WILLIAM S. FREEMAN (SBN 82002)
wfreeman@aclunc.org
SEAN RIORDAN (SBN 255752)
sriordan@aclunc.org
ANGÉLICA SALCEDA (SBN 296152)
asalceda@aclunc.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Attorneys for Petitioners-Plaintiffs
Additional Counsel Listed on Following Page

MANOHAR RAJU (SBN 193771)
Public Defender
MATT GONZALEZ (SBN 153486)
Chief Attorney
GENNA ELLIS BEIER (CA SBN 300505)
genna.beier@sfgov.org
EMILOU H. MACLEAN (CA SBN 319071)
emilou.maclean@sfgov.org
FRANCISCO UGARTE (CA SBN 241710)
francisco.ugarte@sfgov.org
OFFICE OF THE PUBLIC DEFENDER SAN FRANCISCO
555 Seventh Street
San Francisco, CA 94103
Direct: (415) 553-9319
Facsimile: (415) 553-9810

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS, BRENDA RUBI RUIZ TOVAR, LAWRENCE KURIA MWAURA, LUCIANO GONZALO MENDOZA JERONIMO, CORAIMA YARITZA SANCHEZ NUÑEZ, JAVIER ALFARO, DUNG TUAN DANG,

Petitioners-Plaintiffs,

v.

DAVID JENNINGS, Acting Director of the San Francisco Field Office of U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, Deputy Director and Senior Official Performing the Duties of the Director of the U.S. Immigration and Customs Enforcement; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; GEO GROUP, INC.; NATHAN ALLEN, Warden of Mesa Verde Detention Facility,

Respondents-Defendants.

CASE NO. 3:20-CV-02731-VC

REPLY IN SUPPORT OF PETITIONERS-PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

JUDGE VINCE CHHABRIA

BREE BERNWANGER* (NY SBN 5036397)
bbernwanger@lccrsf.org
TIFANEI RESSL-MOYER (SBN 319721)
tresslmoyer@lccrsf.org
HAYDEN RODARTE (SBN 329432)
hrodarte@lccrsf.org
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS OF
SAN FRANCISCO BAY AREA
131 Steuart St #400
San Francisco, CA 94105
Telephone: (415) 814-7631

JUDAH LAKIN (SBN 307740)
judah@lakinwille.com
AMALIA WILLE (SBN 293342)
amalia@lakinwille.com
LAKIN & WILLE LLP
1939 Harrison Street, Suite 420
Oakland, CA 94612
Telephone: (510) 379-9216
Facsimile: (510) 379-9219

JORDAN WELLS (SBN 326491)
jwells@aclusocal.org
STEPHANIE PADILLA (SBN 321568)
spadilla@aclusocal.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
Telephone: (213) 977-9500
Facsimile: (213) 977-5297

MARTIN S. SCHENKER (SBN 109828)
mschenker@cooley.com
COOLEY LLP
101 California Street, 5th Floor
San Francisco, CA 94111
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

TIMOTHY W. COOK (Mass. BBO# 688688)*
tcook@cooley.com
FRANCISCO M. UNGER (Mass. BBO# 698807)*
funger@cooley.com
COOLEY LLP
500 Boylston Street
Boston, MA 02116
Telephone: (617) 937-2300
Facsimile: (617) 937-2400

Attorneys for Petitioners-Plaintiffs
*Motion for Admission *Pro Hac Vice* Forthcoming

I. INTRODUCTION

The Court should grant provisional class certification so it can adjudicate the common question of whether Defendants' failure to implement safe social distancing for hundreds of similarly situated detainees at Yuba County Jail ("Yuba") and Mesa Verde ICE Processing Facility ("Mesa Verde") violates their Fifth Amendment rights.

Defendants do not dispute that COVID-19 poses a grave risk to all detainees. Instead, Defendants claim that Plaintiffs have failed to satisfy the elements of Rule 23 because, according to Defendants, Plaintiffs seek divergent and individualized relief: either being released or remaining in detention in a less crowded facility. (Opposition Brief, ECF 37 "Opp." at 26). But this framing is a straw man that mischaracterizes the common question at the heart of this case: whether Defendants' failure to implement safe social distancing violates *all* class members' Fifth Amendment rights. When viewed through the proper lens, Defendants' attack unravels. All class members have suffered the same injury—the substantial risk of contracting COVID-19 due to the lack of social distancing—and all class members would benefit from the same remedy—an order requiring social distancing at Yuba and Mesa Verde.

