IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.G.B. et al., Petitioners, v. CHAD WOLF, Acting Secretary U.S. Department of Homeland Security et al., Respondents.	)	Civil Action No. 20-01072 (CRC)

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONERS' MOTION FOR CLASS CERTIFICATION

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Petitioners, transgender immigration detainees, brought suit alleging the conditions of their confinement place them at "grave risk" of contracting and falling seriously ill from COVID-19. Mem. In Support of Mot. for Class Certification ("Motion") at 1, ECF No. 21-1. They contend that these conditions violate their due process rights, as well as the rights of all transgender detainees, and seek an injunction ordering the release of all transgender detainees. *Id*. at 5. To obtain such relief, Petitioners request certification of a class of "[a]ll 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." *Id.* at 1.

It is an extraordinary request. It is extraordinary on its face, as the scope includes not just detainees currently held, but also detainees to be held in the future, includes detainees in any detention facility across the country, and would last "during the pendency of the COVID-19 pandemic." It is extraordinary because any detainee's risk from COVID-19 is inherently uncommon, requiring an individualized examination of each detainee's health, the conditions of that detainee's confinement, and whether the requested relief is actually more protective of COVID-19 risks. Finally, Petitioner's request is extraordinary because it asks this Court to release people from detention regardless of the legal basis for detention, which varies by detainee and is thus another uncommon fact that requires an individualized assessment. Accordingly, Petitioners have not shown and cannot show that the proposed class possesses the "commonality" required under Federal Rule of Civil Procedure ("Rule") 23(a)(2) and 23(b)(2). Furthermore, by tethering all transgender detainees to Petitioners' case, certifying a class would deprive other transgender detainees – including some who might otherwise request expedited or other distinctive treatment – of seeking their own relief. This creates a fundamental class

conflict that undermines the "adequacy" of Petitioners' representation as required by Rule 23(a)(4).

Accordingly, Respondents request that the Court deny Petitioners' misguided motion for class certification.

FACTUAL BACKGROUND

A. Proposed Class Representatives

The proposed class representatives are ten transgender ICE detainees, most of whom are young and are not otherwise at higher risk for severe illness from COVID-19 according to the CDC. [1] Only two of the ten, for instance, have medical conditions that the CDC classifies as medical conditions that might place one at higher risk for severe illness from a COVID-19 infection. *Id*. K.M. is a 37-year-old citizen of Haiti who is HIV positive. K.M. Decl. ¶¶ 1, 8 (ECF No. 19-6); Cantrell Decl. ¶ 46. Similarly, K.S. is a 34-year-old citizen of Jamaica who is HIV positive. K.S. Decl. ¶¶ 1, 9 (ECF No. 19-5); Cantrell Decl. ¶ 45. Both, however, are detained pursuant to "mandatory detention" statutes. K.M. is detained under 8 U.S.C. § 1226(c), which requires that the Government detain deportable aliens convicted of certain crimes. Cantrell Decl. ¶ 44. K.S. is detained under 8 U.S.C. § 1231(a)(2), which requires that the Government detain aliens during their removal period. *Id*. ¶ 40.

Four Petitioners allege that they have medical conditions that are among those the CDC considers as placing them at higher COVID-19 risk. M.R.P. is a 22-year-old citizen of El Salvador who alleges having been diagnosed with Hepatitis A, high hemoglobin count, and indications of hyperthyroidism. M.R.P. Decl. ¶¶ 1, 8-17 (ECF No. 19-13); Acosta Decl. ¶ 72. K.R.H. is a 26-

[1] CDC, *Groups at Higher Risk for Severe Illness*, at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited May 11, 2020).

year-old citizen of Guatemala who alleges to have had asthma as a child and to have tachycardia (rapid heartbeat) now. K.R.H. Decl. ¶¶ 1, 16 (ECF No. 19-11); Ciliberti Decl. ¶ 41. A.F. is a 25-year-old citizen of Nicaragua with no documented medical conditions, but alleges to have one kidney. A.F. Decl. ¶¶ 1, 8 (ECF No. 19-2); Ciliberti Decl. ¶ 39.

The fourth of those petitioners is C.G.B., a 31-year-old citizen of Mexico, who alleges that she tested negative for COVID-19, but had "coronavirus-like symptoms" and was treated by Florence Detention Center as a "presumptive positive."[2] C.G.B. Decl. ¶ 8; Malakhova Decl. ¶ 30. C.G.B. has no medical conditions that would place at a risk of severe illness from COVID-19. C.G.B. Decl. ¶¶ 1 (ECF No. 19-1); Malakhova Decl. ¶ 29. To the contrary, in fact, C.G.B. may have a *lower* COVID-19 health risk if she had contracted and recovered from a COVID-19 infection. *See*, NIH Director's Blog, *Study Finds Nearly Everyone Who Recovers From COVID-19 Makes Coronavirus Antibodies*, at https://directorsblog.nih.gov/2020/05/07/study-finds-nearly-everyone-who-recovers-from-covid-19-makes-coronavirus-antibodies/ (last visited May 8, 2020) ("Although more follow-up work is needed to determine just how protective these antibodies are and for how long, these findings suggest that the immune systems of people who survive COVID-19 have been primed to recognize SARS-CoV-2 and possibly thwart a second infection.").

The remaining four Petitioners[3] lack a documented physical medical condition. M.J.J. is a 22-year-old citizen of Honduras with no documented medical conditions. M.J.J. Decl. ¶¶ 1, 6-11

[2] Mayo Clinic News Network, *False-negative COVID-19 test results may lead to false sense of security*, at https://newsnetwork.mayoclinic.org/discussion/false-negative-covid-19-test-results-may-lead-to-false-sense-of-security/.

