UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Jorge Miguel PALACIOS; Jesus Eduardo CARDENAS LOZOYA,

Plaintiffs-Petitioners,

v.

Jefferson B. SESSIONS, Attorney General, Department of Justice; James McHENRY, Acting Director, Executive Office for Immigration Review, Department of Justice; MaryBeth KELLER, Chief Immigration Judge; Deepali NADKARNI, Assistant Chief Immigration Judge; V. Stuart COUCH, Immigration Judge, Charlotte, NC; Barry J. PETTINATO, Immigration Judge, Charlotte, NC; Theresa HOLMES-SIMMONS, Immigration Judge, Charlotte, NC; Sean W. GALLAGHER, Atlanta Field Office Director, U.S. Immigration and Customs Enforcement; Major T.E. WHITE, Facility Commander, Mecklenburg County Jail Central; Charlie PETERSON, Warden, Stewart Detention Center, in their official capacities,

Defendants-Respondents.

Case No._____

BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION AND PROPOSED CLASS DEFINITION

This class action proceeding seeks the Court's review of a policy and/or practice that consistently denies the right of Plaintiffs and proposed class members to obtain prompt bond hearings. Defendants' actions cause prolonged and unlawful detention, additional legal and related expenses, and collateral consequences for class members and their families. Plaintiffs' request this Court's intervention to remedy a denial of their right to a prompt bond hearing.

The Executive Office for Immigration Review (EOIR) established the Charlotte Immigration Court to preside over cases of individuals in North Carolina and South Carolina, including bond proceedings involving those in the custody of the Department of Homeland Security (DHS). Immigration judges (IJs) are statutorily, regulatorily, and constitutionally obligated to conduct these bond hearings to determine whether, and on what conditions, an individual may be released from DHS custody.

Plaintiffs bring this action on behalf of a proposed class to challenge the policy and/or practice of three of the four IJs at the Charlotte Immigration Court, Defendants Couch, Pettinato, and Holmes-Simmons (collectively, the IJ Defendants), who refuse to conduct such bond hearings and the failure of Defendants Sessions, McHenry, Keller, and Nadkarni (collectively, the DOJ Defendants) to take corrective action. This policy and/or practice is most strikingly illustrated by the rubber-stamped decisions of Defendants Couch and Pettinato, which are imprinted with an *actual stamp* stating their refusal to conduct bond hearings. These decisions and the declarations of immigration attorneys demonstrate the existence of Defendants' policy and/or practice and the harm it causes by depriving Plaintiffs and proposed class members of their liberty without an expeditious bond hearing and forcing them to wait for

weeks to have an IJ from another court review the merits of their request for release.[1]

This case presents questions of law that are appropriate for class treatment: whether Defendants are acting unlawfully in violation of 8 U.S.C. § 1226, its implementing regulations, the Administrative Procedure Act, and the Due Process Clause and in conflict with agency precedent requiring courts to conduct bond hearings as expeditiously as possible. This question can be resolved on a class-wide basis, making certification appropriate. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move this Court to certify the following class with named Plaintiffs as class representatives:

> All individuals who are or will be detained in North Carolina or South Carolina, and while detained there, have filed or will file a request for a bond hearing with the Charlotte Immigration Court, and whose cases have been or will be assigned to an Immigration Judge who has a policy and/or practice of either: (a) refusing to conduct bond hearings; or (b) pretermitting bond hearings without reaching the merits based on a representation that DHS has transferred or is transferring the individual outside of North Carolina or South Carolina.

Plaintiffs seek declaratory and injunctive relief that would halt Defendants' unlawful policy and/or practice and restore the right to a prompt bond hearing for all in the Charlotte immigration court.

II. BACKGROUND

A. Jurisdiction and Venue over Bond Hearings

Through 8 U.S.C. § 1226, Congress conferred IJs with jurisdiction, i.e., adjudicatory capacity, to conduct bond hearings. *See Matter of Cerda Reyes*, 26 I&N Dec. 528, 530 (2015) ("[T]he authority to hear bond cases comes from the Act itself, via delegation from the Attorney General."); *see also* 8 C.F.R Part 1236. The regulations governing an application for a bond hearing, also known as a bond motion or request, govern "[a]pplications for the exercise

[1] Exhibits are filed concurrently herewith and are cited as Exhibits (Exs.) A1-J5. *See* First Declaration of Kristin Macleod-Ball in Support of Motion for Class Certification.

of authority to review bond determinations" and provide three locations for filing such applications in a designated order. 8 C.F.R. § 1003.19(c). Individuals who are detained at the time of making the bond application must "ma[k]e" (file) the application "to the Immigration Court having jurisdiction over the place of detention." 8 C.F.R. § 1003.19(c)(1).[2] Non-detained individuals who seek to ameliorate the conditions of an existing release order should make the application "[t]o the Immigration Court having administrative control over the case," and, if this is not possible, "[t]o the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court." 8 C.F.R. §§ 1003.19(c)(2), (3).

B. Defendants' Policy and/or Practice of Refusing to Conduct Bond Hearings and Failing to Take Corrective Action

1. Historical Background

The Charlotte Immigration Court opened in November 2008 with a mandate to adjudicate, *inter alia*, detained cases. Ex. F. Bond motions were then, and are still, properly filed with the Charlotte Immigration Court if the individual was detained in North or South Carolina at the time the motion was filed. 8 C.F.R. § 1003.19(c)(1). Initially, IJ Defendants conducted bond hearings in represented cases without the individual present without inquiry into where he or she was located at the time of the hearing. *See* Exs. B2 ¶2, B4 ¶2, B5 ¶3, B9 ¶5, B10 ¶3, B12 ¶4, B13 ¶2, B14 ¶3, B19 ¶3.

Thereafter, IJ Defendants claimed they lacked jurisdiction to review bond motions if

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[2] Although the regulation refers to the court "having jurisdiction" over a place of detention, that term relates to the court's assigned geographical area, not jurisdiction. *See Matter of Cerda Reyes*, 26 I&N Dec. at 530. The Charlotte Immigration Court is the court assigned to hear cases filed by individuals detained in North Carolina or South Carolina. *See* Ex. F; *see also* EOIR Immigration Court Listing: Administrative Control List, *available at* https://www.justice.gov/eoir/immigration-court-administrative-control-list#Charlotte (last visited Jan. 7, 2018).

DHS transferred or was in the process of transferring the detained individual outside North Carolina or South Carolina during or before the scheduled bond hearing in Charlotte. *See* Exs. B2 ¶3, B3 ¶6, B4 ¶4, B8 ¶5, B9 ¶¶6-7, B11 ¶2, B12 ¶¶5-7, B13 ¶4, B19 ¶4. In one illustrative case, an individual, while detained in South Carolina, filed a bond motion with the Charlotte Immigration Court. *Matter of Cerda Reyes*, 26 I&N Dec. at 529. At the hearing, a DHS attorney told the IJ that DHS had transferred the individual to a detention facility in Lumpkin, Georgia. *Id*. The IJ concluded that she lacked jurisdiction due to the transfer. *Id*. On appeal, in a precedent decision, the Board of Immigration Appeals (BIA or Board) held that the immigration court had not lost jurisdiction over the bond motion due to the transfer, finding that 8 C.F.R. § 1003.19(c) only governs where bond applications are made (venue). *Id*. at 530. The Board reiterated that an IJ's jurisdiction to adjudicate bond motions is governed by 8 U.S.C. § 1226 and 8 C.F.R Part 1236. *Id*.

