

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ROMAN _____ ,
GEORGINA _____ , LUIS _____ ,
and BASSAM _____ ,

Petitioners-Plaintiffs,

and

MARIA _____ ,
PHILLIP _____ , CHENGHUI _____ ,
and YANEYSI _____ ,

Petitioners-Plaintiffs, on behalf of
themselves and others similarly situated

v.

Case No. 4:20-cv-01241

CHAD WOLF, in his official capacity as Acting
Secretary, U.S. Department of Homeland
Security; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; MATTHEW
ALBENCE, in his official capacity as Deputy
Director and Senior Official Performing the
Duties of the Director, U.S. Immigration and
Customs Enforcement; PATRICK
CONTRERAS, in his official
capacity as Field Office Director,
Enforcement and Removal Operations,
Houston Field Office, U.S. Immigration and
Customs Enforcement; and
RANDY TATE, in his official
capacity as Warden of the Montgomery
Processing Center,

Respondents-Defendants.

**MEMORANDUM IN SUPPORT OF MOTION FOR CLASS
CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**

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INTRODUCTION

The Petitioners-Plaintiffs who seek to represent a class of similarly-situated individuals—
Maria _____, Phillip _____, Chenghui _____, and Yaneysi _____ —
 (“Class Plaintiffs”) are people detained in the custody of U.S. Immigration and Customs
Enforcement (“ICE”) at the Montgomery Processing Center (“MPC”).¹ All of the Class
Plaintiffs are, according to criteria identified by the U.S. Centers for Disease Control and
Prevention (“CDC”) and public-health experts, at significantly higher risk of severe disease and
death if they contract COVID-19 because they are over the age of 50, have one or more serious
medical conditions, or both. Ex. 1 to Am. Compl. (Venters Supp. Decl.) ¶¶ 9, 11; *see also* Ex. 2
to Am. Compl. (Amon Supp. Decl.) ¶¶ 5-8. Class Plaintiffs have brought this action seeking their
release from ICE custody at MPC because of the grave risk of death or severe illness they face
while detained there in light of the COVID-19 global pandemic. There are at least seven
confirmed cases of COVID-19 connected to MPC, including six that have emerged since this
Court’s grant of a preliminary injunction for an individual in this litigation less than two weeks
ago.

There are more than 800 people detained at MPC. Order on TRO/PI (Dkt. 41 at 2);
Facility Inspections, ICE, <https://www.ice.gov/facility-inspections> (viewed Apr. 28, 2020)
(FY2020 average daily population of 855 at MPC). Although undersigned counsel have been
able to identify the proposed class representatives here because they managed to retain counsel in
their immigration cases, many people detained by ICE at MPC are unrepresented. Many of these
people, who are currently unknown to putative class counsel, are likely to be, like the proposed

¹ Four Petitioners-Plaintiffs in this action—Roman _____, Georgina _____, Luis _____,
and Bassam _____—are not currently detained at MPC. These Petitioners-Plaintiffs do not seek to represent the
class.

class representatives, at significantly higher risk of severe disease and death if infected with COVID-19. They are also likely unable to seek relief on their own—much less in the short time required to avoid the risk of contracting COVID-19.

This Court has already ordered ICE to release a similarly-situated immigration detainee on the basis that Defendants cannot “[r]equir[e] medically vulnerable individuals to remain in a detention facility where they cannot properly protect themselves from transmission of a highly contagious virus with no known cure.” Dkt. 41 at 11-12. The Class Plaintiffs and the putative class here are in urgent need of the same relief from this Court.

Plaintiffs therefore move this Court for an order certifying a Plaintiff Class of all persons in the custody of ICE at MPC who are over the age of 50 and/or have serious medical conditions as defined by the CDC guidelines on COVID-19 and medical experts. *See Venters Supp. Decl.* ¶ 9. This proposed class meets all the requirements of Federal Rules of Civil Procedure 23(a) and (b)(2), as set forth below, and class certification is urgently needed in order to obtain relief to prevent members of the proposed class from becoming gravely ill or facing death due to infection with the COVID-19 virus while in ICE detention.

FACTUAL BACKGROUND

As set forth in the Amended Complaint (“Am. Compl.”), the Plaintiffs who seek to represent the class are four individuals who are being held in civil detention by ICE at MPC. All of these Plaintiffs, and the members of the putative Plaintiff Class, are over age 50 and/or have one or more serious underlying medical conditions that the CDC and other medical experts have determined put them at grave risk of severe illness or death from COVID-19.

