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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs-Petitioners,

v.

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

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

PLAINTIFFS-PETITIONERS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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

Date Filed: December 12, 2013

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

Defendants-Respondents.[1]

Trial Date: Not Set

[1] Jeh Johnson was sworn in as Secretary of the U.S. Department of Homeland Security on December 23, 2013. Pursuant to Federal Rule of Civil Procedure 25(d), he is substituted as a defendant in place of Rand Beers, Acting Secretary of the U.S. Department of Homeland Security.

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I. INTRODUCTION

This case requires class adjudication. Mr. Mony Preap, Mr. Eduardo Vega Padilla, and Mr. Juan Magdaleno ("Named Plaintiffs") bring this civil-rights case to challenge a uniform Government policy that violates Section 236(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1226 ("Section 1226"). As shown in their opening brief, Mr. Preap, Mr. Padilla, and Mr. Magdaleno, their proposed class members, and the claims they collectively bring, meet Rule 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements. Their requested relief—declaratory judgment that the Government's practice violates Section 1226 and the Constitution and an injunction to stop the offending practice—puts this case squarely within the ambit of Rule 23(b)(2).

The Government opposes class certification, conjuring conflicts of interest, and arguing that Named Plaintiffs and their proposed class do not meet Rule 23(a)'s typicality, commonality, and adequacy-of-representation requirements. But, by definition, claims brought by Named Plaintiffs and those of their proposed class members share common issues of law and fact. They challenge the Government's policy of applying Section 1226(c) to individuals not taken directly into immigration detention "when released" from criminal custody for a Section 1226(c)(1) Offense. Mr. Preap, Mr. Padilla, and Mr. Magdaleno's claims are therefore also typical of those of their proposed class members. The declaratory and injunctive relief they seek would apply to all proposed class members. They have no conflicts of interest with members of their proposed class, and therefore adequately serve as representative litigants.

Accordingly, this Court should grant Named Plaintiffs' motion for class certification.

II. BACKGROUND

A. Named Plaintiffs Mr. Mony Preap, Mr. Eduardo Vega Padilla, and Mr. Juan Magdaleno

Since Named Plaintiffs filed their Motion for Class Certification, ECF No. 8, an immigration judge (IJ) granted Mr. Mony Preap's application for cancellation of removal on December 17, 2013. ICE released him from custody that same day. On December 26, 2013, Mr. Eduardo Vega Padilla appealed his removal order (dated December 3, 2013). His appeal remains pending before the Board of Immigration Appeals (BIA). As of this reply brief's filing date (Feb.

14, 2014), Mr. Padilla is eligible for a *Rodriguez* bond hearing.[2] On December 26, 2013, Mr. Juan Magdaleno appealed his removal order (dated Nov. 29, 2013), which remains pending before the BIA. Mr. Magdaleno had his *Rodriguez* bond hearing on February 14, 2014, and was denied bond.[3] *See* Decl. of A. Prasad regarding J. Magdaleno ¶¶ 1-5 & Ex. 1 (Order of the Immigration Judge re J. Magdaleno).

B. ICE detainers, California's TRUST Act, and Section 1226(c)

As explained below, ICE detainers and the TRUST Act do not bear on Named Plaintiffs' asserted claims or the class certification analysis. *See* Section III.C.1.b, *infra*. However, because the Government has raised both topics, this section addresses them briefly.

1. ICE Detainers

ICE issues immigration detainers to request that state and local law enforcement agencies hold individuals for 48 hours (or up to five days when weekends and holidays intervene) after local charges have been resolved so that ICE can take them into immigration detention for removal purposes.[4] 8 C.F.R. § 287.7. State and local law enforcement agencies have consistently maintained discretion to honor detainer requests. 8 C.F.R. § 287.7(a) ("The detainer is a ***request***

[2] *See Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (affirming district court's order granting preliminary injunction, enjoining government from holding individuals in mandatory detention under Section 1226(c) for more than six months, at which point detention authority shifts to Section 1226(a)). Following the Ninth Circuit's decision, the district court entered a permanent injunction barring the detention of individuals for more than six months under Section 1226(c), ordering that thereafter, bond hearings be granted under the government's discretionary authority under Section 1226(a). No. 2:07-cv-3239, C.D. Cal., ECF No. 255. The Department of Homeland Security ("DHS") and other government defendants in that case have appealed. No. 13-56706 (9th Cir.). Opening appeal and cross-appeal briefs are due March 10, 2014. Briefs opposing the appeal and cross-appeal are due April 9, 2014.

