UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Maria Sandra RIVERA, on behalf of herself as an individual and on behalf of others similarly situated,

Plaintiff-Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General of the United States; Juan P. OSUNA, Director, Executive Office for Immigration Review, United States Department of Justice; Jeh JOHNSON, Secretary of Homeland Security; Thomas S. WINKOWSKI, Principal Deputy Assistant Secretary for United States Immigration and Customs Enforcement; Nathalie R. ASHER, Director, Seattle Field Office of United States Immigration and Customs Enforcement; Lowell CLARK, Warden, Northwest Detention Center; and the UNITED STATES OF AMERICA,

Defendants-Respondents.

Civil Action No.

PLAINTIFF-PETITIONER'S MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:

November 7, 2014

ORAL ARGUMENT REQUESTED

MOT. CLASS CERT.

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I. INTRODUCTION

Plaintiff-Petitioner ("Plaintiff") brings this action to challenge Defendants-Respondents' ("Defendants") unlawful policies and practices denying individuals who are being held in immigration detention under the Immigration and Nationality Act ("INA") § 236(a), 8 U.S.C. § 1226(a), the opportunity to be considered for conditional parole by the Immigration Judge. Section 1226(a), which generally governs the detention of individuals pending resolution of their removal cases, expressly authorizes the Attorney General to exercise discretion to release a noncitizen on a "bond of at least $1,500 . . . *or* . . . conditional parole," which includes release on the condition that the noncitizen appear in court for any subsequent removal hearings and whatever other non-money conditions of supervision the agency may deem necessary. 8 U.S.C. § 1226(a)(2) (emphasis added). Despite this plain language, the Seattle and Tacoma Immigration Courts currently maintain a policy and practice of uniformly failing to consider the availability of "conditional parole"—or, as it has been historically described, release on recognizance—and denying requests for conditional parole when making bond determinations on the grounds that § 1226(a) and its implementing regulations do *not* authorize Immigration Judges to order release on conditional parole, but rather restrict judges to ordering an individual's release on at least the minimum bond of $1,500.

The result of this policy is that Immigration Judges provide deficient bond hearings to individuals such as Plaintiff Maria Sandra Rivera, and require them to post bond, regardless of whether release on conditions of supervision would be adequate to address the government's concerns about flight risk. This misinterpretation of the statute and the implementing regulations effectively denies Ms. Rivera—and other individuals who do not have the resources to pay a

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bond—the opportunity of release from detention while immigration proceedings are pending. Ms. Rivera has now been detained at the Northwest Detention Center in Tacoma, Washington for over four months (since May 29, 2014). Thus, indigent or low-income individuals who are deemed suitable for release, but cannot post bond, routinely suffer continued and unnecessary detention. For others, even when it is possible to post bond, they are forced to strain personal, family, and community resources in order to gain their release.

This case presents a question of law that is appropriate for class treatment. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Ms. Rivera respectfully moves this Court to certify the following class with her as the appointed class representatives:

> All individuals who are or will be subject to detention under 8 U.S.C. § 1226(a) and who are eligible for a bond and whose custody proceedings are subject to the jurisdiction of the Seattle and Tacoma Immigration Courts.

The class consists of members who have been subjected to specific policies and practices of Defendants, which putative class members challenge as violating their statutory rights to seek release under conditional parole while in civil removal proceedings. But for Defendants' unlawful policies and practices, Ms. Rivera and proposed class members would be eligible to seek release under conditional parole while their civil immigration cases are pending, rather than only being eligible for release upon the posting a bond. Ms. Rivera seeks certification of a class under Rule 23(b)(2) in order to obtain class-wide declaratory and injunctive relief. She seeks an order declaring that Defendants' policy and practice of construing § 1226(a) to restrict Immigration Judges to ordering individuals released on at least the minimum $1,500 bond and to prohibit them from ordering individuals released on conditional parole to violate the INA. Ms. Rivera also seeks injunctive relief ordering Defendants to provide individualized bond hearings

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to her and putative class members where the Immigration Judge has the authority under § 1226(a) to consider requests for conditional parole.

