District Judge James L. Robart
Magistrate Judge Michelle L. Peterson

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILFREDO FAVELA AVENDAÑO, Petitioners-Plaintiffs, v. NATHALIE ASHER, Respondents- Defendants.	CASE NO. 20-cv-0700-JLR-MLP FEDERAL RESPONDENTS-DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION Noted for Consideration on: February 19, 2021

Federal Respondents, United States Immigration and Customs Enforcement ("ICE"), ICE Deputy Director and Senior Official Performing the Duties of the Director, Tony H. Pham, and ICE Seattle Field Office Director Nathalie Asher (collectively, the "Government"), by and through their attorneys, Brian T. Moran, United States Attorney for the Western District of Washington, and Michelle R. Lambert and James C. Strong, Assistant United States Attorneys, submit the following objections to the Report and Recommendation (Dkt. # 209) on Petitioners' second motion for class certification. Dkt. #

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134. Fed. R. Civ. P. 72, LCR 72. Petitioners have not met their burden to prove that the second proposed class meets either the requirements of Fed. R. Civ. P. 23(a) or (b)(2) and therefore, the class should not be certified.

I. Introduction

Having already been denied class certification by this Court, Petitioners again seek to certify a class of individuals at (or who will be at) the Northwest ICE Processing Center ("NWIPC"), and who are age 55 or over or that have medical conditions that the Centers for Disease Control ("CDC") has determined places them at a heightened risk of severe illness or death from COVID-19.[1] Dkt. # 132-2 ("Am. Pet.") ¶ 4, Dkt. # 134 ("Mot."), pp. 2-3.

The Report and Recommendation found that two developments changed the previous conclusion that the class should not be certified, namely that Petitioners have now raised alternative forms of relief other than release and the Ninth Circuit's decision in *Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020). This Court, however, should decline to adopt the Report and Recommendation and deny the second motion for class certification because Petitioners still have not met their burden to prove commonality and typicality as required by Fed. R. Civ. P. 23(a) or that the injunctive relief sought is uniform as required by Fed. R. Civ. P. 23(b)(2).

The Report and Recommendation discounts that Petitioners' argument is that release is the only cure for the constitutional violations they allege. *See* Am. Pet. ¶ b (exercise

[1] Petitioner Naeem Khan is the only named petitioner still in detention. *See* Dkt. # 151 (Favela-Avendaño released), Dkt. # 63 ¶ 79 (J.A.M. released).

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authority for expedited bail process to include "release from detention" pending final decision on habeas claims), ¶ d (issue writ ordering release of all class members or placement in community-based alternatives), ¶ e (issue injunctive relief requiring Respondents to review class members for release attaching strong presumption for release), ¶ f (alternatively, issue writ that provides process for the Court to consider individual release applications). *See also* Mot., p. 23. Petitioners emphasize in the Amended Petition that "because risk mitigation at [NWIPC] is impossible, the only effective remedy for the unconstitutional conditions to which [Petitioners] and the proposed class are being subjected is release from the detention center." Am. Pet. ¶ 81. This Court already rejected Petitioners' claim that release would permit the Court to certify the class. Dkt. # 121.

Petitioners' alternative forms of relief fail to make up for this deficiency. The Report and Recommendation's finding that Petitioners' requested relief regarding the conditions of confinement is enough, rests on the Ninth Circuit's decision in *Roman*, but that case is of limited applicability because of the numerous differences between the facility at issue there and the NWIPC. Moreover, Petitioners' request for a common process to consider whether release is appropriate just adds a layer before an individualized determination must be made; it cannot afford relief for any purported violations uniformly.

Because Petitioners have not met their burden under Rule 23(a) or 23(b)(2), this Court should decline to adopt the Report and Recommendation and deny the second motion for class certification.

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II. Legal Standard

Properly lodged objections to a report and recommendation are reviewed *de novo*. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge"); *see also* Fed. R. Civ. P. 72(b)(3).

"The party seeking class certification bears the burden of establishing that the proposed class meets the requirements of Rule 23." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1177 (9th Cir. 2015). The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). A class action should only be certified "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Even if a court finds that an action meets all of Rule 23's requirements, it retains "broad discretion" to determine whether it should certify a proposed class. *Id.* We will discuss the relevant specific requirements of Rule 23 below.

III. Argument

A. Petitioners cannot satisfy the commonality requirement.

The Report and Recommendation errs in finding that Petitioners demonstrated that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Furthermore, "what

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matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (quotation omitted).

