

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOLANY PADILLA, *et al.*,
Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, *et al.*,

Defendants-Respondents.

Case No. 2:18-cv-00928-MJP

**AMENDED MOTION FOR CLASS
CERTIFICATION**

NOTE ON MOTION CALENDAR:
September 28, 2018

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

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2 Plaintiffs are asylum seekers who challenge Defendants’ failure to provide them, and the
3 classes they seek to represent, with timely credible fear interviews as well as timely bond
4 hearings that comport with due process. After arriving in the United States and asking U.S.
5 Customs and Border Protection (CBP) officials for asylum, Plaintiffs were immediately
6 incarcerated. Defendants then prolonged that incarceration by delaying the credible fear
7 interview required to commence the asylum application process. And once they eventually
8 provided that interview and Plaintiffs demonstrated that their fear was, in fact, credible,
9 Defendants further prolonged their incarceration by delaying their access to the bond hearings in
10 which an immigration judge determines whether release pending adjudication of their asylum
11 claim is warranted. When Defendants finally provided those bond hearings, they did not comport
12 with due process because they were not recorded or transcribed, the burden of proof was
13 erroneously placed on Plaintiffs, and the immigration judge did not make particularized findings
14 but instead simply checked a box on a template order to indicate whether, and on what
15 conditions, the immigration judge would permit release. Defendants’ practice of failing to
16 promptly provide detained asylum seekers with credible fear interviews and with fundamentally
17 fair bond hearings violates the Due Process Clause of the U.S Constitution, the Administrative
18 Procedures Act (APA), and the Immigration and Nationality Act (INA).

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21 The questions presented in this case—whether the Department of Homeland Security
22 (DHS) Defendants are obligated to provide Plaintiffs with timely credible fear interviews and
23 whether the Executive Office for Immigration Review (EOIR) Defendants are obligated to
24 provide Plaintiffs with timely bond hearings that afford them fundamental procedural
25 safeguards—can and should be resolved on a class-wide basis. The proposed classes, moreover,
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1 satisfy the requirements set forth in Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil
2 Procedure.

3 Plaintiffs accordingly request that the Court certify the following class and appoint them
4 class representatives:

5 **Credible Fear Interview (“CFI”) Class:** All detained asylum seekers in
6 the United States subject to expedited removal proceedings under
7 8 U.S.C. § 1225(b) who are not provided a credible fear determination
8 within 10 days of requesting asylum or expressing a fear of persecution to
9 a DHS official, absent a request by the asylum seeker for a delayed credible
10 fear interview.

11 Plaintiffs Orantes and Vasquez further request that the Court certify the following
12 class and appoint them class representatives:

13 **Bond Hearing (“BH”) Class:** All detained asylum seekers who entered the
14 United States without inspection, were initially subject to expedited
15 removal proceedings under 8 U.S.C. § 1225(b), were determined to have a
16 credible fear of persecution, but are not provided a bond hearing with a
17 verbatim transcript or recording of the hearing within 7 days of requesting
18 a bond hearing.

19 Plaintiffs seek declaratory and injunctive relief on behalf of these classes, requiring that
20 the respective Defendants provide them with timely credible fear interviews and timely bond
21 hearings that comport with due process.

22 **II. BACKGROUND**

23 **A. Plaintiffs’ Legal Claims**

24 Adjudicating a motion for class certification does not call for “an in-depth examination of
25 the underlying merits,” but a court may nevertheless analyze the merits to the extent necessary to
26 determine the propriety of certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8
(9th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011).

Plaintiffs thus provide a brief summary of their claims here. *See also* ECF No. 26 ¶¶146-171.

1 “It is undisputed that all [noncitizens] possess” a statutory “right” to apply for asylum.
2 *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990) (citing 8 U.S.C. § 1158(a)
3 (1988); *Jean v. Nelson*, 727 F.2d 957, 982 (11th Cir. 1984) (en banc), *aff’d as modified*, 472 U.S.
4 846 (1985); and *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038-39 (5th Cir. 1982)); *see also*
5 8 U.S.C. §§ 1158(a)(1), 1225(b)(1)(A)(ii). Implementing that statutory right, the governing
6 regulations also guarantee noncitizens the right to apply for asylum. *See* 8 C.F.R. §§ 235.3(b)(4),
7 208.30(f), 1003.42(f).

9 Noncitizens who are deemed “arriving [noncitizens],” as well as those who “arrive in,
10 attempt to enter, or have entered the United States without . . . inspection,” may be subject to
11 expedited removal proceedings. *See* 8 C.F.R. § 1235.3(b)(1)(i)-(ii) (outlining applicability of
12 expedited removal proceedings); 8 C.F.R. § 1001.1(q) (defining “arriving [noncitizens]”). In
13 expedited removal proceedings, individuals may be removed by an immigration official “without
14 further hearing or review *unless* the [noncitizen] indicates an intention to apply for asylum . . . or
15 a fear of persecution.” 8 U.S.C. § 1225(b)(i) (emphasis added).