II. BACKGROUND

A. The Plain Language of the Federal Immigration Law Authorizes Immigration Judges to Order Release of Noncitizens on Conditional Parole.

Although the Court need not engage in "an in-depth examination of the underlying merits" at this stage, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011), the Court may have to analyze the merits to some extent in order to determine the propriety of class certification. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) (internal citations omitted). For that reason, Ms. Rivera provides a brief summary of the merits of her claim here. Ms. Rivera is detained in the Western District of Washington at the Northwest Detention Center ("NWDC") while in civil removal proceedings under the INA. She was denied her request seeking release on recognizance as conditional parole, and the Immigration Judge refused to consider the availability of conditional parole in setting her bond pursuant to Defendants' policy and practice, ruling that he did not have jurisdiction to order an individual detained under § 1226(a) to be released on conditional parole, despite the plain language of the statute and implementing regulations. This case concerns the proper reading of § 1226(a), which governs the authority of the Immigration Court in reviewing custody determinations of noncitizens pending their removal proceedings.

Section 1226(a) provides in pertinent part that, pending a decision on removal,

> the Attorney General—
>
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on—

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> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; *or* (B) *conditional parole*;

8 U.S.C. § 1226(a) (emphasis added). Thus, the plain language of § 1226(a) clearly authorizes the Attorney General to grant release on "conditional parole" as an alternative to release on a minimum money bond.[1]

The regulations governing custody redetermination hearings recognize the Immigration Judge's authority to grant release on conditional parole as an alternative to release on money bond. *See* 8 C.F.R. § 1236.1(d) (empowering the Immigration Judge to determine whether "to detain the alien in custody, release the alien, and determine the amount of bond, *if any*, under which the respondent may be released") (emphasis added). *See also* 8 C.F.R. § 1236.3(b) (referring to the release of "[j]uveniles . . . who have been ordered released on recognizance," including those ordered released by the Immigration Judge). An Immigration Judge's authority to order an individual released on her own recognizance also has been repeatedly acknowledged by the Board of Immigration Appeals ("BIA"). *See, e.g.*, *In re Joseph*, 22 I. & N. Dec. 799, 800, 809 (BIA 1999) (upholding the Immigration Judge's order releasing individual on his own recognizance after determining that he was properly considered for release under § 1226(a)).[2]

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[1] The Secretary of the Department of Homeland Security ("DHS") shares the Attorney General's authority under § 1226(a) to detain or release noncitizens during removal proceedings. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2192. Pursuant to the implementing regulations, DHS makes the initial determination, upon the noncitizen's arrest, as to whether a noncitizen will remain in custody, and the noncitizen may seek review of that determination by an immigration judge. *See* 8 C.F.R. § 1236.1 (granting DHS officers discretion to "release an alien . . . under the conditions at [INA §] 236(a)(2)" and providing for immigration judge review).

[2] "Release on recognizance" is a form of "conditional parole" within the meaning of § 1226(a). "Parole" is undisputedly a form of "release," and "recognizance" is "conditional"

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Despite the plain language of the statute and implementing regulations, and despite a long history of the agency recognizing the authority of immigration courts to release individuals on their own recognizance under the INA, Defendants have now adopted a policy and practice of denying the authority of Immigration Judges to release persons on conditional parole. This policy results in deficient bond hearings in which Immigration Judges fail to consider the availability of conditional parole in making bond determinations. It appears to be due in large part to a series of single-member BIA decisions, dating from 2004 onward, that depart from prior authority and conclude that the statute and/or regulations prohibit Immigration Judges from ordering release on recognizance. *See, e.g.*, *In re Gregg*, 2004 WL 2374493, at *1 (BIA Aug. 3, 2004) (concluding without analysis that the INA § 236(a) "clearly" limits the Attorney General to ordering release on a minimum $1,500 bond and that 8 C.F.R. § 1236.1(d) precludes Immigration Judge from releasing alien without monetary bond); *In re Suero-Santana*, 2007 WL 1153879, at *1 (BIA Mar. 26, 2007) (same).

