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12
 13 UNITED STATES DISTRICT COURT
 14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 15
 16 SAN FRANCISCO DIVISION

17)	
18)	Case No. 3:13-cv-05878-EMC
19)	DEFENDANTS' RESPONSE IN
20)	OPPOSITION TO PLAINTIFFS'
21)	MOTION FOR CLASS
22)	CERTIFICATION AND
23)	APPOINTMENT OF CLASS
24)	COUNSEL (ECF No. 14)
25)	<u>Hearing:</u>
26)	Date: April 3, 2014
27)	Time: 1:30 p.m., Courtroom #5
28)	Judge: Edward M. Chen

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1 **I. INTRODUCTION**

2 This immigration case involves a challenge to the adequacy of telephone
3 access afforded those detained by U.S. Immigration and Customs Enforcement
4 (“ICE”) at three facilities outside of San Francisco. Four named plaintiffs – Audley
5 Barrington Lyon, Jr. (“Lyon”); Edgar Cornelio (“Cornelio”); José Elizandro Astorga-
6 Cervantes (“Astorga-Cervantes”); and Lourdes Hernandez-Trujillo (“Hernandez-
7 Trujillo”) (collectively, “Plaintiffs”) – seek to certify a class consisting of “[a]ll
8 current and future immigration detainees who are or will be held by ICE in Contra
9 Costa, Sacramento, and Yuba Counties.” Mot. (ECF No. 14) at Notice of Motion;
10 Compl. (ECF No. 1) ¶ 83. Because Plaintiffs seek to certify an overly broad class
11 that cannot meet the requirements of Federal Rule of Civil Procedure 23,
12 Defendants¹ request that the Court deny Plaintiffs’ motion in its entirety.

13 **II. NAMED PLAINTIFFS**

14 Two of the four named plaintiffs remain detained by ICE in the three
15 detention centers at issue in this litigation. Named plaintiff Cornelio has not been
16 in ICE detention since his removal to Guatemala on February 11, 2014. *See* Decl. of
17 Michael Vaughn (“Vaughn Decl.”), ¶ 9, attached as Ex. A to Declaration of Jennifer
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25 ¹Defendants in this action include ICE; John Sandweg (“Sandweg”), Acting
26 Director of ICE; U.S. Department of Homeland Security (“DHS”); Jeh Johnson
27 (“Johnson”), Secretary of DHS; and Timothy Aitken (“Aitken”), Field Office Director
28 for the ICE Enforcement and Removal Operations (“ERO”) Field Office in San
Francisco (collectively, “Defendants”). Mr. Sandweg will resign from his position as
Acting Director of ICE effective February 21, 2014. His successor will be
substituted under Federal Rule Civil Procedure 25(d) on all future filings.

1 A. Bowen. And named plaintiff Astorga-Cervantes posted bond and was released
2 from ICE custody on February 20, 2014. *Id.* ¶ 19.

3 **A. Audley Barrington Lyon, Jr.**

4 Lyon, a native and citizen of Jamaica, was placed into removal proceedings in
5 October 2013 before the Immigration Court in San Francisco, California; he has
6 been charged as removable under 8 U.S.C. § 1227(a)(2)(B)(i), based on a 2008
7 controlled substance conviction. *See Vaughn Decl.*, ¶¶3, 5. Since October 22, 2013,
8 Lyon was previously detained by ICE at the West County Detention Facility in
9 Richmond, Contra Costa County, California (“Contra Costa facility”) under the
10 mandatory pre-removal order detention scheme imposed 8 U.S.C. § 1226(c).² *Id.* ¶
11 6. Lyon is represented in his removal proceedings by an attorney from Centro Legal
12 de la Raza. *Id.* ¶ 8.

13 **B. Edgar Cornelio**

14 At his removal hearing on January 23, 2014, an Immigration Judge ordered
15 Cornelio removed to Guatemala. *Id.* ¶ 9; *see also* Order of the Immigration Judge,
16 attached as Ex. B to Bowen Decl. Cornelio waived his right to appeal this removal
17 order, rendering the removal order final. *Vaughn Decl.* ¶ 9. On February 11, 2014,
18 Cornelio was removed to Guatemala. *Id.*

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25 ² Under the mandatory pre-removal order detention scheme imposed by 8
26 U.S.C. § 1226(c), absent exceptions not applicable or pursued in his case, Lyon is not
27 eligible for a bond hearing for the first six months of his pre-removal order
28 detention. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013) (holding
that a mandatory detainee must be afforded a bond hearing following six months of
detention (hereinafter, “*Rodriguez* bond hearing”).

