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Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
C.G.B., <i>et al.</i> ,	)	
	)	Case No. 1:20-CV-01072-CRC
<i>Petitioners,</i>	)	
	)	
v.	)	
	)	
WOLF, <i>et al.</i> ,	)	
	)	
<i>Respondents.</i>	)	
_____	)	

**MEMORANDUM OF LAW  
IN SUPPORT OF PETITIONERS' MOTION FOR CLASS CERTIFICATION**

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## **I. INTRODUCTION**

Petitioners filed this action and requested emergency injunctive relief on behalf of a highly vulnerable putative class: transgender individuals in civil immigration detention, all of whom are at grave risk of contracting COVID-19 because of the life-threatening conditions under which they are confined. Transgender people in civil immigration detention – many of whom came to this country seeking safety from violence and persecution because of their gender identities – are among the most vulnerable to infection and death during the current pandemic. Although federal authorities recognize the severe risks posed by outbreaks of the COVID-19 virus in immigration detention centers, Immigration and Customs Enforcement (“ICE”) has taken no specific measures to protect this especially vulnerable population. Common questions of both fact and law pervade this matter making class certification appropriate.

The requirements of Federal Rules of Civil Procedure 23(a) and 23(b) are met by the proposed class. The class is sufficiently numerous: ICE has attested that there are more than seventy-six transgender individuals being held in civil detention. Lederman Decl. ¶ 20 (ECF No. 20-8). All members of the class are bound together by common questions of law and fact – particularly whether, in the face of the lethal COVID-19 pandemic, the conditions of confinement at ICE detention facilities put transgender individuals at risk in a manner that amounts to unconstitutional punishment. The ten named Petitioners<sup>1</sup> are proper class representatives because their claims are typical of the absent class members and because they and their counsel will adequately and vigorously represent the class. Finally, Rule 23(b)(2)

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<sup>1</sup> Thirteen named Petitioners initially brought this action on behalf of the putative class on April 23, 2020. Since then, three named Petitioners (L.R.A.P., R.H. and G.P.) have been released from detention. Mullan Decl. ¶ 8 (ECF No. 20-12); Valenzuela Decl. ¶ 29 (ECF No. 20-13). Accordingly, they would not serve as representatives of the putative class.

permits certification here because Respondents have acted or refused to act on grounds that apply generally to the class through creating and maintaining the conditions that put the class at imminent risk of contracting and suffering from COVID-19 in detention. Therefore, the requested injunctive relief would provide relief to each member of the proposed class.

Since the first confirmed case of COVID-19 in the United States in late January 2020, the number of infected people in this country has exploded to more than one million as of May 3, 2020, with more than 64,000 deaths, according to the U.S. Centers for Disease Control and Prevention (the “CDC”). *See* Cases of Coronavirus Disease (COVID-19) in the U.S., CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. COVID-19 is a respiratory illness that is spread through airborne droplets, such as those expelled when a person coughs or sneezes, or via contact with contaminated surfaces. Immigration detention centers are congregate facilities in which detainees live in close proximity. That fact makes them especially dangerous during pandemics such as COVID-19, which easily spreads from person to person, both through the air and on commonly used surfaces such as tables and toilets. Since ICE first reported a COVID-19 infection in one of its detention centers on March 19, 2020, outbreaks have spread to at least 34 detention centers across the country. As of May 4, 2020, ICE had publicly reported 645 confirmed cases of COVID-19 in those facilities, including 606 detainees and 39 staff members. *See* ICE Guidance on COVID-19 Confirmed Cases, <https://www.ice.gov/coronavirus> . At least eleven facilities where transgender detainees are housed are experiencing reported outbreaks with 236 detainees infected. *Id.*

ICE has systematically failed to provide transgender individuals in civil detention fundamental protections from the spread of COVID-19. Transgender people in immigration detention report that it is often impossible to practice social distancing and take other necessary

measures that are required to protect from COVID-19. A.F. Decl. ¶ 12 (ECF No. 19-2). Beds and tables are bolted to the floor, forcing detainees to sleep and sit only a few feet from each other, and some detainees are still lining up in large groups for meals. A.F. Decl. ¶ 12 (ECF No. 19-2); L.M. Decl. ¶¶ 92-93 (ECF No. 19-8); D.B.M.U. Decl. ¶ 17 (ECF No. 19-10). Few guards and staff members wear face masks when interacting with detainees, and some wear no protective equipment at all. A.F. Decl. ¶ 17 (ECF No. 19-2); K.R.H. Decl. ¶ 11 (ECF No. 19-11). Most detainees have not been provided with face masks; some do not have access to soap and must wash their hands with shampoo. M.M.S.-M. Decl. ¶ 23 (ECF No. 19-3); L.M. Decl. ¶ 51 (ECF No. 19-8); A.F. Decl. ¶ 14 (ECF No. 19-2). Detainees exhibiting symptoms such as coughing or fever on occasion are not given medical examinations or isolated from the rest of the population. A.F. Decl. ¶ 16 (ECF No. 19-2); M.J.J. Decl. ¶ 12 (ECF No. 19-9); K.R.H. Decl. ¶ 12 (ECF No. 19-11).

