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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PETITIONERS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Since Petitioners filed their request for provisional class certification last week, the COVID-19 crisis among civil immigration detainees in Immigration and Customs Enforcement ("ICE") custody has worsened exponentially. As of May 13, 2020, ICE reports 881 confirmed COVID-19 cases among 1,736 detainees who have been tested, and one detainee has died of COVID-19. https://www.ice.gov/coronavirus (last visited May 13, 2020); *see* "Salvadoran man in ICE custody passes away in San Diego" May 7, 2020, *available at* https://www.ice.gov/news/releases/salvadoran-man-ice-custody-passes-away-san-diego. A transgender woman being held in detention at Otay Mesa, who is seeking to be added to this suit as a Petitioner, has tested positive for COVID-19.[1] *See* ECF No. 30. And Respondents admit that another transgender detainee was considered "presumptively positive" for COVID-19. Malakhova Decl. ¶ 30 (ECF No. 20-10).

Against this backdrop of ever-widening infection and death, Respondents argue that the provisional certification of approximately seventy transgender individuals being held in civil immigration detention during this pandemic is "an extraordinary request." Class Cert. Opp. at p. 1. This pandemic is an extraordinary circumstance and, though federal authorities recognize the severe risks posed by outbreaks of the COVID-19 virus in immigration detention centers, ICE has taken no specific measures to protect the especially vulnerable population of transgender immigration detainees.

In opposing class certification, Respondents spend more time arguing that this Court should deny the relief that Petitioners have requested in their motion for a temporary restraining

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[1] Petitioners' counsel have also been informed that one additional transgender detainee at Otay Mesa has tested positive for COVID-19.

order than they do in arguing that class certification is not appropriate.[2] Indeed, Respondents protest that "Petitioners' request is extraordinary because it asks this Court to release people from detention regardless of the legal basis for detention[.]" Class Cert. Opp. at p. 1. What is truly extraordinary here is Respondents' effort to ignore the single most relevant case to Petitioners' motion – *Fraihat v. U.S. Immigration and Customers Enforcement.* No. 5:19-cv-01546, 2020 U.S. Dist. LEXIS 72015 (C.D. Cal. Apr. 20, 2020). In *Fraihat*, the Central District of California certified two nationwide classes of people in civil immigration detention. The *Fraihat* court dealt with almost all of the issues Respondents raise here as obstacles to class certification, summarily rejecting them. Particularly, the *Fraihat* court certified nationwide subclasses, disagreeing that differences "between facilities and between the degree of COVID-19 threat to each individual" "defeat commonality." *Id.* at *55. The *Fraihat* court also rejected the argument that class certification was defeated by individual differences in immigration status, finding Plaintiffs in that case "ask the Court to determine whether ICE's systematic actions, or failures to act, in response to COVID-19 amount to violations of the class members' constitutional or statutory rights. As a result, the same injunction or declaratory judgment would provide relief to all class members, or to none of them, and the Court concludes Rule 23(b)(2)'s requirements are satisfied." *Id.* at *64. Yet, the case is not cited once in Respondents' brief.

In fact, in addition to *Fraihat,* four other district courts have granted motions for provisional certification of classes of civil immigration detainees in the wake of the COVID-19 pandemic. In *Savino v. Souza*, the District of Massachusetts provisionally certified a class of all civil immigration detainees at two Massachusetts facilities who had brought due process claims.

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[2] Respondents also spend time making inappropriate comments about the membership about the proposed class that are not based in fact or law. Class Cert. Opp. at p. 11, note 7.

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. In *Roman v. Wolf*, the Central District of California certified a class of civil immigration detainees being held at the Adelanto detention center who were at "various stages in their respective immigration proceedings." No. EDCV 20-00768 TJH (PVCx), Slip Op. at p. 3 (C.D. Cal. Apr. 23, 2020). In *Rivas v. Jennings*, the Northern District of California certified a class of all civil immigration detainees being held at two detention facilities. No. 20-cv-02731-VC, 2020 U.S. Dist. LEXIS 76788 (N.D. Cal. Apr. 29, 2020). And in *Gomes v. Acting Secretary*, the District of New Hampshire certified a class of all civil immigration detainees being held at one facility. No. 20-cv-453, 2020 U.S. Dist. LEXIS 77945 (D.N.H. May 4, 2020). These cases confirm that class treatment is appropriate here.