17 In order to pursue their asylum claims before an immigration judge, however, governing
18 regulations require that asylum seekers first demonstrate to DHS Defendants that their fear is
19 credible. *See* 8 C.F.R. § 208.30(f), (g). DHS Defendants are, for their part, required to provide
20 these asylum seekers with the opportunity to make that showing. *See* 8 U.S.C.
21 § 1225(b)(1)(A)(ii) (decreeing that an immigration officer who encounters such a noncitizen who
22 expresses an intention to apply for asylum or a fear of return “shall refer the [noncitizen] for an
23 interview by an asylum officer”).

1 Until DHS makes the credible fear determination, however, an asylum seeker in
2 expedited removal proceedings is subject to mandatory detention. 8 U.S.C.
3 1225(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(4)(ii). Once the detained asylum seekers pass a
4 credible fear interview and are placed in removal proceedings under 8 U.S.C. § 1229a, those
5 asylum seekers who are not deemed “arriving”—that is, those who entered without inspection—
6 become entitled to an individualized bond hearing before an immigration judge to assess their
7 eligibility for release from incarceration while they await the government’s lengthy process of
8 adjudicating their asylum claims. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 208.30(f), 236.1(d); *see*
9 *also Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

11 Immigration detention is a grueling, isolating experience. Thus, one way to deter people
12 from seeking asylum, thereby interfering with their right to seek such protection, is to prolong
13 their incarceration by delaying the credible fear interview to which they are legally entitled once
14 they request asylum or express a fear of persecution to a DHS official. DHS Defendants’ practice
15 of scheduling a CFI weeks, if not *months*, after an asylum seeker expresses their fear or intention
16 to apply for asylum, *see* ECF No. 26 ¶¶86-109, is accordingly unreasonable and infringes upon
17 that individual’s right to seek asylum. *Cf.* 8 C.F.R. § 208.31(b)(1) (ordering, in the reasonable
18 fear context, that barring “exceptional circumstances, this [reasonable fear] determination will be
19 conducted within 10 days” of the referral of the individual to the asylum officer). It is also a
20 violation of their procedural and substantive due process rights. *See* ECF No. 26 ¶¶148-150.

23 For the same reasons, EOIR Defendants may not delay bond hearings for asylum seekers
24 who have passed credible fear interviews and are eligible for a custody redetermination hearing.
25 *See* ECF No. 26 ¶¶110-125. Plaintiffs and proposed class ¶¶ members have a right to have a bond
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1 hearing conducted. It is axiomatic that the fundamental right to be free from physical restraint
2 applies to noncitizens as well as citizens. *See, e.g., Wong Wing v. U.S.*, 163 U.S. 228, 238
3 (1896); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 & n.9 (1952) (immigrants stand on “equal
4 footing with citizens” under the Constitution in several respects, including the protection of
5 personal liberty). Every individual in immigration detention has a constitutional, statutory, and
6 regulatory liberty interest in freedom from physical restraint. *See Zadvydas v. Davis*, 533 U.S.
7 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other
8 forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause
9 protects.”) (citation omitted). EOIR Defendants’ failure to conduct prompt bond hearings is
10 unreasonable, violates the procedural and substantive due process rights of Plaintiffs Orantes and
11 Vasquez and proposed class members, and infringes on their right to pursue asylum.
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14 These practices, which willfully prolong the incarceration of asylum seekers, also
15 constitute actions unlawfully withheld or unreasonably delayed in violation of the Administrative
16 Procedures Act (APA). *See* 5 U.S.C. § 706(1). *See also Vietnam Veterans of Am. v. CIA*, 811
17 F.3d 1068, 1075 (9th Cir. 2016) (APA compels agency action where there is “‘a specific,
18 unequivocal command’ placed on the agency to take a ‘discrete agency action,’ and the agency
19 has failed to take that action”) (quoting *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S.
20 55, 63-64 (2004)). In this case, Defendants are obligated to conduct prompt credible fear
21 determinations and bond hearings but have failed to comply with their obligations in a
22 reasonable time. *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1226(a). Defendants’ practices also violate
23 the APA as they are not “not in accordance with the law” and are “contrary to” the procedural
24 safeguards afforded by the Fifth Amendment Due Process Clause. *See* 5 U.S.C. § 706(2)(A), (B).
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1 Defendants in this case have failed to comply with their statutory and constitutional obligations
2 both to conduct prompt credible fear determinations and bond hearings and to utilize appropriate
3 procedural safeguards in bond proceedings.

