District Judge Tiffany M. Cartwright

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Ramon RODRIGUEZ VAZQUEZ, et al.,

Plaintiffs,

v.

Drew BOSTOCK, et al.,

Defendants.

Case No. 3:25-cv-05240-TMC

REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Noting Date: April 21, 2025

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INTRODUCTION

Plaintiff Ramon Rodriguez Vazquez seeks to certify and represent two classes challenging unlawful policies and practices that prevent or prolong a person's release from immigration detention. Defendants object to certification primarily on commonality and typicality grounds. Their arguments fail under well-established caselaw.

First, Defendants are incorrect that the Bond Denial class is overbroad and lacks commonality. Binding caselaw has repeatedly explained that a class is not overbroad simply because it may include some non-injured persons, as Defendants claim is the case here. But if the Court finds that rationale compelling, the class definition can be easily amended to specify that only those without lawful status are included. Similarly, it does not matter if some Bond Denial class members have received "alternative" findings denying bond based on flight risk or danger in addition an IJ's conclusion that the person is subject to § 1225(b)(2) mandatory detention. They have still been unlawfully denied bond and have no opportunity to challenge the alternative findings without first overcoming the unlawful mandatory detention determination.

Second, Defendants' arguments regarding commonality, typicality, and adequacy as to the Bond Appeal class similarly disregard caselaw certifying similar classes. Defendants' contentions boil down to the claim that class members are differently situated because they might be released, might withdraw their appeal, or might be detained for different reasons. These arguments ignore that many such people (those who are released or withdraw their appeals) are *not* class members. These arguments also run afoul of caselaw that recognizes such differences do not matter for purposes of certifying a class that seeks to challenge the single issue of the Board of Immigration Appeals' (BIA) significant delays in deciding custody appeals.

Finally, Defendants disregard the disjunctive phrasing of Rule 23(b)(2)'s plain text in

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asserting Mr. Rodriguez must seek classwide injunctive relief to pursue class certification. As caselaw acknowledges, Rule 23(b)(2) does not require the prospect of an injunction to proceed as a class.

ARGUMENT

I. The Bond Denial Class Meets the Requirements of Rule 23(a).

Defendants' argument that the Bond Denial class is "fatally overbroad" because it includes individuals who have not or will not suffer the alleged injury, Dkt. 23 at 8–9, is contrary to controlling circuit caselaw. The Ninth Circuit has long held that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate" under Rule 23(b)(2). *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *see also, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) ("The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)."), *abrogated on other grounds by Jennings v. Rodriguez*, 583 U.S. 281 (2018). Indeed, an en banc panel of the Ninth Circuit has emphatically "reject[ed]" the "argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc); *see also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) ("[E]ven a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct.").

This is because "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047. Notably, here, Defendants do not question that the bond denial policy exists at the Tacoma Immigration Court—it therefore

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follows that all those individuals potentially subject to that policy, by virtue of their exposure to it, are at risk of being injured by it. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (affirming class certification where, "although a presently existing risk may ultimately result in different future harm for different inmates—*ranging from no harm at all* to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide ADC policy or practice that creates a substantial risk of serious harm" (emphasis added)).[1] The injury Mr. Rodriguez and other putative class members allege is the same: continued detention without any opportunity to seek release. This is enough to satisfy commonality and typicality. *Id.* at 685 (finding typicality met where each named plaintiff "declares [they are] being exposed, like all other members of the putative class, to a substantial risk of serious harm by the challenged . . . policies," that the policies are "not unique to any of them," and that the policies are at "the center of the class claims").

Defendants argue not all putative class members are potentially subject to the unlawful policy because the class could be read to encompass noncitizens who originally enter without inspection but are later granted lawful immigration status. Dkt. 23 at 8–9. To the extent the Court is concerned about overbreadth, this issue "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Olean*, 31 F.4th at 669 n.14 (citation omitted); *see also Ruiz Torres*, 835 F.3d at 1137 (declaring that "fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class,

[1] By contrast, the court found the proposed class in *Ross v. Lockheed Martin Corp.* did not satisfy the commonality requirement because the plaintiffs could not identify with sufficient specificity the injurious policy to which they were all reportedly subject. 267 F. Supp. 3d 174, 197–201 (D.D.C. 2017); *see also* Dkt. 23 at 8, 15 (citing *Ross*). Here, there is no doubt about the injurious policy: the Tacoma Immigration Court's policy of finding that proposed class members are subject to mandatory detention under § 1225(b)(2) and are therefore ineligible for release on bond.