The policy is also reflected in the most recent version of the Executive Office of Immigration Review ("EOIR") Immigration Judge Benchbook. EOIR Immigration Judge Benchbook, Bond/Custody at 3 (Aug. 2014), *available at* http://www.justice.gov/eoir/vll/benchbook/tools/Bond_Guide.pdf. That document, which is an authoritative reference guide for Immigration Judges across the country, including in the Seattle

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because it imposes requirements on the noncitizen—generally that she appear in immigration court for her removal proceedings in addition to obeying whatever other conditions of supervisions the agency deems necessary to ensure her appearance. *See, e.g.*, *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115 (9th Cir. 2007) (noting that "[i]t is apparent that the [Immigration and Naturalization Service ("INS")] used the phrase 'release on recognizance' as another name for 'conditional parole' under § 1226(a)").

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and Tacoma Immigration Courts, instructs that "[f]or non-mandatory custody aliens, Immigration Judges can: (1) continue to detain; or (2) release on bond of not less than $1,500.00. INA § 236(a). Note: Immigration Judges do *not* have authority to consider or review DHS parole decisions." *Id*. (emphasis added).[3]

This case is ideally suited for class certification as it challenges the government's uniform policies and practices precluding Immigration Judges from exercising their statutory authority to consider whether Ms. Rivera and others similarly situated should be released on conditional parole under § 1226(a). These policies and practices violate the INA and binding federal regulations. On behalf of herself and others similarly situated, Ms. Rivera seeks class certification to obtain declaratory and injunctive relief requiring EOIR to conform its policies and practices to the applicable statute and regulations, so that she and proposed class members are not unlawfully denied a bond hearing in which immigration judges consider the availability of conditional parole in making bond determinations and order conditional parole where appropriate. Ms. Rivera asks that the Court determine whether Defendants' policies and procedures are unlawful and order Defendants to apply legally proper procedures to her and proposed class members, thereby providing them with individualized bond hearings in which immigration judges consider the availability of conditional parole in making bond determinations.

B. Ms. Rivera Sought Release on Conditional Parole While Applying For Political Asylum After Fleeing Persecution in Honduras.

[3] Notably, the Benchbook does not attempt to reconcile its guidance with the language of the statute and regulations.

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Plaintiff-Petitioner Maria Sandra Rivera is a native of Honduras who fled Honduras seeking to escape the persecution and torture inflicted by her former partner of 25 years. She entered the United States on foot near Laredo, Texas on May 29, 2014, and was taken into U.S. Immigration and Customs Enforcement ("ICE") custody that same day. She was then transferred to the Northwest Detention Center in Tacoma, Washington. Ms. Rivera is eligible for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") due to her membership in the social group of Honduran women who are viewed as property, and forced to remain in a domestic partnership, where the government was unable or unwilling to protect her due to her relationship with the persecutor/torturer. In Honduras, Ms. Rivera was repeatedly raped and beaten by her former partner, suffering severe physical, sexual, and verbal abuse.

On June 17, 2014, Ms. Rivera passed a credible fear interview with an asylum officer and was referred to the Tacoma Immigration Court for removal proceedings in order to present to an Immigration Judge her applications for asylum, withholding of removal, and CAT relief. Ms. Rivera has now been detained in ICE custody for over four months while pursuing her asylum claim. She is not a danger to the community. She has no criminal record in either the United States or Honduras. Nor is she a flight risk. She has letters of support from friends stating that she may stay with them if released and that they will provide transportation to future hearings in immigration court. Moreover, she has legal representation in the immigration proceedings and understands that this is her one opportunity to obtain legal status in this country.

On June 23, 2014, ICE set an initial bond for Ms. Rivera of $7,500. In doing so, ICE presumably determined that she posed neither a flight risk nor danger that required her detention. On August 26, 2014, Ms. Rivera requested a custody redetermination at a hearing before the

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Immigration Judge, where she asked that the judge release her on her own recognizance pursuant to the Attorney General's authority under § 1226(a) to release her on conditional parole. Ms. Rivera explained that she did not have the resources to pay even a minimum bond of $1,500. The Immigration Judge, however, stated that he did not have authority under § 1226(a) to release Ms. Rivera on conditional parole and denied her request. Instead, after determining that she did not present a danger and was a limited flight risk based on her lack of ties to the country, he simply lowered her bond to $3,500.

