IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

Julio Cesar Sanchez-Acosta, *et al.*	)	
	)	
Petitioners-Plaintiffs,	)	
	)	
v.	)	
	)	
Jefferson B. Sessions, III, *et al.*	)	Civ. No.: 1:18-cv-00872-LO-IDD
	)	
Respondents-Defendants.	)	
	)	
	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR CLASS CERTIFICATION OR REPRESENTATIVE HABEAS ACTION

Petitioners, by counsel, hereby submit the following Reply Memorandum in support of their Motion for Class Certification, Dkt. No. 16. Petitioners seek to certify a class consisting of "all individuals who have an administratively final grant of withholding of removal under 8 USC § 1231 at any time on or after July 20, 2018; and who are detained by or on the authority of Respondents in Virginia at any time on or after July 20, 2018; and who have not been charged in a Notice to Appear or Notice of Reinstatement of Removal, any similar charging document, or through other means in immigration court as being removable to any country other than a country to which their removal was withheld." Dkt. No. 10, ¶ 95.

By certifying this class, Petitioners seek classwide relief predicated on their First, Fourth and Fifth Claims for Relief, under the Immigration and Nationality Act and the Administrative Procedures Act. The First Claim for Relief seeks an order from this Court finding that under a correct interpretation of 8 U.S.C. § 1231(a)(1), the "removal period" does not run for individuals

granted withholding of removal as to all countries previously designated for their removal—in other words, individuals ordered removed to no country—thus benefitting all such individuals. The Fourth and Fifth Claims for Relief seek an order from this Court declaring that the Respondents' new policy of detaining for an additional ninety days all classmembers—a departure from Respondents' previous policy, which presumed relief for such individuals—is arbitrary and capricious, and furthermore was improperly promulgated. To the extent that Petitioners' initial Motion for Class Certification sought classwide treatment of Claims II and III (procedural due process and substantive due process), such request is hereby withdrawn.

I. INTRODUCTION

Petitioners established in their opening Memorandum in Support of Motion for Class Certification, Dkt. No. 17, that all members of the proposed class are individuals who have been granted an order from an immigration judge withholding their removal as to every country that the government designated in each of their cases, all of whom seek resolution of the same common question of law: namely, whether they are in the "removal period" defined under 8 U.S.C. § 1231(a)(1) as they cannot presently be legally removed to any country; and, if they are not in a "removal period," then whether the government has the authority to continue to detain them. These fundamental facts related to class certification are largely ignored in the government's opposition. Instead, the government attempts to sidestep the Rule 23 class certification inquiry by arguing the merits of Petitioners' claims and stating that were each class member to file a traditional post-final-order-of-removal habeas under the statutory holding of *Zadvydas v. Davis*, 533 U.S. 678 (2001), each would have a different result.

The government first argues that 8 U.S.C. § 1252(f)(1) precludes certification of an injunctive relief class under Rule 23(b)(2)—a position that is not supported by case law and is

contrary to the text of the statute upon which the government relies. The express language of § 1252(f)(1) provides that no court shall have jurisdiction to "enjoin or restrain the operation of the provisions" of §§ 1221-1231, unless such an action is brought by an individual alien. Far from seeking to "enjoin or restrain" the operations of § 1231(a), Petitioners seek an order from the Court that the Petitioners and the class members are not in a removal period and therefore §§ 1231(a)(1) and (a)(2) do not apply to them. Section 1252(f)(1) has no relevance to that determination. *See, e.g.*, *Diaz v. Hott*, 297 F. Supp. 3d 618, 627-28 (E.D. Va. 2018) (Brinkema, J.) ("Petitioners are not seeking an injunction 'against the operation of' the INA but are instead seeking an injunction requiring respondents to comply with the terms of the INA, as interpreted by this Court. Accordingly, § 1252(f)(1), by its terms, does not act as a bar to class-wide relief in this civil action").

The government's focus on the potential outcomes that may flow from class members having their custody status reevaluated ignores the fact that the government has tried in vain to find different countries to which they can remove Petitioners. The possibility that class members might not all realize the exact same outcomes under a correct interpretation of the statute is not dispositive under the Rule 23 factors. The commonality and typicality requirements of Rule 23 "[b]oth serve as guideposts for determining whether under the particular circumstances 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." *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338, 349, n.5 (2011). The standard is satisfied in this case. And the fact that the government has sent letters to different countries regarding different Petitioners is irrelevant, as the criteria for class

membership is that there are no countries *designated for removal* to which class members can be removed, as is the case for all three Petitioners.