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particularly as the district court is well situated to . . . refine the class definition"). In this case, to ensure that the class would be limited to those individuals whom the Tacoma Immigration Court would consider to be "applicants for admission," Dkt. 23 at 9, the class definition can be modified by, inter alia, adding the italicized language:

> Bond Denial Class: All noncitizens *without lawful status* detained at the Northwest ICE Processing Center who (1) have entered or will enter the United States without inspection, (2) are not apprehended upon arrival, (3) are not or will not be subject to detention under 8 U.S.C. § 1226(c), § 1225(b)(1), or § 1231 at the time the noncitizen is scheduled for or requests a bond hearing.

Defendants' argument that commonality is lacking because some putative class members are denied bond on alternative grounds under § 1226(a), Dkt. 23 at 9–10, is similarly unavailing. Defendants argue such individuals "receive[] the decision that the rest of the class claims it" ought to have received. Dkt. 23 at 10. This is wrong. The Tacoma Immigration Court first finds such persons ineligible for bond based on the policy, and then offers alternative findings to bolster the unlawful denial. *See, e.g.*, Dkt. 5-1 at 1; Dkt. 5-2 at 4–5; Dkt. 5-3 at 1. Those individuals must still overcome the unlawful policy in order to address flight or danger findings. Defendants cite to *Martinez v. Clark*, 124 F.4th 775 (9th Cir. 2024), but that case supports Plaintiffs' position. There, the Court first addressed whether it had authority to review the danger finding and, only after ruling that it did, assessed whether the evidence supported that danger finding. 124 F.4th at 781–85. In any event, the argument as to alternative findings "misses the point," for there exists a "deficient [general] polic[y] and procedure[]" to which all putative class members are exposed. *Walters*, 145 F.3d at 1046.[2]

[2] Finally, a declaration from this Court affirming the eligibility of such individuals for bond hearings would ensure IJs assess their eligibility for bond unencumbered by the concern that they lack the authority to consider release. IJs are not conducting an "alternative § 1226(a) review" in a vacuum, Dkt. 23 at 10, and it is reasonable to expect that they are less likely to recognize an individual should be released where they have already decided they are subject to mandatory detention. The entire process is tainted by the unlawful application of § 1225(b)(2).

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Here, proceeding on a classwide basis would "generate [a] common *answer*[] apt to drive the resolution of the litigation," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted), for it would make clear that putative class members cannot be denied bond on the basis of § 1225(b)(2). *Parsons*, 754 F.3d at 678 (finding commonality satisfied where a given set of "policies and practices are the 'glue' that holds together the putative class" because "either each of the policies and practices is unlawful as to every inmate or it is not"). There is no need for "individualized review" to answer this question. Dkt. 23 at 10. Whatever other obstacles or hurdles a putative class member may have to obtaining bond other than the applicability of § 1225(b)(2) is simply not at issue in this case.

II. The Bond Appeal Class Meets the Requirements of Rule 23(a).

A. The Bond Appeal class presents common claims.

The Bond Appeal class seeks to resolve in "one stroke" the question of whether the BIA's prolonged custody appeal review process violates the Due Process Clause or the Administrative Procedure Act (APA). *Wal-Mart*, 564 U.S. at 350. Defendants claim that the proposed class of detained noncitizens with pending custody appeals is "too vast" because their "circumstances and procedural statuses wildly differ" and, accordingly, such claims must instead be "analyzed on a case-by-case basis" using the "the six-factor test set forth in *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*)." Dkt. 23 at 11. But Defendants' argument overlooks that these differences do not matter for class certification purposes and that the Due Process Clause may provide a single answer to this question, not a different one for each person.