Detention centers have become death traps for transgender detainees. Gorton Decl. ¶¶ 12-13 (ECF No. 4-15). Transgender detainees are particularly susceptible to COVID-19 infection and, if they do become infected, are more likely to become seriously ill or die. Transgender people in ICE custody are far more likely to be the victims of abuse and sexual assault than non-LGBT detainees – this kind of unwanted close physical contact makes them more vulnerable to infection of COVID-19. Gorton Decl. ¶ 11 (ECF No. 4-15). Further, transgender detainees have not only suffered the trauma of being discriminated against, persecuted, tortured and raped because of their gender identity, but they also live with the constant stress of continuing discrimination, harassment and the risk of sexual assault. Gorton Decl. ¶ 10 (ECF No. 4-15); Franco-Paredes Decl. ¶ 17 (ECF No. 4-16). Such stress lowers their immune systems' response to infection, meaning transgender detainees are more likely to

become infected, become sick, and die from COVID-19. Gorton Decl. ¶ 10 (ECF No. 4-15); Franco-Paredes Decl. ¶ 17 (ECF No. 4-16). Because transgender individuals who have been prescribed medically necessary hormone replacement therapy must interact frequently with medical staff they are further exposed to risk of infection. Gorton Decl. ¶ 11 (ECF No. 4-15). ICE reports that three transgender men in custody receive hormone injections while 51 transgender women in custody receive daily hormone pills. Lederman Decl. ¶ 20 (ECF No. 20-8). Even Respondents' medical expert concedes that transgender detainees as a group are more likely to have underlying medical conditions making them vulnerable, such as infection with HIV, diabetes and high blood pressure. Lederman Decl. ¶ 18 (ECF No. 20-8).

Several federal courts have recently certified or provisionally certified classes of civil immigration detainees in conjunction with ordering injunctive relief in the form of supervised release from detention. On April 8, 2020, in *Savino v. Souza*, the District of Massachusetts provisionally certified a class of all civil immigration detainees held at two detention centers in Massachusetts for their due process claim. No. 20-10617, 2020 U.S. Dist. LEXIS 61775 (D. Mass. Apr. 8, 2020). The Court recognized that “[t]hough there are indeed pertinent and meaningful distinctions among the various Detainees, there is a common question of unconstitutional overcrowding that binds the class together.” *Id.* at \*10. Then on April 20, 2020, in *Frailhat v. U.S. Immigration and Customs Enforcement*, the Central District of California certified two classes of people in civil immigration detention who have certain specified risk factors or disabilities that place them at heightened risk of severe illness and death upon contracting the COVID-19 virus. No. 5:19-cv-01546, 2020 U.S. Dist. LEXIS 72015 (C.D.

Cal. Apr. 20, 2020).<sup>2</sup> Although some named Petitioners have risk conditions which could place them in one of the two *Frailhat* subclasses, the subclasses identified in *Frailhat* only encompass a portion of the putative class here, and the simple reality is that even those transgender detainees with identified medical conditions such as HIV have inexplicably not been released. Rather, this action is brought on behalf putative class of transgender people in civil immigration detention who are at higher risk of contracting and suffering from COVID-19 because of their identification as transgender people and ICE has taken no action to protect them. This suit seeks to protect this especially vulnerable putative class from infection and death.

The conditions in ICE detention violate the putative class members' Fifth Amendment due process rights. Petitioners have requested that this Court issue an injunction mandating the release on parole or other supervised release of all transgender people in civil immigration detention so they may protect themselves against COVID-19. For purposes of the requested injunctive relief, Petitioners request that this Court provisionally certify a class of all transgender people in civil immigration detention who are held, or who will be held, by Respondents in any U.S. detention center or facility during the pendency of the COVID-19 pandemic.

## **II. PROPOSED CLASS DEFINITION**

All transgender people in civil immigration detention who are held, or who will be held, by Respondents in any U.S. detention center or facility during the pendency of the COVID-19 pandemic

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<sup>2</sup> ICE purports to have reviewed four of the named Petitioners in this case, L.M., M.J.J., D.B.M.U., and M.M.S.-M., for release under *Frailhat* but has denied each of their applications for release. TRO Opp. Br. at pp. 6-7 (ECF No. 20-1). ICE has not reviewed the cases of K.M. or K.S., who are both HIV positive. K.S. Decl. ¶ 9 (ECF No. 19-5); K.M. Decl. ¶ 10 (ECF No. 19-6). Respondents fail to provide any explanation as to why these detainees were not released or even considered for release, despite their underlying medical conditions warranting release.

### **III. PROPOSED CLASS REPRESENTATIVES**

The proposed class representatives are the ten named Petitioners currently being held in ICE custody as of the date of this filing. Petitioner C.G.B., f/k/a D.G.B., is a citizen of Mexico who has been detained at the Florence Detention Center (“Florence”) in Florence, Arizona, since January 2020. C.B.G. Decl. ¶¶ 1-3 (ECF No. 19-1). C.G.B., a transgender woman, is seeking asylum because she fears persecution in Mexico because of her transgender status. *Id.* C.G.B. was being held in a pod with approximately 64 other detainees when, on April 2, 2020, the newly arrived man in the bunk above her began coughing uncontrollably. *Id.* at ¶¶ 6-7. He was eventually seen by a doctor five days later, but was returned to the general population and the bunk above C.G.B. *Id.* C.G.B. has experienced COVID-19 symptoms since April 9, 2020. *Id.* at ¶ 8. She saw a doctor after she began vomiting, had a fever, had pain in her throat, head and bones, and began losing hair. *Id.* She had a COVID-19 test performed on April 9, 2020, but despite being told she would have results in three days, she was only told that her test resulted negative three weeks later on April 28, 2020 – after she had filed this suit. C.B.G. Second Decl. ¶ 4 (Exh. 1 to TRO Reply Br.).

Petitioner A.F., f/k/a O.E.R.F., is a citizen of Nicaragua who is detained at the La Palma Correctional Center (“La Palma”) in Eloy, Arizona. A.F. Decl. ¶¶ 1-3 (ECF No. 19-2). She has been in ICE custody since January 9, 2020. *Id.* A doctor at La Palma told A.F. that she is at greater risk for COVID-19 infection because she was born with only one kidney. *Id.* at ¶ 8. She is concerned because there is no way to practice social distancing at La Palma; for example, detainees have meals in groups of more than 100 people and cannot maintain a six-foot distance while waiting in line or eating. *Id.* at ¶ 12. She has not observed guards wearing face masks or gloves while interacting with detainees. *Id.* at ¶ 17.