[3] Mr. Preap's release, Mr. Magdaleno's *Rodriguez* bond hearing, and Mr. Padilla's upcoming *Rodriguez* bond hearing do not moot this case. The inherently-transitory mootness exception in class actions recognizes that "[s]ome claims are so inherently transitory that the trial court will not have had enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)). Accordingly, the class certification decision in these cases relate back to the filing of the class complaint, when claims of the Named Plaintiffs were live. *Id.*; *see also* 1 William B. Rubenstein, *Newberg on Class Actions* § 2:13 (5th ed. 2011). The Government has not challenged Plaintiffs' claims on mootness grounds and therefore waives any such argument.

[4] John Morton, Director, U.S. Immigrations and Customs Enforcement, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems* (Dec. 21, 2012) ("Morton Mem."), http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody . . . .") (emphasis added).

Despite the discretion reserved by state and local authorities, disturbing trends have emerged in ICE's use of immigration detainers. These detainers are sometimes erroneously placed on U.S. citizens, who are not removable.[5] Of the individuals ICE placed on detainers from October 1, 2011 to January 31, 2013, only thirteen percent of them were ultimately ordered removed as of March 19, 2013.[6] Despite ICE's stated priority of removing noncitizens "who pose a danger to national security or risk to public safety,"[7] roughly half (47.7%) of the individuals subject to an ICE detainer from October 1, 2011 to January 31, 2013 had no record of a criminal conviction—not even a minor traffic violation.[8] Moreover, studies have documented that the prospect of exposure to immigration authorities deterred crime victims and witnesses from reporting crimes and cooperating with local law enforcement.[9]

2. The TRUST Act and Section 1226(c)

Effective January 1, 2014, California enacted the Transparency and Responsibility Using

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[5] *See* "Who are the Targets of ICE Detainers?" (Feb. 20, 2013) (reporting that between October 2007 and November 2011, immigration holds were placed on 834 U.S. citizens), available at http://trac.syr.edu/immigration/reports/310/; *see also* Julia Preston, *Immigration Crackdown also Snares Americans*, New York Times (Dec. 13, 2011), http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?pagewanted=all&_r=1&.

[6] "Few ICE detainers target serious criminals," Table 1 (Sept. 17, 2013), available at http://trac.syr.edu/immigration/reports/330.

[7] John Morton, Director, U.S. Immigrations and Customs Enforcement, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, June 30, 2010, http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf.

[8] *See* "Few ICE detainers target serious criminals," note 6, *supra*.

[9] In domestic violence cases when a victim fights back in self-defense, for example, perpetrator and victim may be difficult to distinguish at a crime scene so police take both into custody. *See* George Gascón (San Francisco District Attorney), *Feds' immigration-hold policy misguided*, SF Gate (Sept. 10, 2013), http://www.sfgate.com/opinion/openforum/article/Feds-immigration-hold-policy-misguided-4803416.php.; Lynn Tramonte, Debunking the Myth of "Sanctuary Cities," Community Policing Policies Protect American Communities 9, Immigration Policy Center (Apr. 2011), http://www.immigrationpolicy.org/sites/default/files/docs/Community_Policing_Policies_Protect_American_042611_update.pdf. After being cleared of wrongdoing, crime victims may nonetheless find themselves the subject of immigration holds because an ICE agent believes they match the identity of an individual who could be deportable. Gascon; Tramonte at 8-9. To avoid this scenario, victims and witnesses have been deterred from reporting crimes or otherwise working with law enforcement. Gascon; Tramonte at 6-9.