2. Defendants' Current Policy and/or Practice

No longer able to claim a lack of jurisdiction after the BIA's precedent decision in *Cerda Reyes*, IJ Defendants nonetheless have continued to refuse to adjudicate bond motions properly filed in the Charlotte Immigration Court. They now decline to exercise their authority over the motions, often without any explanation. Exs. A1-A3; *see generally* Ex. B1-B19.[3]

Defendants Pettinato and Couch refuse to adjudicate *any* bond motions—or conduct any bond hearings. *See* Exs. A1; A2; B1 ¶6; B2 ¶5, B3 ¶9, B4 ¶4, B5 ¶5, B6 ¶5, B7 ¶6, B8 ¶6, B9 ¶¶8-9; B11 ¶5; B12 ¶9; B13 ¶5; B15 ¶3; B16 ¶3, B18 ¶¶6-7. Either at the same time as or

[3] IJ Rodger C. Harris also hears cases in Charlotte. In January 2018, IJ Harris denied a motion to reconsider a decision of Defendant Pettinato refusing to hold a bond hearing. *See* Ex. B1 ¶14. To date, IJ Harris has not himself refused to hold a bond hearing. *See id*; *see also* Exs. B2 ¶7, B4 ¶4, B9 ¶13, B11 ¶5, B13 ¶5, B16 ¶3d, B17 ¶¶6, 8. For that reason, he is not named as a defendant in this action.

shortly after the clerk's office generates the notice of the date and time of the bond hearing, Defendants Pettinato and Couch issue orders imprinted with a stamp that reads: "The Court declines to exercise its authority. 8 C.F.R. Sec. 1003.19(c)." *See* Exs. A1; A2; *see also* decisions attached to Exs. B1 at 6; B11 at 10; B15 at 3. Defendant Pettinato has stated that the Charlotte Immigration Court is getting out of the bond business and that he is "done hearing bonds." Exs. B2 ¶8; B7 ¶4. Similarly, Judge Couch has stated that he is not going to hear anymore bond hearings. Ex. B4 ¶5.

Defendant Holmes-Simmons similarly refuses to adjudicate properly filed bond motions if the individual seeking release has been or is in the process of being transferred out of North or South Carolina at the time of the bond hearing in Charlotte. *See* Exs. A3; B1 ¶¶6, 13; B2 ¶¶6, 9; B3 ¶¶6-8, 10; B4 ¶¶4, 6-7; B5 ¶4; B6 ¶¶4-5; B7 ¶6; B8 ¶6; B9 ¶¶7, 12; B11 ¶5; B12 ¶¶5-6; B13 ¶5; B14 ¶4; B16 ¶3c; B17 ¶2; B18 ¶¶9-10. She will pretermit hearings—and so will refuse to issue substantive bond decisions—in which a DHS attorney states that DHS has transferred or is in the process transferring the person outside the Carolinas. *Id.* After indicating that she will not adjudicate the merits, she has asked attorneys to withdraw bond motions filed on behalf of their clients. *See* Exs. B1 ¶6; B16 ¶3c; B18 ¶¶9-10; *cf.* B13 ¶8; B19 ¶4. By pretermitting a bond hearing, Defendant Holmes-Simmons is refusing to conduct the hearing.

IJ Defendants' refusal to adjudicate bond motions is known to the DOJ Defendants, and they have refused to rectify the problem. As early as October 2015, and again in April 2016, the American Immigration Lawyers Association (AILA), a national association of immigration lawyers and law professors, raised the issue with EOIR employees, requesting that EOIR issue guidance to address the problem. *See* Exs. G1 at 6-7; G2 at 12-13; *see also* Ex. B12 ¶14. In response to both requests, EOIR representatives stated that they did "not intend to issue special

guidance" addressing the issue. *See* Exs. G1 at 6-7; G2 at 12-13. Additionally, the Carolinas Chapter of AILA raised the problem with Defendant Nadkarni, the Assistant Chief Immigration Judge (ACIJ) with oversight over the IJ Defendants, by email on November 23, 2016, May 3, 2017, and May 25, 2017 and in person on August 9, 2017. *See* Ex. B11 ¶¶6-14. Defendant Nadkarni indicated in May 2017 that she was aware of the issue and, in a meeting in August 2017, expressly declined to provide any guidance addressing the problem. *Id*. ¶¶9, 14. EOIR's refusal to address this issue effectively denies Plaintiffs and proposed class members their right to a bond hearing before the Charlotte Immigration Court. Similarly, despite numerous opportunities to address the IJ Defendants' dereliction of their duty to adjudicate bond motions, the BIA refuses to do so. Attorneys have appealed the decisions of the IJ Defendants to the BIA in numerous cases. *See* Exs. B1 ¶¶11, 13, 16; B2 ¶¶10-11; B10 ¶¶4-7. In each of those cases, by the time the BIA issued a decision, usually at least two months after the appeal was filed—every case was moot, because the appellant already had received a delayed bond hearing in another jurisdiction and/or had their removal case finally resolved. *Id*.; Exs. B1 at 7; B2 at 7-8.

3. Deviation from Nationwide Bond Procedures

IJ Defendants' policy and/or practice deviates from nationwide bond procedures available to, and used by, IJs in other immigration courts to expeditiously adjudicate properly filed bond motions.[4] IJs can request that DHS ensure that individuals seeking release are

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[4] In its precedential decision *Matter of Chirinos*, the Board held:

> Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter. To achieve this objective we not only countenance, but will encourage, informal procedures so long as they do not result in prejudice. Thus, we even favor "telephonic" hearings before the immigration judge with the consent of the parties, where feasible.

present at their hearings. *Cf.* 8 U.S.C. § 1229a(b)(1) (subpoena authority).[5] They can, and do, conduct hearings without the individual present if he or she has waived presence. *See* Exs. C1 ¶¶2-3 (El Paso Immigration Court conducted bond hearings without clients present); C4 ¶2 and C9 ¶5 (Baltimore IJs rendered bond decision without client present); C5 ¶5 (Portland Immigration Court accepted waiver of presence in at least 40 cases); C10 ¶4 (Atlanta IJs conducted bond hearings without clients present); C12 ¶¶3-4 (Arlington Immigration Court accepted waiver of presence in at least 20 cases); C13 ¶2 (IJs in Georgia conduct bond hearings after clients are transferred to other locations); *see also* Exs. B2 ¶2; B4 ¶2; B5 ¶3; B9 ¶5; B10 ¶3; B11 ¶2; B12 ¶4; B13 ¶2; B14 ¶3; B18 ¶3; B19 ¶3 (addressing Charlotte Immigration Court's past practices of conducing hearing without person present); *accord* 8 U.S.C. § 1229a(b)(2)(A)(ii). In addition, IJs can hold the hearing by videoconference or telephone. *See* Exs. C1 ¶2; C3 ¶¶3-4; C4 ¶¶3-5; C5 ¶4 (Portland Immigration Court reached out to DHS to arrange for client detained in Idaho to appear telephonically); C6 ¶3 (Tacoma Immigration Court worked with the ICE office in Etowah, Alabama to arrange for client to appear via video conferencing); C7 ¶3; C8 ¶2; C9 ¶¶2-3; C10 ¶¶5-6; C11 ¶2; C12 ¶2. IJs also can decide bond motions without a hearing. *See* Ex. C4 ¶2 ("[T]he [Baltimore] IJ rendered a decision on bond based on my written motion only."); Exs. E1; E2 (standing orders noting that bond motions generally can be decided without a hearing); Imm. Court Practice Manual § 9.3(d).

