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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UELIAN DE ABADIA-PEIXOTO, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. 11-cv-4001-RS MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION Hearing Date: Nov. 17, 2011 Hearing Time: 1:30 pm

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL RULES OF CIVIL PROCEDURE

STATUTES

REGULATIONS

INTRODUCTION

The Court should deny Plaintiffs' motion for class certification. By their Complaint (and this motion), Plaintiffs seek class-wide declaratory and injunctive relief on behalf of four (4) civil immigration detainees who have appeared for their immigration proceedings in the San Francisco immigration court while restrained. Specifically, Plaintiffs seek certification of a class defined as "all current and future adult immigration detainees who have or will have proceedings in San Francisco Immigration Court." Pls.' Mem. at 1. On behalf of that putative class, Plaintiffs seek a declaration that "Defendants' policies and practices . . . violate Plaintiffs' rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States." In particular, they allege that regardless of the individual circumstances of each particular civil immigration detainee's case, no such detainee may be shackled during their in-court appearances "without an individualized determination that such restraints are necessary." This court should deny Plaintiffs' motion for class certification for several reasons. As Defendants discuss in greater detail in their pending motion to dismiss, none of the claims of the named Plaintiffs are ripe, because none of them can allege that they have suffered actual prejudice as a result of Defendants' practices. In fact, one named Plaintiff was granted relief from removal (and was subsequently released from custody) on October 12. Additionally, the complaint fails to state a claim upon which relief can be granted.

However, there are additional independent reasons to deny class certification even if the motion to dismiss is denied. The named Plaintiffs fail to meet their burden to demonstrate that the putative class meets the legal requirements for class treatment set forth in Fed. R. Civ. P. 23(a) and 23(b)(2). Specifically, Plaintiffs fail to meet their burden of demonstrating that the class is so numerous that joinder is impractical. In addition, Plaintiffs fail to meet their burden of demonstrating commonality, typicality, and adequacy, because the Court's consideration of Plaintiffs' disparate legal claims necessarily will require the court to consider the individual circumstances of each plaintiff. Accordingly, class certification is improper, and the Court should deny Plaintiffs' motion.

STATEMENT OF ISSUE PRESENTED

Whether Plaintiffs' have failed to meet their burden of demonstrating that class certification is proper: because Plaintiffs' claims are unripe; because Plaintiffs have failed to state a claim upon which relief can be granted; and because Plaintiffs fail to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND[1/]

The U.S. Department of Homeland Security ("DHS") is authorized to detain certain aliens whom the Government seeks to remove from the United States under one of the four general immigration detention statutes set forth in the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1225(b) (authorizing detention of non-citizens seeking admission ("arriving aliens"); 8 U.S.C. § 1226(a) (authorizing detention of non-citizens pending a determination of removability); 8 U.S.C. § 1226(c) (authorizing mandatory detention of non-citizens who have committed certain criminal offenses); 8 U.S.C. § 1231(a) (authorizing detention of non-citizens with administratively final orders of removal during and after the removal period).[2/]

[1/] A more comprehensive statement of facts is set forth in Defendants Motion to Dismiss filed on October 11, 2011. *See* Defs.' Mot. (Dkt. No. 33) at 3-7, and is incorporated herein by reference. For the convenience of the Court, however, Defendants provide the following summary of the facts most relevant to the Court's resolution of this motion.

[2/] An "arriving alien" is a person entering or seeking admission into the United States at a port of entry. *See* 8 C.F.R. § 1240.8(b), 8 C.F.R. §§ 1.1(q), 1001.1(q). Thus, while an alien arriving at a port of entry may be physically present in the United States, an alien not granted admission after arriving at a port of entry is legally outside the United States, having never made an entry. "Arriving aliens" detained under INA section 1226(b) are not entitled to a bond hearing to determine whether they are a danger to the community or a flight risk. Nor are they entitled to the same constitutional protections provided to those within the territorial jurisdiction of the United States. *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004). Unlike "arriving aliens," detainees held under section 1226(a) may contest their detention or terms of release at a bond hearing before an immigration judge. Similarly, detainees held under section 1226(c) may challenge that his detention is not covered by INA section 1226(c) by requesting an immediate hearing before an immigration judge. *Demore v. Kim*, 538 U.S. 510, 514 n.3 (2003) (citing *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999)); *see also* 8 C.F.R. §§ 236.1(d)(1) and 1236.1(d)(1) (explaining that an immigration judge may redetermine the initial custody and bond determination of the district director any time before a final deportation order); 8 C.F.R. § 1003.19(h)(2)(ii) (providing that an alien may seek a "determination by an immigration judge that the alien is not properly included" within § 1226(c)). Once released on bond, the alien would not be restrained during his immigration proceedings.