The Report and Recommendation did not recognize that the commonality requirement is especially rigorous when applied to a class seeking certification under Rule 23(b)(2). As the Supreme Court has previously noted, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each members of the class." *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quotation omitted). The Supreme Court also questioned whether a Rule 23(b)(2) class action litigated on common facts is the appropriate way to resolve Due Process Clause claims given that they are best resolved on a case-by-case basis. *Id.*

The Report and Recommendation rejected the Government's argument that the proposed class lacks commonality because the purported class members have different risk profiles and are detained pursuant to different statutory authority. The Report and Recommendation states that such concern is belied by the Ninth Circuit's decision in *Roman* and the fact that Petitioners asked for forms of relief other than release. The Ninth Circuit's affirmance of the provisional class certification in *Roman*, however, relied on the district court's finding there that the conditions at a single detention facility exposed all detainees there to the same unnecessary risk of harm, findings that have not been made here. 977 F.3d at 942-43; *cf.* Dkt. # 188, pp. 16-17 (order denying TRO listing factual differences between the facility at issue in *Roman* and the NWIPC). And to that end, the class certified in *Roman*

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consisted of all detainees at that facility, not just those with a higher risk profile, and was geared toward improving the conditions at that facility, rather than focusing mostly on release. *Id.* Petitioners seek to certify a class of *certain* detainees at NWIPC and the alleged harm is detention of medically vulnerable individuals, which Petitioners—by their own admission—believe can only be resolved by their release. This presents commonality issues not at issue in *Roman*, where the class was larger, and the complained-of violations concerned very specific conditions at that facility.

To that end, both the class members' health profiles and the fact that they are detained pursuant to different statutory authority are more relevant to the commonality analysis here. Rule 23(a)(2) ensures that the class action "will generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Petitioners cannot show that a single common answer is appropriate for everyone in the proposed class. If the Court grants only the relief that is not release, the court will still need to look at whether each class member is receiving appropriate Fifth Amendment protection consistent with their individual health risk profile and their specific underlying medical condition. On the other hand, if the Court determined that release was appropriate, then the Court would need to individually examine the statutory authority for each detainee to determine if it could afford that relief.

Either way, this is the sort of "wide factual variation" that shows a lack of commonality. *Id.* Accordingly, the Court should not adopt the Report and Recommendation and deny Petitioners' Motion to Certify a Class because Petitioners cannot meet their burden to establish commonality under Rule 23(a). *See Mazza v. Am. Honda Motor Co.*, 666 F.3d

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581, 596 (9th Cir. 2012) (common issue does not predominate where "an individualized case" must be made on behalf of each class member to obtain relief).

B. Petitioners cannot satisfy the typicality requirement.

The Report and Recommendation errs in finding that Petitioners meet Rule 23's typicality requirement. Typicality requires a showing that "the claims or defenses of the representative are typical of the claim or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (quotation marks omitted).

Petitioners' circumstances of detention, including the statutory authority under which they are detained, and those of the other potential class members at NWIPC are too different and varied to satisfy Rule 23's typicality requirement. *See Dukes*, 564 U.S. at 350 (holding that where "individualized assessments are necessary" the class fails on typicality under Rule 23(a)(3)). The individualized nature of these claims is evidenced by comments made by the Court during the *Pimentel* hearing on May 22, 2020. *See Pimentel v. Asher*, No. 2:20-cv-00495-RSM-BAT, Dkt. # 72 (W.D. Wash. May 22, 2020). In deciding to convert the temporary restraining order into a preliminary injunction, the Court repeatedly referenced the fact that the decision concerning Mr. Pimentel's condition of confinement habeas claim was based on the facts and circumstances presented in that case alone, which included an analysis of Mr. Pimentel's medical history, and his status at the NWIPC, among other factors.

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The Report and Recommendation found those concerns went more to the merits of whether to grant a habeas petition than to the typicality of the claim. Dkt. # 209, p. 13. A detainee's detention status, however, is relevant to his or her claim; it directs if and how habeas relief may be available. Similarly, a detainee's medical history also bears on what claim may be available. Therefore, at bottom, the Court would have to conduct an analysis of each class members' medical history, their immigration status, and what conditions they are currently confined to at NWIPC, since there are multiple housing pods with different living configurations and differing levels of detainees to determine how that detainee's Fifth Amendment might be implicated.

The analysis needed goes beyond just examining what facts the claim arose from, to actually examining whether a claim exists. All of this demonstrates the lack of typicality among the proposed class and counsels against certification in this case. Accordingly, the Court should reject the Report and Recommendation and deny the Motion.

