UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JANET MALAM,

Petitioner-Plaintiff,

- against -

REBECCA ADDUCCI, *et al.*,

Respondent-Defendants.

No. 5:20-cv-10829-JEL-APP

PETITIONERS-PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Petitioners-Plaintiffs, by and through undersigned counsel, hereby move, pursuant to Rules 23(b)(1), 23(b)(2) and 23(c)(4) of the Federal Rules of Civil Procedure, 28 U.S.C. §§ 2241 and 2243, and the Court's habeas authority, for the entry of an Order certifying this matter as a class action and designating undersigned counsel as class counsel. The grounds for this motion are set forth in the Brief in Support of Petitioners-Plaintiffs' Motion for Class Certification, filed herewith, and the accompanying Declaration in support.

WHEREFORE, Petitioners-Plaintiffs respectfully move this Court to:

1. Certify the class and subclass as defined in the accompanying brief pursuant to Rule 23(b)(1) or comparable habeas authority;
2. Certify the class and subclass as defined in the accompanying brief pursuant to Rule 23(b)(2) or comparable habeas authority;

3. In the alternative, certify the class and subclass under Rule 23(c)(4) or comparable habeas authority for resolution of the following issues:

    a. Common factual questions related to current practices to prevent and manage coronavirus infections at Calhoun.

    b. Common factual questions related to what practices are necessary to prevent and manage coronavirus infections at Calhoun;

    c. Whether continued detention in civil immigration custody at the Calhoun County Correctional Facility of members of the class violates the Due Process Clause, and what standard should be applied to answer that question; and

    d. Whether continued detention in civil immigration custody at the Calhoun County Correctional Facility of members of the subclass violates the Due Process Clause, and what standard should be applied to answer that question.

4. Designate undersigned counsel as class counsel.

Pursuant to the local rules, Plaintiffs have conferred with counsel for Defendants, who oppose this motion, and have contacted counsel for separately-represented Plaintiff Janet Malam, who has not responded as of the time of filing.

Dated: June 14, 2020

Respectfully submitted,

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BRIEF IN SUPPORT OF
PETITIONERS-PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This action arises from Defendants' failure to protect noncitizens civilly detained by U.S. Immigration and Customs Enforcement ("ICE") at the Calhoun County Correctional Center ("Calhoun") from contracting COVID-19 and the resulting risk of death or serious physical injury while detained. Plaintiffs seek to certify a class of all noncitizens held by ICE at Calhoun, and a subclass of medically vulnerable individuals who have one or more factors placing them at heightened risk for serious illness or death if exposed to COVID-19. Certification is warranted under Federal Rule of Civil Procedure 23, 28 U.S.C. §§ 2241 and 2243, and the Court's habeas authority. The class and subclass meet the requirements of Federal Rule of Civil Procedure 23(a), as well as 23(b)(1) and 23(b)(2). In the alternative, the Court can initially certify an issue class and subclass pursuant to Rule 23(c)(4).

BACKGROUND AND FACTS

Due to the grave dangers Plaintiffs face in detention, this Court has thus far ordered release of seven individuals from Calhoun. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.532; Apr. 9 Op. & Order, Dkt. 29, PageID.629; May 12 Op. & Order, Dkt. 68, PageID.1903; May 23 Op. & Order, Dkt. 90, PageID.2704; *Zaya v. Adducci*, 2020 WL 1903172, at *1 (E.D. Mich. Apr. 18, 2020). Although their ages and underlying medical conditions vary, the Court has adopted common factual findings

and applied a common analytical framework in each case, which shows exactly why class certification is warranted.

The Court's common factual findings include:

- "COVID-19 is a global pandemic of unparalleled scope, and the public health evidence . . . suggests that communal confinement cannot ensure detainees reasonable safety from infection." Apr. 17 Op. & Order, Dkt. 33, PageID.722.

- As Defendants have conceded, social distancing of at least six feet is impossible at Calhoun. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.541.

- "[E]ven the most stringent precautionary measures—short of limiting the detained population itself—simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease." Apr. 6 Am. Op. & Order, Dkt. 23, PageID.554.

- Medically vulnerable individuals remain "at an unreasonable and substantial risk of infection, and consequently of dire health consequences, including death." Apr. 17 Op. & Order, Dkt. 33, PageID.715. The "stark reality [is] that communal confinement, even with the precautions Defendants have employed, creates a significant risk of COVID-19 infection." May 12 Op. & Order, Dkt. 68, PageID.1915.

- "The emergence of COVID-19 at the Calhoun County Correctional Facility transforms a generalized yet substantial risk into a specific and immediate risk." May 12 Op. & Order, Dkt. 68, PageID.1914-15.

