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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MONY PREAP;
EDUARDO VEGA PADILLA;
JUAN LOZANO MAGDALENO;

Plaintiffs-Petitioners,

vs.

JEH JOHNSON, Secretary of the Department of Homeland Security;
ERIC H. HOLDER, JR., Attorney General of the United States;
TIMOTHY S. AIKEN, Immigration and Customs Enforcement ("ICE") San Francisco Field Office Director;
GREGORY ARCHAMBEAULT, ICE San Diego Field Office Director;
DAVID MARIN, ICE Los Angeles Field Office Director;

Defendants-Respondents.

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

Honorable Yvonne Gonzalez Rogers

Defendants' Response in Opposition to Plaintiffs' Motion to Certify Class

Date: March 18, 2014
Time: 2:00 p.m.
Courtroom 5, 2d Floor
Oakland Courthouse

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I. INTRODUCTION

In 1996, Congress enacted 8 U.S.C. § 1226(c), which prevents criminal aliens from being released on bond, after recognizing the danger criminal aliens pose to public safety, and to prevent criminal aliens from absconding from removal proceedings or reoffending while free on bond. Many of these criminal aliens had a high incentive to flee because, once subjected to proceedings, they realized they essentially faced automatic removal because their crimes disqualified them from most forms of immigration relief. As a result, Congress enacted Section 1226(c) to mandate the custody of criminal aliens during their removal proceedings, whenever they came to the attention of immigration agencies.

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno, (collectively, "Petitioners") contend that immigration agencies can nonetheless restore bond eligibility to certain criminal aliens by failing to detain such aliens immediately upon their release from criminal custody. In addition to jointly filing individual habeas petitions, Petitioners seek to certify and represent the following proposed class:

> All individuals in the state of California who are or will be subject 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.

(Pet. ¶ 40; Motion for Class Certification ("Class Mot."), Dec. 16, 2013, Doc. 8 at 7.)

Petitioners' motion for class certification must be denied for the following reasons: (1) Petitioners are not adequate representatives for the entire proposed class; and (2) the proposed class fails to satisfy Rule 23(a)'s commonality and typicality requirements.

II. STATEMENT OF FACTS

The three putative class representatives—Plaintiffs-Petitioners Mony Preap ("Preap"), Eduardo Vega Padilla ("Padilla"), and Juan Lozano Magdaleno ("Magdaleno")—were convicted of crimes enumerated in subparagraphs (A) through (D) of 8 U.S.C. § 1226(c)(1). Preap was in immigration detention for three months, but he no longer has a judiciable claim because an immigration judge granted his request for Cancellation of Removal and he was released from immigration detention on December 17, 2013. Padilla and Magdaleno were ordered removed,

appealed the orders, and remain in pre-order detention pending the outcome of their appeals. Both soon will no longer have a judiciable claim because, under Ninth Circuit law the authority for their detention shifts from 8 U.S.C. § 1226(c) to 8 U.S.C. § 1226(a) after they have been detained under subsection 1226(c) for six months, and they will receive bond hearings under subsection 1226(a). *See Rodriguez v. Robbins (Rodriguez II)*, 713 F.3d 1127, 1138 (9th Cir. 2013).[1] Magdaleno is scheduled for a "*Rodriguez* hearing" on February 14, 2014. (Return and Mot. to Dismiss (hereinafter "Return"), Ex. 26.) Similarly, Padilla will soon no longer have a judiciable claim on or about February 15, 2014, at which time he will be eligible for a custody redetermination hearing under *Rodriguez II*.

A. Plaintiff-Petitioner Mony Preap

Preap is a native of Cambodia who was born in a refugee camp to Cambodian parents. (Pet. ¶ 16.) He entered the United States as a refugee in 1981 and became a lawful permanent resident in 1992, retroactive to 1981. (Pet. ¶ 16; Return, Ex. 28.) He was detained for three months at the ICE Contra Costa Detention Facility in Richmond, California, until he was granted relief from removal. (Pet. Ex. A; Return, Ex. 29.)