The proposed class meets the Rule 23 requirements and an injunction ordering adequate social distancing at Yuba and Mesa Verde benefits *all* class members, regardless of how the order is implemented or who is released first. The Court should provisionally certify the proposed class.[1]

II. THE PROPOSED CLASS MEETS RULE 23(A) REQUIREMENTS.[2]

A. The Proposed Class Meets the Commonality Requirement.

When assessing commonality, courts seek to determine whether Defendants' policies or practices "violate class members' rights in a systematic way." *Saravia v. Sessions*, 280 F.Supp.3d 1168, 1204 (N.D. Cal. 2017). For the reasons set forth more fully in Plaintiffs' TRO

[1] Defendants also contend the Court should not certify the proposed class because of the provisional prior class certification order in *Fraihat v. U.S. Immigration & Customs Enforcement*, No. 19-1546-JGB (C.D. Cal.). As explained in Plaintiffs' Opposition to Defendants' Motion to Stay, filed contemporaneously herewith, the provisional class in *Fraihat* is substantially different from the putative class here, and the issues in the two cases are substantially different.

[2] Defendants do not dispute that the proposed class is sufficiently numerous.

papers, all class members suffer the same deprivation of their constitutional rights because they are unable to achieve social distancing. *See, e.g.*, TRO Brief, ECF 5 at 5-8. Defendants' conduct "violate[s] class members' rights in a systematic way" by exposing all of them to the risk of COVID-19 due to the lack of social distancing at Yuba and Mesa Verde. *See Saravia*, 280 F.Supp.3d at 1204.

Defendants contend that differences in the health and age of class members, differences in facility conditions, the underlying reasons for class members' detainment, and the administration of class-wide relief defeat commonality. *See* Opp. at 21-22. Each of these arguments fails.

First, Defendants' focus on variations in class members' health conditions and age presupposes that only those with existing health conditions or elderly class members have a right to social distancing. Opp. at 22. But the undisputed expert testimony demonstrates that younger adults and people without known underlying conditions are also at risk of serious complications or death if they contract COVID-19. *See* Greifinger, ECF 5-2 ¶ 8. Accordingly, even a "significant variation among the Detainees does not defeat commonality or typicality" because "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.'" *Savino v. Souza*, 2020 WL 1703844, at *7 (D. Mass. Apr. 8, 2020) (citation omitted). As the Ninth Circuit acknowledged in *Parsons v. Ryan*, "although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide [] policy or practice that creates a substantial risk of serious harm." 754 F.3d 657, 678 (9th Cir. 2014); *see also Postawko v. Mo. Dep't of Corrections*, 910 F.3d 1030, 1038-39 (8th Cir. 2018) ("Here the physical symptoms eventually suffered by each class member may vary, but the question asked by each class member is susceptible to common resolution.").

Second, Defendants erroneously suggest that commonality among these detained class

members does not exist because "the circumstances within each facility are not uniform." Opp. at 22. But variances between and within the facilities do not defeat class certification because each proposed subclass independently meets class certification requirements and, within each facility, all class members are deprived of minimally adequate social distancing. Courts have routinely found common issues of fact and law in classes comprised of detainees in such circumstances, including for those housed in different facilities. *Parsons*, 754 F.3d at 676 (finding commonality met where "policies and practices of . . . systematic application expose[d] all inmates in [ten state prison facilities] to a substantial risk of serious harm"); *Savino*, 2020 WL 1703844, at *7 (certifying class alleging unconstitutional conditions at two ICE facilities); *Rosas v. Baca*, 2012 WL 2061694, at *3 (C.D. Cal. 2012) (provisionally certifying class alleging unconstitutional deliberate indifference by staff at three interconnected jails).

Third, the underlying reason for each class members' detention has no bearing on the adjudication of their class-wide claims. *See* Opp. at 22-23. Indeed, "[t]he specific reason ***why*** each Petitioner and putative class member is being detained is immaterial, here. The issue before the Court is whether ***the manner*** of their detention—the conditions of confinement—violates their Fifth Amendment substantive due process rights." *Roman v. Wolf*, CV-20-768, ECF 52 at 4 (C.D. Cal. Apr. 23, 2020).[3] The Ninth Circuit has affirmed class certification of immigration detainees to address common constitutional violations, notwithstanding that class members were held under different statutory provisions. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) ("The nature of the particular statute authorizing the detention of individual class members will play some role in determining whether class members are entitled to relief, as well. Nonetheless, the constitutional issue at the heart of each class member's claim for relief is common.").