Finally, the class should be certified retroactive to the date of filing the Motion for Class Certification, Dkt. No. 16, because Petitioners' claims regarding the proper interpretation of a "removal period" which lasts only 90 days are inherently transitory.

II. ARGUMENT

The government does not seek to challenge whether the proposed class satisfies the Rule 23(a)(1) and 23(a)(4) requirements of numerosity and adequacy. Dkt. No. 26 at 21, n.11. The government also does not challenge the ascertainability of the proposed class anywhere in its opposition. The government limits its class certification opposition to whether the class can be certified under 8 U.S.C. § 1252(f)(1) and Rule 23(b)(2), the Rule 23(a) elements of commonality and typicality, and whether a representative habeas class is appropriate. Dkt. No. 26. The government's arguments at each turn, however, are premised on erroneous legal reasoning and mischaracterizations of the relief sought by Petitioners. The requirements of Rule 23 are well satisfied.

A. 8 U.S.C. § 1252(f)(1) Does Not Preclude Class Certification

The government argues that 8 U.S.C. § 1252(f)(1) precludes any class-wide injunctive relief concerning the application of 8 U.S.C. §§ 1221-1231, and that Rule 23(b)(2) therefore cannot be satisfied in this case. But § 1252(f)(1) provides only that "no court shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [Sections 1221-1231]" on a classwide basis. Far from seeking to "enjoin or restrain the operation" of the law, Petitioners' First Claim for Relief merely seeks to have the law properly interpreted and applied to them and to the similarly situated classmembers.

Numerous courts have evaluated § 1252(f)(1) in habeas class action proceedings concerning the application of injunctive relief to §§ 1221-1231, including the Eastern District of Virginia. Those courts have consistently found that § 1252(f)(1) does not prohibit class-wide injunctive relief where the plaintiffs seek to ensure that the law is properly applied (as opposed to seeking to prevent the law from being applied at all). *See, e.g.*, *Diaz v. Hott*, 297 F. Supp. 3d 618, 627-28 (E.D. Va. 2018) (Brinkema, J.) ("Petitioners are not seeking an injunction 'against the operation of' the INA but are instead seeking an injunction requiring respondents to comply with the terms of the INA, as interpreted by this Court. Accordingly, § 1252(f)(1), by its terms, does not act as a bar to class-wide relief in this civil action"); *Abdi v. Duke*, 280 F. Supp. 3d 373, 409 (W.D.N.Y. 2017) ("Where, as here, the moving party 'does not seek to enjoin the operation of §§ 1221–1231,' and instead, seeks to enjoin violations of the statutory and regulatory framework, the class-wide prohibition on injunctive relief is inapplicable."); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Section 1252(f)(1) prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes."); *Preap v. Johnson*, 303 F.R.D. 566, 584 (N.D. Cal. 2014), aff'd, 831 F.3d 1193 (9th Cir. 2016) (certifying class of aliens challenging whether they are correctly detained pursuant to 8 U.S.C. §§ 1226(a) or 1226(c)). In cases such as the instant case where petitioners do not seek to enjoin the law itself as unlawful, but instead seek to enjoin the unlawful application of the law, the prohibition does not apply.

The key phrase in *Jennings v. Rodriguez* is that § 1252(f)(1) prohibits "classwide injunctive relief *against* the operation of §§ 1221-123[2]." 138 S.Ct. 830, 851 (2018) (emphasis added). In other words, it is when the petitioners are seeking to *stop* application of the relevant statutes that § 1252(f)(1) applies. *Jennings* itself acknowledges that the Ninth Circuit did not consider § 1252(f)(1) to apply in cases such as the instant case where the petitioners are seeking

injunctions against the government's unlawful interpretation of the law, but do not seek to prevent the law (once correctly interpreted) from running. *Id*.

