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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION – RIVERSIDE

FAOUR ABDALLAH FRAIHAT, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No.: 19-cv-01546-JGB(SHKx)

Plaintiffs' Reply in Support of Motion for Class Certification

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I. INTRODUCTION

Named Plaintiffs[1] moved for provisional certification of two subclasses of detained persons who face immediate risk if exposed to COVID-19 based on the inadequacy of Defendants' system-wide policies. In opposing provisional certification, Defendants describe centralized, system-wide procedures they allege to have implemented to address COVID-19 in all Detention Facilities, nationwide. *See, e.g.*, Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Defts' Opp."), ECF 94 at 8-10[2] ("ICE has taken a nationwide approach" to its COVID-19 guidance and planning). Whatever the merits of these procedures – addressed in the parties' briefing on Plaintiffs' Motion for a Preliminary Injunction – the fact that Defendants purport to be addressing COVID-19 on a system-wide basis demonstrates that class certification is appropriate.

Indeed, the question of whether Defendants' system-wide approach is sufficient, in light of the immediate risks facing all persons who have identified Risk Factors[3], is a common question that can be answered without any need to inquire into the individual circumstances of any putative class members.

Contrary to Defendants' mischaracterizations, Plaintiffs do not seek any individualized relief through their motion for emergency preliminary injunction. Rather, Plaintiffs seek a process for identifying and assessing needs for COVID-19 precautions for persons with Risk Factors as well as a process to ensure

[1] Faour Fraihat, Alex Hernandez, Martin Munoz, Aristoteles Sanchez Martinez, and Jimmy Sudney.

[2] All page number citations to ECF documents are to the number printed in the ECF stamp at the top of the page.

[3] Risk Factors include: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; or HIV/AIDS. Declaration of Carlos Franco-Paredes, ECF 81-12 at 4-5 (defining "Risk Factors").

implementation of those precautions. *See* Plaintiffs' Memorandum in Support of Emergency Motion for Preliminary Injunction ("PI Motion"), ECF 81-1 at 10. Defendants can implement these processes through their control and oversight of their Detention System without the need to delve into the circumstance of any individual class members. Such process-based remedies have repeatedly been found appropriate in multi-facility and systemic cases. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 870-72 (9th Cir. 2001), *overruled on other grounds by Johnson v. California*, 543 U.S. 499, 504–05 (2005); *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019), *cert. denied sub nom. Faust v. B. K.*, No. 19-765, 2020 WL 1325853 (U.S. Mar. 23, 2020).

Based on the common questions raised by Defendants' admittedly systemic policies and the urgency of the class-wide issues presented by this pandemic, Plaintiffs respectfully request immediate provisional certification of the proposed subclasses.

II. ARGUMENT

A. Plaintiffs satisfy the Rule 23(a) Requirements.

1. The subclasses are sufficiently numerous.

As Defendants themselves concede, the putative subclasses "could consist of several thousand detainees," easily satisfying the 40-person threshold for numerosity. *See* Defendants' Opposition to Plaintiffs' Motion for Emergency Preliminary Injunction, ECF 95 at 11; *see also Arroyo v. United States Dep't of Homeland Sec.*, No. SACV 19-815 JGB (SHKX), 2019 WL 2912848, at *9 (C.D. Cal. June 20, 2019) (subclass of at least 40 satisfied numerosity). Plaintiffs also demonstrated numerosity with evidence indicating that the subclasses number in the thousands, evidence which Defendants did not address. Plaintiffs' Memorandum in Support of Motion for Class Certification, ECF 83-1 at 12-13.

Further, in actions for prospective injunctive relief, it is not necessary to

know the exact size of the class in order to determine if it is sufficiently numerous, so long as it satisfies the threshold requirement. In cases where "only injunctive or declaratory relief is sought . . . the numerosity requirement is relaxed so that even speculative or conclusory allegations regarding numerosity are sufficient to permit class certification." *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004) (quotation omitted). Numerosity is satisfied when "general knowledge and common sense indicate that [the class] is large." *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408, at *7 (C.D. Cal. Feb. 26, 2018) (*quoting Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008)).