First, Defendants' position depends on an obvious but key oversight. They claim that the "proposed class includes all *possible* appeals of a bond decision," Dkt. 23 at 10, asserting "[t]here simply cannot be a common question related to appeal adjudication time . . . between

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individuals who are detained or not detained," *id.* at 14; *see also id.* at 15 ("Similarly, an individual who is released from detention while DHS appeals an IJ's order to grant bond cannot be said to suffer the same injury as an individual who remains in custody while appealing an IJ's order to deny bond."). This argument ignores that the proposed class is defined as "[a]ll *detained* noncitizens who have a pending appeal, or will file an appeal, of an immigration judge's bond hearing ruling to the [BIA]." Dkt. 2 at 2 (emphasis added). The class thus specifically excludes people who have been released, a factor that Plaintiff agrees is important for any due process analysis. A person falls out of the class as soon as they are released, and they would no longer benefit from any classwide finding made in this case.

Defendants also argue that the underlying issues of each appeal, and the individual factual circumstances of detained persons, defy commonality as to the legality of EOIR's appeal processing timelines. Dkt. 23 at 11, 14. But 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); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011) ("[D]iffering factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality."). Here, Mr. Rodriguez and proposed class members all face the same practice whereby the BIA fails to ensure appeals are timely adjudicated and present the common question of whether this policy or practice is unlawful under the Due Process Clause and the APA. This is a legal question sufficient to satisfy the commonality requirement. *See, e.g.*, *Gonzalez Rosario v. USCIS*, No. C15-0813JLR, 2019 WL 1275097, at *3 (W.D. Wash. Mar. 20, 2019) ("This court's binding resolution of the common question whether USCIS is obligated to adjudicate initial asylum [employment authorization applications] within 30 days is distinct from the factual questions that may arise in individual actions."); *Perez-Olano v. Gonzalez*, 248

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F.R.D. 248, 257 (C.D. Cal. 2008) ("Courts have found that a single common issue of law or fact is sufficient to satisfy the commonality requirement."); *Gonzalez v. U.S. ICE*, 975 F.3d 788, 808 (9th Cir. 2020) ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." (citation omitted)).

Differences in a person's procedural posture, and whether they wait four or eight months for a BIA decision, do not affect this conclusion. Indeed, "[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." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978–79 (9th Cir. 2008); *see also Parsons*, 754 F.3d at 676 (finding commonality where plaintiffs challenged "policies and practices of statewide and systemic application [that] expose all inmates in . . . custody to a substantial risk of serious harm"); *Gonzalez*, 975 F.3d at 809 (rejecting government's argument that the fact-specific nature of individual probable cause inquiries precluded class action challenging the *procedures* used to determine probable cause).

Defendants also make much of the fact that some individuals "file[] and withdr[a]w an appeal within the span of a month," questioning how such a person's case is similar to that of a person who waits months for a BIA decision. Dkt. 23 at 14; *see also id.* at 12–13 (citing examples of such cases). This argument, like the one about non-detained persons, reflects a basic misunderstanding of how classes work. A person is a class member only so long as they fit the class definition – i.e., they are detained and have a custody appeal pending. A person who is released or withdraws their appeal is no longer a class member. Relying on these examples demonstrates that Defendants do not have a serious basis to oppose class certification.

Lastly, Defendants are incorrect that *TRAC* applies here and mandates a case-by-case analysis. Defendants' unworkable proposal ignores that the Due Process Clause provides a

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single, uniform answer to this question. The Supreme Court and Ninth Circuit have previously and repeatedly recognized that due process often demands specific timeframes for action to protect the rights of persons seized by the government. *See, e.g.*, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 58–59 (1991) (requiring probable cause hearing with 48 hours of arrest in class action); *Zadvydas v. Davis*, 533 U.S. 678, 700–01 (2001) (requiring release of persons with final order of removal subject to indefinite immigration detention if removal is not reasonably foreseeable after six months of detention); *United States v. Fernandez-Alfonso*, 813 F.2d 1571, 1572–73 (9th Cir. 1987) (holding that a district court's review of a magistrate judge detention decision must occur within thirty days); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (holding due process requires probable cause hearing as to civil commitment within seven days of commitment). The proposed class's claims are no different.