Additionally, as various cases brought under the APA show, challenges to unlawful *policies* or the non-compliance with previously enacted policies are also not subject to § 1252(f)(1), as they are not challenging the operation of the INA. *See Damus v. Nielsen,* Civ. A. No. 18–578 2018 WL 3232515 (D.D.C. July 2, 2018) (provisionally certifying a class seeking an injunction mandating compliance with a previously issued ICE procedure); *R.I.L-R,* 80 F. Supp. 3d at 182-184 (provisionally certifying a class seeking an injunction preventing respondents from applying an immigration policy violating the APA and the INA). Instead, they are challenging an unlawful interpretation of the law and the authority granted to the agencies. Indeed, when a class action challenges policies that are in violation of the either the INA itself or the APA, § 1252(f)(1) "poses no bar to relief." *R.I.L-R,* 80 F. Supp. 3d at 184.

What is more, § 1252(f)(1) is concerned only with "[l]imits on injunctive relief." Section 1252(f)(1) does not prohibit class-wide declaratory relief. *See Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) ("the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief."); *Gayle v. Warden Monmouth Cty. Corr. Inst.*, No. 12-CV-02806(FLW), 2017 WL 5479701, at *21 (D.N.J. Nov. 15, 2017) (Section 1252(f)(1) prohibits class-wide injunctive relief, but not class-wide declaratory relief, and thus does not preclude class certification). Petitioners seek a declaration that 8 U.S.C. § 1231(a)(1)(A) does not require any class member's continued detention, and that Respondents' new policy violates the APA.[1] Dkt. 10 at 35, ¶¶ 2, 6. The government only argues against declaratory relief in a footnote referencing its arguments

[1] Respondents do not argue that § 1252(f)(1) specifically bars claims under the APA; however, it should be noted that courts have held such claims to be appropriate under § 1252(f)(1). *See Damus*, 2018 WL 3232515 at *6 (D.D.C. July 2, 2018); *R.I.L-R*, 80 F. Supp. 3d at 182-183.

against commonality, typicality, 23(b)(2), and a representative habeas class, and not regarding § 1252(f)(1); for the reasons stated below, Petitioners disagree that these requirements are not met.

Finally, Respondents argue that the class cannot be certified because classes cannot be certified under § 1252(f)(1) for claims under the U.S. Constitution seeking to enjoin the statute. As set forth above, to the extent Petitioners' initial motion sought to certify a class based on Claims II and III, such request is withdrawn; Petitioners now seek to certify a class only on their statutory and APA claims.[2]

B. The Central Contention in This Case is Common to and Typical of All Members of the Proposed Class

As explained in Petitioners' opening brief, the determination of whether an individual whose removal has been withheld as to every country that has been designated for removal is in the § 1231(a)(1)(A) "removal period" forms the central question to each class member's case. Dkt. No. 17 at 2. The resolution of that question would "resolve an issue that is central to the validity of each one of the claims in one stroke," and therefore satisfies the commonality requirement of Rule 23(a)(2). *Wal-Mart*, 564 U.S. at 350; *see also Wyatt By & Through Rawlins v. Poundstone*, 169 F.R.D. 155, 165 (M.D. Ala. 1995) (the commonality inquiry turns on whether "a group of persons have suffered injury at the hands of the same policy.").

Rather than respond to this central contention head on, the government focuses on the merits of Petitioners' claims and the fact that the government has sought to remove different Petitioners to different countries. Respondents state that Petitioners are seeking an analysis of each class member's detention based on *Zadvydas*, 533 U.S. 678. Dkt. No. 26 at 25. This,

[2] The constitutional argument remains relevant to the statutory claims, of course, because the canon of constitutional avoidance provides guidance as to the proper interpretation of the statute. Given that the interpretation of the statutory provisions propounded by the government regarding the removal period would be plainly unconstitutional, that interpretation cannot be the correct interpretation, and thereby the government's application of the law should be enjoined. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936).

however, entirely misstates Petitioners' legal theory. *Zadvydas*'s statutory holding dealt with continued detention under § 1231(a)(6) after the expiration of the § 1231(a)(1) removal period, for a noncitizen who was in fact ordered removed to a specific country, and the government was facing (perhaps insurmountable) difficulties removing the noncitizen to that designated country. Petitioners here have been ordered removed to no country and yet nonetheless are being treated by the government as though they were still within the § 1231(a)(1) removal period. Petitioners ask the court to find that they are not in the removal period at all, and therefore their detention is not authorized under § 1231(a)(2). *Zadvydas*'s statutory holding is only implicated if one (prematurely) assumes Respondents' interpretation of the statute to be correct, and that each Petitioner *is* in the removal period. This, however, requires an inquiry into the merits of the case at the class certification stage. The law is clear that a district court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976); *see also Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971). Therefore, it is improper to assume Respondents' statutory interpretation is correct.

