UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DIORIS RAMON RIVERA DE LOS SANTOS, on his own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

CHAD WOLF, in his official capacity as Acting Secretary, U.S. Department of Homeland Security; THOMAS E. FEELEY, in his official capacity as Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement; and JEFFREY SEARLS in his official capacity as Administrator, Buffalo Federal Detention Facility,

Respondents-Defendants.

Case No. 20-cv-584

PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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New York, N.Y.

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INTRODUCTION

The petitioners move for class certification in this action seeking classwide relief consistent with that which has been ordered for the individual petitioners in *Jones v. Wolf*, a group of "individuals with [COVID-19-related] vulnerabilities identified by the CDC" for whom "the respondents are acting with deliberate indifference to unreasonably unsafe conditions at BFDF[, the Buffalo Federal Detention Facility,] and to those petitioners' serious medical needs." Case No. 20-CV-361, 2020 WL 1643857, at *12 (W.D.N.Y. Apr. 2, 2020). In that case, the Court held that the "respondents have actual knowledge of serious risks to the health and wellbeing of individuals with the vulnerabilities identified by the CDC and have not taken adequate steps to protect" them, *id*., and both its legal and factual analyses apply with equal force to any similarly situated person detained at BFDF with the "vulnerabilities identified by the CDC." The petitioners' counsel made an express written request for confirmation that ICE would provide such people with constitutionally-mandated protections; ICE ignored it. Now, because ICE has declined to apply the protections ordered in *Jones* to all qualified people, many of whose identities are known only to ICE, the petitioners seek an order requiring it to do so.

This case is plainly appropriate for class-wide adjudication. The proposed class consists of a large group of detained people who, by virtue of their indigence and incarceration, are hampered from bringing individual suits against ICE. The challenged injury—the failure to take adequate steps to protect vulnerable people at BFDF from potentially deadly health risks—is experienced by all class members and results from the same common policy, and the remedy sought would apply to the entire class. Finally, proposed class counsel are qualified and experienced in class action, civil rights, and immigrants' rights litigation. For all these reasons

and other reasons set forth below, class certification is appropriate and the petitioners respectfully request that the Court certify the proposed class.

BACKGROUND

The factual and procedural history that led to the instant litigation has been discussed at length in the temporary restraining orders issued in *Jones v. Wolf*, *see* 2020 WL 1643857 (hereinafter "*Jones* TRO"), at *1-*13, and in the related habeas action *Ramsundar v. Wolf*, *see* No. 20-CV-402, 2020 WL 1809677, at *1-*5 (W.D.N.Y. Apr. 9, 2020), in the subsequently issued preliminary injunction, *see Jones*, 2020 WL 1986923 (W.D.N.Y. Apr. 27, 2020) (hereinafter "*Jones* PI Order"), as well as in the parties' briefing in these actions. The petitioners provide a summary of that history below.

Unreasonably Unsafe Conditions at BFDF for Medically Vulnerable People

On March 25, 2020, twenty-three medically-vulnerable people in civil immigration detention at the Buffalo Federal Detention Facility ("BFDF") filed a group habeas challenging the lack of adequate protective measures taken by the facility in response to the COVID-19 pandemic because "[m]edical experts agree[d] it is not a case of if, but rather when Batavia will be hit by this pandemic." *Jones* Memorandum in Support of TRO (ECF 9) at 4. Recognizing the severity of the threat, on April 2, 2020, even before any positive case of COVID-19 had been detected at the BFDF, the Court found that ICE had demonstrated "deliberate indifference to the health and safety of those petitioners with the conditions identified by the CDC by holding them in a congregate, communal-living setting where social distancing is an oxymoron." *Jones* TRO, 2020 WL 1643857, at *12 (internal quotation marks omitted).

Subsequently, on April 9, 2020, the Court ordered that mitigation policies be adopted to provide protection to medically-vulnerable petitioners, specifically defined to include people in the following categories:

> a. People 65 years and older
> b. People who live in a nursing home or long-term care facility
> c. People of all ages with underlying medical conditions, particularly if not well controlled, including
> i. People with chronic lung disease or moderate to severe asthma
> ii. People who have serious heart conditions
> iii. People who are immunocompromised ... [including those with the following conditions]:
> 1. Cancer treatment
> 2. Smoking
> 3. bone marrow or organ transplant
> 4. immune deficiencies
> 5. poorly controlled HIV or AIDs, and
> 6. prolonged use of corticosteroids and other immune weakening medications
> v. People with severe obesity (body mass index [BMI] of 40 or higher)
> vi. People with diabetes
> vii. People with chronic kidney disease undergoing dialysis
> viii. People with liver disease.