[3] Although there were 13 named Petitioners at the beginning of this lawsuit (*see* ECF No. 3 at 4–10), ICE has released 3 of them, and as Petitioners conceded at the May 6, 2020 hearing, the released petitioners' claims are now moot.

(ECF No. 19-9); Davies Decl. ¶ 60. D.B.M.U. is a 19-year-old citizen of Honduras with no documented medical conditions. D.B.M.U. Decl. ¶¶ 1, 6-11 (ECF No. 19-10); Davies Decl. ¶ 76. M.M.S.M. is a 22-year-old citizen of El Salvador with no documented physical medical conditions M.M.S.M. Decl. ¶¶ 1, 9-17 (ECF No. 19-3); Davies Decl. ¶ 96. Finally, L.M. is a 23-year-old citizen of Jamaica who admits her "physical health is fine" and "do[es] not have any physical health conditions that [she] came into the U.S. with." L.M. Decl. ¶¶ 3, 12-14 (ECF No. 19-8); Davies Decl. ¶ 43.

B. Relevant Detention Facilities

The ten proposed class representatives are housed in five detention facilities. When the suit was filed, the then thirteen named Petitioners were housed at eight detention facilities. The five facilities are Aurora Contract Detention Facility in Aurora, CO, housing L.M., M.J.J., D.B.M.U., and M.M.S.M.[4]; El Paso Processing Center in EL Paso, TX, housing M.R.P.; Florence Detention Center in Florence, AZ, housing C.G.B.; the La Palma Correctional Center in Eloy, AZ, housing A.F. and K.R.H.; Nevada Southern Detention Center, in Pahrump, NV, housing K.M. and K.S. Mot. at 9.

LEGAL STANDARD

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, "Plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John*

[4] The Motion states that M.M.S.M. is detained at Winn Correctional Center. Mot. at 7. But that has not been true since April 24, 2020. Hodges Decl. ¶ 34.

Fund, Inc., 134 S. Ct. 2398, 2412 (2014). A courts may certify a class only if plaintiffs present "evidentiary proof" sufficient to withstand a "rigorous analysis" of Rule 23's requirements. *Behrend,* 569 U.S. at 33.

Under this standard, a party seeking certification of a proposed class bears the burden of demonstrating that the required elements of Rule 23(a) exist: (1) the proposed class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the named plaintiffs are typical of the claims or defenses of the class ("typicality"); and (4) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation"). In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *See, e.g.*, *Hartman v. Duffey*, 19 F.3d 1459, 1468 (D.C. Cir. 1994). In this case, Plaintiffs seek certification under Rule 23(b)(2), which permits class certification where "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). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 [2009]).

ARGUMENT

I. The Court Lacks Jurisdiction To Certify An Injunctive Class

Both in their briefing and at oral argument, Petitioners left no doubt that they effectively seek only one remedy: immediate, blanket release of all transgender detainees. The option of seeking the Court's assistance in implementing changes at detention facilities to protect Petitioners from COVID-19 during their detention seems to have fallen by the wayside. To grant Petitioners their requested relief, however, the Court would have to enjoin or restrain the normal operations of the various detention statutes. And 8 U.S.C. § 1252(f)(1) expressly prohibits any court from doing so on a classwide basis.

"Regardless of the nature of the action or claim… no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221–1232], other than with respect to the application of such provisions to an individual alien against whom proceedings … have been initiated." 8 U.S.C. § 1252(f)(1). In the eyes of the Supreme Court, this provision is a bar on "classwide injunctive relief against the operation of §§ 1221–1231" with a carve out that applies to "individual cases." *Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999). The Supreme Court in *Jennings v. Rodriguez*, 138 S.Ct. 830, 847 (2018), indicated that § 1252(f)(1) would apply to constitutional claims like those raised by Petitioners, because they seek to enjoin the ordinary application of the detention statutes as unconstitutional. *See id.* 851. Lest there be any doubt, Congress entitled this provision "[l]imit on injunctive relief," and it unquestionably prohibits class-based injunctions while preserving individual access to a habeas writ and all forms of equitable relief. *See also Hamama v. Adducci*, 912 F.3d 869, 878–79 (6th Cir. 2018) ("Nevertheless, we find that 8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief for the

detention-based claims. In our view, *Reno* [525 U.S. 471] unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the detention-based claims."); *Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016) (instructing district court to "reexamine its position on the inapplicability of § 1252(f)(1) – which expressly provides a '[l]imit on injunctive relief' in the context of [§1226(c)]").

Here, if the Court were to grant Petitioners' request for blanket release of all transgender detainees and for a prohibition on future detention of transgender detainees during COVID-19, it would inarguably "enjoin or restrain the operation of" 8 U.S.C. §§ 1225; 1226; 1231, which are statutes that would likely apply to absent transgender putative class members just as they apply to petitioners. To order all transgender detainees released notwithstanding the statutory provisions mandating detainment would clearly "enjoin or restrain" their operation—which § 1252(f)(1) expressly forbids. *Siddiqui et al v. ICE*, No. 20-cv-793 R&R (NEB/ECW) (D. Minn. Apr. 28, 2020 42–43) ("However, the Court does agree with Federal Respondent that the Court does not have jurisdiction to grant class-wide injunctive relief as 8 U.S.C. § 1252(f)(1) unambiguously precludes this Court from granting class-wide injunctive relief that would effectively restrain operation of §§ 1221-31.… Therefore, while section 1252(f)(1) does not preclude individual claims, which the present motion addresses, it bars injunctive relief on behalf of a class.") (citing *Jennings*, 138 S. Ct. at 851).[5]

[5] Section 1252(f)(1) does not explicitly bar classwide declaratory relief (although it does bar anything that would "restrain the operation" of the detention statutes) but that is little solace to Petitioners because they "filed this action and requested emergency *injunctive* relief on behalf of" a putative class. Mot. at 1 (emphasis added).