Petitioner M.M.S-M., f/k/a A.H.S-M., is a citizen of El Salvador who is detained at the Winn Correctional Center (“Winn”) in Winnfield, La. M.M.S.-M. Decl. ¶¶ 1-6 (ECF No. 19-3). She has been in ICE custody for nearly a year. *Id.* M.M.S-M., a transgender woman, is seeking asylum because she fears persecution and death in El Salvador because of her transgender status. *Id.* Because of her fear and anxiety from being housed with 40 cisgender men, M.M.S-M. has been placed in segregation, which is exacerbating her mental health issues. *Id.* at ¶¶ 16-17. Nurses at Winn do not wear gloves or masks, and neither medical staff nor guards have provided M.M.S-M. with information about COVID-19. *Id.* at ¶ 21.

Petitioner K.S., f/k/a J.H.S., is a citizen of Jamaica who is detained at the Nevada Southern Detention Center (“Nevada Southern”) in Pahrump, Nevada. K.S. Decl. ¶¶ 1-6 (ECF No. 19-5). She has been in ICE custody since March 27, 2019. *Id.* K.S., a transgender woman, is seeking asylum because she has received death threats from her family and fears persecution in Jamaica because of her transgender status. *Id.* K.S., who is living with HIV, has difficulty ensuring that she receives her antiretroviral medication as prescribed. *Id.* at ¶¶ 9-12. Staff at Nevada Southern, including medical staff, do not always wear gloves and masks. *Id.* at ¶ 30.

Petitioner K.M., f/k/a G.M., is a citizen of Haiti who has been detained at Nevada Southern since March 27, 2019. K.M. Decl. ¶¶ 1-6 (ECF No. 19-6). K.M., a transgender woman, is seeking asylum because she fears persecution and violence in Haiti because of her gender identity. *Id.* Staff at the facility sometimes do not provide K.M., who is living with HIV, with her antiretroviral medication, causing her to miss doses. *Id.* at ¶¶ 10-14. She has observed other detainees in her pod showing possible COVID-19 symptoms such as coughing and fever; those detainees received medical care but returned to the general population. *Id.* at ¶ 29.

Petitioner L.M., f/k/a S.M., is a citizen of Jamaica who is detained at the Aurora Detention Center (“Aurora”) in Aurora, Colorado. L.M. Decl. ¶¶ 3-6 (ECF No. 19-8). She is seeking asylum because she has experienced beatings, death threats, discrimination and persecution in Jamaica because of her status as a transgender woman. *Id.* at ¶ 7. At Aurora, it took approximately 3-4 weeks for her to obtain an appointment with a doctor, who resumed her prescribed hormone treatments at one-quarter of her previous dose. *Id.* at ¶ 20.

Petitioner M.J.J., f/k/a O.H.J., is a citizen of Honduras who is detained at Aurora. M.J.J. Decl. ¶¶ 1-4 (ECF No. 19-9). She has been detained for about one month – originally at El Paso Processing Center (“El Paso”) in El Paso, Texas, then transferred to Florence, and eventually to Aurora. *Id.* M.J.J., a transgender woman, is seeking asylum because she fears persecution in Honduras because of her transgender status. *Id.* She is in a dorm with seven other transgender women, five of whom are HIV positive. *Id.* at ¶¶ 15, 27. She does not believe that anyone in the dorm has been tested for COVID-19. *Id.* at ¶ 29. She has not been given gloves or masks. *Id.* at ¶ 19. The guards at Aurora wear gloves but do not wear masks. *Id.* at ¶ 23.

Petitioner D.B.M.U., f/k/a W.E.M.U., is a citizen of Honduras who is detained at Aurora. D.B.M.U. Decl. ¶¶ 1-5 (ECF No. 19-10). She has been detained for more than a month – originally at El Paso, then transferred to Florence, and eventually to Aurora. *Id.* D.B.M.U., a transgender woman, is seeking asylum because she fears persecution in Honduras because of her transgender status. *Id.* She was detained in a room with six other transgender women. *Id.* at ¶ 17. She heard on the news that there was a confirmed case of COVID-19 at Aurora. *Id.* at ¶ 14. She does not have access to any disinfectants, gloves, or masks, and she has not seen anyone at Aurora being tested for COVID-19. *Id.* at ¶ 18.

Petitioner K.R.H., f/k/a W.D.R.H., is a citizen of Guatemala who has been detained in ICE custody at the La Palma since the beginning of April 2020. K.R.H, Decl. ¶¶ 1-3 (ECF No. 19-11). K.R.H., a transgender woman, is seeking asylum because she fears persecution based on her LGBTQ+ identity in Guatemala, where she experienced threats and a kidnapping attempt. *Id.* She suffers from tachycardia (an abnormally rapid heartbeat) and anxiety. *Id.* at ¶ 16. In early April, K.R.H. suffered a headache and fever, which are potential symptoms of COVID-19, but a nurse at La Palma did not see her until a week later, did not test her for the virus, and did not provide medication for her symptoms. *Id.* at ¶ 12. K.R.H. is housed in a 120-person pod and does not have sufficient space in the pod to stay more than six feet away from other people; the detainees congregate in groups of 20 to 30 to have meals and watch television, and the beds in the two-person cells do not provide a six-foot distance for sleeping. *Id.* at ¶ 14. Three people from her pod tested positive for COVID-19, days after exhibits COVID-19 symptoms, and were taken to a hospital offsite. K.R.H. Second Decl. ¶ 5 (Exh. 4 to TRO Reply Br.). K.R.H. was told she would be in quarantine until May 11, 2020 and fears she may have been infected. *Id.*