Impracticability of joinder of the thousands of individuals in Defendants' custody who are at risk from COVID-19 also militates strongly in favor of certification of a class. Requiring all such individuals to file claims regarding the precautionary measures at issue would undoubtedly clog the Court system. Moreover, it is unlikely that all people in detention with Risk Factors will be able to secure their own counsel, particularly in light of restricted attorney visits and the nationwide shelter-in-place. *See, e.g.*, Declaration of Anne Rios, ECF 81-13 ¶¶ 10-12, 19-21; Declaration of Frances L. Conlin, ECF 81-9 ¶ 4.

2. Plaintiffs' claims that ICE has failed in its Constitutional and Section 504 obligations raise common issues of law and fact.

Plaintiffs challenge the lack of adequate procedures ICE has in place to ensure that Detention Facilities appropriately identify, assess, and implement precautionary measures to protect people in detention with Risk Factors that make them susceptible to severe illness or death if exposed to COVID-19. They seek an injunction requiring ICE to adopt such measures throughout its Detention Facilities.

Defendants' brief describes a system-wide approach to COVID-19. Defts' Opp., ECF 94 at 8-10. It is the adequacy of this system-wide approach that

Plaintiffs challenge, not—as Defendants repeatedly insist—the outcome for any particular individual. Thus, whether Defendants' *system-wide approach* is sufficient to ensure that people in Detention Facilities with Risk Factors are not at risk of irreparable harm or placed in conditions that are unnecessarily dangerous are common questions, which can be answered without the need to analyze the individual circumstances of any particular subclass member. Similarly, the question of whether Defendants have *a sufficient process* in place to ensure the COVID-19-related needs of people whose disabilities place them at heightened risk if exposed to the virus are identified and accommodated can be answered by addressing Defendants' policies and practices—without a need to dive into the specific facts or health conditions of subclass members.

Further, it is well-established that in cases such as this one, which challenge systemic policies and seek systemic relief, commonality is satisfied even where there are "individual factual differences among class members." *Parsons*, 754 F.3d at 681-82 (internal quotation omitted). As in *Parsons*—controlling Circuit precedent that Defendants do not cite, much less distinguish—Plaintiffs here "[do] not allege that the care provided on any particular occasion to any particular inmate (or group of inmates) was insufficient, but rather that [defendants'] policies and practices of . . . systemic application expose all [individuals in defendants'] custody to a substantial risk of serious harm." *Id.* at 676.

The members of the putative class share a heightened vulnerability to COVID-19, and have in common the need for a process that identifies them and ensures that appropriate precautionary measures are taken, irrespective of which Risk Factor or disabling condition they may have. Similar to the plaintiffs in the *Armstrong* litigation who challenged the adequacy of the state's *process* for accommodating the needs of persons with disabilities in parole proceedings at facilities spread throughout the state, "individual factual differences among the individual litigants or groups of litigants" does not justify requiring Plaintiffs and

members of the putative class, "all of whom suffer similar harm from the Board's failure to accommodate their disabilities, to prosecute separate actions." *See Armstrong*, 275 F.3d at 868; *see also Parsons* 754 F.3d at 678 (challenged common policies and practices are " … the 'glue' that holds together the putative class and the putative subclass . . . That inquiry does not require us to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination."); *B.K.*, 922 F.3d at 968-69 (Due Process challenge to policies and procedures of state foster care agency was proper for class treatment where all class members were subjected to the challenged policies and procedures.)

Defendants' claims that commonality is defeated because Plaintiffs are held in different facilities, or that their immigration proceedings are at different stages, or that they are held pursuant to different statutory authority, are even further afield. None of these differences changes the fact that all of the Plaintiffs and putative class members are subject to *ICE's* inadequate response to COVID-19, and therefore suffer the same risk of harm from exposure to COVID-19.

3. Plaintiffs' injuries and the process-based relief they seek are typical of the class.

Whether a named plaintiff's claims are typical depends on "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Parsons*, 754 F.3d at 685 (internal citation omitted); *see also Arroyo*, 2019 WL 2912848, at *10 (same). The Named Plaintiffs' claims are "typical" if they are "reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons*, 754 F.3d at 685.