- Due to the rapid spread of COVID-19 in detention facilities, release of Plaintiffs promotes public health. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.572.

The Court also applied the same legal framework in each case, concluding, *inter alia*, that:

- The Court has jurisdiction under both 28 U.S.C. § 2241 and 28 U.S.C.

§ 1331; sovereign immunity does not apply; and no other statute deprives the Court of jurisdiction. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.542–549; Apr. 9 Op. & Order, Dkt. 29, PageID.632; May 12 Op. & Order, Dkt. 68, PageID.1910–11.

- The Court has yet to decide what standard applies to Plaintiffs' claims, finding in each instance to date that Plaintiffs satisfy the most stringent objective/subjective deliberate indifference test. Apr. 9 Op. & Order, Dkt. 29, PageID.641, n.1; Apr. 17 Op. & Order, Dkt. 33, PageID.725; May 12 Op. & Order, Dkt. 68, PageID.1930–32; May 23 Op. & Order, Dkt. 90, PageID.2725 n.1.

- "[A]ny response short of authorizing release" for those "whose underlying health conditions expose [them] to a high risk of an adverse outcome if infected by COVID-19, demonstrates deliberate indifference to a substantial risk." Apr. 17 Op. & Order, Dkt. 33, PageID.722–23.

- Plaintiffs have met the objective prong of the deliberate indifference test because so long as plaintiffs remain detained, they are exposed to a substantial risk of serious harm. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.566; May 12 Op. & Order, Dkt. 68, PageID.1934–41 (rejecting Defendants' argument re imminence of harm, compliance with policies, and societal toleration of risk).

- Plaintiffs have met the subjective prong of the deliberate indifference test because, in light of Plaintiffs' underlying health conditions and age, Defendants cannot ensure their reasonable safety even with precautionary measures. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.568. Moreover, "[b]ecause Defendants have not taken specific precautions to protect medically vulnerable detainees, the Court finds that Defendants have acted unreasonably and have disregarded the risk of COVID-19." May 12 Op. & Order, Dkt. 68, PageID.1942. "Defendants are aware that medically vulnerable detainees require additional protection, but nonetheless have declined to act." *Id.* at 1947–48.

- For medically vulnerable individuals, "given the extraordinary nature of the COVID-19 pandemic, no set of possible confinement conditions would be sufficient to protect [their] Fifth Amendment rights. Release from

custody represents the only adequate remedy in this case, and it is within this Court's broad equitable power to grant it." Apr. 6 Am. Op. & Order, PageID.525; Apr. 17 Op. & Order, Dkt. 33, PageID.708–09 (same). "[T]he presence of a risk factor for severe illness and/or death translates a high risk of infection into a high risk of irreparable injury and a substantial risk of serious harm such that no conditions of confinement at the Calhoun County Correctional Facility can ensure a civil detainee's reasonable safety." May 23 Op. & Order, Dkt. 90, PageID.2711.

- Where continued detention violated the Constitution, immigration statutes requiring detention must give way. Apr. 6 Am. Op. & Order, Dkt. 23, PageID.573.

These findings apply not just to the seven people released so far, but also to all noncitizens or all medically vulnerable noncitizens detained at Calhoun.

ARGUMENT

I. Legal Standard for Class Certification

A district court has broad discretion to decide whether to certify a class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 72 F.3d 838, 850 (6th Cir. 2013). Rule 23 of the Federal Rules of Civil Procedure governs certification of classes seeking damages, declaratory relief, or injunctive relief. Where a class seeks a writ of habeas corpus, such a "proceeding is merely analogous to a Rule 23 class action, and . . . the provisions of Rule 23 need not be complied with precisely." *Cameron v. Bouchard*, __ F. Supp. 3d __, No. 20-10949, 2020 WL 2569868, at *16 (E.D. Mich. May 21, 2020) (quoting *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 221 n.5 (7th Cir. 1976)), *later opinion stayed on other grounds*, No. 20–3547, 2020 WL 3100187, at *2–3 (6th Cir. June 11, 2020). Here,

Plaintiffs primarily seek class-wide declaratory and habeas relief.[1] Class certification is thus proper if the Plaintiffs meet the Rule 23 standards with respect to their claims for declaratory relief, or the more flexible representative habeas standards with respect to habeas relief.