Petitioner M.R.P., f/k/a J.N.R.P., is a citizen of El Salvador who has been detained since June 11, 2019. M.R.P. Decl. ¶¶ 1-5 (ECF No. 19-13). Since February 2020, she has been detained at El Paso. *Id.* She was previously detained at Cibola and Otero Detention Center (“Otero”) in Chaparral, New Mexico. *Id.* M.R.P., a transgender woman, is seeking asylum because she fled persecution, torture and death threats in El Salvador because of her transgender status. *Id.* She has respiratory issues, hypothyroidism, Hepatitis A, abnormally high bilirubin, and abnormally high hemoglobin. *Id.* at ¶¶ 11-15. She sleeps in a barrack with nine cisgender men. *Id.* at ¶ 27. The beds in the barrack are only three or four feet apart, so social distancing is impossible. *Id.* at ¶ 34. She is afraid that she will become infected with COVID-19 and that she

will develop serious medical issues because people with respiratory issues are at a higher risk for serious symptoms if they contract COVID-19. *Id.* at ¶ 38.

#### **IV. ARGUMENT**

##### **A. Legal standard**

Federal Rule of Civil Procedure 23(a) establishes four requirements for certification of a class: (1) numerosity, that “the class is so numerous that joinder of all members is impracticable”; (2) commonality, that “there are questions of law or fact common to the class”; (3) typicality, that “the claims or defenses of the representative parties are typical of the claims or defenses of the class”; and (4) adequacy, that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). In addition to meeting these requirements under Rule 23(a), a putative class must also meet one of the requirements of Rule 23(b). Rule 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b). In other words, Rule 23(b)(2) requires that “a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

Petitioners here seek provisional class certification in connection with their request that the Court grant the requested preliminary injunction. “In granting such provisional certification, the Court must still satisfy itself that the requirements of Rule 23 have been met.” *Damus v. Nielsen*, 313 F. Supp. 3d 317, 329 (D.D.C. 2018). The Court’s “analysis is tempered, however, by the understanding that such certifications may be altered or amended before the decision on the merits.” *Id.* (internal quotation marks omitted).

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

**1. The proposed class is so numerous that joinder would be impractical.**

The proposed class satisfies the requirement that the class be “so numerous that joinder of all members is impractical.” Fed. R. Civ. P. 23(a)(1). To establish numerosity, “a party need not provide a precise number of class members as long as there is a reasonable basis to estimate it.” *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 206 (D.D.C. 2018) (Cooper J.). Courts in this Circuit have considered a class of “at least forty members to presumptively meet the requirement of numerosity.” *Id.* (citing *Barnes v. District of Columbia*, 242 F.R.D. 113, 121 (D.D.C. 2007)).

Here, ICE has attested that at least seventy transgender people are currently being held in civil detention. Lederman Decl. ¶ 20 (ECF No. 20-8). The proposed class thus easily satisfies the numerosity requirement. The impossibility of joinder here is compounded by the exigent circumstances of the current COVID-19 pandemic. The *Fraihat* court recognized: “It would be inconvenient and difficult, if not impossible, for detainees to obtain timely relief by filing conditions of confinement suits for each detention facility or unit in the country. Given the many obstacles to accessing counsel during the COVID-19 pandemic, the Court is concerned that many putative class members would not be able to proceed on their own[.]” 2020 U.S. Dist. LEXIS 72015, at \*53. So too here. The detention facilities have limited access to counsel by limiting visits to non-contact visits or only allowing in person visitation when specifically requested by counsel. Acosta Decl. ¶ 58 (ECF No. 20-2); Cantrell Decl. ¶ 28 (ECF No. 20-4); Ciliberti Decl. ¶ 30 (ECF No. 20-5); Davies Decl. ¶ 26 (ECF No. 20-6); Hodges Decl. ¶ 24 (ECF No. 20-7); Mros Decl. ¶ 13 (ECF No. 20-11). It would be difficult, if not impossible, for all transgender people in detention to obtain timely relief given the obstacles to access to counsel in the current pandemic. Proceeding by class is the most efficient means for them to obtain relief.

**2. The proposed class representatives present issues of fact and law in common with the class.**

The putative class satisfies the requirement of commonality. Commonality requires that the plaintiff class has “suffered the same injury.” *Wal-Mart Stores*, 564 U.S. at 350. The Supreme Court has explained that the putative class’s “claims must depend upon a common contention” that is “capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* This court found commonality was satisfied in *Damus v. Nielson* when it provisionally certified a class of asylum seekers who had been found to have credible fear but were detained by ICE after being denied parole. 313 F. Supp. 3d at 332. This case also satisfies the requirement of a single common question that is shared by all members of the proposed class. Here, that overarching question, among others, is whether ICE’s failure to protect transgender people in detention from the risks of contracting, suffering, and dying from the COVID-19 pandemic in detention renders class members’ confinement a punishment that violates their constitutional due process rights. All of the class members have been subjected to unsafe conditions of confinement and a determination that Respondents’ conduct is unconstitutional will “resolve an issue that is central to the validity” of each of the putative class members’ claims. *Wal-Mart Stores*, 563 U.S. at 350.