Fourth, Defendants conflate the common class-wide *violation*—whether Defendants' failure to provide social distancing violates class members' Fifth Amendment rights—with how the Court should administer *relief*. Defendants mistakenly argue that commonality is defeated

[3] Plaintiffs note that the preliminary injunction in *Roman* has been administratively stayed by the Ninth Circuit.

because "[s]ome class members will be released under plaintiff's proposed TRO, and many will not." Opp. at 22. Commonality exists when a class-wide proceeding has the capacity "to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (Opp. at 21). When, as here, "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members[,]" "commonality is satisfied[.]" *Rosas*, 2012 WL 2061694, at *3 (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)) (certifying class alleging constitutional violations stemming from Sherriff's deliberate indifference to violence against inmates at three jails).

Here, an order that Defendants enable adequate social distancing benefits all class members. Consider a small room housing three detainees: if adequate social distancing could be achieved with two detainees remaining in the room, releasing one detainee would remedy the constitutional violation for all three detainees.

Notably, Defendants do not contend that class members' constitutional *claims* are different; instead, they focus on which class members might receive prioritized review for relief. But Plaintiffs' proposed order is just that: a common-sense proposal for the Court to fashion class-wide relief requiring social distancing at Yuba and Mesa Verde to protect class members' common constitutional rights. While the Court may grant relief in a way that prioritizes certain detainees in its implementation of an injunction, as the court did in *Savino*, 2020 WL 1703844, at *8-9, the Court "has broad discretion to fashion injunctive relief." *Melendres v. Maricopa County*, 897 F.3d 1217, 1221 (9th Cir. 2018). The Court is free to impose any process that remedies Defendants' failure to implement social distancing at Yuba and Mesa Verde.

Defendants' cited cases are off-base. Unlike a case requiring an individualized showing that each consumer viewed a disputed advertisement to demonstrate the reliance prong of a consumer-protection claim, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (Opp. at 23), or a case requiring a showing that millions of independent employment decisions discriminated against every female employee in a national retailer on the basis of sex, *Wal-Mart*, 564 U.S. at 352 (Opp. at 22), this case presents a common question posed by similarly situated detainees that is amenable to a common answer.

B. The Proposed Class Meets the Typicality Requirement.

The proposed class also meets the typicality standard of Rule 23(a)(3). Here again, Defendants' attack focuses on a proposed *order*, rather than the nature of the class representatives' *claims*. Opp. at 24. If the Government's view were correct, no class action could ever be certified in any action challenging unconstitutional conditions such as prison overcrowding if the result was the release of only some class members. But the Supreme Court has approved the use of prison depopulation orders in class cases, even though the relief sought required the release of some but not all prisoners. *See, e.g., Brown v. Plata,* 563 U.S. 493, 502-03 (2011) (affirming class-wide injunction of court-mandated population limit to remedy constitutional violations caused by overcrowding). Courts have implicitly rejected Defendants' black-and-white logic. *See Pierce v. Cty. of Orange*, 526 F.3d 1190, 1196, 1207 (9th Cir. 2008) (describing injunctive relief, including jail population caps and affirming that "population caps may be an appropriate remedy when overcrowding rises to the level of constitutional violation"); *see also Duran v. Elrod,* 713 F.2d 292, 297 (7th Cir. 1983) (affirming district court order requiring release of certain pre-trial detainees to address overcrowding in class action on behalf of all pre-trial detainees); *Inmates of the Allegheny Cty. Jail v. Wecht*, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (reducing overcrowding "is within our power to correct the constitutional violations").

Indeed, Defendants' opposition contravenes controlling case law and this Court's decision recognizing the propriety of class litigation to establish constitutional processes for release from unlawful confinement, even if all individuals ultimately do not win release under the process established. *Rodriguez*, 591 F.3d at 1123-24 (finding common underlying constitutional claim to bond hearing process warranted certification); *Saravia*, 280 F.Supp.3d at 1204 (holding common underlying constitutional claim to release or bond hearing warranted certification).

Tellingly, Defendants do not cite any cases holding that claims like those asserted by the class representatives here are atypical of the absent class members. Instead, Defendants argue only that the ability of courts to make individualized determinations in habeas petitions brought

by individuals prevents class relief. *See, e.g., Sacal-Micha v. Longoria*, 2020 WL 1518861, at *6 (S.D. Tex. Mar. 27, 2020) (collecting cases); *see also* Opp. at 24-25 (same). But those cases have no bearing on whether these plaintiffs' claims are representative of the rest of the proposed class. If anything, different individual habeas outcomes weigh in favor of certifying the class. *See Rodriguez*, 591 F.3d at 1123 (certifying class because answering a common constitutional question would "render management of these claims more efficient for the courts" and "obviate[e] the severe practical concerns that would likely attend [class members] were they forced to proceed alone").[4]

At bottom, "Petitioners' claim and the claim of the putative class members are the same—a Fifth Amendment substantive due process claim—and the remedy sought is the same—a reduction in [Defendants'] detainee population." *Roman*, ECF 52, at 5. Defendants' efforts to unravel typicality by focusing on the proposed mechanism to order social distancing is misguided, and the Court should find that the proposed class meets the typicality requirement.

