The Honorable James L. Robart
The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WILFREDO FAVELA AVENDAÑO, et al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

Case No. 2:20-cv-700-JLR-MLP

RESPONSE TO OBJECTIONS TO REPORT AND RECOMMENTATION

NOTE ON MOTION CALENDAR:
February 19, 2020

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Seattle, WA 98104
Tel: 206-957-8611

INTRODUCTION

Petitioners-Plaintiffs (Plaintiffs) are persons detained at the Northwest Detention Center (NWDC) who are vulnerable to serious illness and death from COVID-19. On February 2, 2021, the Magistrate Judge issued a Report and Recommendation (R&R), recommending that the Court grant Plaintiffs' motion to allow this case to proceed as a class action. In the R&R, the Magistrate Judge correctly recognized that key factual developments and Plaintiffs' amended pleadings now warrant class certification, despite this Court's prior denial of class certification. In addition to these important developments, the Ninth Circuit has since issued a published decision affirming a district court's conditional grant of class certification in another action challenging an Immigration and Customs Enforcement (ICE) detention center's response to the COVID-19 pandemic. *See Hernandez Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020).

Despite this clear, recent, and directly-on-point precedent, Respondents-Defendants (Defendants) continue to insist class certification is not appropriate. Defendants claim that the Plaintiffs' proposed class lacks commonality and typicality because putative class members are detained under different statutes and face different medical issues. They also assert that Plaintiffs cannot satisfy Rule 23(b)(2), contending Plaintiffs have not alleged a uniform class remedy. The R&R correctly dismissed each of these arguments, again recognizing that *Hernandez Roman* has effectively foreclosed Defendants' arguments—just as other district courts across this circuit have also acknowledged.[1] This Court should now do the same.

[1] *See, e.g.*, *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 38 (N.D. Cal. 2020); *Savino v. Souza*, 453 F. Supp. 3d 441, 449–53 (D. Mass. 2020); *Alcantara v. Archambeault*, No. 20-cv-756 DMS (AHG), --- F. Supp. 3d ----, 2020 WL 2315777, at *6–7 (S.D. Cal. May 1, 2020); *Malam v. Adducci*, 475 F. Supp. 3d 721, 744 (E.D. Mich. 2020); *Coreas v. Bounds*, No. 8:20-cv-780-TDC, 2020 WL5593338, at *15 (D. Md. Sept. 18, 2020); *Quadrelli v. Moniz*, No. 1:20-cv-10685-ADB, 2020 WL 3051778, at *7 (D. Mass. June 8, 2020); *Yanes v. Martin*, No. 1:20-cv-216-MSM-PAS,

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Plaintiffs also respectfully request that the Court provide expedited consideration of the Magistrate Judge's R&R in light of the case's current status. Later this week, the current discovery deadline in the case will arrive. *See* Dkt. 194 at 2 (discovery closes on February 18, 2021). Under the current schedule, dispositive motions are due on March 18, 2021. *Id.* Due to the Magistrate Judge's recommendation that the class be certified, Plaintiffs timely requested that the Magistrate Judge extend these deadlines to ensure that they have the time to conduct class-related discovery. Dkt. 211 at 2 (noting limitation of discovery to named plaintiff alone, and specifically barring class-related discovery). The Magistrate Judge denied this motion without prejudice. Dkt. 224 at 2 (denying motion for extension of time). In doing so, the Magistrate Judge noted that Plaintiffs could renew their request in the event the Court certifies the class. *Id.* However, the impending dispositive deadlines present the possibility that the parties will not be able to fully address the merits with the benefit of a fully developed record, resulting in a waste of the Court's resources. Indeed, the general rule is that class certification must be resolved before motions for summary judgment. *See Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) (observing that resolving a summary judgment motion while class certification is pending would not protect defendants from subsequent suit by potential class members). This is especially true in this case, which involves a "a classic example of a transitory claim that cries out for a ruling on certification as rapidly as possible." *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (observing that it would be an abuse of discretion to decide summary judgment motion before class certification in a case involving transitory claims). Nevertheless, Plaintiffs appreciate that the Court may not be able to issue an immediate decision, and thus they may

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Dkt. 21, at 1–2 (D.R.I. May 20, 2020) (filed at Dkt. 134-2); *Gomes v. Acting Secretary, U.S. Dep't of Homeland Sec.*, No. 20-cv-453-LM, 2020 WL 2113642, at *1–4 (D.N.H. May 4, 2020).

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instead seek an extension of the dispositive motion deadlines if the Court is unable to issue a quick decision.