Ramsundar, 2020 WL 1809677, at *1–2. The Court ordered the following ongoing mitigation policies for such people: "placement in single-occupancy cells; accommodation to eat meals in those cells and to bathe and shower in isolation; the provision, without charge, of sufficient shower disinfectant, masks, and ample soap; and the requirement that all BFDF staff and officers wear masks *whenever* interacting with these petitioners." *Id.* at *6 (emphasis in original). If ICE was unable to implement such measures for a qualified individual, the Court ordered they be released. *Id.*

Over the ensuing weeks, the situation at the BFDF deteriorated dramatically. As of April 29, 2020, 49 out of 319 people held in detention there had tested positive—a known rate of infection of over 15%, representing a 1200% growth in infections between April 9 and April 29—

and the BFDF accounted for 12% of all positive cases found in ICE detention centers nationwide. *See* ICE, *ICE Guidance on COVID-19*.[1] In light of this development, on April 27 the Court in *Jones* and *Ramsundar* converted its temporary restraining order into a preliminary injunction, noting that, "with respect to the vulnerable petitioners, if anything, the measures previously ordered have become even more critical." PI Order, 2020 WL 1986923, at *3. The Court also noted that most of the new COVID-19 cases at the BFDF "were found among detainees housed in one of the communal living situations this Court found inadequate to protect the vulnerable petitioners." *Id.* at 7.

ICE's Failure to Provide Relief to All Medically Vulnerable People at BFDF

Throughout the *Jones* and *Ramsundar* litigation, the Court's analysis regarding ICE's constitutional obligation to provide the enumerated "social distancing measures" has turned only on whether the petitioner "met the CDC vulnerability criteria," *Jones* PI Order, 2020 WL 1986923, at *2, and not on any more individualized assessment of the person's health or medical condition, *see id.*, *see also Jones* TRO, 2020 WL 1643857, at *1 (ordering relief for "petitioners who are vulnerable individuals, as defined by the . . . CDC"); *Ramsundar*, 2020 WL 1809677, at *4 (same). Accordingly, counsel for the petitioners have sought to ensure that additional qualified individuals who were not yet identified—and thus were not individually named—at the time of the *Jones* and *Ramsundar* petition filings can obtain the same relief to which they are entitled by the Constitution. *See* Declaration of Robert Hodgson (May 15, 2020) ¶¶ 8-11. While ICE has been responsive when petitioners' counsel affirmatively identifies and provides details regarding a newly-discovered person at BFDF who meets the CDC vulnerability criteria on an *ad hoc* basis, it has refused to provide the same relief to all such individuals as a categorical matter.

[1] *Available at* https://www.ice.gov/coronavirus (Updated April 28, 2020).

See id.; *see also id.* Ex. 1 (letter from petitioners' counsel to ICE counsel demanding that ICE provide the relief ordered in *Jones* to all similarly situated people at the BFDF, which received no response).

Consequently, a significant number of putative class members who are all medically vulnerable as defined by the CDC and who are thus all entitled to the same protective social distancing measures as the successful petitioners in *Jones* are currently languishing in the "communal-living situations [the] Court found inadequate to protect" them. *Jones* PI Order, 2020 WL 1986923, at *3. Their rights remain unvindicated through no fault of their own, but simply because they have not yet become identifiable to the petitioners' counsel and because ICE, the only party with the ability to identify them, refuses to do so.

Putative Class Representative Dioris Ramon Rivera De Los Santos

Putative class representative Dioris Ramon Rivera de los Santos is currently in detention at the BFDF. Declaration of Dioris Ramon Rivera de los Santos ("Rivera Decl.") ¶ 1. He has diabetes and hypertension, which means that he is a medically-vulnerable person as defined by the CDC under the terms of the *Jones* preliminary injunction. *See id.* ¶ 2; *Jones* PI Order, 2020 WL 1986923, at *1.