When detained aliens are brought before Immigration Judges, pursuant to a Memorandum of Understanding ("MOU") between the Executive Office for Immigration Review ("EOIR") and the Immigration and Naturalization Service (now Immigration and Customs Enforcement ("ICE")), ICE is responsible for ensuring security during immigration proceedings held within ICE detention facilities and/or in EOIR's base city courtrooms. *See* Operating Policies and Procedures Memorandum 88-9: Courtroom Security, at 1-3, attached as Ex. A to Declaration of Jeffrey M. Bauer. In particular, ICE agents are charged with ensuring that all EOIR personnel as well as the parties, witnesses, and the public are secure as to their personal safety at all times. *Id*. at 1. ICE retains discretion to ensure such security, and Immigration Judges lack the authority to overrule final ICE determinations regarding security in specific situations. *Id*.

Plaintiffs allege that ICE's decision to restrain them during their immigration proceedings violates the Due Process Clause of the Fifth Amendment because, regardless of each particular Plaintiff's case or circumstances, no detainee may be restrained during their in-court appearances "without an individualized determination that such restraints are necessary." Complaint ¶ 9.

Plaintiff Abadia-Peixoto is a criminal alien detained in Yuba County under INA section 1226(c). *Id*. ¶ 66; Decl. of Jason M. McClay ("McClay Decl.")¶ 4, attached as Ex. B to Decl. of Jeffrey M. Bauer. She has twice been convicted of possession of cocaine, as well as driving under the influence, and inflicting corporal injury on a spouse or cohabitant. McClay Decl. ¶¶ 4-5, attached as Ex. B to Declaration of Jeffrey M. Bauer. An immigration judge denied her bond, because she is a danger to the community. *Id*. Plaintiff Abadia-Peixoto specifically alleges that during her five (5) appearances in immigration court, she has been restrained in "ankle and wrist restraints and a belly chain" and that on one occasion the restraints caused her to cry out in pain. Complaint at ¶¶ 71-72. She further alleges that during one of her five appearances in immigration court, she was chained to other detainees. Abadia-Peixoto Decl. ¶ 11. Her next court appearance is scheduled for November 2, 2011. McClay Decl. ¶ 7.

Plaintiff Cifuentes is a 39-year-old man and native of Guatemala currently in immigration custody in Yuba County. Complaint ¶ 76. He is currently detained without bond, following an

Immigration Judge's determination that he poses a danger to the community. McClay Decl. ¶¶ 9-10. Plaintiff Cifuentes' prior criminal history includes driving under the influence twice, including once with a blood alcohol level of .29%, possession of a controlled substance, furnishing a false ID to a peace officer, and obstructing/resisting a peace officer. *Id*. He alleges that he has appeared in immigration court in "ankle and wrist restraints and a belly chain" on three occasions and that on one occasion he was chained to other immigration detainees and "could not speak confidentially with a consulting attorney." Complaint ¶¶ 78-79. He further alleges that his restraints cause him discomfort and that on at least one occasion he has asked ICE officers to adjust his restraints, but was ignored. *Id*. ¶ 80. He also alleges that the restraints make him feel "punish[ed]" and "humiliated" because people might think he "did something wrong" and that this shame and discomfort make him too embarrassed to answer questions in court. *Id*. at 82-83. His next court appearance is scheduled for October 18, 2011. McClay Decl. ¶ 12.

Plaintiff Nolasco is a 32-year-old transgendered woman and native of Mexico, who was granted relief from removal on October 12, and was subsequently released from ICE custody. *See* Amended Order of the Immigration Judge, *In the Matter of Pedro Nolasco Jose* (Oct. 12, 2011) and Order of Supervision (Oct. 12, 2011), attached as Ex. C to Bauer Decl. Prior to obtaining relief, Nolasco alleged that she has been restrained in "ankle and wrist restraints and a belly chain" for each of her immigration proceedings and that her restraints make it "difficult and uncomfortable to walk." Compl. ¶ 89. Also prior to obtaining relief and being released, she alleged that the shame and discomfort of being restrained might distract her from "participat[ing] and testify[ing] to her fullest ability." *Id*. ¶ 91. She further alleged that the restraints might "make it difficult for her to speak to the judge with confidence about why he or she should grant my application for relief." Nolasco Decl. ¶ 10. Nolasco appeared in court with counsel on October 12, and was granted withholding of removal. All parties waived appeal. Ex. C to Bauer Decl. at 1.