Transgender people in immigration detention report it is often impossible to practice social distancing, they have not been provided with protective equipment such as face masks, and detainees exhibiting symptoms are not given timely medical attention or isolated from the rest of the population. A.F. Decl. ¶¶ 12, 16 (ECF No. 19-2); M.M.S.-M. Decl. ¶ 23 (ECF No. 19-3); L.R.A.P. Decl. ¶ 8 (ECF No. 19-4); L.M. Decl. ¶ 51 (ECF No. 19-8); M.J.J. Decl. ¶ 12 (ECF No. 19-9); K.R.H. Decl. ¶ 12 (ECF No. 19-11). Transgender detainees are particularly

susceptible to COVID-19 infection and, if they do become infected, are more likely to become seriously ill or die because as a group they are more likely to have underlying medical conditions or suffer from harassment and assault making them vulnerable. Gorton Decl. ¶ 10 (ECF No. 4-15); Franco-Paredes Decl. ¶ 17 (ECF No. 4-16). Transgender people live with the constant stress of discrimination, harassment and the risk of sexual assault; such stress lowers their immune systems' response to infection, meaning they are more likely to become infected, become sick, and die from COVID-19. Gorton Decl. ¶ 10 (ECF No. 4-15); Franco-Paredes Decl. ¶ 17 (ECF No. 4-16). Because transgender individuals on medically necessary hormone replacement therapy must interact frequently with medical staff they are further exposed to risk of infection. Gorton Decl. ¶ 11 (ECF No. 4-15). Transgender people in ICE custody are far more likely to be the victims of abuse and sexual assault than non-LGBT detainees – this kind of unwanted close physical contact makes them more vulnerable to infection of COVID-19. Gorton Decl. ¶ 11 (ECF No. 4-15). In the face of these increased risks, ICE has taken no specific measures to protect transgender people in their custody from the risk of infection of COVID-19.

The fact that transgender people are detained at different detention centers and thus that certain details relating to their conditions of confinement vary among class members does not defeat class certification. In *Damus*, this court held that although “the asylum-seekers acknowledge that the circumstances of their detention may vary, [...] they have sufficiently identified a common cause and injury as a result of the current parole regime and ICE’s departure from the mandates of the Parole Directive.” 313 F. Supp. 3d at 332. The *Frailhat* court also addressed this argument, finding that “[d]espite Plaintiffs’ admitted differences, each putative class member finds herself in similar situation. Each class member claims entitlement to a minimally adequate national rescue response from ICE.” 2020 U.S. Dist. LEXIS 72015, at

\*56; *see also Savino*, 2020 U.S. Dist. LEXIS 61775, at \*21 (“the Court determines that the admittedly significant variation among the Detainees does not defeat commonality or typicality.”). The *Savino* court went on to hold that “[a]t bottom, a common question of law and fact in this case is whether the government must modify the conditions of confinement -- or, failing that, release a critical mass of Detainees -- such that social distancing will be possible and all those held in the facility will not face a constitutionally violative substantial risk of serious harm.” 2020 U.S. Dist. LEXIS 61775, at \*21 (internal quotation marks omitted). The common question of whether detaining transgender people in conditions that increase their risks of contracting the deadly COVID-19 virus is shared by all putative class members.

**3. The claims of the proposed class representatives are typical of those of the class.**

The claims of the ten named Petitioners are typical of the putative class of transgender people in civil immigration detention. Typicality assesses “whether the class representatives have suffered injuries in the same general fashion as absent class members.” *Garnett*, 301 F. Supp. 3d at 209 (internal citation omitted). The facts and claims of each named representative “need not be identical” to those of the absent class members. *Id.* Typicality simply requires “sufficient factual and legal similarity between the class representative’s claims and those of the class to ensure that the representative’s interests are in fact aligned with those of the absent class members.” *In re Navy Chaplaincy*, 306 F.R.D. 33, 53 (D.D.C. 2014) (internal citation omitted).

Here, the interests of the ten named Petitioners and the proposed class members are aligned. The proposed class representatives are members of the class, have suffered the same injury of increased risk of infection as proposed class members, and have been injured by Respondents’ actions and inaction that have led to conditions of confinement that threaten the health and safety of all class members. There is no risk that issues involving named Petitioners

individual claims will impede their litigation on behalf of the class. And, the fact that named Petitioners may be housed in different detention facilities from absent class members does not defeat typicality. The court in *Savino* found that “the admittedly significant variation among the Detainees does not defeat commonality or typicality.” 2020 U.S. Dist. LEXIS 61775, at \*21. In so holding, the court recognized “the troubling fact that even perfectly healthy detainees are seriously threatened by COVID-19. To be sure, the harm of a COVID-19 infection will generally be more serious for some petitioners than for others. Yet it cannot be denied that the virus is gravely dangerous to all of us.” *Id.* Because the named Petitioners are challenging the same practices and seeking the same injunctive relief on behalf of the entire putative class they can fairly and adequately pursue the interests of the absent class members.

**4. The proposed class representatives and class counsel can adequately represent the class.**

The ten named Petitioners and their undersigned counsel can adequately represent the interests of absent class members. The D.C. Circuit recognizes two criteria for determining adequacy: “(1) that the named plaintiffs must not have antagonistic or conflicting interests with the unnamed members of the class and (2) that the named representatives must appear able to vigorously prosecute the interests of the class through qualified counsel.” *Garnett*, 301 F. Supp. 3d at 210 (internal quotation marks omitted). Here, the interests of the ten named Petitioners will not conflict with the interests of any class members because those interests are aligned. The named Petitioners have alleged the same injuries, arising from the same conduct by ICE, and they seek the same injunctive and declaratory relief which will apply equally to benefit all class members.

The named Petitioners are represented by the national law firm Ballard Spahr, LLP as well as two public interest organization with significant experience in the relevant legal areas:

Rapid Defense Network, and the Transgender Law Center. Collectively, counsel have significant experience in the areas of immigration law, constitutional law, and class action litigation, and they have more than sufficient resources to vigorously prosecute this case. *See* Copeland Decl. attached as Exhibit 1, Egyes Decl. attached as Exhibit 2, John Decl. attached as Exhibit 3. For these reasons, counsel also satisfy the requirements of Rule 23(g) and should be appointed as class counsel.