C. Petitioners have failed to demonstrate that the relief sought will provide an indivisible remedy.

In its prior order denying class certification, this Court could not conclude "that Petitioners [sought] an indivisible remedy as required under Rule 23(b)(2) certification." Dkt. # 121, p. 10. The same remains true here. Petitioners must demonstrate that the Government "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).

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The Report and Recommendation disregarded that the thrust of Petitioners' argument is that "because risk mitigation at NWDC is impossible, the only effective remedy for the unconstitutional conditions to which Plaintiffs and the proposed class are being subjected to is release from the detention center." Am. Pet. ¶ 81. To wit, Petitioners still seek immediate release as a remedy for the class members, which this Court has already rejected as incapable of being applied uniformly. *Compare* Am. Pet. ¶¶ 88, d (stating that "to be clear, Plaintiffs seek release on constitutional grounds *by Court order,* and not in the exercise of ICE's discretion," and requesting writ "order[ing] their release or placement in community-based alternatives to detention such as conditional release, with appropriate precautionary public health measures") (emphasis added) *with* Dkt. #121, p. 10 (order denying first motion for class certification) ("as noted above, because not all class members may be eligible for immediate release, the court cannot conclude that Petitioners seek an indivisible remedy as required under Rule 23(b)(2) certification"). Although Petitioners have applied for other forms of relief, the Court should scrutinize that what they are seeking is a remedy (i.e., release) not appropriate for a class action.

Petitioners have plead other forms of relief that may not seek immediate release but share the same flaw that they cannot be applied uniformly. For example, the Report and Recommendation found it significant that Petitioners now seek "a process to consider if release is appropriate for proposed class members, as opposed to release." Dkt. # 209, p. 14. Petitioners, however, failed to connect how a common process to examine the possibility of release would remedy the practice of detaining the putative class during the pandemic. A

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class member who is statutorily ineligible for release would not be afforded relief from that practice just because a process is in place to consider release for other detainees. Instead, the Court would need to examine whether such a class member's claims might require some other remedy to afford relief.

Thus, unlike in *Rodriguez v. Hayes*, a process here would not provide a uniform remedy to the class because the individual outcomes of the process may not resolve the alleged uniform practice of detaining the putative class during the pandemic. 591 F.3d 1105 (9th Cir. 2010) (seeking the provision of bond hearings to remedy the government's practice of prolonging an alien's detention during immigration for more than six months without a bond hearing).

The Report and Recommendation also stated that Petitioners "now seek injunctive relief regarding the conditions of confinement at NWIPC," finding that was another sufficient basis for class certification citing the Ninth Circuit's decision in *Roman*, but again that case is of limited applicability here. The district court's factual findings made about the facility in *Roman* drove the conclusion that the relief sought was appropriate for a class action, where the class sought relief on behalf of all detainees. These and other differences between the facilities mean that Petitioners do not face the same (alleged) "unnecessary risk of harm," as in *Roman*, and undermine any claim that the remedies they seek will uniformly address the problems they allege.

Petitioners attempt to plead around their Rule 23(b)(2) problem by reframing their request for release as a "process to consider if release is appropriate" and adding generic

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requests for mitigation measures already in place at NWIPC.[2] Petitioners' requests, however, do not resolve the fundamental flaw that this Court already identified: "Petitioners [. . .] insist that 'risk mitigation at the NWDC is impossible' and expressly state that the sole means of protecting their health and constitutional rights is not a 'process' to determine whether release or other mitigation is required, but an injunction requiring immediate release." Dkt. # 121, p. 11. This remains Petitioners' position, *see* Am. Pet. ¶ 81, and the Court should take their stated position at full value—that they believe that only release will remedy the constitutional violations they allege. Petitioners' position, however, defeats their request for class certification, because the ultimate relief they seek cannot be applied as an indivisible remedy as this Court has already held. Dkt. # 121, p. 10 ("[B]ecause not all class members may be eligible for immediate release, the court cannot conclude that Petitioners seek an indivisible remedy as required under Rule 23(b)(2) certification."). On that basis, Petitioners fail to satisfy Rule 23(b)(2) and the Court should not certify the class.

IV. Conclusion

For the aforementioned reasons, the Federal Respondents respectfully request the Court decline to accept the Report and Recommendation and instead deny the Petitioners' second motion for class certification.

Dated: February 2, 2021.

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[2] In fact, this Court has noted that NWIPC has already undertaken the steps requested by Petitioners, namely that NWIPC's detainee population in December 2020 was at 18.4% of its capacity and that it tests its detainees when certain events occur. Dkt. # 188, pp. 16-17.

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Respectfully submitted,

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