Furthermore, it is irrelevant that the government has taken different steps for each Petitioner and each class member in order to attempt to find some other country willing to accept them, so that the government might *in the future* seek to designate their removal to some third country. The crucial common fact for all Petitioners and class members is that *as of today*, each of them has been granted withholding of removal as to every country ever designated for removal, and Respondents have designated no other country for Petitioners' removal. The INA prohibits Respondents from removing an individual to a country without first designating the country and permitting the individual to seek withholding of removal as to that country as well.

8 U.S.C. § 1229a(b)(4); *Romero v. Evans*, 280 F. Supp. 3d 835, 847 n.24 (E.D. Va. 2017); *see also Diaz*, 297 F. Supp. 3d at 625. The class is specifically defined as including only those individuals who have not had countries designated for their removal other than those to which their removal has been withheld, or in other words, have been ordered removed to no country. Dkt. No. 17 at 2-3. That the government is engaged in an effort to send letters to third countries in an attempt to find one willing to accept any given Petitioner or class member is a pure exercise in bureaucratic paper-pushing; but more to the point, in the extraordinarily unlikely event that a random third country were to open its doors to United States deportees with no connection to that country or claim of nationality there, additional legal process would still be required in the form of formal notice and an opportunity to apply for withholding of removal as to that country as well. *Diaz*, 297 F. Supp. 3d at 625. Even assuming *arguendo* that said attempts were relevant, it would be analogous to the use of subjective discretion amongst managers being used with common direction, a practice the Fourth Circuit specifically found sufficient for commonality under *Wal-Mart*, in that the specifics may be slightly different, but the overarching policy is the same. *See Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013). Still yet, courts have held that "factual variations among the class members will not defeat the commonality requirement." *Damus v. Nielsen*, 2018 WL 3232515, at *10 (quoting *Hardy v. D.C.*, 283 F.R.D. 20, 24 (D.D.C. 2012).

The government's argument that their attempts to find different third countries to which to remove Petitioners and the class members defeats commonality, is belied by statistics on the rarity of removal of individuals who have been granted withholding. *See* Decl. of Katherine Melloy Gotettel, Ex. A. Based on documentation received by the National Immigrant Justice Center in 2018 through Freedom of Information Act requests, in Fiscal Year 2017, 1,511

individuals were granted withholding of removal, and only 21 individuals who had been granted withholding of removal were actually removed from the United States. *Id.* at ¶¶ 4, 5, 7, 9. Even taking into consideration that the numbers may not directly overlap, that makes for a removal rate of only approximately 1.39%. *Id.* at ¶ 10. Thus, it stands to reason that 98.61% of individuals who have been granted withholding of removal share the same set of common and typical facts: they are not removable to the countries that were designated, and in fact they are not going to be removed from the United States. This gives further support to the statutory contention that they are not in a "removal period." The declaration of the Supervisory Detention and Deportation Office that Respondents submit in support of the opposition to class certification similarly indicates that, specifically with respect to Petitioners, Respondents have made no progress in identifying alternative countries of removal, evenafter more than more than ninety days with respect to Petitioner Sanchez-Acosta. Docket No. 26-1, ¶ 11.

Respondents' affiant states that "[Petitioner] Najjar holds a valid passport for Jordan[.]" Dkt. No. 26-1 at ¶ 17. Insofar as Respondents seem to imply that Petitioner Najjar lacks commonality with the class because he has a claim to Jordanian citizenship, this is incorrect,[3] and the affiant's naked assertion of the existence of a document which is not in the record is emblematic of why the hearsay and Best Evidence rules of evidence exist. Respondents do not dispute that they have never formally designated Jordan as a country of removal for Mr. Najjar. As set forth above, the government thus cannot forcibly remove Mr. Najjar to that country without first going through an additional removal proceeding. If the Department of Homeland

[3] Petitioner Najjar possesses a document resembling a Jordanian passport, though it is only a document that Jordan at one time offered stateless Palestinians such as Mr. Najjar. *See* United Nations Refugee Commission discussion of the Jordan document at http://www.refworld.org/docid/5652e15c4.html. Jordan at one time offered the document on a humanitarian basis to stateless Palestinians who otherwise could not obtain a document permitting international travel. The document provides no entitlement to Jordanian citizenship, nationality, residence, or any other privilege.