Petitioners ask this Court to provisionally certify a class of all transgender detainees for purposes of their due process claims. Certification of the proposed class of transgender people being held in civil immigration detention during the pendency of the COVID-19 pandemic meets each of the requirements under Rule 23. Respondents argue that certification is inappropriate because Petitioners have not shown commonality, arguing "any detainee's risk from COVID-19 is inherently uncommon." *Id.* But the same would be true for any class of civil immigration detainees and, as set forth above, several have been certified. All members of the proposed class are bound together by the common question of whether, in the face of the lethal COVID-19 pandemic, the conditions of confinement at ICE detention facilities puts them at risk in a manner that amounts to unconstitutional punishment. Petitioners have presented evidence from medical practitioners specializing in infectious diseases and the treatment of transgender patients showing

that transgender people in ICE detention are particularly susceptible to COVID-19 infection and, if they are infected, are more likely to become seriously ill or die. *See* Gorton Decls. (ECF Nos. 4-15, 22-6); Franco-Paredes Decls. (ECF Nos. 4-16, 22-7). In addition to increased risk of underlying medical conditions, transgender people being held in civil immigration detention all have an increased risk of contracting COVID-19 and thus present a common question of whether ICE has violated their due process rights by failing to protect them from this risk. In particular, Petitioners presented unrebutted expert testimony that transgender people in detention are more likely to contract COVID-19 because they are more likely to be assaulted or harassed, thus exposing them unwillingly to the transmission of the disease. Gorton Decl. ¶ 10 (ECF No. 4-15). That class members are held at different detention centers does not defeat Petitioners' motion for class certification as no detention center has taken steps necessary to protect them and no detention center has policies that protect this vulnerable group of detainees.

II. FACTUAL BACKGROUND

Since filing their motion for class certification, Petitioners have also filed a motion to join two additional transgender women being held in civil immigration detention as Petitioners. ECF No. 31. Both of these additional Petitioners are members of the proposed class.

M.I.M.M. is a transgender woman who has tested positive for COVID-19 while in the custody of ICE. M.M.I.M. Decl. ¶¶ 2-9 (ECF No. 28-1). While detained at the Otay Mesa Detention Center in San Diego, California, M.I.M.M. had to stay in close quarters with other detainees showing COVID-19 symptoms. *Id.* In early April 2020, when M.I.M.M. began experiencing symptoms including body aches, a cough and a fever, she requested a visit to the infirmary, where she sat in a waiting area with eight other detainees; the nurse said she was not obligated to treat M.I.M.M. and told her to return to her living area if she did not want to wait.

Id. It was not until April 27, 2020 that M.I.M.M. was tested for COVID-19, and facility staff informed her on May 4, 2020, that she had tested positive for the viral infection. *Id.*

Y.Z., f/k/a U.Z., is a transgender woman from Kyrgyzstan being held at the Imperial Regional Detention Facility in Calexico, California. Y.Z. Decl. ¶ 2 (ECF No. 28-2). She describes being unable to practice social distancing because her assigned bunk is close enough for her to reach out and touch the man in the bunk next to her and because detainees must line up for meals or to use the bathroom and are not kept apart. *Id.* at ¶¶ 5-6. Y.Z. also describes being harassed by both facility staff and other detainees. One detainee offered to pay her for sex; another yelled at her during the night; and another threatened to "break [her] neck." *Id.* at ¶¶ 15, 20. Although Y.Z. recently suffered symptoms of a respiratory ailment, she was not tested for COVID-19. *Id.* at ¶¶ 8-9.

ICE has not deemed any of the ten original Petitioners worthy of release under *Fraihat*. Acosta Supplemental Decl. ¶ 77 (ECF No. 33-1) ("M.R.P. does not have a vulnerability described under FRAIHAT"); Cantrell Supplemental Decl. ¶ 60 (ECF No. 33-5) ("K.S. and K.M. are not suitable for release"); Cantu Decl. ¶ 23 (ECF No. 33-11) ("C.G.B. does not fall into any of the risk categories for either sub class"); Ciliberti Supplemental Decl. ¶ 47 ("A.F. and K.R.H. are not part of either *Fraihat* subclass") (ECF No. 33-6); Davies Supplemental Decl. ¶¶ 45, 53, 62, 69 (ERO reviewed custody of L.M., M.J.J., D.B.M.U., and M.M.S.-M. pursuant to *Fraihat* and declined to release them) (ECF No. 33-3). It is not clear who at ICE is making these *Fraihat* determinations, what criteria are being considered, and what record, if any, is maintained of these decisions. The irregularity of these *Fraihat* reviews is highlighted by the cases of K.S. and K.M. Since Petitioners filed their motion for class certification, ICE reviewed the cases of K.M. and K.S., both of whom are living with HIV, for release under *Fraihat*. ICE confirmed that K.M.

