HONORABLE JAMES L. ROBART
HONORABLE BRIAN A. TSUCHIDA

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

Arturo MARTINEZ BAÑOS, Edwin FLORES TEJADA, and German VENTURA HERNANDEZ, on behalf of themselves as individuals and on behalf of others similarly situated, Plaintiffs-Petitioners, v. Nathalie ASHER, Field Office Director; Thomas D. HOMAN, Acting Director of Immigration and Customs Enforcement; John F. KELLY, Secretary of Homeland Security; Dana J. BOENTE, Acting Attorney General of the United States; Juan P. OSUNA, Director of Executive Office for Immigration Review; Lowell CLARK, Warden, Defendants-Respondents.	Case No. 2:16-cv-01454-JLR-BAT Agency Nos. A 089 091 010 A 098 225 790 A 206 104 257 PLAINTIFFS-PETITIONERS' AMENDED MOTION FOR CLASS CERTIFICATION Noted for Consideration On: March 3, 2017 Oral Argument Requested

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

I. MOTION AND PROPOSED CLASS DEFINITION

This motion for class certification amends the previous motion filed by Plaintiff Arturo Martinez Baños ("Mr. Martinez"). *See* Dkt. 6. On January 25, 2017, this Court issued an order granting Mr. Martinez's motion for leave to file an amended complaint. On January 31, 2017, Mr. Martinez filed an amended complaint, modifying the class definition and adding two named Plaintiffs: Edwin Flores Tejada ("Mr. Flores") and German Ventura Hernandez ("Mr. Ventura"), who are both currently detained at the Northwest Detention Center. Mr. Martinez, Mr. Flores, and Mr. Ventura hereby submit an amended motion for class certification to reflect the amendments to the complaint.

Mr. Martinez, Mr. Flores, and Mr. Ventura and the class they seek to represent are individuals who are subjected to unlawful and prolonged detention without a custody hearing as a result of Defendants-Respondents' ("Defendants") policies and practices. The named Plaintiffs and putative class members are individuals who have been placed in "withholding only" proceedings before Immigration Judges ("IJs") after establishing a reasonable fear of persecution or torture. 8 C.F.R. §§ 241.8(e); 1208.31(e). Notwithstanding that their cases have been referred to IJs for full "withholding only" proceedings, Defendants maintain that the named Plaintiffs and putative class members are subject to a final administrative order, and are accordingly subject to mandatory detention without any opportunity for an individual custody hearing by an IJ.

The result of Defendants' policies and practices is that individuals—persons who are fleeing persecution and torture—are denied the opportunity to even seek a custody determination while their applications for protection are pending before the IJ. Thus, they remain locked up in federal facilities and private prisons like the Northwest Detention Center for several months, often in excess of a year, and sometimes for multiple years. Prolonged detention without an individualized determination of dangerousness or flight risk violates the general immigration detention statutes and is "constitutionally doubtful." *Rodriguez v. Robbins (Rodriguez II)*, 715

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

F.3d 1127, 1137 (9th Cir. 2013) (quoting *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942, 951 (9th Cir. 2008)) (internal quotation marks omitted). Moreover, Defendants' policies and practices deny the named Plaintiffs and putative class members their statutory right to seek a custody hearing when first referred to withholding only proceedings, even before their detention becomes prolonged. *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016); 8 C.F.R. 1236.1(d).

Pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure, Plaintiffs Martinez, Flores, and Ventura respectfully move this Court to certify the following class with them as the appointed representatives:

> All individuals who are placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington who are detained or subject to an order of detention.[1]

The class consists of noncitizens in withholding only proceedings who are subject to immigration detention without an opportunity for an individualized custody determination by an IJ (including those, like Plaintiff Martinez, who although previously received an individualized custody hearing, the IJ or BIA has since determined that they must be detained without recourse to an individualized custody hearing). Defendants unlawfully deny the named Plaintiffs and putative class members the right to seek custody hearings when first referred to withholding only proceedings, pending resolution of their applications for withholding of removal and relief under the Convention Against Torture. In addition, Defendants' policies and practices unlawfully deny the named Plaintiffs and putative class members their right to an automatic custody hearing upon being detained for six months.

The named Plaintiffs seek an order from this Court vacating the August 1, 2016 decision of the Board of Immigration Appeals ("BIA") against Mr. Martinez, and declaring Defendants'

[1] "Order of detention" refers only to a custody determination issued by the IJ or Board of Immigration Appeals that orders the detention of an individual.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

practice and policy denying individualized custody hearings to persons in withholding only proceedings to be in violation of controlling case law from the Ninth Circuit Court of Appeals, the Immigration and Nationality Act, and the United States Constitution. The named Plaintiffs also seek injunctive relief ordering Defendants to automatically provide individualized custody hearings to class members who are currently detained at or before six months in immigration custody.

II. BACKGROUND

A. LEGAL BACKGROUND

Although the Court need not engage in "an in-depth examination of the underlying merits" at this stage, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011), the Court may need to analyze the merits to some extent in order to determine the propriety of class certification. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) (internal citations omitted). For that reason, the named Plaintiffs provide a brief summary of the merits of their claims.