4 Finally, EOIR Defendants' failure to provide bond hearings that include certain basic
5 procedural safeguards—recorded hearings or written transcripts, a particularized determination
6 as to the factors relevant to the immigration judge's determination, and the placement of the
7 burden of proof on the government as opposed to the noncitizen—is also a violation of the
8 procedural and substantive due process rights of Plaintiffs Orantes and Vasquez as well as the
9 putative BH class members. *See, e.g., Pensamiento v. McDonald*, No. 18-10475-PBS, 2018 U.S.
10 Dist. LEXIS 84818, *17 (D. Mass May 21, 2018) (holding, in the context of 8 U.S.C. § 1226(a)
11 bond proceedings, that “where a non-criminal [noncitizen’s] liberty may be taken away, due
12 process requires that the government prove that detention is necessary”); *cf. Singh v. Holder*, 638
13 F.3d 1196, 1208-09 (9th Cir. 2011) (holding that due process requires EOIR to provide
14 contemporaneous recordings of bond hearings challenging prolonged detention, and that a
15 written decision issued after the bond decision is appeal is not an adequate substitute), & at 1203
16 (holding that, in the context of bond proceedings challenging prolonged detention, the burden of
17 proof falls on the government). The dearth of safeguards inhibits noncitizens' ability to
18 meaningfully appeal an adverse bond decision. *Cf.* 8 C.F.R. § 1003.19(f) (providing that
19 immigration judges' custody determinations may be administrative appealed pursuant to 8 C.F.R.
20 § 1003.38).

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24 **B. Named Plaintiffs' Factual Backgrounds.**

25 Plaintiff Yolany Padilla fled her native Honduras with her six-year-old son to seek
26 protection in the United States. They were apprehended by CBP soon after entering the United

1 States without inspection on or about May 18, 2018. Although Ms. Padilla informed a CBP
2 official shortly after her apprehension that she and her son were seeking asylum, DHS
3 Defendants did not conduct her credible fear interview until July 2, 2018, more than one month
4 after she made her fear known. DHS Defendants issued a positive credible fear finding in her
5 case the following day. *See* ECF No. 26 ¶¶39-40, 92-95; ECF No. 12, Ex. A at 10 & 12.
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7 Plaintiff Ibis Guzman fled her native Honduras with her five-year-old son to seek
8 protection in the United States. They were apprehended by CBP soon after entering the United
9 States without inspection on or about May 16, 2018. Although Ms. Guzman informed a CBP
10 official shortly after her apprehension that they were seeking asylum, DHS Defendants did not
11 conduct her credible fear interview until June 27, 2018, more than one month after she made her
12 fear known. DHS Defendants issued a positive credible fear finding on June 28, 2018. *See* ECF
13 No. 26 ¶¶41-42, 96-99; ECF No. 12, Ex. C at 30 & 32.
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15 Plaintiff Blanca Orantes fled her native El Salvador with her eight-year-old son to seek
16 protection in the United States. They were apprehended by CBP soon after entering the United
17 States without inspection on or about May 21, 2018. Although Ms. Orantes informed a CBP
18 official shortly after her apprehension that they were seeking asylum, DHS Defendants did not
19 conduct her credible interview until June 27, 2018, more than one month after she made her fear
20 known. DHS issued a positive credible fear finding on June 28, 2018. EOIR Defendants did not
21 provide a bond hearing until July 16, 2018, at which point she was denied bond. *See* ECF No. 26
22 ¶¶43-44, 100-103, 121; ECF No. 12, Ex. B at 21 & 22.
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24 Plaintiff Baltazar Vasquez fled his native El Salvador to seek protection in the United
25 States. He was apprehended by CBP soon after entering the United States without inspection on
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1 or about June 1, 2018. Although he informed a CBP official shortly after apprehension that he
2 was seeking asylum, DHS Defendants did not conduct his credible fear interview until July 31,
3 2018, nearly two months after he made his fear known. DHS Defendant subsequently issued a
4 positive credible fear finding. EOIR Defendants did not provide him with a bond hearing until
5 August 20, 2018, almost three months after his expression of fear to DHS. *See* ECF No. 26 ¶¶46-
6 46, 104-108, 125.

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8 During their bond hearings, all Plaintiffs had the burden to demonstrate their eligibility
9 for release on bond. None of them were afforded a verbatim transcript or audio recording of the
10 proceedings. Moreover, none were issued decisions demonstrating specific, particularized
11 findings describing the basis for their custody determinations. *See* ECF No. 26 ¶¶115 (Plaintiff
12 Padilla's bond hearing), 116-119 (Plaintiff Guzman's bond hearing), 120-122 (Plaintiff Orantes's
13 bond hearing), 124-125 (Plaintiff Vasquez's bond hearing); ECF No. 12 at 12 (Plaintiff Padilla's
14 bond grant order), 22 (Plaintiff Orantes's bond denial order), 32 (Plaintiff Guzman's bond denial
15 order).

17 III. THE COURT SHOULD CERTIFY THE CLASSES.

18 Plaintiffs seek certification of the aforementioned classes under Federal Rule of Civil
19 Procedure 23, pursuant to which class certification is warranted where two conditions are met:

20 The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity,
21 commonality, typicality, and adequacy of representation), and it also must fit into
22 one of the three categories described in subdivision (b). By its terms this creates a
23 categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue
his claim as a class action.

24 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (internal
25 citation omitted). Plaintiffs' proposed classes satisfy Federal Rule of Civil Procedure 23(a) and
26 (b)(2).

