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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane Doe # 1; Jane Doe # 2; and Norlan Flores, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Jeh Johnson, Secretary, United States Department of Homeland Security, in his official capacity; R. Gil Kerlikowske, Commissioner, United States Customs & Border Protection, in his official capacity; Michael J. Fisher, Chief of the United States Border Patrol, in his official capacity; Jeffrey Self, Commander, Arizona Joint Field Command, in his official capacity; and Manuel Padilla, Jr., Chief Patrol Agent-Tucson Sector, in his official capacity,

Defendants.

Case No. 4:15-cv-00250-TUC-DCB

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Defendants' brief in opposition fails to rebut Plaintiffs' arguments demonstrating why this Court should certify a class comprised of "[a]ll individuals who are now or in the future will be detained for one or more nights at a CBP facility, including Border Patrol facilities, within the Border Patrol's Tucson Sector."

Defendants' first argument, that the foregoing definition is unascertainable, forces Defendants to dispute the plain meaning of "night" and of "detained." (Defs.' Resp. in Opp'n to Pls.' Mot. for Class Cert. ("Opp'n") at 5-6, ECF No. 41.) While the words "night" and "detained" may confound Defendants, several courts have certified classes based on overnight detention. *See infra* at p. 4. Defendants, it appears, would prefer the word "custody," Opp'n at 5, despite the fact that Defendants' own guidance specifically describes "custody" as "detention." *See infra* at p. 3. Ultimately, Plaintiffs' definition identifies membership of the class, which is all that is required. Should this Court disagree, Plaintiffs are willing to modify the class definition to address any lingering definitional uncertainties.

Defendants next argue that Plaintiffs have failed to demonstrate commonality. Defendants' own pleading undermines this argument. In their opposition, Defendants identify a legal issue—common to all—the answer to which drives this litigation: "the legal standard for determining whether Defendants have violated Plaintiffs' Fifth Amendment due process rights." (Opp'n at 9.) Even without this admission, all putative class members have in common their exposure, as a result of Tucson Sector-wide "policies and procedures," to unconstitutional conditions of confinement. Commonality is satisfied.

Defendants' typicality and adequacy arguments fare no better. Jane Doe # 1, Jane Jane Doe # 2, Norlan Flores, and all putative class members were or will be detained for one night or more in CBP hold rooms and, while detained, exposed to unconstitutional conditions of confinement. The cause of the injury is identical, and the injuries suffered

are (if not identical) similar, which satisfies typicality. And, because no class representative has conflicts of interest with the proposed class, adequacy is also met.

Finally, Defendants' rule 23(b)(2) argument fails because Defendants' Tucson Sector-wide practice of exposing putative class members to unconstitutional conditions of confinement constitutes action that is generally applicable to the class. Likewise, Defendants' failure to abide by their own stated policies constitutes refusal to act on grounds generally applicable to the class.

For all the foregoing reasons, this Court should grant Plaintiffs' Motion for Class Certification.

ARGUMENT

I. PLAINTIFFS' PROPOSED CLASS DEFINITION IS CLEAR

While "a class definition should be precise, objective, and presently ascertainable," it need not be "so ascertainable that every potential member can be identified at the commencement of the action." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1988) (citing 7A Charles A.Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d*, § 1760 at 117 (1986)). As long as "the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." *Id.* (citing Wright, Miller & Kane, § 1760 at 118). Moreover, classes certified under rule 23(b)(2) "generally command less precision than those brought under Rule 23(b)(3)," and courts in this circuit have therefore relaxed the ascertainability requirement for (b)(2) classes. *Lyon v. U.S. Immigration & Customs Enforcement*, 300 F.R.D. 628, 636 n.3 (N.D. Cal. 2014).

Plaintiffs' proposed class easily meets this standard. Its general outlines are clear: the class encompasses "[a]ll individuals [men, women, or children] who are now or in the future will be detained [kept under restraint or custody] for one or more nights [overnight] at a CBP facility, including Border Patrol facilities, within the Border Patrol's Tucson Sector."