In addition, the Ninth Circuit's decision in *Gonzalez* is highly instructive in showing the feasibility of a class action seeking timely review of detention decisions. There, the court considered whether a "Judicial Determination Subclass," which was defined "to include those individuals detained pursuant to a detainer for longer than 48 hours," had a viable claim. 975 F.3d at 823. The Court answered that question in the affirmative, underscoring that the type of claim the proposed class brings here can be answered on a classwide basis, regardless of the underlying circumstances of each class member.[3]

[3] Notably, applicability of the *TRAC* factors would not preclude class treatment. *See Rosario v. USCIS*, 365 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018) (granting summary judgment for the class and finding that "even if Defendants are correct that the *TRAC* factors apply, they weigh in favor of granting injunctive relief"). While Defendants cite to *Casa Libre/Freedom House v. Mayorkas*, No. 2:22-cv-01510-ODW (JPRx), 2023 WL 3649589 (C.D. Cal. May 25, 2023), to suggest otherwise, they ignore that this Court certified a class on the precise issue in *Casa Libre* and issued classwide relief requiring U.S. Citizenship and Immigration Services to adjudicate certain immigration applications within 180 days. *See Moreno Galvez v. Cuccinelli*,

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B. Mr. Rodriguez's claims are typical of the class.

Mr. Rodriguez's claims are typical of the class. He is plainly a member of the class as defined and he faces the same prolonged appellate process that all putative class members face. Defendants focus on the fact that at the time Mr. Rodriguez filed this case, sixty days had not yet passed since he filed his appeal. Dkt. 23 at 15. But Defendants conflate the remedy sought with the fact that Mr. Rodriguez, like all proposed class members, faces a custody appeals system that fails to implement timelines or safeguards to ensure a timely decision. Defendants do not contest that the agency's own data demonstrates that on average, a decision is not rendered until 204 days—more than six months—have elapsed. Dkt. 1 ¶ 57.

Mr. Rodriguez is subject to the same injury as other class members. Here, the same analysis as the previous section applies, because "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Mr. Rodriguez has alleged the "'the same or [a] similar injury' as the rest of the putative class." *Parsons*, 754 F.3d at 685 (alteration in original) (citation omitted). That injury is the "result of a course of conduct that is not unique to [Plaintiff]; and [Plaintiff] allege[s] that the injury follows from the course of conduct at the center of the class claims." *Id.* As a result, typicality is established. "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, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims." *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998); *see also Rivera v. Holder*, 307 F.R.D. 539, 550 (W.D. Wash. 2015) ("Plaintiff's claim is typical of her class members', given that the class faces the same injury from the same policy.").

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492 F. Supp. 3d 1169, 1182 (W.D. Wash. 2020). The Ninth Circuit largely affirmed the resulting injunction on appeal. *See Moreno Galvez v. Jaddou*, 52 F.4th 821 (9th Cir. 2022).

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Defendants' counterarguments depend on their confusion between the *injury*—which is continued detention without a timely, meaningful opportunity to seek review of a custody determination —and the *remedy*—which the complaint proposes as a requirement of adjudication within sixty days of filing a notice of appeal. Mr. Rodriguez has plainly alleged and provided evidence that he is subject to the challenged practice. *See, e.g.*, Dkt. 1 ¶¶ 6–9, 56–72, 80–81; Dkt. 9 ¶ 12, Dkt. 22 Ex. B. Defendants' true contention appears to be that Mr. Rodriguez does not have standing to seek the remedy he requests. But this is incorrect; the Ninth Circuit and this Court have repeatedly recognized that a plaintiff may challenge a practice that will imminently harm them. *See, e.g.*, *Gonzalez*, 975 F.3d at 805 (holding that the named plaintiff "did not need to wait" to "challenge [the] legality" of detention where he would be subject to the challenged practice); *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1083 (W.D. Wash. 1994) ("Threatened harm that has not yet occurred, but that will occur unless judicial relief is afforded, is enough to support a civil rights claim."), *aff'd sub nom. Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996). Here, Mr. Rodriguez can "firmly predict" he will be subject to the challenged policy and practice. *Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor v. I.N.S.*, 306 F.3d 842, 861–62 (9th Cir. 2002). His claims are therefore "reasonably co-extensive with those of absent class members," and typical of the claims of the proposed class. *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1238 (9th Cir. 2024) (citation omitted).