The practices of IJs around the country, including the past practice of IJ Defendants themselves, demonstrate the viability of these readily available options. Yet, IJ Defendants

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16 I&N Dec. 276, 277 (BIA 1977) (emphasis in the original). *See also Matter of Valles-Perez*, 21 I&N Dec. 769, 772 (BIA 1997) (encouraging expeditious adjudication of bond motions).

[5] According to EOIR, DHS is "is responsible for ensuring that detained [individuals] appear at all hearings." Imm. Court Practice Manual § 9.1(c).

utilize none of them. *See* § II.B.2, *supra*. This is particularly troubling given that, in counseled cases, many bond motions are largely adjudicated between the IJ and counsel for the parties with limited to no interaction between the IJ and the individual seeking release. Exs. C2 ¶6 (stating that, except in pro se cases, "there is rarely any interaction between the judges and the detainees"); C3 ¶¶3-4; C4 ¶¶4-5; C5 ¶3; C7 ¶3 (describing contact with the detained individual as usually "minimal"); C8 ¶3; C9 ¶4; C10 ¶7; C11 ¶2; C12 ¶5 ("It is rare for my clients to provide testimony or otherwise speak during their bond proceedings."); C13 ¶4; B16 ¶10 (stating that in bond hearings outside of North Carolina, IJs "have not questioned the respondents about anything" and the "bond decision is solely based on the documentation presented to the Court, and the questions directed at the attorney"). Indeed, IJs conducting bond hearings for persons detained in Georgia, which is where DHS transfers most proposed class members, rarely seek to obtain information directly from the individuals seeking release. *See* Exs. C2 ¶7 (attesting to IJ interaction with the detained individual in less than 5 of 100 counseled cases at the immigration court in Lumpkin, Georgia); B7 ¶9 (attesting that IJs in Lumpkin "rarely, if ever ask questions of detained individuals" and "do nothing differently there that could not be done at the Charlotte Immigration Court, except the detained individuals is present:"); B13 ¶6 (stating that IJs in Atlanta, Lumpkin, Charlotte, and York, Pennsylvania "have never questioned my clients during a bond hearing or required them to testify"); B14 ¶2 ("[Atlanta IJs] never asked my clients any questions at the bond hearings."); B16 ¶10.

4. Harm to Plaintiffs and Proposed Class Members

Defendants' policy and/or practice harms Plaintiffs and proposed class members. They are deprived of an expeditious bond hearing in Charlotte, even though venue lies with that Court and the IJ Defendants have jurisdiction. *Matter of Cerda Reyes*, 26 I&N Dec. at 530.

They are needlessly detained waiting for a new bond hearing for weeks after the date on which they would have had a hearing in Charlotte but for Defendants' policy and/or practice, not including the time spent in detention in the Carolinas. *See* Ex. B1 ¶¶10-13 (generally, two to three weeks and, in one case, six weeks); B2 ¶12 ("usually two or three weeks, but in some cases as long as four weeks"); B3 ¶11 ("three weeks to as long as two months"); B6 ¶5 ("an average of 15-20 days"); B7 ¶11 ("several weeks, if not more than a month"); B9 ¶17 (normally, "at least 1 month"); B12 ¶11 ("anywhere from 15 to 30 days" and once more than a month due to multiple transfers); B13 ¶7 ("anywhere from two to three weeks"); B15 ¶5 ("an average of 15-29 days"); B16 ¶8 ("up to three weeks"); B19 ¶7 ("between 2 and 4 weeks").

For class members for whom another IJ eventually orders release, this delayed release is unwarranted and unnecessary, as is their extended separation from their families, many of whom rely on them for financial and emotional support. *See* Exs. B1 ¶¶11-12 (detailing family separations); B4 ¶¶8-9 (describing emotional suffering where client with epilepsy and ADD was denied medication during detention); B15 ¶¶6-8 (attesting to family and financial burden when detained individual is the "primary breadwinners in their household" and businesses). In addition, having already paid an attorney to file a bond motion in Charlotte, proposed class members may not have the resources to retain counsel to file and represent them at a subsequent bond hearing in the new location and their families and other witnesses are less likely to be able to travel to the new location, all of which diminishes their chances for release in a subsequent bond hearing. *See* B1 ¶10; B2 ¶13; B6 ¶6; B7 ¶10; B9 ¶20; B11 ¶17; B15 ¶9. Had the IJ Defendants conducted the original bond hearings, Plaintiffs and proposed class members would not be subject to additional detention or financial and emotional harms.

C. Named Plaintiffs

On January 17, 2018, Plaintiff Palacios, through counsel, filed a motion for a bond hearing with the Charlotte Immigration Court while he was detained at the Mecklenburg County Jail Central, in Charlotte, North Carolina. Ex. I2. Included with the bond request was a signed waiver of appearance authorizing Plaintiff Palacios' attorney to represent him at a bond hearing in his absence. Ex. I3. On January 17, 2018, the Court scheduled a bond hearing for January 22, 2018 in Courtroom 2. Ex. I4. Defendant Couch presides over all hearings in Courtroom 2 of the Charlotte Immigration Court. Ex. B2 ¶15; *see also* Ex. I4 (with notation of Defendant Couch's initials). Defendant Couch has a policy and/or practice of refusing to adjudicate any bond motions. *See* § II.B.2, *infra*. Indeed, Defendant Couch has a policy and/or practice of issuing Orders of the Immigration Judge with Respect to Custody and imprinting the forms with a pre-prepared stamp that reads, "The Court declines to exercise its authority. 8 C.F.R. Sec. 1003.19(c)," followed by the date and his name See Ex. A1. Plaintiff Palacios is presently detained at the Mecklenburg County Jail Central. Ex. I5.