1 **C. José Elizandro Astorga-Cervantes**

2 Following an October 2013 arrest, Astorga-Cervantes, a native and citizen of
3 Mexico, was placed into removal proceedings before the Immigration Court in San
4 Francisco, California. *Id.*, ¶¶ 16, 18. ICE charged him with removability under 8
5 U.S.C. § 1227(a)(2)(A)(iii), based on a 1992 narcotics conviction. *Id.* ¶ 18. Astorga-
6 was taken into ICE custody on November 20, 2013, and detained at the Rio
7 Cosumnes Correctional Center in Sacramento County, California (“Sacramento
8 facility”), which is located in the Eastern District of California. *Id.* ¶ 19. Astorga-
9 Cervantes was detained under the pre-removal order detention scheme governed by
10 8 U.S.C. § 1226(a). *Id.* On January 23, 2014, an Immigration Judge granted him
11 bond in the amount of \$6,000. *Id.* Astorga-Cervantes posted bond and was released
12 from custody on February 20, 2014. *Id.* Astorga-Cervantes is represented in his
13 removal proceedings by an attorney with the American Civil Liberties Union. *Id.* ¶
14 22.

15 **D. Lourdes Hernandez-Trujillo**

16 Hernandez-Trujillo, a native and citizen of Mexico who overstayed her B-2
17 visitor visa, which expired in March 2008, was placed into removal proceedings in
18 November 2012 before the Immigration Court in San Francisco, California. *Id.*
19 ¶ 23-24. ICE charged her with removability under 8 U.S.C. § 1227(a)(1)(B) as an
20 overstay who remained in the United States without authorization. *Id.* ¶ 24.
21 Initially detained at the Sacramento facility, Hernandez-Trujillo has been detained
22 at the Yuba County Jail (“Yuba facility”) since April 2013. *Id.* ¶ 25. Based on a
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1 criminal conviction for armed robbery, Hernandez-Trujillo is subject to mandatory
2 pre-removal order detention under 8 U.S.C. § 1226(c). *Id.* The attorney
3 representing Hernandez-Trujillo in her removal proceedings has declined
4 Hernandez-Trujillo’s right to a bond hearing, pursuant to the Ninth Circuit’s
5 decision in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) . *Id.* ¶ 27.
6 Hernandez-Trujillo is next scheduled for an individual hearing before an
7 Immigration Judge on March 13, 2014. *Id.* ¶ 28

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10 **III. FEDERAL RULE OF CIVIL PROCEDURE 23**

11 Plaintiffs seeking certification of a proposed class must first demonstrate the
12 existence of the four required elements set forth in Rule 23(a) of the Federal Rules
13 of Civil Procedure:
14

- 15 (1) the class is so numerous that joinder of all members is
16 impracticable [“numerosity”];
- 17 (2) there are questions of law or fact common to the class
18 [“commonality”];
- 19 (3) the claims or defenses of the [named plaintiffs] are typical of the
20 claims or defenses of the class (“typicality”); and
- 21 (4) the [named plaintiffs] will fairly and adequately protect the
22 interests of the class (“adequacy of representation”).

23 Fed. R. Civ. P. 23(a). In addition to these four prerequisites, plaintiffs who propose
24 to certify their class under Rule 23(b)(2) – as Plaintiffs do in this action – must show
25 that “the party opposing the class has acted or refused to act on grounds generally
26 applicable to the class.” Fed. R. Civ. P. 23(b)(2). “The party seeking class
27 certification bears the burden of demonstrating that the requirements of Rules 23(a)
28

