IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARVIN DUBON MIRANDA, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs-Petitioners*, v. WILLIAM P. BARR, *et al*., *Defendants-Respondents*.	Civil No. 1:20-cv-01110-CCB

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

INTRODUCTION

This case challenges, on a class-wide level, the federal government's bond hearings pursuant to 8 U.S.C. § 1226(a) in the Baltimore Immigration Court as violative of the U.S. Constitution and the Immigration and Nationality Act ("INA"). Respondents' actions have caused and will cause unlawful detention and collateral consequences for the named Plaintiffs-Petitioners Marvin Dubon Miranda, Jose de la Cruz Espinoza, and Ajibade Thompson Adegoke ("Petitioners") and the proposed class. Petitioners, on behalf of themselves and all others similarly situated, respectfully request that this Court certify a class to remedy the systemic denial of their right to a fair bond hearing.

Petitioners seek to represent a proposed class of persons subject to detention under 8 U.S.C. § 1226(a) and who have had or will have immigration bond hearings before the Baltimore Immigration Court. Petitioners challenge (1) the Respondents' imposition of the onus on such persons to prove at their bond hearings that they are not a danger or a flight risk; and (2) the Respondents' refusal to consider each detained individual's ability to pay when making bond determinations or their suitability for release on alternative conditions of supervision, resulting in detention of individuals based solely on their lack of financial resources. *See* Dkt. 1-5 (Declaration of Adam N. Crandell ("Crandell Decl.")) ¶¶ 16–17; Dkt. 1-6 (Declaration of Katherine J. Perino ("Perino Decl.")) ¶ 21; Dkt. 1-7 (Declaration of Michelle N. Mendez ("Mendez Decl.")) ¶ 13; Dkt. 1-8 (Declaration of Judge Denise Noonan Slavin ("Judge Slavin Decl.")) ¶¶ 5, 9–10.

As federal courts across the country have held, Respondents' policies violate the Due Process Clause of the U.S. Constitution. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (affirming class-wide injunction requiring that an immigration judge ("IJ")

consider both an individual's ability to pay in setting the amount of bond and alternative conditions of release); *Brito v. Barr*, 415 F. Supp. 3d 258, 263, 267 (D. Mass. 2019), *appeal docketed*, 20-1119 (1st Cir. Feb. 10, 2020) (granting class-wide relief and holding that the Due Process Clause mandates that the government bear the burden of demonstrating flight risk and dangerousness at bond hearings and "requires an immigration court [to] consider both an [individual]'s ability to pay in setting the bond amount and alternative conditions of release" in 1226(a) bond hearings); *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018) (concluding that "due process requires the government to bear the burden of proving that detention is justified at a bond hearing under § 1226(a)") (internal citation omitted); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018) (explaining that "[r]equiring a non-criminal [individual] to prove that he is not dangerous and not a flight risk at a bond hearing violates the Due Process Clause," and that the Constitution therefore "requires placing the burden of proof on the government in . . . custody redetermination hearings" under 8 U.S.C. § 1226(a)); *Ortiz v. Tompkins*, No. 18-12600-PBS, 2019 WL 7755299, at *1 (D. Mass. Jan. 29, 2019) (reaffirming that "due process requires that the Government bear the burden to prove an [individual]'s dangerousness or flight risk at a § 1226(a) custody redetermination hearing"); *Alvarez Figueroa v. McDonald*, No. 18–10097–PBS, 2018 WL 2209217, at *5 (D. Mass. May 14, 2018) (same).

Class certification is appropriate here because the proposed class easily satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(2). *First*, the class is so numerous that joinder of all members is impracticable. The proposed class includes at least several hundred individuals who have had an unlawful bond hearing under 8 U.S.C. § 1226(a) before the Baltimore Immigration Court within the last year, with 80 hearings occurring in March 2020,

even before factoring in the individuals who will in the future be detained under this statute. *See* Dkt. 1 (Complaint) ¶ 26; Perino Decl. ¶ 9; ECF No. 15-8 (Declaration of Sophie Beiers ("Beiers Decl.")) ¶ 8; Ex. 1 (Supplemental Declaration of Sophie Beiers ("Beiers Suppl. Decl.")) ¶ 4. *Second*, the proposed class is bound by common questions of law that are appropriate for class treatment, including whether a constitutionally and statutorily adequate § 1226(a) bond hearing requires, at a minimum, that the burden of proof be placed on the government to show by clear and convincing evidence dangerousness or flight risk, and that the IJ consider an individual's ability to pay in setting the bond amount and alternative conditions of release. Determining these questions on a class-wide basis will efficiently resolve issues that cut to the core of each class member's claims in one fell stroke. In other words, a class-wide proceeding will "generate common *answers* apt to drive the resolution of the litigation," making certification appropriate. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotation marks omitted). *Third*, Petitioners are also proper class representatives because their claims are typical of the proposed class and because they, along with their counsel, will fairly and adequately protect the interests of the proposed class. *Finally*, the proposed class satisfies Rule 23(b)(2) because Respondents are subjecting the putative class members to a common practice, namely, detention based upon unlawful bond hearings, and an appropriate injunction or declaration will provide relief on a class-wide basis.