Plaintiff Wei is a 38-year-old woman and native of China, currently in immigration custody in Sacramento County. Complaint ¶ 92. She is currently detained without bond because of her status as an arriving alien pursuant to 8 C.F.R. 1003.19(h)(2)(i)(B). McClay Decl. ¶ 19. She was

previously convicted of being an accessory to cultivation and possession of marijuana for sale under California law. McClay Decl. ¶ 20. She alleges that she has been restrained on "her wrists, ankles, and waist" three times, and that, one time she complained to an agent regarding her restraints. Complaint ¶ 95. She also alleges that her restraints make her "heavy-hearted," and that while she has yet to engage the court, she fears because she has no attorney her restraints will "interfere with her ability to present her positions" and make her appear to the judge as a "crazy old lady." *Id*. ¶ 96. Ms. Wei is currently represented by counsel, and her next appearance in court is scheduled for December 5, 2011. McClay Decl. ¶¶ 21-22.

ARGUMENT

I. CLASS CERTIFICATION SHOULD BE DENIED AND THIS CASE SHOULD BE DISMISSED BECAUSE PLAINTIFFS' CASE IS UNRIPE AND BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.[3/]

As a preliminary matter, this Court should deny class certification because the Named Plaintiffs cannot obtain the class-wide injunctive and declaratory relief they seek. "In a proposed class action . . .where the plaintiffs seek sweeping injunctive relief, questions relating to the named plaintiffs' standing and entitlement to equitable relief, the propriety of class certification, and the availability of systemwide relief will often overlap . . . . Although these inquiries may intersect, standing and entitlement to equitable relief are threshold jurisdictional requirements that must be satisfied prior to class certification." *Stevens v. Harper*, No. S-01-0675, 2002 U.S. Dist. LEXIS 19067 at *11 (E.D. Cal. Sept. 11, 2002) (internal citations omitted). "Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief." *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). The Plaintiffs here fail that fundamental test.

As discussed more fully in Defendants' motion to dismiss, Plaintiffs cannot obtain the relief they seek here, because their claims are unripe. Plaintiffs alleging due process violations in removal

[3/] On October 11, 2011, Defendants filed their Motion to Dismiss (Dkt. No.33). Defendants arguments with respect to the ripeness and with respect to failure to state a claim are more fully set forth in that motion and the supporting memorandum.

proceedings must, as a matter of law, demonstrate "actual prejudice." *See United States v. Nicholas-Armenta*, 763 F.2d 1089, 1091 (9th Cir. 1985); accord *United States v. Howard*, 480 F.3d 1005, 1013-14 (9th Cir 2007); *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995). None of the named Plaintiffs have alleged any instance of actual prejudice pursuant to the use of restraints sufficient to satisfy ripeness concerns. Rather, their claims "rest upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). For example, notwithstanding Plaintiff Nolasco's stated fear that the restraints might make it difficult for her to participate in her own defense, she was granted relief from removal. *See* Ex. C to Bauer Decl. at 1. For that reason, Plaintiff's claims are unripe, and class certification should be denied.

In addition to their claims being unripe, Plaintiffs have failed to state a claim upon which relief can be granted. Because Plaintiffs' blanket challenge to Defendants' use of restraints is a facial constitutional challenge, they "must establish that no set of circumstances exists under which the [policy] would be valid." *See El Rescate Legal Services, Inc. v. EOIR*, 959 F.2d 742, 751 (9th Cir. 1992). Plaintiffs' allegations fail to make such a showing. Moreover, none of the named Plaintiff assert any plausible claim for relief. The Ninth Circuit has already held that mandatory restraints during court appearances are not prejudicial to detainees where no jury is involved. *See United States v. Howard*, 480 F.3d 1005, 1013-14 (9th Cir 2007) ("[T]he rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of non-jury [] hearings."). Thus, Plaintiffs' allegations regarding their restraints do not support a cognizable due process claim and therefore must be dismissed. Plaintiffs further fail to allege any cognizable due process claim premised on their alleged inability to participate in their defense or to communicate freely with their attorneys. In the context of non-jury proceedings, these claims cannot serve as the basis of a due process claim where restraints are based on legitimate security concerns. *See id.* at 1008; *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997). Even if they could, each named Plaintiff fails to allege, let alone plausibly, that their restraints have in fact prejudiced them. In fact,