[1] This is the current and binding law in the Ninth Circuit under *Rodriguez II*, but the case is still on appeal. *See Rodriguez v. Hayes*, No. 2:07-cv-3239-TJH (C.D. Cal. filed May 16, 2007). On September 19, 2012, the Central District of California issued a preliminary injunction ordering a bond hearing for aliens detained for 180 days or longer in the Central District of California under subsections 1226(c) and other detention statutes. (No. 2:07-cv-3239, Doc. 255.) The Government appealed the order to the Ninth Circuit, which upheld the preliminary injunction and held that aliens detained under subsections 1226(c) and 1226(b) were due a hearing after six months. *Rodriguez II*, 715 F.3d at 1138. Thereafter, the decision was implemented, pending litigation, throughout the Ninth Circuit. On August 6, 2013, the Central District of California granted summary judgment for plaintiffs and issued a permanent injunction mandating the bond hearings for all aliens detained in the Central District of California for 180 days or longer under any of the four major immigration detention provisions, 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) and 1231. (No. 2:07-cv-3239, Doc. 353.) The Government filed an appeal of the judgment to the Ninth Circuit and the case is scheduled for briefing. (No. 13-56706, docketed Oct. 1, 2013.)

1. Preap's Criminal History

Preap has been convicted of numerous crimes in California Superior Court.[2] In 2006, he was convicted of two counts of Possession of Marijuana in violation of California Health and Safety Code § 11357(a) and sentenced to time served. (Pet. ¶ 18; Return, Ex. 28.) In 2013, Preap was arrested for Inflicting Corporal Injury on a Spouse in violation of California Penal Code § 273.5. (Return, Ex. 27; Return, Ex. 28.) On September 9, 2013, he pleaded guilty to Battery in violation of California Penal Code § 242 and was sentenced to ninety days of incarceration. (Pet. ¶ 18; Return, Ex. 27.)

2. Preap's Immigration Detention and Removal Proceedings

On September 11, 2013, immediately upon his release from the Battery conviction, ICE officers arrested and charged Preap with being removable from the United States under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance violation. (Return, Ex. 28.) That same day Preap was detained at the ICE Contra Costa Detention Facility pending removal proceedings. Preap was mandatorily detained under 8 U.S.C. § 1226(c)(a)(1)(B) based on his 2006 conviction for two counts of Possession of Marijuana. On October 7, 2013, the immigration judge found Preap removable as charged, and on December 17, 2013, the immigration judge granted him Cancellation of Removal. (Return, Ex. 29). ICE released Preap from immigration detention on December 17, 2013. (Return, Ex. 29.)

B. Plaintiff-Petitioner Eduardo Vega Padilla

Padilla is a native and citizen of Mexico. (Pet. ¶ 22; Return, Ex. 1.) He entered the United States as a lawful permanent resident in 1966. (Pet. ¶ 22; Return, Ex. 1; Return, Ex. 2.) He has been detained at Rio Cosumnes Correctional Center in Elk Grove, California, for almost six months.[3]

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[2] Preap has several convictions for Driving Without a License in violation of Cal. Veh. Code § 12500(a) and Possession of Marijuana in violation of Cal. Health & Safety Code § 11357(a). (*See* Return, Ex. 28.)

[3] Padilla was arrested and detained by ICE in the Eastern District of California. (Return, Ex. 8.) Thus, in Padilla's case, the Government denies Petitioners' allegations that "a substantial part of the events giving rise to these claims" occurred in the Northern District of California." (Pet. ¶ 6.) Should the Court deny Petitioners' Motion to Certify Class, the Government requests that

1. Padilla's Criminal History

In 1997, Padilla was convicted in California Superior Court of Possession of a Controlled Substance (methamphetamine), a misdemeanor, in violation of California Health and Safety Code § 11377(a). (Return, Ex. 3.) After he failed to abide by a diversion order, Padilla was sentenced to thirty days. (Return, Ex. 3.) In 2000, Padilla again was convicted in California Superior Court of Possession of a Controlled Substance (methamphetamine), a felony in violation of California Health & Safety Code § 11377(a). (Pet. ¶ 24; Return, Ex. 4.) He was sentenced to 180 days of confinement. (Return, Ex. 4.) On January 14, 2002, while still on probation for the 2000 possession offense, Padilla was convicted of Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1). (Pet. ¶ 24; Return, Ex. 5.) Padilla was sentenced to 180 days for the firearm conviction and an additional 185 days for violation of probation from his 2000 conviction. (Return, Ex. 5.)