To date, Ms. Rivera has been unable to post bond. Although Ms. Rivera has friends and extended family members in the United States, none of these individuals have been able to borrow sufficient funds to pay the $3500 bond set by the Immigration Judge.

III. ARGUMENT

Plaintiff seeks certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2).[4] Both the Ninth Circuit and this Court routinely order the certification of class actions based on

[4] In addition, Plaintiff-Petitioner seeks certification of a habeas corpus class of detainees in DHS custody in the Western District of Washington. It is well-established that, in appropriate circumstances, a habeas corpus petition may proceed on a representative or class-wide basis. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 404 (1980) (holding that class representative could appeal denial of nationwide class certification of habeas and declaratory judgment claims); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus"); *Ali v. Ashcroft*, 346 F.3d 873, 886-91 (9th Cir. 2003) (affirming certification of nationwide habeas and declaratory class), *overruled on other grounds by Jama v. ICE*, 543 U.S. 335 (2005); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (holding that "under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions, holding multiple hearings, and writing multiple opinions"); *Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 620 (E.D. Pa. 1996) (certifying habeas class action challenging state's status under Antiterrorism and Effective Death Penalty Act). *See also Yang v. Reno*, 852 F. Supp. 316, 326 (M.D. Pa. 1994) (noting that "class-wide habeas relief may be appropriate in some circumstances."). The authority for such a proceeding is found in Federal Rule of Civil

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claims challenging the adequacy of procedural protections under the immigration laws. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (affirming preliminary injunctive relief for certified class of immigration detainees); *Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014) (certifying class and ordering declaratory relief for immigration detainees); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying district-wide class of delayed naturalization cases); *Santillan v. Ashcroft*, No. C 04–2686 MHP, 2004 WL 2297990 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Ali v. Ashcroft*, 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Walters v. Reno*, No. C94-1204, 1996 WL 897662 (W.D. Wash. Mar. 13, 1996), *aff'd*, 145 F.3d 1032 (9th Cir. 1998), *cert. denied*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud

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Procedure 81(a)(4), which provides that the Federal Rules of Civil Procedure are applicable to proceedings for habeas corpus to the extent that the practice in such proceedings "is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases[,] and has previously conformed to the practice in civil actions." Accordingly, courts have held that even if Rule 23 is technically inapplicable to habeas corpus proceedings, courts should look to Rule 23 and apply an analogous procedure. *See, e.g.*, *Ali*, 346 F.3d at 891 (rejecting argument that Rule 23 requirements could not be used for guidance in determining whether a habeas representative action was appropriate); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-27 (2d Cir. 1974) (finding in habeas action "compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure"); *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 221-22 (7th Cir. 1976); *Bijeol v. Benson*, 513 F.2d 965, 967-68 (7th Cir. 1975); *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 929 n.5 (N.D. Ga. 1982) (noting that "a number of circuit courts have upheld the notion of class certification in habeas cases, whether certification is accomplished under Fed. R. Civ. P. 23, or by analogy to Rule 23."); *accord* William B. Rubenstein, *Newberg on Class Actions* § 25:28 (4th ed. 2014).

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cases); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Gonzales v. U.S. Dep't of Homeland Sec.*, 239 F.R.D. 620, 628 (W.D. Wash. 2006) (certifying Ninth Circuit wide class challenging USCIS policy contradicting binding precedent), *preliminary injunction vacated*, 508 F.3d 1227 (9th Cir. 2007) (establishing new rule and vacating preliminary injunction but no challenge made to class certification); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding district court had jurisdiction to grant injunctive relief in certified class action challenging unlawful immigration directives issued by EOIR); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district court's denial of class certification in case challenging inadequate notice and standards in INS vehicle forfeiture procedure).