Noncitizens who are apprehended by U.S. Immigration and Customs and Enforcement (ICE) are subject to an administrative removal process under 8 U.S.C. § 1231(a)(5) known as "reinstatement of removal" if they have previously been ordered removed and thereafter re-entered the United States without inspection. Pursuant to the implementing regulations, persons subject to reinstatement of removal are summarily removed by an ICE official without an opportunity to appear in front of an IJ. 8 C.F.R. § 241.8(a). Similarly, ICE may issue summary administrative removal orders under 8 U.S.C. § 1228(b), again without the opportunity to appear in front of an IJ, to noncitizens who are not permanent residents and are found to be deportable for having been convicted of an aggravated felony. 8 U.S.C. §1227(a)(2)(A)(iii).

An "exception" to these summary removal procedures exists for individuals who, like the named Plaintiffs, express a fear of being persecuted or tortured if returned to their home

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

country. 8 C.F.R. §§ 241.8(e), 238.1(f)(3). These persons are interviewed by asylum officers who determine whether they have a reasonable fear of persecution or torture. *Id*. Upon a finding of reasonable fear, they are transferred from the summary reinstatement process into full proceedings before IJs, known as "withholding only" proceedings. 8 C.F.R. § 208.31(e). Those in withholding only proceedings also have the right to an administrative appeal to the BIA, and thereafter to seek judicial review before the federal court of appeals if the IJ denies their application for withholding of removal or relief under the Convention Against Torture. *See* 8 C.F.R. § 1208.31(e).

This case concerns the proper source of detention authority for individuals in withholding only proceedings and the legality of prolonged detention without the right to a custody determination by the IJ. The source of statutory authority for the detention of a noncitizen "can affect whether his detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest the necessity of detention." *Prieto-Romero*, 534 F.3d 1053, 1057 (9th Cir. 2008). Notwithstanding that the named Plaintiffs and proposed class members have been transferred to full withholding only proceedings before IJs, Defendants assert that they remain subject to reinstatement of removal under 8 U.S.C. § 1231(a)(5). Defendants thus purport to detain these individuals pursuant to 8 U.S.C. § 1231(a), which authorizes the mandatory detention of noncitizens who are subject to an administratively final order of removal, rather than 8 U.S.C. § 1226, which authorizes the detention of noncitizens "pending a decision on whether [the noncitizen] is to be removed from the United States." Persons detained under § 1226(a) are entitled to seek an individualized custody determination from the IJ. *See also* 8 C.F.R. § 1236.1(d)(1).

Additionally, Defendants assert that IJs do not have the authority to conduct custody hearings for individuals who face prolonged detention under 8 U.S.C. § 1231. This position directly contravenes controlling case law from the Ninth Circuit Court of Appeals, making clear

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

that all persons in immigration proceedings who face prolonged detention—detention of 180 days or longer—are entitled to a custody hearing. *See Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081, 1093 (9th Cir. 2011); *Casas-Castrillon*, 535 F.3d at 949; *Prieto-Romero*, 534 F.3d at 1059.

The named Plaintiffs and proposed class members submit that they are subject to the detention authority of 8 U.S.C. § 1226 because their cases have been transferred for full withholding only proceedings before the IJ. The Second Circuit, the only court of appeals that has squarely addressed this issue, unequivocally held that Section 1226 provides the statutory authority for detaining those in withholding only proceedings because "the purpose of withholding-only proceedings is to determine precisely whether 'the [noncitizen] is to be removed from the United States.' 8 U.S.C. § 1226(a)." *Guerra v. Shanahan*, 831 F.3d at 62. Even prior to the Second Circuit's decision in *Guerra*, the Ninth Circuit held that individuals who fall under reinstatement of removal are not subject to an administratively final order "until the reasonable fear of persecution and withholding of removal proceedings are complete." *Ortiz–Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012). The named Plaintiffs and proposed class members also submit that they are all "entitled to automatic bond hearings after six months of detention." *Rodriguez III*, 804 F.3d at 1085.

However, agency guidance disseminated by Defendant ICE explicitly instructs that individuals in withholding only proceedings "will be subject to the detention authority of INA § 241(a)." Dkt. 7, Ex. A. Moreover, the BIA adopted this position in Mr. Martinez's case, concluding that IJs lack jurisdiction to conduct custody hearings for those in withholding only proceedings. Dkt. 38, Ex. A. As a result, IJs in Tacoma are now denying custody hearings to individuals in withholding only proceedings who have been detained for over six months. Specifically, the Immigration Court in Tacoma now utilizes a bond template sheet that includes a

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

check mark box for denying custody determinations based on "No Jurisdiction" with a category for "Withholding Only Proceedings." Dkt. 38, Ex. B.