2. Padilla's Immigration Detention and Removal Proceedings

On August 15, 2013, ICE charged Padilla with being removable from the United States based on his 1997 and 1999 controlled substance convictions and his 2002 firearm conviction. (Return, Ex. 9; Return, Ex. 10). That same day, during Operation Cross Check,[4] ICE arrested Padilla in Sacramento, California, and detained him at Rio Cosumnes Correctional Center under 8 U.S.C. § 1226(c). (Pet. ¶ 9; Return, Ex. 6; Return, Ex. 7; Return, Ex. 8.) Padilla requested a custody redetermination before an immigration judge, and on October 15, 2013, the immigration judge found that Padilla was lawfully detained under 8 U.S.C. § 1226(c) and, thus, the immigration judge did not have jurisdiction to consider his request for a release on bond. (Return, Ex. 13.)

Padilla's individual petition for a writ of habeas corpus should be transferred to the U.S. District Court for the Eastern District of California under Federal Rule of Civil Procedure 12(b)(3).

[4] Operation Cross Check is a concerted effort by ICE to target priority criminal aliens who are subject to removal from the United States. *See* ICE, Fact Sheet: National Cross Check Overview, Apr. 2, 2012, http://www.ice.gov/news/library/factsheets/crosscheck.htm; *see also* ICE Director John Morton, Memorandum for All ICE Employees, March 2, 2011, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (setting priorities for the apprehension, detention, and removal of aliens).

On December 3, 2013, an immigration judge ordered Padilla removed from the United States under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of a controlled substance offense. (Return, Ex. 11.) The immigration judge also found that Padilla is ineligible for any relief from removal. (Return, Ex. 11.) On December 26, 2013, Padilla appealed the removal order to the Board of Immigration Appeals ("Board"), where it remains pending. (Return, Ex. 12.) Padilla will be eligible for a *Rodriguez* hearing on February 14, 2014. *See Rodriguez v. Robbins (Rodriguez II)*, 713 F.3d 1127, 1138 (9th Cir. 2013).

C. Plaintiff-Petitioner Juan Lozano Magdaleno

Magdaleno is a native and citizen of Mexico. (Return, Ex. 14.) He entered the United States as a lawful permanent resident in 1974. (Return, Ex. 14; Return, Ex. 15.) Magdaleno has been detained at the Contra Costa West County Detention Center in Richmond, California, for approximately six months. (Pet. ¶ 10; Return, Ex. 21.)

1. Magdaleno's Criminal History

Magdaleno has been convicted of numerous crimes in California Superior Court.[5] Relevant to his immigration detention, on October 13, 2000, Magdaleno was convicted as a Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1) based on his possession of a firearm after three prior Driving Under the Influence convictions. (Return, Ex. 16.) He was sentenced to 147 days of confinement and three years of probation. (Return, Ex. 16.) On May 21, 2003, the California Superior Court revoked Magdaleno's probation for the 2000 firearm conviction and sentenced Magdaleno to sixteen months of incarceration. (Return, Ex. 17.) On June 16, 2007, Magdaleno was convicted of Driving on a Suspended License/Driving Under the Influence in violation of California Vehicle Code § 14601.2(a), a misdemeanor, and Possession of a Controlled Substance (methamphetamine), a felony, in

[5] Magdaleno has over twenty misdemeanor convictions, including Hit and Run-Property Damage in violation of California Vehicle Code § 20002(a), Possession of a Controlled Substance in violation of California Health & Safety Code § 11377(a), Under the Influence of a Controlled Substance in violation of California Health & Safety Code § 11550(a), and Driving on a Suspended License in violation of California Vehicle Code § 14601. He also has two felony convictions for Driving Under the Influence in violation of California Vehicle Code § 14601.2(a), (*See* Return, Ex. 16.)

violation of California Health & Safety § 11377(a). (Return, Ex. 18.) He was sentenced to six months of confinement for the convictions. (Return, Ex. 18.)

