IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VADIM KAZAROV AND VOEUTH LONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Petitioners, vs. THOMAS RIDGE, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, THE DEPARTMENT OF HOMELAND SECURITY, JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, CYNTHIA O'CONNELL AS INTERIM CHICAGO DISTRICT DIRECTOR OF THE BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT OF THE DEPARTMENT OF HOMELAND SECURITY, AND THE UNITED STATES DEPARTMENT OF JUSTICE, Respondents.	FILED NOV 18 2003 MICHAEL W. DOBBINS CLERK, U.S. DISTRICT COURT DOCKETED NOV 19 2003 JUDGE JAMES B. ZAGEL No. 02 C 5097

PETITIONERS REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

The Respondents in this case acknowledge that the Petitioners seek to certify a class in order to gain injunctive and declaratory relief relating to the policies and procedures by which the Respondents detain putative class members for more than six months after the entry of an administratively final order of removal. *See* Respondents' Brief at 6-7. The Respondents then ignore all of Petitioners' claims and arguments other than the claims for writs of habeas corpus.

48

As set forth in the numerous authorities in Petitioners' first brief, it is entirely appropriate for this court to determine the common issues of law and fact that the members of the proposed class share regarding their due process claims against the Respondents. These claims include, but are not limited to, the habeas claim. *See, e.g.,* Counts V, VI and VII of the Petition. Certifying a class or representative action regarding habeas corpus claims is appropriate in this case. But even if it were not, it would still be appropriate to certify a class to adjudicate the non-habeas claims set forth in the Petition. Respondents' silence on these issues effectively concedes the propriety of class certification.

As set forth below, the Court should grant Petitioners' motion and enter an order certifying a class in this case.

ARGUMENT

I. Petitioners' Suit Contains Common Questions of Law and Fact.

Although the Court may need to grant individualized relief at some point in this case, the central issue for the class is common to all: the question of the constitutionality of the practices and procedures of the BICE. Class certification under these circumstances is appropriate. Some factual variation among class members does not prevent class certification. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Indeed, class certification has been granted when there are questions common to the class, despite the need for individual remedies for class members. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980). In *Coley*, the Eighth Circuit reversed a district court's denial of class certification that was based upon "'so many variations of remedy (for each inmate of Rogers Hall) that any sort of class relief would be impossible.'" *Id.* The appellate court stated that "[t]he fact that individuals may also seek relief on the basis of facts peculiar to their individual cases does not deflect the thrust of this lawsuit

away from the constitutional questions" and thus provides no basis for refusing to grant class certification. *Id.*

Respondents rely on two individual habeas corpus cases to support their allegation that individual factual differences in the present case should prevent class certification. Resp. Mem. 12. However, these cases do not address the commonality requirement for class certification and thus are inapplicable to the present case. Both *Pelich v. Immigration and Naturalization Service*, 329 F.3d 1057 (9th Cir. 2003), and *Lema v. U.S. Immigration and Naturalization Service*, 341 F.3d 853 (9th Cir. 2003), deal with individual habeas corpus pleas for release from detention. The Ninth Circuit, in these cases, decided only the appropriateness of continued detention for the individual before the court. Lema, 341 F.3d at 857; *Pelich*, 329 F.3d at 1062. Broader, procedural claims were not present.

Respondents cite *Wang v. Reno*, 862 F. Supp. 801, 811 (E.D.N.Y. 2001), for the proposition that class certification is inappropriate in this case because of the injunctive type of relief requested. *Wang* is also inapplicable in this case. The petitioners in *Wang* were seeking asylum. *Id.* at 807. They were seeking review of their final orders of exclusion. *Id.* at 808. The court discussed at length the difference between this type of claim, a substantive, individual claim and the type of claim that Petitioners make in this case, a procedural claim. *Id.* at 809. The court stated "Plaintiffs claims are simply a challenge to rulings made by BIA in individual cases. They are not a challenge to the procedures used...nor are they based on a contention that a statutory or constitutional right has been violated." *Id.* Because of jurisdictional problems and because of the substantive rather than procedural claim being made, the court found that class certification was inappropriate. *Id.* at 813.