This case is ideally suited for class certification as it challenges the government's uniform policy and practice denying individualized custody determinations for the named Plaintiffs and other similarly situated individuals. Defendants' application of mandatory detention to individuals in withholding only proceedings violates the INA and controlling case law from the Ninth Circuit. On behalf of himself and others similarly situated, the named Plaintiffs seek class certification to obtain declaratory and injunctive relief requiring Defendants to provide custody hearings to detained class members who seek a hearing when referred for withholding only proceedings, and in addition, to automatically provide custody hearings where the government bears the burden of justifying their continued detention if they are detained for six months. The named Plaintiffs ask the Court to determine for all others similarly situated whether Defendants' policies and procedures are unlawful, and order Defendants to apply legally proper procedures to the named Plaintiffs and proposed class members, thereby providing them an opportunity to seek a custody determination before a neutral arbiter who determines whether their continued detention is justified.

B. THE NAMED PLAINTIFFS' FACTUAL BACKGROUND

1. Plaintiff Martinez

Mr. Martinez is a native and citizen of Mexico who is currently in withholding only proceedings after an asylum officer determined that he faced a reasonable fear of persecution or torture if returned to Mexico. Mr. Martinez first entered the United States around 1997 without any lawful status and was ordered removed in 2009. He then returned to the United States later in 2009 and was summarily removed. After he re-entered the United States, he was convicted of Misprision of a Felony in 2012. While serving prison time for this conviction, his co-defendants accused him of providing information about them to U.S. law enforcement agents. In 2013, Mr.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

Martinez was again summarily removed to Mexico after serving his prison sentence. In Mexico, he was kidnapped, beaten, sodomized, and psychologically tortured by uniformed police officers from Petatlan, who held him for ransom, which was ultimately paid by his former employers in Washington State. Mr. Martinez thereafter returned to the United States in mid-2013.

In March 2015, Mr. Martinez was apprehended by ICE and served with a Notice of Intent to Reinstate his 2009 removal order. While detained at the Northwest Detention Center in Tacoma, he expressed fear of return of Mexico and underwent a Reasonable Fear Interview pursuant to 8 C.F.R. § 208.31(b). The Asylum Office found that Mr. Martinez demonstrated a reasonable fear of torture by the Mexican police, who previously tortured him with impunity, as well as by the members of the cartel-related drug trafficking operation, who suspect Mr. Martinez of providing prejudicial information about them to U.S. law enforcement.

On October 8, 2015, 196 days after Mr. Martinez was first detained by ICE, the Immigration Court conducted a custody hearing. Immigration Judge Fitting determined that in light of the ongoing withholding only proceedings, his strong community ties, and notwithstanding his past offenses, the government had failed to carry its burden of demonstrating with clear and convincing evidence that Mr. Martinez presented either a flight risk or a danger to the community. Accordingly, Judge Fitting set a bond in the amount of $10,000. Mr. Martinez was released upon paying the bond.

However, ICE subsequently filed a notice of appeal to the BIA, challenging the IJ's authority to grant bond to individuals in withholding only proceedings. On July 27, 2016, a three-member panel of the BIA issued a split decision, sustaining the appeal and vacating Mr. Martinez's bond of $10,000. The majority opinion found that the IJ "lacked jurisdiction to consider [Mr. Martinez's] request to be released from custody" because he is subject to detention under "section 241(a) of the Act [8 U.S.C. § 1231(a)], not section 236(a) [8 U.S.C. § 1226(a)], because the respondent is subject to an administratively final removal order that has been

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

reinstated." Dkt. 38, Ex. A at 1. The BIA also specified that "while the United States Court of Appeals for the Ninth Circuit has held that certain [noncitizens] are required to be provided custody redetermination hearings after 180 days in detention, [noncitizens] detained under section 241(a) of the Act [8 U.S.C. § 1231(a)] are specifically excluded from that class." *Id.* at 2.

Although Mr. Martinez is currently released from the Northwest Detention Center, he is subject to immediate detention at Defendants' discretion due to the BIA's decision in his case. As such, he remains in the constructive custody of ICE.

2. Plaintiff Flores

Mr. Flores is a native and citizen of El Salvador who is currently in withholding only proceedings after an asylum officer determined that he faces a reasonable fear of torture if returned to El Salvador. Mr. Flores first entered the United States in 2001, having escaped from El Salvador after a brutal attack by members of the Mara Salvatrucha ("MS-13") gang. In 2005, Mr. Flores was convicted for operating a vehicle while impaired and sentenced to one day in jail. He was subsequently ordered removed from the United States, but did not depart until January 2014, when he was apprehended by immigration authorities and physically removed to El Salvador. After returning to El Salvador, Mr. Flores was told by a friend that MS-13 members were still investigating him. Mr. Flores fled to Mexico, where he was kidnapped and threatened. In April 2014, after being released by the kidnappers, Mr. Flores returned to the United States. He was apprehended by Border Patrol officers and convicted for improper entry under 8 U.S.C. § 1325 and sentenced to 75 days in jail. After serving his jail sentence, Mr. Flores was summarily removed to El Salvador, but immediately returned to the United States out of fear. He began to live in SeaTac, Washington, with his family, including two children born in the United States.

