UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NAK KIM CHHOEUN AND MONY NETH, individually and on behalf of a class of similarly situated individuals,

Petitioners,

v.

DAVID MARIN, DAVID JENNINGS, THOMAS HOMAN, ELAINE DUKE, JEFFERSON SESSIONS III, SANDRA HUTCHENS, AND SCOTT JONES,

Respondents.

Case No.: SACV 17-01898-CJC(GJSx)

ORDER DISCHARGING ORDER TO SHOW CAUSE

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I. INTRODUCTION

Petitioners Nak Kim Chhoeun and Mony Neth bring this habeas petition on behalf of themselves and a putative class of Cambodian citizens who were once detained and ordered removed from the United States, but subsequently released from immigration custody when Cambodia would not accept their repatriation. Petitioners allege that, beginning in October 2017, they were abruptly and arbitrarily re-detained by U.S. Immigration and Customs Enforcement ("ICE") in immigration raids targeting Cambodian citizens. Petitioners allege that approximately 100 additional putative class members were also re-detained, and that 1,900 Cambodian nationals residing in the United States face possible re-detention. Petitioners claim that ICE's practice of arbitrary re-detention violates constitutional, statutory, and regulatory law.

On March 26, 2018, the Court ordered the parties to show cause why the following proposed class should not be certified:

> All Cambodian citizens in the United States who received final orders of deportation or removal to Cambodia, who were subsequently released from ICE custody, who then years later were re-detained for removal by ICE, and who now have filed motions to reopen their removal proceedings.

(Dkt. 105.)[1] The Court also ordered the parties to show cause why the proposed class members should not be released from detention. The Court now finds that certification of this class would not be appropriate because it fails to meet the numerosity requirement. According, the Court hereby **DISCHARGES** its order to show cause.[2]

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[1] This class definition was proposed by the Court and is not the class definition proposed in Petitioners' Complaint.

[2] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for April 16, 2018, at 1:30 p.m. is hereby vacated and off calendar.

II. BACKGROUND

On October 27, 2017, Petitioners Nak Kim Chhoeun and Mony Neth filed this habeas petition on behalf of themselves and a putative class of 1,900 Cambodian citizens who were ordered removed from the United States based on criminal convictions. (Dkts. 1 [Complaint], 27 [First Amended Complaint, hereinafter "FAC"].) Petitioners allege that when their removal orders were issued over a decade ago, Cambodia would not accept their repatriation and they were released from immigration custody. (FAC ¶ 2.) Since their release, Petitioners lived peaceably and productively in their communities. (*Id.*) Then, in October 2017, they were abruptly and arbitrarily re-detained by ICE. (*Id.* ¶ 3.) According to Petitioners, approximately 100 Cambodian citizens were re-detained around the same time, and approximately 1,900 Cambodian citizens are threatened with re-detention. (*Id.* ¶ 4.) Petitioners claim that the Government's conduct violates constitutional, statutory, and regulatory law.[3]

In January 2018, the Court issued a preliminary injunction enjoining ICE from deporting putative class members who have been re-detained until February 5, 2018, to afford them an opportunity to file motions to reopen their immigration proceedings. (Dkt. 75.) For detainees who filed a motion to reopen by February 5, 2018, their removals were enjoined for an additional, limited period to adjudicate motions to stay their removals before the appropriate courts. (*Id.*)

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[3] "The Government" refers to Respondents David Marin, Field Office Director, Los Angeles Field Office, United States Immigration and Customs Enforcement; David Jennings, Field Office Director, San Francisco Field Office, United States Immigration and Customs Enforcement; Kirstjen Nielsen, Secretary of the Department of Homeland Security; and Jefferson Sessions III, United States Attorney General.

On March 26, 2018, the Court issued an order granting the habeas petition as to Petitioner Chhoeun. (Dkt. 104.) The Court found that ICE had no justification for abruptly detaining Chhoeun and threatening to deport him, when he had been living and working peaceably in his community for fourteen years, and all the while complying with ICE's orders. (*Id*. at 12–15.) The Court accordingly held that the Government had violated Chhoeun's due process rights and ordered him immediately released from immigration custody pending his motion to reopen his immigration proceedings. (*Id*.) The Court did not consider whether Petitioner Neth was also entitled to relief as Neth had already been released from custody in December 2017. (*Id*. at 12 n.4.)

Also on March 26, 2018, the Court issued an order to show cause why the Court should not certify the following proposed class:

> All Cambodian citizens in the United States who received final orders of deportation or removal to Cambodia, who were subsequently released from ICE custody, who then years later were re-detained for removal by ICE, and who now have filed motions to reopen their removal proceedings.