PROPOSED CLASS DEFINITION

All people who, now or at any future time, are detained pursuant to 8 U.S.C. § 1226(a), and either had or will have a bond hearing in the Baltimore Immigration Court in Baltimore, Maryland.

ARGUMENT

Petitioners seek certification of the proposed class described above under Federal Rule of Civil Procedure 23. "By its terms, [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Class certification is thus appropriate where the proposed class satisfies the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and at least one of the categories of Rule 23(b). Fed. R. Civ. P. 23(a)–(b). As set forth below, the proposed class meets all the requirements of Rule 23(a).

In addition, the proposed class satisfies Rule 23(b)(2)'s requirement that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).[1] The latter rule "was created to facilitate civil rights class actions," *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.24 (4th Cir. 2006); *see also* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1775 (3d ed. 2019). Here, Petitioners seek only declaratory and injunctive relief and, absent class

[1] Petitioners also seek to proceed as a representative habeas class. Although Rule 23 does not technically apply to habeas corpus proceedings, circuit courts have applied an "analogous" procedure to the Rule 23 factors to permit habeas corpus petitions to proceed on a class-wide basis. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1117, 1121–26 (9th Cir. 2010) (recognizing "that class actions may be brought pursuant to habeas corpus" and examining the habeas class under Rule 23); *Napier v. Gertrude*, 542 F.2d 825, 827 n.2 (10th Cir. 1976) (same); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1126–27 (2d Cir. 1974) (finding habeas class action appropriate because, among other considerations, the Rule 23 requirements were met); *Mays v. Dart*, --F. Supp. 3d.--, 2020 WL 1987007 at *16 (N.D. Ill. Apr. 27, 2020) (affirming that representative actions can be brought in habeas corpus proceedings and finding that "Rule 23 is instructive in analyzing whether plaintiffs can bring a representative action"). Because Petitioners satisfy the Rule 23 requirements as discussed herein, the Court should likewise certify a representative habeas action.

certification, most class members will lack any redress for Respondents' unlawful deprivation of their liberty.

Indeed, for detained noncitizens, class actions may be the only way to vindicate the civil rights of class members who would otherwise not have the ability to present their claims individually for a host of reasons: because they are in detention; they lack counsel and the resources to obtain counsel; their language skills are imperfect; and they have little or no experience with, or understanding of, U.S. immigration and constitutional law. *See Scott v. Clarke*, 61 F. Supp. 3d 569, 591 n.13 (W.D. Va. 2014) ("[C]ourts routinely certify class actions involving prisoners . . . .") (internal quotation marks omitted) (collecting cases); *id.* at 584 (citing "the fluidity of prison populations and [individual] prisoners' lack of access to counsel" as favoring certification) (quotation marks omitted) (alteration in original); *Mondragon v. Scott Farms, Inc.*, No. 5:17-cv-356-FL, 2019 WL 6125928, at *4 (E.D.N.C. Nov. 18, 2019) (certifying a wage-and-hour class in part because the class members "lack[ed] sophistication" and were "non-English speaking migrant workers").

Accordingly, courts regularly grant class certification to noncitizens challenging immigration practices and policies on constitutional and statutory grounds. *E.g.*, *Hernandez v. Lynch*, EDCV 16-00620-JGB, 2016 WL 7116611, at *20 (C.D. Cal. Nov. 10, 2016), *aff'd sub nom*, *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (certifying a class of noncitizens held following deficient bond hearings pursuant to 8 U.S.C. § 1226(a)); *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014), *remanded on other grounds*, 819 F.3d 486 (1st Cir. 2016) (certifying class of immigration detainees because, among other things, joinder would be unreasonable since "many [class members] do not speak English, a majority do not have counsel, and most are unlikely even to know that they are members of the proposed class"); *Brito v. Barr*, 395 F. Supp. 3d 135,

144 n.3 (D. Mass. 2019), *modified by* 415 F. Supp. 3d 258 (D. Mass. 2019) (finding numerosity was satisfied given "the inability of many [noncitizens] to speak English and secure counsel"). The myriad difficulties that detained noncitizens normally face have been compounded by the unprecedented COVID-19 crisis. With the world on lock-down and the exigent threat of the spreading, deadly pandemic, there is not time for Class members to each bring separate actions to vindicate their rights piecemeal.