Under the familiar and traditional Rule 23 analysis, the party seeking certification must satisfy the four requirements of Rule 23(a) and at least one of the three requirements in Rule 23(b). *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). In addition, under Rule 23(c)(4), "[w]hen appropriate, a class action may be brought or maintained as a class action with respect to particular issues." *Martin v. Behr Dayton Thermal Products*, 896 F.3d 405, 413 (6th Cir. 2018). Plaintiffs here seek certification under both Rule 23(b)(1) and (b)(2). In the alternative, Plaintiffs seek issue class certification under Rule 23(c)(4). Issue class certification is similar to class-wide declaratory relief, and provides an alternative path for the class-wide determination of common issues, particularly if the Court wishes, for case management purposes, to decide certain

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[1] As discussed in Section VI, the Sixth Circuit has interpreted 8 U.S.C. § 1252(f)(1) to bar class-wide injunctive relief that would "enjoin or restrain" certain provisions of the Immigration and Naturalization Act. Nothing in the Plaintiffs' requests countermand that position. This Court can award class-wide injunctive relief that does not enjoin/restrain that Act (for example, orders mandating comprehensive testing, requiring masks, etc.), and while Plaintiffs' Petition encompasses the possibility of such injunctive relief, *see* 2d Am. Pet., Dkt. 97, Prayer for Relief ¶ l, Plaintiffs focus on class-wide declaratory and habeas relief.

issues at the outset before determining how the case as a whole should proceed.

For purposes of certifying a representative habeas action "this Court need only look to the provisions of Rule 23 in determining whether a representative action is appropriate and need not find precise compliance with the rule." *Cameron*, 2020 WL 2569868 at *19. Congress has codified the historical flexibility of habeas proceedings by granting federal courts the power to "dispose of [habeas corpus petitions] . . . as law and justice require." 28 U.S.C. § 2243; *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The very nature of the writ demands that it be administered with the initiative and flexibility."). Accordingly, courts may establish "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Harris*, 394 U.S. at 299. When courts consider representative habeas actions, they analogize to, but do not strictly apply, Rule 23.[2] Numerous courts have certified habeas class actions during the COVID-19 crisis, looking both to Rule 23 and to other equitable factors.[3]

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[2] *See, e.g., Sielaff*, 546 F.2d at 221 n.5; *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974); *Napier v. Gertrude*, 542 F.2d 825, 827 n.2 (10th Cir. 1976); *Streicher v. Prescott*, 103 F.R.D. 559, 561 (D.D.C. 1984).

[3] *See, e.g., Wilson v. Williams*, No. 20-3447, 2020 WL 3056217, at *5 (6th Cir. June 9, 2020) (finding habeas jurisdiction in class action seeking release of medically vulnerable prisoners); *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *29–30 (D. Conn. May 12, 2020) (framing question as "whether a multi-party proceeding analogous to a class action is appropriate" because "multi-party treatment avoids the considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical

Rule 23(d)—"which grants a court significant leeway in managing a class suit"—allows for the creation of subclasses as a case management device. 3 *Newberg on Class Actions* § 7:29 (5th ed.). Unless there is a conflict of interest between the class and subclass, "there is no necessity that each subclass … independently comply with all of the requirements of Rule 23 (a) [and] (b)." *Id.*; *Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, 334 F.R.D. 234, 250 (E.D. Cal. 2019) ("[T]he Court views the proposed subclasses as 'case management' subclasses under Rule 23(d) that are treated informally and need not independently satisfy the certification requirements of Rules 23(a) and 23(b)"). Here, the subclass need not independently satisfy Rule 23, as there is no conflict between the class and subclass.

The class easily satisfies the Rule 23 requirements that are needed for certification with respect to declaratory relief and instructive for certification in habeas. In the event that the Court might find those requirements applicable to the subclass, Plaintiffs also explain why the subclass likewise easily satisfies those requirements.

II. Proposed Class and Subclass Definitions

The proposed class is defined as all noncitizens who are detained in Immigration and Customs Enforcement custody at Calhoun. Within the class, Plaintiffs seek to certify a subclass defined as:

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issue" and ensures representation of inmates with no access to counsel); *Roman v. Wolf*, Ed CV 20-00768 TJH (PVCx), slip op. at 7 (C.D. Cal. Apr. 23, 2020).