and K.S. have "risk factors due to their HIV status" but nonetheless "ICE has determined the [sic.] K.S. and K.M. are not suitable for release." Cantrell Supplemental Decl. ¶ 60 (ECF No. 33-5).

III. ARGUMENT

A. The Court Has Jurisdiction To Certify This Class.

This Court has jurisdiction to provisionally certify Petitioners' proposed class. In fact, Respondents never challenged this Court's jurisdiction to hear this due process case, thus waiving the jurisdictional argument they seek to make now. In any event, none of Respondents' arguments about the propriety of class wide injunctive relief affect this Court's power to grant class certification. Respondents claim this Court lacks jurisdiction to certify the proposed class due to purported limitations on injunctive relief in the immigration context, arguing "if the Court determines that Petitioners' continued detention violates the Due Process Clause or the Administrative Procedures Act, it must grant relief, if at all, on an individual basis." Class Cert. Opp. at p. 8. But this argument fundamentally misapprehends the nature of this action as well as the interplay of these laws at the class certification stage.

Respondents claim that "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." *Id.* at p. 6. While Petitioners do seek such relief, it is only one aspect of the relief that Petitioners seek. In fact, Petitioners' "Complaint for Declaratory and Injunctive Relief" makes quite clear that Petitioners are seeking both declaratory and injunctive relief in this action. *See* Compl. (ECF No. 1) "Prayer for Relief." Petitioners specifically request that this Court "[d]eclare that Respondents' conduct constitutes a danger to public health and safety;" "[d]eclare that Respondents' detention of Petitions and class members creates an undue risk of infection, disease and death, and is therefore unconstitutional in violation of the Fifth Amendment;" and

"[d]eclare that Respondents have violated the Administrative Procedures Act[.]" *Id.* It is for Petitioners, not Respondents, to characterize the relief sought.

Moreover, it is appropriate for this Court to certify this class based on Petitioners' request for declaratory as well as injunctive relief. Respondents argue that this Court is prohibited from certifying Petitioners' proposed class because 8 U.S.C. § 1252(f)(1) expressly prohibits any court from enjoining or restraining the normal operations of the various detention statutes on a classwi de basis. Class Cert. Opp. at p. 6. But, Respondents concede, as they must, that "Section 1252(f)(1) does not explicitly bar classwide declaratory relief[.]" *Id.* at p. 7. In fact, the *Savino* court outright rejected the argument Respondents are attempting to make here, holding "this provision does not bar declaratory relief and therefore **poses no obstacle to class certification**." 2020 U.S. Dist. LEXIS 61775, at *15-16 (emphasis added) ("With six Justices of the current Supreme Court now on record stating that section 1252(f) does not bar declaratory relief, and because that is the better reading of the statute, the Court adheres to that view.") And, like the plaintiffs in *Savino*, Petitioners here seek both injunctive and declaratory relief, removing any purported obstacle to the requested class certification.

Nor has Respondents' argument that this Court would lack jurisdiction to grant class wide injunctive relief fared any better. In *Rodriguez v. Marin*, the Ninth Circuit held that § 1252(f)(1) does not on its face bar class actions or class wide relief. 909 F.3d 252, 256 (9th Cir. 2018) (remanding to the district court to "decide in the first instance whether § 1252(f)(1) precludes classwide injunctive relief"). More recently, the Ninth Circuit confirmed in *Padilla v. Immigration & Customers Enforcement*, that "§ 1252(f)(1) did not bar the district court from granting preliminary injunctive relief for this class of noncitizens, each of whom is an individual noncitizen against whom removal proceedings have been initiated." 953 F.3d 1134, 1151 (9th