1 and (b) are met.” *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th
2 Cir. 2010); *see also Wal-Mart Stores, Inc. v. Dukes*, --- U.S. ---, 131 S.Ct. 2541, 2551
3 (2011) (same). The failure to meet “any one of Rule 23’s requirements destroys the
4 alleged class action.” *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th
5 Cir. 1975). The Supreme Court has held that “actual, not presumed, conformance
6 with Rule 23(a) [is] indispensable.” *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160
7 (1982).
8

9 10 **IV. ARGUMENT**

11 Plaintiffs’ motion for class certification should be denied for several reasons.
12 First, Plaintiffs’ proposed class is overly broad and not limited to those individuals
13 who are or will be “held in government custody *pending deportation proceedings*.”
14 Compl. ¶ 1 (emphasis added). Second, Plaintiffs have not shown that they meet the
15 prerequisites of Rule 23(a), requiring adequate representation, commonality, and
16 typicality. Finally, Plaintiffs fail to show that their proposed class meets the
17 cohesiveness required to certify a class under Rule 23(b)(2).
18

19 20 **A. The Proposed Class Is Not Adequately Defined.**

21 “Although there is no explicit requirement concerning the class definition in
22 [Rule] 23, courts have held that the class must be adequately defined and clearly
23 ascertainable before a class action may proceed.” *Lukovsky v. San Francisco*, No. C
24 05–00389 WHA, 2006 WL 140574, *2 (N.D. Cal. Jan. 17, 2006) (quoting *Schwartz v.*
25 *Upper Deck Co.*, 183 F.R.D. 672, 679–80 (S.D. Cal. 1999)). In other words, “[a] class
26 definition should be ‘precise, objective, and presently ascertainable.’” *O’Connor v.*
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1 *Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (quoting Manual for
2 Complex Litigation, Third § 30.14, at 217 (1995)). Because Plaintiffs' proposed class
3 definition is overly broad and not precisely defined, their motion for class
4 certification should be denied.
5

6 Plaintiffs propose to certify a class consisting of “[a]ll current and future
7 adult immigration detainees who are or will be held by ICE in Contra Costa County,
8 Sacramento County, or Yuba County.” Compl. ¶ 83. Yet the very first sentence of
9 their Complaint declares that “[t]his is a class action for injunctive and declaratory
10 relief necessary to remedy ongoing violations of the constitutional and statutory
11 rights of immigrants held in government custody *pending deportation proceedings*.”
12 Compl. (ECF No. 1) ¶ 1 (emphasis added); *see also* Mot. (ECF No. 14) at 11
13 (asserting that “[a]ll members of the proposed class are held in ICE custody *while*
14 *awaiting* deportation proceedings” (emphasis added)). Plaintiffs also admit that
15 they only seek to represent those ICE detainees who are “[t]rying to [d]efend
16 [t]hemselves” in removal proceedings. Mot. (ECF No. 14) at 3 (emphasis added).
17 Because the class definition they propose is not so limited, Plaintiffs admit that
18 their proposed class is overly broad. As defined by Plaintiffs, the proposed class
19 consists of all individuals detained by ICE regardless of whether any removal
20 proceedings are or have been pending. Plaintiffs' conclusory assertion that “all class
21 members have, have had, or likely will have immigration proceedings before the
22 San Francisco Immigration Court,” does not meet their burden to adequately define
23 the class they seek to represent. Mot. (ECF No. 14) at 3-4 (citing Compl. (ECF No.
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1) ¶ 37). Indeed, not all ICE detainees who are detained under 8 U.S.C. § 1225(b) or § 1231 in Yuba, Contra Costa, or Sacramento County will necessarily have or have had proceedings before the San Francisco Immigration Court. Plaintiffs have failed to adequately define the class they seek to certify.

B. The Proposed Class Does Not Meet Requirements of Rule 23(a).

Additionally, Plaintiffs' motion must also be denied because the proposed class fails to meet the prerequisites for certification under Rule 23 of the Federal Rules of Civil Procedure. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (quotation marks omitted). Furthermore, a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161. The class proposed by Plaintiffs in this litigation falls short of satisfying the requirements of Rule 23(a)(2)-(4).³

1. The Named Plaintiffs Cannot Satisfy the Adequate Representation Required by Rule 23(a)(4).

While Defendants do not question that Plaintiffs' counsel can adequately represent the proposed class,⁴ Plaintiffs themselves have not demonstrated that

³ Defendants do not at this time challenge whether the proposed class meets the numerosity requirement of Rule 23(a)(1), but reserve the right to do so in the future should grounds arise for such a challenge.