Security were to designate Jordan as an additional country of removal, Petitioner Najjar would then have the opportunity to apply for withholding of removal as to that country as well;[4] and then, with a pending application for withholding of removal, he would no longer be a classmember. But such a hypothetical future scenario does not defeat his typicality and commonality as a class representative, any more than does the hypothetical possibility that the governments of Ethiopia and Eritrea might one day stop persecuting individuals on the basis of their ethnicity or political belief and instead start respecting human rights, such that the Respondents could then seek to set aside Petitioner Tesfateon's grant of withholding of removal as to those countries; or the hypothetical possibility that a genealogical investigation might prove Petitioner Sanchez-Acosta's maternal great-grandmother to have been a citizen of Spain, thus giving him a claim to nationality and allowing Respondents to seek his removal to that country. Under the procedural posture of all three Petitioners' cases as they exist today, all three are also classmembers and there are no presently existing facts that defeat commonality or typicality.

Finally, Respondents argue at great length that class members' claims will not be common or typical as some may have criminal backgrounds or be considered dangerous to the community. They allege that individuals with these backgrounds can or must be detained during the removal period, during the *Zadvydas* period, and after the *Zadvydas* period. Dkt. No. 26 at 26. Respondents, however, continue to prematurely assume that their interpretation of the removal period statute is accurate and ignore Petitioners' contention that there is no removal period in effect as there are no countries that have been designated from which their removal has not been withheld. As there are no countries to which they can be removed until a country has

[4] As an ethnic Palestinian who "speaks fluent Hebrew, studies the Torah, and affiliates with members of the Jewish religion," Am. Compl. [Dkt. No. 10] at ¶ 38, Petitioner Najjar could well fear persecution in Jordan as well. This exemplifies why the government cannot forcibly remove an individual to any country without giving that individual the opportunity to apply for withholding of removal as to that country.

been designated and they have not sought withholding of removal, there is no removal period in effect, and therefore 8 U.S.C. § 1231(a)(2) does not apply. Therefore, the commonality and typicality of the claims are not impacted by factors such as criminal backgrounds or danger to society.[5]

As to typicality, Respondents assert the same objections they make as to commonality: that there are individual facts to be determined because of specific countries and the circumstances surrounding removal. As discussed above, Petitioners' claims are also typical of those of unnamed class members. Petitioners have no countries that have been designated for their removal to which their removal has not been withheld. They seek a determination that they are not in the removal process and thus cannot be detained. If the court finds that this is true for Petitioners, the same will be true for the unnamed class members, and the unnamed class members' claims will be advanced. *Deiter v. Microsoft Corp.*, 426 F.3d 461, 466-67 (4th Cir. 2006).

C. Rule 23(b)(2) Does Not Require the Exact Same Outcome for all Class Members

Rule 23(b)(2) classes are appropriate when "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." FRCP 23(b)(2). Respondents assert that individualized determinations will be required for each class member because of issues such as the fact that the government is seeking to remove individuals to different countries and the fact that some individuals may be detained in different forms of

[5] Additionally, it is unclear what Respondents mean by stating that "as time goes on [the class] would include" individuals detained under various categories. Dkt. No. 26 at 26. The proposed class would include any individual who, as of or after July 20, 2018, had a final grant of withholding of removal as to every country designated for removal. The class therefore would only grow as grants of withholding of removal are ordered, not as individuals process through the system post-order.