Here, Defendants have failed to refute the fact that, similar to members of High Risk subclass, the proposed class representatives all have at least one Risk

Factor placing them at heightened risk of severe illness or death if exposed to COVID-19—and therefore all are similarly impacted by Defendants' system-wide approach to this pandemic. Declaration of Alex Hernandez, ECF 83-7 ¶ 2; Declaration of Aristoteles Sanchez Martinez, ECF 83-8 ¶¶ 2-3; Declaration of Faour Fraihat, ECF 83-9 ¶ 4; Declaration of Jimmy Sudney, ECF 81-10 ¶¶ 4-5, 7; Declaration of Martin Munoz, ECF 83-11 ¶ 2 (describing medical conditions and disabilities). Defendants also fail to refute the fact that the proposed representatives of the Disability subclass, similar to members of that subclass, have disabilities under Section 504 of the Rehabilitation Act that place them at heightened risk if exposed to COVID-19, and are similarly impacted by Defendants' approach to the pandemic. *Id.* Named Plaintiffs have thus all alleged an injury—exposure to a substantial risk of serious harm and denial of meaningful access to ICE's programs as a result of the challenged ICE procedure—which is the "result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims." *Parsons*, 754 F.3d at 685*; see also B.K.*, 922 F.3d at 970.

That Named Plaintiffs have different Risk Factors and disabilities does not affect this typicality analysis. The CDC guidelines and medical expert testimony recommend the same set of precautionary measures for all individuals with heightened vulnerability. Named Plaintiffs' injuries need not be identical to each other or those of the class; unnamed class members need only "have injuries similar to those of the named plaintiffs and . . . result from the same, injurious course of conduct." *Armstrong*, 275 F.3d at 869. In *Armstrong*, the court held that the injuries experienced by the plaintiffs, people with disabilities who were subject to Parole Board procedures throughout the state, were typical of those of a class of individuals even though the class included individuals with a wide range of disabilities who were affected by the procedures in different ways. *Id.*

Defendants' recycled commonality arguments—that determination of

whether individuals will be eligible for release requires individualized factual analysis—are unavailing here for the same reasons they fail as to commonality: first, a named plaintiff's injuries need not be identical to those of all members of the class (although here they are), so long as they are "reasonably coextensive with those of absent class members." *Parsons*, 754 F.3d at 685. Moreover, the factual differences between Named Plaintiffs and the members of the class may be relevant for an individualized determination of eligibility for release, but that is not the relief sought here. Defendants fail to explain how the potential differences they identify between Named Plaintiffs and the putative class members cause their claims and the relief they seek to differ from those of the class.

Further, Plaintiffs who have been released from ICE custody pursuant to individual habeas proceedings or temporary restraining orders since filing of the complaint still satisfy the typicality requirement. "In determining whether Petitioners' claim is typical of a putative class member's claim, the Court invokes the relation back doctrine and asks whether typicality was satisfied as of the filing of the complaint." *Doe v. Wolf*, No. 19-CV-2119-DMS (AGS), --- F.Supp.3d ----, 2020 WL 209919, at *9 (S.D. Cal. Jan. 14, 2020) (*citing Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1092 (9th Cir. 2011)) (holding that certification of inherently transitory claims "relates back to the filing of the complaint"). As argued in more detail in Plaintiffs' concurrently filed Reply in support of their Motion for Preliminary Injunction, Plaintiffs' claims fall into the well-established exception to mootness for claims which are "inherently transitory" because they are capable of repetition as to other class members but evade review because of the pace of litigation in comparison with other proceedings.