2. Magdaleno's Immigration Detention and Removal Proceedings

On July 17, 2013, ICE arrested Magdaleno at his residence and charged him with removal under 8 U.S.C. § 1227(a)(2)(c) as an alien convicted of a firearms offense and under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance offense. (Return, Ex. 19; Return, Ex. 20; Return, Ex. 22.) He was detained at Contra Costa West County Detention Center under 8 U.S.C. § 1226(c)(1)(A) based on his 2007 conviction for possession of a controlled substance. (Pet. ¶ 10; Return, Ex. 21.) Magdaleno challenged his detention before an immigration judge, and on December 12, 2013, the immigration judge found that Magdaleno was lawfully detained under 8 U.S.C. § 1226(c) and, thus, the immigration judge did not have jurisdiction to consider his request for a release on bond. (Return, Ex. 23.) Magdaleno is scheduled to receive a *Rodriguez* hearing before an immigration judge on February 14, 2014, (Return, Ex. 26), where the Government will be required to show that he would be a danger to society or a flight risk should he be released from immigration detention, *see Rodriguez II*, 713 F.3d at 1135-36.

On September 17, 2013, Magdaleno conceded the charges of removability, and the immigration judge found him to be removable by clear and convincing evidence. (Return, Ex. 24.) On November 29, 2013, the immigration judge ordered Magdaleno to be removed and denied his application for relief from removal. (Return, Ex. 24.) On December 26, 2013, Magdaleno appealed the removal order to the Board, where it remains pending. (Return, Ex. 25.)

D. Petitioners' Complaint and Petitions

Petitioners filed the instant habeas petitions on December 12, 2013. (*See* Pet., Doc. 1.) In addition to individual writs of habeas corpus and certification of a class, Petitioners seek a declaration that the Government's interpretation and application of 8 U.S.C. § 1226(c) is unlawful and an order requiring the Government to provide Petitioners and members of the putative class with individualized bond hearings. (Pet. ¶ 3.)

III. RELEVANT LAW

A. Federal Rule of Civil Procedure 23(a)

A party seeking certification of a proposed class must demonstrate the existence of the four required elements set forth in Rule 23(a) of the Federal Rules of Civil Procedure, namely:

(1) the class is so numerous that joinder of all members is impracticable ("numerosity"),

(2) there are questions of law or fact common to the class ("commonality"),

(3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"), and

(4) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation").

See Fed. R. Civ. P. 23(a). In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Here, Petitioners ask the Court to certify a class under Rule 23(b)(2). (Class Mot. at 21.) Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that generally apply to the class." Fed. R. Civ. P. 23(b)(2).

The party seeking class certification bears the burden of proof in demonstrating that it has satisfied all four Rule 23(a) prerequisites and that their class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Zinser*, 253 F.3d at 1186. The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982).

Consequently, a district court must conduct a rigorous analysis to determine that the requirements of Rule 23 have been met. *Id.* at 161. If a court is not fully satisfied, the class cannot be certified. *Id.* Even when all of Rule 23's requirements are met, the district court retains "broad discretion" to determine whether a class *should* be certified. *Zinser*, 253 F.3d at 1186. When reviewing a motion for class certification, a court should only analyze the portions

of the merits of a claim that overlap with Rule 23's requirements. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

B. 8 U.S.C. § 1226(c)

As explained in the Government's Return to Petitions for Writs of Habeas Corpus and Motion to Dismiss Complaint filed concurrently with this response in opposition to Petitioners' Motion to Certify Class, Congress enacted a multi-layered statute that provides for the civil detention of aliens placed in removal proceedings. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008). Relevant here, when a lawful permanent resident receives a Notice to Appear in removal proceedings, he may be detained under 8 U.S.C. § 1226(a) "except as provided in subsection (c)"—*i.e.*, the alien committed a serious crime or is involved in terrorist activity as enumerated in 8 U.S.C. § 1226(c)(1)(A) through (D). *See* 8 C.F.R. § 1236.1 (2003) (further defining detention under section 1226). This case turns on the statutory interpretation of 8 U.S.C. § 1226(c), which sets the parameters for the mandatory detention of aliens of have been convicted, committed, or engaged in criminal or terrorism-related activity. 8 U.S.C. § 1226(c)(1). Although subsection 1226(a) vests immigration authorities with the authority to release pre-order aliens on bond or parole, subsection 1226(c) prohibits such release except under the one exception in subsection 1226(c)(2) involving witness protection, which is not applicable here. *Gutierrez v. Holder*, --- F. Supp. 2d ----, 2014 WL 27059, *3 (N.D. Cal. Jan. 2, 2014) (upholding mandatory detention for a criminal alien detained six months after his release from criminal custody). Subsection 1226(c) prevents criminal or terrorist aliens in removal proceedings from absconding or reoffending while free on bond after being served with removal charges and placed in removal proceedings based on their criminal offenses. *Demore v. Kim*, 538 U.S. 510, 518-19 (2003)). In *Demore*, the Supreme Court recognized Congress' intent in drafting that statute, and upheld its constitutionality for those purposes. *Demore*, 538 U.S. 510 at 513. In the Ninth Circuit, pre-order criminal aliens are detained without bond under subsection 1226(c) for the first sixth months of removal proceedings. *Rodriguez II*, 715 F.3d at 1138. Thereafter, his detention shifts to subsection 1226(a) and the alien is entitled to an individualized