detention than others, and argue that *Wal-Mart Stores, Inc. v. Dukes* prohibits certification in those situations. Respondents, however, completely miss the mark.[6] Although 23(b)(2) does not permit certification when each class member is "entitled to a different injunction or declaratory judgment against the defendant," that is not what is at issue here. *Wal-Mart*, 564 U.S. at 360 (emphasis removed). Courts have found that even if some class members have not been injured at all by the practice being challenged, "[i]t is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole." *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 598 (N.D. Cal. 2015) (citing *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). Indeed, Rule 23(b)(2) asks that courts examine "whether class members seek uniform relief from a practice applicable to all of them." *Yahoo Mail Litig.*, 308 F.R.D. at 599 (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). *Rodriguez* presented similar facts to the instant case: a noncitizen detainee petitioner who had been held without a bond hearing for more than six months requested injunctive and declaratory relief for individual bond hearings for himself and a class of similarly situated noncitizens. 591 F.3d at 1111-12. The Ninth Circuit, in rejecting the respondents' argument that class members would be detained pursuant to different statutes, including for mandatory detention, and therefore there could not be generally applicable grounds, stated that:

> The particular statutes controlling class members' detention may impact the viability of their individual claims for relief, but *do not alter the fact that relief from a single practice is requested by all class members.* Similarly, although the current regulations control what sort of process individual class members receive at this time,

[6] Indeed, although the holding is not limited as such, it should be noted that the *Wal-Mart* court was concerned with the discrepancies between potential class members because of *monetary damages*, in large part because there is no opt-out mechanism for a 23(b)(2) class. 564 U.S. at 360-67 (*e.g.*, "the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone"); *see also Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) ("the Supreme Court clarified in *Dukes* that claims for individualized monetary relief—in that case, back-pay awards under Title VII—are not "incidental" for purposes of Rule 23(b)(2) and may not be certified under that Rule.").

> all class members' [*sic*] seek the exact same relief as a matter of statutory or, in the alternative, constitutional right.

Id. at 1126 (Emphasis added). In fact, courts have regularly permitted class actions in the immigration detention setting. *See, e.g.*, *R.I.L-R*, 80 F. Supp. 3d at 182 (provisionally certifying a class and stating, "[p]laintiffs have shown that DHS policy requires ICE to consider deterrence of mass immigration in dealing with members of the class. They seek declaratory and injunctive relief invalidating consideration of that factor and enjoining ICE from applying the policy to deny release. In other words, the suit challenges a policy 'generally applicable' to all class members. A determination of whether that policy is unlawful would resolve all class members' claims "in one stroke[.]"); *Preap*, 303 F.R.D. at 587 ("Petitioners seek a declaration that Section 1226(c) requires immediate detention upon release from predicate custody and injunctive relief in the form of bond hearings for class members. Because Petitioners seek only injunctive and declaratory relief and a single remedy would provide relief for each class member, the proposed class is appropriate for 23(b)(2) certification."); *see also Diaz*, 297 F. Supp. 3d at 626 (certifying a class and stating in regards to commonality that "[r]esolving that question is not dependent on whether a particular alien is subject to § 1226(c) and is therefore ineligible for bond. Accordingly, the core legal question raised by the petition is common among all members of the proposed class, regardless of whether any individual member is subject to § 1226(c).").

Courts have also found 23(b)(2) classes appropriate in other situations outside of the immigration context where relief for class members may not be exactly identical. *See e.g.*, *Knight v. Lavine*, No. 1:12-CV-611, 2013 WL 427880, at *4 (E.D. Va. Feb. 4, 2013) ("In the case at bar, a single declaratory judgment that the conduct of Defendants was unlawful (or not) would resolve all of the Plaintiffs' claims."); *Yahoo Mail Litig.*, 308 F.R.D. at 601 ("Yahoo may have to, as a practical matter, adjust its scanning practices on an individual basis. That does not,

however, change the fact that Plaintiffs seek uniform relief from a common policy that Yahoo applies to all class members.").

Similarly, Petitioners and class member seek uniform relief: a declaration that they are not in the removal period and injunctive relief releasing them. As with other immigration habeas cases such as *Rodriguez* and *Diaz*, even after such a ruling some individual classmembers may ultimately remain detained; but they still obtain a benefit, namely the declaration that they are not in the removal period, thus giving them the *opportunity* to seek release, which at present they do not have. For those individuals who are being incorrectly detained under the purported authority of § 1231(a)(1), even were the government to then seek to justify their continued detention under § 1231(a)(6)—a proposition which Petitioners dispute—that subsection provides expanded opportunities for release from detention. *Compare* 8 U.S.C. § (a)(2) (mandatory detention for noncitizens with certain criminal convictions during the § 1231(a)(1) removal period) *with* 8 C.F.R. §§ 241.13, 241.14 (providing some due process and opportunity for release of noncitizens during the § 1231(a)(6) period and placing the burden on the government to justify continued detention on the grounds of dangerousness). The fundamental relief, however, remains the same for all class members: the correct and lawful application of the law. Thus, a Rule 23(b)(2) class is appropriate in the instant case.