⁴ "Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure, those questions have, since 2003, been governed by Rule 23(g)." *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Defs.' Opp. to Motion for Class Cert.

1 they “will fairly and adequately protect the interests of the class.” *See* Fed. R. Civ.
2 P. 23(a)(4). Courts consider two issues when assessing whether named plaintiffs
3 can adequately represent the proposed class: (1) whether the named plaintiffs have
4 any conflicts of interest with other class members, and (2) whether the named
5 plaintiffs will prosecute the action vigorously on behalf of the class. *Hanlon v.*
6 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Indeed, “uncovering conflicts of
7 interest between the named parties and the class they seek to represent is a critical
8 purpose of the adequacy inquiry.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 959
9 (9th Cir. 2009).

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12 First, Plaintiffs cannot show that Cornelio will be an adequate class
13 representative given his removal to Guatemala on February 11, 2014. *See* Vaughn
14 Decl. ¶ 9. Cornelio was ordered removed from the United States by an Immigration
15 Judge on January 23, 2014. *Id.* Cornelio waived any right to appeal that removal
16 order, rendering it a final removal order and resulting in his removal. *Id.* Given
17 this development, Cornelio has not and cannot demonstrate that he can adequately
18 represent Plaintiffs’ proposed class.

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21 Second, none of the four named plaintiffs can adequately represent any ICE
22 detainee who alleges that his or her detention has been prolonged by inadequate
23 telephone access. Lyon is detained under the mandatory pre-removal order
24 detention scheme governed by 8 U.S.C. § 1226(c), which precludes Lyon from

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27 Cir. 2010) (citing Fed. R. Civ. P. 23(g), 2003 Advisory Committee Note). “Thus,
28 under the plain language of the rule, a district court's decision to certify a class
must *precede* the appointment of class counsel.” *Id.* (emphasis in original).

Defs.’ Opp. to Motion for Class Cert.

1 seeking release on bond at this time. *See* Vaughn Decl., ¶ 6. Prior to his removal to
2 Guatemala, Cornelio was released on bond in August 2010, but had that bond
3 revoked in September 2013 after he was arrested and incarcerated for driving under
4 the influence of alcohol in July 2013. *Id.* ¶¶ 12-14. Astorga-Cervantes was granted
5 release on \$6,000 bond, which he posted on February 20, 2014. *Id.* ¶ 19. And
6 Hernandez-Trujillo has declined, through her attorney, to seek release on bond
7 pursuant to the Ninth Circuit’s decision in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th
8 Cir. 2013). Therefore, none of the named plaintiffs can evidence any causation
9 between their detention and any allegedly inadequate telephone access.
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12 Third, only one of the four named plaintiffs alleges that she requested
13 assistance with placing a legal call from one of the three detention facilities.
14 Hernandez-Trujillo is the only named plaintiff to allege that she requested
15 assistance, but that her “request was denied.” *See* Decl. of Hernandez-Trujillo (ECF
16 No. 14-5), ¶ 16 (failing to confirm the number of requests made – if more than one –
17 or whether she was told the reason for the denial). No other named plaintiff has
18 made such an assertion. *See generally* Decl. of Lyon (ECF No. 14-2); Decl. of
19 Astorga-Cervantes (ECF No. 14-3); Decl. of Cornelio (ECF No. 14-4). To the extent
20 there are options at each facility to request a private legal phone call that will not
21 automatically cut off after a certain time period and that is free for any indigent
22 detainee, a detainee’s decision not to pursue such options will be a defense in this
23 litigation. The failure of three of the four named plaintiffs to assert having ever
24 sought assistance in placing a call from their respective detention facilities allows
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1 for the inference of a conflict between those named plaintiffs and the class they
2 propose to represent, precluding them from demonstrating that they can adequately
3 represent the proposed class.