bond hearing.[6] Thus, Petitioners in their action are only challenging their initial detention for six or less months under subsection 1226(c).

Following the enactment of subsection 1226(c), the Board of Immigration Appeals confronted challenges from aliens who argued that they were not subject to the new detention rules because they had not been taken into custody "when . . . released" from criminal custody. The Board reviewed the language in 8 U.S.C. § 1226(c) and concluded that the Government's authority to detain criminal aliens did not depend on how soon they were taken into immigration custody after their release from criminal custody. *See Matter of Rojas*, 23 I. & N. Dec. at 121-26 (construing 8 U.S.C. § 1226(c)). In *Matter of Rojas*, the Board concluded that an alien, whose conviction would otherwise subject him to 8 U.S.C. § 1226(c), was not exempt from mandatory detention because he was not taken into immigration custody until two days after his release from state criminal custody. *Id.* at 117-18.

The Board's decision was predicated on two grounds. First, it concluded that the prohibition on release of "an alien described in paragraph (1)," found in subsection 1226(c)(2), "when read in isolation, . . . [was] susceptible to different readings" – and thus ambiguous. *Id.* at 120. Second, the Board concluded that this "description" included only the categories of removable aliens enumerated in subparagraphs 1226(a)(1)(A) through (D), that the "when . . . released" clause described only the point at which the Attorney General's detention duty arose, and that the statute therefore prohibited such aliens' release from immigration custody regardless of how or when they entered such custody. *Id.* at 121. The Board concluded that the clause "when the alien is released" does not define the class of "alien[s] described in" subsection 1226(c)(1) who are subject to mandatory detention under subsection 1226(c)(2), but instead specifies the earliest point in time when the Government's authority to take the alien into custody arises. *Id.* at 121, 126. The Board also determined that "when" in the "when . . . released"

[6] Unlike bond hearings held immediately upon an alien's detention under subsection 1226(a) where the alien bears the burden of showing that he is not a flight risk or danger to the community, the Government must prove by clear and convincing evidence that a detainee under subsection 1226(c) is a flight risk or a danger to the community to justify the denial of bond in a Rodriguez hearing. *Rodriguez II*, 715 F.3d at 1135-56.

clause does not unambiguously limit subsection 1226(c)'s application to the moment "immediately upon" an alien's release from state custody. *See id.* at 127.

C. The Trust Act

Effective January 1, 2014, the State of California enacted the Trust Act, which allows local governments to limit ICE's ability to use immigration detainers to track and detain pre-order criminal aliens upon their release from state and local criminal custody. 2013 Cal. A.B. 4 (codified at Cal. Gov't Code §§ 7282-7282.5 (2014). The Trust Act mandates that state and local officials in California have the discretion to honor immigration detainers for criminal aliens convicted of most of the serious crimes enumerated in subparagraphs 1226(c)(1)(A) through (C) who are in criminal custody at state and local facilities. CGC § 7282.5(a). The Trust Act was implemented after ICE activated the Secured Communities, a program designed to enhance efforts to identify and remove convicted criminal aliens from the United States by sharing information with other law enforcement agencies.[7] The Trust Act continues to allow California law enforcement officers the discretion to honor ICE detainers in some instances. *See* Cal. Gov't Code § 7282.5(a). However, the Trust Act expressly prohibits local officials from sharing any information with ICE on aliens convicted of some of the crimes covered under subparagraphs 1226(c)(1)(A) through (C). Cal. Gov't Code § 7282.5(b). While the Trust Act is well-intentioned, the inevitable consequence is that certain criminal aliens who are described in 8 U.S.C. §1226(c) will be released to the community and not into ICE custody.