State Tools, or "TRUST," Act. Factually, the TRUST Act has little impact on the Government's ability to arrest individuals upon release from a Section 1226(c)(1) Offense because the TRUST Act limits local authority to respond to immigration detainers for only certain offenses. Nearly all Section 1226(c)(1) Offenses are included in the list of convictions for which agencies ***can*** continue to honor immigration detainers. *See* Cal. Gov't Code § 7282.5 (Jan. 1, 2014). These include convictions for offenses such as assault, battery, property crimes, felony driving under the influence, obstruction of justice, bribery, and firearms violations. *Id.* Indeed, the few Section 1226(c)(1) Offenses for which immigration detainers cannot be honored under the TRUST Act—such as misdemeanor drug possession and misdemeanor theft resulting in a sentence of less than a year—fall outside of ICE's own policy priorities for issuing detainers.[10]

Additionally, nothing in the TRUST Act limits local law enforcement agencies from communicating with ICE,[11] contrary to the Government's assertions. *See* Defs.' Resp. in Opp. to Pls.' Mot. to Certify Class ("Opp.") at 10-11, 13-14. Rather, the TRUST Act only limits local law enforcement agencies from *detaining* individuals on the basis of immigration holds after they become eligible for release from custody. *See* Cal. Gov't Code § 7282.5.

III. ARGUMENT

Through this action, Named Plaintiffs and their proposed class members seek to redress the same wrong: the Government's uniform policy and practice of subjecting them to mandatory detention under Section 1226(c), even though they were taken into immigration detention some time after their release from criminal custody for a Section 1226(c)(1) Offense, rather than "when released," as Section 1226(c) requires for mandatory detention. The number of habeas petitions filed across the country contesting the Government's application of Section 1226(c) demonstrates that class adjudication of the claims in this action would be both efficient and appropriate. *See*

[10] *See* Morton Mem. at 2 & n.2 (limiting issuance of detainers for misdemeanor convictions to where there are three or more non-minor convictions or misdemeanors involving violence, sexual abuse, driving under the influence, unlawful flights, unlawful possession or use of a deadly weapon, distribution or trafficking of a controlled substance, or other significant threat to safety), note 4, *supra*.

[11] Indeed, the TRUST Act does not impact automatic communication to ICE regarding individuals booked into local custody in California. Under the Secure Communities program, booking fingerprints are shared through the FBI with DHS, which creates the opportunity for ICE to issue detainers to local jails. *See* http://www.ice.gov/secure_communities/.

Mot. for Prelim. Inj. 9-11 (citing cases).

As demonstrated in their opening brief, Named Plaintiffs' class action satisfies each of Rule 23(a) and Rule 23(b)(2)'s requirements and should therefore be certified. The Government opposes class certification, arguing only that commonality, typicality, and adequacy-of-representation requirements have not been met. For the reasons explained below, the Government is wrong.

A. The Government concedes that the proposed class meets Rule 23(a)'s numerosity requirement, that the Government has acted on grounds that apply generally to the class making certification under Rule 23(b)(2) appropriate, and that proposed class counsel is adequate.

In its opposition, the Government does not contest and therefore concedes that Named Plaintiffs' proposed class satisfies Rule 23(a)(1)'s numerosity requirement. Implicit within that concession is that members of the proposed class largely lack resources to bring individual suits demanding individualized bond hearings, and that the Government's practice impacts a large and ever-changing group of individuals. *See* Mot. for Class Cert. 9-10. As compared with requiring adjudication of each claim by each proposed class member individually, deciding the claims presented in this case through the class-action device would be "economical [in] fashion." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

The Government similarly does not contest and therefore concedes that it "has acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Its practice of holding in mandatory detention under Section 1226(c) individuals who are taken into immigration detention at some point ***after*** they have been released from criminal custody—rather than "when released," as the statute dictates—is the uniform policy against which Named Plaintiffs seek an injunction. *See* Mot. for Class Cert. at 3-5, 7-8, 15; Mot. for Prelim. Inj. at 11-21. This class is therefore appropriately certified under Rule 23(b)(2).

Lastly, the Government does not contest and therefore concedes that proposed class counsel—Keker & Van Nest LLP, Asian Americans Advancing Justice – Asian Law Caucus, and American Civil Liberties Union Foundation of Northern California—will prosecute this action vigorously on behalf of the class and that they will fairly and adequately represent the interests of

the class, making their appointment appropriate under Rule 23(g).[12]

The Government argues only that (i) there are not common questions of law and fact to the class; (ii) claims of the Named Plaintiffs are not typical of those of their proposed class members; and therefore (iii) the Named Plaintiffs are inadequate representatives of the proposed class members. Opp. at 11-17. None of these challenges overcome Named Plaintiffs' showing that their proposed class meets Rule 23(a) and Rule 23(b)(2)'s requirements for class certification.