notwithstanding the restraints, Plaintiff Nolasco was granted relief from removal, and has been released. Plaintiffs' fundamental failure requires the dismissal of their claims, as without allegations of "actual prejudice," they cannot raise a cognizable due process claim. *Nicholas-Armenta*, 763 F.2d 1089, 1091 (9th Cir. 1985); *accord Howard*, 480 F.3d at 1013.

It follows that, because Plaintiffs claims are unripe and because Plaintiffs have failed to state a claim upon this Court can grant them relief, their request for class certification must also be denied. Plaintiff's failure to demonstrate a cognizable claim necessarily proves fatal to any claims raised on behalf of the putative class members. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Nevertheless, even if Plaintiffs had stated a legally cognizable claim, their request for class certification must still be denied for the reasons set forth below.

II. THE CLASS PROPOSED BY PLAINTIFFS FAILS TO SATISFY THE REQUIREMENTS FOR CERTIFICATION OF A CLASS.

A. Standard of Review

This Court should deny Plaintiffs' motion for class certification because the proposed class fails to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure governing class actions. In the instant action, Plaintiffs seek to certify a class defined as "all current and future adult immigration detainees who have or will have proceedings in San Francisco Immigration Court," Plaintiffs' Motion for Class Certification at 1. Assuming Federal Rule of Civil Procedure 23 applies, upon a motion for class certification, the named Plaintiffs – and not the Defendants – bear the burden of establishing that the requirements of Federal Rule 23 are met. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Should Plaintiffs fail to carry out their burden as to any of the requirements of Rule 23, they will be precluded from maintaining their lawsuit as a class action. *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 675 (S.D. Cal. 1999) (citing *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975)); *see also Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656 (N.D. Cal. 1976), appeal dismissed as moot, 602 F.2d 925 (9th Cir. 1979). The reviewing court must conduct a rigorous analysis to determine that the requirements of Rule 23 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). If a court is not fully

satisfied that a plaintiff has met his burden on each legal criterion, the class should not be certified. *Id*.

To that end, maintenance of a class action lawsuit requires Plaintiffs to sufficiently satisfy a two-step process prior to judicial certification of a "class" of plaintiffs. To obtain class certification under Fed. R. Civ. P. 23, the party seeking certification must first meet their burden of demonstrating all of the four factors in Rule 23(a), 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 representative parties are typical of claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy of representation"].

Fed. R. Civ. P. 23(a). In addition to satisfying those four requirements for class certification, the plaintiffs must also meet their burden of demonstrating one of the three subsections listed in Rule 23(b), such that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

See Fed. R. Civ. P. 23(b).

B. Plaintiffs Fail To Meet Their Burden of Demonstrating Rule 23(a)(1)'s Numerosity Requirement.

Plaintiffs' fail to satisfy their burden of demonstrating that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). According to the United States

Supreme Court, "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). Plaintiffs fail to provide evidence that the proposed class, or any other ICE detainees appearing in the San Francisco immigration court, beyond those Plaintiffs named in the aforementioned paragraphs, have actually been affected by the various policies alleged in the Complaint. While Plaintiffs are not required to provide a precise number of class members, "[p]laintiffs must show some evidence of or reasonably estimate the number of class members. Mere speculation as to satisfaction of this numerosity requirement does not satisfy Rule 23(a)(1)." *Nguyen*, 70 F.R.D. at 661 (citing cases); *see also Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 680 (S.D. Cal. 1999) ("A higher level of proof than mere common sense impression or extrapolation from cursory allegations is required.").

Plaintiffs claim to meet their burden of proof as to the Rule 23 numerosity requirement relying solely on a single statistic set forth in the Executive Office of Immigration Review's 2010 Statistical Yearbook. Compl. ¶ 31; Pls.' Mem. at 8. Citing to the statistical yearbook, Plaintiffs claim that they seek to "represent a class likely consisting of thousands of members." Pls.' Mem. at 8. While that number may appear seductive on its face, standing alone it is insufficient to satisfy Plaintiffs' burden of proof to demonstrate numerosity. *See Siles v. ILGWU Nat'l Ret. Fund*, 783 F.2d 923, 930 (9th Cir. 1986) (holding that plaintiff in an ERISA case failed to meet her burden to demonstrate numerosity because, although plaintiff presented evidence that 31,000 employees were covered by the benefit plan at issue and lost their jobs, plaintiff failed to provide specific facts as to how many were actually harmed by the application of the benefit plan.).