If Respondents believe these cases are instructive in the case before this Court then they have misunderstood the claims of Petitioners. As a class, Petitioners are not challenging the decision the government eventually makes for each individual in continuing detainment upon a likelihood of removal to the alien's home country or releasing the individual back into the country. The Court is not being asked to determine whether every member of the class is being appropriately detained. Petitioners agree with Respondents that those decisions are highly individual and inherently factually based. Instead, Petitioners are challenging the *process* used by the BICE against those in the class. The question before the Court is whether BICE has appropriate procedures in place for ensuring that individuals are not detained outside of the rule set by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001).

As long as "a single issue is common to all class members," factual and legal questions do not need to be the same for all class members. *Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1111 (N.D. Ill. 1982); *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993). "Class actions, therefore, cannot be defeated on commonality grounds solely because there are some factual variations among the claims of individual members." *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993).

When the central issue in the case is a challenge to the *process* applied to all class members, factual differences are irrelevant. *See Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1111 (N.D. Ill. 1982); *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993). For example, in *Tonya K.*, plaintiffs challenged the process by which educational placements of handicapped children were made. *Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1108 (N.D. Ill. 1982). The court found that the question of whether placement was completed in a timely manner was an appropriate one for a class action. *Id.* at 1111. In doing so, the court

stated that "it is irrelevant for commonality purposes that class members are variously disabled or need either day or residential placement." *Id.* The reason these individual differences were irrelevant was that the court was not evaluating the appropriateness of individual placement decisions. *Id.* ("The Court is not asked here to determine whether a placement decision is appropriate."). It was reviewing the process by which those decisions were made.

Similarly, in *Evans*, the court stated "the issue presented by the Plaintiffs, whether the Process violates IDEA insofar as it imposes lengthy delays after development of an IEP, clearly presents a question of law common to all class members. The Plaintiffs' challenge does not require this Court to make individual determinations concerning the necessity of a residential placement. Rather, the question is simply whether the Process, which is common to all class members, violates IDEA." *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993).

Like the plaintiffs in *Evans* and *Tonya K.*, Petitioners in this case have claims appropriate for a class action. Although only one common issue is necessary for class certification, Petitioners have many common issues of both fact and law. Common questions of law include whether BICE's procedures are facially violative of due process, violative of due process as applied, and violative of the Administrative Procedures Act. *See* Pet. Mot. 7. Common questions of fact derive from the systematic government practice of keeping aliens in custody longer than 6 months after a final order of deportation and include whether the Respondents have a practice of delaying adjudication of release decisions, a practice of failing to give an opportunity to be heard, and/or a practice of justifying continued detention on non-existing failures to cooperate or possibilities of return to home countries. *Id.* The decision to continue detainment or to release that is made by the BICE may or may not be appropriate, but

the central issue in this action is the invalidity of the timing and procedure by which that decision is made.

II. Joinder of All Members of the Putative Class is Impracticable.

The cases cited by Respondents are not applicable to the case before us. All of the cases cited by Respondents for denial of class certification either have (1) no factors to consider in addition to class size or (2) have extenuating circumstances that mitigate against rather than in favor of class certification. None of these cases provide a reason not to certify the present class and some re-emphasize the same reasons for classification in this case discussed in Petitioners' original brief.

For example, certification was denied in *Young* and in *Danis* because class size was not only small but class members were clearly known and easy to join. *Danis v. USN Commun., Inc.*, 189 F.R.D. 391, 399-400 (N.D. Ill. 1999); *Young v. Magnequench Intl., Inc.*, 188 F.R.D. 504, 507 (S.D. Ind. 1999). In *Young*, the plaintiff actually made an alternative motion for joinder of the four proposed members as an alternative to class certification. *Young v. Magnequench Intl., Inc.*, 188 F.R.D. 504, 505 (S.D. Ind. 1999) (Footnote 1). The court believed that the real desire of the Plaintiff was to make this into a "multiple-plaintiff action." *Id.* at 507 (FN4). The court did recognize the importance of considering other factors when class number is small and cited cases in which groups of eighteen and twenty-two were certified. *Id.* at 506-507 ("when the putative class is small, other factors become more significant"). Class certification was not granted in *Young*, but only because there was no "difficulty whatsoever" in joining these four clearly identified individuals to the suit and no complicating factors were shown. *Id.* at 507. Similarly, the *Danis* court denied Plaintiffs' motion for certification of a defendant class consisting of fifteen "major brokerage firms" with "readily obtainable"

addresses. *Danis v. USN Commun., Inc.*, 189 F.R.D. 391, 400 (N.D. Ill. 1999). The Plaintiffs had failed to "demonstrate special circumstances warranting certification" of a small class. *Id.*