> All noncitizens who are detained in ICE custody in the Calhoun County Correctional Center, and who have one or more risk factors placing them at heightened risk of severe illness or death if exposed to COVID-19.[4]

Quaid Alhalmi, Waad Barash, Sergio Brito, Tomas Cardona Ramirez, Guo Yan Lin Castro, Jose Mauricio Garcia Toledo, Jose Gomez Santiz, Lenche Krcoska, Yohandry Ley Santana, Sergio Perez Pavon, Damary Rodriguez Salabarria, Emanuel Rosales Borboa, Rudy Sosa Carillo, Amer Toma, Johanna Whernman, William Whernman, and Min Can Zhang seek to represent the class.[5] Plaintiffs

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[4] These risk factors are: age of 50 or above, pregnancy or recent pregnancy (within last 6 weeks), and serious underlying medical condition including: chronic kidney disease (including receiving dialysis); chronic liver disease (including cirrhosis and chronic hepatitis); endocrine disorders (including diabetes mellitus); compromised immune system (immunosuppression) (e.g., receiving treatment such as chemotherapy or radiation, received an organ or bone marrow transplant and is taking immunosuppressant medications, taking high doses of corticosteroids or other immunosuppressant medications, HIV or AIDS); metabolic disorders (including inherited metabolic disorders and mitochondrial disorders); heart disease (including congenital heart disease, congestive heart failure and coronary artery disease); lung disease including asthma or chronic obstructive pulmonary disease (chronic bronchitis or emphysema) or other chronic conditions associated with impaired lung function or that require home oxygen; neurological and neurologic and neurodevelopment conditions (including disorders of the brain, spinal cord, peripheral nerve, and muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability, moderate to severe developmental delay, muscular dystrophy, or spinal cord injury); body mass index (BMI) of 40 or greater; hypertension; smoking or history of smoking; and, any other condition identified by the CDC as putting a person at a higher risk.

[5] Plaintiffs Janet Malam (who is separately represented), Ruby Escobar (whom Defendants voluntarily released); Barajas Santoyo (who was released on bond, Second Amended Complaint ("2d Am. Compl."), Dkt. 97, PageID.3259 n.19),

Alhalmi, Barash, Cardona Ramirez, Krcoska, Perez Pavon, Rodriguez Salabarria, Rosales Borboa, Ley Santana, Toma, and Johanna and William Whernman seek to represent the subclass.

III. Plaintiffs Satisfy the Rule 23(a) Requirements.

The class and subclass satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a).

A. Plaintiffs Satisfy Rule 23(a)(1).

Plaintiffs satisfy Rule 23(a)(1) because joinder of all class members is "impracticable" based on the large number of class members and the barriers they face in filing individually. There were 144 noncitizens detained by ICE at Calhoun as of May 5, 2020, 51 of whom were identified by Defendants as having chronic medical conditions that make each of them likely to fall within the subclass.[6] While any "substantial number" of class members will satisfy numerosity, "[c]ourts within the Sixth Circuit have recently stated that 'the numerosity requirement is fulfilled when the number of class members exceeds forty.'" *In re Wal-Mart ATM Fee Notice Litig.*, 2015 WL 6690412, at *7 (W.D. Tenn. Nov. 3, 2015) (quoting *Phillips v.*

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and Leonard Baroi (who was moved to different detention facility, Decl. of Christopher Labadni ¶ 19, Dkt. 101–2) do not seek to represent the class.

[6] *See* 2d Am. Compl., Dkt. 97, at ¶ 253 (list of 51 detainees is "underinclusive, as it excludes individuals with risk factors identified in the subclass definition").

Philip Morris Cos., Inc., 298 F.R.D. 355, 362 (N.D. Ohio 2014)). In cases where the class satisfies numerosity, "there is a relaxed numerosity approach for subclasses."[7] *NorCal Tea Party Patriots v. Internal Revenue Serv.*, 2016 WL 223680, at *6 (S.D. Ohio Jan. 19, 2016).

In addition, the logistical challenges posed by the pandemic, the fact that many individuals detained at Calhoun lack counsel and have limited English proficiency, and the need for this Court to resolve many similar claims expeditiously all support certification. *See Barry v. Corrigan*, 79 F. Supp. 3d 712, 731 (E.D. Mich. 2015) (noting judicial economy and practicality with which individual class members can bring suit individually as factors in 23(a)(1) inquiry), *aff'd sub nom. Barry v. Lyon*, 834 F.3d 706 (6th Cir. 2016); *Fraihat v. ICE*, __ F. Supp. 3d __, 2020 WL 1932570, at *17-20 (C.D. Cal. Apr. 20, 2020) ("Given the many obstacles to accessing counsel during the COVID-19 pandemic, the Court is concerned that many putative class members would not be able to proceed on their own . . .").