D. A Representative Habeas Class is Appropriate

The instant case is an appropriate case for a *Sero* representative habeas class. Respondents' entire argument against certification is that no court within the Fourth Circuit has adopted *Sero*, and Petitioners do not mean the standards for commonality and typicality in a standard Rule 23 class. Dkt. No. 26 at 30.

It is important to note that although no court within the Fourth Circuit has adopted *Sero*, nor has any court within the Fourth Circuit rejected *Sero*. Thus, there is no precedent prohibiting the certification of a *Sero* representative habeas class. Such certification, however, is only sought in the event that the Court finds there is no basis for a Rule 23 class. Should that occur, Petitioners maintain that, as discussed above, they do meet the Rule 23(a) requirements, and certification is appropriate.

III. This Class Should Be Certified Retroactive to the Filing of Petitioners' Motion for Class Certification, as Petitioners' Claims are Inherently Transitory

It is further appropriate to certify this class at this stage of litigation because each individual petitioner's claim is inherently transitory, thus making it difficult to litigate on an individual basis. A case where claims may be mooted before a petitioner/plaintiff can even be granted class certification is precisely the type of claim for which class actions are most important. *See* Rubenstein, 1 Newberg on Class Actions § 2:10 (5th ed.). Thus, there is an "inherently transitory claim" exception to the mootness doctrine in the context of class actions. *See U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 399 (1980) ("some 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"). The quintessential "inherently transitory" case is one where the named plaintiff files his claim while he is in government custody, and he is released from custody before the class can be certified. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51–52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)).

The basis of the "inherently transitory" exception is the "relating back" doctrine, viewing claims as live based upon the time of filing of the complaint containing class allegations. *Riverside*, 500 U.S. at 51–52 ("In such [inherently transitory] cases, the 'relation back' doctrine

is properly invoked to preserve the merits of the case for judicial resolution."; *see also Geraghty*, 445 U.S. at 398–99 (noting the establishment of an exception for claims that 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" and the use of the "relation back" approach to accomplish certification prior to mootness (citing *Gerstein*, 420 U.S. at 110 n.11)); *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (noting how "relation back" doctrine addresses the problem of the lengthy timeline of judicial review creating mootness problems with respect to named plaintiffs in class cases (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975)) (internal quotation marks omitted); *Gerstein*, 420 U.S. at 110–11 n.11 (holding that plaintiffs' claims fell under the exception for claims capable of repetition yet evading review, but further noting that "[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain"); *Sosna*, 419 U.S. at 402 n.11 (1975) ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review."). Therefore, if the individual plaintiffs in the class may quickly change, but the overall existence of a plaintiff population remains, the principal of "relating back" for "inherently transitory claims" applies.

Courts have often certified classes of individuals subject to immigration detention after named plaintiffs have been released from custody or where the potential exists. *See, e.g.*, *Abdi*,

280 F. Supp. 3d at 402 (noting that even if plaintiff's claims were moot, "this would not adversely affect the class action claims or [his] capacity to continue litigating the class claims on behalf of the putative class . . . because the inherently transitory doctrine applies"); *R.I.L-R*, 80 F. Supp. 3d at 183 (provisionally certifying a class where "[t]he period of allegedly unlawful detention" was "significant enough to create a cognizable injury," but "too short for a court to be expected to rule on a certification motion"); *Khoury v. Asher*, 3 F. Supp. 3d 877, 891 (W.D. Wash. 2014) (finding plaintiffs adequate representatives of a class despite release from detention after six months because their release "plac[ed] them squarely within the transitory claim exception"); *see also Diaz*, 297 F. Supp. 3d at 627 n. 14 (finding that certifying class of detained immigrants was proper in part because "experience demonstrates that individual claims are often rendered moot during the appellate process").