In *CL-Alexanders* and *State Security*, in addition to a small class, there were factors actually **negating** the propriety of class certification. *See State Sec. Ins. Co. v. Frank B. Hall & Co., Inc.*, 95 F.R.D. 496, 498 (N.D. Ill. 1982); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 460 (S.D.N.Y. 1989). In *CL-Alexanders*, the proposed class consisted of twenty-five clearly identified British investors all of whom had already signed forms consenting to the class action. *Id.* at 455-457. The court interpreted this participation by the individuals as a showing of interest in joining the suit and noted the ease of future litigation coordination because of the cohesiveness of the group, since many of the proposed class members were present or former co-employees or relatives. *Id.* at 457. Even with these factors negating the need for class certification, the court refused to rely solely on these facts in denying class certification. *Id.* at 455. Instead, the court relied upon the totality of circumstances in the case. *Id.* at 460. The court was concerned over possible conflicts of interest between class members. *Id.* And, because of the international nature of the case, res judicata issues made a special and complicated opt-in procedure necessary if class certification was granted. *Id.*

In *State Security*, a class of twenty-eight members was denied certification after no "more than simply the number of potential claimants" was shown. *State Sec. Ins. Co. v. Frank B. Hall & Co., Inc.*, 95 F.R.D. 496, 498 (N.D. Ill. 1982). In addition, jurisdictional concerns and opt-out practicalities led the court to believe the class would be "a good deal smaller" than the twenty-eight asserted. *Id.* The numerosity issues favoring denial were exacerbated by the improbability of satisfying the other requirements for class certification and the impropriety in litigating in a forum inconvenient to all but the named plaintiff. *Id.* at 499.

Respondents also cite *Evans v. Evans*, 818 F. Supp. 1215 (N.D. Ind. 1993), in support of their argument against class certification. *See* Resp. Mem. 18. However, in *Evans* the court granted class certification based on the large number of class members. *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993). The court recognized the importance of factors such as judicial economy and the ability of individuals to bring individuals suits in deciding impracticability but didn't need to address these issues because of the easy satisfaction of the impracticability requirement. *Id.*

The cases cited by Respondents are not significant in deciding the present class certification motion. Unlike *Young* and *Danis*, Petitioners have special circumstances favoring class certification in addition to class size. And, unlike *CL-Alexanders* and *State Security*, there are not factors preventing the effective application of class certification in this case. There is no reason certification should not be granted in this case.

Both sides in this case have turned to conflicting cases regarding class size. Petitioners have cited several cases certifying classes of less than twenty members. *See* Pet. Mot. 6. Respondents have found cases denying certification to larger groups. *See* Resp. Mem. 18. The real difference between these cases is the factors courts consider *in addition* to number that allow the principles underlying the impracticability requirement to be fully accounted for. All of the cases cited by the Respondents recognize that factors apart from class size should be considered in the decision to certify a class. *Danis v. USN Commun., Inc.*, 189 F.R.D. 391, 400 (N.D. Ill. 1999); *State Sec. Ins. Co. v. Frank B. Hall & Co., Inc.*, 95 F.R.D. 496, 499 (N.D. Ill. 1982); *Young v. Magnequench Intl., Inc.*, 188 F.R.D. 504, 506 (S.D. Ind. 1999); *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 456 (S.D.N.Y. 1989). These additional factors favor class certification in this case.

As discussed in Petitioners' Memorandum in Support of their Motion for Class Certification, several factors in addition to class size support a finding of impracticability of joinder in this case. *See* Pet. Mot. 6-7. The nature of relief sought, the dispersed locations of class members, the inability of class members to bring their own suits, the interests of judicial economy, and especially the transient nature of the class, compel the granting of class certification. *See Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1109 (N.D. Ill. 1982) (recognizing that future class members in an evolving class should favor a finding of impracticability); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (stating "constantly revolving" nature of inmate population a factor in finding of impracticability). Because of the constant evolution of the proposed Petitioner class and the already numerous complaint amendments, "joinder would be a mere 'fiction for class adjudication.'" *Northwestern Natl. Bank of Minneapolis v. Fox & Co.*, 102 F.R.D. 507, 511 (S.D.N.Y. 1984). Class certification is appropriate.