Yet Defendants contend that this definition fails to account for the "operational realities" of these facilities because: (1) it is not explicit as to the facilities; (2) it improperly classifies individuals in custody within these facilities as "detained"; and (3) it is ambiguous with respect to the phrase "one or more nights." (Opp'n at 1-2.) These arguments have no merit.

First, by referencing facilities that lie within the Border Patrol's Tucson Sector, the class definition necessarily excludes CBP-operated ports-of-entry, which, by definition, are not located in Border Patrol's Tucson Sector, and are not Border Patrol facilities.[1] This ought to be clear enough, but if it is not, Plaintiffs hereby clarify that this is the scope of the definition.

Second, Defendants' argument that Plaintiffs and the class members they seek to represent are not "detained" is untenable. Defendants do not dispute that the individuals that they apprehend are placed in "custody," but nevertheless argue that this custody is not detention. This ignores that the definition of the term "detain" is "to hold or keep in or keep as if in *custody*." *Miriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/detain (emphasis added). Defendants do not—and could not—dispute that the individuals they hold in custody are kept there under restraint without the freedom to leave voluntarily. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 235 (2008) (defining "detention").

Defendants' argument is particularly odd given that their own guidelines specifically describe this custody as "detention." (*See* Memorandum, *Hold Rooms & Short Term Custody*, U.S.Customs & Border Patrol (June 2, 2008) at § 1, ECF No. 26-1, Ex. A ("This directive establishes national policy for the short term *custody* of persons . . . detained in hold rooms in Border Patrol stations . . .")) (emphasis added). Defendants

[1] Plaintiffs' class definition references CBP as Border Patrol's parent agency, with ultimate responsibility for Border Patrol policies and practices. All Border Patroloperated facilities are in that sense CBP facilities. The agency's structure does not, however, alter the class definition—which is plainly limited to facilities in Border Patrol's Tucson Sector.

specifically define the term "custody" as "the period of time in which a *detainee* is under arrest or is *detained* in a Border Patrol hold room" and similarly define a "hold room" as including a "*detention* cell." (*Id.* at §§ 3.2, 3.3) (emphasis added).

Third, Defendants argue that the phrase "for one or more nights" is temporally ambiguous. This ignores the fact that other courts have certified classes based on "overnight" detention. *See, e.g.*, *Brown v. City of Detroit*, No. 10-12162, 2012 WL 4470433, at *20 (E.D. Mich. Sept. 27, 2012) (certifying class of persons detained overnight or for more than sixteen hours without bedding); *Dunn v. City of Chicago*, 231 F.R.D. 367, 371 (N.D. Ill. 2005) (certifying class of persons held in lock-up cells overnight and not provided with a mattress or other bedding).

The several examples put forward by Defendants do not support their claim of ambiguity. (Opp'n at 6.) "Overnight" is commonly understood to mean "during the night" or "of, lasting, or staying the night." *See, e.g.*, *Miriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/overnight. None of Defendants' examples satisfies this definition, because each pertains to detention lasting for only a portion of a night: a child detained between 6 p.m. and 11:30 p.m.; an individual detained between 1 a.m. and 5 a.m.; and a woman detained at Border Patrol facilities from 11 p.m. until 2 a.m.

While Plaintiffs do not believe further clarification of the proposed class definition or any of its terms is necessary, they are willing to make modifications if this Court so requests. In the alternative, this Court could make modifications *sua sponte*. *See, e.g.*, *Mazur v. eBay Inc.*, 257 F.R.D. 563, 568 (N.D. Cal. 2009) (recognizing court's inherent power to modify proposed class definitions to make them sufficiently definite); *Booth v. Appstack, Inc.*, No. C-13-1533JLR, 2015 U.S. Dist. LEXIS 40779, at *13 (W.D. Wash. Mar. 30, 2015) (modifying the class definition in accord with the intent of Plaintiffs in order to avoid confusion) (citing *Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2011) ("Where appropriate, the district court may redefine the class")); *Maneely v. City of Newburgh*, 208 F.R.D. 69, 71 (S.D.N.Y. 2002) (*sua sponte* broadening the definition of the class); *see also Califano v. Yamazaki*, 442 U.S. 682, 703 (1979) ("[M]ost issues

arising under Rule 23, [are] committed in the first instance to the discretion of the district court.").