C. Mr. Rodriguez is an adequate class representative.

Defendants also err in asserting Mr. Rodriguez is not an adequate representative. Dkt. 23 at 16. They point to no antagonism or conflicting interests—nor can they, for Mr. Rodriguez and the putative class members all share the common goal of expedited bond appeals. *See Ellis*, 657 F.3d at 985 ("Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between

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representatives and absentees."). They are all subject to the same practice and all seek to resolve their claims in "one stroke" declaring their rights. *Wal-Mart*, 564 U.S. at 350. Their differing underlying circumstances do not affect this inquiry, just as the reasons a person's underlying immigration status did not affect class certification in *Gonzalez*, or just as a person's underlying criminal conduct did not stop the Supreme Court from setting a uniform rule in *County of Riverside*.

III. The Proposed Classes Satisfy Rule 23(b)(2).

Defendants finally urge the Court to deny class certification as to both classes because Plaintiff seeks only classwide declaratory relief for each class. Rule 23(b)(2)'s plain text refutes this argument.

Plaintiff's request for declaratory relief is the result of the ban on classwide injunctive relief in 8 U.S.C. § 1252(f)(1). The Supreme Court has interpreted that statute to prohibit federal courts from "entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022). The "specified statutory provisions" include § 1226 and § 1225. However, this section "was not meant to bar classwide declaratory relief," *Rodriguez*, 591 F.3d at 1119, a fact the Supreme Court has repeatedly recognized, *see Biden v. Texas*, 597 U.S. 785, 798 (2022); *Nielsen v. Preap*, 586 U.S. 392, 402 (2019) (opinion of Alito, J., joined by Roberts, C.J., and Kavanaugh, J.) (explaining that § 1252(f)(1) did not eliminate "jurisdiction to entertain the plaintiffs' request for declaratory relief").

Defendants' argument that classwide declaratory relief is not available notwithstanding these decisions reads the word "or" out of the statute. Rule 23(b)(2) permits a class action where "final injunctive relief *or* corresponding declaratory relief is appropriate respecting the class as a

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whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). The "word 'or' . . . is 'almost always disjunctive." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (citation omitted). Accordingly, Rule 23(b)(2) "does not require that both forms of relief be sought and a class action seeking solely declaratory relief may be certified." 7AA Charles A. Wright & Arthur. R. Miller, Fed. Prac. & Proc. § 1775 (3d ed. 2025); *see also Wal-Mart*, 564 U.S. at 360 ("Rule 23(b)(2) applies only when a single injunction *or* declaratory judgment would provide relief to each member of the class." (emphasis added)). Defendants' assertion that "corresponding" requires a party also seek injunctive relief makes little sense. Dkt. 23 at 17. "Corresponding" simply means "to be similar, analogous or equal (*to* something)." *Maury Microwave. Inc. v. Focus Microwaves, Inc.*, No. CV 10-03902 MMM JCGX, 2012 WL 9161988, at *23 (C.D. Cal. July 30, 2012) (citation omitted). The rule thus does not require a party to seek injunctive relief, but rather merely recognizes that declaratory relief can be an adequate or equal substitute for injunctive relief in many instances.

Notably, this Court has previously issued only declaratory relief in a class action that similarly sought to enforce the rights of persons detained under § 1226. In *Khoury v. Asher*, this Court explained it was not "necessary to impose a permanent injunction in addition to the classwide declaratory relief the court has already awarded." 3 F. Supp. 3d 877, 892 (W.D. Wash. 2014), *aff'd*, 667 F. App'x 966 (9th Cir. 2016), *rev'd and remanded on other grounds sub nom. Nielsen v. Preap*, 586 U.S. 392 (2019). *Khoury* exemplifies that injunctive relief is not necessary for a Rule 23(b)(2) class to proceed, just as the Rule's plain text provides.

CONCLUSION

Accordingly, Mr. Rodriguez respectfully requests the Court certify both proposed classes.

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Respectfully submitted this 17th of April, 2025.

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WORD COUNT CERTIFICATION

I certify that this memorandum contains 4,115 words, in compliance with the Local Civil Rules.

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