B. Plaintiffs Satisfy Rule 23(a)(2).

Rule 23(a)(2) requires that "there [be] questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A class satisfies the commonality requirement if the class members' claims "depend on a common contention" and that common

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[7] *See also Carter v. Arkema, Inc.*, 2018 WL 1613787, at *7 (W.D. Ky. Apr. 3, 2018); *Lau v. Arrow Fin. Servs.*, LLC, 245 F.R.D. 620, 625 (N.D. Ill. 2007).

contention is "of such a nature that it is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Stated another way, a proposed class satisfies the commonality requirement if class treatment will "generate common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool*, 722 F.3d at 852. Rule 23(a)(2) requires only that a single issue of law or fact be common to all members of the class. *Wal-Mart*, 564 U.S. at 359.

Courts routinely certify classes alleging systemic constitutional violations in jails, prisons, and detention centers, and indeed, numerous courts have certified such classes during the pandemic.[8] Here, Plaintiffs satisfy Rule 23(a)(2) because questions of both law and fact pertain to all class and subclass members, and are capable of class-wide resolution such that certification will advance the litigation.

The questions of law common to the class include whether: (1) detention at Calhoun violates their due process rights, and (2) Defendants must modify the conditions of confinement—or, failing that, release a critical mass of detainees—such that social distancing will be possible and all those held in the facility will not face a constitutionally violative substantial risk of serious harm. *See* 2d Am. Compl. ¶ 255. Questions of law common to the subclass include whether their detention at Calhoun violates their due process rights, requiring their immediate release. *Id.*

[8] *See infra* at 17 n.10.

Common questions of fact for both the class and subclass include whether and how social distancing can be accomplished in Calhoun, what measures are being taken to protect detainees from COVID-19 and whether those measures are sufficient. *Id.* Resolving these questions will yield exactly the kind of "common answer[s]" to Plaintiffs' Fifth Amendment claims that the Supreme Court requires. *See Wal-Mart*, 564 U.S. at 351. Each of these questions can be determined "in one stroke" for all class and subclass members at the same time. *Id.* at 350. Indeed, this Court, in deciding the TRO motions to date, has already made numerous common legal and factual determinations. *See supra* pp. 2–4.

Factual differences regarding the precise nature of a person's medical conditions and/or age are not relevant to the class definition, and do not defeat a showing of commonality for the subclass (if required). *See In re Whirlpool Corp.*, 722 F.3d at 858. Such discrepancies are not central or essential to the claims or remedy, and do not defeat commonality because Plaintiffs' central constitutional question—whether the inevitable risks posed by COVID-19 at Calhoun violate their due process rights—overcomes any differences. *See, e.g.*, *Savino v. Souza*, __ F. Supp. 3d __, 2020 WL 1703844, at *7 (D. Mass. Apr. 8, 2020) ("[T]he Court determines that the admittedly significant variation among the Detainees does not defeat commonality . . . ."); *Zepeda Rivas v. Jennings*, 2020 WL 2059848, at *1 (N.D. Cal. Apr. 29, 2020) ("The government's arguments regarding commonality .

. . do not defeat class certification" because "[t]he primary question is whether the people detained … are being exposed to an unreasonable risk of infection in violation of the Due Process Clause"); *Alcantara v. Archambeault*, 2020 WL 2315777, at *5 (S.D. Cal. May 1, 2020) (finding commonality since subclass members' varying risk profiles "do[] not detract from the undisputed common feature of the subclass, which is that each member is at high risk."); *Hill v. Snyder*, 308 F. Supp. 3d 893, 914 (E.D. Mich. 2018) (finding commonality among class challenging state's statutory scheme barring them from parole eligibility "[r]egardless of individual factors regarding a prisoner's likelihood of parole"); *Fraihat*, 2020 WL 1932570, at *16–20.

C. Plaintiffs Satisfy Rule 23(a)(3).

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The claims of class representatives need not be identical to the claims of other class members. *See Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007); *Bridging Cmtys. Inc. v. Top Flight Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016). "A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Beattie*, 511 F.3d at 561. The typicality and commonality inquiries tend to merge. *Whirlpool*, 722 F.3d at 853.

Here, the claims of the Named Plaintiffs—each of whom is described in detail in the Second Amended Complaint, Dkt. 97, at ¶¶ 18–37, 108–180—are typical of the class and subclass. Each named putative class and subclass representative is being harmed or threatened with harm by the same course of conduct as the rest of the class and subclass, namely ICE's decision to continue to detain them in a setting that makes social distancing impossible. And each representative seeks similar relief as the rest of the class and/or subclass based on the same legal theories. Plaintiffs therefore satisfy Rule 23(a)(3).

D. Plaintiffs Satisfy Rule 23(a)(4).

Finally, Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). There are two criteria for adequate representation: class representatives must (1) have common interests with unnamed members of the class, and (2) vigorously prosecute the interests of the case through qualified counsel. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976); *Am. Med. Sys., Inc.*, 75 F.3d at 1083.