In *Siles*, the Ninth Circuit addressed a similar situation as here, where a plaintiff challenged the application of a specific policy, and sought class certification on behalf of potentially thousands of putative class members who were covered by a particular policy and who might have been affected by the application of that policy. The plaintiff, who was denied benefits under a pension fund, sued under ERISA and sought class certification on behalf of all beneficiaries of the retirement plan who had been denied benefits for the same reasons that her benefits had been denied. *Siles*, 783

F.2d at 926. In support of her motion for class certification, plaintiff submitted evidence that 31,000 employees covered by the plan lost their jobs in 1974 and 1975. *Id*. at 930. The district court denied plaintiff's motion for class certification because she failed to provide more specific information about the members in her putative class, including how many of the class members suffered the same injury that she suffered – denial of benefits – based on the application of the policy. *Id*. The Ninth Circuit affirmed.

That analysis requires the same result here. As in *Siles*, Plaintiff asks this Court to certify a class based solely on an aggregate number of potential class members that have been subject to the alleged policy at issue in this case. But as the *Siles* court held, evidence of possible membership is not evidence of actual membership in Plaintiffs' proposed class. Importantly, the aggregate data does not specify whether other members of the putative class were harmed or prejudiced in the same way as Plaintiffs allege by being restrained during their immigration proceeding. As set forth above, *supra* p. 5, one named Plaintiff has indeed been granted relief from removal, and released from custody. Simply put, Plaintiffs provide no evidence of how other proposed class members, aside from the specifically named Plaintiffs, have been affected or prejudiced by being restrained, if at all. Moreover, Plaintiffs' use of aggregate government data overestimates the size of their proposed class. For example, the aggregate data relied upon by Plaintiffs does not differentiate between adult detainees (which Plaintiffs seek to represent) and juvenile detainees (who are not in the putative class), and Plaintiffs have made no allegations in the Complaint with respect to juvenile detainees. The aggregate data also does not differentiate between restrained detainees and those who may not have been restrained, because they have requested to have – and have had – their restraints removed during their immigration proceedings. Nor does the aggregate data distinguish between the different purposes for which detainees may appear in immigration court.[4/] For these reasons, the aggregate

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[4/] Generally, there are three types of immigration proceedings at which the level of restraint may vary. *See* Complaint ¶¶ 52, 56. Master calendar hearings are group hearings where detainees often appear en masse, sometimes sitting four to a bench. *Id*. ¶ 52. Detainees are cuffed at the wrists and those cuffs are connected to a "seat-belt"-style restraint fastened around the detainee's waist. *Id*. Additionally, each detainee's ankles are chained together. *Id*. In the past, detainees have sometimes been chained to other detainees. *Id*. Unlike master calendar hearings, when detainees at merits hearings and bond-determinations are restrained, they are not chained to other detainees; they are, however,

data, standing alone, is insufficient to satisfy Plaintiffs' burden to demonstrate numerosity. Because Plaintiffs have failed to carry their burden of proof to demonstrate that the proposed class is "so numerous that joinder of all members is impracticable," certification of this proposed class should be denied.

Plaintiffs' failure to carry their burden on the Rule 23 numerosity requirement is compounded by the fact that counsel for Plaintiffs have been preparing for this lawsuit since at least January of 2010. *See* Bauer Decl. ¶ 5. Despite having more than a year and a half to obtain plaintiffs who have allegedly been prejudiced by the use of restraints during their immigration proceedings, only four appear to have been identified for this case. Of those four, none have alleged actual prejudice, *supra* p. 6-7, and despite the use of restraints, one has now been granted relief from removal and released. A putative class size of three detainees is "too small to meet the numerosity requirement." *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980) (citations omitted). Joinder is not impractical when so few possible class members have been identified. *See Harik v. Cal. Teachers Ass'n*, 298 F.3d 863, 872 (9th Cir. 2002) (certification of class of seven, nine, and ten members vacated on numerosity grounds); *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1309-10 (9th Cir. 1977) (joinder held not impracticable in putative class of thirteen employees). And while Plaintiffs suggest that the "rotating membership" of the class (due to administrative closure and termination of removal cases of individuals) support their argument for numerosity, they overlook the counterargument: that the government may be sufficiently safeguarding the rights of restrained aliens by issuing bonds, and resolving removal cases expeditiously.[5/]

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cuffed on their wrists, and those cuffs are connected to a waist chain, and their ankles are chained to each other. *Id.*¶ 56.