B. Named Plaintiffs' proposed class satisfies the commonality requirement.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Civil rights cases that challenge policies or practices that have an impact on all putative class members typically meet the commonality requirement. 5 James W. Moore, *Moore's Federal Practice* § 23.23[4][f] (3d ed. 2013). These standards have been met, and met easily, in this case. Named Plaintiffs and members of their proposed class share common contentions that are central to their claims and are capable of resolution "in one stroke" by this Court. *Wang v. Chinese Daily News, Inc.*, 787 F.3d 538, 544 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2451, 2551 (2011)). Named Plaintiffs and all members of their proposed class have been (or will be) held in mandatory detention under Section 1226(c), even though they were not (or will not have been) taken into immigration custody "when released" from criminal custody for a Section 1226(c)(1) Offense. Mot. for Class Cert. at 11-12. Not only do these questions of law and fact form common contentions among the claims of all Named Plaintiffs and proposed class members, they are also central to those claims. By interpreting Section 1226(c) and the import of its "when released" clause, this Court will resolve Named Plaintiffs' and their proposed class members' statutory claim in a single stroke.

Named Plaintiffs and their proposed class members also allege the same injury—deprivation of individualized custody review, including the opportunity for a bond hearing, under

[12] Defendants also do not contest that the legal issues presented in this action are appropriate for class certification under 28 U.S.C. § 1331, certification as a representative habeas class under § 2241, or that the Rule 23 procedures may be applied by analogy to the habeas class. *See* Mot. for Class Cert. at 8 n.4.

the same statute—Section 1226. Mot. for Class Cert. at 11-12, 15; Mot. for Prelim. Inj. at 8-22. Their injuries arise from the Government's uniform policy of subjecting individuals to mandatory detention, even though they have ***not*** been taken directly into immigration custody from release from criminal custody for a Section 1226(c)(1) Offense. *See* Section III.A, *supra*. This policy "appl[ies] generally to the class," and therefore necessarily presents a common question of fact. 1 William B. Rubenstein, *Newberg on Class Actions* § 3:27 (5th ed. 2011). The suitability of declaratory and injunctive relief presents common questions of law. *Id.*

As the Supreme Court recently recognized, to satisfy Rule 23(a)(2)'s commonality requirement, "[e]ven a single [common] question will do." *Wal-Mart*, 131 S. Ct. at 2556; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2009) ("the commonality requirement[] asks us to look only for some shared legal issue or a common core of facts"). Named Plaintiffs and their proposed class easily satisfy this requirement.

The Government nonetheless argues that the proposed class does not meet the commonality requirement because claims of proposed class members "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." Opp. at 16. But this argument mischaracterizes the claims brought in this action.

Named Plaintiffs' statutory claim is not tied to the length of any individual's gap between his or her release from criminal custody for a Section 1226(c)(1) Offense and immigration detention or his or her familial and community ties. On the contrary, Named Plaintiffs argue that Section 1226(c) means precisely what it says: for an individual to be subject to mandatory detention under Section 1226(c), the Government must have taken the individual into custody *immediately* upon his or her release from criminal custody for a Section 1226(c)(1) Offense. Mot. for Prelim. Inj. at 8-18. In other words, Named Plaintiffs challenge the Government's system-wide misapplication of Section 1226(c). Their proposed class includes individuals with *any* gap in time between release from criminal custody and immigration detention.