Accordingly, if the Court determines that Petitioners' continued detention violates the Due Process Clause or the Administrative Procedure Act, it must grant relief, if at all, on an individual basis. The Court lacks jurisdiction to grant *classwide* injunctive relief.

II. The Proposed Class Does Not Satisfy Rule 23's Requirements

A. The proposed class lacks the commonality required under Rule 23(a)(2) and 23(b)(2)

The Supreme Court has repeatedly held that "[i]t is not the raising of common 'questions'— even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart*, 564 U.S. at 350. The commonality requirement is uniquely rigorous when applied to a class—like the proposed class here—seeking certification under Rule 23(b)(2). For certification under Rule 23(b)(2), plaintiffs must show that "relief is available to the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* at 360. Accordingly, Petitioners have the burden of demonstrating that factual or legal differences among putative class members are unlikely to bear on one's entitlement to relief. *See id.*

To clarify the determination before the Court, if the factual differences have the likelihood of changing the outcome of the legal issue, then class certification is not appropriate. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *Wal-Mart*, 564 U.S. at 350-51, 360. Satisfaction of Rule 23(a)(2) for a class under Rule (b)(2), therefore, requires a common legal problem "of such a nature that it 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*." *Wal-Mart*, 564 U.S. at 350 (emphasis added).

Petitioners assert that they meet the commonality requirement because all members of the proposed class share a single common question, "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." Mot. at 12, 16. But "'[a]ny competently crafted class complaint literally raises common 'questions.'" *Wal-Mart*, 564 U.S. at 349 (citing Nagareda, 84 N.Y.U. L. REV. 97, 131–32). Petitioners' purported question does not provide any more indication of commonality than the questions raised in *Wal-Mart*: "For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?" *Id*.

Petitioners' claims allege COVID-19 health risks resulting from the conditions of their confinement. Resolution of these claims turn on consideration of factual and legal circumstances that are not shared by the class as a whole. Petitioners' allegations that "they are unable to practice social distancing;" that they are "unable" to "take other precautions to contain the spread of the virus;" and that ICE detention facilities have not "followed even the minimal COVID-19 response requirements that ICE itself sets forth" *necessarily* raise questions with answers that vary based on the conditions each putative class member faces at each individual detention facility. TRO Mot. at 10, 29. Likewise, Petitioners' allegation that the putative class members are being "put at unreasonable and unconstitutional risk of infection, disease and death" during this pandemic requires an individualized analysis of each specific circumstance, most notably their medical history. *See, e.g.*, Pet. ¶ 1. Similarly, the Court cannot render Petitioners' primary requested relief—an injunction ordering the release of all transgender detainees—classwide

because of the individual differences in the statutory bases of their detention and in the living arrangements should they be released.

Petitioners' proposed class not only fails the Rule 23 commonality inquiry under the class certification principles articulated by the Supreme Court, but it is also inconsistent with a proper due-process analysis. Indeed, the Supreme Court recently reiterated in *Jennings* that a class action may not be the proper vehicle to resolve such due process claims because due process "calls for such protections as the particular situation demands." 138 S. Ct. at 852 (remanding to the Court of Appeals to consider this question) (internal quotation and citations omitted); *see also, Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). Here, whether any transgender class member's detention amounts to punishment or is unconstitutionally excessive in relation to legitimate government interests is a function of each individual's COVID-19 risk, which itself turns on each putative class member's medical condition and that member's conditions of confinement. Where commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" the facts of this case in relation to the proposed class makes commonality unattainable. *Wal-Mart*, 564 U.S. at 349-50; *see also Buleishvili v. Hoover*, Civ. A. No. 20-0607, 2020 WL 1911507, at *12 (M.D. Pa. Apr. 20, 2020) (explaining that "relief in these cases must be individualized" and articulating factors courts should consider: (1) the petitioner's condition; (2) the detention space itself; and (3) the facility's efforts to prevent or mitigate detainee exposure to the virus, and (4) the initial basis and continued justification for the petitioner's detention).[6]

[6] Petitioners' reliance on *Savino v. Souza*, 2020 WL 1703844, (D. Mass. Apr. 8, 2020) provides little support for their nationwide class. There, the proposed class covered two local facilities within the District of Massachusetts.

1. Putative class members' medical conditions are not common

There is no dispute that an individual's COVID-19 risk is a function of one's age and underlying health. The CDC has concluded that people who are above the age of 65 or who have one of a discrete set of underlying health conditions are at a higher risk for severe illness from COVID-19. *See* note 1, *supra*. In this case, only two of the ten Petitioners have a health condition that the CDC considers would place them at higher risk. *See* page 2, *supra*.

Petitioners implicitly acknowledge that COVID-19 risk is not the same for all transgender persons, because if all transgender persons had the same risk, then there would have been no need for Petitioners' recitation of their individual medical histories in their declarations or their proffered experts asserting that a greater share of transgender persons have certain underlying health conditions than cisgender persons. *See* Gorton Decl 1 ¶ 10.A–E (ECF No. 4-15) (explaining transgender people "as a group" have higher rates of various risk factors).