Petitioners ask the Court to require immediate detention of individuals subject to mandatory detention, but fail to recognize that in some cases this has become extremely difficult in some counties where local officials refuse to expend local resources to share information on alien's criminal custody. Further efforts to frustrate ICE's enforcement ability can be seen in the increasing number of "sanctuary" cities and counties in California. For example, at least two local governments in this jurisdiction have passed ordinances or adopted policies limiting local law enforcement's ability to honor ICE detainers, while others prohibit any communication with

[7] This comprehensive effort greatly increases ICE's ability to identify criminal aliens using biometric identification. For more information on the Secured Communities program, see ICE, Secured Communities, http://www.ice.gov/secured_communities.

ICE or the expenditure of any local resources except for the most violent crimes. Petitioners are asking the Court to treat criminal aliens who were not immediately detained due to local governments' policies differently from those incarcerated in local jurisdictions who choose to honor immigration detainers and share information with ICE officials. Petitioners are asking the Court to endorse an interpretation of 8 U.S.C. § 1226(c) that would allow state and local officials in California to frustrate Congress's detention scheme even for the aliens who ICE is able to identify, locate, and arrest. Thus, the Trust Act sets new parameters on the Government's ability to undertake the duty mandated by Congress to detain aliens who have committed serious crimes and qualify for detention under subsection 1226(c). 8 U.S.C. § 1226(c)(1) (stating "[t]he Attorney General[8] *shall take into custody* any alien who" is described in the subsection) (emphasis added)).

IV. ARGUMENT

A. This Court should deny Petitioners' motion for class certification because Petitioners fail to satisfy Rule 23(a)(4)'s adequacy of representation requirement.

Petitioners cannot demonstrate that they "will fairly and adequately protect the interests of the class" they purport to represent, and therefore are not adequate class representatives. *See* Fed. R. Civ. P. 23(a)(4). Courts consider two issues when assessing whether an individual will serve as an adequate class representative: (1) whether the named plaintiffs have any conflicts of interest with other class members, and (2) whether the named plaintiffs will prosecute the action vigorously on behalf of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Indeed, "uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.").

[8] Although 8 U.S.C. § 1226(c) specifically refers to the "Attorney General," these immigration functions have been transferred to the Secretary of Homeland Security. *See* 6 U.S.C. § 557.

The named Petitioners here are not adequate representatives because their interests conflict with some members of the proposed class. In their motion for class certification, Petitioners allege that "they have no conflict of interest with" and their "interests are entirely aligned with those of the proposed class members." (Class Mot. at 18.) A comprehensive reading of all of the Petitioners' individual petitions for writs of habeas corpus and putative class action, however, shows Petitioners' implicit recognition that class members' interests vary based on the length of the gap in time between release from criminal custody and immigration detention as well as the alien's level of integration back into his or her community during that period. *See* Pet. ¶ 2 (stating that each Petitioner "has lived in freedom since his release, some for periods of many years; each has ties to family and community; and *each has an individualized case to make* that his criminal record should not result in his unconditional detention or ultimate deportation"). Notably, Petitioners contend that the BIA's interpretation of Section 1226(c) in *Matter of Rojas* is invalid because "the Government continues to subject individuals throughout the State of California to mandatory detention under Section 1226(c) *regardless of how long ago* the individual finished serving his sentence for a Section 1226(c)(1) offense." (Pet. ¶ 38. (emphasis added)).