Plaintiffs satisfy the requirements of Rule 23(a)(4) because their interests are the same as to those of the unnamed members of the class. Like the unnamed class members, Plaintiffs are in danger of infection, injury and death from COVID-19 as result of being detained at Calhoun. They have a life-or-death incentive to litigate their claims vigorously. Plaintiffs have no known conflicts with other class

members. Plaintiffs' counsel—attorneys from the national American Civil Liberties Union; the American Civil Liberties Union of Michigan; and Paul, Weiss, Rifkind, Wharton & Garrison LLP—are experienced in conducting federal class action litigation, are familiar with the relevant laws and procedures, and have adequate resources to vigorously litigate this case. Counsel's qualifications are set forth more fully in the attached Declaration of Miriam Aukerman, Ex. A.

IV. Plaintiffs Satisfy the Rule 23(b) Requirements.

Certification here is warranted under both Rule 23(b)(1), because separate actions by class members would risk creating inconsistent outcomes and incompatible standards of conduct for Defendants, and under Rule 23(b)(2), because Defendants are acting in the same matter with respect to the class and subclass, such that class-wide relief is appropriate.

A. Plaintiffs Satisfy Rule 23(b)(1).

A class may be certified under Rule 23(b)(1)(A) if "prosecuting separate actions by . . . individual class members would create a risk of . . . varying adjudications . . . that would establish incompatible standards of conduct." As the Advisory Committee Notes explain, the considerations under Rule 23(b)(1)(A) "are comparable to certain of the elements which define the persons whose joinder in an

action is desirable as stated in Rule 19(a)."[9] Fed. R. Civ. P. 23(b)(1) Advisory Committee's Note to 1966 amendment. "'The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways.'" Fed. R. Civ. P. 23(b)(1) Advisory Committee's Note to 1966 amendment (quoting Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962)). The phrase "incompatible standards of conduct" refers to the situation where "different results in separate actions would impair the opposing party's ability to pursue a uniform course of conduct." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (citing 7A Wright & Miller § 1773 at 431 (2d ed. 1986)); *see also First Federal of Mich. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989) (stating that Rule 23(b)(1)(A) certification is appropriate where inconsistent adjudications could create conflicts in satisfying individual claims). "'Rule 23(b)(1)(A) certification is most common" in cases in which the class seeks declaratory or injunctive relief against the government 'to provide unitary treatment to all members

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[9] *See also* Apr. 3, 2020 Telephonic Mot. Hr'g, Dkt. 110, PageID.3749–50 (finding that Plaintiffs Escobar and Toma could intervene as of right in part because their "ability to protect [their interest in declaratory relief] in the absence of intervention may be impaired by disposition of the action").

of a defined group.'" *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 Moore's Fed. Practice § 23.41[4] (3d ed. 2000)). Courts regularly certify classes under Rule 23(b)(1)(A) where the alternative is multiple individual suits seeking the same or similar remedial relief against the same set of defendants, possibly resulting in inconsistent judgments directing contrary actions.[10]

Plaintiffs satisfy Rule 23(b)(1). There are now 21 plaintiffs in this case alone, eleven of whom also fall in the proposed subclass. Three other lawsuits have already been brought by immigration detainees seeking release from Calhoun. *See Awshana v. Adducci, et al.,* Case No. 20-10699 (habeas denied); *Murai v. Adducci, et al.,* Case

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[10] *See, e.g.*, *Dodson v. CoreCivic*, 2018 WL 4776081, at *5 (M.D. Tenn. Oct. 3, 2018) (certifying (b)(1)(A) class of insulin-dependent inmates because individual suits "could easily lead to inconsistent judgments and incompatible standards of conduct," and "[c]ourts could arrive at different conclusions as to whether the same conduct is unconstitutional and how to remedy that conduct if it is"); *Ali v. Ashcroft*, 213 F.R.D. 390 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003), *opinion withdrawn on denial of reh'g sub. nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005), *as amended on reh'g*, (Oct. 20, 2005) (certifying (b)(1)(A) class due to risk of inconsistent standards from conflicting judicial interpretations of same statute in action seeking to enjoin government from removing Somali nationals); *Does I v. Gap, Inc.*, 2002 WL 1000073, at *5 (D. N. Mar. I. May 10, 2002) (certifying (b)(1)(A) class in action by factory workers because "absent class action, the defendants would be faced with potentially numerous lawsuits which could easily lead to conflicting injunctions that impose different standards of conduct, monitoring programs, and remedial rules on the various defendants"); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) (certifying (b)(1)(A) class for remediation claims because it is "unlikely that two different courts would tailor a remedial order in the same fashion, and it is therefore entirely conceivable that different remedial orders would contain incompatible provisions").