**C. The Proposed Class Meets the Requirements of Rule 23(b).**

The putative class satisfies the requirement of Rule 23(b)(2) because ICE has acted or refused to act on grounds generally applicable to the class such that the requested injunctive relief would provide relief to each class member. A proposed class must meet one of the three requirements of Rule 23(b). Rule 23(b)(2), which Petitioners invoke here, requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In other words, Rule 23(b)(2) requires that "a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores*, 564 U.S. at 360.

Petitioners here seek declaratory and injunctive relief to address a systematic harm: ICE's failure to take any action to protect transgender people in civil detention from contracting the deadly COVID-19 virus. This failure "is an agency action generally applicable to all class members, and a determination of whether that practice is unlawful would therefore resolve all members' claims in one stroke." *Damus*, 313 F. Supp. 3d at 334-35 (finding a putative class of detained asylum seekers met the requirements of Rule 23(b)(2) where they sought "declaratory and injunctive relief requiring [ICE's] compliance with the Directive and mandating that the

Field Offices provide the individualized parole determinations and protections required by such agency guidance”).

In *Fraihat*, the court found that ICE’s failure to protect people in civil immigration detention with risk factors or disabilities that place them at heightened risk of severe illness and death upon contracting the COVID-19 virus applied to the class generally. 2020 U.S. Dist. LEXIS 72015, at \*63. Rule 23(b)(2) was satisfied where “[t]he putative class seeks declaratory and injunctive relief based on the asserted inadequacies of Defendants’ COVID-19 protocols and response.” *Id.* Moreover, the court found that “[f]or purposes of this inquiry, the fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2).” *Id.* (internal citation omitted).

Petitioners have requested that this Court enter an injunction that would provide relief to each member of the proposed class of transgender people in civil immigration detention, thus meeting the requirements of Rule 23(b).

## **V. CONCLUSION**

For all of the foregoing reasons, Petitioners respectfully request that the Court enter an Order (1) certifying a class consisting of all transgender people in civil immigration detention who are held, or who will be held, by Respondent in any U.S. detention center or facility during the pendency of the COVID-19 pandemic, (2) appointing the ten named Petitioners as class representatives; and (3) appointing the undersigned counsel as class counsel.

May 5, 2020

Respectfully submitted,

/s/ Matthew E. Kelley

Matthew E. Kelley (Bar No. 1018126)

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(D.D.C. Bar # NY0311)  
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*Attorneys for Petitioners*

## EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

C.G.B. et al.,

*Petitioners,*

V.

WOLF et al.,

*Respondents.*

Case No.: 1:20-cv-01072 (CRC)

**DECLARATION OF GREGORY P. COPELAND IN SUPPPORT OF MOTION FOR CLASS CERTIFICATION**

**DATED MAY 5, 2020**

I, Gregory P. Copeland, declare under penalty of perjury that the following is true and correct:

1. I am attorney licensed to practice in the states of New York, Connecticut, and New Jersey, and numerous federal courts. I was first admitted to practice in February 2010.

2. Since January of 2019, I have held the position of co-Legal Director of the organization now known as the Rapid Defense Network (RDN). RDN is a New York State incorporated nonprofit legal services organization specializing in federal habeas corpus litigation for non-citizens detained by immigration authorities facing removal from the United States. RDN has extensive experience litigating detention issues in impact litigation and habeas corpus litigation across the county.

3. Prior to my present position at RDN, I served as the Supervising Attorney of The Legal Aid Society of New York's (LAS) Federal Practice within the Immigration Law Unit. LAS is a non-profit legal aid provider based in New York City. Founded in 1876, it is the oldest and largest provider of legal aid in the United States. I was employed by LAS from June 1, 2017 to January 1, 2019.

4. I joined LAS from Debevoise & Plimpton LLP, where I was a litigation associate from October 2009 until May 2017, and a summer associate in 2008. Debevoise is a New York

City based law firm founded in 1931 with approximately 800 lawyers across nine offices across three continents. During my time at Debevoise, the firm was recognized by ALM's The American Lawyer as "2014 Litigation Department of the Year" and also placed No. 1 overall in The American Lawyer's "10-Year A-List" – a ranking of the law firms who have earned the highest cumulative score on the A-List since its inception in 2003.

5. While at Debevoise, I represented a broad coalition challenging the constitutionality of the State of Connecticut's public education funding laws as inadequate in failing to provide minimally sufficient educational opportunities and inequitable in not providing substantially similar educational opportunities for at risk students across the state's low-income districts. I led a litigation team – as the only attorney admitted in Connecticut and most senior associate – during the course of a six-month trial that involved testimony from more than 50 witnesses to a successful result at trial. I also worked on substantial state and federal civil class actions at Debevoise, on both the plaintiff side (involving claims related to mortgage backed securities) and on the defense side (coordinating efforts involving automotive personal injury class claims in connection to, and interaction with, Federal Multidistrict Litigation and criminal and civil investigations by several state and federal agencies in over 30 U.S. jurisdictions pending simultaneously). For most of the time I worked at Debevoise, I was the associate coordinator for pro bono immigration matters, advising and supervising junior colleagues.

6. I am a member of the state bars of New York, Connecticut, and New Jersey, as well as the U.S. District Courts for Connecticut, the District of Columbia, New Jersey, and the Southern, Eastern, and Western Districts of New York, and the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Ninth, Eleventh, and D.C. Circuits, and the U.S. Supreme Court. I am also a member of The American Immigration Lawyers Association, The Federal Bar

Association, and The Federal Bar Council. I frequently present on habeas corpus litigation before local and national bar associations, law school clinics, and private law firms.