II. DEFENDANTS CONCEDE THE EXISTENCE OF QUESTIONS OF LAW AND FACT COMMON TO THE PROPOSED CLASS

The commonality rule requires a plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2) (emphasis added). One suffices. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) ("commonality only requires a single significant question of law or fact."). Defendants concede at least two: the applicable legal standard and the existence of Tucson Sector-wide "policies and procedures." (Opp'n at 8-9, 13 n.6.)

"What matters to class certification [is] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." (*Id.* at 7 (citing *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).) Defendants fail to rebut Plaintiffs' showing of five common questions satisfying this requirement. To the contrary, Defendants concede the existence of a central unresolved question of law, the answer to which drives this litigation: "the legal standard for determining whether Defendants have violated Plaintiffs' Fifth Amendment rights." (*Id.* at 9.) As Defendants acknowledge:

> [T]he Court has not yet had the opportunity to determine if [the legal standard articulated in *Jones v. Blanas*] is, in fact, the legal standard that should be applied in the context of the type of custodial processing that occurs at Border Patrol stations, for what appear to be recent entrants into the United States without lawful status. Indeed, no case clearly established a legal standard for Fifth Amendment due process challenges in this context. The unique nature of custody during processing at Border Patrol stations has significant legal differences from pretrial civil detention, which itself may provide good reason to find that a different standard applies.

(*Id.* at 9-10.)

This alone satisfies commonality, for whether putative class members are entitled to greater due process rights as either civil or pretrial detainees applies to the entire class and is not dependent on individual factual differences among class members. Indeed,

because this legal question is common to all, commonality is met even if—as Defendants allege, Opp'n at 12-13, putative class members experience non-identical conditions while in CBP custody. *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014), *reh'g denied*, 784 F.3d 571 (9th Cir. 2015) (en banc).

Defendants request that this Court postpone a ruling on certification until Defendants brief this legal issue. (Opp'n at 10 n.5.) Defendants can't have it both ways. Having conceded the existence of a common question of law applicable to the entire class, Defendants must wait for certification to litigate this common legal claim. In seeking a determination of the correct legal standard at this stage, Defendants impermissibly seek to turn this motion into "a dress rehearsal of the trial on the merits." *Parsons v. Ryan*, 289 F.R.D. 513, 516 (D. Ariz. 2013) (citation omitted); *accord Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

Defendants also argue that Plaintiffs fail to identify specific policies and practices to which all members of the class are, or will be, subjected. (Opp'n at 12.) But Defendants' own affiant concedes the existence of "policies and procedures that govern the apprehension, processing, and temporary custody of aliens." (Declaration of Manuel Padilla ("Padilla Decl.") ¶ 3, ECF No. 39-1.) These "policies and procedures" include constant illumination in hold rooms, *id.* ¶ 8, depriving class members of sleep, and the absence of trashcans in hold rooms, *id.* ¶ 14, leading to unsanitary conditions of confinement.

For purposes of class certification, this case is identical to *Parsons*. As in *Parsons*, Plaintiffs identify systematic policies and practices in Border Patrol facilities—denial of beds, lack of medical screening, constant illumination, extremely cold temperatures, unsanitary hold rooms—that affect all detainees in those facilities. *Compare Parsons*, 289 F.R.D. at 522-23 (listing declarations detailing exposure), *with* Pls.' Mot. for Class Certification at 2-5, ECF No. 4 (listing declarations detailing exposure). As in *Parsons*, "Plaintiffs' claim is that *despite* [CBP] stated policies"—health screening, clean hold

rooms, adequate food and water—"the actual [conditions] suffer[] from systematic deficiencies" that rise to the level of Fifth Amendment violations. *Parsons*, 289 F.R.D. at 521. Those very systematic deficiencies form the basis for Plaintiffs' other claim, that Defendants' failure to follow their own policies violates the APA.