The proposed class representatives are all particularly vulnerable to COVID-19 due to their underlying medical conditions and/or their age. *Venters Supp. Decl.* ¶ 11 (determination by

medical expert that all of the proposed class representatives “have underlying medical conditions that place them at heightened risk of serious illness or death should they contract COVID-19”).

For example, Plaintiff _____ is 58 years old, has only one kidney due to a donation to her brother and as a result is on a restricted diet, and suffers from hypertension. Ex. 7 to Am.

Compl. (_____ Decl. ¶¶ 2, 6, 7); *see Venters Supp. Decl. ¶ 11(a)*. Plaintiff

suffers from severe hypertension. Ex. 6 to Am. Compl. (_____ Decl. ¶¶ 7-10); *see Venters*

Supp. Decl. ¶ 11(b). Plaintiff _____ is 58 years old and suffers from hypertension. Ex. 5 to Am.

Compl. (Gao Decl. ¶¶ 2, 7); *see Venters Supp. Decl. ¶ 11(c)*. Plaintiff _____ has a history

of heart obstruction and high blood pressure. Ex. 4 to Am. Compl. (_____ Decl. ¶¶ 9-10);

see Venters Supp. Decl. ¶ 11(d).

As this Court found in its partial preliminary injunction in this litigation, “for Plaintiffs [two particularly vulnerable individuals], the threat of a mass outbreak is one that portends a high likelihood of serious illness or death, and is one that MPC cannot take sufficient steps to prevent.” Dkt. 41 at 13. The precarious situation facing the medically vulnerable Class Plaintiffs in this case who remain in ICE detention is, in all material respects, indistinguishable from that faced by the original Plaintiffs in this case. Indeed, as this Court predicted, the spread of COVID-19 in MPC was “not [a question] of if, but when.” *Id.* at 14. While MPC had only one publicly confirmed case of COVID-19 as of the Court’s April 17 ruling, and none among those detained, it now has seven, including three confirmed cases among detainees.²

Each of the proposed class representatives and putative class members are detained at MPC, “where social distancing and proper hygiene are impossible.” *Id.* at 11. They ordinarily

² Elizabeth Trovall, *Texas Immigrant Detention Facilities Report Surge In COVID-19 Cases*, Houston Public Media, April 22, 2020, <https://www.houstonpublicmedia.org/articles/news/health-science/coronavirus/2020/04/22/367591/texas-immigrant-detention-facilities-report-surge-in-covid-19-cases/>; *ICE Guidance on COVID-19*, ICE, <https://www.ice.gov/coronavirus> (last viewed Apr. 29, 2020).

sleep in dormitories that hold dozens of people, with beds close together. Decl. ¶ 15; Decl. ¶¶ 14, 15; Decl. ¶ 21. They share bathrooms and communal tables. Decl. ¶ 15; Decl. ¶ 14. They interact with facility staff in close physical proximity. Decl. ¶ 15. They interact with officers who regularly do not wear face masks, and they have been instructed to wear their own recently provided masks only *outside* their rooms. Decl. ¶ 21; Decl. ¶¶ 17–18; Decl. ¶ 12. In short, the conditions at MPC contravene medical and public health directives for risk mitigation: “Because there is no known vaccine or cure for COVID-19, prevention of transmission through proper social distancing and personal hygiene is the only option for medically vulnerable individuals, like Plaintiffs. However, detention [at MPC] necessarily prevents Plaintiffs from protecting themselves in this way.” Dkt. 41 at 11.

Beyond Defendants’ failure to provide conditions for safe social distancing or the practice of basic hygiene, they also fail to effectively quarantine detainees who are exhibiting symptoms of COVID-19. *E.g.*, Decl. ¶¶ 24–25; Decl. ¶ 11. Defendants also have failed to separate detainees exhibiting symptoms of COVID-19 from others and to provide basic medical care, including to those exhibiting symptoms consistent with COVID-19. *Id.*

CDC guidance recognizes that incarcerated/detained persons, generally, are at heightened risk for COVID-19 infection once the virus is introduced—and the number of confirmed cases at MPC is growing.³ The risk is even higher for those in the putative class, due to their age and/or underlying medical conditions recognized by the CDC and medical experts. Class treatment is both appropriate and necessary.