In December 2015, Mr. Flores was apprehended by ICE and served with a Notice of Intent to Reinstate his prior removal order. While detained at the Northwest Detention Center in

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

Tacoma, he expressed fear of return to El Salvador and underwent a Reasonable Fear Interview pursuant to 8 C.F.R. § 208.31(b). The Asylum Office found that Mr. Flores demonstrated a reasonable fear of torture by the MS-13, who previously persecuted him on account of his membership in his nuclear family.

On August 30, 2016—after 253 days in detention, and approximately one month after the BIA's decision vacating Mr. Martinez's bond—Mr. Flores appeared before the Immigration Court for a custody redetermination hearing. IJ Fitting denied his request for a bond hearing on the basis that she lacks jurisdiction to order his release because he is in withholding only proceedings. Mr. Flores has appealed the IJ's denial of bond. That appeal is currently pending before the BIA, and Mr. Flores remains detained at the Northwest Detention Center.

3. Plaintiff Ventura

Mr. Ventura is a 23-year-old citizen and national of Mexico who is currently in withholding only proceedings after an asylum officer determined that he faces a reasonable fear of torture if returned to Mexico. In January 2014, while living in Mexico, Mr. Ventura was beaten and threatened by residents of a rival town and members of its football team. He reported the incident to the police, but the police did not take any measures. For several weeks, Mr. Ventura continued to receive death threats at his home. In March 2014, the attackers encountered Mr. Ventura at a market, beat him with rocks, and attempted to run him over with a car. Mr. Ventura fled from Mexico and entered the United States without inspection around March 16, 2016. He was apprehended by immigration authorities near the border and removed to Mexico. Around 10 days later, Mr. Ventura returned to the United States and entered without inspection. On June 1, 2016, Mr. Ventura was convicted for driving under the influence of alcohol in Oregon. He was sentenced to a 12-month diversion program and began to comply with the court-ordered sentence.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

On October 18, 2016, Mr. Ventura was apprehended by ICE officers at his home and transported to the Northwest Detention Center. On November 3, 2016, Mr. Flores underwent a Reasonable Fear Interview pursuant to 8 C.F.R. § 208.31(b). The Asylum Office found that Mr. Ventura had demonstrated a reasonable possibility of torture upon removal to Mexico. Mr. Ventura currently remains detained at the Northwest Detention Center.

III. THE COURT SHOULD CERTIFY THE CLASS.

The named Plaintiffs seek certification under Federal Rules of Civil Procedure 23(b)(2).[2] Both the Ninth Circuit and this Court have repeatedly ordered the certification of class actions based on claims challenging the adequacy of procedural protections under the immigration laws. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (affirming preliminary injunctive relief for certified class of immigration detainees subject to prolonged detention); *Mendez Rojas*,

[2] In the alternative, Plaintiffs seek certification of a habeas corpus class of detainees in DHS custody in the Western District. It is well-established that, in appropriate circumstances, a habeas corpus petition may proceed on a representative or class-wide basis. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 404 (1980) (holding that class representative could appeal denial of nationwide class certification of habeas and declaratory judgment claims); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus"); *Ali v. Ashcroft*, 346 F.3d 873, 886-91 (9th Cir. 2003) (affirming certification of nationwide habeas and declaratory class), *overruled on other grounds by Jama v. ICE*, 543 U.S. 335 (2005); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (holding that "under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions, holding multiple hearings, and writing multiple opinions"); *Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 620 (E.D. Pa. 1996) (certifying habeas class action challenging state's status under Antiterrorism and Effective Death Penalty Act). *See also Yang You Yi v. Reno*, 852 F. Supp. 316, 326 (M.D. Pa. 1994) (noting that "class-wide habeas relief may be appropriate in some circumstances"). The authority for such a proceeding is found in Federal Rule of Civil Procedure 81(a)(4), which provides that the Federal Rules of Civil Procedure are applicable to proceedings for habeas corpus to the extent that the practice in such proceedings "is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has previously conformed to the practice in civil actions." Accordingly, the courts have held that even if Rule 23 is technically inapplicable to habeas corpus proceedings, courts should look to Rule 23 and apply an analogous procedure. *See, e.g., Ali*, 346 F.3d at 891 (rejecting argument that Rule 23 requirements could not be used for guidance in determining whether a habeas representative action was appropriate); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-27 (2d Cir. 1974) (citing *Harris v. Nelson*, 394 U.S. 286, 294 (1969)) (finding in habeas action "compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure"); *United States v. Sielaff*, 546 F.2d 218, 221-22 (7th Cir. 1976); *Bijeol v. Benson*, 513 F.2d 965, 967-68 (7th Cir. 1975); *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 929 n.5 (N.D. Ga. 1982) ("[A] number of circuit courts have upheld the notion of class certification in habeas cases, whether certification is accomplished under Fed. R. Civ. P. 23, or by analogy to Rule 23."); *accord* William B. Rubenstein, Newberg on Class Actions § 25.28 (4th ed. 2012).