III. The class action is not moot.

In *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975), the Supreme Court recognized that there may be times when a proposed named plaintiff's claims become moot before "the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 (FN11). There are cases in which although "state officials will undoubtedly continue to enforce a challenged statute" or continue to utilize a challenged procedure, "because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion." *Id.* at 400.

In these cases, the court should examine "the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review" in deciding whether to "'relate back'" the time for certification to the filing of the complaint and thus avoid

mootness. *Id.* at 402 (FN11). The Supreme Court applied this standard to a class of pretrial detainees in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975) and found that time realities made the claims "'capable of repetition, yet evading review,'" *Id.* at 111, 861. The Court said:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures.

Id. In *Gerstein*, the length of time any individual would be detained could not be determined at the outset because many events could lead to discharge or conviction and thus end the pre-trial detainment. *Id.* It was "by no means certain" that any particular named plaintiff would stay in pre-trial detainment "long enough for a district judge to certify the class." *Id.; See Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (finding class action not moot because of the revolving nature of the inmate population and the amount of time necessary to get through the class certification process); *But See Robinson v. Leahy*, 73 F.R.D. 109, 113-114 (N.D. Ill. 1977) (finding *Gerstein* time requirements for certification of a moot class representative not satisfied since plaintiff was in custody for two years after commencement of the action).

In *Dixon v. Quern*, 537 F. Supp. 990 (N.D. Ill. 1982), *vacated on other grounds*, 559 F. Supp. 395 (N.D. Ill. 1984), the court considered the defendant's control over the mootness of named plaintiffs' claims in addition to time considerations. *Id.* at 993. The court stated that declaring the class action moot and thereby denying certification because of satisfaction of the proposed named plaintiffs' claims:

> would mean that the procedures at issue would constantly evade review. The SSA could avoid judicial scrutiny by granting hearings to the named plaintiffs and informing plaintiffs of the basis for SSA's determination of non-disability. However, long delays and lack of information about the basis for findings of non-

> disability might still continue. These critical issues are issues that are alive for members of the class.

Id. The court decided the class action controversy was not moot and granted certification. *Id.*

Both the time realities discussed in *Sosna* and *Gerstein* and the defendants' control over mootness recognized in *Dixon* favor the continuation of this lawsuit as a class action. In the case before this Court, as in *Gerstein*, it cannot be determined at the outset how long any particular class member will be detained. To become a member of the class, an individual must have already been detained by the government for six months after a final order of deportation. The length of time a detainee will be kept beyond that point is only speculation. In addition, the Respondents have complete control over the release of these individuals. At any time a named petitioner could be released by the government, making the claims of that individual moot. If the court allows the release of a named plaintiff to prevent certification of the class, Respondents could continually thwart the progress of this litigation. The constitutional claims of the class members would never be addressed. Not granting class certification in this case "would effectively preclude any judicial relief" for the individuals detained by BICE. *Dixon v. Quern*, 537 F. Supp. 990, 992 (N.D. Ill. 1982), *vacated on other grounds*, 559 F. Supp. 395 (N.D. Ill. 1984).

IV. Named Petitioners, Voueth Long and Vadim Kazarov, are adequate class representatives.

Courts have consistently found that a moot named plaintiff can satisfy the requirement of adequate representation necessary for class certification. *See Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1112-1113 (N.D. Ill. 1982) (finding no reason to doubt adequacy of representation of class members by named plaintiffs whose individual claims are moot and granting class certification); *Dixon v. Quern*, 537 F. Supp. 990, 992 (N.D. Ill. 1982), *vacated on other grounds*, 559 F. Supp. 395 (N.D. Ill. 1984) (certifying class despite mootness of

individual claims of named plaintiffs); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (certifying class with moot plaintiff as adequate class representative as no conflicting interests exist and counsel is competent and experienced).