Mr. Rivera has been exposed to COVID-19 risks by being forced to live in a multiple-occupancy room, by not having ready access to soap or cleaning supplies, by being forced to eat meals in close contact with other people, and by being forced to interact regularly with staff who do not wear protective gear. Rivera Decl. ¶ 3. While ICE recently began providing him with certain social distancing protections—including a single-occupancy room—after his attorney identified him as vulnerable to the agency, ICE has made no guarantee that it will continue to

provide such protections. *See id.* ICE retains the ability to subject Mr. Rivera to all of the conditions of confinement the Court found unconstitutional in *Jones* at any time.

ARGUMENT

The petitioners move for certification of the following class:

> **All individuals who are or will be detained at the Buffalo Federal Detention Facility and who are vulnerable to COVID-19 as defined by the Centers for Disease Control and Prevention.**

The Court should certify the proposed class because it meets the requirements of Rules 23(a) and 23(b)(2). Specifically, Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law and fact are common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(2) is satisfied by a showing that the defendants have "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).

As the Second Circuit has explained, district courts must give these requirements "liberal rather than restrictive construction" and "adopt a standard of flexibility." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal quotation marks and citation omitted). District courts are afforded broad discretion in certifying a class. *See Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001). Courts have routinely granted class certification under circumstances similar to this case. Generally, courts in this circuit recognize that class actions are particularly appropriate in litigation involving detained people because "[p]risoners . . . come and go from institutions for a variety of reasons . . . [n]evertheless, the

underlying claims tend to remain." *Clarkson v. Coughlin*, 145 F.R.D. 339, 346 (S.D.N.Y. 1993) (internal quotation marks and citation omitted).

More specifically, courts in this circuit have certified classes in immigration cases involving challenges to immigration detention, *see, e.g.*, *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 617 (S.D.N.Y. 2018) (certifying class of detained immigrant children); *Abdi v. Duke*, 323 F.R.D. 131, 145 (W.D.N.Y. 2017) (certifying class of detained immigrants at the BFDF); *Bertrand v. Sava*, 535 F. Supp. 1020, 1024-25 (S.D.N.Y. 1982) (certifying class of detained Haitian asylum seekers), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982), and in recent weeks and months, courts around the country have certified or provisionally certified classes of people in immigration detention challenging ICE's failure to implement social distancing measures to combat COVID-19, *see Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 1703844, at *4 (D. Mass. Apr. 8, 2020) (certifying a class of all people in immigration detention at the Bristol County House of Corrections, and a subclass of "[d]etainees with medical conditions recognized under the CDC guidelines as heightening their risk of harm from COVID-19"); *Rodriguez Alcantara v. Archambeault*, No. 20CV0756 DMS (AHG), 2020 WL 2315777, at *7 (S.D. Cal. May 1, 2020) (provisionally certifying class of medically-vulnerable immigration detainees at the Otay Mesa facility and ordering their release); *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 2059848, at *3 (N.D. Cal. Apr. 29, 2020) (provisionally certifying class of immigration detainees at two facilities and ordering various forms of COVID-related relief); *Hernandez Roman v. Wolf*, No. EDCV2000768TJHPVCX, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020) (ordering classwide relief for people detained in Adelanto facility); *Fraihat v. U.S. Immigration & Customs Enf't*, No. EDCV191546JGBSHKX, 2020 WL 1932570, at *20 (C.D.

Cal. Apr. 20, 2020) (provisionally certifying two subclasses of people in immigration detention with COVID-19 vulnerabilities).

I. THE PROPOSED CLASS SATISFIES RULE 23(a).

A. The Proposed Class Is Sufficiently Numerous.

The proposed class satisfies the requirement that it be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In the Second Circuit, while a class with forty or more members is presumed to meet this condition, *see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), there is no requirement to establish a precise number of class members, particularly where such a number is in the exclusive control of the government, *see Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (holding that plaintiffs need not define exact size of class or the identity of its members to obtain class certification) (internal citations omitted). Moreover, the inquiry into joinder goes beyond "mere numbers" and requires consideration of "all the circumstances surrounding a case." *Id.* at 936. Other factors that may make a class "superior to joinder" include "(i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members." *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014) (citing *Robidoux*, 987 F.2d at 936).