To be sure, Named Plaintiffs invoke the canon of constitutional avoidance in support of their statutory claim, arguing that the Government's interpretation of Section 1226(c) should be

rejected because it raises serious constitutional issues. *See* Mot. for Prelim. Inj. at 16-18. Specifically, the Government's interpretation permits it to mandatorily detain any individual it takes into immigration detention, even if that individual was released from criminal custody for a Section 1226(c)(1) Offense ***over fifteen years ago***—back to October 1998 (Section 1226's effective date). *Id.* The lengthy gap spanning release from criminal custody for a Section 1226(c)(1) Offense and subsequent immigration detention for Mr. Preap, Mr. Padilla, and Mr. Magdaleno, along with each's own familial and community ties, provide additional examples of the constitutional concerns implicated by the Government's interpretation of Section 1226(c) and the BIA's interpretation in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). But Named Plaintiffs argue constitutional avoidance to vindicate their statutory claims. *Clark v. Martinez*, 543 U.S. 371, 382 (2005) ("[W]hen a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others…; he seeks to vindicate his own statutory rights."). *Any* proposed class member could invoke the canon, regardless of his or her own gap length. *Id.* at 380-81 ("If one [interpretation] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."). Differences in gap length or familial and community ties among proposed class members are therefore irrelevant to the commonality analysis.[13]

At most, the duration of an individual's freedom from custody for a Section 1226(c)(1) Offense and the extent of his or her community ties are relevant to the due process claim. But even for their due process claim, not all class members need to have suffered the same injury or degree of injury for the commonality requirement to be met. *See Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001) (finding commonality requirement met in class action challenging policies and practices for parole and parole revocation as violating the Americans with Disabilities Act (ADA) and Rehabilitation Act, despite differences in specific disabilities), abrogated on other grounds by *Johnson v. California*, 543 U.S. 499, 504-505 (2005); *Baby Neal ex rel. Kanter v.*

[13] To the extent the Government suggests that the six-month gap in *Gutierrez v. Holder* was adjudicated to be a permissible gap under Section 1226(c)'s language, Opp. at 8 (citing *Gutierrez*), that is not the case. *Gutierrez* did not turn on the length of the petitioner's gap and it explicitly declined to consider Section 1226(c)'s "when released" language. No. 13-cv-05478-JST, 2014 WL 27059, *4-*5 (N.D. Cal. Jan. 2, 2014).

Case, 43 F.3d 48, 56-57 (3d Cir. 1994) (commonality requirement typically met "where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them" and "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."). Indeed, "Rule 23(a)(2) does not require that ***all*** questions of law or fact raised in the litigation be common." 1 Rubenstein, *Newberg on Class Actions* § 3:20 (emphasis added).[14]

Accordingly, the proposed class meets Rule 23(a)(2)'s commonality requirement.

C. Named Plaintiffs adequately represent the interests of proposed class members.

For the same reasons that Named Plaintiffs share common contentions with their proposed class members, they adequately represent the interests of those absent class members. Demonstrating adequate representation requires showing only "sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class." 1 Rubenstein, *Newberg on Class Actions* § 3:58. It "does not require complete identity of claims or interests between the proposed representative and the class." *Id.*

Named Plaintiffs request the very same declaratory and injunctive relief that their proposed class members would request. Additionally, as described above, they uniformly contend that Section 1226(c)'s "when released" clause requires the Government to take individuals directly into immigration detention upon their release from criminal custody for a Section 1226(c)(1) Offense. Far from having any affirmative antagonism with members of their proposed class on their claims, Named Plaintiffs pursue the exact same relief under the same legal arguments that their proposed class members would advocate. Their interests are therefore entirely aligned, satisfying Rule 23(a)(4)'s adequacy of representation requirement.

[14] Under the doctrine of constitutional avoidance, this Court should first attempt to address the injury to class members through resolution of Plaintiffs' statutory claim, for which the commonality requirement is indisputably met. If the Court ultimately finds it necessary to address factual differences between class members in order to reach the merits of the due process claim, it may alter or amend its class certification order any time before final judgment, including through the creation of subclasses, as necessary. Fed. R. Civ. P. 23(c)(1)(C) & (c)(5).

1. Named Plaintiffs have no conflict of interest with proposed class members.

The Government nonetheless attempts to demonstrate a conflict of interest between Named Plaintiffs and members of their proposed class. But its arguments fall apart on inspection.

a. Gap in time as well as familial and community ties do not defeat Named Plaintiffs' adequacy of representation.