No. 20-10816 (habeas denied); *Zaya v. Adducci*, Case No. 20-10921 (preliminary injunction granted). There has also been an explosion of litigation involving immigration detainees at the other Michigan ICE facilities, demonstrating the likelihood, absent class certification, that there will be many more individual suits at Calhoun which could trigger inefficiencies and inconsistent judgments directing contradictory actions by Defendants.[11]

If each of the approximately 144 putative class members detained at Calhoun were to bring a separate suit making the allegations made here, the adjudication of these actions would risk creating inconsistent decisions that would establish varying standards to which Defendants would have to adhere. *See Adair*, 209 F.R.D. at 12 (finding risk of inconsistent adjudications where there were three other pending cases on same issue). Indeed, Defendants themselves have argued that there "are already inconsistent decisions among Calhoun detainees." Defs.' Resp. to Mot. to Amend, Dkt. 94, PageID.3227. That is precisely the problem Rule 23(b)(1)(A) is designed to address. Not only might different courts reach different conclusions

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[11] Petitioners are aware of at least twelve cases with wildly divergent outcomes concerning immigration detainees at other Michigan ICE facilities. *See, e.g.*, *Perez-Perez v. Adducci, et al.*, Case No. 20-10833 (TRO granted—Monroe); *Fofana v. Albence, et al.*, Case No. 20-10869 (TRO denied in part, granted in part—Monroe); *Thaer v. Adducci*, Case No. 20-10857 (TRO denied—St. Clair); *Albino-Martinez v. Adducci, et al.*, Case No. 20-10893 (one detainee voluntarily released after infected with COVID; TRO denied for others—St. Clair, Monroe).

about the applicable legal standards or make different factual findings, but different courts could subject the Defendants to conflicting obligations. For example, different courts might find release is required based on the failure to meet different conditions of quarantining, sanitation, testing, and isolation. Different courts might conclude that detention is impermissible absent de-densification of Calhoun to allow for social distancing, but disagree on the number of individuals who can be safely detained, or on whether, if social distancing is possible, those most vulnerable must still be released. Thus, if this Court were to find, for example, that only 50 people could safely be detained at Calhoun consistent with social distancing and order releases prioritizing those most vulnerable, that order would be inconsistent with an order in another court holding that a highly vulnerable detainee can remain detained because there is no constitutional violation. Similarly, were this Court to find single-celling required to protect against the virus, but another court were to find that this violates constitutional limitations on solitary confinement, Defendants could not comply with both orders. A similar issue might arise if a facility only had two available medical cells, yet more than two courts ordered their use. Because certification under Rule 23(b)(1) is designed to address "situations in which different courts might put a defendant under conflicting decrees," 3 *Newberg on Class Actions* § 4:11 (5th ed.), it is warranted here for both the class and subclass.

B. Plaintiffs Satisfy Rule 23(b)(2).

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As stated in the leading treatise on class actions:

> Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory and injunctive relief on behalf of the class and therefore readily satisfy Rule 23(b)(2) class action criteria.

2 *Newberg on Class Actions* § 25.20 (4th ed. 2002); *Dearduff v. Washington*, 330 F.R.D. 452, 472 (E.D. Mich. 2019). Courts routinely certify (b)(2) class actions in cases challenging the policies, procedures and safety of prisons, jails, and detention centers. *See Brown v. Plata*, 563 U.S. 493, 506 (2011); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 374 (1992).

Here, Defendants have acted or refused to act on grounds that apply generally to the class, namely by detaining and failing to protect class members during the COVID-19 pandemic. Plaintiffs bring common claims susceptible to common proof and seek a common remedy. *See Gooch v. Life Inv'rs Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012). Class and subclass members all assert that Defendants are placing them at grave risk of serious illness or death and violating their due process rights. Adjudication of those common claims requires looking to common proof, *e.g.*, information about social distancing, hygiene, and testing at Calhoun.

Plaintiffs also seek common remedies. First, the class and subclass ask the Court to declare that their continued detention is unlawful—a common remedy that requires resolution of common legal and factual questions. The Sixth Circuit has approved (b)(2) certification for class members seeking common declaratory relief. *Gooch*, 672 F.3d at 428 (certification where class members sought declaratory judgment that uniformly interpreted a contract). All class members seek the same declaration as to what steps must be taken so that immigration detention at Calhoun during the COVID-19 crisis is non-punitive, including the maximum number who can be safely detained. All subclass members seek the same declaration that civil detention under any conditions during the pandemic violates their due process rights.