Here, the proposed class is sufficiently numerous. While only ICE is in possession of information sufficient to determine the exact number of class members, reliable analyses of other incarcerated populations have found that nearly 40% of those detained have at least one of the COVID-19 risk factors identified by the CDC. *See* Amanda Klonsky, *An Epicenter of the Pandemic Will be Jails and Prisons, if Inaction Continues*, N.Y. Times (Mar. 16, 2020)

("[A]bout 40 percent of incarcerated people suffer[] from a chronic health condition, [and] the overall health profile of people in jails and prisons is abysmal.");[2] *see also* Abene Clayton, *California urged to release older prisoners amid coronavirus*, TheGuardian.com (April 6, 2020) (reporting that, of the 116,000 inmates in California prisons, 37% "have at least one of the risk factors that the US Centers for Disease Control and Prevention (CDC) says put them at risk of severe illness from Covid-19");[3] Declaration of Donald Specter (April 1, 2020), *Coleman v. Newsom*, Case No. 90-cv-520 (E.D. Cal.) (ECF 6559) Ex. B (California Correctional Health Care Services data reflecting the same 37% figure). Here, 40% of the 319 people detained at the BFDF would be 128 people, more than three times the threshold number for presumptive numerosity.

In addition, here the class definition also includes additional people who will flow into the class as new people continue to arrive at BFDF. Recognizing the transient nature of detained populations—and that "the past is telling of the future"—courts include "future class members to satisfy the numerosity requirement." *Chief Goes Out v. Missoula County*, 12-CV-155, 2013 WL 139938, at *3-*4 (D. Mont. Jan. 10, 2013); *see also Jane B. by Martin v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (noting that the putative class included "an undetermined number of girls who will reside" at the defendant facility in the future).

Not only is the proposed class presumptively proper because of its size, joinder of all putative class members' claims is impracticable for additional reasons. As the Court in *Jones* has previously recognized, the need for relief in this case is urgent, especially given how rapidly

[2] *Available at* https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html.
[3] *Available at* https://www.theguardian.com/world/2020/apr/06/california-prisons-older-inmates-coronavirus; *see also* Paige St. John, *No mass prison release for now*, Los Angeles Times (April 4, 2020) (reporting the same figure).

COVID-19 is spreading at BFDF. *See Jones*, Order Setting Expedited Schedule (Mar. 26, 2020) (ECF 10). Requiring detained individuals, many of whom do not have attorneys or the resources to hire attorneys, who may have limited English proficiency, or who may be unfamiliar with the U.S. judicial system, to prepare and file individual habeas petitions in the expedited timeline necessary for adequate relief here is impracticable. *See, e.g., Gortat v. Capala Bros., Inc.*, 07-CV-3629, 2012 WL 1116495, at *3 (E.D.N.Y. Apr. 3, 2012) (joinder impracticable for class of 28 "immigrant laborers who speak little English" and lacked financial resources), *aff'd*, 568 Fed. Appx. 78 (2d Cir. 2014); *Abdi*, 323 F.R.D. at 140 ("'[T]he ability of any one individual member of the class or the subclass to maintain an individual suit will necessarily be limited by the simple reality that they are being detained' as part of the immigration process") (quoting *V.W. by and through Williams v. Conway*, 236 F. Supp. 3d 554, 574 (N.D.N.Y. 2017)); *Dean v. Coughlin*, 107 F.R.D. 331, 332–33 (S.D.N.Y. 1985) (noting that "[t]he fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group affected remain constant") (citations omitted). Nor would a series of individual habeas claims, all turning on the same issue, be an inefficient use of court resources. *See Odom v. Hazen Transp., Inc.*, 275 F.R.D. 400, 407 (W.D.N.Y. 2011) (certifying class of 16 because it would entail "more efficient use of judicial resources").

B. Questions of Law and Fact Are Common to the Proposed Class.

With every class member here falling under the CDC's categorical definition of vulnerable, and every member seeking access to the same protective measures, the questions of law and fact here are plainly "common to the class," Fed. R. Civ. P. 23(a)(2), because their "resolution will affect all or a significant number of the putative class members." *Johnson v.*