What all members of the putative class have in common is their exposure, as a result of Tucson Sector-wide "policies and procedures," to unconstitutional conditions of confinement. *See Parsons*, 754 F.3d at 678 (noting common exposure). All individuals detained for one or more nights in Defendants' custody are necessarily subjected to the same conditions because of Defendants' practice of detaining putative class members overnight in hold rooms that Defendants admit are "not designed for long-term care and detention." (Padilla Decl. ¶¶ 11-12.)

III. PLAINTIFFS' CLAIMS ARE TYPICAL OF THE PROPOSED CLASS

To satisfy rule 23(a)(3) typicality, Plaintiffs need demonstrate "only that unnamed class members have injuries similar to those of the named plaintiff and that the injuries result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001), *abrogated on other grounds by Johnson v. Cal.*, 543 U.S. 499 (2005). "The commonality and typicality requirements of Rule 23(a) tend to merge" such that typicality is satisfied if commonality is satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 n.5 (2011) (citation omitted).

That putative class members may have slightly different experiences while detained by CBP does not defeat typicality. (Opp'n at 14-15.) "[N]amed plaintiffs' injuries [need not] be identical with those of other class members." *Armstrong*, 275 F.3d at 869. "Rule 23(a)(3) requires only that that their claims be 'typical' of the class, not that they be identically positioned to each other or every class member." *Parsons*, 754 F.3d at 686 (citation omitted). The named Plaintiffs were all detained for one or more nights in Border Patrol hold rooms and, while

detained, were exposed to unconstitutional conditions of confinement. Because *all* putative class members will be so detained and so exposed, their "claim[s] will be of the same nature" as other class members. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011).[2]

IV. PLAINTIFFS ARE ADEQUATE REPRESENTATIVES

Defendants' challenges to Plaintiffs' adequacy to represent the class have no merit. For instance, Defendants argue that Plaintiff Flores is an inadequate representative because of his "own aspirations to maintain his U Nonimmigrant visa status." (Opp'n at 16.) Defendants fail to offer any support—or even a clearly identifiable theory—for how Plaintiff Flores's appropriate pursuit of a visa, which is available to victims of crimes, would "place his interests in conflict with those of the class members." (*Id.*) To the contrary, Plaintiff Flores's efforts to remain in the United States are indicative of his mutual interest in vindicating the constitutional rights of putative class members detained here.

Next, Defendants argue that the named Plaintiffs do not have the same injuries as alleged in the complaint and that the potential for "vastly different experiences" among Plaintiffs and putative class members foreclose the possibility that Plaintiffs are "adequate class members for all putative class members." (Opp'n at 16.) These arguments are simply a rehash of Defendants' commonality and typicality arguments, and for the reasons already stated, should be rejected. *Cf. Rodriguez* v. *Hayes*, 591 F.3d 1105, 1125 (9th Cir.

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[2] Norlan Flores's purported lack of standing is irrelevant to whether his injuries are typical, which is what matters for rule 23(a)(3) purposes. Defendants' own case, *Bailey v. Patterson*, 369 U.S. 31 (1962), supports this. In *Bailey*, African-American plaintiffs lacked standing to enjoin Mississippi's breach-of-peace statutes because "they [did] not allege that they ha[d] been prosecuted or threatened with prosecution under them." *Id.* at 32-33. Because they weren't injured under the statutes, they couldn't represent a putative class that had been. But "as passengers using the segregated transportation facilities they [were] aggrieved parties and ha[d] standing to enforce their rights to nonsegregated treatment." *Id.* at 33. So injured, they could represent *that* class. It is the injury that counts, and Flores—like Jane Doe # 1, Jane Doe # 2, and putative class members—was injured by his exposure to unconstitutional conditions of confinement in a CBP hold room. Flores's injuries are typical, and typicality is met.

2010) (rejecting adequacy arguments that amount to re-assertions of commonality and typicality arguments).