Finally, Defendants cite no case law for their contention that a circuit split on an issue of law prohibits a nationwide class under federal law from proceeding. Nor could they. Indeed, if Defendants' argument holds, then cross-circuit class actions could never proceed where there was any difference of law between

circuits that could meaningfully impact the claims—not just underlying constitutional standards but also threshold or key procedural issues, such as mootness. That Defendants' argument should be rejected for this reason is evidenced by the legions of nationwide class actions concerning federal law—notwithstanding the fact that circuits may be split on certain legal issues. It is well-established that a federal court applies the law of its own Circuit regardless of whether the case may have a connection to another Circuit. *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994). To the extent that venue for this case is proper in this District and Circuit, the existence of a circuit split on a relevant, common issue of law does not defeat typicality.

4. Plaintiffs have no conflict of interest with absent class members and will zealously prosecute the case, adequately representing the interests of the class.

A plaintiff shows adequacy by demonstrating that (1) neither they nor their counsel have any conflicts of interest with members of the putative class, and (2) they and their counsel will prosecute the action vigorously on behalf of the class. *Arroyo*, 2019 WL 2912848, at *11. Named Plaintiffs satisfy both elements. Defendants argue that Named Plaintiffs have potential conflicts of interest with other class members because (1) Plaintiffs' detention at three distinct facilities allegedly undermines their ability to adequately represent people in other facilities across the country; (2) Plaintiffs' risks do not cover every category of risk factor named by the CDC; and (3) they are detained under different statutory authority. These arguments recycle yet again Defendants' commonality and typicality arguments without ever identifying a conflict of interest between the Named Plaintiffs and the proposed subclasses.

Finally, Defendants argue that an absent member of the class may not want to be released because of "the availability of no-cost medical care at detention facilities." Defts' Opp., ECF 94 at 29. Regardless of whether such a person exists, these considerations regarding appropriateness of release as to specific individuals

are irrelevant to the adequacy of Named Plaintiffs to represent a class seeking adequate assessment tools and *a process* for implementing necessary precautionary measures. Such a process will apply to all detained people with Risk Factors, regardless of the basis for their detention or the posture of their individual immigration cases.

Moreover, the proposed class representatives have committed to prosecute the action on behalf of the class whether or not they are released. *See* Hernandez Decl., ECF 83-7 ¶ 9; Martinez Decl., ECF 83-8 ¶ 20; Fraihat Decl., ECF 83-9 ¶ 13; Sudney Decl., ECF 83-10 ¶ 16; Munoz Decl., ECF 83-11 ¶ 13. Indeed, despite being released, Plaintiffs Fraihat, Sudney, and Munoz have each continued to communicate regularly with their legal team for purposes of litigating this case. Consequently, Defendants' assertion that Named Plaintiffs will fail to prosecute the action after their release is baseless.

Because they do not have conflicting interests with other class members, and because they are prosecuting this action vigorously on behalf of the class regardless of whether they are detained, Named Plaintiffs are adequate representatives of the putative subclasses.

B. Plaintiffs satisfy the requirements for a Rule 23(b)(2) class.

Where defendants "acted or refused to act on grounds that apply generally to the class," certification under Rule 23(b)(2) is appropriate. Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class 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." *B.K.*, 922 F.3d at 971 (quotation omitted). The requirements of Rule 23(b)(2) are "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688.

In *Parsons*, *B.K.*, and *Armstrong*, the Ninth Circuit affirmed a "single,

indivisible injunction ordering state officials to abate" centralized policies and practices placing the class at a substantial risk of serious harm. *Parsons*, 754 F.3d at 688; *B.K.*, 922 F.3d at 971; *Armstrong*, 275 F.3d at 873-76. Similarly, Plaintiffs here seek relief from Defendants' inadequate response—which Defendants themselves characterize as centralized and system-wide—through a single, system-wide process.[4] Throughout their opposition, Defendants conflate the systemic relief Plaintiffs seek here on behalf of the subclasses with the individualized relief sought by hundreds of individual detained people in separate actions around the country. Contrary to Defendants' arguments, this case does not require individualized analysis of the factual differences between the named plaintiffs and members of the class. Rather, Plaintiffs call for ICE to implement a procedure to identify individuals at high risk of harm from exposure to COVID-19 and assess and implement precautions to protect the health and safety of such individuals (including release, where appropriate), and to bring its protocols regarding COVID-19 into compliance with medical recommendations.