Nextel Commc'ns Inc., 780 F.3d 128, 137–38 (2d Cir. 2015). To satisfy the commonality requirement, a question of law or fact must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Not every question of law or fact relevant to class members must be the same. *See Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983) (finding denial of class certification improper where proposed class sought review of policy or practice of denying promotion to employees who criticized defendant employer, not review of promotions themselves); *accord Wal-Mart*, 564 U.S. 359 ("Even a single [common] question will do.") (internal citation and quotation marks omitted). Rather, the commonality requirement is satisfied when defendants apply a common course of prohibited conduct to the plaintiff class. *See Marisol A.*, 126 F.3d at 377 (holding that commonality requirement was met where "plaintiffs allege[d] that their injuries derive[d] from a unitary course of conduct by a single system"); *see also Brown v. Kelly*, 609 F.3d 467, 468 (2d Cir. 2010) ("[W]here plaintiffs were allegedly aggrieved by a single policy of the defendants, and there is strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited.") (internal quotation marks and citation omitted); *Escalera v. N.Y.C. Hous. Auth.*, 425 F.2d 853, 867 (2d Cir. 1970) (holding that commonality requirement was met where plaintiffs were subject to same Housing Authority procedures despite variation in facts giving rise to Authority action against each plaintiff); *Floyd v. City of New York*, 283 F.R.D. 153, 172-75 (S.D.N.Y. 2012) (finding commonality where challenged *Terry* stops were product of NYPD-wide policies); *Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (finding commonality requirement met where putative class members raised "similar question of law," namely whether defendants' conduct violated a regulation and the due process clause).

The commonality requirement is met in this case, and indeed the Court in *Jones* has already performed an evaluation of the class members' claims that treats every one of them identically for the purposes of its constitutional analysis and the relief ordered. *See Jones* PI Order, 2020 WL 1986923, at *2 (constitutional question turned only on whether the petitioner "met the CDC vulnerability criteria," not on any more individualized assessment of the person's health); *see also Jones* TRO, 2020 WL 1643857, at *1 (ordering relief for all "petitioners who are vulnerable individuals, as defined by the . . . CDC"); *Ramsundar*, 2020 WL 1809677, at *4 (same). Putative class members are all detained at the BFDF, are all vulnerable to COVID-19 pursuant to the CDC's criteria, and all seek access to the same social distancing measures designed to protect them from grave medical harm. Common questions of law and fact exist as to all proposed class members, including but not limited to the following: (a) whether the denial of social distancing measures to a medically vulnerable person constitutes a constitutional violation; (b) what type of social distancing measures can BFDF officials provide at their facility; and (c) at what point the threat of COVID-19 will have diminished such that social distancing is no longer constitutionally required.

Resolution of these questions and a single injunction will resolve the central issue for the class "in one stroke." *See, e.g.*, *Abdi*, 323 F.R.D. at 141. In *Abdi*, a habeas class of detained asylum-seekers at the BFDF challenged ICE's deficient parole procedures at that facility, and while each individual experienced different harms, the court held that commonality existed because all the "Petitioners seek compliance with certain procedural safeguards." *Id.*;[4] *see also*

[4] While the court in *Abdi* subsequently decertified a separate subclass of detained people based on intervening Supreme Court case law going directly to the merits of their claim, that decision did not disturb the court's certification of the "parole subclass" discussed here. *See Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019).

Johnson, 780 F.3d at 137 ("The claims for relief need not be identical for them to be common; rather, Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members.").

C. Mr. Rivera's Claims Are Typical of the Proposed Class.

Rule 23's requirement that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3), is satisfied where, as here, "it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented," *Robidoux*, 987 F. 2d at 936-37. Mr. Rivera shares with the class claims "based on the common application of certain challenged policies," *Abdi*, 323 F.R.D. at 141; *see also Robidoux,* 987 F.2d at 936–37 (noting that, even when "variations in the fact patterns underlying individual claims" are present, typicality exists "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented"); *V.W. by and through Williams v. Conway,* 236 F. Supp. 3d 554, 576 (N.D.N.Y. 2017) (typicality requirement satisfied because the claims of the class representative and the class were "based on the common application of certain challenged policies"). Specifically, Mr. Rivera has been denied access to the protective social distancing measures required by the Constitution despite the fact that he is vulnerable to COVID-19 pursuant to the CDC's guidelines. *See* Rivera Decl. ¶ 3.

D. Mr. Rivera Will Fairly and Adequately Represent the Proposed Class.

The fourth and final requirement of Rule 23(a), that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), is twofold: "the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v.*

Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006). "Courts that have denied class certification based on the inadequate qualifications of plaintiffs have done so only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit." *In re Frontier Ins. Group, Inc., Sec. Litig.*, 172 F.R.D. 31, 47 (E.D.N.Y. 1997) (internal quotation marks and citation omitted).