I. The Proposed Class Meets the Requirements of Rule 23(a)

"[F]ederal courts should give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (internal quotation marks omitted). Rule 23(a) provides that a class may be certified if it meets four requirements: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Petitioners' proposed class easily clears the bar on each of these counts.

A. The Class Is So Numerous as to Render Joinder Impracticable

The proposed class satisfies the requirement that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No specified number is needed to maintain a class action under Fed. R. Civ. P. 23; [rather,] application of the rule is to be considered in light of the particular circumstances of the case . . . ." *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). Indeed, the numerosity requirement

is relaxed where, as here, Petitioners seek only injunctive or declaratory relief. *See Doe v. Heckler*, 576 F. Supp. 463, 467 (D. Md. 1983) ("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 . . . . " (quoting *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975))) (internal quotation and alteration marks omitted). Courts generally find the numerosity requirement satisfied even when relatively few class members are involved. *Cypress*, 375 F.2d at 653 (affirming that class of 18 was sufficiently numerous); *Harbourt v. PPE Casino Resorts Maryland, LLC*, No. CCB-14-3211, 2017 WL 281992, at *4 (D. Md. Jan. 23, 2017) (noting that even a class "consisting of as few as 25 to 30 members raises the presumption that joinder would be impractical") (alteration and quotation marks omitted); *Doe 1 v. Shenandoah Valley Juvenile Ctr. Comm'n*, No. 5:17-CV-00097, 2018 WL 10593355, at *1 (W.D. Va. June 27, 2018) (finding numerosity satisfied based on an "assertion that there [were] approximately "30 unaccompanied immigrant minors under detention"). Finally, "[i]t is not required that the exact size of a class be established" to demonstrate numerosity, *Harris v. Rainey*, 299 F.R.D. 486, 489 (W.D. Va. 2014); rather, "[i]n making this determination, the court is entitled to make common sense assumptions" based on the evidence before it, *Hewlett v. Premier Salons Int'l Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997) (internal quotation marks omitted); 1 William B. Rubenstein, *Newberg on Class Actions* § 3:13 (5th ed. 2019) ("Generally, a plaintiff must show enough evidence of the class's size to enable the court to make commonsense assumptions regarding the number of putative class members.").

Here, the class is numerous enough to warrant class treatment. Based on an analysis of government data from March 2019 through March 2020, hundreds of people eligible for release from the last year—including 80 in the month of March 2020—have had deficient bond hearings

at the Baltimore Immigration Court, Suppl. Beiers Decl. ¶ 4, easily surpassing the numerosity thresholds that have been certified in this Circuit, *see Cypress,* 375 F.2d at 653; *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 360–61 (D. Md. 2004); *see also Jones v. Fid. Res., Inc.*, Civ. No. RDB-17-1447, 2019 WL 4141015, at *8 (D. Md. Aug. 30, 2019) ("Generally, a class with as few as 25 to 30 members raises a presumption that joinder would be impracticable.") (internal quotation marks omitted); *Harbourt*, 2017 WL 281992, at *4 (same). Moreover, because the Baltimore Immigration Court holds bond hearings several times a week, with multiple individuals' bond hearings held in a day, and always with the burden of proof placed on the noncitizen and without any requirement that the IJ consider the noncitizen's ability to pay or release on alternative conditions of supervision, large numbers of new class members are regularly being added to the class. *See* Beiers Decl. ¶ 8; Crandell Decl. ¶¶ 4, 16; Mendez Decl. ¶ 5; Perino Decl. ¶¶ 6, 8–10, 21; Judge Slavin Decl. ¶¶ 5, 10.

The putative class also includes individuals who, after receiving deficient bond hearings in the Baltimore Immigration Court, are detained at three detention centers located in the State of Maryland. Collectively, these centers have the capacity to hold approximately 350 individuals detained by ICE at any given time. *See* Perino Decl. ¶ 3. Common sense dictates that a sizeable number of these individuals are or will be detained under § 1226(a) and are therefore likely to be class members, further supporting a finding of numerosity. Moreover, numerous other individuals, after receiving a deficient bond hearing in Baltimore Immigration Court, are subsequently transferred out of the state.[2]

[2] *See* Ex. 2, TRAC Immigration, *Transfers of ICE Detainees from Howard County Detention Center*, accessed May 22, 2020, available at https://trac.syr.edu/immigration/detention/201509/HOWARMD/tran/; Ex. 3, TRAC Immigration, *Transfers of ICE Detainees from Worcester County Detention Center*, accessed May 22, 2020,