ARGUMENT

I. The R&R Correctly Concluded that Plaintiffs Satisfy the Commonality and Typicality Requirements.

a. Commonality

Defendants assert that the R&R is incorrect with respect to commonality for two reasons. Each lacks support in case law and the record, as the R&R correctly acknowledges.

Defendants first fault the Magistrate Judge for "not recogniz[ing] that the commonality requirement is especially rigorous when applied to a class seeking certification under Rule 23(b)(2)." Dkt. 223 at 5. Defendants do not cite any authority for this principle, instead noting what Rule 23(b)(2) itself requires, even though Rule 23(b)(2) presents a separate inquiry from commonality. As the R&R noted, all the existing authority suggests precisely the *opposite* of what Defendants contend, i.e., that the commonality inquiry is not a demanding one. Indeed, "[the commonality] requirement is 'construed permissively.'" Dkt. 209 at 8 (quoting *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998)). This "requirement[] asks [the Court] to look only for some shared legal issue or a common core of facts*." Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010). Commonality "does not . . . mean that every question of law or fact must be common to the class." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis omitted). Even "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (citations omitted). In fact, the standard is even more liberal in a civil rights suit such as this one, which "challenges a system-wide practice or policy that affects all of the putative class members."

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Gonzalez v. U.S. Immig. & Customs Enf't, 975 F.3d 788, 808 (9th Cir. 2020) (citation omitted).

These principles apply with equal force in the context of a Rule 23(b)(2) class action. The Ninth Circuit explicitly found in *Hernandez Roman* that the district court there did not err in certifying a class of detainees in a Rule 23(b)(2) action under circumstances almost identical to this one. *See* 977 F.3d at 944–45. As the Court of Appeals noted, class certification is appropriate even where "'a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death' because 'every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm.'" *Id.* (quoting *Parsons v. Ryan*, 754 F.3d 657, 678, 689 (9th Cir. 2014)). Courts in this circuit have recognized and applied this principle in many cases long before the COVID-19 pandemic. *See, e.g.*, Dkt. 164 at 6 n.3 (citing, inter alia, *Armstrong v. Davis*, 275 F.3d 849, 856–57, 868–69 (9th Cir. 2001) (affirming as "generally proper" the certification of "all present and future California state prisoners and parolees with mobility, sight, hearing, learning, developmental and kidney disabilities that substantially limit one or more of their major life activities"), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005); *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 636–44 (D. Ariz. 2016) (certifying class challenging health care in Customs and Border Protection facilities)).

Defendants next claim that the "health profiles" and "different statutory authorit[ies]" for Plaintiffs defeat commonality. Dkt. 223 at 6. The R&R correctly rejected both of these arguments. First, as to the allegedly different health profiles, the Magistrate Judge correctly noted that Defendants "have been able to identify potentially high-risk detainees and continue to

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do so." Dkt. 209 at 9.[2] Moreover, Defendants recognize that class members all face a high risk of serious illness or death from COVID-19, which is "evidenced by [Defendants'] . . . custody redetermination of those individuals resulting in the release of many detainees, including Petitioner Favela Avendaño." *Id.* As Plaintiffs explained before, *see* Dkt. 164 at 6–7, Defendants' own list of individuals who face high risks of COVID-19 nearly matches the proposed class definition, and Defendants have provided a uniform process to consider all such individuals for release. Those facts simply underscore that all class members face a risk from COVID-19 and that NWDC's response to that risk is common to them, as the R&R recognized. *See* Dkt. 209 at 9–10. Thus, just like in other detention or jail settings alleging a facility has failed to provide constitutional care and protection, the Court should recognize—as the R&R did—that common questions exist here. *See, e.g.*, *Hernandez Roman*, 977 F.3d at 944–45; *Parsons*, 754 F.3d at 678, 689; *see also* Dkt. 209 at 11.

Defendants' assertion that the different statutory authorities governing Plaintiffs' claims defeat commonality is equally unavailing. Again, as the R&R correctly observed, this same fact was true in *Hernandez Roman*, and the Court of Appeals affirmed the district court's grant of class certification. Dkt. 209 at 10–11. The R&R's conclusion and *Hernandez Roman*'s result make sense. As Plaintiffs have explained, Dkt. 164 at 8, their request for class wide relief arises from the Due Process Clause, and all detention statutes, mandatory or not, must comport with the Constitution. The fact that an individual is subject to mandatory detention by statute does not allow Defendants to subject them to dangerous, life-threatening conditions without some inquiry

[2] In any event, the ability to identify class members is not a requirement for class certification. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017). Notably, Defendants have abandoned any argument that class members cannot be identified or that this might defeat commonality.