A decision in this case regarding the systemic relief sought by the class would not preclude detained individuals, including Named Plaintiffs, from seeking individualized relief, including release, through separate legal actions. *See Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013) (holding that an individual inmate's claim for injunctive relief for his individual medical care was not precluded by class action which sought systemic reform relating to same general subject matter); *Parsons*, 754 F.3d at 677-78 ("Since *Plata*, we have relied on this fundamental distinction to hold that where a California prisoner brings an independent claim for injunctive relief solely on his own behalf for specific medical treatment denied to

[4] This court has authority to issue an injunction addressing ICE's detention system as a unit. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283-84 (9th Cir. 2020) (recognizing District Court's authority "to enjoin unlawful policies on a universal basis" in the immigration context due to the important need for uniformity in immigration policy (quotation omitted)).

him, *Plata* does not bar the prisoner's claim for injunctive relief." (quotation omitted)); *Anderson v. California Dep't of Corrs. & Rehab.*, No. 15-CV-02013-MEJ, 2016 WL 7013246, at *4 (N.D. Cal. Dec. 1, 2016) (same).

C. Defendants' proposed revisions to the class definitions are unnecessary.

This Court has the power to revise the class definition as it sees fit, but the revisions proposed by Defendants are unnecessary.

First, the Court need not exclude individuals seeking relief including release through separate cases. As demonstrated above, the relief sought in this case is not coextensive with the individualized relief, including release, that hundreds of people in detention throughout the country are currently seeking through habeas petitions and temporary restraining orders. A ruling in this case—which seeks systemic relief—would not preclude their individual claims for relief. *See Pride v. Correa*, 719 F.3d at 1137; *Anderson*, 2016 WL 7013246, at *3-*4. Further, it is unclear what it would mean to exclude individuals who have sought individualized relief from the class; the relief sought here is for the system-wide implementation of policies and therefore, all individuals in custody with Risk Factors would by definition be subject to the new policies.

Second, Defendants do not explain why individuals who are detained pursuant to provisions requiring mandatory detention should be excluded from the subclasses. All people who have Risk Factors for heightened vulnerability from exposure to COVID-19 benefit from a procedure that identifies them, assesses their need for additional precautions, and implementation of those precautions.

Third, the class need not be limited to individuals held in the facilities where the Named Plaintiffs are held. The policies Plaintiffs challenge apply systemwide, as Defendants themselves admit in their opposition. The Named Plaintiffs adequately represent a class of individuals injured by those policies because they are in ICE's custody.

Finally, Plaintiffs seek certification of two subclasses here: those in detention who have Risk Factors causing heightened vulnerability to serious harm from exposure to COVID-19, and those in detention who have disabilities causing heightened vulnerability to serious harm from exposure to COVID-19. Many of the Risk Factors are also qualifying disabilities, such that there is overlap between the Risk Factor subclass and the Disability subclass. However, one of the Risk Factors is age,[5] which is not on its own a qualifying disability entitling an individual to the protections of Section 504. It is this difference which warrants the establishment of two subclasses, since not all of those with age as a Risk Factor will necessarily have qualifying disabilities under Section 504.

III. CONCLUSION

Plaintiffs and Defendants agree that a system-wide response is needed to address the risks of this pandemic. Plaintiffs challenge the adequacy of Defendants' system-wide response and seek relief that will include the implementation of a process to ensure the protection of those throughout Defendants' detention system whose conditions make them vulnerable to significant harms if exposed to the virus. This emergency challenge and request for relief is thus appropriately addressed on a class basis and this Court should grant the provisional motion for class certification.

[5] Defendants refer to CDC guidelines, which include people 65 and older in the high risk group. Plaintiffs' medical experts, state that in correctional settings specifically, "the age of 55 is used to identify older patients, because of the extremely high level of physical and behavioral health problems among this cohort of people. I believe the age of 55 should be applied to ICE detainees for the same reason." Declaration of Homer Venters, ECF 81-11 ¶ 13. *See also* Franco-Paredes Decl., ECF 81-12 at 3-5.

DATED: April 9, 2020

Respectfully submitted,

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