Petitioners attempt to sidestep the lack of commonality on medical conditions by emphasizing other aspects of their identity as transgender individuals. [7] Those other aspects, however, do not increase the risk associated with COVID-19, which is, after all, the purported cause that underlies this action. Petitioners argue that "[t]ransgender detainees are particularly susceptible to COVID-19 infection and, if they do become infected, are more likely to become

[7] Notably, "transgender" is a broad term encompassing a diverse group of individuals. According to the CDC, "Transgender is an umbrella term for persons whose gender identity or expression (masculine, feminine, other) is different from their sex (male, female) at birth." https://www.cdc.gov/lgbthealth/transgender.htm (last visited May 8, 2020). Thus, even determining whether an alien fits within this group requires an individualized analysis. What is more, the nature of this group may create the need for even further levels of individual review—an injunction prohibiting ICE from detaining any transgender person could prompt unscrupulous individuals to falsely claim to be a member of this group simply to avail themselves of this extraordinary relief.

seriously ill or die." Mot. at 3. Putting aside the statistical likelihood of transgender persons having underlying health conditions placing them at greater risk, Respondent's evidence rebuts Petitioners' contention, and Plaintiffs' evidence fails to support it.

Captain Edith Lederman, M.D., M.P.H. is a physician licensed to practice medicine in the state of California, a specialist in Infectious Disease, and ICE Health Service Corps's ("IHSC") subject matter expert for transgender care. She stated that the CDC guidelines do not identify being a transgender person as a risk factor for COVID-19, and the CDC has not identified transgender individuals as being inherently at higher risk for severe illness due to COVID-19. Lederman Decl. ¶¶ 11, 13 (ECF No. 20-8). Further, she explained that current scientific research does not indicate that transgendered individuals are inherently at greater risk than any other group or the general population for contracting COVID-19 or suffering an adverse outcome from COVID-19. *Id*. ¶ 17. And she stated that there are no known underlying immunocompromising issues related to being transgender which would place transgender individuals at higher risk for COVID-19. *Id*. On the other hand, Dr. Nick Gorton opines on behalf of Petitioners that transgender persons suffer "minority stress" and have higher rates of mental illness, but he offers no scientific evidence that either condition (neither of which is exclusive to the transgender community) makes a person more at risk of COVID-19 infection or illness.[8] Gorton Decl. ¶ 10 (ECF No. 4-15).

[8] None of Petitioners' other experts establishes otherwise. Petitioners claim that transgender women on hormone replacement therapy are at a higher risk of hypercoagulability (an increased tendency for potentially fatal blood clots), which they also claim is a complication from COVID-19. ECF No. 22 at 13. But current CDC guidelines do not identify hypercoagulable states (whether congenital or acquired) as an underlying risk factor for worse outcomes in connection with COVID-19 infection, even though there are reports of thromboembolic phenomena, such as the formation of a blood clot, associated with COVID-19 infection. Lederman Supp Decl ¶¶ 2,4. And the CDC does not list any medication class as making a patient more vulnerable to COVID-19, except immunosuppressants. Lederman Supp Decl ¶ 5. Further, not all transwomen take

Plaintiffs' allegation that transgender persons are more likely to be the victims of sexual assault than non-LGBT detainees and, thus, more vulnerable to COVID-19 infection is similarly attenuated.[9] Significantly, none of the original 13 Petitioners who submitted declarations in this case alleges that she has been physically or sexually assaulted while in ICE detention, much less by an individual actively suffering from COVID-19. It is also speculative that a detainee suffering from COVID-19 would assault a transgender detainee or that an asymptomatic COVID-19 positive detainee would ignore the social distancing education and risk contracting COVID-19 by assaulting a potentially asymptomatic COVID-19 positive transgender detainee. *See United Farm Workers v. Chao*, 593 F. Supp. 2d 166, 171 (D.D.C. 2009) ("speculative injuries" insufficient to show irreparable harm); ECF No. 20-1 at 14 (citing cases).

In support of their TRO motion, Petitioners raise the scientifically untethered assertion that "health risks posed by COVID-19 to transgender detainees . . . do not turn on facts unique to each Petitioner, beyond their having identity characteristics that make them more vulnerable to the virus." TRO Reply at 25. Petitioners cited as support *Ferreyra v. Decker*, Civ. A. No. 20-03170, 2020 WL 1989417, at *2 (S.D.N.Y. Apr. 27, 2020), even though the court actually stated:

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hormone therapy or seek to take hormone therapy, and Estrogen (the component of hormone therapy that potentially increases the risk of hypercoagulability for some transwomen) is not a component of hormone therapy for transmen. Lederman Decl 2 ¶ 3.

[9] It seems Dr. Gorton overstates the likelihood of assault on transgender ICE detainees in myriad ways. Putting aside the fact that the three reports Dr. Gorton references in ¶ 11 all address men's correctional facilities and prisons—not civil immigration detention facilities, the "97 times more likely to be sexually victimized" number includes lesbian, gay, and bisexual detainees—in addition to transgender detainees. Plus, the article Dr. Gorton cites for this "97 times more likely" statistic concedes that it "assum[es] each report of sexual violence is substantiated and involves a separate victim"—two major assumptions. *See* Sharita Gruberg *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse* Center for American Progress (2018) https://www.americanprogress.org/issues/lgbtq-rights/news/2018/05/30/451294/ices-rejectionrules-placing-lgbt-immigrants-severe-risk-sexual-abuse/ (last visited May 8, 2020).

"Here, the health risks posed by COVID-19 and the constitutional claims presented do not turn on facts unique to each Petitioner *beyond their having preexisting conditions that make them vulnerable to the virus*." *Id*. at 4. (emphasis added). Thus, that court *did* consider the individual medical circumstances. *Id*. at 2–3, 5. Further, *Ferreyra* was a multi-party habeas petition, rather a nationwide class action, as Petitioners proffer before this Court. *Id*. at 5. As noted, *supra*, asserting a nationwide class presents numerous obstacles that were simply not present in *Ferreyra*.