[5/] Additionally, Plaintiffs' "rotating membership" argument does not support numerosity but is more appropriately made in connection with the issue of whether, in cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion, the certification can be said to 'relate back' to the filing of the complaint. *See County of Riverside v. McLaughlin,* 500 U.S. 44 (1991).

In short, Plaintiffs have identified only four individuals who allegedly have been harmed by appearing in immigration court while restrained. None of those four have sufficiently alleged actual prejudice; and one has been granted relief and has been released from custody. The remaining three are represented in their immigration proceedings by counsel. Plaintiffs offer no explanation why they could not bring their claims individually or jointly. Consequently, Plaintiffs have failed to meet their burden of demonstrating numerosity. For that reason, this Court should deny class certification.

C. The Proposed Class Fails To Satisfy The Rule 23(a)(2) Commonality Requirement.

Not only have Plaintiffs failed to satisfy their burden to demonstrate that the proffered class is so numerous that joinder of all members is impracticable, but they have also failed to demonstrate that "there are questions of law or fact common to the class" as required by Fed. R. Civ. P. 23(a)(2), and as recently construed by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. __, 131 S. Ct. 2541 (2011). In *Wal-mart*, the Supreme Court noted that the class action "is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). The Supreme Court further stated that a party seeking to justify a departure from the "usual rule," must "'possess the same interest and suffer the same injury' as the class members." *Id*. (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). The Court clarified that to meet his burden of demonstrating commonality, a plaintiff must show more than that the putative class shares a violation of the same provision of law, 131 S. Ct. at 2551. Rather, to meet his burden, a class plaintiff is required to demonstrate that the class members 'have suffered the same injury,'" 131 S. Ct. at 2551 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). More specifically, class members must share a common contention that is "of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. In other words, "[w]hat matters to class certification . . . is not the raising of common 'questions' - even in droves - but rather, the capacity of a classwide proceeding to generate common answers apt to drive

the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (internal citation and quotation omitted).

Here, Plaintiffs make no attempt to demonstrate commonality of law or fact with the proposed class. Rather, Plaintiffs seek to satisfy their burden to show commonality by merely claiming that there are common issues of fact and law because all detainees in the San Francisco immigration court are subject to the same practices of the Defendants. *See* Pls.' Mem. at 9-10. However, that is precisely the type of cursory allegation that the Supreme Court found to be insufficient in *Wal-Mart*. In the instant case, Plaintiffs broadly challenge Defendants' practice in restraining detained criminal aliens in the San Francisco immigration court, but they fail to identify a discrete class of persons who have suffered the same (or similar) alleged injury as the named Plaintiffs who were affected by these policies "such that the [Plaintiffs'] claims and the class claims will share common questions of law or fact." *Id.*

As Plaintiffs' allegations reveal, disparate questions of law and fact apply to the proposed class of Plaintiffs. Plaintiff Nolasco has been granted relief from removal, and has been released from custody. Even including Nolasco's claims, the four named Plaintiffs themselves challenge Defendants' restraint practices on several separate and distinct fronts, and allege separate and discreet injuries. For example, Plaintiff Wei does not specifically allege that she has suffered any actionable injury by being restrained during her immigration proceedings. Nor does she allege that the use of restraints has impeded her ability to address the Court or participate in her own defense.[6/] In contrast, Plaintiffs Abadia-Peixoto, Cifuentes, and Nolasco specifically allege that the use of restraints caused them physical pain. Compl. ¶ 72; Cifuentes Decl. ¶ 11. Unlike Plaintiff Nolasco, however, Plaintiffs Abadia-Peixoto and Cifuentes describe that the physical pain they allege was caused by being restrained was due, at least in part, to a specific pre-existing injury. Compl. ¶ 72; Cifuentes Decl. ¶ 11. Only Plaintiffs Cifuentes has alleged that being restrained has hindered his ability to participate in his own defense. Compl. ¶ 83. Moreover, none of the named Plaintiffs specifically declare that being in restraints impedes their ability to communicate effectively with

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[6/] Plaintiff Wei concedes that she has not yet "had to engage with the court." Comp. ¶ 96.

their counsel.[7/] In fact, while Plaintiffs' alleged injuries are, according to each named Plaintiff, related to the use of restraints in some way, each of the challenges presents distinct legal and factual questions and fall well short of the requirement that "the plaintiff [] demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). Thus, Plaintiffs' claims are inappropriate for resolution through a class action.