Cir. 2020). And two of the courts that recently granted provisional class certification to classes of civil immigration detainees expressly rejected the argument Respondents make here, recognizing the availability of classwide injunctive relief. *Roman v. Wolf*, No. EDCV 20-00768 TJH (PVCx), 2020 U.S. Dist. LEXIS 72080, at *25 (C.D. Cal. Apr. 23, 2020) ("The INA does not deprive this Court of jurisdiction to grant class-wide injunctive relief for a class of noncitizens where each member of the class is, as here, an individual and not an organization."); *Savino*, 2020 U.S. Dist. LEXIS 61775, at *16 ("This is not to suggest that injunctive relief will be categorically unavailable in this case.").

Although Respondents attempt to frame their argument as a bar to class certification, they are arguing about the merits of Petitioners' requested relief. Their argument that this Court "lacks jurisdiction to grant *classwide* injunctive relief" does not bear on the Court's jurisdiction to grant class certification. Class Cert. Opp. at p. 8. It is not necessary for the Court to resolve these merits issues at the class certification stage. Rather, "[a]t this class certification stage, it is enough to establish that the Court could provide a classwide remedy in the form of a declaratory judgment or injunctive relief." *Savino v. Souza,* 2020 U.S. Dist. LEXIS 61775, at *16. Since the Court could grant such relief here, there is no jurisdictional bar to class certification.

B. <u>The Proposed Class Meets the Requirements of Rule 23(a).</u>

The proposed class of transgender individuals in civil immigration detention meets each requirement of Federal Rule 23(a): numerosity, commonality, typicality, and adequacy.

Despite the fact that Respondents do not contest Petitioners have met the requirement of numerosity, they make the baffling argument that "even determining whether an alien fits within this group [of transgender detainees] requires an individualized analysis." Class Cert. Opp. at p. 11, note 7. This contention is nonsensical in light of the fact that ICE maintains records of transgender detainees and Respondents' own medical expert confirmed that at least seventy

transgender people are currently being held in civil detention. Lederman Decl. ¶ 20 (ECF No. 20-8). Respondents go on to argue that "the nature of this group may create the need for even further levels of individual review" as "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." Class Cert. Opp. at p. 11, note 7. This offensive insinuation reveals a cavalier attitude towards the thirteen original Petitioners and the two additional class members seeking to join as Petitioners, all of whom are transgender women seeking asylum from violence and persecution they have faced in their home countries as a result of their gender identities. Because Respondents do no contest that Petitioners have satisfied the requirements for numerosity and typicality, Petitioners will not further address those requirements here.

1. Common issues of fact and law pervade this class.

Class certification is appropriate in this case because all proposed class members have suffered the same injury. The common question of fact and law is whether ICE's failure to protect transgender people in detention from the risks of contracting, suffering, and dying from the COVID-19 pandemic 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 resulting from the lack of any policies or practices sufficient to protect transgender persons in detention 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, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Petitioners have presented expert medical testimony demonstrating that transgender detainees are particularly susceptible to COVID-19 infection because they are more likely to have underlying medical conditions and to suffer from assault in detention. Gorton Decl. ¶ 10

(ECF No. 4-15); Gorton Second Decl. ¶¶ 6-9 (ECF No. 22-6); Franco-Paredes Decl. ¶ 17 (ECF No. 4-16); Frano-Paredes Second Decl. ¶¶ 3, 7, 11 (ECF No. 22-7). Despite their arguments in opposition to class certification, Respondents' own expert admits that "transgender individuals may be more likely to have co-morbidities or underlying conditions which are risk factors for COVID-19". Lederman Decl. ¶¶ 16, 18 (ECF No. 20-8) (explaining that transgender detainees additionally are specifically screened for HIV, a recognized COVID-19 risk factor). Respondents similarly present no evidence (expert or otherwise) to refute Petitioners' evidence that transgender people in ICE custody are far more likely to be the victims of abuse and sexual assault than non-LGBT detainees and that this kind of unwanted close physical contact makes them more vulnerable to infection of COVID-19. Gorton Decl. ¶ 10 (ECF No. 4-15); Gorton Second Decl. ¶¶ 6-9 (ECF No. 22-6); Franco-Paredes Decl. ¶ 17 (ECF No. 4-16). Respondents' counsel quibble with the accuracy of three different studies supporting Dr. Gorton's contention, rather than dispute that there is in fact an increased risk of unwanted physical contact for detainees who are transgender. In the face of these increased risks of infection, ICE has taken no specific measures to protect transgender people in their custody from the risk of COVID-19. This common failure underlies the claim of each proposed class member.