³ CDC, *Guidance for Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last viewed Apr. 29, 2020); *see* Venters Supp. Decl. ¶¶ 2-6, 29.

PROPOSED CLASS DEFINITION

The proposed class representatives—

—seek certification of a Plaintiff Class defined as:

All persons who are now, or will in the future be, detained in ICE custody at the Montgomery Processing Center, and who have been diagnosed with, or are receiving treatment for, an underlying medical condition and/or are over the age of 50.

Those underlying medical conditions are:

1. Chronic kidney disease (e.g., receiving dialysis);
2. Chronic liver disease (e.g., cirrhosis and chronic hepatitis);
3. Endocrine disorders (e.g., diabetes mellitus);
4. Compromised immune system (immunosuppression) (e.g., receiving treatment such as chemotherapy or radiation, received an organ or bone marrow transplant and is taking immunosuppressant medications, taking high doses of corticosteroids or other immunosuppressant medications, HIV or AIDS);
5. Metabolic disorders (e.g., inherited metabolic disorders and mitochondrial disorders);
6. Heart disease (e.g., congenital heart disease, congestive heart failure and coronary artery disease);
7. Lung disease (e.g., asthma, chronic obstructive pulmonary disease (chronic bronchitis or emphysema), or other chronic conditions associated with impaired lung function or that require home oxygen);
8. Neurological and neurologic and neurodevelopment conditions (e.g., disorders of the brain, spinal cord, peripheral nerve, and muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability, moderate to severe developmental delay, muscular dystrophy, or spinal cord injury);
9. Current or recent pregnancy (in the last two weeks);
10. Body mass index (BMI) greater than 40; and
11. Hypertension.

See Amon Supp. Decl. ¶¶ 5-8 (listing medical conditions that the CDC has identified as placing individuals at heightened risk for serious illness and death from COVID-19, including all of the above); Venters Supp. Decl. ¶ 9 (same, and identifying minimum age for heightened risk for individuals within the proposed class for serious illness and death from COVID-19 as age 50).

Plaintiffs move for class certification under Federal Rule of Civil Procedure 23(a) and (b)(2) and seek declaratory relief, and injunctive relief and a writ of habeas corpus on behalf of the proposed class.

ARGUMENT

CLASS PLAINTIFFS MEET THE STANDARDS FOR CLASS CERTIFICATION UNDER RULES 23(a) AND 23(b)(2).

Under Rule 23(a), Class Plaintiffs must show that: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). As set forth below, Class Plaintiffs meet all four of the Rule 23(a) requirements.

Class Plaintiffs also demonstrate below that Defendants “ha[ve] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole,” as required under Rule 23(b)(2). “[A] single injunction or declaratory judgment would provide relief to each member of the class,” and therefore certification is appropriate under Rule 23(b)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011); *see also Yates v. Collier*, 868 F.3d 354, 367 (5th Cir. 2017).

A. The Class Meets All of the Requirements of Rule 23(a).

1. The Class Is So Numerous that Joinder Is Impracticable.

Class Plaintiffs meet the Rule 23(a) numerosity requirement, which tests whether it is impracticable to join all injured individuals.

A “reasonable estimate of the number of purported class members” when combined with additional factors making joinder impracticable is sufficient for numerosity. *Zeidman v. J. Ray*

McDermott & Co., Inc., 651 F.2d 1030, 1038-39 (5th Cir. 1981) (quoting Newberg, Class Actions § 8812 at 36) (noting that trial courts have been quite willing to accept “common sense assumptions in order to support a finding of numerosity”); *see also In re Dynege, Inc. Sec. Litig.*, 226 F.R.D. 263, 268 (S.D. Tex. 2005) (plaintiff need not show precise numbers to prove joinder impracticable “where such a conclusion is clear from reasonable estimates”); *J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009) (same); *Zeidman*, 651 F.2d at 1038 (“[T]he proper focus (under Rule 23(a)(1)) is not on numbers alone, but on whether joinder of all members is practicable.”).