That courts routinely certify classes in this area under Rule 23(b)(2) is unsurprising for at least three reasons. First, the rule was intended to "facilitate the bringing of class actions in the civil-rights area," particularly those seeking declaratory or injunctive relief. 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1775 (3d ed. 2014). Second, they often involve claims on behalf of class members who would not have the ability to present their claims absent class treatment. This rationale applies with particular force to civil rights suits like this one, where absent certification of the class, the legal claim will likely have no opportunity to be resolved before an individual case is mooted out. Finally, the core issues in these types of cases generally present pure questions of law and thus are well suited for resolution on a class wide basis. *See e.g.*, *Unthaksinkun v. Porter*, No. C11-0588JLR, 2011 WL 4502050, at *12 (W.D.

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Wash. Sept. 28, 2011) (finding that, because all class members were subject to the same process, the court's ruling as to the legal sufficiency of the process would apply to all).

Ms. Rivera does not ask this Court to adjudicate her individual immigration proceedings, nor for that matter, her individual bond hearing. Ms. Rivera also does not seek money damages. Rather, she asks only that the Court determine whether Defendants' policy and practice is unlawful, and, if so, order Defendants to implement the procedures necessary to protect her and proposed class members.

A. Ms. Rivera Satisfies the Requirements for Class Certification Under Rule 23(a).

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

Rule 23(a)(1) requires that the class be "so numerous that joinder is impracticable." "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). No fixed number of class members is required. *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *see also Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) ("There is no magic number for determining when too many parties make joinder impracticable. Courts have certified classes with as few as thirteen members, and have denied certification of classes with over three hundred members." (citations omitted)). "Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such situation." William B. Rubenstein, *Newberg on Class Actions* § 3:11 (5th ed. 2014). "Thus, Rule 23(a)(1) is an impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due process, judicial economy, and the ability of claimants to institute suits." *Id.* Where it is a close

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question, the Court should certify the class. *Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998) ("where the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1)").

Determining whether plaintiffs meet the test "requires examination of the specific facts of each case and imposes no absolute limitations." *Troy v. Kehe Food Distribs.*, 276 F.R.D. 642, 652 (W.D. Wash. 2011) (citing *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Thus, courts have found impracticability of joinder when relatively few class members are involved. *See Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765-66 (9th Cir. 1971) (finding seventeen class members sufficient); *McCluskey v. Trs. of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class with twenty-seven known members).

Moreover, in certifying classes of noncitizens, courts have taken notice of circumstances in which "INS [now DHS] is uniquely positioned to ascertain class membership." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (requiring Defendants to provide notice to class members). Where defendants have control of the information proving the practicability of joinder and does not make such information available, it would be improper to allow the agency to defeat class certification on numerosity grounds. In this case, Defendants are knowledgeable as to the size of the proposed class as they are uniquely positioned to know the number of persons who are currently and will be subject to detention under § 1226(a) and who are eligible for a bond, whose custody proceedings are subject to the jurisdiction of the Seattle and Tacoma immigration courts.

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While Defendants are uniquely positioned to know the exact number of detained persons in removal proceedings under the jurisdiction of the immigration courts in Seattle and Tacoma, there can be little question that at any given time, several hundred individuals are detained under § 1226(a) who are eligible for a bond, and thus are subject to the policies and practices challenged herein.[5] The attached declarations and supporting exhibits confirm that the class is numerous. *See* Declaration of Michael Tan ¶ 8 (summarizing EOIR data showing that in any given month there are between 500 to 850 persons detained in the NWDC who are not subject to mandatory detention, the vast majority detained under § 1226(a)); *see also* Declaration of David Hausman ¶ 12 (summarizing EOIR data between April 1, 2013 to April 1, 2014, demonstrating that under the most conservative numbers available—the number of persons granted a bond amount by Immigration Judges at the NWDC, and thus where the Immigration Judges have necessarily determined that they have authority under § 1226(a) to review a custody determination and issue a bond amount—the data demonstrates that there were 1,287 unique individuals granted a bond); Declaration of Timothy Warden-Hertz ¶ 6 (stating in his experience as supervising attorney of the legal services office focused on detained immigrants at the NWDC there are forty-five to seventy-two bond hearings each week at the Tacoma Immigration Court). Thus, the information provided demonstrates that the proposed class is numerous. *See Ali*, 213 F.R.D. at 408 (noting that "the Court does not need to know the exact size of the putative class, 'so long as general knowledge and common sense indicate that it is large'" (quoting *Perez-Funez*, 611 F. Supp. at 995)); *Newberg on Class Actions* § 3:13 (noting that "it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members").