7. In addition to myself, Sarah T. Gillman, who is my RDN co-Legal Director, is also representing Petitioners and the putative class in this matter. Sarah T. Gillman is an attorney licensed to practice in the State of New York, with nineteen years of legal experience. She was employed by LAS from 2001-2018. From 2007 until 2017, Sarah worked for LAS' Immigration Law Unit where she represented non-citizens who were detained and facing removal before the Executive Office of Immigration Review (EOIR) and the federal courts. During that time, she was held positions as a staff attorney and thereafter as a supervising attorney.

8. From 2012-2014, Sarah was an adjunct professor at the New York University School of Law's Immigrant Rights Clinic and Advanced Immigrant Rights Clinic. Since January of 2019, Sarah has held the position of Legal Director for the Rapid Defense Network. Sarah is admitted to practice before the U.S. District Courts for the Southern, Eastern and Western Districts of New York, and the District of Columbia; and the U.S. Courts of Appeals for the Second, Third, Fifth, Ninth, Eleventh and D.C. Circuits.

9. Rapid Defense Network has extensive experience in litigating complex cases involving immigration matters before the Federal Courts. *See Sean B. v. McAleenan*, 412 F. Supp. 3d 472 (D.N.J. 2019); *Joshua M. v. Barr*, Civil Action No. 3:19cv770, 2020 U.S. Dist. LEXIS 29492 (E.D. Va. Feb. 20, 2020); *E.O.H.C. v. AG United States*, No. 20-1163, 2020 U.S. App. LEXIS 14121 (3d Cir. Apr. 20, 2020); *Gayle v. Meade*, No. 20-21553-Civ, 2020 U.S. Dist. LEXIS 76040 (S.D. Fla. Apr. 30, 2020); *Campbell v. Dep't of Homeland Sec.*, No. 20-10354-GG, 2020 U.S. App. LEXIS 12648 (11th Cir. Apr. 20, 2020); *Vasquez v. Wolf*, No. 20-55142, 2020 U.S. App. LEXIS 5869 (9th Cir. Feb. 26, 2020); *Sillah v. Barr*, No. 19-CV-1747 (VEC),

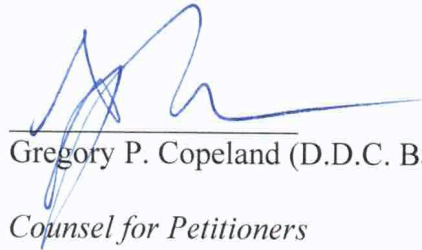
2019 U.S. Dist. LEXIS 48493 (S.D.N.Y. Mar. 14, 2019); *Emeli v. Edwards*, Civil Action No. 18-15029 (SRC), 2019 U.S. Dist. LEXIS 118585 (D.N.J. July 17, 2019).

10. During the time that Ms. Gillman and I were employed by The Legal Aid Society, we litigated a number of cases that involved complex cases involving immigration matters before the Federal Courts. *See Xiu Qing You v. Sessions*, No. 18-CV-5392 (GBD)(SN), 2019 U.S. Dist. LEXIS 130786 (S.D.N.Y. Aug. 2, 2019); *Villavicencio Calderon v. Sessions*, 330 F. Supp. 3d 944 (S.D.N.Y. 2018); *Ramatu Kiadii v. Decker*, 423 F. Supp. 3d 18 (S.D.N.Y. 2018); *Brissett v. Decker*, 324 F. Supp. 3d 444 (S.D.N.Y. 2018); *Maldonado v. Lloyd*, 2018 U.S. Dist. LEXIS 75902 (S.D.N.Y. May 4, 2018); *Hernandez v. Decker*, No. 18-CV-5026 (ALC), 2018 U.S. Dist. LEXIS 124613 (S.D.N.Y. July 25, 2018); *Lopez v. Sessions*, 2018 U.S. Dist. LEXIS 98712 (S.D.N.Y. June 12, 2018); *N.T.C. et al. v. United States Immigration & Customs Enft*, No. 18-cv-1626 DMS (JLB), 2018 U.S. Dist. LEXIS 229768 (S.D. Cal. Aug. 16, 2018); *E.S.R.B. et al. v. Sessions*, No. 18-6654, Dkt. No. 4 (S.D.N.Y. July 24, 2018); and *S.N.C. v. Sessions*, 2018 U.S. Dist. LEXIS 199761 (S.D.N.Y. Nov. 26, 2018).

11. Rapid Defense Network is currently counsel in three other multi-plaintiff/petitioner matters pending before the United States District Court for the District of Columbia, the District Court for the Southern District of Florida, and the United States Court of Appeals for the District of Columbia Circuit. *See O.M.G. et. al. v. Wolf et. al.*, No. 1:20-cv-00786-JEB (D.D.C. March 28, 2020); *Gayle v. Meade*, No. 20-21553-Civ, 2020 U.S. Dist. LEXIS 76040 (S.D. Fla. Apr. 30, 2020); *M.M.V. et. al. v. Barr et. al.*, No. 20-5106 (D.C. Cir. April 27, 2020).

I, Gregory P. Copeland, declare under penalty of perjury, that all of the foregoing statements are true and correct to the best of my knowledge.

Dated: Brooklyn, New York  
May 5, 2020



Gregory P. Copeland (D.D.C. Bar # NY0311)  
*Counsel for Petitioners*

## EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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C.G.B., *et al.*

Petitioners,

v.

CHAD WOLF, *et al.*

Respondents.

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**DECLARATION OF LYNLY S. EGYES  
IN SUPPORT OF PETITIONERS' MOTION FOR CLASS CERTIFICATION**

I, Lynly S. Egyes Esq., in support of Petitioners' Motion for Class Certification hereby certify under penalty of perjury as follows:

1. I am the Legal Director at Transgender Law Center and make this declaration in support of Transgender Law Center's application to be named as co-counsel for the proposed Class in the above-captioned action. This declaration is based on my personal knowledge and it true to the best of my knowledge and belief.