The lack of commonality is further illustrated by additional factors that are not contained in the Complaint or in Plaintiffs' declarations. Whether and when to use restraints is entirely up to ICE's discretion. *See* Ex. A to Bauer Decl. The exercise of that discretion, and the attendant discretion of whether to remove the restraints of a particular detainee at any particular time, would necessarily depend on any number of factors that may be specific to each particular detainee. Thus, a court's review of whether ICE's restraint practices in San Francisco violate a detainees due process rights would necessarily turn on the facts specific to a particular detainee, including the basis for the detainee's detention. As the Supreme Court noted in *Wal-Mart*, a practice that permits discretion is "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Wal-Mart*, 131 S. Ct. at 2554. Considering the wide variation in factual allegations that could be raised to support each claim related to the allegation that Defendants' use of restraints violated the Plaintiffs' due process rights, it is clear that there is little to no commonality between them, given their inherent fragmentation. Although these claims raise allegations of similar due process violations, they are nevertheless grounded in specific individual factual determinations for each Plaintiff, whose claims may require individual answers. As a result, the causes of action are fragmented and therefore ill-suited for declaratory and/or injunctive relief in the form of a class action. Accordingly, the putative class does not aver a common set of factual or legal allegations.

[7/] Although the allegation does not appear in Plaintiff Cifuentes's sworn declaration in support of this motion, he provides a vague allegation in the Complaint that " he could not speak confidentially with a consulting attorney." Compl. ¶¶ 78-79. It is unclear from that cursory allegation whether the "consulting attorney" was Cifuentes' counsel such that the use of restraints could allegedly impair his right to counsel. In any event, as Plaintiffs appear to concede, "detainees typically are not shackled to other detainees during bond and individual merits hearings . . ." Compl. ¶ 56. Accordingly, by Plaintiffs' own admission, a right to counsel would not be adversely impacted for those detainees.

See Nguyen, 70 F.R.D. at 663 ("The common principles of 'due process' and 'liberty' . . . do not provide a common question of law."). For that reason, the Court should deny class certification.

D. The Proposed Class Fails To Satisfy The Rule 23(a)(3) Typicality Requirement.

Plaintiffs have likewise 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). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (internal quotation omitted). *See also Falcon*, 457 U.S. at 156 ("We have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class member.") (internal quotation omitted).

In this case, however, Plaintiffs have failed to demonstrate which named Plaintiffs have the same interests or suffered the same injury as the members of the putative class. Instead, without reference to a particular representative Plaintiff, Plaintiffs merely make a perfunctory claim that "[t]he Named Plaintiffs' claims are typical of those in the class." Pls.' Mem. at 10. However, Plaintiffs are without basis in attempting to claim that the named aliens represent the "typical" claims of the putative class. *See Falcon*, 457 U.S. at 160 ("actual, not presumed conformance with Rule 23(a) remains . . . indispensable"). Typicality can only be demonstrated if members of the putative class have similar injury resulting from the same course of conduct, and if action is not based on conduct unique to the named plaintiff. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Here, the named Plaintiffs advance several and distinct legal theories that may inure from appearing at their immigration proceeding in restraints: whether the restraints cause prejudice (Plaintiff Nolasco); whether the restraints impact the ability to participate in one's defense (Plaintiffs Cifuentes and Nolasco); whether the restraints impede the right to counsel (arguably Plaintiff Cifuentes); and whether the restraints cause actionable physical harm (Abadia-Peixoto, Cifuentes, and Nolasco). The Courts resolution of those legal questions will necessarily turn on different legal analyses applied to different sets of facts that are specific to each potential plaintiff.

In summary, absent proof that the putative class of immigration detainees appearing in the San Francisco immigration court have experienced similar injury or harm, as alleged by Plaintiffs, the claim of typicality fails for purposes of class certification. The Court should therefore deny Plaintiffs' motion.