[5] With limited exceptions, the immigration court in Tacoma handles detained adult cases, while the immigration court in Seattle is responsible for detained juvenile cases.

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Joinder is also inherently impractical because of the unnamed, unknown future class members who will be subjected to Defendants' unlawful policy and practice of denying the authority of Immigration Judges to release persons on conditional parole. *Ali*, 213 F.R.D. at 408-09 ("'where the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met,' regardless of class size.") (citations omitted). *See also Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable."); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal.1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured."). Future unnamed, unknown class members will be unlawfully detained under Defendants' policies as they are taken into custody. The impracticability of joining future class members is particularly relevant with inherently revolving detainee populations, such as those at the NWDC. *See J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009) ("The mere fact that the population of the [Youth Study Center] is constantly revolving during the pendency of litigation renders any joinder impractical."); *Clarkson v. Coughlin*, 145 F.R.D. 339 (S.D.N.Y. 1993) (certifying classes of male and female deaf and hearing-impaired inmates even though only seven deaf or hearing impaired female inmates were identified, in part because the composition of the prison population is inherently fluid).

In addition to class size and future class members, there are several other factors that demonstrate impracticability of joinder in the present case. Most importantly, joinder is impracticable when proposed class members, by reason of such factors as financial inability, lack

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of representation, fear of challenging the government, and lack of understanding that a cause of action exists, are unable to pursue their claims individually. *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals . . . who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf.") (internal citation omitted); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that poor, elderly plaintiffs dispersed over a wide geographic area could not bring multiple lawsuits without great hardship).

Most of the detained noncitizens appearing in immigration court are unrepresented. *See* Executive Office for Immigration Review, Separate Representation for Custody and Bond Proceedings, 79 Fed. Reg. 55659, 55659-60 (Sept. 17, 2014) (reporting that 79% of detained noncitizens where unrepresented in cases completed from FY 2011 to FY 2013). *See also* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 542 n.8 (2009) (citations omitted). The proposed class members are, by definition, detained, and not currently able to work to support themselves or their family. The vast majority do not have the resources to retain legal counsel, and free legal services are limited. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) ("in . . . deportation proceedings, . . . we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and . . . often do not even understand the tongue in which they are accused."). Equity favors certification where class members lack the financial ability to afford legal assistance. *Lynch v. Rank*, 604 F. Supp. 30, 38 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528

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(9th Cir. 1984) (certifying class of poor and disabled plaintiffs represented by public interest law groups).

In addition, where, as here, injunctive or declaratory relief is sought, the requirements of Rule 23(a) are more flexible. *See Goodnight v. Shalala*, 837 F. Supp. 1564, 1582 (D. Utah 1993). In particular, smaller classes are less objectionable, and the plaintiffs' burden to identify class members is substantially reduced. *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984) (citing *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975)); *Doe v. Charleston Area Med. Ctr*., 529 F.2d 638, 645 (4th Cir. 1975) ("Where 'the only relief sought for the class is injunctive and declaratory in nature . . .' even 'speculative and conclusory representations' as to the size of the class suffice as to the requirement of many." (citation omitted)). Ms. Rivera here challenges Defendants' unlawful policies and practices and is seeking declaratory and injunctive relief. Because Ms. Rivera satisfies the stricter numerosity requirement of Rule 23(a)(1), *a fortiori*, she meets the requirements of the rule when liberally construed. While Defendants are in possession of the precise number of proposed class members, Ms. Rivera has demonstrated that the number of current and potential future class members, and the impracticability of joining the current and future detainees held under this policy, makes class certification appropriate as the class is "so numerous that joinder is impracticable." Fed. R. Civ. P. 23(a).

2. The Class Presents Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, "[a]ll questions of fact and law need not be common." *Ellis*, 657 F.3d at 981 (quoting *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the

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contrary, one shared legal issue can be sufficient. *See, e.g.*, *Walters*, 145 F.3d at 1046 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement asks us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551. In determining that a common question of law exists, the putative class members' claims "must depend upon 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.* Thus, "[w]hat matters to class certification is not the raising of common 'questions' . . . but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal citation and quotation marks omitted).

The commonality standard is even more liberal in a civil rights suit such as this one, in which "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005). "[C]lass suits for injunctive or declaratory relief" like this case "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1763 (3d ed. 2014).

Here, Ms. Rivera and the proposed class members all suffer from the same injury caused by the uniform policy and practice of Defendants denying them bond hearings in which

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immigration judges consider the availability of conditional parole. Ms. Rivera and every putative class member has been or will be denied the opportunity to have a custody determination in immigration court where the Immigration Judge considers whether the person should be released on her own recognizance, as opposed to being forced to pay at least the minimum bond of $1,500. Thus, the question presented is whether the immigration laws are properly interpreted under Defendants' policies and practices as precluding an immigration judge from exercising the statutory authority under § 1226(a) to order conditional parole, and from making custody determinations in light of the availability of conditional parole. Should Ms. Rivera prevail, all who fall within the class will benefit; they will all be entitled to bond hearings where the Immigration Judge is required to consider whether they should be released under conditional parole. Thus, a common answer as to the legality of the challenged policy and practice will "'drive the resolution of the litigation.'" *Ellis*, 657 F.3d at 981 (quoting *Wal-Mart*, 131 S. Ct. at 2551).

Although factual variations in individual cases may exist, these are insufficient to defeat commonality. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."); *Walters*, 145 F.3d at 1046 ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification."). Ms. Rivera is not asking this Court to determine whether she or any putative class member is entitled to release on recognizance, or whether immigration judges should ultimately order their release on recognizance instead of imposing a bond. Rather, she is only

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requesting that this Court review whether the legal policies and practices challenged here conform to the plain language of the statute and implementing regulations.

As such, the questions presented apply equally to all class members regardless of any other factual differences. For this reason, questions of law are particularly well-suited to resolution on a class-wide basis because "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy*, 276 F.R.D. 642, 654. *See also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact). As such, resolution on a class-wide basis also serves a purpose behind the commonality doctrine: practical and efficient case management. *Rodriguez*, 591 F.3d at 1122.

3. The Claims of the Named Plaintiff Is Typical of the Claims of the Members of the Proposed Class.

Rule 23(a)(3) specifies that the claims of the representative must be "typical of the claims . . . of the class." Meeting this requirement usually follows from the presence of common questions of law. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). To establish typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 154. As with commonality, factual differences among class members do not defeat typicality provided there are legal questions common to all class members. *LaDuke*, 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . typicality . . . is

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usually satisfied, irrespective of varying fact patterns which underlie individual claims.") (citation omitted).

The claims of the named Plaintiff, Ms. Rivera, are typical of the claims of the proposed class. Ms. Rivera, just like every proposed class member, is currently in immigration custody pending resolution of her immigration proceedings. Moreover, as she is subject to detention under § 1226(a), the Immigration Judge is indisputably authorized to entertain a request for a review of ICE's initial custody determination. Ms. Rivera, just like every proposed class member, was denied a custody hearing where the Immigration Judge determined whether she should be entitled to release on a bond *or* on conditional parole as the Immigration Judges in Seattle and Tacoma refuse to acknowledge that they can consider her for release on conditional parole rather than requiring a bond. Ms. Rivera represents the proposed class as all have been denied this same opportunity to have an Immigration Judge consider the availability of conditional parole when making a determination on their custody pending the resolution of their immigration proceedings. *See* Declaration of Vanessa Arno ¶ 3 (Immigration Judge at custody determination informed Ms. Rivera's counsel that he does not have jurisdiction to consider a release on conditional parole under § 1226(a)); Declaration of Leila Kang ¶ 3 (same). Thus Ms. Rivera, like all members of the proposed class, seeks declaratory and injunctive relief from this Court clarifying that § 1226(a) requires a bond hearing in which immigration judges consider the availability of conditional parole when making bond determinations.