Petitioners also rely on *Barbecho v. Decker*, Civ. A. No. 20-2821, 2020 WL 1876328, at *3 n.2 (S.D.N.Y. Apr. 15, 2020), in which the court undertook in depth analyses of the petitioners' health conditions and found that their specific medical conditions do not appear in the CDC guidance defining groups at higher risk for severe illness from COVID-19. *Id*. at 6–7 and n.2 (explaining that, although two petitioners had a history of smoking, "smoking itself is not an identified CDC risk factor; rather, being immunocompromised is an identified risk factor, and smoking, in turn, is listed as a condition that may cause a person to be immunocompromised… These Petitioners have not offered any evidence that their histories of smoking have caused them to be immunocompromised" and, although another petitioner offered evidence that high blood pressure may place him at a heightened risk of developing complications from COVID-19, "that condition is not currently identified by the CDC as placing him at a higher risk of severe illness from COVID-19").

Here, the proposed class members' differing risk profiles preclude a single, indivisible remedy, because not all risk profiles necessitate the same precautions. Indeed, "a petitioner's individual circumstances (that is, his or her medical condition) are critical to the analysis." *Derron B., et al. v. Tsoukaris*, No. 20-3679, 2020 WL 2079300, at *8 (D.N.J. Apr. 30, 2020).

And whether an individual's claimed medical condition actually puts her at a higher risk of infection and illness from COVID-19 must be evaluated along with the conditions at the particular facility where she is detained, including the medical treatment and special accommodations being afforded her, as discussed, *infra*.

2. Putative class members' conditions of confinement are not common

Petitioners are not challenging a policy universally applicable to all detention facilities.[10] Instead, Petitioners attempt to apply a gloss of commonality by stating the "overarching" issue is "ICE's failure to protect transgender people" from the pandemic. Yet as their Petition makes abundantly clear, Petitioners challenge the conditions at the detention facilities and their "failure to follow [ICE's] own regulations." Pet. ¶ 114; *see generally* Pet. ¶¶ 66-114 (alleging failures by the facilities housing Petitioners with respect to social distancing, hand-washing and hygiene, protective equipment, and information and training). There is no escaping the fact that Petitioners can prove that these "failures" constitute punishment in violation of due process *only* by looking at each detention facility individually and by similarly analyzing the impact on each putative class member.

The individualized nature of the analysis is reflected in recent decisions by other federal district courts evaluating conditions of confinement challenges under the Fifth Amendment. Some courts have found the detention facilities were taking measures to adequately protect the detainee population such that continued detention did not "amount to punishment." *See, e.g.*, *Toure v. Hott*, No. 1:20-cv-395, 25–26 (Apr. 29, 2020) (explaining the measures the two facilities had taken in response to COVID-19, including education, screening, testing, providing soap and

[10] This is why Petitioners' reliance on *Damus v. Nielsen* is misplaced. At issue there was whether five ICE field offices were engaged in a policy of "de facto parole denial" in contravention of the Parole Directive. 313 F. Supp. 3d 317, (D.D.C. 2018).

masks, and operating well below capacity, and rejecting the plaintiffs' claim that "there is nothing Defendants can do that would adequately protect Plaintiffs inside the walls of the detention facilities"); *Peter O.C. v. Tsoukaris*, No. 20-4622, 6–8 (SDW) (D.N.J. May 7, 2020) (denying ICE detainee's petition for release after detailing the "numerous concrete steps to alleviate and mitigate the risk COVID-19 presents" that the facility had taken); *Barco v. Price*, No. 2:20-cv-350-WJ-CG, 7–9, 15–16 (D.N.M. May 1, 2020) (rejecting the plaintiffs' claim that "there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero" after detailing the numerous measures the facility had taken, such as operating at 60% capacity, adjusting activities to allow for social distancing, testing and isolating detainees with COVID-19 symptoms, cleaning with disinfectant chemicals, and giving detainees hygiene kits). Other courts found certain detention facilities were coming up short. *See, e.g.*, *Ferreyra v. Decker*, Civ. A. No. 20-03170, 2020 WL 1989417, at 21–22 (S.D.N.Y. Apr. 27, 2020) (finding that the measures the facilities had taken were insufficient to protect the plaintiffs with preexisting conditions that make them vulnerable to the virus. where, for instance, detainees had to wait a week to see a doctor after complaining of cough, fever, and respiratory issues, and showers and phones were not being cleaned or disinfected regularly).

Respondents are confident that the record establishes that none of the detention facilities relevant to Petitioners' claims is subjecting Petitioners to conditions that amount to punishment. Nonetheless, Petitioners can prove otherwise only by analyzing each facility's performance, as they did in their Petition (albeit using information that was wrong, unsubstantiated, or no longer accurate). *See generally* Pet. ¶¶ 66-114. For example, Petitioners allege that they are unable to social distance, but that is in part a function of facility capacity, which varies, and how facilities

maximize lower detainee capacity.[11] As another example, Petitioners allege they had inadequate information and education regarding COVID-19, an allegation that only can be verified by determining if a given facility was providing written material or oral presentations.