Additional impracticability factors in the Fifth Circuit include whether additional class members might be unavailable for joinder and the difficulty in identifying additional class members. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624–25 (5th Cir. 1999). “[T]he fact that the class includes unknown, unnamed future members also weighs in favor of certification.” *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) (citing *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974)). Finally, “[t]he general rule encouraging liberal construction of civil rights class actions applies with equal force to the numerosity requirement of Rule 23(a)(1),” and “[s]maller classes are less objectionable where . . . the plaintiff is seeking injunctive relief on behalf of future class members as well as past and present members.” *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975), *abrogated on other grounds, Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978).

In this case, Plaintiffs _____ are among the hundreds of ICE detainees at MPC: roughly 833 as of March 24, 2020, Dkt. 41 at 2, consistent with MPC’s average daily population of 855 in FY2020.⁴ Plaintiffs’ counsel do not, and cannot, know precisely how many class members there are among the numerous ICE detainees at MPC.

⁴ *Facility Inspections*, ICE, <https://www.ice.gov/facility-inspections> (last viewed Apr. 28, 2020).

Only Defendants have the information necessary to determine the exact number of class members.

Joinder is impracticable here. It is highly likely that there are a substantial number of members of the proposed class among the hundreds of people held by ICE at MPC. A U.S. Department of Justice study found that 43.9% of people detained in prisons and jails nationwide had “a current chronic medical condition” that approximately correlates with those identified by the CDC for COVID-19. *See* Laura M. Marushack et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, at *3, 2011-12, U.S. Dep’t of Justice (updated Oct. 2016). Between 26% and 30% of detainees have high blood pressure, and 14% to 21% suffer from tuberculosis, Hepatitis B or C, or a sexually transmitted disease. *Id.* 62% to 74% range from overweight to morbidly obese. *Id.* Applying even just one of the foregoing medical conditions yields an unwieldy number of plaintiffs were they to be each joined individually.

Moreover, joinder is impracticable because it is Defendants who control the information flow and access to the putative class members, rendering most potential class members inaccessible. A substantial portion of detainees at MPC are not being actively represented by counsel.⁵ The conditions of the COVID-19 pandemic—underlying this litigation—in fact prevent those who wish to access detainees from traveling in person to MPC.⁶ Telephonic communication in and out of MPC via confidential legal calls is not a viable alternative, given constraints on access to legal calls and the detention center’s requirement that attorneys provide

⁵ 43% of people with pending immigration cases in Montgomery County, where MPC is located, are unrepresented. TRAC, *Individuals in Immigration Court by Their Address*, <https://trac.syr.edu/phptools/immigration/addressrep/> (last visited April 29, 2020).

⁶ *See, e.g.*, Dkt. 12-2, Ex. C (Montgomery County stay-home order); Ex. A (Decl. of Holly Kuchera) ¶ 3.

an individual's name and A-number (used by ICE for identification purposes) in order to contact them.⁷

For all of the foregoing reasons, Plaintiffs satisfy the numerosity requirement.

2. Members of the Class Have Questions of Law and Fact in Common.

Commonality under Rule 23(a)(2) concerns “the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Ward v. Hellerstedt*, 753 Fed. Appx. 236, 245 (5th Cir. 2018). “To satisfy the commonality requirement under Rule 23(a)(2), class members must raise at least one contention that is central to the validity of each class member’s claims.” *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014). Even a single common question of law or fact is sufficient, so long as the resolution of the common question “will resolve an issue that is central to the validity of each one of the class member’s claims in one stroke.” *Cole v. Livingston*, 4:14-CV-1698, 2016 WL 3258345, at *3 (S.D. Tex. June 14, 2016) (Ellison, J.), *aff’d sub nom.*, *Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017)) (quoting *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012)) (original emphasis). And while dissimilarities amongst the class members are considered in the commonality assessment, the existence of dissimilarities is not determinative as to certification. *See, e.g., Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017).

The proposed class here meets the commonality requirement of Rule 23(a)(2) because the continued detention of each of the members at MPC elevates their risk of death or severe illness from COVID-19. Venters Supp. Decl. ¶ 11; *see also* Decl. ¶¶ 6–8; Decl. ¶¶ 6–8; Decl. ¶ 13; Decl. ¶ 23. This litigation presents common questions of law

⁷ Kuchera Decl. ¶ 4. Legal telephone calls are not accessible at all times at MPC. MPC requires that attorneys schedule legal calls in advance; detainees cannot directly call attorneys for confidential calls. *Id.* ¶¶ 5-6. Additionally, MPC declines to schedule legal calls on weekends. *Id.* ¶ 6.

as to whether the Defendants' continued detention of members of the Plaintiff Class, under conditions that put them at risk of death or severe illness due to COVID-19, violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution. This Court's resolution of that question will either benefit all of them or none of them in one stroke.

This case also presents common questions of fact, including (1) whether conditions maintained by Defendants at MPC present a risk of COVID-19 infection that puts the class members at risk of death or severe illness; (2) whether class members' detention under these conditions is justified by a legitimate, non-punitive government interest; (3) whether Defendants have been and are deliberately indifferent to the risk their actions and inactions pose to class members' health and safety; and (4) whether some form of release from ICE custody is required to protect class members' lives and safety.

These questions of law and fact lie at the heart of this litigation, and resolution of these questions will resolve the issue central to the validity of the claims of all putative class members: whether continued civil detention violates their constitutional right to due process in light of the COVID-19 pandemic. The proposed class thus meets Rule 23(a)(2)'s commonality requirement.

3. The Claims of the Proposed Class Representatives Are Typical of Those of the Class.

Rule 23(a)(3) requires that the "named plaintiffs must demonstrate that there is sufficient similarity between their legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Morrow v. Washington*, 277 F.R.D. 172, 194 (E.D. Tex. 2011) (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (internal quotations omitted)). Stated differently, "[t]he [Rule 23(a)] analysis focuses on whether the named representative's claims are typical, not whether the representative is." *Cole v. Livingston*, 4:14-

CV-1698, 2016 WL 3258345, at *8 (S.D. Tex. June 14, 2016), *aff'd sub nom.*, *Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017).

Typicality does not require exact identity between claims; rather, the class representative's claim must have the same *essential characteristics* as that of the putative class. *Morrow*, 277 F.R.D. at 194. Claims arising from a similar course of conduct and sharing the same legal theories are typical claims even if there is factual difference between the representative and others in the class. *James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001).

The proposed class representatives here easily meet Rule 23(a)(3)'s typicality requirement. Each of the proposed class representatives complains of the same constitutional violation caused by their continued detention at MPC in light of the COVID-19 pandemic and the risk it poses to their lives and continued health. Although their particular reasons for being detained by ICE, their medical conditions, and their ages may vary, it is the *existence vel non* of those factors, not the particularities of each, that binds the proposed class representatives to the theories raised and remedies sought by the class. Accordingly, typicality is satisfied.

4. The Proposed Class Representatives Will Fairly and Adequately Protect the Interests of the Class.

Plaintiffs also meet the fourth and final requirement of Rule 23(a), which is that the proposed class representatives must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The adequacy inquiry has two components: (1) whether the attorneys retained by the proposed class representatives are competent to conduct the litigation; and (2) whether the proposed class representatives have the willingness and ability to take an active role in and control the litigation and to protect the interest of absentees. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001).

First, Plaintiffs’ attorneys are qualified and experienced in conducting class action litigation involving immigration detention and unconstitutional conditions in prisons and jails. Plaintiffs’ legal team includes Andre Segura, Legal Director of the ACLU of Texas, who has litigated numerous class actions to vindicate the rights of immigrants. Ex. B (Decl. of Andre Segura) ¶ 4. Plaintiffs are also represented by David Fathi and Eunice Cho of the ACLU’s National Prison Project, one of the nation’s leading organizations litigating prisoners’ rights class actions, and Michael Tan, Deputy Director of the ACLU Immigrants’ Rights Project, who has successfully litigated numerous class actions on behalf of immigration detainees. *Id.* ¶ 17 – 32. Moreover, Plaintiffs’ attorneys include those from Weil, Gotshal & Manges LLP—a law firm known for its highly competent attorneys—to include Weil’s head litigation partner for its Dallas office, Paul Genender, who has practiced for 26 years, stewarding a host of highly complex litigation matters through this Circuit’s federal courts. *Id.* ¶ 33 – 37.