In granting certification, the Court must decide that the named plaintiffs whose claims are now moot "will adequately protect the interests of the class." *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 559 (1975). A moot named plaintiff will adequately represent the interests of the class where it is "unlikely" that members of the proposed class "would have interests conflicting" with those advanced by the named plaintiff and "where the interests of that class have been competently urged at each level of the proceeding." *Id.*

The first prong of the test for adequate representation assures that "the named plaintiffs' interests are not antagonistic to those of the class." *Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1112 (N.D. Ill. 1982). Neither Long nor Kazarov have interests adverse to those of the other class members. *See Dixon v. Quern*, 537 F. Supp. 990, 993 (N.D. Ill. 1982), *vacated on other grounds*, 559 F. Supp. 395 (N.D. Ill. 1984) (dismissing idea that moot plaintiffs' claims are antagonistic to the class). Both named petitioners and class members have been harmed by the unconstitutional governmental procedures and seek an end to the practices and procedures currently in place by the BICE. For the purposes of deciding whether class certification is appropriate, Long and Kazarov can serve as adequate representatives for the class. If substitution of the named petitioners becomes necessary further into the litigation, counsel for petitioners will address the concern at that point.

The second prong of this adequacy test is concerned with the ability of counsel to competently handle the litigation. *See Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981). In *Green*, the court recognized the experience of counsel in representing similarly-situated

individuals and in conducting class litigation. *Id.* The emphasis of the adequacy analysis was on two case characteristics: the existence of a class still affected by defendant practices and attorneys with a "sufficient interest in protecting the rights of inmates" affected by defendant practices. *Id.* The named plaintiffs act *through their attorneys* in "fairly and adequately" representing the interests of all class members. *Id.*

Respondents have not disputed the capabilities of Petitioners' counsel in representing the class concerning the matter before the Court. Counsel for the Petitioners are experienced litigators, ready and willing to vigorously pursue the interests of all of these class members. And, clearly there is a class of individuals still affected by the unconstitutional practices and procedures of the BICE.

CONCLUSION

All of the requirements for class certification are satisfied. First, there are common issues of law and fact. At the center of this dispute is the question of the constitutionality of the procedures and practices used by the BICE against all class members. Second, joinder of all members of the proposed class is impracticable because of the significant number of individuals considered in light of the special circumstances present in this case, such as the revolving nature of a detainee class. Third, the Named Petitioners, Kazarov and Long, are adequate representatives for this action. Neither has interests adverse to those of the other class members and their counsel is more than competent to assure that the common interests of the class are pursued. Fourth, the claims of the named petitioners are typical of those of the class. Respondents do not dispute this fact. *See* Resp. Mem. 18 (FN15). All of the requirements are satisfied and Respondents have not provided a valid reason to deny class certification. Therefore, the Court should grant Petitioners' Motion for Class Certification pursuant to Fed. Rule Civ. Proc. 23(a) and 23(b)(2).

November 18, 2003

Respectfully submitted, Vadim Kazarov and Voeuth Long

By: _____
Attorneys for Petitioners

Douglas M. Hagerman
Michael D. Smith
Thomas P. Krebs
Christopher J. Werner
FOLEY & LARDNER
321 North Clark Street
Suite 2800
Chicago, Illinois 60610
312.832.4500
312.832.4700 (fax)

Charles Roth
Anne Relias
MIDWEST IMMIGRANT AND
HUMAN RIGHTS CENTER
208 South LaSalle Street
Suite #1818
Chicago, Illinois 60604
(312) 660-1613
(312) 660-1505 (fax)

CERTIFICATE OF SERVICE

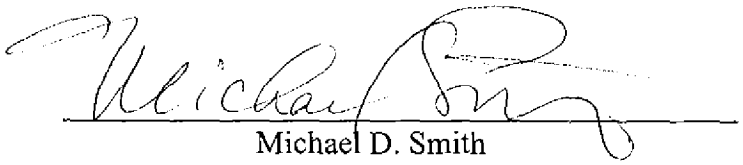
I, Michael D. Smith, an attorney, certify that I served a copy of the Petitioners Reply to Respondents' Memorandum in Opposition to Petitioners' Motion for Class Certification, via first class U.S. mail, with proper postage affixed, from 321 North Clark Street, Chicago, Illinois 60610, upon the following individuals:

Sheila M. Entenman
Assistant District Counsel
United States Department of Justice,
Immigration & Naturalization Service
219 South Dearborn Street
5th Floor
Chicago, Illinois 60604
(312) 353-8788
Fax: (312) 353-2067

Craig A. Oswald
Assistant United States Attorney
United States Department of Justice
219 South Dearborn Street
5th Floor
Chicago, Illinois 60604
(312) 886-9080
Fax (312) 353-2067

Efthimia S. Pilitsis
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044

on November 18, 2003, before the hour of 5:00 p.m.



Michael D. Smith