On January 4, 2018, Plaintiff Cardenas Lozoya, through counsel, filed a motion for a bond hearing with the Charlotte Immigration Court while he was detained at the Wake County Detention Center in Raleigh, North Carolina. Ex. J2. On January 5, 2018, the Court scheduled a bond hearing for January 10, 2018 before Defendant Holmes-Simmons. Ex. J5. Plaintiff Cardenas Lozoya signed waiver of appearance authorizing his attorney to represent him at a bond hearing in his absence. Ex. J3. On January 10, 2018, Plaintiff Cardenas Lozoya's counsel appeared telephonically at the hearing. Several of his relatives were present in the courtroom. At the hearing, the DHS trial attorney asserted that DHS already had transferred Plaintiff Cardenas Lozoya to the Stewart Detention Center in Lumpkin, Georgia. Thereafter, Defendant

Holmes-Simmons stated that she could not hear the case and pretermitted consideration of the merits of the bond motion. She issued a decision stating that she "decline[d] to exercise jurisdiction" over the case because Plaintiff Cardenas Lozoya was not in the Carolinas. Ex. J4.

D. Plaintiffs' Legal Claims

Although the Court must not engage in "an in-depth assessment of the merits" of Plaintiffs claims at this stage, *Brown v. Nucor Corp.*, 785 F.3d 895, 903 (4th Cir. 2015) (internal quotations omitted), the Court may analyze the merits to some extent to determine the propriety of class certification. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-51 (2011). For that reason, Plaintiffs provide a brief summary of their merits claims here.

First, Defendants' policy and/or practice violates the Immigration and Nationality Act (INA) and its implementing regulations. Section 1226(a) of Title 8 confers on IJ Defendants jurisdiction to review DHS' custody determinations and release individuals on their own recognizance, bond, or appropriate conditions, while 8 C.F.R. § 1003.19(c) designates the proper venue to make bond motions to immigration courts. *See also* § II.A., *supra*. IJs order release absent a finding that the individual seeking relief is a danger to the community or a flight risk, *see, e.g., Matter of Patel*, 15 I&N Dec 666, 666 (BIA 1976); 8 C.F.R. § 1236.1(c)(8), which necessarily requires a proceeding to assess these factors. *Cf. Jarpa v. Mumford*, 211 F. Supp. 3d 706, 720 (D. Md. 2016) (noting that the statute "provid[es] for a detention hearing upon entry into ICE custody"). Properly construed, the statute and regulations entitle Plaintiffs and class members to a bond hearing by the IJ Defendants because they were physically within North Carolina or South Carolina at the time they filed their bond request. By entirely declining to adjudicate the merits of properly filed bond motions and failing to redress the policy and/or practice of so declining, Defendants violate 8 U.S.C. § 1226(a), 8 C.F.R. Part

1236, and 8 C.F.R. § 1003.19(c).

In addition, by refusing to adjudicate bond motions, Defendants are unlawfully withholding agency action and failing to perform a required duty in violation of the mandamus statute and the Administrative Procedure Act (APA), respectively. *See, e.g.*, *McKenzie v. Aviles*, No. 12-0201, 2012 U.S. Dist. LEXIS 35910, *5 n.4 (D.N.J. Mar. 16, 2012) (unpublished) ("Since [8 U.S.C. § 1226(a)] has a built-in right to a bond hearing, an IJ's failure to conduct such a hearing entitled the [noncitizen] to seek mandamus relief from the circuit court having jurisdiction over the IJ."). Mandamus is available to compel a federal official or agency to perform a duty if: (1) there is a clear right to the relief requested; (2) defendant has a clear, non-discretionary duty to act; and (3) there is no other adequate remedy available. *See* 28 U.S.C. § 1361; *First Fed. Sav. & Loan Ass'n of Durham v. Baker*, 860 F.2d 135, 138 (4th Cir. 1988). The APA provides that a reviewing court shall "compel agency action unlawfully withheld. . . ." 5 U.S.C. § 706(1).

As stated above, Congress vested IJs with jurisdiction to conduct bond hearings. *See* 8 U.S.C. § 1226. Congress alone controls an agency's jurisdiction and, unless Congress provides an agency authority to "adopt rules of jurisdictional dimension," any attempt to limit an agency's jurisdiction cannot stand. *Union Pacific R.R. v. Brotherhood of Engineers,* 558 U.S. 67, 84 (2009). Because Congress did not grant the IJ Defendants any authority to contract their jurisdiction, by failing to conduct bond hearings to adjudicate bond motions, Defendants unlawfully withhold agency action and decline to perform a non-discretionary duty to which Plaintiffs are entitled. Because DOJ Defendants have not taken corrective action despite ample opportunity to do so, *see* § II.B.2, *supra*, there is no adequate remedy available other than intervention by the appropriate federal court.

Finally, Defendants' policy and/or practice also violates the Due Process Clause of the Fifth Amendment. By denying Plaintiffs and class members a prompt adjudication of the merits of their properly filed bond motion, Defendants deprive them of their liberty without fair process, and violate established BIA precedent prioritizing expeditious bond adjudications. *Matter of Chirinos*, 16 I&N Dec. at 277; *Matter of Valles-Perez*, 21 I&N Dec. at 772.

III. THE COURT SHOULD CERTIFY THE CLASS

Plaintiffs and proposed class members seek certification under Fed. R. Civ. P. 23(a) and (b)(2) to challenge Defendants' uniform policy and/or practice of refusing to conduct prompt hearings on the merits of requests for bond in violation of their statutory, regulatory, and due process rights. The Court should certify the proposed class.

"[F]ederal courts should give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells v. HealthPlan Servs., Inc.,* 348 F.3d 417, 424 (4th Cir. 2003) (internal quotations omitted). Under Rule 23(a), the party seeking class certification must establish that: (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." In this case, Plaintiffs also must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Certification in this case is consistent with Rule 23(a) and 23(b)(2). The latter rule "was

created to facilitate civil rights class actions," *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.24 (4th Cir. 2006), especially those seeking declaratory or injunctive relief. Here, Plaintiffs seek only such relief and, absent class certification, most class members never will be able to seek redress for Defendants' unlawful deprivation of their liberty.

A. This Action Satisfies the Class Certification Requirements of Rule 23(a)

1. The Proposed Class Members Are So Numerous That Joinder Is Impracticable

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." "No specified number is needed to maintain a class action under Fed. R. Civ. P. 23; [rather,] application of the rule is to be considered in light of the particular circumstances of the case . . . ." *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). Courts generally find this requirement satisfied even when relatively few class members are involved. *Id*. (finding that class of 18 was sufficiently numerous).[6] Here, Plaintiffs do not know the exact number of individuals who have filed requests for bond hearings with the Charlotte Immigration Court while detained within the Carolinas—and could not possibly know the precise number who *will file*—but can demonstrate that the total is sufficiently large. *Harris v. Rainey*, 299 F.R.D. 486, 489 (W.D. Va. 2014) ("[I]t is not required that the exact size of a class be established. Indeed, where general knowledge and common sense would indicate that it is large, the numerosity requirement is satisfied.") (internal quotations omitted). Moreover, Defendants can easily ascertain the exact number who have filed. *Accord Barahona-*

[6] *See, e.g.*, *Arkansas Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (20 class members); *Jones v. Diamond*, 519 F.2d 1090, 1100 n.18 (5th Cir. 1975) (48 class members); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (41-46 class members); *Milbourne v. JRK Residential Am., LLC*, No. 3:12cv861, 2014 U.S. Dist. LEXIS 155288, *12 (E.D. Va. Oct. 31, 2014) (unpublished) (43 class members).

Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999) ("[Immigration officials are] uniquely positioned to ascertain class membership").

As of July 2017, at least nine facilities held individuals in immigration detention in North Carolina and South Carolina. *See* Ex. D. At an absolute *minimum*, the number of persons detained in immigration custody in the Carolinas in the last three fiscal years (FY) has been 847 (FY2015), 847 (FY2016), and 1,452 (FY2017), respectively. *Id*. at ¶8. As the Field Office Director for the Atlanta ICE Office, Defendant Gallagher is responsible for the detention of individuals in the Carolinas,[7] and thus has knowledge of the number of individuals in DHS custody at any given time.[8]

Of the large number of individuals detained in immigration custody in the Carolinas, many will request bond hearings, and, according to the regulation governing the venue of bond proceedings, *see* 8 C.F.R. § 1003.19(c), must file those requests with the Charlotte Immigration Court. There is a 75% chance that, of the requests filed, the clerk's office will schedule a bond hearing with one of the three IJ Defendants.[9] Significantly, EOIR, specifically Defendants Sessions, McHenry, and Keller, easily can ascertain the number of bond requests previously filed, and currently pending, with the Charlotte Immigration Court and assigned to the IJ Defendants.[10] As such, the proposed class is sufficiently large that joinder is impracticable.

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[7] *See* Enforcement and Removal Operations Field Offices, https://www.ice.gov/contact/ero (last visited Jan. 17, 2018).

[8] Defendant White, as Facilities Commander of the Mecklenburg County Jail Central, has similar knowledge of the number of individuals detained in that facility.

[9] If the clerk's office assigns the case to the fourth sitting judge, IJ Harris, the bond hearing will take place. *See* n.3, *supra*.

[10] Whether an individual remains in DHS custody can be determined via the ICE locator system. *See* Online Detainee Locator System, https://locator.ice.gov/odls/#/index (last visited Jan. 17, 2018).

Scott v. Clarke, 61 F. Supp. 3d 569, 584 (W.D. Va. 2014) ("In general, if a proposed class size exceeds 25 plaintiffs, joinder is usually presumed impracticable.").

Plaintiffs have ascertained that there are currently at least 38 additional individuals who satisfy the class definition. *See* Ex. B1 ¶17 (identifying 20 clients as putative class members); B2 ¶14 (same, 3 clients); B3 ¶13 (same, 15 clients). As more individuals taken into custody in the Carolinas file requests for bond hearings and hearings are scheduled before the IJ Defendants, more individuals will become class members. *Scott*, 61 F. Supp. 3d at 584 (finding that fluidity of incarcerated population favored finding numerosity). The inherently transitory nature of the claims, *see* § III.C, *infra*, further demonstrates that joinder is impracticable.

Defendants are in possession of the precise number of current proposed class members, and Plaintiffs have demonstrated the large number of current and future class members and the many reasons why "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see also*; *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable.").[11]

2. Because Plaintiffs' Claims Derive from Defendants' Common Practice, the Class Presents Common Questions of Law and Fact

Rule 23(a)(2) requires that there be questions of law or fact that are common to the

[11] Although the Fourth Circuit has found that "Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable," *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (internal quotation omitted), it has not explicitly addressed whether this requirement would apply to Rule 23(b)(2) class actions seeking injunctive relief. Consistent with the majority of circuits to have addressed the issue, and for the reasons articulated by the Third Circuit Court of Appeals in *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015), Plaintiffs submit that it does not apply to this Rule 23(b)(2) action. Regardless, proposed class members are "readily identifiable" because of the specific parameters of the class definition and for the other reasons set forth above.

class. "A single common question will suffice, but it must be of such a nature that its determination will resolve an issue that is central to the validity of each one of the claims in one stroke." *EQT Prod. Co.*, 764 F.3d at 360 (internal quotations & citations omitted); *see also Rehberg v. Flowers Baking Co. of Jamestown, LLC*, No. 3:12-cv-00596-MOC-DSC, 2015 U.S. Dist. LEXIS 36929, *22 (W.D.N.C Mar. 24, 2015) (unpublished) ("[The minor] differences [in relationships between class members] are not so great as to not destroy commonality."); *Plotnick v. Computer Sci. Corp. Deferred Comp. Plan*, 182 F. Supp. 3d 573, 582 (E.D. Va. 2016) ("[Commonality] is satisfied when there is even a single common question that will resolve an issue central to the validity of each of the class member's claims.").

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores*, 564 U.S. at 349-50 (internal quotation omitted). To establish the existence of a common question of law, the proposed class members' claims "must depend upon a common contention" that is "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." *Id*. at 350. Thus, "[w]hat matters to class certification . . . is not the raising of common 'questions' . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation and citation omitted).

Whether an agency action results in the unlawful deprivation of a liberty interest is a question common to the entire class, resulting in a similarly common answer. As such, challenges involving the adjudication of, and access to, immigration bond hearings are routinely certified as class actions. *See*, *e.g.*, *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (affirming district-wide preliminary injunction to certified class of immigration detainees

challenging the practice of IJs refusing to consider a person's financial circumstances when setting bond amounts); *Reid v. Donelan*, 297 F.R.D. 185 (D. Mass. 2014) (certifying class of all individuals who are or will be mandatorily detained within Massachusetts for over six months and are not provided an individualized bond hearing); *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015) (certifying district-wide class of immigration detainees challenging the immigration courts' policy of refusing to hear requests for conditional parole); *Hamama v. Adducci*, No. 17-cv-11910, 2018 U.S. Dist. LEXIS 421 (M.D. Mich. Jan. 2, 2018) (certifying three nationwide subclasses of detained Iraqi nationals subject to post-removal order and/or prolonged detention).

Plaintiffs and proposed class members have been, or will be, subject to Defendants' refusal to conduct bond hearings or to take corrective action. *Accord Scott v. Family Dollar Stores, Inc.*, No. 3:08-cv-00540-MOC-DSC, 2016 U.S. Dist. LEXIS 105267, *17-18 (W.D.N.C. Jun. 24, 2016) (unpublished) (finding commonality met where plaintiffs challenged company-wide policy and brought a pattern-or-practice claim). Like proposed class members who have been, or will be, deprived of a bond hearing by the IJ Defendants due to that common policy and/or practice, Plaintiffs similarly have been or will be deprived of an expeditious bond hearing. Plaintiffs' and proposed class members' claims implicate common factual questions, including:

- Whether the IJ Defendants have a policy and/or practice of failing to conduct a hearing on the merits of a request for release; and
- Whether the DOJ Defendants have failed to take corrective action in response to the IJ Defendants' policy and/or practice of failing to conduct such bond hearings.