Furthermore, whether the risk to detainees is excessive in a due process context requires an assessment of a particular detainee in relation to a particular detention facility. In other words, it is not simply that the Court has to look at each class member and each facility individually; instead the Court must look at the intersection of both at an individual level. For example, even if a particular individual falls into the CDC's high-risk category, the facility may be further sheltering that person from COVID-19 exposure or providing adequate medical care to a detainee with COVID-19. *See, e.g.*, *Umarbaev v. Lowe*, Civ. A. No. 20-413, 2020 WL 1814157, at *7 (M.D. Pa. April 9, 2020) (denying release of petitioner with risk factors who had been receiving medical care in detention and monitored during 14-day quarantine period and where facility has taken steps to address COVID-19, and noting that the "success of each petition will depend not only on the circumstances of the petitioner before the Court, but also on a rapidly changing landscape that includes the state of the COVID-19 pandemic, current conditions in ICE facilities, and the evolving response by ICE and facility officials to medical needs"); *U.S. v. Martin*, No. PWG-19-140-13, 2020 WL 1274857, at *4 (D. Md. Mar. 17, 2020) (prisoner had diabetes, high blood pressure and asthma but not sufficient to rebut the "Government's proffer that the correctional and medical staff were implementing precautionary and monitoring practices to protect detainees from exposure to COVID-19"). Indeed, some courts have held that

[11] For example, at Nevada Southern, detainees sleep in bunk beds that are positioned approximately six feet apart, and only one detainee occupies each bunk bed (Cantrell Decl. ¶17; Cantell Supp Decl. ¶ 30), and at Winn, detainees sleep in single beds that are three feet apart separated by a storage chest and are not attached to any other beds, and the detainees can usually sleep with an empty bed in between them (Hodges Supp Decl. ¶¶ 14, 16).

individuals who have contracted COVID-19 were not entitled to release because they failed to demonstrate that the detention facility was failing to provide proper medical treatment. *Derron B.*, 2020 WL 2079300, at *11 (D.N.J. Apr. 30, 2020) (denying TRO filed by petitioners who tested positive for COVID-19, where both were receiving daily examinations, during which their subjective complaints were recorded, and their vital signs and other relevant testing (such as temperature) were reviewed and documented); *Camacho Lopez v. Lowe*, Civ. A. No. 20-563, 2020 WL 1689874, at *7 (M.D. Pa., Apr. 7, 2020) (finding no deliberate indifference when a detainee tested positive for COVID-19 and whose condition further deteriorated, given that he was placed in the medical isolation dorm as soon as he tested positive for COVID-19, was closely monitored thereafter, and was later taken to a local hospital).

Detainees housed in the same facility may have different experiences—especially when that detainee is transgender or has an underlying health condition that carries a higher risk of infection and illness from COVID-19. For example, although four named Petitioners are detained at Aurora, two of them (L.M. and M.M.S-M.) are in segregated housing, while two others (D.B.M.U. and M.J.J.) are in dorm rooms shared with six other detainees (the dorms have a capacity to hold up to 24 detainees). Davies Decl. ¶¶ 38–39, 92–93, 55–56, 71–72. Similarly, at La Palma, transgendered detainees are offered the opportunity to voluntarily transfer to a designated facility that houses transgender female detainees. Davies Decl. ¶ 14. If detainee declines, the facility will offer the detainee the opportunity to be placed in a single cell. *Id*. And during the intake process at Florence Detention Center, transgendered detainees are offered the option to stay in protective custody single cell or the general population dormitory; C.G.B. chose the latter. Malakhova Supp Decl. ¶ 12. Upon arrival to the Winn Correctional Center, transgender detainees are offered protective custody in a single cell. Hodges Supp Decl. ¶ 15.

3. Legally available relief is not common to the class

The relief that is legally available to the class is not common among all putative class members. Petitioners ignore the fact that they and the putative class members are detained pursuant to a variety of different statutes, including statutes that do not allow for their release. As a consequence, Petitioners' claims cannot be resolved "in one stroke," and class certification is, therefore, inappropriate.

Petitioners cannot reasonably argue that their proposed class does not include transgender criminal aliens. As noted, *supra*, certain criminal aliens are held pursuant to 8 U.S.C. § 1226(c), which prohibits release from detention during removal proceedings. Congress has mandated that section 1226(c) applies to aliens who have committed certain dangerous crimes and to those who have connections to terrorism" and that the statute "forbids" their release, requiring that those criminal aliens "be arrested and detained without a chance to apply for release on bond or parole." *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019) (emphasis added). Congress enacted this mandate because it was "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore v. Kim*, 538 U.S. 510, 513 (2003). And in *Jennings*, the Supreme Court re-affirmed that § 1226(c) mandates detention without a bond hearing for the duration of the administrative process. *Jennings*, 138 S.Ct. at 847. Thus, immigration judges do not have authority to release aliens detained under § 1226(c) on bond. *See* 8 C.F.R. § 1003.19(h)(2)(i)(D) ("[A]n immigration judge may not redetermine conditions of custody imposed by [DHS] with respect to… [a]liens in removal proceedings subject to section 236(c)(1) of the Act…."). K.M. is detained pursuant to U.S.C. 1226(c). *See* Cantrell Decl. ¶¶ 40, 44.

Petitioners' proposed class also includes transgender aliens without a final order of removal, who may be detained under 8 U.S.C. § 1231(a). Under § 1231(a), DHS "shall detain" an alien "[d]uring the removal period." 8 U.S.C. § 1231(a)(2). Thus, Congress has further directed that detention of those aliens is mandatory, and K.S. is mandatorily detained under § 1231(a)(2). *See* Cantrell Decl. ¶¶ 40, 44.

Petitioners' proposed class further includes transgender aliens seeking admission to the United States who are placed in expedited removal proceedings under 8 U.S.C. § 1225 and can be ordered removed by an immigration officer without a hearing before an immigration judge.[12] For those aliens found inadmissible at a port of entry, as well as those apprehended between the ports of entry and subject to expedited removal, Congress has plenary power to define the process provided to such aliens. *See e.g., Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Peralta-Sanchez*, 847 F.3d at 1135–36; *Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422, 445–46 (3d Cir. 2016). As the Supreme Court has long held, in those circumstances,

[12] Expedited removal proceedings under 8 U.S.C. § 1225 are limited to aliens arriving in the United States, "whether or not at a designated port of arrival;" and "aliens who are physically present in the U.S. without having been admitted or paroled, (2) who are found within 100 air miles of the U.S. international land border, and (3) who cannot establish that they have been physically present in the United States for the immediately preceding fourteen days." *U.S. v. Peralta-Sanchez*, 847 F.3d 1124, 1130 (9th Cir. 2017) (citing 8 U.S.C. §§ 1225(a)(1), (b)(1)(A)(iii)(II); 8 C.F.R. § 235.3(b)(1); 69 Fed. Reg. at 48880) (internal quotations omitted).