Because the named Plaintiff and the proposed class are united in their interest and injury and raise common legal claims, the element of typicality is met.

4. <u>The Named Plaintiff Will Adequately Protect the Interests of the Proposed Class, and Counsel Are Qualified to Litigate this Action.</u>

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Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citation omitted).

a. *Named Plaintiff*

Ms. Rivera will fairly and adequately protect the interests of the proposed class because she seeks relief on behalf of the class as a whole and has no interests antagonistic to other members of the class. Their mutual goal is to declare Defendants' challenged policies and practices unlawful and to enjoin further violations. The interest of the class representative is not in any way antagonistic to those of the proposed class members, but in fact coincides with those interests.

Ms. Rivera, like every proposed class member, is detained while in civil removal proceedings before immigration courts in Seattle or Tacoma, and has been unlawfully denied consideration for conditional parole by an Immigration Judge under § 1226(a). Ms. Rivera contends that Defendants' policies and practices interpreting and applying the detention provision to her, as with all proposed class members, violate the statute and implementing regulations. Thus, their respective goals are the same.

b. *Counsel*

The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir.

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1984), *amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979), *aff'd without opinion*, 609 F.2d 505 (4th Cir. 1979).

Plaintiffs are represented by Northwest Immigrant Rights Project, the ACLU Immigrants' Rights Project, and the ACLU of Washington Foundation. Counsel are able and experienced in protecting the interests of noncitizens and, among them, have considerable experience in handling complex and class action litigation, including litigation on behalf of immigration detainees. *See* Declarations of Matt Adams and Sarah Dunne. Counsel are able to demonstrate that they are counsel of record in numerous cases focusing on immigration law that successfully obtained class certification and class relief. In sum, Plaintiffs' counsel will vigorously represent both the named and absent class members.

B. This Action Satisfies the Requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure.

In addition to satisfying the four requirements of Rule 23(a), plaintiffs also must meet one of the requirements of Rule 23(b) for a class action to be certified. Class certification under Rule 23(b)(2) "requires 'that the primary relief sought is declaratory or injunctive.'" *Rodriguez*, 591 F.3d at 1125 (citation omitted). "The rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Id.* This action meets the requirements of Rule 23(b)(2), namely "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." Ms. Rivera challenges—and seeks declaratory and injunctive relief from—systemic policies and

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practices that deny her and all other proposed class members the right to a bond hearing in which Immigration Judges consider the availability of conditional parole when making bond determinations. *Id.* at 1126 (finding that class of non-citizens detained during immigration proceedings met Rule 23(b)(2) criteria because "all class members' seek the exact same relief as a matter of statutory or, in the alternative, constitutional right"). *See also Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (Rule 23(b)(2) "requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole"); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (finding certification under Rule 23(b)(2) appropriate "where the primary relief sought is declaratory or injunctive.").

In this case, Defendants have created and applied policies and practices that deny the same relief to all proposed class members. The class describes a group of persons detained under the jurisdiction of the Immigration Courts in Seattle and Tacoma who have been or will be subjected to Defendants' unlawful policies and practices denying them their statutory and regulatory right to consideration for conditional parole pending resolution of their immigration proceedings, a benefit for which they would otherwise be eligible. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1.

Defendants' actions in refusing to afford proposed class members the opportunity to have Immigration Judges consider their requests that they be released on conditional parole clearly demonstrate that Defendants have acted "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." Hence, the requirements of Rule 23(b)(2) are met.

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IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion and enter the attached order certifying the proposed Class pursuant to Rule 23(b)(2); appoint Ms. Rivera as Class representative; and appoint the Northwest Immigrant Rights Project, the ACLU Immigrants' Rights Project, and the ACLU of Washington Foundation as Class counsel.

DATED this 16th day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. I further certify that copies of the same will be served, via United States Postal Service, Certified Mail, Return Receipt Requested, to the following on October 17, 2014:

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Dated: October 16, 2014, at Seattle, Washington.

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