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5 Finally, to the extent Plaintiffs are allowed to certify the class as they have
6 defined it, Plaintiffs have not and cannot show that they will adequately represent
7 any ICE detainees who are subject to a detention statute other than 8 U.S.C. §
8 1226. *See* Vaughn Decl. ¶¶ 6, 14, 19, 25. Only Cornelio – who has not shown that
9 he can serve as an adequate class representative from Guatemala – has been
10 subject to mandatory post-removal order detention under 8 U.S.C. § 1231. *Id.* ¶ 9.
11 Additionally, Plaintiffs do not and cannot allege that any of the four named
12 plaintiffs have been subject to detention under 8 U.S.C. § 1225(b), a detention
13 scheme that affords “limited due process protection.” *Rodriguez*, 715 F.3d at 1140.
14 Plaintiffs cannot demonstrate that they can adequately represent their proposed,
15 overly-broad and imprecisely-defined class, as required by Rule 23(a)(4).
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19 2. Plaintiffs Cannot Satisfy the “Commonality” Required by Rule
20 23(a)(2).

21 Rule 23(a) requires “questions of law or fact common to the class.” Fed. R.
22 Civ. P. 23(a)(2). To satisfy this commonality prerequisite, the proposed class
23 members must “have suffered the same injury.” *Dukes*, 131 S. Ct. at 2551 (quoting
24 *Falcon*, 457 U.S. at 157). Plaintiffs cannot satisfy this burden by merely alleging
25 that all of the proposed class members have “suffered a violation of the same
26 provision of law” or raise some “common questions.” *Id.* (“[The commonality]
27 language is easy to misread, since any competently crafted class complaint literally
28 Defs.’ Opp. to Motion for Class Cert.

1 raises common ‘questions.’). Rather, the proposed class members’ claims must
2 depend upon a common contention, the determination of which “will resolve an
3 issue that is central to the validity of each one of the claims in one stroke.” *Id.*
4 Although “[t]he existence of shared legal issues with divergent factual predicates is
5 sufficient [to establish commonality],” *Hanlon*, 150 F.3d at 1019, commonality
6 cannot be established where there is wide factual variation requiring individual
7 adjudications of each class member’s claims. *See Nguyen Da Yen v. Kissinger*, 70
8 F.R.D. 656, 663-64 (N.D. Cal. 1976).

11 Plaintiffs have moved to certify a class consisting of “[a]ll current and future
12 adult immigration detainees who are or will be held by ICE in Contra Costa County,
13 Sacramento County, or Yuba County.” Mot. (ECF No. 14) at Notice of Motion; *see*
14 *also* Compl. (ECF No. 1) ¶ 83. This proposed class fails the commonality required
15 by Rule 23(a)(2). First, Plaintiffs’ attempt to raise a “systemic challenge” to their
16 conditions of confinement will require a showing of “widespread actual injury.”
17 *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Yet, those detainees within the proposed
18 class who are ineligible to seek relief from removal or who are awaiting removal
19 proceedings cannot evidence the “actual injury” required to contest their conditions
20 of confinement. As noted by the *Lewis* Court, “depriving someone of a frivolous
21 claim . . . deprives him of nothing at all.” *Id.* at 353 n.3. Because an unknowable
22 and indeterminable number of potential class members will not be able to
23 demonstrate any actual injury, Plaintiffs’ broadly defined class cannot meet the
24 commonality threshold required by Rule 23(a)(2).
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1 Moreover, Plaintiffs’ “mere allegations of systemic violations of the law . . .
2 will not automatically satisfy Rule 23(a)’s commonality requirement.” *See, e.g.,*
3 *Lightfoot v. District of Columbia*, 273 F.R.D. 314, 324 (D.D.C. 2011) (decertifying a
4 class for failure to meet the commonality required by Rule 23(a)(2)) (quoting *DG ex*
5 *rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010)). Rather, any
6 analysis of Plaintiffs’ claims regarding violations of constitutional and statutory
7 rights caused by lack of telephone access will necessarily require an independent
8 analysis with respect to each separate facility and the alternative options available
9 for placing telephone calls at each facility. Unlike the class certified in *Abadia-*
10 *Peixoto v. DHS*, 277 F.R.D. 572 (N.D. Cal. Dec. 23, 2011), in which the plaintiffs
11 challenged a single ICE policy applying to the entire class, Plaintiffs in this action
12 challenge various practices at three detention facilities. *See generally* Compl. (ECF
13 No. 1). Rather, Plaintiffs challenge several practices, which they do not and cannot
14 allege stem from any overriding policy applicable to all facilities.
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16 As such, any determination as to the legality of practices contested by
17 Plaintiffs will require independent and separate considerations as to each facility.
18 *See, e.g., Turk v. Plummer*, Case No. C 94-3043 VRW, 1994 WL 508678, at *1 (N.D.
19 Cal. Sept. 2, 1994) (“Pretrial detainees and prisoners’ [constitutional rights are]
20 subject to rational limitations in the face of legitimate security interests of the penal
21 institution.”); *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002) (denying the
22 plaintiff’s constitutional claims where “the telephone restriction was rationally
23 related to a legitimate government interest [and the plaintiff] “had alternative
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1 means of exercising his right to communicate”). The legal and factual questions as
2 to adequate telephone access at each facility at issue in this litigation preclude
3 Plaintiffs from meeting the commonality required by Rule 23(a)(2).
4