1 Courts in the Ninth Circuit routinely grant class certification to noncitizens challenging
2 immigration policies and practices. *See, e.g., Rosario v. U.S. Citizenship and Immigration*
3 *Services*, No. C15-0813JLR, 2017 WL 3034447, at *12 (W.D. Wash. July 18, 2017) (granting
4 nationwide certification to class of initial asylum applicants challenging the government's
5 adjudication of employment authorization applications); *Wagafe, v. Trump*, 2:17-cv-0094-RAJ,
6 2017 WL 2671254, at *16 (W.D. Wash. June 21, 2017) (certifying two nationwide classes of
7 immigrants challenging legality of a program applied to certain immigration benefits
8 applications); *Mendez Rojas v. Johnson*, 2:16-cv-1024-RSM, 2017 WL 1397749 (W.D. Wash.
9 Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum
10 application procedures); *A.B.T. v. U.S. Citizenship and Immigration Services*, 2013 WL 5913323
11 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving a settlement amending
12 practices by EOIR and U.S. Citizenship and Immigration Services that precluded asylum
13 applicants from receiving employment authorization); *Santillan v. Ashcroft*, No. C 04-2686,
14 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful
15 permanent residents challenging delays in receiving documentation of their status); *Ali v.*
16 *Ashcroft*, 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003),
17 *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis
18 challenging legality of removal to Somalia in the absence of a functioning government); *Walters*
19 *v. Reno*, No. C94-1204C, 1996 WL 897662, at *5-8 (W.D. Wash. 1996), *aff'd*, 145 F.3d 1032,
20 1045-47 (9th Cir. 1998), *cert. denied*, *Reno v. Walters*, 526 U.S. 1003 (1999) (certifying
21 nationwide class of individuals challenging adequacy of notice in document fraud cases). *See*
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1 *also Roshandel v. Chertoff*, 554 F. Supp. 2d 1194 (W.D. Wash. 2008) (certifying districtwide
2 class of delayed naturalization cases).

3 Certification of such classes raising civil rights challenges to the immigration system
4 under Rule 23(b)(2) is unsurprising. The rule was intended to “facilitate the bringing of class
5 actions in the civil-rights area,” 7AA WRIGHT & MILLER, FEDERAL PRACTICE &
6 PROCEDURE § 1775 (3d ed. 2018), especially those—like the present case—seeking
7 declaratory or injunctive relief. What is more, class actions in the immigration arena often
8 involve claims on behalf of class members who would not have the ability to present their claims
9 absent class treatment. This rationale applies with particular force to civil rights suits like this
10 one, where, absent class certification, there likely will be no opportunity to resolve the legal
11 claims at issue. Putative class members are recent immigrants to this country who have fled
12 danger, many of whom do not understand English and have little to no understanding of U.S.
13 immigration or constitutional law. All of them are detained, and a large percentage of them are
14 indigent and unrepresented, thus lacking the legal counsel necessary to even contemplate, much
15 less raise, the type of claims brought here. *See, e.g.*, TRAC Immigration, *Who is represented in*
16 *immigration court?*, Oct. 16, 2017, <http://trac.syr.edu/immigration/reports/485/#f3> (showing that
17 only about 30% of detained noncitizens have legal representation). Finally, the core issues here,
18 like the class actions cited above, involve questions of law, rather than questions of fact, and are
19 thereby well suited for resolution on a class-wide basis. *See, e.g.*, *Mendez Rojas*, 2017 WL
20 1397749 at *5 (finding class certification proper where “the resolution of the legal issues raised
21 by Plaintiffs will generate one result for each member of the putative classes and subclasses”).

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25 In reviewing whether to certify a nationwide class, courts consider whether (1) there are
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1 similar cases currently pending in other jurisdictions, and (2) the plaintiffs are challenging a
2 nationwide policy or practice. *See, e.g., Arnott v. U.S. Citizenship & Immigration Servs.*, 290
3 F.R.D. 579, 589 (C.D. Cal. 2012); *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011). To the
4 best of counsel’s knowledge, there are no other similar cases currently pending in other
5 jurisdictions. And as noted above, nationwide classes challenging immigration policies and
6 practices are regularly certified given that immigration policy is based on uniform, federal law.
7 Nationwide certification is especially warranted in this case to effectuate Congress’s intent to
8 “create a ‘uniform procedure’ for consideration of asylum claims.” *Orantes-Hernandez*, 919 F.2d
9 at 552 (citation omitted).
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11 Moreover, this issue can only be addressed on a nationwide level. It would be
12 unworkable to limit the scope of certification to anything other than a nationwide class given that
13 asylum seekers can be detained in facilities across the country following their entry into the
14 United States. *See, e.g., ECF No. 13, O’Brien Decl.*, ¶¶3, 6 (testifying as to transfer of detainees
15 from Texas to federal detention facility in Washington); James Doubek, *ICE to Send 1,600*
16 *Detainees to Federal Prisons*, NPR (June 8, 2018),
17 <https://www.npr.org/2018/06/08/618182740/ice-to-send-1-600-detainees-to-federal-prisons>
18 (describing Defendants’ plans to detain an additional 1,600 noncitizens who recently entered the
19 country in federal prisons in California, Oregon, Arizona, Texas, and Washington). Thus, any
20 challenge to Defendants’ practices and policies concerning detained asylum seekers must apply
21 to the entire nation in order to avoid Defendants’ dissimilar treatment of similarly situated
22 individuals by virtue of their location—an arbitrary and unjust result. *See Gorbach v. Reno*, 181
23 F.R.D. 642, 644 (W.D. Wash. 1998), *aff’d on other grounds*, 219 F.3d 1087 (9th Cir. 2000) (en
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1 banc) (finding certification of a nationwide class particularly fitting because “anything less that
2 [sic] a nationwide class would result in an anomalous situation allowing the [immigration
3 officials] to pursue denaturalization proceedings against some citizens, but not others, depending
4 on which district they reside in”).