Finally, Defendants suggest that Plaintiffs fail to prosecute this case vigorously by being unable to allege some form of physical and psychological harm. (Opp'n at 17.) Defendants apparently overlook the fact that Plaintiffs' Complaint and Motion for Class Certification both allege several such harms and exacerbated risks of harm. (*See, e.g.*, Compl. at ¶ 11, ECF No. 1 (conditions "deny . . . humanity"); *id.* ¶ 93 (conditions "exacerbate the serious harms and risks of harm"); *id.* ¶ 107 ("deprivation of sleep"); *id.* ¶¶ 110, 113 ("sudden exposure to extremely cold temperatures . . . to individuals who are already suffering from impairments, such as heat stroke and dehydration"); *id.* ¶ 126 ("infections and other communicable illnesses); *id.* ¶ 135 ("direct and serious risk of harm to the physical and mental health of detainees"); *id.* ¶ 146 ("high anxiety"); Pls.' Mot. for Class Cert. at 11 ("exposed to appalling conditions . . . which create a substantial risk of harm to detainees"); Pls.' Mot. for Class Cert. at 11 ("suffering from the harsh, punitive conditions").)[3] These allegations are further supported by numerous firsthand accounts of harms detailed in the fifty declarations of former detainees submitted in support of Plaintiffs' Motion for Class Certification. (*See generally* Lyall Decl. in Support of Motion for Class Certification, ECF No. 2.)[4]

[3] "In determining whether certification is proper, a district court must take the substantive allegations of the complaint as true, and may also consider extrinsic evidence submitted by the parties." *In re Cooper Companies Inc. Sec. Litig.*, 254 F.R.D. 628, 633 (C.D. Cal. 2009) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975)).

[4] It is unclear why Defendants rely on *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015 (9th Cir. 2012) and *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003), to challenge Plaintiffs' ability to prosecute this action vigorously. (Opp'n at 17.) The court in *Evon* reversed the district court's denial of class certification on one issue as an abuse of discretion and held that the named plaintiff *was* an adequate representative despite waiving her actual damages claim. 688 F.3d at 1031-32. The court in *Staton* held that the district court acted within its discretion in certifying the case as a class action. Both of these cases are entirely inapposite and do nothing to advance Defendants' case.

V. RULE 23(B)(2) DOES NOT PRECLUDE PLAINTIFFS' PROPOSED CLASS

"Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). "Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (citation omitted).

Defendants' Tucson Sector-wide practice of exposing putative class members to unconstitutional conditions of confinement constitutes action that is generally applicable to the class. Likewise, Defendants' failure to abide by their own stated policies—including adequate health screening, and clean hold rooms, *see* Padilla Decl. ¶¶ 9, 10, 13, constitutes refusal to act on grounds generally applicable to the class.

As in *Parsons*, Plaintiffs identify "separate issues that Defendants should be required to address in any court-enforced plan to satisfy their alleged remedial obligations." *Parsons*, 754 F.3d at 687. Defendants' remedial plan should include the provision of bed and bedding for overnight detainees, basic hygiene products, clean drinking water and nutritionally adequate food, constitutionally adequate temperatures, and medical screening. (Compl. ¶¶ 229–235.) As in *Parsons*, "'the remedy in this case would not lie in providing specific [relief] to specific [detainees],' but rather 'the [conditions] and resources would be raised for all [detainees].'" *Parsons*, 754 F.3d at 687 (citing *Parsons*, 289 F.R.D. at 524). Moreover, the remedy sought would bring Defendants' practices in line with their stated policies. Defendants admit both that these policies apply to "the apprehension, processing, and temporary custody of aliens" and that they must be "implemented and adhered to within the Tucson Sector." (Padilla Decl. ¶¶ 2-3.)

It matters not that each of Defendants' practices and policies "may not affect every member of the proposed class in the same way," *Parsons*, 754 F.3d at 688 (citation omitted), because the remedy sought by Plaintiffs would "provide relief to each member

of the class," *Wal-Mart*, 131 S. Ct. at 2557. Certification under rule 23(b)(2) is clearly appropriate.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Class Certification.

Dated: July 21, 2015 By: */s/ Harold J. McElhinny*

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2015, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

Harold J. McElhinny	/s/ *Harold J. McElhinny*
(typed)	(signature)