Here, Mr. Rivera has an interest in vigorously pursuing the claims of the class. *See* Rivera Decl. ¶¶ 3-6. He has no interests antagonistic to the interests of other class members, and he has articulated a particular desire for the government to afford all similarly-situated people the same relief by applying social distancing measures to all medically vulnerable people at BFDF. *See id.*

II. THE PROPOSED CLASS SATISFIES RULE 23(b)(2).

In addition to satisfying the requirements of Rule 23(a), this action satisfies those of Rule 23(b)(2) because "the party opposing the class [] act[s] . . . 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). According to the Supreme Court, civil rights cases are "prime examples" of Rule 23(b)(2) class actions. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Likewise, the Second Circuit has recognized that "'[c]ivil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class . . . fall squarely into the category of [Rule] 23(b)(2) actions.'" *Marisol A.*, 126 F.3d at 378 (quoting *Jeanine B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995)).

Here ICE is acting on grounds generally applicable to the proposed class by denying medically-vulnerable people at BFDF access to vital social distancing protections. Furthermore, Rule 23(b)(2) applies here because "a single injunction or declaratory judgment"—an order requiring classwide application of the social distancing protections ordered in *Jones* for all

qualified medically vulnerable people at BFDF—"would provide relief to each member of the class." *Wal-Mart Stores*, 564 U.S. at 360; *see also Abdi*, 323 F.R.D. at 144 (finding that Rule 23(b)(2) was satisfied because ordering the government to follow its own rules and implement procedural protections would provide relief to each member of the class); *V.W.*, 236 F.Supp.3d at 577 (finding 23(b)(2) satisfied where the class sought "an order enjoining defendants from application of the policies and practices resulting in the deprivations at issue").

III. PROPOSED CLASS COUNSEL ARE ADEQUATE UNDER RULE 23(g).

Proposed class counsel, the New York Civil Liberties Union and Prisoners' Legal Services of New York, are "qualified, experienced and able to conduct the litigation," *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp*, 222 F.3d 52, 60 (2d Cir. 2000), and they satisfy the requirements set forth in Rule 23(g). Proposed class counsel at Prisoners' Legal Services have already done significant work by researching and developing legal theories first articulated in the *Jones* case, on which they are lead counsel, and by vigorously litigating that action and obtaining two temporary restraining orders and a preliminary injunction for their clients. Hodgson Decl. ¶¶ 5-6. In addition, NYCLU counsel have extensive experience in complex federal civil rights litigation seeking systemic reform, *id.* ¶¶ 2-3, and deep knowledge of constitutional and immigration law, having litigated directly or as *amicus* cases challenging the unlawful detention of immigrants, *see id*. Finally, proposed class counsel have devoted significant resources to staffing of this case, and they will continue to do so as the case proceeds. *See id*. ¶ 6.

IV. THE PROPOSED CLASS ALSO QUALIFIES AS A REPRESENTATIVE HABEAS CLASS.

The proposed class also qualifies as a representative habeas class pursuant to *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974) (holding that while Rule 23 does not directly apply to a habeas action, district courts have the authority to allow cases to proceed as "a

multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure"), *cert. denied* 95 S.Ct. 1587 (1975). In *Preiser*, the Second Circuit set out a test for habeas class certification that is the functional equivalent of Rule 23, requiring that a moving class show (1) that the claims are "applicable on behalf of the entire class, uncluttered by subsidiary issues," *id.* at 1126; (2) that "it is not improbable that more than a few [class members] would otherwise never receive the relief here sought on their behalf," *id.*; and (3) that class certification will achieve judicial economy by avoiding "[t]he considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue," *id.*

For the same reasons that class certification is warranted under Rule 23, it is also warranted under *Preiser*. *See Abdi*, 323 F.R.D. at 136 (certifying class of detained noncitizens at the BFDF and noting that, under *Preiser*, "[c]ourts that have proceeded with class claims in habeas cases have applied the Rule 23 requirements in determining whether to certify the multiparty action"). Further, the second *Preiser* requirement provides a particularly compelling reason to permit a habeas class here: many individual class members whom petitioners' counsel have not been able to identify and who are languishing at BFDF without access to basic constitutionally-mandated protections are highly unlikely to know how to seek—let alone obtain—the protections that ICE has to date been unwilling to provide. As a result, these class members realistically have no other way to obtain the relief sought in this case, which for them may be a matter of life or death.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant the motion for class certification, certify the proposed class, appoint Mr. Rivera representative of the class, and appoint the undersigned counsel as counsel for both.

Dated: May 18, 2020
New York, N.Y.

Respectfully Submitted,

/s/ Robert Hodgson
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