Similarly, Plaintiffs and proposed class members share dominant and controlling questions of law in the case: whether the IJ Defendants' policy and/or practice of refusing to conduct hearings on the merits of a request for release from detention and the DOJ Defendants' failure to act

violates the INA and implementing regulations, the APA, and the Due Process Clause of the Fifth Amendment. *All* proposed class members make the same legal claims—that the immigration laws and the Constitution provide both:

(1) the right to have a bond hearing conducted, provided venue properly lies under 8 C.F.R. § 1003.19(c) and the Court has jurisdiction; and

(2) the right to have such bond hearing conducted as expeditiously as practicable.

These legal questions are common to *all* proposed class members. Should Plaintiffs prevail with respect to any of their claims, *all* class members will benefit; all will be entitled to declaratory relief and benefit from injunctive relief if they have not yet been afforded a bond hearing.

The Court's answer to whether the IJ Defendants' policy and/or practice of refusing to conduct bond hearings and the DOJ Defendants' failure to act violates the INA and implementing regulations, the APA, and the Due Process Clause of the Fifth Amendment will "drive the resolution" of the case, and a favorable resolution for Plaintiffs will remedy the problem for all class members. *Wal-Mart Stores*, 564 U.S. at 350 (internal quotation omitted). The proposed class members thus have raised a "common contention . . . 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." *Id*. The alleged existence of the IJ Defendants' policy and/or practice and the DOJ Defendants' failure to take corrective action is the "glue" holding the proposed class together. *Id*. at 352.

There are no factual differences in the circumstances of the proposed class members that are relevant. The salient common facts that all class members, by definition, share—that they have been, or will be, subject to the IJ Defendants' unlawful policy and/or practice and the

DOJ Defendants' failure to act—are central to the case.[12] Notably, Plaintiffs do not ask for an order of release from immigration custody nor do they ask the Court to determine whether or how DHS may transfer them; they are simply requesting that this Court review whether the IJ Defendants are required to follow the INA and its implementing regulations and conduct bond hearings and whether the DOJ Defendants are required to take corrective action when IJs do not do so. As such, the questions presented apply equally to all class members regardless of any other factual differences. The commonality requirement is satisfied because all class members allege the same injuries and raise the same set of common questions, and because the relief sought by all class members is the same.

3. Plaintiffs' Claims Are Typical of the Claims of the Members of the Proposed Class

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . of the class." To establish typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation omitted). "That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned," only that "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006). In

[12] Although Defendants Couch and Pettinato refuse to conduct any bond hearings, and Defendant Holmes-Simmons will commence and then pretermit a bond hearing if DHS represents it has transferred or is transferring the person outside the Carolinas, the relevant factual characteristic is that all three IJ Defendants refuse to review the merits of the bond request. Rather than allowing waiver of presence, holding a hearing by telephone or video, or simply requesting that DHS make the individual available for the hearing, all three IJs violate the right to an expeditious bond hearing.

this way, commonality and typicality "tend to merge" because both "serve as guideposts for determining whether, under the particular circumstances presented by the case, maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of the Southwest*, 457 U.S. at 157 n.13.

Plaintiffs' claims are typical of the proposed class because they proceed under the same legal theories, seek the same relief, and have suffered the same injuries. Like each proposed class member, Plaintiffs have been subject to the IJ Defendants policy and/or practice and the DOJ Defendants' failure to take corrective action, resulting in the refusal of the IJ Defendants' to review their custody status. Despite meeting all the statutory and regulatory requirements entitling them to such review, Plaintiffs have been injured by the denial of a bond hearing in Charlotte and must wait weeks for a new hearing to take place, all the while being deprived of their liberty and separated from their families. *See* § II.B.4, *supra*. The proposed class suffers the same injury. Thus, the facts underlying Plaintiffs' claims derive from the same facts proving the claims of the class. Because Plaintiffs suffer the same statutory, regulatory, and constitutional injuries as proposed class members, their claims are typical of the class. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (upholding typicality where plaintiffs "raise[d] similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings"). And, because they are united in their interest and injury, the element of typicality is met.

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class Members, and Counsel Are Qualified to Litigate this Action

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "The adequacy standard of Rule 23(a)(4) is met if: (1) the named

plaintiff has interests common with, and not antagonistic to, the Class' interests; and (2) the plaintiff's attorney is qualified, experienced and generally able to conduct the litigation." *In re Se. Hotel Props. Ltd. P'ship Inv'r Litig.*, 151 F.R.D. 597, 606-07 (W.D.N.C. 1993). A minor conflict of interest is not sufficient to defeat adequacy. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("For a conflict of interest to defeat the adequacy requirement, that conflict must be fundamental." (internal quotation omitted)).

The named Plaintiffs have interests in common with and seek relief on behalf of the class as a whole and have no interest antagonistic to those of other class members. *See* Exs. I1, J1. Therefore, they will fairly and adequately protect the interests of the class members they seek to represent. Their mutual goal is to have this Court declare unlawful Defendants' challenged policy and/or practice and failure to take corrective action and issue injunctive relief that halts this policy and/or practice and affords them bond hearings. They seek no monetary damages. Thus, they seek a remedy for the same injuries, and the interests of the representatives and the class members are aligned.[13]

Plaintiffs' counsel also "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Counsel are considered qualified when they can establish their experience in previous class actions and cases involving the same field of law. *See, e.g.*, *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979); *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1224 (N.D. Ill. 1985). Plaintiffs are represented by attorneys from the American Immigration Council, the Capital Area

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[13] Plaintiffs also meet the adequacy requirement for the same reasons that they satisfy the commonality and typicality requirements. *See* §§ III.A.2, III.A.3, *supra*; *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (noting that the "adequacy-of-representation requirement tends to merge with the commonality and typicality criteria of Rule 23(a)" (internal quotation omitted)).

Immigrants' Rights (CAIR) Coalition, and Cauley Forsythe Law Group. Counsel have a demonstrated commitment to protecting the rights and interests of noncitizens and have experience in handling complex and class action litigation, including in the immigration field. *See* Exs. H1; H2; H3; H4; H5. Class counsel have the experience and ability to zealously and effectively represent both named and absent class members. *Id*.

B. Plaintiffs Satisfy the Requirements of Rule 23(b).

Rule 23(b)(2), under which Plaintiffs seek certification, requires that Defendants have "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." The underlying premise of subsection (b)(2) is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct at issue can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores*, 564 U.S. at 360 (internal quotation omitted). In other words, Rule 23(b)(2) is met where "a single injunction or declaratory judgment would provide relief to each member of the class." *Id*. It "'is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory.'" *US Airline Pilots Ass'n v. Velez*, No. 3:14-cv-00577-RJC-DCK, 2016 U.S. Dist. LEXIS 54239, *10 (W.D.N.C. Apr. 22, 2016) (unpublished) (quoting *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 595 (4th Cir. 1976)). Certification under Rule 23(b)(2) is especially appropriate in civil rights and constitutional cases. *See, e.g.*, *Amchem Prods.*, 521 US at 614; *Thorn*, 445 F.3d at 330 & n.24; *Scott*, 61 F. Supp. 3d at 590-91.