2. I received my undergraduate degree from Ithaca College in 2003 and graduated from Benjamin Cardozo School of Law in 2009.

3. I am admitted to practice law in the state of New York and the state of New Jersey, the United States District Court for the Colorado, and the Supreme Court of the United States. I have also been admitted to appear *pro hac vice* in specific cases by numerous other district courts throughout the country.

4. My principle area of practice is Transgender Rights. I have eleven years of legal experience working in the areas of immigration, civil rights, human rights, human trafficking,

LGBT rights.

5. Transgender Law Center has extensive experience representing transgender plaintiffs in matters including class actions and immigration matters. These include: *Whitaker v. Kenosha Unified School District* (E.D. Wis. 16-cv-943; 7th Cir. 16-3522), *Saunders-Velez v. Colorado Department of Corrections* (D. Colo. 17-cv-1654), *Mott v. Kansas Dept of Health and Environment* (Kan. Dist. Ct. 2016-cv-150), *In Re The Name Change of E.N.R.F.*, *In re: Yuen Mei Tsui*, *Raven v. Polis* (Colo. Dist. Ct. 2019CV34492).

6. Transgender Law Center and I are committed to vigorously representing the proposed Class and to working collaboratively and efficiently with other class counsel.

7. Transgender Law Center has no conflicts of interest that would prevent us from providing zealous representation to the named Petitioners and the proposed Class.

Dated: May 4, 2020

By:

A handwritten signature in black ink, appearing to read 'L. Egyes', written over a horizontal line.

Lynly S. Egyes

## EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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C.G.B., *et al.*

Petitioners,

v.

CHAD WOLF, *et al.*

Respondents.

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**DECLARATION OF LESLIE E. JOHN  
IN SUPPORT OF PETITIONERS' MOTION FOR CLASS CERTIFICATION**

I, Leslie E. John, Esq., in support of Petitioners' Motion for Class Certification, hereby declare under penalty of perjury as follows:

1. I am a partner in the Philadelphia office of Ballard Spahr LLP ("Ballard") and make this declaration in support of Ballard's application to be named as co-counsel for the proposed Class in the above-captioned action. This declaration is based on my personal knowledge and it true to the best of my knowledge and belief.

2. I received my undergraduate degree from University of California, Berkeley in 1984 and graduated from the University of California Berkeley School of Law in 1987.

3. I am admitted to practice law in the states of California and Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, the United States Court of Appeals for the Third Circuit, and before the U.S. Supreme Court. I have also been admitted to appear *pro hac vice* in specific cases by numerous other district courts throughout the country.

4. My principal area of practice focuses on complex civil litigation with an emphasis on antitrust and class action litigation. I have over thirty years of experience working on complex

legal issues. I am ranked in *Chambers USA* and am among *Benchmark Litigation's* Top 250 Women in Litigation nationwide.

5. Ballard associates Matthew Kelley, Elizabeth Weissert and Alexa Levy are also working with me on this matter.

6. Matthew Kelley is an associate in Ballard's Washington D.C. office. Mr. Kelley represents media companies, journalists, filmmakers, and content creators in a wide range of legal issues, including First Amendment litigation. Before beginning his legal career, Mr. Kelley was an investigative reporter for the Associated Press and USA Today. He received his undergraduate degree from Kent State University in 1991 and graduated from the George Washington University Law School in 2012. Mr. Kelley is admitted to practice in the state of Virginia and the District of Columbia as well as the United States District Court for the District of Columbia. He has also been admitted to appear *pro hac vice* in specific cases by numerous other district courts throughout the country.

7. Elizabeth Weissert is an associate in Ballard's Philadelphia office. Ms. Weissert practices complex civil litigation with an emphasis on antitrust litigation. She received her undergraduate degree from Smith College in 2013 and graduated from the University of Pennsylvania Law School in 2016. Ms. Weissert is admitted to practice in the State of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, and the United States Court of Appeals for the Third Circuit. She has also been admitted to appear *pro hac vice* in specific cases by numerous other district courts throughout the country.

8. Alexa Levy is an associate in Ballard's Philadelphia office. Ms. Levy practices commercial litigation. She received her undergraduate degree from the University of Pennsylvania in 2016 and graduated from the George Washington University Law School in

2019. Ms. Levy is admitted to practice in the state of Pennsylvania.

9. Lawyers at Ballard have extensive experience representing plaintiffs in immigration matters and class actions against detention centers. Over the past five years, Ballard attorneys have devoted more than 28,400 hours to representing individuals in pro bono immigration matters, including more than 900 hours on bond, parole, and other humanitarian release requests, and 3,500 hours providing legal support in immigration detention centers. Representative matters in which Ballard attorneys have represented plaintiffs in suits against detention centers include: *Tolton et al. v. Haddon et al.*, (D. Utah No. 4:20-cv-00003) (seeking injunction to prevent Defendants – state officials within the Utah Department of Corrections -- from depriving Plaintiffs of their right, as faithful adherents to Islam, to congregate for prayer, study, and religious ceremony); and *Vega v. Mullen et al.*, (E.D. Pa. No. 5:16-cv-04620) (seeking injunction to prevent enforcement of policy at Berks County jail prohibiting incoming mail with crayon or colored pencil markings, in violation of detained individuals' First and Fourteenth Amendment rights).


10. Ballard is a national law firm with more than 650 lawyers in 15 offices. Our litigators have experience in various types of litigation, including complex class actions.

11. Ballard and I are committed to vigorously representing the proposed Class and to working collaboratively and efficiently with other class counsel.

12. Ballard has no conflicts of interest that would prevent us from providing zealous representation to the named Petitioners and the proposed Class.

I, Leslie John, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: May 5, 2020  
Media, Pennsylvania

By:   
Leslie E. John