(Dkt. 105.) In addition, the Court ordered the parties to show cause why it should not release members of the proposed class from immigration detention pending their motions to reopen their removal proceedings. (*Id*.)

III. ANALYSIS

Under Federal Rule of Civil Procedure 23, district courts have broad discretion to determine whether a class should be certified. *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (abrogated on other grounds). The plaintiff bears the burden of showing that each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23 is not merely a pleading standard—a party seeking

class certification must affirmatively demonstrate compliance with the Rule by proving the requirements in fact. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Rule 23(a) provides that a case is appropriate for certification as a class action if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." These four requirements are often referred to as numerosity, commonality, typicality, and adequacy. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982).

A putative class satisfies the numerosity requirement if it is impracticable to litigate each putative class member's claims separately. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Id*. at 913–14 (citation omitted). There is no threshold number of class members that satisfies the numerosity requirement. But as a general matter, "courts have found that the numerosity factor is satisfied if the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer." *Wamboldt v. Safety-Kleen Sys., Inc.*, 2007 WL 2409200, at *11 (N.D. Cal. Aug. 21, 2007). The Supreme Court has indicated that a putative class of 15 members would be too small to meet the numerosity requirement. *Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980).

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The Government asserts that class certification is not appropriate because the proposed class would consist of 13 members, and therefore does not satisfy the numerosity requirement. (Dkt. 115 at 6.) According to the Government, the proposed class would consist of the following individuals:

- 7 Cambodian citizens who were re-detained and who filed motions to reopen by February 5, 2018, including Petitioner Chhoeun and Neth.[4]
- 6 Cambodian citizens who were re-detained and who have filed motions to reopen since February 5, 2018.

(*Id*. at 6–7.) The Government also represents that only 7 of the 13 potential class members are currently in detention as the others have been released. (*See id*. at 11.) In addition at least one of the 13 potential class members recently commenced an individual habeas petition. (*Id*. at 17 n.12.)

Petitioners do not dispute that the putative class consists of 13 members, and do not provide any evidence indicating that the Government's representations are incorrect or under-inclusive. (Dkt. 117 at 7–10.) But, Petitioners argue that the numerosity requirement is nonetheless satisfied because the Government is continuing to re-detain Cambodian citizens who will be added to the proposed class, and the number of future class members remains "fluid" and unascertainable. (*Id*. at 9–10.) Petitioners claim that because class members will be added in the future, joinder of the proposed class members is impracticable. (*Id*. at 9.)

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[4] Because these individuals filed motions before February 5, 2018, they are covered by the Court's preliminary injunction staying their removal.

Petitioners note that courts in this Circuit have found that the numerosity requirement is met where the number of future class members is uncertain. (*Id*. at 8–10.) Importantly, in those cases, the plaintiffs produced evidence demonstrating a significant likelihood that a large number of class members would be added in the future. For example, in *Inland Empire-Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018), a district court considered whether the numerosity requirement had been met in a class action challenging the Executive Department's termination of the Deferred Action for Childhood Arrivals ("DACA") program. *Id*. at 7. The district court found that, although the parties had identified only 22 class members, the numerosity requirement was satisfied because hundreds of thousands of individuals were covered by DACA and the defendants admitted that DACA was subject to automatic termination. *Id*. The district court found that this evidence demonstrated that "an inference of future class members is reasonable," such that joinder is "inherently impractical." *Id*.

Those cases are not applicable here, however, because the parties have presented no evidence demonstrating that future class members would render joinder impracticable. Petitioners claim that future re-detentions are likely, and point to the Government's admission that it has re-detained over a dozen Cambodian citizens since November 2017. (*See* Dkt. 117 at 4.) However, future class members would not include all Cambodian citizens who are re-detained, but only those who file motions to reopen. And, the Government indicates that only one Cambodian citizen who was re-detained after November 2017 has filed a motion to reopen and would fall within the proposed class definition. This evidence does not demonstrate that the number of future class members would be so large as to render joinder impracticable. *Cf. Franco-Gonzales v. Napolitano*, 2011 WL 11705815, at *9 (C.D. Cal. Nov. 21, 2011) ("Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.").

In short, the evidence indicates that there are only 13 members of the proposed class and a limited number of future members. Based on this evidence, joinder of the cases is not impracticable. Consideration of each proposed class member's habeas petition on an individual basis is also not impracticable. Accordingly, the Court finds that certification of the proposed class is not warranted, but this finding is without prejudice to each member's ability to bring individual habeas petitions to challenge his or her detention as unlawful.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **DISCHARGES** its order to show cause and **DENIES** certification of the proposed class.

DATED: April 12, 2018

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE