declaratory relief to remedy alleged constitutional (including due process) violations in immigration enforcement policies and practices. *Id.* Her colleagues, Michael T. Risher and Jingni (Jenny) Zhao are also experienced in class action litigation, including cases vindicating the rights of immigration detainees. *Id.* at 6-7. The ACLU of Northern California is the largest regional affiliate of the American Civil Liberties Union and is dedicated to the defense and promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions. *Id.* ¶¶ 3, 6. It has extensive expertise in class action and other impact litigation and has participated in numerous cases in federal court that involve the policies and practices of the federal immigration system. *Id.*

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(2)

Rule 23(b)(2) is an appropriate basis for certification when a Defendant "has acted or refused to act on grounds that apply generally to the class," thereby allowing declaratory and injunctive relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2). Certification of a class under Rule 23(b)(2) does not require every single class member to have been injured or aggrieved in the same way by a Defendant's conduct. A class may properly be certified under Rule 23(b)(2) if the opposing party's "[a]ction or inaction is directed to a class . . . even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966). Thus, it is sufficient if the Defendant has adopted or engaged in a pattern of activity that is "central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994).

Civil rights class actions such as this one are the paradigmatic Rule 23(b)(2) suits, "for they seek classwide structural relief that would clearly redound equally to the benefit of each

class member." *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979), *vacated on other grounds sub nom., Lombard v. Marcera*, 442 U.S. 915 (1979); *see also Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 435 (5th Cir. 1979); *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) (action to enjoin allegedly unconstitutional government conduct is "the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)"), *aff'd in pertinent part sub nom., Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

Certification of the proposed class under Rule 23(b)(2) is appropriate here because Defendants' practices apply equally to all class members and violate the constitutional and statutory rights of most. Further, this action is appropriate under Rule 23(b)(2) because the injunctive and declaratory relief it seeks is necessary to avoid mootness and facilitate enforcement of judgments. 1 Newberg at § 2.28; 2 Newberg at § 5.03; *see, e.g., Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (if a claim is "inherently transitory," the action qualifies for an exception to any mootness argument because "there is a constantly changing putative class that will become subject to these allegedly unconstitutional conditions"). Absent certification of the proposed class, there would be no named Plaintiff remaining in ICE custody throughout the course of the litigation with standing to enforce any judgment entered by the Court.

Moreover, other detainees who meet the class definition or who may do so in the future are certainly entitled to the same rights under federal law. Classwide final injunctive and declaratory relief is therefore appropriate to avoid mootness and to facilitate enforcement of any judgment this Court may enter. 1 Newberg at § 2.28; 2 Newberg at § 5.03; *see also Lynch v. Rank*, 604 F. Supp. 30, 38-39 (N.D. Cal. 1984) (certifying a nationwide class so that other public interest groups "will not be forced to throw their efforts and resources into relitigating the issue").

Accordingly, Rule 23(b)(2) is satisfied.

C. The Court Should Designate Plaintiffs' Counsel as Class Counsel Pursuant to Rule 23(g)(1)

Upon certifying a class, a court must appoint class counsel. Fed. R. Civ. P. 23(g)(1). Class counsel is then listed in the class certification order. Fed. R. Civ. P. 23(c)(1)(B). The Federal Rules list four factors that the court must consider in appointing class counsel: (1) the

work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

As discussed above (*see* Section III.A.4, *supra*), Plaintiffs' counsel have extensive knowledge and experience in handling class actions and other complex federal court litigation, due process cases, and are knowledgeable about the applicable law. They have already committed substantial time, effort and resources to representation of Plaintiffs and the proposed class, and will continue to commit their resources to thoroughly and vigorously represent the class in this case. Scott Decl. ¶ 5; Mass Decl. ¶ 5-6. Orrick Herrington & Sutcliffe has over two hundred attorneys in its San Francisco office, and the capacity and resources to achieve a successful outcome for the class in this lawsuit. Plaintiffs' counsel will, in all likelihood, be taking depositions of numerous government officials, obtaining documents from government agencies and third parties, interviewing additional class members, and taking other actions necessary to prepare this case for final resolution, whether by summary judgment or trial. To ensure that those activities are pursued expeditiously, the Court should appoint Plaintiffs' counsel as class counsel in its certification order, with Mr. Varian of Orrick serving as lead counsel.

IV. THE COURT SHOULD GRANT CLASS CERTIFICATION EXPEDITIOUSLY

Because the constitutional injury suffered by the Plaintiffs (and the putative class) is inherently transitory, the Court should consider the instant motion "as rapidly as possible." *Wade*, 118 F.3d at 670 (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). An immigrant detainee denied telephone access cannot realistically hope to obtain relief in a federal court action challenging such a practice prior to termination of that person's detention – whether such detention ends via release on bond, affirmative relief from removal, voluntary departure, or removal via immigration court order. Under these circumstances, the Ninth Circuit has determined that district courts should rule expeditiously on a motion for class certification to permit the detainee class injured by denial of telephone access to challenge the constitutionality of ICE's practice, to afford relief and to prevent Defendants from evading judicial review. *See*

Wade, 118 F. 3d at 669.

In *Wade*, Plaintiff filed a class action complaint challenging the working conditions of "chain gang" labor at a county jail housing pretrial detainees and misdemeanants. *Id.* Plaintiff simultaneously filed for class certification. *Id.* The district court denied the motion for class certification without prejudice, deciding to postpone consideration of that motion until after Defendants' dispositive motions were adjudicated. *Id.* at 669. Plaintiff was then transferred to another facility, and Defendants' motion for summary judgment was granted on the basis of mootness. *Id.* The Ninth Circuit reversed.

In so ruling, the Ninth Circuit emphasized that in some cases judicial economy interests militate in favor of resolving dispositive motions prior to class certification, but "[t]his is not one of those cases" because the Plaintiff was "attempting to represent short-term inmates in a county jail, presenting a classic example of a transitory claim that cries out for a ruling on certification as rapidly as possible." *Id.* at 670. The Ninth Circuit further noted that if a claim is "inherently transitory," the action qualifies for an exception to any mootness argument – even if there is no indication that Plaintiff will again be subject to the objectionable conduct – because "there is a constantly changing putative class action that will become subject to these allegedly unconstitutional conditions." *Id.*

V. CONCLUSION

Plaintiffs respectfully request that the Court certify the proposed class, and appoint Orrick 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: January 13, 2014

ORRICK, HERRINGTON & SUTCLIFFE LLP

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Dated: January 13, 2014

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

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