Joinder is made especially impracticable based on the composition of the class. The class is inherently transient because class members are detained pending their removal cases and are either released from custody or deported from the country upon conclusion of those cases. *See Scott*, 61 F. Supp. 3d at 584 (citing "the fluidity" of imprisoned populations as a "factor[] weigh[ing] in favor of finding that numerosity is met"); *Brito*, 395 F. Supp. 3d at 144 n.3 (certifying a class of individuals detained under § 1226(a) and relying, in part, on "[t]he transient nature of the class" as a factor supporting numerosity). The class also includes many noncitizens who are unrepresented, are non-English speaking, and lack the financial resources to bring individual claims. Dkt. 1-16 (Declaration of Jose de la Cruz Espinoza ("de la Cruz Espinoza Decl.)) ¶ 16; Dkt. 1-13 (Declaration of Ajibade Thompson Adegoke ("Thompson Decl.)) ¶ 14–16. Courts have consistently found impracticability in similar circumstances. *See, e.g.*, *Scott*, 61 F. Supp. 3d at 584 (noting that the imprisoned persons' "lack of access to counsel" supported a finding of numerosity); *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (listing "financial resources of class members" and their "ability . . . to institute individual suits" as factors in determining impracticability and holding that, partly because the class members were "economically disadvantaged," the district court *abused its discretion* in failing to recognize that the numerosity requirement had been met) (emphasis added).[3]

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available at https://trac.syr.edu/immigration/detention/201509/WORCEMD/tran/; Ex. 4, TRAC Immigration, *Transfers of ICE Detainees from Frederick County Detention Center*, accessed May 22, 2020, available at https://trac.syr.edu/immigration/detention/201509/FREDEMD/tran/.

[3] *See also Brito*, 395 F. Supp. 3d at 144 n.3 ("The transient nature of the class and the inability of many [noncitizens] to speak English and secure counsel render joinder impracticable.") *Coleman ex rel. v. District of Columbia*, 306 F.R.D. 68, 80–82 (D.D.C. 2015) (discussing the class members' "vulnerabilities," including economic disadvantage, as reasons for finding the numerosity requirement met, and noting that "Rule 23, in permitting the aggregation of claims, embodies a principle of protection for weaker plaintiffs" (internal quotation marks omitted)); *Reid*, 297 F.R.D. at 189 (finding impracticability of joinder when, *inter alia*, "many [class members] do not speak

In addition to the identified class members currently detained pursuant to 8 U.S.C. § 1226(a), the class includes numerous future class members who, while not currently identifiable, will unquestionably exist and be subjected to the Respondents' challenged bond policies and practices. The inclusion of these future class members further supports a finding of numerosity, as joinder of "unknown future . . . individuals is certainly impracticable." *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) (citation omitted); *Cypress*, 375 F.2d at 653 n.9 (affirming numerosity met with 18 class members, partly based on the possibility of future class members); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 367–68 (S.D.N.Y. 2019) (finding joinder impracticable for certain immigrants applying for legal status, in part because "[n]ew members regularly and continuously join the proposed class as their SIJ status petitions are adjudicated").

B. There Are Questions Common to the Class

To satisfy Rule 23(a)(2), Petitioners "must present a common contention capable of being proven or disproven in one stroke." *Brown v. Nucor Corp.*, 785 F.3d 895, 909 (4th Cir. 2015) (internal quotation marks omitted). This requires that class claims implicate a common question that would "generate common *answers* apt to drive the resolution of the litigation." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014) (quoting *Dukes*, 564 U.S. at 350).

The question of whether Respondents have failed to provide immigration bond proceedings consistent with due process and the statute is common to the entire class and will generate a similarly common answer. As such, challenges involving the adequacy of bond hearing procedures

English, a majority do not have counsel, and most are unlikely even to know that they are members of the proposed class"); *Mondragon*, 2019 WL 6125928, at *4 (finding joinder "all but impossible" where, *inter alia*, the class members "lack[ed] sophistication" and were "non-English speaking migrant workers").

are routinely certified as class actions. *See*, *e.g.*, *Brito*, 395 F. Supp. 3d at 147–49; *Rivera v. Holder*, 307 F.R.D. 539, 550 (W.D. Wash. 2015); *Reid*, 297 F.R.D. at 189; *Hernandez*, 2016 WL 7116611, at *16–17, 20.

Here, the questions common to all members of the proposed class include, *inter alia*, the following:

1. Does the Due Process Clause require that individuals detained pursuant to § 1226(a) receive a bond hearing at which both (1) the burden of proof is placed on the government to prove dangerousness and flight risk by clear and convincing evidence; and (2) the IJ is required to consider the noncitizen's ability to pay in setting the bond amount and to consider the noncitizen's suitability of release on alternative conditions of supervision?