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6 **A. The Proposed Class Members Are So Numerous that Joinder Is Impracticable.**

7 The first Rule 23(a) criterion is that “the class is so numerous that joinder of all members
8 is impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticable” does not mean “impossible.”
9 Instead, impracticable relates to the difficulty or inconvenience of individually joining all class
10 members as parties. *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-14 (9th Cir.
11 1964) (“[I]mpracticability’ does not mean ‘impossibility,’ but only the difficulty or
12 inconvenience of joining all members of the class.”) (citation omitted).

13 Nor does Rule 23(a)(1) require a fixed number of class members—relatively few class
14 members can suffice. *See, e.g., Arkansas Educ. Ass’n v. Bd. Of Educ.*, 446 F.2d 763, 765-66 (8th
15 Cir. 1971) (17 class members held sufficient); *McCluskey v. Trs. Of Red Dot Corp. Employee*
16 *Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class
17 with 27 known members); *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (class
18 membership of 48); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir.
19 1977) (41-46 class members); *Perez-Funez v. District Director, Immigration & Naturalization*
20 *Service*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) (no specific number of class members is
21 required to satisfy numerosity).
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24 The proposed CFI Class meets the numerosity requirement. Plaintiffs believe that at least
25 several hundred asylum seekers currently fit within it. *See* ECF No. 26 ¶129. At a minimum,
26 Plaintiffs are aware of 206 asylum seekers who were newly incarcerated in Washington State

1 alone in June 2018, all of whom were required to wait for weeks and sometimes months for
2 credible fear determinations. *See* ECF No. 13, O’Brien Decl., ¶6. Practitioners in Texas and
3 Maryland similarly report that asylum seekers are forced to wait more than ten days for their
4 credible fear interviews. *See* Patel Decl. ¶3 (routine delays of three to four weeks in cases of
5 asylum seekers detained in Maryland);¹ Russell Decl. ¶¶3-6 (routine delays of at least three
6 weeks, and in one case of more than two months, for asylum seekers detained in Texas); Stein
7 Decl. ¶¶3-4 (delays in cases of asylum seekers detained at the South Texas Family Detention
8 Center in Dilley, Texas in July 2018). Defendants know the exact number of asylum seekers they
9 are detaining without providing a credible fear determination within 10 days, which is certainly
10 far larger than the 17, 27, 41, 46, and 48 members that were sufficiently numerous for class
11 certification in the cases cited above. *Accord Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237
12 (9th Cir. 1999) (“[Immigration officials are] uniquely positioned to ascertain class
13 membership.”). Furthermore, joinder of all members of the proposed CFI class is impracticable
14 because Defendants have incarcerated them in prisons across the country. *See, e.g., James*
15 *Doubek, ICE to Send 1,600 Detainees to Federal Prisons, supra*; Stein Decl. (asylum seekers
16 detained in Texas); Russell Decl. (same); Patel Decl. (asylum seekers detained in Maryland).

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19 Similarly, the proposed BH Class meets the numerosity requirement. Although
20 Defendants have the best information regarding the exact number of individuals in the proposed
21 class, Plaintiffs believe that a sufficient number of asylum seekers, including Plaintiffs Orantes
22 and Vasquez, fit within the BH Class described above to warrant certification. Practitioners in
23 Idaho, Maryland, Texas, and Washington all report representing individuals who do not receive a
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¹ All declarations cited without a docket number refer to declarations submitted concurrently herewith.

1 bond hearing within seven days of requesting one. *See* Garcia Decl. ¶4 (regular delays for bond
2 hearings in Pearsall, Texas, sometimes up to a month; regular delays also in Port Isabel, Texas);
3 Patel Decl. ¶4 (routine delays, at times of up to 45 days, for bond hearings in Baltimore,
4 Maryland); Rojas Decl. ¶3 (regular delays in bond hearings in Arlington, Virginia, sometimes up
5 to 37 days); Russell Decl. ¶5 (regular delays for bond hearings in Pearsall, Texas, sometimes up
6 to six weeks); Stein Decl. ¶4 (delays in the vast majority of 30 bond proceedings); Warden-Hertz
7 Decl. ¶4 (delays in bond hearings for several clients in the last six months in Washington State).²