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into the propriety of detention. All class members face the same common danger of serious illness or death from continued detention, regardless of the statute at issue. *See also Rodriguez*, 591 F.3d at 1122–23 (class of detainees held under different statutes warranted certification because "the constitutional issue at the heart of each class member's claim for relief is common"). Once again, the Ninth Circuit confirmed this fact in *Hernandez Roman*, affirming the certification of a class that covered all persons in immigration custody. 977 F.3d at 944–45. Moreover, Chief Judge Martinez has explicitly held that the court may order the release of an individual "[r]egardless of the statutory basis for [a petitioner's] detention." *See Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1253 (W.D. Wash. 2020); *see also Bent v. Barr*, 445 F. Supp. 3d 408, 413–14 (N.D. Cal. 2020) (similar); *Basank v. Decker*, 449 F. Supp. 3d 205, 215–16 (S.D.N.Y. 2020) (similar).

Finally, Defendants' efforts to distinguish *Hernandez Roman* are unavailing. According to them, "the class certified in *Roman* consisted of all detainees at [the] facility, not just those with a higher risk profile, and was geared toward improving the conditions, rather than focusing mostly on release." Dkt. 223 at 5–6. Defendants do not explain why Plaintiffs' more tailored class—which focuses on high-risk individuals—fails the commonality test, while a broader class would not. The principles animating the Ninth Circuit's decision in *Hernandez Roman* demonstrate that this difference does not matter. For both a class including all detainees and a class focusing on high-risk detainees, "every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm." *Hernandez-Roman*, 977 F.3d at 944–45 (alteration in original) (quoting *Parsons*, 754 F.3d at 678, 689). In the case of a high-risk class, the members simply face greater consequences because of that injury.

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Nor are Defendants correct that Plaintiffs "focus[] mostly on release." In their Amended Complaint, Plaintiffs seek (1) an expedited interim *process* for considering release of class members pending final judgment; (2) a declaration that conditions of confinement for aged or medically vulnerable individuals held at NWDC are unconstitutional under the Fifth Amendment Due Process Clause, (3) a writ of habeas corpus or final injunctive relief in the form of release of all class members or, in the alternative, a conditional writ or final injunction providing a uniform *process* for all class members to be considered for release, (4) a cap on NWDC's population to allow for social distancing, and, (5) regular mass testing. *See* Dkt. 167 at 34–35. And in recent briefing on a temporary restraining order, Plaintiffs requested many of these same forms of uniform, process-based and conditions-oriented injunctive relief. *See* Dkt. 175-1 at 3–4. Thus, Defendants' focus on the remedy of release as defeating commonality is unwarranted. But even if Defendants did not misconstrue Plaintiffs claims, their argument is unavailing. Again, *Hernandez Roman* directly forecloses Defendants' argument. As the Ninth Circuit explained there, "even though [a court order] [c]ould . . . entail[] the release or transfer of only some of the detainees," the order "would [still] remed[y] the constitutional violations as to all detainees." 977 F.3d at 944. That is because lowering the population guarantees that detained persons can more easily engage in one of the only ways to stop COVID-19—social distancing. Thus, for all these reasons, the R&R correctly concluded that Plaintiffs satisfy the commonality inquiry.

b. Typicality

The Magistrate Judge also correctly concluded that "the reasons supporting the commonality requirement also support the typicality requirement." Dkt. 209 at 13. The R&R's reliance on the reasoning supporting commonality is well-supported, because "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw.*

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v. Falcon, 457 U.S. 147, 157 n.13 (1982). As with commonality, "[d]iffering factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011). Instead, the typicality "inquiry focuses on the *nature of the claim* . . . of the class representatives, and not . . . the specific facts from which it arose." *Gonzalez*, 975 F.3d at 808 (alterations in original) (citation omitted). Specifically, typicality looks to whether a class representative has suffered "the same or similar injury" as other class members. *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1329 (W.D. Wash. 2015) (ciation omitted). Here, that "same or similar injury"—a due process violation—is suffered by all those who fall into the medically vulnerable categories identified by the CDC, are detained at the same facility, and are subject to the same policies and practices by ICE.

Defendants simply repeat the argument made in their opposition to Plaintiffs' motion for class certification, asserting that Plaintiffs' "circumstances of detention" as well as the statutory authority under which they are detained are too varied to satisfy the typicality requirement. *Compare* Dkt. 223 at 7 *with* Dkt. 156 at 12. Yet, as Plaintiffs noted in their Reply, and as the R&R recognized, Defendants' emphasis on the alleged differences among class members fails to apprehend that "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Dunakin*, 99 F. Supp. 3d at 1329 (quoting *Parsons*, 754 F.3d at 685). While Defendants point to differing detention statutes and other alleged differences, the "typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class." *Id.* (quoting *Parsons*, 754 F.3d at 687). Accordingly, in this case, the typicality inquiry is focused exclusively on whether the detention conditions at NWDC violate class members' Fifth Amendment rights. The Magistrate Judge thus correctly concluded the class satisfies this inquiry given that the

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proposed class members "are all confined at this facility and are subject to the same alleged inadequate practices and procedures" and thus "face the same risk of injury." Dkt. 209 at 13.

II. The R&R Correctly Concluded that Plaintiffs Satisfy the Rule 23(b)(2) Inquiry.

The proposed class must also meet the requirements of Rule 23(b)(2). The Rule requires a request for relief that is uniform and that allows "final injunctive relief or corresponding declaratory relief [that] is appropriate respecting the class as whole." As Plaintiffs previously showed and as the Magistrate Judge found, the requested relief amply meets the Rule 23(b)(2) requirements.

In the Amended Complaint, Plaintiffs explicitly seek several forms of relief that would benefit the entire class: final injunctive relief or a writ of habeas corpus in the form of release of all class members or a uniform process for all class members to be considered for release, and an injunction capping NWDC's population to allow for social distancing and requiring regular mass testing of detainees and staff. Dkt. 167 at 34–35. Numerous courts in this and other circuits have certified classes requesting relief similar or identical to the relief requested here. Most importantly, in *Hernandez Roman*, the Ninth Circuit affirmed provisional class certification in a case raising the same COVID-related Fifth Amendment claims as are at issue in this case, where the plaintiffs requested improvements in conditions and a reduction in population. 977 F.3d at 939, 944. Furthermore, the Ninth Circuit approved of the district court's provisional certification under Rule 23(b)(2) even though the preliminary injunction "would have entailed the release . . . of only some of the detainees." *Id*. at 944; *see also Alcantara v. Achambeault*, No. 20-cv-756 DMS (AHG), --- F. Supp. 3d ---, 2020 WL 2315777, at *1, 6–7 (S.D. Cal. May 1, 2020) (concluding class satisfied Rule 23(b)(2)); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d. 36, 38 (N.D. Cal. 2020) (same); *Malam v. Adducci*, 475 F. Supp. 3d 721, 742–43 (E.D. Mich. 2020)

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(same); *Gomes v. Wolf*, No. 20-cv-453-LM, 2020 WL 2113642, at *3 (D.N.H. May 4, 2020) (same); *Savino v. Souza*, 453 F. Supp. 3d 441, 452–53 (D. Mass. 2020) (same).

Even before these cases decided during the pandemic, Rule 23(b)(2) was interpreted to allow certification when the remedy prescribes a uniform process applicable to all in the class, even though application of the process might result in different outcomes for different class members. For example, in *Rodriguez*, the Ninth Circuit ordered a district court to certify a class of immigration detainees who requested relief in the form of bond hearings and alleged a common constitutional violation resulting in prolonged detention without such hearing. The Ninth Circuit held certification was consistent with Rule 23(b)(2) even though the court recognized that individual factors "may impact the viability of [class members'] individual claims for relief." 591 F.3d at 1126; *see also, e.g.*, *Franco-Gonzalez v. Napolitano*, No. 10-CV-02211, 2011 WL 11705815, at *14–16 (C.D. Cal. Nov. 21, 2011) (certifying Rule 23(b)(2) class when injunction required individualized competency determination hearings for detained noncitizens).

Thus, as the Magistrate Judge recognized, the two main forms of relief Plaintiffs have requested—release or a process for release consideration and changes in conditions of confinement—meet the requirements of Rule 23(b)(2). Dkt. 209 at 14 (citing *Hernandez Roman*). Defendants' objections do not provide any basis for this Court to rule otherwise.

Defendants fail in their attempt to distinguish *Hernandez Roman*. Defendants claim that there are factual differences between the facility at issue in *Hernandez Roman* and NWDC, which made class certification appropriate there but inappropriate here. Dkt. 223 at 10. But the Rule 23(b)(2) issue is dependent solely on the form of relief requested, not on unspecified factual details that may go toward the merits of the underlying claim. The constitutional claims in

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Hernandez Roman and this case are identical, and the injunctive remedy sought is virtually the same. While it is true that the proposed class in *Hernandez Roman* was all detainees and the present case seeks to certify only a class of those at highest risk from COVID-19, that difference is irrelevant to the Rule 23(b)(2) inquiry. Improvements in conditions would benefit all in the proposed class here, just as similar improvements in *Hernandez Roman* would benefit all in the broader class there. There is no relevant difference between the two cases.

Regarding the proposed release process, Defendants try to distinguish *Rodriguez* by claiming that in the present case, different statutory bases for detention could result in different outcomes in a release process, and thus the "individual outcomes of the process may not resolve the alleged uniform practice of detaining the putative class during the pandemic." Dkt. 223 at 9–10. If by this Defendants mean that it is possible that even if Plaintiffs prevail not all class members will be released, that is true. But as Plaintiffs explained above, a release process uniformly available to all in the class meets the requirements of Rule 23(b)(2). *Rodriguez*, though based on a different substantive legal theory, is indistinguishable from the present case on the question whether proposed relief is consistent with Rule 23(b)(2). As noted, in *Rodriguez*, the class sought the process-based relief bond hearings to remedy the prolonged detention that they faced. In ordering certification of the class, the court explicitly held that different statutory bases for detention does not equal a lack of uniformity under Rule 23(b)(2), even if the outcomes of the hearings differ for class members: "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

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Tel: 206-957-8611

from a single practice is requested by all class members." 591 F.3d at 1126. The relief requested here is the same.[3]

Defendants also try to erase from the Amended Complaint the request for injunctive relief to change detention conditions by claiming that Plaintiffs have effectively asked only for a release process. Dkt. 223 at 9. But as explained above, Plaintiffs have proposed a uniform release process that would meet Rule 23(b)(2) requirements. In addition, Plaintiffs have also requested injunctive relief to improve conditions, both while release is being considered and to provide some ongoing protection to any class member who is not ordered released. Defendants' argument is in effect that Plaintiffs are somehow limited to requesting only one form of relief, but Defendants cite no authority for this odd proposition. And here, a request for multiple forms of relief is especially apt, given that the forms of relief requested are complementary and could be implemented simultaneously to protect members of the proposed class.

For all these reasons, the proposed relief meets the requirements of Rule 23(b)(2), as the Magistrate Judge correctly found.

CONCLUSION

For the foregoing reasons, the Courts should adopt the R&R and grant class certification.

[3] In the introduction to their objections, Defendants attempt a slightly different form of the same argument. Specifically, they claim that "Petitioners' request for a common process to consider whether release is appropriate just adds a layer before an individualized determination must be made," and that this renders the remedy insufficiently uniform. Dkt. 223 at 3. But again, this is exactly the kind of relief approved in cases such as *Rodriguez*. In such cases, all class members are granted access to the process that could result in release, and therefore the relief is easily found uniform in the sense required by Rule 23(b)(2).

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615 2nd Ave Ste. 400
Seattle, WA 98104
Tel: 206-957-8611

Respectfully submitted on this 16th day of February, 2021.

s/ Matt Adams
Matt Adams, WSBA No. 28287
matt@nwirp.org

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974
aaron@nwirp.org

s/ Margot Adams
Margot Adams, WSBA No. 56573
margot@nwirp.org

Northwest Immigrant Rights Project
615 Second Ave., Suite 400
Seattle, WA 98104
Tel: (206) 957-8611

s/ Tim Henry Warden-Hertz
Tim Henry Warden-Hertz,
WSBA No. 53042
tim@nwirp.org

Northwest Immigrant Rights Project
1119 Pacific Ave., Suite 1400
Tacoma, WA 98402
Tel: (206) 957-8652

s/ Enoka Herat
Enoka Herat, WSBA No. 43347
eherat@aclu-wa.org

s/ John Midgley
John Midgley, WSBA No. 6511
jmidgley@aclu-wa.org

American Civil Liberties Union
Foundation of Washington
P.O. Box 2728

s/ David C. Fathi
David C. Fathi, WSBA No. 24893**
dfathi@aclu.org

s/ Eunice H. Cho
Eunice H. Cho, WSBA No. 53711**
echo@aclu.org

Lauren Kuhlik*
Joseph Longley†
American Civil Liberties Union Foundation
National Prison Project
915 15th Street N.W., 7th Floor
Washington, DC 20005
Tel: (202) 548-6616

Omar C. Jadwat*
ojadwat@aclu.org
Michael Tan*
mtan@aclu.org
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600

My Khanh Ngo*
mngo@aclu.org
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0774

*Admitted pro hac vice
**Not admitted in DC; practice limited to federal courts
†Admitted pro hac vice; not admitted in DC; practice limited to federal courts

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 16th day of February, 2021.

s/ Aaron Korthuis
Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 816-3872
(206) 587-4025 (fax)