This suit falls directly within the ambit of Rule 23(b)(2). Plaintiffs challenge Defendants' uniform refusal to conduct bond hearings with no regard to the individual merits of Plaintiffs' custody status. Defendants' refusal to act constitutes statutory, regulatory, and

constitutional violations that apply to the entire class. Plaintiffs seek only declaratory and injunctive relief to remedy these violations; they ask the Court to declare that Defendants' policies and/or practices violates the INA, APA, and due process, to order Defendants to cease refusing to conduct bond hearings, to vacate the IJ Defendants' prior decisions refusing to conduct bond hearings, and to order the Charlotte Immigration Court to conduct a bond hearing for any class members who have not yet been afforded one. Plaintiffs seek no monetary damages for the substantial harms Defendants' actions cause Plaintiffs and their families. The requested declaratory and injunctive relief would apply to Plaintiffs and all proposed class members in identical fashion. Therefore, Defendants' actions have made appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2); *see also Reid*, 297 F.R.D. at 193 (certifying a class under Rule 23(b)(2) where "it is undisputed that Defendants refuse to provide any of the class members with an individualized bond hearing"); *Hernandez v. Lynch*, No. 16-00620-JGB, 2016 U.S. Dist. LEXIS 191881, *55-56 (C.D. Cal. Nov. 10, 2016) (certifying under Rule 23(b)(2) where various policies and practices would "subject[] Proposed Class members to improperly derived bond determinations"). The requirements of Rule 23(b)(2) are met.

C. Certification Also Is Warranted Due to the Inherently Transitory Nature of Plaintiffs' Claims.

Certification of the proposed classes is also appropriate due to the inherently transitory nature of Plaintiffs' claims. "'[S]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)). In such cases, the named plaintiff's claims are "capable of repetition, yet evading review."

Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975). Accordingly, a class action may be the only mechanism to provide for meaningful review.[14]

Past efforts to address the IJ Defendants' policy and/or practice repeatedly demonstrate how Plaintiffs' claims are "capable of repetition, yet evading review." Numerous appeals of decisions of the IJ Defendants have been filed with the BIA. *See* Exs. B1 ¶16; B2 ¶10; B10 ¶¶4-7. In each case, the Board did not rule for months. *Id*. By the time it ruled, it determined that each case had become moot. *Id*. Similarly, without class certification, an individual plaintiff likely would receive a delayed hearing on the merits of their bond requests in a new location *before* this Court would reach the merits of the case. As such, Defendants' decision to refuse Plaintiffs and proposed class members *prompt* hearings on the merits of their requests for bond would evade judicial review and they would have no declaratory or injunctive redress for their additional weeks of detention without adjudication of their bond motions.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Class Certification and enter the accompanying proposed certification order.

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[14] In *County of Riverside*, the Court found that, in such cases, "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." 500 U.S. at 52. Thus, claims which are "'inherently transitory'" are preserved even if an individual plaintiff's claim becomes moot between the filing of a complaint and a district court ruling on class certification. *Id*. (quoting *Geraghty*, 445 U.S. at 399); *see also Shifflett v. Kozlowski*, No. 92-0072-H, 1993 U.S. Dist. LEXIS 997, *14-17 (W.D. Va. Jan. 25, 1993) (unpublished) (permitting class action to proceed where named plaintiffs' claims were mooted 2, 8, and 16 days after filing complaint and where individuals would continue to be subject to the challenged actions).

Respectfully submitted,

By:

s/ *Jordan Forsythe Greer*
Jordan Forsythe Greer, NC Bar #37645
CAULEY FORSYTHE LAW GROUP
402 West Trade Street Suite 210
Charlotte, North Carolina 28202
(704) 522-6363
jordan@cauleyforsythe.com

Trina Realmuto*
Kristin Macleod-Ball*
AMERICAN IMMIGRATION COUNCIL
100 Summer Street, 23rd Floor
Boston, MA 02110
(857) 305-3600
trealmuto@immcouncil.org
kmacleod-ball@immcouncil.org

Adina Appelbaum*
David Laing, NC Bar #15935*
CAPITAL AREA IMMIGRANTS' RIGHTS COALITION
1612 K Street NW Suite 204
Washington, DC 20006
(202) 899-1412
adina@caircoalition.org
david@caircoalition.org

Attorneys for Plaintiffs

*Moving for *pro hac vice* admission

January 17, 2018

CERTIFICATE OF SERVICE

I, Jordan Forsythe Greer, hereby certify that on January 17, 2018, I electronically filed the attached Brief in Support of Motion for Class Certification with the Clerk of the Court using the CM/ECF system. In addition, I will send a copy of this document by U.S. certified mail to each of the following:

United States Attorney
Western District of North Carolina
Attn: Civil Process Clerk
227 W. Trade Street
Suite 1650, Carillon Building
Charlotte, NC 28202

Jefferson B. Sessions, U.S. Attorney Genera
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

James McHenry, Acting Director,
c/o Executive Office for Immigration Review
Office of the Director
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Kirstjen Nielsen
c/o Office of the General Counsel
Department of Homeland Security
Mail Stop 3650
Washington, DC 20528

Sean W. Gallagher, Field Office Director
U.S. Immigration and Customs Enforcement
180 Ted Turner Dr. SW, Suite 522
Atlanta, Georgia 30303

Major T.E. White, Facility Commander
Mecklenburg County Jail Central
801 E 4th St, Charlotte, NC 28202

MaryBeth Keller, Chief Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

Deepali Nadkarni, Assistant Chief Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

V. Stuart Couch, Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

Barry J. Pettinato, Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

Theresa Holmes-Simmons, Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

Charlie Peterson, Warden
Stewart Detention Center
146 CCA Road
Lumpkin, Georgia 31815

s/ *Jordan Forsythe Greer*
Jordan Forsythe Greer, NC Bar #37645

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Jorge Miguel PALACIOS; Jesus Eduardo CARDENAS LOZOYA,

Plaintiffs-Petitioners,

v.

Jefferson B. SESSIONS, Attorney General, Department of Justice; James McHENRY, Acting Director, Executive Office for Immigration Review, Department of Justice; MaryBeth KELLER, Chief Immigration Judge; Deepali NADKARNI, Assistant Chief Immigration Judge; V. Stuart COUCH, Immigration Judge, Charlotte, NC; Barry J. PETTINATO, Immigration Judge, Charlotte, NC; Theresa HOLMES-SIMMONS, Immigration Judge, Charlotte, NC; Sean W. GALLAGHER, Atlanta Field Office Director, U.S. Immigration and Customs Enforcement; Major T.E. WHITE, Facility Commander, Mecklenburg County Jail Central; Charlie PETERSON, Warden, Stewart Detention Center, in their official capacities,

Defendants-Respondents.