The Government argues that Named Plaintiffs inadequately represent absent claim members because Named Plaintiffs' claims are based on the length of their respective gaps between their release from criminal custody for a Section 1226(c)(1) Offense and their subsequent immigration detention; absent claim members may have shorter gaps. As explained above in the context of commonality, this is incorrect. *See* Section III.B, *supra*. Named Plaintiffs' statutory claim is based on the plain language of the statute itself, its legislative history, the context in which the statute was enacted, and the contention that even if Section 1226 and its "when released" clause were ambiguous (they are not), the administrative decision underlying the Government's practice—*Matter of Rojas*—is not a permissible application of Section 1226(c) and is therefore undeserving of *Chevron* deference. *Id.*; *see* Mot. for Prelim. Inj. at 8-20.

None of Named Plaintiffs' arguments turn on the length of any individual's gap. *See* Section III.B, *supra*. Similarly, none of the Government's arguments regarding its interpretation of Section 1226(c) turn on the length of time between release and subsequent immigration detention. Mot. to Dismiss at 11-29. Accordingly, the fact that Named Plaintiffs and members of their proposed class have different gap lengths is immaterial for the adequacy-of-representation analysis. Any differences in the lengths of their respective gaps fall far short of creating any "antagonism" between them.[15]

[15] As discussed above, Section III.B & note 14, *supra*, to the extent an individual's gap length impacts analysis of the due process claim, this "should be resolved in favor of upholding the class, subject to later possible reconsideration in the form of creation of subclasses to protect special or divergent interests of class minorities." 8 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 25:13 (4th ed. 2002). "Courts have held that in order for a conflict between members of an alleged class to preclude a class action, it must be one involving the very issue in litigation." *Id.* (citations omitted). The Court need not reach Plaintiffs' due process claim, however, were it to grant relief based on their statutory claim.

b. ICE's enforcement priorities and passage of the TRUST Act do not impact the adequacy-of-representation analysis.

The Government next points out that Named Plaintiffs were released from criminal custody before ICE set priorities to detain noncitizens with criminal histories over those without criminal histories. Opp. at 13, 15. But the Government does not explain why this matters, or why it impacts the adequacy-of-representation analysis, let alone creates a conflict of interest. None of Named Plaintiffs' statutory interpretation arguments turn on the Government's enforcement priorities. Nor do the Government's arguments, as far as Named Plaintiffs can tell.

Indeed, quite the opposite is true. Named Plaintiffs' statutory claim requires examination of Section 1226(c), including the context in which Congress enacted it and whether Congress spoke to the question of whether Named Plaintiffs and their proposed class members should be subjected to mandatory detention under Section 1226(c). *See* Mot. for Prelim. Inj. at 8-21. ICE's enforcement priorities—set through the Secure Communities program and through the Morton Memorandum which issued thirteen and fifteen years, respectively, ***after*** Section 1226's enactment—do not bear on that analysis.

The Government next appeals to the TRUST Act for a conflict of interest between Named Plaintiffs and their proposed class members, but the TRUST Act is also unavailing. As a matter of statutory interpretation, the TRUST Act is irrelevant to the Court's construction of Section 1226(c). In 1996, when Congress enacted Section 1226(c), neither the TRUST Act nor the 2011 and 2013 policies of local law enforcement cited by the Government were in place. *See* Opp. at 13-14.[16] They therefore have no bearing on whether Congress intended in 1996 for mandatory detention to apply to individuals taken into immigration custody after a period of freedom following their release from criminal custody for a Section 1226(c)(1) Offense.

[16] Even the detention policy cited by the Government for Santa Clara County directs its agents to honor immigration holds from ICE, particularly if "[t]he individual is convicted of a serious or violent felony offense for which he or she is currently in custody," if the individual "has been convicted of a homicide crime," or if "[t]he individual has been convicted of a serious or violent felony within 10 years of the request." *See* Decl. of T. Liggett ISO Defs.' Return for Writs of Habeas Corpus and Mot. to Dismiss Compl., Ex. 30 (Santa Clara, Cal., Board of Supervisor Policy § 3:54 (adopted Oct. 18, 2011)).

As a matter of practical impact, the TRUST Act also does not bear on the claims in this litigation. The TRUST Act maintained the status quo for state and local law enforcement to maintain discretion to honor ICE detainer requests for individuals with just about every Section 1226(c)(1) Offense. *See* Section II.B.2, *supra*. Thus, whether a proposed class member was released from criminal custody for a Section 1226(c)(1) Offense before or after the effective date of the TRUST Act, or was held in criminal custody in locales that do not honor immigration detainers, is a distinction without a difference.[17]

2. Named Plaintiffs request the same relief for all class members.

The Government speculates (in just a single sentence) that Named Plaintiffs "might be awarded relief that satisfies them but provides no relief to differently-situated putative class members." Opp. at 16. But this is incorrect. Named Plaintiffs request the opportunity for individualized bond hearings. The declaratory and injunctive relief at issue in this case would apply to all proposed class members. *See, e.g.*, Mot. for Prelim. Inj. at 1 ("Relief Requested"). "[W]hen the class representative's claims are for the same type of relief as those of the class, there is no obstacle to them being an adequate representative." 1 Rubenstein, *Newberg on Class Actions* § 3:59. Accordingly, the Government has failed to identify any conflict of interest based on the nature of the relief sought.

D. Named Plaintiffs satisfy the typicality requirement.

Government's sole ground for contesting the typicality of Named Plaintiffs' claims is that Named Plaintiffs are all lawful permanent residents (LPRs) of the United States, but that their proposed class includes individuals who are not. Opp. at 17. The Government argues that LPRs have a significantly greater likelihood of prevailing before the immigration court and that this

[17] If the Government means to suggest that individuals it could not take directly into custody as a result of the TRUST Act pose greater flight risks than others, an IJ is already directed to evaluate "[a]ttempts to escape from authorities or other flight to avoid prosecution" and the individual's "criminal record, including extensiveness and recency," in a bond hearing. Significant Factors in a Bond Determination, available at http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm (last visited Feb. 12, 2014). These individual equities do not bear on the claims in this action, nor are they relevant for purposes of the class certification analysis.

affects the typicality analysis.[18] *Id.* But it does not. The claims in this action seek redress for injury resulting from the Government's blanket misapplication of Section 1226(c), not the release from custody based on factors specific to each individual.[19]

"The test for typicality is not demanding and focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." 1 Rubenstein, *Newberg on Class Actions* § 3:29 (citations omitted). As explained above, the Named Plaintiffs bring the same claims that absent class members would bring, and argue the same legal theories that absent class members would argue. *See* Section III.B, *supra*. Section 1226(c) does not distinguish between LPRs and non-LPRs. *See* 8 U.S.C. § 1226(c). The Government's application of Section 1226(c) under *Matter of Rojas* does not turn on an individual's status as an LPR versus a non-LPR. Named Plaintiffs request the same declaratory and injunctive relief that absent class members would request—an individualized bond hearing and declaration that they are held under Section 1226(a) and not under Section 1226(c)—none of this turns on an individual's status as an LPR or a non-LPR. *See Stewart v. Abraham*, 275 F.3d 220 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2661 (2002). Accordingly, the LPR versus non-LPR distinction drawn by the Government does not "strike[] at the heart of the [claims]" brought, and does not defeat a finding of typicality. 1 Rubenstein, *Newberg on Class Actions* § 3:39.

This Court should find that Named Plaintiffs satisfy Rule 23(a)(3)'s typicality requirement.

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[18] The Government advances this argument under its "typicality" heading, but frames the argument as one going to the Named Plaintiffs' adequacy of representation. For the same reasons the LPR versus non-LPR distinction is irrelevant to typicality, so too is it irrelevant to the "adequacy of representation" analysis.

[19] If the Government contends that an individual's prospects for relief from removal turn on his or her status, and that in turn affects his or her flight risk, that also has no bearing on the relief Named Plaintiffs seek or the claims they bring. Individualized determinations as to one's flight risk, including an individual's "criminal record, including . . . ineligibility for relief from deportation/ removal," would be taken into account by an IJ at a bond hearing and are not before this Court. *See* EOIR Benchbook, "Significant Factors in a Bond Determination," available at http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm (last visited Feb. 11, 2014).

IV. CONCLUSION

For the foregoing reasons, Named Plaintiffs request that this Court certify their proposed class.

Dated: February 14, 2014

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