E. The Proposed Class Fails To Satisfy The Rule 23(a)(4) Adequacy of Representation Requirement.

Additionally, Plaintiffs cannot demonstrate that they are adequate representatives of the class they purport to represent. *See* Fed. R. Civ. P. 23(a)(4). A showing of adequate representation requires named Plaintiffs in a putative class action to demonstrate that their claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Falcon*, 457 U.S. at 158 n.13.[8/] "This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel." *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1233 (9th Cir. 2007).

As applied to the instant case, however, Plaintiffs have, once again, failed to demonstrate how adjudication of the claims of any of the named Plaintiffs will fairly and adequately protect the interest of the proposed class. *See* Fed. R. Civ. P. 23(a)(4). Instead, Plaintiffs merely offer a cursory claim that this aspect of the requirement is satisfied. Pl.'s Mem. at 11. Given the various and discrete injuries alleged by the named Plaintiffs and the disparate questions of law and fact that apply to the named Plaintiffs – and that could apply to the potential claims of members of the putative class – such a perfunctory assertion is insufficient to satisfy Plaintiffs' burden. Despite Plaintiffs' unsupported assertion, however, Plaintiffs fail to address – or even consider – an important point: the interests of certain detained aliens in the putative class might well differ from the interests of other detainees who are allegedly personally affected by the restraint practice at issue. For example, a fundamental purpose of the use of restraints during immigration proceedings

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[8/] In this regard, courts have found that the commonality, typicality, and adequacy of representation requirements "tend to merge." *See Falcon*, 457 U.S. at 158 n.13; *Nguyen*, 70 F.R.D. at 664-65.

is for the security and personal safety of judges, witnesses, parties, and of the public, who often consist of the families of the detainees. *See* Ex. A to Bauer Decl. With that fact in mind, a detained alien who has not been prejudiced by or is not otherwise harmed by being restrained during his immigration hearing, might take comfort in knowing that he and his family member attending the hearing are protected by the use of restraints on other detainees. In such a case, Plaintiffs' alleged harms and interest in this litigation might not coincide and may even conflict with those of the other immigration detainees appearing in San Francisco immigration court. Accordingly, Plaintiffs fail to demonstrate that the Plaintiffs are adequate representatives of the class they purport to represent.

F. The Proposed Class Is Not Maintainable Under 23(b)(2).

Finally, despite the claims outlined in the Complaint, Plaintiffs have failed to demonstrate that the proposed class is maintainable under one of the subsections of Fed. R. Civ. P. 23(b). More specifically, on its face, the Complaint asserts that this putative class is maintainable under subsection (b)(2), such that if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, . . . final injunctive relief or corresponding declaratory relief [would be appropriate] with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). However, Plaintiffs' cause of action lacks the evidence needed to maintain the proposed class under Rule 23(b)(2). According to one court, "[a]n extremely close identity of common questions and of typicality of claims is required if the relief is to enjoin defendants from further acting on grounds generally applicable to the class as a whole." *Nguyen*, 70 F.R.D. at 667. In *Nguyen*, plaintiffs alleged that Vietnamese children were brought to the United States in violation of due process without proper documentation showing that they were orphaned. *Id*. In response, the court held that the requirements of Rule 23(b)(2) were not satisfied because, even if a class were certified, the court would be faced with "[s]ome two thousand individual adjudications." *Id*. In so finding, the court based its holding on a determination that the requirement of a "close identity" between plaintiffs was lacking because of the individualized nature of each person's due process claim. *Id*. Similarly, here, as explained above, the class challenging Defendants' restraint practices presents several distinct legal claims. *See supra*, at 13-15. As such, Defendants' actions with respect to individuals

challenging these practices might not be "generally applicable" to the putative class as a whole. *See* Fed. R. Civ. P. 23(b)(2). Rather, a fact intensive inquiry is necessary to determine whether a particular alien in removal proceedings will be injured by being restrained. This is because every case presents different circumstances, and local ICE agents charged with maintaining the security of the immigration court in San Francisco may have different ways of dealing with the specific cases before them. Because Plaintiffs have failed to demonstrate that they have satisfied the additional requirements of Rule 23(b), the Court should deny certification of the proposed class.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully submit that the Court should deny Plaintiffs' motion for class certification.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2011, I electronically filed the foregoing 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.

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