District courts in the Fourth Circuit have applied these principles. *See, e.g.*, *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, 974 F. Supp. 2d 856 (D. Md. 2013) (finding that the decision denying certification as moot following settlement in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013) did not apply to Rule 23 class action cases); *Shifflett v. Kozlowski*, No. CIV. A. 92-0072-H, 1993 WL 21465, at *4 (W.D. Va. Jan. 25, 1993). Although the Fourth Circuit itself has not addressed this issue, several circuits have explicitly applied the principle. *See Olson v. Brown*, 594 F.3d 577, 583 (7th Cir. 2010), cert. denied (2010) ("When the claim is inherently transitory, as it was in *Gerstein* and as it is in this case, the plaintiff must show that there will likely be a constant class of persons suffering the deprivation complained of in the complaint."); *Zurak v. Regan*, 550 F.2d 86, 91–92 (2d Cir. 1977) ("Because of the relatively short periods of incarceration involved and the possibility of conditional release there was a significant possibility that any single named plaintiff would be released prior to

certification. . . As in *Gerstein*, however, the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues." (citing *Gerstein*, 420 U.S. at 110–11 n.11)).

In the instant case, all three Petitioners may ultimately be past the ninety-day threshold by the time this Court issues a ruling on the pending Motion to Dismiss, Dkt. No. 24, and Respondents may argue that Petitioners' statutory claim is moot because the government no longer considers them to be in a "removal period" under 8 U.S.C. § 1231(a)(1)(A), nor seeks to justify their continued detention under 8 U.S.C. § 1231(a)(2). The same could be said of any classmember, whose claim is subject to be mooted at any time. Although ninety days is far from a short amount of time for an individual incarcerated at an immigration detention center, it is a short period of time to build a lawsuit, file, brief, argue, and await a ruling. A claim that only lasts ninety days until it would be mooted by the passage of time is quintessentially "inherently transitory." Because the violations are ongoing across the board, and even if Petitioners are released from custody or otherwise acknowledged by the government to be outside of the "removal period" by the time of a ruling from this Court, their claims are inherently transitory, the class should be certified retroactive to the date of filing the Motion for Class Certification, to address the issue at one time.

IV. CONCLUSION

For the aforementioned reasons, Petitioners respectfully request that the Court grant Petitioners' Motion for Class Certification.

Date: August 20, 2018

Respectfully submitted,

Julio Cesar Sanchez Acosta, Khaled Najjar, Minase Tesfateon

By Counsel

By: /s/_____

Rachel C. McFarland, VSB No. 89391
rmcfarland@justice4all.org
Simon Sandoval-Moshenberg, VSB No. 77110
simon@justice4all.org
LEGAL AID JUSTICE CENTER
6066 Leesburg Pike #520
Falls Church, VA 22041
(703) 778-3450
Fax: (703) 778-3454
Pro Bono Attorneys for Petitioners

Adina Appelbaum, VSB. No. 88974
adina@caircoalition.org
David J. Laing (pro hac vice)
david@caircoalition.org
Claudia Cubas (pro hac vice)
claudia.cubas@caircoalition.org
Capital Area Immigrants' Rights (CAIR) Coalition
1612 K Street NW, Suite 204
Washington, DC 20006
(202) 769-5231 (Tel.)
(202) 331-3341 (Fax)
Pro Bono Attorneys for Petitioners

Johnathan Smith (pro hac vice)
johnathan@muslimadvocates.org
Sirine Shebaya (pro hac vice)
sirine@muslimadvocates.org
Muslim Advocates
P.O. Box 66408
Washington, DC 20035
(202) 897-2622 (Tel.)
(202) 508-1007 (Fax)
Pro Bono Attorneys for Petitioners

Certificate of Service

I, the undersigned, hereby certify that on this 20th day of August, 2018, I caused a copy of the foregoing, along with all exhibits and attachments thereto, to be uploaded to the Court's CM/ECF system, which will send a Notice of Electronic Filing (NEF) to all counsel of record:

JOHN V. COGHLAN
Assistant United States Attorney
Office of the United States Attorney
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3738
Fax: (703) 299-3983
Email: john.coghlan@usdoj.gov
Counsel for Respondents

/s/
Rachel C. McFarland
LEGAL AID JUSTICE CENTER
1000 Preston Avenue, Ste A
Charlottesville, VA 22903
434-977-0553
434-977-0558
Attorney for Petitioners