Case No._____

INDEX OF EXHIBITS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Exhibit	Exhibit Description
A	**Orders of the Immigration Judge with Regard to Custody issued by Defendants Pettinato, Couch, and Holmes-Simmons**
A1	Orders issued by Defendant Couch
A2	Orders issued by Defendant Pettinato
A3	Orders issued by Defendant Holmes-Simmons
B	**Declarations of Attorneys Practicing in the Charlotte Immigration Court**
B1	Declaration of Rebecca Moriello and attachments: • Order issued by Defendant Pettinato, dated Dec. 15, 2017 • Board of Immigration Appeals decision, dated Oct. 4, 2017
B2	Declaration of Helen Parsonage and attachments: • Affidavit of Helen Parsonage, dated Jul. 19, 2017 • Board of Immigration Appeals decision, dated Oct. 21, 2015 • Board of Immigration Appeals decision, dated Oct. 21, 2015
B3	Declaration of Jeffrey Bruce Widdison
B4	Declaration of Cynthia A. Aziz and attachments: • Email from Cynthia Aziz, dated Apr. 26, 2016 • Order issued by Defendant Holmes-Simmons, dated Jan. 30, 2017
B5	Declaration of David A. Concha
B6	Declaration of Matthew Duncan Pierce
B7	Declaration of Andres Lopez
B8	Declaration of W. Rob Heroy
B9	Declaration of Jim Melo
B10	Declaration of Evelyn Smallwood
B11	Declaration of Jessica L. Yañez and attachments: • Order issued by Defendant Couch, dated Aug. 31, 2015 • Email from Jessica Yañez, dated Aug. 23, 2016 • Email from Jessica Yañez, dated May 3, 2017 • Email from Defendant Nadkarni, dated May 3, 2017 • Email from Jessica Yañez, dated May 3, 2017 • Order issued by Defendant Pettinato, dated May 3, 2017 • Email from Jessica Yañez, dated May 25, 2016 • Email from Jessica Yañez, dated Aug. 17, 2017 • Draft Q&A summary with Defendant Nadkarni, dated Aug. 9, 2017 • Email from Defendant Nadkarni, dated Aug. 24, 2017
B12	Declaration of Jeremy L. McKinney
B13	Declaration of P. Mercer Cauley
B14	Declaration of Patrick J. Hatch
B15	Declaration of Nina Cano Richards and attachment: • Order issued by Defendant Couch, dated May 24, 2017

B16	Declaration of Stefan Latorre
B17	Declaration of Benjamin A. Snyder
B18	Declaration of James Gilchrist IV
B19	Declaration of Georgeanna Gardner
C	**Declarations of Attorneys Practicing in Other Immigration Courts**
C1	Declaration of Eduardo Beckett
C2	Declaration of Martin Rosenbluth
C3	Declaration of Jeremy Jong
C4	Declaration of Priya Patel
C5	Declaration of Benjamin E. Stein
C6	Declaration of Timothy Warden-Hertz
C7	Declaration of Philip Torrey
C8	Declaration of Edith Hinson
C9	Declaration of Himedes V. Chicas
C10	Declaration of Jama Ibrahim
C11	Declaration of Alexandra Ribe
C12	Declaration of Eileen P. Blessinger
C13	Declaration of Carolina Antonini
D	**Declaration of Mary Small and attachment** • Spreadsheet excerpt, Confidential ICE ERO Facility List 07-10-2017-1
E	**Immigration Judges' Standing Policies on Bond**
E1	Policy on Custody Redetermination ("Bond") Hearings, IJ Tuckman
E2	Policy on Bond Hearings, IJ Abbott
F	**Memorandum from R. Elliott Edwards, Court Administrator to the American Immigration Lawyers Association, entitled "Opening the Charlotte Immigration Court"**
G	**AILA/EOIR Meeting Agendas and Minutes**
G1	AILA/EOIR Meeting Agenda and Minutes, dated Oct. 22, 2015
G2	AILA/OCAHO and AILA/EOIR Agenda and Minutes, Apr. 7, 2016
H	**Declarations of Proposed Class Counsel**
H1	Declaration of Trina Realmuto
H2	Declaration of Kristin Macleod-Ball
H3	Declaration of Jordan Forsythe Greer
H4	Declaration of Adina Appelbaum
H5	Declaration of David Laing
I	**Declaration and Documents Relating to Plaintiff Jorge Miguel Palacios**
I1	Declaration of Jorge Miguel Palacios
I2	Cover page of Respondent's Request for Bond Hearing of Jorge Miguel Palacios, date-stamped as received by the Charlotte Immigration Court on Jan. 17, 2018

I3	Waiver of appearance signed by Jorge Miguel Palacios
I4	Notice of Custody Redetermination Hearing in Immigration Proceedings of Jorge Miguel Palacios, dated Jan. 17, 2018
I5	Screenshot of Mecklenburg County Sheriff's Office website inmate search for Jorge Miguel Palacios on Jan. 17, 2018
J	**Declaration and Documents Relating to Plaintiff Cardenas Lozoya**
J1	Declaration of Jesus Cardenas Lozoya
J2	Cover page of Motion for Bond Redetermination, Telephonic Appearance, and Recordation of Bond Hearing of Jesus Cardenas Lozoya, date-stamped as received by the Charlotte Immigration Court on Jan. 4, 2018
J3	Waiver of appearance signed by Jesus Cardenas Lozoya
J4	Order of the Immigration Judge with Regard to Custody issued by Defendant Holmes-Simmons, dated Jan. 10, 2018
J5	Notice of Custody Redetermination Hearing in Immigration Proceedings of Jesus Cardenas Lozoya, dated Jan. 5, 2018

CERTIFICATE OF SERVICE

I, Jordan Forsythe Greer, hereby certify that on January 17, 2018, I electronically filed the attached Index of Exhibits in Support of Plaintiffs' Motion for Class Certification with the Clerk of the Court using the CM/ECF system. In addition, I will send a copy of this document by U.S. certified mail to each of the following:

United States Attorney
Western District of North Carolina
Attn: Civil Process Clerk
227 W. Trade Street
Suite 1650, Carillon Building
Charlotte, NC 28202

Jefferson B. Sessions, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

James McHenry, Acting Director,
c/o Executive Office for Immigration Review
Office of the Director
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Kirstjen Nielsen
c/o Office of the General Counsel
Department of Homeland Security
Mail Stop 3650
Washington, DC 20528

Sean W. Gallagher, Field Office Director
U.S. Immigration and Customs Enforcement
180 Ted Turner Dr. SW, Suite 522
Atlanta, Georgia 30303

Major T.E. White, Facility Commander
Mecklenburg County Jail Central
801 E 4th St, Charlotte, NC 28202

MaryBeth Keller, Chief Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

Deepali Nadkarni, Assistant Chief Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

V. Stuart Couch, Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

Barry J. Pettinato, Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

Theresa Holmes-Simmons, Immigration Judge
Office of the Immigration Judge
Executive Office for Immigration Review
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

Charlie Peterson, Warden
Stewart Detention Center
146 CCA Road
Lumpkin, Georgia 31815

s/ *Jordan Forsythe Greer*
Jordan Forsythe Greer, NC Bar #37645