In light of Petitioners' emphasis on the length of the gap in time between release from criminal custody and immigration detention and on reintegration back into the community during that period, Petitioners are not adequate representatives for the entire proposed class. Petitioners each allege that since their release from criminal custody and their detention by immigration authorities, they have established significant familial and other ties to their communities. (*See* Pet. ¶ 17 (Preap), ¶ 23 (Padilla), ¶ 28-31 (Magdaleno).) However, not all putative class members can assert the times and ties as Petitioners. For example, the petitioner in the latest decision from this district on the same legal issue presented by Petitioners involved an alien detained six months after his release from criminal custody after two other unsuccessful attempts by immigration officials to arrest him. *Gutierrez*, 2014 WL 27059 at *3. Although the decision does not indicate whether ICE issued an immigration detainer while he was in custody, San Francisco-based ICE officers were delayed in detaining the criminal alien "due to manpower,

caseload, and geological coverage" that prohibited them from focusing on petitioner's case more than the three attempts necessary to detain him in Sonoma County. *Id.*, 2014 WL 27059 at *3. In *Matter of Rojas*, the seminal administrative decision challenged by Petitioners (Pet. ¶ 38), Rojas was a criminal alien taken into immigration custody only two days after his release from state criminal custody. *Id.* at 117-18. Thus, the proposed class would include all aliens not transferred directly from criminal custody to ICE, including those with gaps of minutes, hours, or days, which a Court may determine to be "immediate" under Petitioners' proposed interpretation of subsection 1226(c). Thus, Petitioners are not adequate class representatives of aliens with short gaps between criminal custody and immigration detention.

Furthermore, Petitioners were released from criminal custody before ICE set priorities to emphasize the arrest and detention of criminal aliens over those without criminal records. *See* ICE Director John Morton, Memorandum for All ICE Employees, March 2, 2011, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (setting priorities for the apprehension, detention, and removal of aliens). Moreover, since the Petitioners were released from criminal custody, ICE enacted the Secured Communities program throughout California beginning in 2009 with San Diego County. Under this relatively new ICE policy and program, the Government is first expending limited resources on detaining aliens who fall under the enumerated offenses in subparagraphs 1226(c)(1)(A) through (D).[9] *Id.*

After ICE initiated its new priorities, the state and many localities in California continued to refuse to cooperate with ICE's efforts to detain criminal aliens such as Petitioners. The new California Trust Act expressly states that law enforcement officials shall not notify ICE of criminal aliens in their custody in certain instances, thus limiting ICE's ability to track and detain criminal aliens under subsection 1226(c) as mandated by Congress. *See* Cal. Gov't Code § 7282.5. Sanctuary communities such as San Francisco and Santa Clara County have given local law enforcement great latitude withholding information to ICE about aliens in criminal custody. *See* San Francisco, CA, Admin. Code Chapter 12I: Civil Immigration Detainers, Ord.

[9] ICE only issues detainers for aliens identified through Secured Communities if the alien falls within the priorities outlined in Director Morton's 2011 memorandum.

204-13, Effective Nov. 7, 2013 (prohibiting law enforcement officials from honoring immigration detainers for all aliens except those convicted of a "Violent Felony" in the seven years immediately before the date of the detainer) (Return, Ex. 31); Santa Clara County Board of Supervisors Policy § 3.54 Civil Immigration Detainer Requests, adopted Oct. 18, 2011 (prohibiting ICE officers from access to individuals in county custody or use of county facilities for investigative interviews or other purposes and limiting county responses to immigration detainers to those convicted of homicide or serious or violent felonies under certain circumstances) (Return, Ex. 30). Santa Clara County has refused to spend any local resources to respond to ICE inquiries. *See* Santa Clara County Board of Supervisors Policy § 3.54(C) ("Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.") (Return, Ex. 30). This has resulted in the release of criminal aliens that ICE was ready and willing to take into immigration custody upon completion of their criminal proceedings.[10]

Petitioners were each released from criminal custody before these new policies were implemented. Their cases present entirely different fact sets and issues from aliens released more recently in localities that do not cooperate with ICE officials and honor immigration detainers. Petitioners' cases are not representative of many of the criminal aliens who were not immediately detained upon release from criminal custody, and they certainly are not

[10] For example, in 2012 Santa Clara County released an alien in criminal custody without notifying ICE, despite the issuance of an immigration detainer, after the alien was serving time for a violation of probation on a 2004 conviction for Possession of Controlled Substance Paraphernalia, Possession for Sale with a Firearm; Under the Influence of a Controlled Substance, and Taking a Vehicle Without Owner's Consent. Because local officials refused to share the information, the alien remains at large despite the best efforts of ICE's Fugitive Operations.

representative of those released after the implementation of the Trust Act and many new local policies on immigration detainers.