Many courts have found that classes of civil immigration detainees met the commonality requirement despite differences in underlying health conditions, conditions of detention, and status of immigration proceedings. *Fraihat*, 2020 U.S. Dist. LEXIS 72015, at *56 ("[T]he factual differences are not of the sort that likely affect entitlement to relief or that are likely to change the outcome of the legal analysis."); *Savino*, 2020 U.S. Dist. LEXIS 61775, at *21 ("[A]dmittedly significant variation among the Detainees does not defeat commonality or typicality."); *Roman v. Wolf*, No. EDCV 20-00768 TJH (PVCx), slip op. at p. 4 ("commonality is

established because the common question that will generate common answers apt to drive resolution of this litigation is whether the putative class members' Fifth Amendment substantive due process rights are being violated"); *Rivas v. Jennings*, 2020 U.S. Dist. LEXIS 76788, at *4 ("The government's arguments regarding commonality, typicality, adequacy, and Rule 23(b) do not defeat class certification"); *Gomex v. Acting Secretary*, 2020 U.S. Dist. LEXIS 77945, at *8 ("Petitioners need only articulate a single common question to meet the commonality requirement. […] That requirement is met here.")

a. That class members may have differing medical conditions does not defeat certification where they are all at risk.

The common question of ICE's failure to protect transgender detainees from the risks of COVID-19 presented by the proposed class members is not affected by the fact that some class members may have greater health risks than others. Respondents argue that commonality is defeated because proposed class members' "medical conditions are not common." Class Cert. Opp. at p. 11. In support of this argument, Respondents point out that Petitioners "acknowledge that COVID-19 risk is not the same for all transgender persons[.]" *Id.* But Petitioners have never argued that all transgender people have the same exact risk of infection or complications from COVID-19. If this were the standard, no court could certify any class in this context as no two individuals have the exact same risk. Rather, Petitioners have demonstrated that certain medical and environmental factors, including the increased risk of assault in ICE detention, put transgender detainees at a higher risk than detainees who are not transgender.

Several courts have rejected Respondents' argument that differences in medical conditions among proposed class members defeats commonality. In *Fraihat*, the government argued "Plaintiffs themselves have varying medical conditions and risk factors." 2020 U.S. Dist. LEXIS 72015, at *55. The *Fraihat* court succinctly rejected argument as follows: "This person

may die of COVID-19 because of hypertension, and that one may die because of HIV. Yet across all facilities and individuals, the question remains: is ICE required to adopt a global response, and is that response adequate?" *Id.* at *56. Respondents point out that here they believe that only two of the named Petitioners have health conditions that would place them in the *Fraihat* subclasses.[3] But other courts have recognized that the danger of COVID-19 is not limited to people with CDC-recognized health conditions and, in fact, that risk can support certification of classes including people who do not have any underlying health conditions whatsoever. *Savino*, 2020 U.S. Dist. LEXIS 61775, at * 23 ("The case law supports a finding of commonality for class claims against dangerous detention conditions, even when some detainees are more at risk than others."); *Rivas v. Jennings*, 2020 U.S. Dist. LEXIS 76788, at *5 ("Nor, incidentally, is exposure to the virus a significant danger merely to people in high-risk groups.").

Federal Rule 23 "does not mandate that every putative class member share every fact in common." *Roman v. Wolf*, No. EDCV 20-00768 TJH (PVCx), Slip Op. at p. 4. And it is true that Petitioners and putative class members do not share the exact same medical histories or histories of harassment or assault. But ICE has recognized that transgender detainees, as a class, are more likely to have certain underlying health conditions, including HIV which suppresses the immune system. This increased probability, combined with transgender detainees' higher risk of COVID-19 infection due to assault in detention, is common to the class and supports class

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[3] ICE makes much of the fact that "only two of the ten Petitioners have health conditions that the CDC considers would place them at higher risk." Class Cert. Opp. at p. 11. Yet, despite the fact that both K.S. and K.M. are living with HIV, an underlying medical condition that the CDC and *Fraihat* court have recognized puts them at higher risk for COVID-19, ICE has nonetheless declined to release them. Cantrell Supplemental Decl. ¶ 60 (ECF No. 33-5) ("K.S. and K.M. are not suitable for release"). Moreover, Respondents have seemingly brushed aside medical conditions of other Petitioners with no explanation whatsoever.

certification regardless of Petitioners' individual medical conditions, which may place them individually at higher risk still.

b. All class members are being confined in conditions that violate their due process rights.