C. The Proposed Class Meets the Adequacy Requirement.

Courts deny challenges to adequacy that merely repeat arguments against commonality and typicality. *See Rodriguez*, 591 F.3d at 1125 (rejecting Defendants' "challenge [to] Petitioner's adequacy only by re-asserting their commonality and typicality arguments"). No conflict exists between proposed class representatives and absent class members. Defendants conjure a hypothetical conflict in which class representatives will urge their own release over absent class members, but that has no support in the record or reality. Indeed, Plaintiffs proposed a process that would afford discretion to the Court to determine who should be released.

Once again, Defendants attempt to reframe the mechanism of relief as a request for multiple injunctions. Opp. at 26. But the class seeks a single order requiring social distancing. Accordingly, the proposed class representatives adequately represent the class because all class members seek the same injunction and declaratory judgment, and all class members stand to benefit from an order requiring social distancing.

[4] Moreover, even if the Court were to accept Defendants' contention that inconsistent individual adjudications are inimical to (b)(2) class certification, the better result would be to certify the class under Rule 23(b)(1).

III. THE PROPOSED CLASS MEETS THE REQUIREMENT OF RULE 23(B).

As with their challenge under Rule 23(a), Defendants' argument under Rule 23(b)(2) targets the proposed mechanism for administering class-wide relief rather than the reality that requiring social distancing benefits all class members. Opp. at 21-22. Notably, Defendants have not cited a single case holding that a proposed process to address a class-wide constitutional violation destroys Rule 23(b)(2) certification. Indeed, while Plaintiffs do propose a workable process here, such a proposal is unnecessary: "Plaintiffs do not need to specify the precise injunctive relief they will ultimately seek at the class certification stage." *B.K. by next friend Tinsley v. Snyder*, 922 F. 3d 957, 972 (9th Cir. 2019). Defendants quibble with *who* should be released first. But even those who remain detained stand to benefit from less-crowded facilities.

It is noteworthy that despite taking issue with Plaintiffs' specific proposed order, Defendants do not contend that "crafting uniform injunctive relief will be impossible." *B.K.*, 922 F.3d at 973. In fact, they have done the opposite. If the Court finds preliminary relief appropriate, "Defendants propose that the Court order defendants to reduce the populations at MVDF and YCJ to numbers that permit social distancing. Defendants would then determine which class members would be released and provid[e] weekly updates to the Court regarding the class members released and the current populations at MVDF and YCJ." Opp. at 29. Defendants' own proposal demonstrates that final injunctive relief or declaratory relief is viable on a class-wide basis. *See* Rule 23(b)(2).

A "preliminary injunction [that] clarifies how the federal government must treat those people [in detention,]" meets the requirements of Rule 23(b)(2) because it "can protect all class members' . . . rights . . .. " *Saravia*, 280 F.Supp.3d at 1205. Consistent with that principle, courts around the country have provisionally certified classes of detainees alleging violation of their Fifth Amendment rights because of ICE's failure to provide social distancing at other ICE facilities. *See Savino*, 2020 WL 1703844, at *7 (certifying class of immigrant detainees alleging Fifth Amendment violations because of risk of contracting COVID-19 at ICE facility); *Roman*, ECF-52, at 6-7 (C.D. Cal. Apr. 23, 2020) (same); *also Wilson v. Williams*, 2020 WL 1940882, at *8 (N.D. Ohio Apr. 22, 2020) (certifying subclass of medically vulnerable inmates seeking

habeas relief because of risk of contracting COVID-19 at detention facility). This case should be no exception. The proposed class satisfies Rule 23(b)(2).

IV. CONCLUSION.

For the reasons stated in the opening brief and above, this Court should provisionally certify the proposed class and subclasses.

Dated: April 27, 2020

Respectfully submitted,

/s/ William S. Freeman
William S. Freeman
Sean Riordan
Angélica Salceda
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

Bree Bernwanger
Tifanei Ressl-Moyer
Hayden Rodarte
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF SAN FRANCISCO BAY AREA

Judah Lakin
Amalia Wille
LAKIN & WILLE LLP

Jordan Wells
Stephanie Padilla
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA

Manohar Raju
Public Defender
Matt Gonzalez
Chief Attorney
Francisco Ugarte
Genna Ellis Beier
Emilou H. MacLean
OFFICE OF THE PUBLIC DEFENDER SAN FRANCISCO

Martin S. Schenker
Timothy W. Cook
Francisco M. Unger
COOLEY LLP

Attorneys for Petitioners-Plaintiffs