Thus, while Petitioners themselves assert a claim for a bond hearing under a length-and-ties interpretation of Section 1226(c), putative class members with shorter gaps and/or lesser community ties might not benefit from such an interpretation. Similarly, Petitioners claims are not representative of those whom ICE has pursued since their release, s*ee Gutierrez*, 2014 WL 27059 at *3, and certainly not the same as those released from criminal custody under the veil of a local government's refusal to notify ICE officials of the release before being rearrested and detained under subsection 1226(c). The Petitioners' interests are therefore not aligned with the interests of the entire putative class on either their statutory or their constitutional claims.

Accordingly, given the possibility that Petitioners might be awarded relief that satisfies them but provides no relief to differently-situated putative class members, a conflict exists between Petitioners and at least some members of the proposed class. That conflict renders all Petitioners inadequate class representatives. This Court should therefore deny Petitioners' motion for class certification.

B. This Court should deny Petitioners' motion for class certification for failure to satisfy Rule 23(a)'s "commonality" and "typicality" requirements.

Petitioners' motion for class certification fails to satisfy Rule 23(a)'s "commonality" and "typicality" requirements for many of the same reasons identified above. Indeed, the Supreme Court has noted that Rule 23(a)'s requirements of commonality, typicality, and adequacy of representation tend to overlap. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (noting that the commonality, typicality, and adequacy of representation requirements "serve as guideposts for determining . . . 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").

Under Rule 23(a)(2), a class should not be certified because Petitioners have failed to establish the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have

suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157). It is not sufficient for a plaintiff to allege merely that all of the proposed class members have "suffered a violation of the same provision of law" or raise some "common questions." *Id.* ("[The commonality] language is easy to misread, since any competently crafted class complaint literally raises common 'questions.'"). Rather, the proposed class members' claims must *depend* upon a common contention, the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Thus, although "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to establish commonality]," *Hanlon*, 150 F.3d at 1019, commonality cannot be established where there is wide factual variation requiring individual adjudications of each class member's claims, *see Nguyen Da Yen v. Kissinger*, 70 F.R.D. 663-64 (N.D. Cal. 1976). Indeed, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (quotation omitted).

Here, Petitioners cannot show that the proposed class members have a common contention, the resolution of which would, in "one stroke," resolve an issue "central to the validity of each" of their claims. Indeed, as noted above, Petitioners' claims are in large part tied to the length of the gap in time between an individual's release from criminal custody and immigration detention and not the mere existence of a gap. Resolving whether an individual is properly detained under subsection 1226(c), particularly in the context of Petitioners' due process claim, presents the type of "wide factual variation" and "[d]issimilarities within the proposed class" that render commonality unmet. *See Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 ("[Commonality] does not mean merely that they have all suffered a violation of the same provision of law.").

Likewise, Petitioners have failed to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Overlapping with the adequacy requirement, "[t]he purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon*

v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). As shown in detail above, however, Petitioners' interests actually conflict with some members of the proposed class.

In addition, the Petitioners do not adequately represent all proposed class members because the Petitioners are all lawful permanent residents, yet a relevant portion of the proposed class definition includes "*all individuals* . . . who are will be subject to mandatory detention". ((Pet. ¶ 40; Class Mot. at 7.)) (emphasis added). The class therefore includes individuals who are not lawful permanent residents and extends to those criminal aliens who are in the United States illegally or have stayed beyond the period of time authorized by DHS. Lawful permanent residents have significantly greatly likelihood of prevailing before the immigration court, just as Preap has demonstrated. This conflict renders Petitioners inadequate as class representatives.

Accordingly, because Petitioners' allegations do not satisfy Rule 23(a)'s "commonality" and "typicality" requirements, this Court must deny their motion to certify a class.

III. CONCLUSION

This Court should deny Petitioners' motion for class certification. Petitioners are not adequate representatives for the entire proposed class because their interests conflict with putative class members with shorter gaps and/or lesser community ties. Additionally, Petitioners' proposed class fails to satisfy Rule 23(a)'s commonality and typicality requirements.

Respectfully submitted,

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