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 commonality. The *Fraihat* court certified nationwide subclasses of civil immigration detainees being held in dozens of detention centers across the country, 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. Here, despite being housed at different facilities, each proposed class member is claiming the same injury – ICE has taken no action to protect transgender detainees in the wake of the COVID-19 pandemic. This common question supports class certification. *See Gomes v. Acting Secretary*, 2020 U.S. Dist. LEXIS 77945, at *7 ("Petitioners claim that respondents have subjected the putative class to the same injury: policies and practices (or the lack thereof) that put their health at substantial risk of harm by inhibiting their ability to practice social distancing during the COVID-19 pandemic.")

Respondents argue that Petitioners cannot prove that ICE's failures to protect them from COVID-19 "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." Class Cert. Opp. at p. 15. But ICE does not, and cannot, dispute that it has taken no action whatsoever (whether in policy or practice) to protect Petitioners and the putative class from COVID-19. Respondents argue that class certification is inappropriate because detainees "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." *Id.* at p. 18. Yet that is precisely the point. ICE has failed to implement any standard measures to protect transgender detainees. The *Fraihat* court found that "the variety of facility COVID-19 countermeasures tends to support Plaintiffs' contention that ICE has failed to institute the well-ordered, mandatory relief effort to which they claim entitlement." 2020 U.S. Dist. LEXIS 72015, at *56. The same is true here. ICE has failed to institute any relief for transgender detainees. 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.

2. The class representatives adequately represent the interests of the proposed class.

Respondents' argument that the ten named Petitioners will not adequately represent the interest of the class ignores the entire purpose of class actions. The ten named Petitioners are all members of the proposed class, as are the two additional transgender women who are seeking to be added as Petitioners. The interests of the ten named Petitioners will not conflict with the interests or any class members because those interests are aligned. The named Petitioners have alleged the same injuries, arising from the same action or inaction by ICE, and they seek the same injunctive and declaratory relief which will apply equally to benefit all class members.

Respondents again misapprehend the function of class action litigation. Respondents paternalistically argue that if the court certified the proposed class "transgendered [sic.] aliens in ICE detentions would likely find themselves with no ability to raise other forthcoming challenge, presuming those individuals even agreed that release would render them safer from contracting COVID-19, rather than less safe." Class Cert. Opp. at p. 25. Respondents have presented no evidence of any transgender detainee who believes that that release from detention would render

them less safe from the risk of COVID-19. Similarly, Respondents argue that "a class member who may have a higher COVID-19 risk, presumably from more serious underlying health conditions […] and who may be subject to harsh detention conditions, unlike Petitioners here, would likely be denied an alternative route to release." *Id.* at p. 26. But Respondents, who have the records of all transgender persons in civil immigration detention, have presented evidence of no such individual. Nor could they without admitting that they have subjected transgender individuals in their custody to "harsh detention conditions." This argument is thus pure speculation.

Respondents go on to argue that there is a conflict of interest between the ten named Petitioners and unnamed class members because "the merits of the putative class will necessarily be based on the evidence developed by Petitioners." *Id.* at p. 26. That is the value of class action litigation. As the *Fraihat* court recognized, "[i]t 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, a fact which further highlights the impracticability of joinder." 2020 U.S. Dist. LEXIS 72015, at *53. Respondents have presented no evidence of any actual conflict of interest between the named Petitioners and un-named class members beyond those they have invented from whole cloth. In fact, Petitioners' motion to join two additional transgender women in immigration detention as named Petitioners demonstrates that class members who were unnamed at the time of filing this class certification motion in fact agree that their interests are aligned with those of the proposed class representatives.