2. Does the Immigration and Nationality Act require that IJs consider a § 1226(a) noncitizen's ability to pay in setting a bond amount and that IJs consider the noncitizen's suitability for release on alternative conditions of release?

These questions should be answered on a class-wide basis. All class members "have suffered the same injury," *Dukes*, 564 U.S. at 350 (internal quotation marks omitted), as they have either been, or will be, subjected to detention following an unlawful § 1226(a) bond hearing. A class-wide determination that the government's practices are unconstitutional and/or violative of the INA will "resolve an issue that is central to the validity" of each class member's detention, and drive a resolution to this litigation. *Id*. Should Petitioners prevail with respect to any of their claims, all class members will benefit; all will be entitled to declaratory relief and benefit from injunctive relief.

Any variations among proposed class members are secondary to the primary and common legal questions detailed above and have no bearing on Petitioners' fulfillment of the commonality requirement. *See, e.g.*, *Brown*, 785 F.3d at 910–12, 922 (instructing district court to certify class where 100 class members who worked in a single plant were subjected to hostile plant-wide policies and practices, albeit in different departments, in part because "all of the workers' evidence

concerns a single connected facility"); *Diaz v. Hott*, 297 F. Supp. 3d 618, 626–27 (E.D. Va. 2018) (finding commonality and typicality despite variations in the types of bond hearings available to the immigrant detainees of the class because "the core legal question raised by the petition is the same across all class members"); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 152–53 (D.S.C. 2018) (finding commonality where diverse plaintiffs complained of "universal application" of company policy and where the "answer" to the question at hand would "resolve large swathes [of] the class members'" claims in "one fell swoop."); *Harbourt*, 2017 WL 281992, at *5 (finding commonality among proposed class of allegedly unpaid work trainees—"regardless of the amount" of training time—"because all proposed class members suffered the same alleged injury of non-compensated work"). Petitioners are subject to the same burden under the same statute, 8 U.S.C. § 1226(a), such that a resolution of the due process and statutory issues raised in this case would "drive the resolution of" the litigation. *Dukes*, 564 U.S. at 350 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

C. Petitioners' Claims Are Typical of the Class

While commonality looks to the relationship among class members generally, typicality under Rule 23(a)(3) "goes to the heart of a representative['s] ability to represent a class." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). In practice, however, the analysis of typicality and commonality "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). To satisfy Rule 23(a)(3), "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 156 (internal quotation marks omitted).

Here, the interests of the class representatives and the proposed class members are well aligned.[4] The named Petitioners are typical of the proposed class because they proceed under the same legal theories, seek the same relief, and have suffered the same injury as the proposed class members: detention following an unlawful bond hearing. *See* de la Cruz Espinoza Decl. ¶¶ 12–14; Dkt. 1-10 (Declaration of Marvin Amilcar Dubon Miranda ("Dubon Miranda Decl.")) ¶¶ 12–17; Thompson Decl. ¶¶ 14–17. Accordingly, the named Petitioners also advance the same claims for relief and rely on the same legal theories as the proposed class members. Namely, they contend that a lawful § 1226(a) bond hearing requires, at a minimum, that (1) the burden of proof by clear and convincing evidence be placed on the government and (2) the IJ consider a non-citizen's ability to pay in setting the bond amount and consider the non-citizen's suitability for release on alternative conditions of supervision. This satisfies the typicality requirement. *See Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 498–99 (D. Md. 1998) (explaining that "[t]he test for determining typicality is whether the claim or defense arises from the same course of conduct leading to the class claims, and whether the same legal theory underlies the claims or defenses" and finding typicality satisfied when "the claims all arise from the same conduct of Defendant and are based on the same legal theory") (citing *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 637 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993))); *Harbourt*, 2017 WL 281992, at *5 ("The typicality requirement determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." (quotation marks omitted)).[5]

[4] There is no requirement, however, that the interests be "perfectly identical or perfectly aligned." *Deiter*, 436 F.3d at 467.

[5] *See also Klugmann v. Am. Capital Ltd.*, No. PJM 09-5, 2009 WL 2499521, at *5 (D. Md. Aug. 13, 2009) (noting that "[t]he typicality requirement is satisfied when the representative plaintiff

There is, moreover, no risk that issues involving the named Petitioners' individual claims will impede their litigation on behalf of the class. Petitioners' claims in this Court do not hinge on the merits of their bond applications in the Immigration Court: the habeas petition merely seeks, for all class members, the right to due process in the conduct of the Immigration Court proceedings, as guaranteed by the Fifth Amendment and the INA. Because the named Petitioners are challenging the same practices and seeking the same relief without regard to the outcome of their own efforts to obtain release on bond, the named Petitioners' own individual claims will simultaneously "advance the interests of the absent class members." *Deiter*, 436 F.3d at 466–67.