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

et al. v. Johnson, et al., 2:16-cv-1024-RSM, ECF No. 37 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures); *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015) (certifying class and ordering declaratory and injunctive relief for all individuals detained under 8 U.S.C. § 1226(a)); *Khoury v. Asher*, 3 F.Supp.3d 877, 2014 WL 954920 (W.D. Wash. 2014) (certifying class and ordering declaratory relief for immigration detainees subject to mandatory detention); *Roshandel v. Chertoff*, 554 F.Supp.2d 1194 (W.D. Wash. 2008) (certifying district-wide class of delayed naturalization cases); *Santillan v. Ashcroft*, 2004 U.S. Dist. LEXIS 20824, at *40 (N.D. Cal. 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status); *Ali v. Ashcroft*, 213 F.R.D. 390, 409-10 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis challenging legality of removal to Somalia in the absence of a functioning government); *Walters v. Reno*, 1996 WL 897662, No. 94-1204 (W.D. Wash. 1996), *aff'd* 145 F.3d 1032 (9th Cir. 1998), *cert. denied*, *Reno v. Walters*, 526 U.S. 1003 (1999) (certifying nationwide class of individuals challenging adequacy of notice in document fraud cases); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (certifying nationwide class of persons challenging validity of administrative denaturalization proceedings); *Gonzales v. U.S. Dept. of Homeland Sec.*, 239 F.R.D. 620, 628 (W.D. Wash. 2006) (certifying Ninth Circuit wide class challenging USCIS policy contradicting binding precedent), *preliminary injunction vacated*, 508 F.3d 1227 (9th Cir. 2007) (establishing new rule and vacating preliminary injunction but no challenge made to class certification); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding district court had jurisdiction to grant injunctive relief in certified class action challenging unlawful immigration directives issued by EOIR); *Gete v. INS*, 121 F.3d 1285, 1299 (9th Cir. 1997) (vacating district

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

court's denial of class certification in case challenging inadequate notice and standards in INS vehicle forfeiture procedure).

That courts routinely certify classes in this area under Rule 23(b)(2) is unsurprising for at least three reasons. First, the rule was intended to "facilitate the bringing of class actions in the civil-rights area," particularly those seeking declaratory or injunctive relief. 7AA WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1775, at 71 (3d ed. 2005). Second, they often involve claims on behalf of class members who would not have the ability to present their claims absent class treatment. This rationale applies with particular force to civil rights suits like this one, where absent certification of the class, the legal claims will likely have no opportunity to be resolved before the individual case is mooted out. Finally, the core issues in these type of cases generally present pure questions of law, rather than disparate questions of fact, and thus are well suited for resolution on a class wide basis. *See e.g., Unthaksinkun v. Porter*, 2011 U.S. Dist. LEXIS 111099, at *38 (W.D. Wash. Sept. 28, 2011) (finding that, because all class members were subject to the same process, the court's ruling as to the legal sufficiency of the process would apply to all).

The named Plaintiffs do not ask this Court to adjudicate their individual custody determinations. Nor do they seek money damages. Rather, the named Plaintiffs and proposed class members ask only that the Court determine whether Defendants' policy and practice is unlawful, and, if so, order Defendants to implement the procedures necessary to protect the named Plaintiffs and proposed class members.

A. THIS ACTION SATISFIES THE CLASS CERTIFICATION REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 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 is impracticable." "[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d 909, 913-14

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

(9th Cir. 1964) (citation omitted). No fixed number of class members is required. *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) ("There is no magic number for determining when too many parties make joinder impracticable. Courts have certified classes with as few as thirteen members, and have denied certification of classes with over three hundred members." (citations omitted)). "Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such situation." W. Rubenstein & A. Conte, 1 Newberg on Class Actions § 3:11 (5th ed. 2013). "Thus, Rule 23(a)(1) is an impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due process, judicial economy, and the ability of claimants to institute suits." *Id.* Where it is a close question, the court should certify the class. *Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998) ("where the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1)").

Determining whether plaintiffs meet the test "requires examination of the specific facts of each case and imposes no absolute limitations." *Troy v. Kehe Food Distributors*, 276 F.R.D. 642, 652 (W.D. Wash. 2011) (citing *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Thus, courts have found impracticability of joinder when relatively few class members are involved. *See Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763, 765-66 (9th Cir. 1971) (finding 17 class members sufficient); *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class with 27 known members).

There can be little question that at any given time several dozens of individuals are in withholding only proceedings, and are thus subject to the policies and practices challenged herein. Defendants have confirmed that on January 12, 2017, there were 70 withholding only

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

cases pending before the Tacoma Immigration Court, which hears cases of individuals detained at the Northwest Detention Center. *See* Dkt. 29-2 ¶6. *See also* Dkt. 8 ¶7 (estimating that there are about 80 individuals in withholding only proceedings detained at the Northwest Detention Center); Dkt. 9 ¶6 (reporting that 39 withholding only hearings had been completed before the Tacoma Immigration Court in a 4-month time span in 2015); Dkts. 31 & 21 (clarifying the declarants' usage of the phrase "withholding only proceedings"). Upon information and belief there are currently over eighty individuals detained at the Northwest Detention Center who fall within the proposed class and several hundred are detained at the Northwest Detention Center over the course of a year.

These numbers are consistent with statistical data compiled and made public by EOIR and ICE. Nationwide, immigration courts received 2,988 withholding only cases during the 2015 fiscal year. U.S. Department of Justice, EOIR Office of Planning, Analysis, and Statistics, *FY 2015 Statistics Yearbook* (2016), *available at* https://www.justice.gov/eoir/page/file/fysb15/download, at B1. As of June 2016, there were 37,573 individuals detained by ICE; among them, 1,459 individuals—or 3.9 percent of the total number—were detained at NWDC. U.S. Department of Homeland Security, ICE Office of Enforcement and Removal Operations, Information and Resource Management, *Weekly Departures and Detention Report* (2016), *available at* https://oversight.house.gov/wp-content/uploads/2016/07/ICE-Weekly-Departures-and-Detention-Report1.pdf, at 11. Projecting from this number, 3.9 percent of the 2,988 withholding only cases from the last fiscal year, would result in 116 cases in the Tacoma Immigration Court for the last fiscal year.

Joinder is also inherently impractical because of the unnamed, unknown future class members who will be subjected to Defendants' unlawful, mandatory detention policy. *Ali*, 213 F.R.D. at 408-09 ("where the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met,

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

regardless of class size.") (citations and internal quotation marks omitted); *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."); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal.1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured"). Future unnamed, unknown class members will be unlawfully detained under Defendants' policies as they are taken into custody.

Finally, the impracticability of joining future class members is particularly relevant with inherently revolving detainee populations, such as those at the Northwest Detention Center. *See J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009) ("The mere fact that the population of the [Youth Study Center] is constantly revolving during the pendency of litigation renders any joinder impractical."); *Clarkson v. Coughlin*, 145 F.R.D. 339 (S.D.N.Y. 1993) (certifying classes of male and female deaf and hearing-impaired inmates even though only seven deaf or hearing impaired female inmates were identified, in part because the composition of the prison population is inherently fluid).

In addition to class size and future class members, there are several other factors that demonstrate impracticability of joinder in the present case. Most importantly, joinder is impracticable when proposed class members, by reason of such factors as financial inability, lack of representation, fear of challenging the government, and lack of understanding that a cause of action exists, are unable to pursue their claims individually. *Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals … who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf.") (internal citation omitted); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that poor,

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

elderly plaintiffs dispersed over a wide geographic area could not bring multiple lawsuits without great hardship).

Most of the detained noncitizens appearing in immigration court are unrepresented. *See* Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (2016), at 9, *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf (reporting that eight percent of respondents before the Tacoma Immigration Court were represented by counsel between 2007 and 2012). The proposed class members are, by definition, detained, and not currently able to work to support themselves or their family. The vast majority do not have the resources to retain legal counsel, and free legal services are limited. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) ("in … deportation proceeding[s], … we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and … often do not even understand the tongue in which they are accused."). Equity favors certification where class members lack the financial ability to afford legal assistance. *Lynch v. Rank*, 604 F. Supp. 30, 38 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984) (certifying class of poor and disabled plaintiffs represented by public interest law groups).

In addition, where, as here, injunctive or declaratory relief is sought, the requirements of Rule 23 are more flexible. *See Goodnight v. Shalala*, 837 F. Supp. 1564, 1582 (D. Utah 1993). In particular, smaller classes are less objectionable and the plaintiffs' burden to identify class members is substantially reduced. *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984) (citing *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 276 (10th Cir. 1977) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975)); *Doe v. Charleston Area Medical Ctr*., 529 F.2d 638, 645 (4th Cir. 1975) ("Where 'the only relief sought for the class is injunctive and declaratory in nature . . .' even 'speculative and conclusory representations' as to the size of the

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

class suffice as to the requirement of many.") (citation omitted). The named Plaintiffs here challenge Defendants' unlawful policies and practices and is seeking declaratory and injunctive relief. Because the named Plaintiffs satisfy the stricter numerosity requirement of Rule 23(a)(1), *a fortiori*, they meet the requirements of the rule when liberally construed. While Defendants are in possession of the precise number of proposed class members, the named Plaintiffs have demonstrated that the number of current and potential future class members, and the impracticability of joining the current and future detainees held under this policy, makes class certification appropriate as the class is "so numerous that joinder is impracticable." Fed. R. Civ. Proc. 23(a).

2. The Class Presents Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, "[a]ll questions of fact and law need not be common." *Ellis*, 657 F.3d at 981 (quoting *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998)). To the contrary, one shared legal issue can be sufficient. *See, e.g.*, *Walters*, 145 F.3d at 1046 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement asks us to look only for some shared legal issue or a common core of facts.").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551. In determining that a common question of law exists, the putative 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*. Thus, "[w]hat matters to class certification is not the raising of common 'questions'

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

… but, rather the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal citation and quotation marks omitted).

The commonality standard is even more liberal in a civil rights suit such as this one, in which "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005). "[C]lass suits for injunctive or declaratory relief" like this case, "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1763 at 226.

Here, the named Plaintiffs and the proposed class members all suffer from the same injury caused by the uniform policies and practices of Defendants denying them an opportunity to seek an individualized custody determination. The named Plaintiffs and every putative class member has been or will be denied the opportunity to have an individualized custody determination by the IJ, in spite of having immigration proceedings pending before the Immigration Court. Putative class members who have previously been released under a bond but remain subject to an order of detention—such as Mr. Martinez—still remain in the constructive custody of Defendants. Thus, the question presented is whether the immigration laws are properly interpreted under Defendants' policies and practices as subjecting individuals in withholding only proceedings to mandatory detention under 8 U.S.C. § 1231(a), without an opportunity to request a custody determination by the IJ. Should the named Plaintiffs prevail, all who fall within the class will benefit; they will all be entitled to seek custody determinations by the IJ under 8 U.S.C. § 1226, when first transferred to withholding only proceedings. Thus, a common answer as to the legality of the challenged policy and practice will "'drive the resolution of the litigation.'" *Ellis*, 657 F.3d at 981 (quoting *Wal-Mart*, 131 S. Ct. at 2551).

Similarly, the answer to one legal question will "drive the resolution of the litigation" as to the issue of prolonged detention. *Id.* The core, common legal question is whether the named

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

Plaintiffs and all proposed class members are entitled to an automatic custody hearing before an IJ at the point their detention becomes prolonged—when they have been detained for six months. Although factual variations in individual cases may exist, these are clearly insufficient to defeat commonality as they do not take away from the core common questions presented. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."); *Walters*, 145 F.3d at 1046 ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification"). The named Plaintiffs are not asking this Court to determine the merits of their or any putative class member's custody hearing—i.e., whether they or putative class members present a risk of flight or danger to the community. Therefore, the core common questions presented do not necessitate a substantial individual inquiry that would prevent a "classwide resolution." *Wal-Mart*, 131 S. Ct. at 2551.

Rather, the named Plaintiffs are only requesting that this Court review whether the legal policies and practices challenged here conform to the plain language of the statute, implementing regulations, and controlling Ninth Circuit precedent. The questions presented apply equally to all class members regardless of any other factual differences. For this reason, questions of law are particularly well-suited to resolution on a class-wide basis because "the court must decide only once whether the application" of Defendants' policies and practices "does or does not violate" the law. *Troy*, 276 F.R.D. 642, 654; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure "plainly" created common questions of law and fact). As such, resolution on a class-wide basis also serves a purpose behind the commonality doctrine: practical and efficient case management. *Rodriguez*, 591 F.3d at 1122.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

3. The Claims of the Named Plaintiffs are Typical of the Claims of the Members of the Proposed Class.

Rule 23(a)(3) specifies that the claims of the representatives must be "typical of the claims ... of the class." Meeting this requirement usually follows from the presence of common questions of law. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). 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." *Id.* at 154. As with commonality, factual differences among class members do not defeat typicality provided there are legal questions common to all class members. *La Duke*, 762 F.2d at 1332 ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."); *Smith v. U. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented … typicality … is usually satisfied, irrespective of varying fact patterns which underlie individual claims.") (citation omitted).

The claims of the named Plaintiffs are typical of the claims of the proposed class. Mr. Flores and Mr. Ventura, like proposed class members, are currently in withholding only proceedings and detained at the Northwest Detention Center. While Mr. Martinez is not currently detained, he is in withholding only proceedings and subject to an order of detention; therefore, he and other class members are similarly subject to the constructive custody of Defendants. Defendants assert that every class member is subject to the detention authority of 8 U.S.C. § 1231, as opposed to § 1226. Similarly, Defendants assert that class members are not entitled to an automatic bond custody hearing when they face prolonged detention—at six months. The named Plaintiffs, just like every proposed class member, are subject to Defendants' uniform policies and practices which deny them the opportunity to obtain individualized custody hearings from IJs.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

All named Plaintiffs represent the proposed class as they are all subject to Defendants' policy and practice of denying persons in withholding only proceedings the opportunity to seek a custody hearing before an IJ pending the resolution of their lengthy civil proceedings, despite the fact that they may not present either a flight risk or a threat to the community. While Mr. Martinez previously received an individualized custody hearing, the BIA has since determined that he must be detained without recourse to an individualized custody hearing. Thus Mr. Flores, Mr. Ventura, and Mr. Martinez together represent all individuals who are subjected to the same policy and practice. The named Plaintiffs, along with all members of the proposed class, seek declaratory and injunctive relief from this Court clarifying that (1) their detention is authorized by 8 U.S.C. § 1226(a), which provides an opportunity to seek a custody determination by an IJ when they are transferred to withholding proceedings, and (2) that they must be provided automatic bond hearings after 180 days in immigration detention.

Because the named Plaintiffs and the proposed class are united in their interest and injury and raise common legal claims, the element of typicality is met.