Section 1252(e)(1)(A) provides in no uncertain terms that "no court may enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 8 U.S.C. § 1225(b)(1) except as specifically authorized in a subsequent paragraph of this subsection." 8 U.S.C. § 1252(e)(1)(A). Section 1252(e)(1)(B) prohibits a court from certifying a class under Rule 23 "in any action for which judicial review is authorized under a subsequent paragraph of this section." 8 U.S.C. § 1252(e)(1). Congress has specifically barred class actions challenging the expedited removal processes or allowing for injunctive relief outside of the stricture of section 1252(e). Thus, this Court should deny Petitioners' motion for class certification because the proposed class cannot include aliens seeking admission and placed in expedited removal proceedings. *See Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1359 (D.C. Cir. 2000).

"[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" and "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543–44 (1950); *see also Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens is essentially a power of the political branches of government, which may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.").

For aliens subject to expedited removal, an exception exists for those who express an intention to apply for asylum or a fear of persecution. These aliens are referred to an asylum officer for a credible fear interview. 8 U.S.C. § 1225(b)(1)(A)(ii). If the asylum officer finds that the alien lacks a credible fear, the alien shall be removed subject to a limited opportunity to request review by an immigration judge of the asylum officer's negative credible fear determination. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). If the asylum officer finds that the alien has expressed a credible fear of persecution, the alien is referred to an immigration judge for removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(ii), 8 C.F.R. § 235.6(a)(1)(ii). With few exceptions, such aliens are not entitled to a bond hearing and may only be released from custody subject to DHS's parole power. L.M., M.R.P., M.J.J., and D.B.M.U. are detained under § 1225(b). *See* Davies Decl. ¶¶ 33, 34, 36; 20-2, Acosta Decl. ¶ 70; 20-6, Davies Decl. ¶¶ 54, 70.

The proposed class also covers those aliens held in the Government's discretion under 8 U.S.C. § 1226(a). Section 1226(a) provides for discretionary detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Aliens detained under 8 U.S.C. § 1226(a) are automatically assessed for bond eligibility, and may be released on

bond if "the alien…demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). An alien who is denied bond may request a custody redetermination hearing conducted by an immigration judge at any time before the final order of removal is issued. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19; *see also Matter of Sanchez*, 20 I. & N. Dec. 223, 225 (BIA 1990). Petitioners ask this Court to eschew the individualized factual considerations and simply enact a bright-line rule requiring the release of all transgender detainees. C.G.B., A.F., K.R.H., and M.M.S-M. are detained under § 1226(a). *See* Bourne Decl. ¶¶ 5, 11; Lopez Decl. ¶¶ 4, 15; Davies Decl. ¶ 88.

By seeking a classwide injunction ordering Respondents to release individuals being held pursuant to a statute mandating detention (or under a statute granting discretion to Respondents) raises thorny and individualized jurisdictional issues that are not common to the class.

4. Release is not a common remedy

Petitioners assert that the dangers posed by the virus "can be remedied only by the detainee's immediate release to safer areas." Pet. ¶ 114; *see also* Mot. at 5. Whether release would increase, decrease, or have no impact on detainees' risk from COVID-19, however, is another inherently individualized consideration. To resolve that question, the Court must consider factors that include the social distancing and hygiene required in detention; whether a putative class member would have space and resources to practice social distancing and increased hygiene outside detention; how a released individual would travel to the host's destination in light of the CDC suggested travel guidelines[13]; and the healthcare resources to

[13] *See* CDC, *Coronavirus and Travel in the United States*, https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html *and* CDC, *Travel:*

which a putative class member would have access upon release—especially considering the comprehensive medical resources available to ICE detainees. *See* ECF No. 20-1 at 11–12 (summarizing extensive medical care at the facilities at issue in this case).

Courts have denied release when the alternative was not shown to present a lower risk of contracting COVID-19. *See Verma v. Doll*, Civ. A. No. 20-14, 2020 WL 1814149, at *6 (M.D. Pa. Apr. 9, 2020) (denying release despite Verma being "uniquely susceptible to contracting" COVID-19 because the "record is devoid of evidence of his individual circumstances" including "any evidence to suggest that he will be safer if he were released from ICE custody"); *U.S. v. Bell*, No. 17-20183, 2020 WL 1650330, at *7 (E.D. Mich. Apr. 3, 2020) (denying release to pretrial inmate because among other things, the inmate did not explain how his release would minimize his risk of contracting the virus); *U.S. v. Terrance Boatwright*, No. 19-00301, 2020 WL 1639855, at *3 (D. Nev. Apr. 2, 2020) (denying the prisoner's request for temporary release because he did not demonstrate that his risk of contracting COVID-19 while in custody is significantly higher than if he were released); *U.S. v. Flores Molina*, No. 19-00102, 2020 WL 1640182, at *1 (N.D. Ala. Apr. 2, 2020) (denying inmate release because of COVID-19 because no explanation as to how inmate would be protected in public rather than in jail).