D. Petitioners and Their Counsel Are Adequate Representatives

Finally, the named Petitioners and their counsel will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement is satisfied if: "(1) the named plaintiffs' interests are not opposed to those of other class members, and (2) the plaintiffs' attorneys are qualified, experienced and able to conduct the litigation." *Cuthie v. Fleet Reserve Ass'n*, 743 F. Supp. 2d 486, 499 (D. Md. 2010) (citation omitted).

The interests of the named Petitioners will not conflict with the interests of any of the class members, because—as explained, *supra*, Section I.C.—those interests are perfectly aligned. For a conflict of interest between the named plaintiff and class members to defeat the adequacy requirement, that conflict "must be more than merely speculative or hypothetical," *Harbourt*, 2017 WL 218992, at *5 (quoting *Gunnells*, 348 F.3d at 430–31); it must be "fundamental," *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (citation omitted). "A conflict is not fundamental when . . . all class members share common objectives and the same factual and legal

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suffers the same injuries as the class and when the claims are based on the same legal theory" and finding typicality when the plaintiffs "and the rest of the class purchased ACL securities and suffered damages as a result of Defendants' alleged misrepresentations and omissions").

positions [and] have the same interest in establishing the liability of [defendants]." *Ward*, 595 F.3d at 180 (alterations in original) (internal quotation marks omitted).

The named Petitioners have alleged the same injuries arising from the same unlawful bond hearings, and they share the same mutual goal to seek the same injunctive and declaratory relief, which will apply equally to the benefit of all class members. They have no interest antagonistic to those of other class members and will fairly and adequately protect the interests of the class members they seek to represent. They seek no monetary damages. Thus, they seek a remedy for the same injuries, and the interests of the representatives and the class members are aligned.

Petitioners' counsel also "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same field of law. *See, e.g.*, *Lloyd v. Gen. Motors Corp.*, 266 F.R.D. 98, 104 (D. Md. 2010) (finding class counsel satisfied adequacy requirement where "[c]lass counsel [were] highly experienced and ha[d] the intellectual and financial resources necessary to prosecute a sophisticated class action"); *see also Hewlett*, 185 F.R.D. at 218 ("In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class."); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979). Proposed Class Counsel is qualified, experienced and able to vigorously conduct the proposed litigation. The named Petitioners are represented by the American Civil Liberties Union Foundation of Maryland, the American Civil Liberties Union Foundation Immigrants' Rights Project, the Capital Area Immigrants' Rights ("CAIR") Coalition, and Sanford Heisler Sharp, LLP. Collectively, counsel have a demonstrated commitment to protecting the rights and interests of noncitizens and significant experience in the areas of immigration law, immigration detention and bond processes, constitutional law, class action litigation, and habeas

corpus actions. Declaration of Saba Bireda in Support of Petitioners' Motion for Class Certification ¶¶ 3, 5, 10, 16, 20–27. Moreover, Class Counsel have already devoted significant resources to this matter and have sufficient resources to litigate this matter to completion. For the same reasons, Class Counsel also satisfy the requirements of Rule 23(g).[6] *See* Fed. R. Civ. P. 23(g) (providing that, in appointing class counsel, the court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions . . . and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class"); *see also Bell v. Brockett*, 922 F.3d 502, 512 (4th Cir. 2019) ("In applying Rule 23(g), courts must consider the four mandatory factors and may consider other permissive factors in assessing the adequacy of class counsel."). For the foregoing reasons, Petitioners satisfy the Rule 23(a) factors.[7]

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[6] *See* Rubenstein, *supra,* § 3:72 (noting that Congress in 2003 "adopted Rule 23(g) that creates an explicit textual mooring for the class counsel analysis[,] but most courts continue to employ the substantive standards generated under Rule 23(a)(4) prior to Rule 23(g)'s adoption in their analysis of counsel's adequacy"); Fed. R. Civ. P. 23(g) Comm. (explaining that Rule 23(g) was meant to "build[] on" previous judicial experience in evaluating adequacy under Rule 23(a)(4)).