Second, Plaintiffs’ interests align with the interests of the proposed class as a whole. Plaintiffs do not have any interests antagonistic to those of any other member of the proposed class. Here, all members of the class, including the putative class representatives, seek only to protect themselves from serious illness or death due to COVID-19 by taking measures not possible or available to them at MPC; in that effort, there is not a sliver of daylight between them. The Plaintiffs and all members of the proposed class have a unified interest in obtaining a declaration that Defendants’ actions and inactions have created unconstitutionally life-threatening conditions at MPC. Granting the relief Plaintiffs seek would benefit all class members and would not impair any future class member’s claims. Plaintiffs have no incentive to deviate from this class relief. There are no differences that “create conflicts between the proposed class representatives’ interests and the class members’ interests.” *Mullen v. Treasure*

Chest Casino, LLC, 186 F.3d 620, 625–26 (5th Cir. 1999); *see also Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).

Finally, each of the proposed class representatives is engaged with counsel and committed to this litigation. *See* Decl. ¶ 34; Decl. ¶ 19; Decl. ¶ 15;

Decl. ¶ 25. They will fairly and properly represent the Class. Accordingly, the proposed class meets Rule 23(a)(4)'s adequacy requirement.

B. Plaintiffs Meet the Requirements of Federal Rule 23(b)(2).

Rule 23 requires that, in addition to satisfying the requirements of Rule 23(a), a putative class must also fall within one of the parts of subsection (b). *Yates v. Collier*, 868 F.3d 354, 366 (5th Cir. 2017). Plaintiffs here seek class certification under Rule 23(b)(2), which provides that a class action is appropriate when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

As this Court knows well, “[i]t is well-established that instead of requiring common issues, Rule 23(b)(2) requires common behavior by the defendant toward the class.” *Yates v. Collier*, 868 F.3d 354, 366 (5th Cir. 2017) (quoting *In re Rodriguez*, 695 F.3d 360, 365 (5th Cir. 2012)) (internal quotations omitted); *see also Casa Orlando Apartments, Ltd. v. Fed. Nat’l Mortg. Ass’n*, 624 F.3d 185, 198 (5th Cir. 2010) (same). Thus, in the Fifth Circuit, Rule 23(b)(2) certification is available if three requirements are satisfied: “(1) class members must have been harmed in essentially the same way; (2) injunctive relief must predominate over monetary damage claims; and (3) the injunctive relief sought must be specific.” *Yates*, 868 F.3d at 366 (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007)).

This class easily meets the Rule 23(b)(2) standard. All class members complain of the same constitutional harm arising from the confinement that ICE subjects them to uniformly, they

seek no monetary damages, and the relief they seek is specific: they ask for their release from ICE detention so as to better protect themselves from COVID-19 infection. *See* Decl. ¶¶ 32–33; Decl. ¶¶ 3, 12; Decl. ¶¶ 13–14; Decl. ¶¶ 23–24.

Moreover, several courts have now certified classes of detainees, in both immigration and criminal detention, due to COVID-19—including for detainees whose age and/or underlying conditions make them particularly vulnerable to severe illness and death if they contract COVID-19. *See, e.g., Fraihat v. U.S. Imm. & Customs Enforcement*, No. 19-1546, 2020 WL 1932393 (C.D. Cal. Apr. 20, 2020) (certifying class of medically vulnerable detainees in civil immigration detention, defined by list of enumerated risk factors); *Hernandez Roman v. Wolf*, No. ED CV 20-00768 TJH, ECF No. 52 (C.D. Cal. Apr. 23, 2020) (certifying class of detainees in civil immigration detention in Adelanto Immigration and Customs Enforcement Processing Center); *Savino v. Souza*, No. 20-10617-WGY, 2020 WL 1703844, at *1 (D. Mass. Apr. 8, 2020) (certifying class of civil immigration detainees at specific detention facility seeking their release in light of the danger posed by COVID-19).

C. Counsel Meet the Criteria of Rule 23(g).

The undersigned counsel, who have investigated and presented these claims, include experienced civil rights and class action lawyers from some of the most respected organizations and firms in this Circuit and nationally in these areas. Counsel will fairly and adequately represent the Class in this litigation.

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiffs’ motion and should certify a class as defined herein, and should appoint the attorneys listed below as Class Counsel.

DATED: April 29, 2020

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Respectfully submitted,

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* *Motions to appear pro hac vice forthcoming*

***Motions to appear pro hac vice
forthcoming; not admitted in DC; practice
limited to federal courts.*

****S.D. Tex. renewal forthcoming*

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