5 3. Plaintiffs Cannot Satisfy the “Typicality” Required by Rule
6 23(a)(3).

7 Plaintiffs have likewise failed to demonstrate that “the claims or defenses of
8 the representative parties are typical of the claims or defenses of the class.” Fed. R.
9 Civ. P. 23(a)(3). The typicality requirement of Rule 23(a)(3) “derives its
10 independent legal significance from its ability to screen out class actions in which
11 the legal or factual position of the representatives is markedly different from that of
12 other members of the class even though common issues of law or fact are present.”
13 *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 598 (3d Cir. 2012) (internal
14 quotation omitted). Thus, “a class representative must be part of the class and
15 possess the same interest and suffer the same injury as the class member.” *Falcon*,
16 457 U.S. at 156. For the same reasons that Plaintiffs cannot satisfy the adequacy
17 and commonality prerequisites Rule 23(a), Plaintiffs also cannot satisfy the
18 typicality requirements of Rule 23(a)(3).
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22 **C. Rule 23(b)(2) Precludes Plaintiffs Proposed Class.**

23 “The key to the (b)(2) class is the indivisible nature of the injunctive or
24 declaratory remedy warranted – the notion that the conduct is such that it can be
25 enjoined or declared unlawful only as to all of the class members or as to none of
26 them.” *Dukes*, 131 S. Ct. at 2557 (internal quotation omitted) (emphasis added). In
27 this litigation, unlike that before the *Abadia-Peixoto* Court, Plaintiffs do not
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1 challenge a single policy applying to all facilities, but rather various practices
2 amongst the facilities. As such, Plaintiffs have failed to show that any order by this
3 Court could apply to the entirety of the proposed class. Rather, Plaintiffs'
4 allegations of wrongdoing will require this Court to consider those claims on a
5 facility-by-facility basis. As this Court has held, "the right to access to counsel is
6 not absolute, but must be balanced against the legitimate government interest in
7 maintaining the security and safety of prison facilities." *Manly v. Sonoma County*,
8 Case No. C-92-3228 EFL, 1993 WL 742803, at *2 (N.D. Cal. Feb. 22, 1993) (citing
9 *Bell v. Wolfish*, 441 U.S. 520, 546 (1979)). Plaintiffs have failed to show that their
10 proposed class can meet the cohesiveness required by Rule 23(b)(2).
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12

13 **V. CONCLUSION**

14
15 This Court should deny Plaintiffs' motion for class certification. Plaintiffs
16 have failed to adequately define their class, resulting in an overly broad and
17 unascertainable class. Additionally, Plaintiffs have failed to carry their burden and
18 demonstrate that their proposed class meets the requirements of Rule 23.
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DATED:

February 21, 2014

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CERTIFICATE OF SERVICE

No. 3:13-cv-05878-EMC

I hereby certify that on this 21st Day of February 2014, a true and correct copy of **Defendants' Response in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel (ECF No. 14)** was served with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and electronic link of the same to all attorneys of record through the Court's CM/ECF system.

/s/ Jennifer A. Bowen
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