[7] The Fourth Circuit has never explicitly addressed whether an additional ascertainability requirement would apply to Rule 23(b)(2) class actions seeking injunctive relief. Consistent with the majority of circuits to have addressed the issue, and for the reasons articulated by the Third Circuit Court of Appeals in *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015), Petitioners submit that ascertainability is not a prerequisite to this Rule 23(b)(2) action. Regardless, the class easily satisfies this element, both for current and future class members. *Adair*, 764 F.3d at 358 (noting that a court must be able to "readily identify the class members in reference to objective criteria"). Each member of the class can be identified, either currently or—when necessary—in the future, by the fact that they are, or will be, detained following a bond hearing in the Baltimore Immigration Court pursuant to 8 U.S.C. § 1226(a). Indeed, the government regularly collects such "objective" data, thereby providing "a reliable and administratively feasible method of ascertaining the individuals encompassed" by the proposed class. *Chatman v. GC Servs., LP*, 57 F. Supp. 3d 560, 570 n.17 (D.S.C. 2014); *Barahona Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) ("[Immigration officials are] uniquely positioned to ascertain class membership."); *see also* Beiers Decl. ¶¶ 2–7. And because each class member was, or will be, subjected to a deficient § 1226(a) bond hearing, it will be unnecessary to conduct "extensive and individualized fact-finding or mini-trials" to determine whether a particular person is a member of the proposed class. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (internal quotation marks omitted).

II. The Proposed Class Meets the Requirements of Rule 23(b)(2)

In addition to meeting the four requirements of Rule 23(a), a "class action must fall within one of the three categories enumerated in Rule 23(b)." *Adair*, 764 F.3d at 357 (quoting *Gunnells*, 348 F.3d at 423). Here, Petitioners seek certification under Rule 23(b)(2), which "authorizes class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(2)). The underlying premise of subsection (b)(2) is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (internal quotation omitted). In other words, Rule 23(b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Id*.

The "prime examples" of Rule 23(b)(2) cases are civil rights cases like this one, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997), where the class members challenge "a pattern or practice that is generally applicable to the class as a whole," *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (citation omitted); *see also Thorn*, 445 F.3d at 330 n.24 ("Indeed, Rule 23(b)(2) was created to facilitate civil rights class actions.") (citation omitted).[8] The rule applies, moreover, when "a single injunction or declaratory judgment would provide relief to each member of the class," *Adair*, 764 F.3d at 357 (quoting *Dukes*, 564 U.S. at 360), as opposed to, for example,

[8] This Court has previously granted class certification under analogous circumstances. *See, e.g.*, *George v. Baltimore City Pub. Sch.*, 117 F.R.D. 368, 372 (D. Md. 1987) (certifying Rule 23(b)(2) class of schoolteachers alleging violations of their First and Fourteenth Amendment rights); *see also Duvall v. O'Malley*, No. ELH-94-2541, 2016 WL 3523682, at *1 (D. Md. June 28, 2016) (approving settlement for Rule 23(b)(2) "class of persons . . . who are now or who will in the future be confined to the Baltimore City Detention Center" challenging conditions of their confinement).

cases in which each class member would need an individual injunction or declaration, or in which each class member would be entitled to an individualized award of money damages.

The claims asserted here satisfy these requirements. The government has engaged in unconstitutional and statutorily unlawful behavior towards the entire class. Every member of the class has either received, or will receive, a bond hearing. *See, e.g*, de la Cruz Espinoza Decl. ¶ 12; Dubon Miranda Decl. ¶¶ 12–13; Thompson Decl. ¶¶ 14. But the Baltimore Immigration Court has violated the Constitution and the INA by shifting the burden of proof in *every* § 1226(a) bond hearing and failing to consider the individual's ability to pay in selecting the amount of any bond and suitability for release on alternative conditions of supervision. *See* Crandell Decl. ¶¶ 2, 16; Perino Decl. ¶¶ 21; Judge Slavin Decl. ¶¶ 7, 10, 14–15. Petitioners seek no monetary damages for the substantial harms that Respondents' actions cause Petitioners and their families. Moreover, because every member of the class is entitled to a constitutionally and statutorily adequate bond hearing, an appropriate injunction or declaration will provide relief on a class-wide basis to all proposed class members in identical fashion. *See, e.g.*, *Brito*, 395 F. Supp. 3d at 149 (certifying pre-hearing and post-hearing classes of noncitizens, finding that "[b]oth classes satisfy Rule 23(b)(2) because the Court can issue a single remedy that addresses the legal rights of all members of each class"); *see also Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) (noting that the "paradigmatic Rule 23(b)(2) case" is one in which the injunctive relief sought is "indivisible, benefitting all [ ] members of the (b)(2) Class at once") (internal quotation marks omitted) (alterations in original); *Adair*, 764 F.3d at 357 ("As the Supreme Court has instructed, '[t]he key to the (b)(2) class is the indivisible nature of the . . . remedy warranted.'" (quoting *Dukes*, 564 U.S.

at 360)) (alterations in original).[9]

III. Class Certification Is Permissible Even If the Named Petitioners' Individual Claims Are Moot

Finally, this Court may still certify the class even if any of the named Petitioners is released or otherwise obtains relief prior to this Court's granting of class certification. On May 7, 2020, Petitioner Thompson's application for asylum was granted and the Department of Homeland Security ("DHS") waived its right to appeal. *See* Dkt. 18 (Joint Notice). And on May 18, 2020, Mr. Dubon Miranda's application for withholding of removal was granted. *See* Dkt. 20 (Joint Notice). Even though Mr. Thompson's and Mr. Dubon Miranda's unlawful detentions have ended,[10] certification of the proposed class is nonetheless permissible due to the inherently transitory nature of Petitioners' claims.