4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed Class, 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." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citation omitted).

a. *Named Plaintiffs*

The named Plaintiffs will fairly and adequately protect the interests of the proposed class because they seek relief on behalf of the class as a whole and has no interests antagonistic to other members of the class. Their mutual goal is to declare Defendants' challenged policies and

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

practices unlawful and to enjoin further violations. The interests of the class representatives are not in any way antagonistic to those of the proposed class members, but in fact coincide.

The named Plaintiffs, like every proposed class member, are in withholding only proceedings before Immigration Courts in Seattle or Tacoma, and have been unlawfully denied the opportunity to seek a custody determination by an IJ when first referred to withholding proceedings. Moreover, even though the IJ initially determined that Mr. Martinez was entitled to an individualized custody hearing at the time his detention became prolonged, the BIA has vacated the IJ's order, declaring that persons in withholding only proceedings are not entitled to custody hearings even when their detention becomes prolonged. Moreover, the Immigration Court does not schedule automatic custody hearings for the named Plaintiffs or proposed class members at six months of immigration custody. The named Plaintiffs contend that Defendants' policies and practices interpreting and applying the mandatory detention provision to him, similar to all proposed class members, violate the statute and implementing regulations. Thus, their respective goals are the same.

b. Counsel

The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984), *amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill. 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979), *aff'd without opinion*, 609 F.2d 505 (4th Cir. 1979).

Plaintiffs are represented by Northwest Immigrant Rights Project. Counsel is able and experienced in protecting the interests of noncitizens and have considerable experience in handling complex and class action litigation, including litigation on behalf of immigration detainees. *See* Dkt. 10 ¶¶ 3-4 (describing counsel's experiences in litigating issues related to the

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

Immigration and Nationality Act before the Ninth Circuit and federal district courts). Counsel is able to demonstrate that they are counsel of record in numerous cases focusing on immigration law that successfully obtained class certification and class relief. In sum, Plaintiffs' counsel will vigorously represent both the named and absent class members.

B. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the requirements of Rule 23(b) for a class action to be certified. Class certification under Rule 23(b)(2) "requires 'that the primary relief sought is declaratory or injunctive.'" *Rodriguez,* 591 F.3d at 1125 (citation omitted). "The rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Id.* This action meets the requirements of Rule 23(b)(2), namely "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The named Plaintiffs challenge—and seek declaratory and injunctive relief from—systemic policies and practices that deny him and all other proposed class members (1) the right to request an individualized custody determination by the IJ when placed in withholding proceedings, and (2) the right to an automatic custody hearing before an IJ at six months. *Id.* at 1126 (finding that class of non-citizens detained during immigration proceedings met Rule 23(b)(2) criteria because "'all class members' seek the exact same relief as a matter of statutory or, in the alternative, constitutional right"); *see also Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (Rule 23(b)(2) "requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole"); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (finding

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone (206) 957- 8611

certification under Rule 23(b)(2) appropriate "where the primary relief sought is declaratory or injunctive").

In this case, Defendants have created and applied policies and practices that deny the same relief to all proposed class members. The class describes a group of persons detained under the jurisdiction of the Immigration Courts in Seattle and Tacoma, or subject to an order of detention, who have been or will be subjected to Defendants' unlawful policies and practices denying them their statutory and regulatory right to seek a custody determination pending resolution of their withholding only proceedings and their right to an automatic custody hearing before an IJ once their detention becomes prolonged. Defendants' actions in subjecting proposed class members to mandatory detention without a custody hearing clearly demonstrate that Defendants have acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Hence, the requirements of Rule 23(b)(2) are met.

IV. CONCLUSION

The named Plaintiffs respectfully request that the Court grant this motion and enter the enclosed order certifying this challenge to Defendants' policies and practices depriving persons in withholding proceedings of their opportunity to individualized custody determinations made by an IJ.

Dated this 8th day of February, 2017.

Respectfully submitted,

NORTHWEST IMMIGRANT RIGHTS PROJECT

s/ Matt Adams

Matt Adams, WSBA No. 28287
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611

s/ Leila Kang
Leila Kang, WSBA No. 48048
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8608

s/ Glenda M. Aldana Madrid
Glenda M. Aldana Madrid, WSBA No. 46987
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8646

CERTIFICATE OF SERVICE

RE: *Arturo Martinez-Baños, et al., v. Natalie Asher, et al.*

I, Leila Kang, am an employee of Northwest Immigrant Rights Project. My business address is 615 Second Ave., Ste. 400, Seattle, Washington, 98104. I hereby certify that on October 20, 2016, I electronically filed the foregoing motion and proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered partiers, including opposing counsel for the Defendants-Respondents, Nathalie Ahser, et al.:

Gladys M. Steffens Guzman
United States Department of Justice
Civil Division, Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
gladys.steffens-guzman@usdoj.gov
(202) 305-7181

Executed in Seattle, Washington, on February 8, 2017.

s/ Leila Kang
Leila Kang, WSBA No. 48048
NORTHWEST IMMIGRANT
RIGHTS PROJECT
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8608
(206) 587-4025 (Fax)