9 Moreover, three additional reasons establish that both proposed classes in this case satisfy
10 the numerosity requirement. *First*, caselaw confirms that since Plaintiffs seek injunctive and
11 declaratory relief, the “requirement is relaxed and plaintiffs may rely on . . . reasonable
12 inference[s] arising from plaintiffs’ other evidence that the number of unknown and future
13 members of [the] proposed subclass . . . is sufficient to make joinder impracticable.” *Arnott*, 290
14 F.R.D. at 586 (quoting *Sueoka v. United States*, 101 Fed. App’x 649, 653 (9th Cir. 2004)).
15 *Second*, the proposed class includes individuals who will be subjected to Defendants’ delays in
16 the future; when the class includes “unnamed and unknown future members,” joinder is
17 impractical and thus “the numerosity requirement is ... met, regardless of class size.” *Ali*, 213
18 F.R.D. at 408 (internal quotation marks and citation omitted). And *third*, even if numerosity were
19 a close question here (which it is not), caselaw shows this Court still should certify the class at
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23 ² EOIR Defendants’ performance standards provide that immigration judges are permitted to make 10% of
24 bond determinations more than 14 days after they are requested. Executive Office for Immigration Review, Case
25 Priorities and Immigration Court Performance Measures at App. A ¶4 (Jan. 17, 2018),
26 <https://www.justice.gov/eoir/page/file/1026721/download>. Combined with the fact that, according to Defendant
USCIS’ data, more than 55,000 individuals have already received positive credible fear determinations in FY2018,
see U.S. Citizenship and Immigration Services, Credible Fear Workload Report Summary (last visited Sep. 6, 2018),
[https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/FY18CFandRF
stats_2018_06_30.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/FY18CFandRFstats_2018_06_30.pdf), many of whom will subsequently seek release on bond, Defendants’ own standards suggest
that the Proposed BH Class is sufficiently numerous.

1 this initial stage. *See Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D.
2 Pa. 1998) (“[W]here the numerosity question is a close one, the trial court should find that
3 numerosity exists, since the court has the option to decertify the class later pursuant to
4 Rule 23(c)(1).”).

5 Thus, each of the proposed classes satisfies the numerosity criterion of Rule 23(a)(1).

6 **B. The Proposed Classes Present Common Questions of Law and Fact.**

7 The second Rule 23(a) criterion is that “there are questions of law or fact common to the
8 class.” Fed. R. Civ. P. 23(a)(2). One issue of law or fact common among class members,
9 standing alone, is enough to satisfy this criterion. *See, e.g., Perez-Olano v. Gonzalez*, 248 F.R.D.
10 248, 257 (C.D. Cal. 2008) (“Courts have found that a single common issue of law or fact is
11 sufficient.”) (citation omitted); *Sweet v. Pfizer*, 232 F.R.D. 360, 367 (C.D. Cal. 2005) (“there
12 must only be one single issue common to the proposed class”) (quotation and citation omitted).
13

14 That different class members may have different circumstances or other individual issues
15 does not defeat that commonality. *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370
16 (C.D. Cal. 1982) (granting certification in challenge to common government practices in asylum
17 cases, even though the outcome of individual asylum cases would depend on individual class
18 members’ varying entitlement to relief); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015,
19 1029 (9th Cir. 2012) (even when “the circumstances of each particular class member vary but
20 retain a common core of factual or legal issues with the rest of the class, commonality exists”)
21 (internal quotation marks omitted); *Walters*, 145 F.3d at 1046 (“Differences among the class
22 members with respect to the merits of their actual document fraud cases, however, are simply
23 insufficient to defeat the propriety of class certification. What makes the plaintiffs’ claims
24 suitable for a class action is the common allegation that the INS’s procedures provide insufficient
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1 notice.”); *Arnott*, 290 F.R.D. at 586-87 (factual variations not defeat certification where core
2 legal issues were similar).

3 Commonality accordingly exists if class members “have suffered the same injury,” and
4 that injury is “of such a nature that it is capable of class-wide resolution – which means that
5 determination of its truth or falsity will resolve an issue that is central to the validity of each one
6 of the claims in one stroke.” *Dukes*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157). For
7 example: when a common answer on the legality of a defendant’s action will “drive the
8 resolution of the litigation.” *Ellis*, 657 F.3d at 981 (quoting *Dukes*, 564 U.S. at 350).

10 Both of the proposed classes satisfy the commonality requirement. By definition, the CFI
11 Class is expressly limited to detained asylum seekers in the United States subject to expedited
12 removal proceedings under 8 U.S.C. § 1225(b) who all have suffered the same injury: DHS
13 Defendants failed to provide them with a credible fear interview and determination within
14 10 days of requesting asylum or expressing a fear of persecution to a DHS official (absent a
15 request by the asylum seeker to delay the credible fear interview).³ Similarly, the proposed BH
16 Class is limited to asylum seekers who EOIR Defendants subject to the same injury: failing to
17 provide a timely bond hearing within seven days of request, where the burden of proof is on the
18 government, and where EOIR Defendants provided a verbatim transcript or recording as well as
19 particularized findings underlying the custody determination. By definition, all BH Class
20 Members did not receive bond hearings within seven days. Defendants’ own policies, as well as
21 the experiences of practitioners in Immigration Courts around the country, demonstrate that
22 Defendants apply a uniform policy of failing to provide the relevant procedural protections to
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26 ³ Asylum seekers may request additional time for myriad reasons, such as to obtain supporting evidence or procure counsel.