The Supreme Court has repeatedly held that a court may certify a class action, even if the claims of a named plaintiff are technically moot, when "it is certain that other persons similarly situated will continue to be subject to the challenged conduct and the claims raised are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013) (internal quotation marks and citation omitted); *see also Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019) (applying "inherently transitory" exception to the immigration detention context and finding that the Court would not be deprived of jurisdiction

[9] Indeed, "in social reform litigation like this, it may be in the *defendant's* interest to have a class certified." *Hewlett*, 185 F.R.D. at 219 (finding certification under Rule 23(b)(2) appropriate, partly based on defendant's interest in avoiding duplicative litigation about whether its policy was unlawful); *accord Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("Absent a class action decision, individual [noncitizens] across the country could file complaints . . . in federal court, each of them raising precisely the same [constitutional] challenge[.]").

[10] Petitioners note that DHS has thirty days from the issuance of IJ Kessler's May 18, 2020 order to appeal to the BIA; the grant of relief to Mr. Dubon Miranda is therefore not yet final.

even if "a class was not certified until after the named plaintiffs' claims had become moot . . . when, as in these cases, the harms alleged are transitory enough to elude review") (internal quotation marks omitted); *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (recognizing that where a claim is "so inherently transitory," an otherwise moot individual claim will not moot the class action because "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution"); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding that claims of the named plaintiffs were not moot, even though named plaintiffs were no longer pretrial detainees, because "[p]retrial detention is by its nature temporary," and "[i]t is by no means certain that any given individual, named as plaintiff would be in custody long enough for a district judge to certify the class").

The nature of bond processes, abrupt transfers and removals of individuals who are detained, and changing circumstances of when an individual is able to post a bond demonstrate the transitory nature of Petitioners' claims.[11] In such circumstances, a class action may be the only mechanism to provide for meaningful review. *See Nielsen*, 139 S. Ct. at 963; *Gerstein*, 420 U.S. at 110 n.11 (observing that claim related to pretrial detention "is one that is distinctly 'capable of repetition, yet evading review'"); *Diaz*, 297 F. Supp. 3d at 627 n.14 (noting that "class certification is . . . necessary to allow the Fourth Circuit to decide the important legal questions presented in this petitioner, because experience demonstrates that individual claims are often rendered moot during the appellate process"); *Shifflett v. Kozlowski*, No. 92–0072–H, 1993 WL 21465, at *4–5 (W.D. Va. Jan. 25, 1993) (permitting class action to proceed where named plaintiffs' claims were

[11] Indeed, Mr. de la Cruz Espinoza, whose next immigration hearing was scheduled for June 8, 2020 at the time of the filing of this action, had his individual merits hearing advanced to May 21, 2020.

mooted 2, 8, and 16 days after filing complaint and where "the issue presented in this case would evade review if this court declines to certify a class").

Accordingly, despite Mr. Thompson's and Mr. Dubon Miranda's release subsequent to the filing of the class action complaint, this Court should find that Mr. Thompson, Mr. Dubon Miranda, and Mr. de la Cruz Espinoza may proceed as named Petitioners on behalf of the proposed class—regardless of whether their individual claims have become, or will become, moot—because their standing relates back to the filing of the complaint on April 30, 2020. *See Brown v. Lexington Cty., S.C.*, No. 3:17-cv-1426-MBS, 2018 WL 3359019, at *4–5 (D.S.C. July 10, 2018) (noting, in keeping with Supreme Court precedent, that "a class plaintiff's standing will relate back to the filing of the complaint if the claims asserted are so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's interest expires") (internal quotation marks and citation omitted); *Palacios v. Sessions*, No. 3:18-CV-0026-RJC-DSC, 2018 WL 6333706, at *3 (W.D.N.C. June 26, 2018) ("Where claims are inherently transitory, a class action will remain live even if the named plaintiff's claims may be moot, provided that the claims of proposed class members are not. Certification of the class action complaint can 'relate back' to the time it was filed.") (citations omitted).

CONCLUSION

Petitioners respectfully ask the Court to certify this action as a class action pursuant to Rule 23 and to appoint the undersigned counsel as Class Counsel.

Respectfully Submitted,

Dated: May 22, 2020

/s/

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+ Application for admission to the U.S. District Court for the District of Maryland pending

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