Here, although Petitioners have purported to have submitted varying levels of detail regarding their plans for release, none is insufficient to establish that release is indeed "safer" than their current location. For instance, D.B.M.U., L.M., M.J.J., and K.S. did not articulate any release plan at all. M.M.S-M. and M.R.P. simply stated that they had sponsors who would take them in if they are released. M.M.S-M. Decl. ¶ 5 (ECF No. 19-3); M.R.P. Decl. ¶ 6 (ECF No. 19-

Frequently Asked Questions and Answers, https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html (both last visited May 8, 2020).

13). C.G.B. and K.M. named a person with whom they planned to stay, but did not state where that person was located, the nature of the alternative living conditions or available medical care, or how they planned to travel there. C.G.B. Decl. ¶ 5 (ECF No. 19-1); K.M. Decl. ¶ 7 (ECF No. 19-6). K.R.H. and A.F. named locations but provided little additional relevant information. K.R.H. Decl. ¶ 6 (ECF No. 19-11) (currently detained in Arizona and planning to stay with a friend in Stamford, Connecticut); A.F. Decl. ¶ 6 (ECF No. 19-2) (currently detained in Arizona and planning to stay with a cousin in San Francisco, California). Petitioners' failure to establish safer alternatives cuts against their release, but, more importantly for purposes of this motion, demonstrates that the relief Petitioners demand requires an individualized inquiry rendering inappropriate classwide injunctive relief under Rule 23(b)(2). *Wal-Mart*, 564 U.S. at 350

B. Petitioners cannot adequately represent the interests of the putative class

Finally, the proposed class fails to satisfy the adequacy prong of Rule 23(a). "'Two criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575–76 (D.C. Cir. 1997) (quoting *Nat'l Ass'n of Reg'l Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)). The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Hoyte v. District of Columbia*, 325 F.R.D. 485, 490 (D.D.C. 2017) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (internal citation omitted). Conflicts of interest prevent named plaintiffs from satisfying the adequacy requirement if they are "fundamental to the suit and ... go to the heart of the

litigation." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 205, 216 (D.D.C. 2015) (quoting Newberg on Class Actions § 3:58 (5th ed. 2014)).

At the heart of this class action is Petitioners' request for an injunction ordering the release of class members because of the conditions of confinement. According to Petitioners, the "conditions in ICE detention" violate the Fifth Amendment due process rights of transgender detainees. Mot. at 5. Accordingly, Petitioners have requested "an injunction mandating the release . . . of all transgender people in civil immigration detention so that they may protect themselves against COVID-19, and "[f]or purposes of the requested relief, Petitioners request that this Court provisionally certify a class." *Id*. Yet there is a fundamental conflict between Petitioners and unnamed class members—whether the present action is actually the best way to "protect themselves against COVID-19."

Certifying the proposed nationwide class locks all transgender detainees into resolving the issue of COVID-19 safety issue in this case. Rule 23(b)(2) is "mandatory" in that Rule 23 "provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Wal-Mart*, 564 U.S. at 362; *see also Richardson v. L'Oreal USA, Inc*., 991 F. Supp. 2d 181, 197 (D.D.C. 2013).

If this Court certifies a class here, transgendered aliens in ICE detentions would likely find themselves with no ability to raise any other forthcoming challenge, presuming those individuals even agreed that release would render them safer from contracting COVID-19, rather than less safe. Multiple courts of appeals have upheld dismissals of a case if there is a parallel class action raising the same or substantially similar issues. *See, e.g.*, *Crawford v. Bell*, 599 F.2d 890, 892-93 (9th Cir. 1979) (a district court may dismiss "those portions of [the] complaint which duplicate the [class action's] allegations and prayer for relief"); *McNeil v. Guthrie*, 945

F.2d 1163, 1165–66 (10th Cir. 1991) (individual suits for injunctive and declaratory relief cannot be brought where a class action with the same claims exists); *Horns v. Whalen*, 922 F.2d 835, 835 & n.2 (4th Cir. 1991); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (once a class action has been certified, "[s]eparate individual suits may not be maintained for equitable relief"); *Bennett v. Blanchard*, 802 F.2d 456, 456 (6th Cir. 1986) (affirming dismissal of a case when the plaintiff was a member in a parallel class action).

This creates a conflict between Petitioners and unnamed class members. As proposed, the merits of the putative class case will necessarily be based on the evidence developed by Petitioners, which is a reflection of the conditions of confinement at the five facilities housing Petitioners as well as the medical risks Petitioners themselves have from COVID-19. A class member who may have a higher COVID-19 risk, presumably from more serious underlying health conditions than the relatively young and healthy Petitioners, and who may be subject to harsh detention conditions, unlike Petitioners here, would likely be denied an alternative route to relief. Putative class members thus would have no chance to seek speedier or particularized relief by filing individual federal court petitions. This creates a fundamental conflict at the heart of the litigation.[14]

[14] Even apart from the adequacy requirement there is good reason to be wary of Petitioners' one-size-fits-all approach. Nationwide injunctions are generally disfavored. *See, e.g.*, *Shvartsman v. Apfel*, 138 F.3d 1196, 1201 (7th Cir. 1998) (declining to certify a nationwide class where varying law and circumstances impacted validity of class claims); *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029–30 (9th Cir. 2019) (staying the injunction outside the Ninth Circuit because "all injunctions—even ones involving national policies—must be 'narrowly tailored to remedy the specific harm shown'" and explaining that "'[n]ational injunctions interfere with good decisionmaking by the federal judiciary'" and "'deprive' other parties of 'the right to litigate in other forums'") (citations omitted). *See also DHS v. New York*, No. 19A785, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring) (on application for stay: "By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions. The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' Motion for Class Certification.

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Washington, D.C.

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slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process. The rise of nationwide injunctions may just be a sign of our impatient times. But good judicial decisions are usually tempered by older virtues.") (internal citations omitted).