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

1. Requested Injunctive Relief of Release is Legally Available.

Respondents argue that Petitioners ignore the fact that they and the putative class members are detained pursuant to different immigration statutes, including statutes that typically do not allow for release. Class Cert. Opp. at p. 22. Contrary to Respondents' assertion, Petitioners addressed this issue in their reply brief in support of their motion for a temporary restraining order, the appropriate forum for arguments on the merits of Petitioners' claims for relief. *See* ECF No. 22, Section III.A.2. As set forth in Petitioners' reply, district courts retain jurisdiction to grant release if the Government fails to cure violations of Petitioners' constitutional due process rights. *See Arana v. Barr*, No. 19-7924, 2020 U.S. Dist. LEXIS 77134, at *22-23 (S.D.N.Y. May 1, 2020); ECF No. 22 at 19. And courts have jurisdiction to order release even of people who are being mandatorily detained if they are being held in violation of their due process rights. *See Ferreyra v. Decker*, No. 20 Civ. 3170, 2020 U.S. Dist. LEXIS 73986, at *37 (S.D.N.Y. Apr. 27, 2020) ("courts have the authority to order those held in violation of their due process rights released, notwithstanding § 1226(c)").

As determined by the *Fraihat* court, the requested injunctive relief of release is legally available to all immigration detainees, regardless of their immigration status, and therefore the proposed class meets the requirements of Rule 23(b)(2). 2020 U.S. Dist. LEXIS 72015, at *64 (C.D. Cal. Apr. 20, 2020) ("[T]he same injunction or declaratory judgment would provide relief to all class members, or to none of them, and the Court concludes Rule 23(b)(2)'s requirements are satisfied."); *see also Roman v. Wolf*, No. EDCV 20-00768 TJH (PVCx), Slip Op. at p. 4 ("While Petitioners and the putative class members are at various stages in their respective immigration proceedings, Petitioners alleged that the conditions of their detention at Adelanto, […] in light of the COVID-19 pandemic, violate their Fifth Amendment substantive due process

rights.") In *Fraihat*, the government tried and failed to convince the court that class certification was defeated because the proposed class members were held under different statutory mandates. *See* 2020 U.S. Dist. LEXIS 72015, at *61 n.22 (C.D. Cal. Apr. 20, 2020) ("[W]hatever the particular detention authority Defendants might invoke, the due process violations asserted arise from the same systematic failures, and could overcome a more generalized detention mandate.") (citing *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) ("We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional . . . .")). Here, Petitioners assert the same constitutional violations as in *Fraihat*, but on behalf of transgender detainees – a distinct, vulnerable, high-risk group. Therefore, the "specter of a conflict between class members who are 'mandatorily' detained and those who are not" is as meaningless here as it was determined to be in *Fraihat*. *See id.*

2. Respondents' Other Arguments Are Untenable.

Respondents additionally argue that class certification is inappropriate under Rule 23(b)(2) because whether release would "increase, decrease, or have an impact on detainees' risk from COVID-19 [...] is another inherently individualized consideration." Class Cert. Opp. at p. 22. Respondents cannot make this argument with a straight face. On the one hand, of the 1,736 civil immigration detainees that ICE has tested for COVID-19, 881 have tested positive – more than 50%. https://www.ice.gov/coronavirus (last visited May 13, 2020). On the other hand. Petitioners have certified to the Court that a coalition of organizations supporting transgender detainees, including the Santa Fe Dreamers Project and the Transgender Law Center, has put together a plan to support the release of transgender immigration detainees to allow the safe shelter of all released detainees, allowing them to follow CDC guidelines to prevent the spread of COVID-19. Love Decl. (ECF No. 4-23). The coalition has amassed nearly $100,000 in funds to facilitate these release plans. *Id.* Respondents argue that, though "Petitioners have purported to

have submitted varying levels of detail regarding their plans for release, none is insufficient [sic.] to establish that release is indeed 'safer' then their current location." Class Cert. Opp. at p. 23. It is not clear the level of detail in a release plan that ICE would consider sufficient to demonstrate that release would be safer than continued confinement in detention facilitates where confirmed cases of this deadly infectious disease are increasing exponentially. Regardless, named Petitioners and their counsel have committed to provide the funds, sponsors, and resources necessary to ensure that safe release is possible for all proposed class members.

IV. CONCLUSION

For all of the foregoing reasons, as well as those presented in Petitioners' opening brief, 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 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be filed and served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: May 13, 2020

/s/ *Matthew E. Kelley*
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