1 proposed class members in bond hearings. *See, e.g.*, Imm. Court Practice Manual §§ 9.3(e)(iii)
2 (“Bond hearings are generally not recorded.”), 9.3(e)(vii) (providing that oral immigration judge
3 custody determinations are not transcribed and that immigration judges only provide written
4 decisions after an administrative appeal is filed); *Matter of Adeniji*, 22 I&N Dec. 1102, 1113
5 (BIA 1999) (placing the burden of proof in bond proceedings under 8 U.S.C. § 1226(a) on the
6 noncitizen); *see also* Garcia Decl. ¶5 (describing lack of particularized findings for practitioner
7 in Texas); Patel Decl. ¶5 (same, for practitioner in Maryland and Virginia); Rojas Decl. ¶4
8 (same); Russell Decl. ¶6 (same, for practitioner in Texas); Warden-Hertz Decl. ¶3, 5 (same, at
9 the Tacoma, Washington, Immigration Court); Stein Decl. ¶4 (describing lack of transcripts,
10 recordings, and particularized findings in bond proceedings at immigration courts including
11 those in Tacoma, Washington and Salt Lake City, Utah).

12
13 Those injuries are capable of class-wide resolution through declaratory relief declaring
14 Defendants’ actions and failure to act unlawful under the Fifth Amendment, the APA, and the
15 INA, and injunctive relief requiring their unlawful conduct to cease.

16
17 **C. Plaintiffs’ Claims Are Typical of the Claims of Members of the Proposed Classes.**

18 The third Rule 23(a) criterion is that “the claims or defenses of the representative parties
19 are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Typical” simply
20 means that “a class representative must be part of the class and ‘possess the same interest and
21 suffer the same injury’ as the class members.” *Falcon*, 457 U.S. at 156 (citation omitted).

22
23 Factual differences among class members therefore do not defeat typicality in a case (like
24 this one) that involves a defendant’s uniform policy or practice, the named plaintiffs have
25 injuries similar to those of the class members, and plaintiffs’ “injuries result from the same,
26 injurious course of conduct.” *See Armstrong v. Davis*, 275 F.3d 849, 869 (2001); *see also, e.g.*,

1 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (the rule’s “permissive” typicality standard
2 simply requires the plaintiff representative’s claims to be “reasonably co-extensive with those of
3 absent class members; they need not be substantially identical”); *LaDuke v. Nelson*, 762 F.2d
4 1318, 1332 (9th Cir. 1985) (“The minor differences in the manner in which the representative’s
5 Fourth Amendment rights were violated does not render their claims atypical of those of the
6 class.”); *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (“When
7 it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff
8 and the class sought to be represented, the typicality requirement is usually satisfied, irrespective
9 of varying fact patterns which underlie individual claims.”) (citation omitted); *cf. Marisol A. v.*
10 *Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (certifying Rule 23(b)(2) class despite differences in
11 the exact nature of the harm suffered by class members).

12
13
14 In this case, Plaintiffs’ claims with respect to DHS Defendants’ failure to provide timely
15 credible fear interviews are not just *typical* of other Credible Fear Interview Class members—
16 they are the same. By definition, Plaintiffs and putative CFI Class members suffered the same
17 injury in fact: the denial of a credible fear determination within 10 days of requesting asylum or
18 expressing a fear of persecution to a DHS official. Similarly, Plaintiffs Orantes and Vasquez and
19 members of the proposed BH class by definition suffered the same injury as a result of their
20 claims related to EOIR Defendants’ failure to provide them with timely bond hearings that
21 afforded them basic procedural protections. *See also supra* at 16-17 (discussing EOIR
22 Defendants’ uniform policy of failing to provide verbatim transcripts, recordings, or
23 particularized determinations and placement of the burden of proof on noncitizens in bond
24 proceedings).

1 Thus, Plaintiffs' claims with respect to the legality of Defendants' conduct are the same
2 as fellow class members' claims: it is unlawful under the Fifth Amendment, the APA, and the
3 INA.

4 **D. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Classes,
5 and Counsel Are Qualified to Litigate this Action.**

6 The fourth Rule 23(a) criterion is that "the representative parties will fairly and
7 adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Satisfying this adequacy
8 criterion "depends on the qualifications of counsel for the representatives, an absence of
9 antagonism, a sharing of interests between representatives and absentees, and the unlikelihood
10 that the suit is collusive." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2009) (internal
11 quotation marks and citation omitted).

12
13 With respect to counsel, they are considered qualified under Rule 23(a)(4) when they
14 have experience in previous class actions and cases involving the same field of law. *See Lynch v.*
15 *Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24
16 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979). Plaintiffs here are
17 represented by attorneys from the Northwest Immigrant Rights Project and the American
18 Immigration Council who have extensive experience litigating class action lawsuits and other
19 complex cases in federal court, including civil rights lawsuits on behalf of noncitizens. *See* ECF
20 No. 14, Adams Decl.; Realmuto Decl.

21
22 With respect to the Plaintiffs, their interests in this case are shared with the other putative
23 members of their respective classes. As to the CFI Class, all Plaintiffs will fairly and adequately
24 protect the interests of their fellow class members because Plaintiffs seek the same justice for all
25 similarly situated asylum seekers that they seek for themselves: declaratory and injunctive relief
26

1 that stops Defendants from illegally prolonging an asylum seeker’s incarceration by delaying
2 their credible fear interview determination more than 10 days after they requested asylum or
3 expressed a fear of persecution to a DHS official. Similarly, Plaintiffs Orantes and Vasquez have
4 interests in common with and seek relief on behalf of the proposed BH Class as a whole and
5 have no interests antagonistic to those of other class members. They share a mutual goal of
6 having this Court declare unlawful EOIR Defendants’ practice of delaying bond hearings more
7 than seven days after they are requested and conducting those hearings without the procedural
8 protections described above. Plaintiffs do not seek money damages for themselves. They seek
9 declaratory and injunctive relief for their respective Classes as a whole.
10

11 Even though a defendant can “moot out” a class plaintiff’s claim after the lawsuit is filed,
12 the Supreme Court has made it clear that such a mooted-out plaintiff may still serve as class
13 representative when their claim in the lawsuit is capable of repetition yet evading review.
14 *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44,
15 51-52 (1991).
16

17 **E. Plaintiffs Satisfy the Requirements of Rule 23(b).**

18 Rule 23(b)(2), under which Plaintiffs seek certification, requires that “the party opposing
19 the class has acted or refused to act on grounds that apply generally to the class, so that final
20 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a
21 whole.” Fed. R. Civ. P. 23(b)(2).
22

23 That is the situation of the CFI Class. Class membership is expressly defined by the DHS
24 Defendants’ conduct applicable to all class members—i.e., Defendants’ failure to provide asylum
25 seekers a credible fear determination within 10 days of requesting asylum or expressing a fear of
26 persecution to a DHS official. Regardless of what this Court ultimately rules Defendants’ legal

1 duty is with respect to credible fear determinations, the same law applies to all class members—
2 so the same final injunctive relief and corresponding declaratory relief is appropriate respecting
3 the class as a whole. Similarly, the BH Class is defined by the conduct of the EOIR Defendants
4 applicable to all class members—i.e., that EOIR Defendants do not provide proposed class
5 members with bond hearings that comport with due process within seven days of request.
6

7 Defendants might contend that Plaintiffs’ claims for declaratory and injunctive relief
8 should be rejected. But any such contention does not defeat class certification under
9 Rule 23(b)(2), for that rule “does not require [the court] to examine the viability or bases of class
10 members’ claims for declaratory and injunctive relief, but only to look at whether class members
11 seek uniform relief from a practice applicable to all of them.” *Rodriguez*, 591 F.3d at 1125
12 (citation omitted). This suit seeks uniform declaratory and injunctive relief against practices of
13 DHS Defendants and EOIR Defendants that are applicable to all CFI Class members and BH
14 Class members, respectively—namely, prolonging each member’s incarceration by delaying that
15 member’s credible fear interview determinations more than 10 days after requesting asylum or
16 expressing a fear of persecution to a DHS official and further prolonging each member’s
17 incarceration by denying access to a prompt bond hearing that comports with due process.
18

19 A single injunction with a corresponding declaratory judgment addressing the DHS
20 Defendants’ and EOIR Defendants’ above practices would uniformly protect and vindicate the
21 legal rights of all members of the proposed classes—including Plaintiffs. *See, e.g., Walters*, 145
22 F.3d at 1047 (certifying Rule 23(b)(2) class based on defendants’ practice of providing deficient
23 notice of deportation procedures); *Parsons*, 754 F.3d at 689 (finding declaratory and injunctive
24 relief proper as to the whole class where “every [member] in the proposed class is allegedly
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1 suffering the same (or at least a similar) injury and that injury can be alleviated for every class
2 member by uniform changes in . . . policy and practice”).

3 In short, the each of the classes meets the requirements of Rule 23(b)(2).⁴

4 **IV. CONCLUSION**

5 For the reasons detailed in this motion, the Credible Fear Interview Class and Bond
6 Hearing Class proposed in the Second Amended Complaint are entitled to class certification
7 under Rule 23. Plaintiffs accordingly request that this Court grant this motion and issue the
8 accompanying proposed order.
9

10 RESPECTFULLY SUBMITTED this 6th day of September, 2018.

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⁴ Plaintiffs alleged in their complaint that the CFI and BH Classes also satisfy Rule 23 (b)(1) and (b)(3). See ECF No. 26 ¶¶ 134, 136, 143, 145. However, they seek certification only under Rule 23(b)(2) at this time.

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2018, I filed the foregoing motion for class certification as well as the accompanying supporting declarations with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 6th day of September, 2018.

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