Similarly, Plaintiffs seek unitary habeas relief. The subclass seeks a class-wide writ of habeas corpus on the ground that their detention during the pandemic is not reasonably related and excessive in relation to the government's interest in ensuring their availability for removal. Similarly, the class seeks class-wide habeas relief, in the form of a conditional writ ordering their release, unless: (1) Defendants have demonstrated that the class member presents a risk of flight or danger that outweighs the risk of severe illness or death such that continued detention of the individual is reasonable under those circumstances; and (2) Defendants have taken the steps that the Court has declared must be taken in order for individuals to be detained at Calhoun without violating their constitutional rights and have reduced

the population to the level that the Court has found can be safely detained. Finally, to the extent that Plaintiffs may seek other injunctive relief to protect their health and safety, that relief would be common to the class.

Courts throughout the country have certified classes of immigration detainees seeking declaratory, injunctive, and habeas relief throughout the COVID-19 pandemic using 23(b)(2) and/or its habeas counterpart.[12] *See, e.g.*, *Zepeda Rivas*, 2020 WL 2059848, at *1 ("all class members have suffered the same injury—the substantial risk of contracting COVID-19 due to the lack of social distancing—and all class members would benefit from the same remedy—an order requiring social distancing"); *Fraihat*, 2020 WL 1932570, at *17-20 (provisionally certifying class of ICE detainees seeking injunctive and declaratory relief under 23(b)(2)); *Savino*, 2020 WL 1703844, at *8 (provisionally certifying class of ICE detainees seeking habeas, injunctive, and declaratory relief under Rule 23(b)(2)); *Gomes v. Acting Secretary*, No. 20-CV-453-LM, 2020 WL 2113642, at *3–4 (D.N.H. May 4, 2020) (provisionally certifying class of all ICE detainees for the purpose of facilitating expedited bail hearings in light of the COVID-19 pandemic); *Alcantara*, 2020 WL

[12] Numerous courts have also certified classes of people detained in prisons and jails during the pandemic, as well as subclasses of the medically vulnerable, under Rule 23(b)(2). *See, e.g.*, *Busby v. Bonner*, No. 20-cv-2359-SHL, slip op. at 17–18 (W.D. Tenn. June 10, 2020); *Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 2569868, at *19 (E.D. Mich. May 21, 2020); *Yanes v. Martin*, No. 1:20-cv-00216-MSM-PAS, Dkt. 21 (D.R.I. May 20, 2020).

2315777, at *6 (medically vulnerable "subclass is particularly suited for certification under Rule 23(b)(2) because Defendants are acting on grounds generally applicable to the subclass, and the injunctive relief sought is appropriate for the subclass as a whole"); *Quadrelli v. Moniz*, 2020 WL 3051778, at *7 (D. Mass. June 8, 2020) (certifying class of ICE detainees under Rule 23(b)(2) and noting that declaratory and injunctive relief other than a class-wide release could be granted). Just as in those cases, the class and subclass here present commons claims that can be resolved on a class-wide basis and therefore satisfy Rule 23(b)(2).

V. In the Alternative, the Court Can Certify Issue Classes under Fed. R. Civ. P. 23(c)(4).

For the reasons outlined above, certification is warranted under either Rule 23(b)(1) or (b)(2). However, Defendants will likely argue that the merits and certification questions are intertwined, and use merits arguments to oppose certification. To address this, the Court could, if it prefers, first certify certain merits issues for resolution under Rule 23(c)(4), and then decide, after ruling on those issues, whether to grant full certification.[13] When certification is sought under Rule

[13] Resolution of those questions may also shape the relief available. For example, the Court will need to decide what standard applies to claims by immigrant detainees challenging confinement during the pandemic. If the Court finds that detention of those at highest risk of severe illness or death is punitive because it is not reasonably related to, and excessive in relation to, the government's interest in ensuring their availability for removal, it could grant unitary habeas relief to the subclass. If, on the other hand, the Court adopts a standard that requires a

23(c)(4), the court need only assess whether the Rule 23(b) requirements are met with respect to the issues being certified, not with respect to the case as a whole. *See Martin*, 896 F.3d at 413.

Rule 23(c)(4) provides: "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." The issues appropriate for certification under Rule 23(c)(4) here include:

a. Common factual questions related to current practices to prevent and manage coronavirus infections at Calhoun;

b. Common factual questions related to what practices are necessary to prevent and manage coronavirus infections at Calhoun;

c. Whether continued detention in civil immigration custody at Calhoun of members of the class violates the Due Process Clause, and what standard should be applied to answer that question; and

d. Whether continued detention in civil immigration custody at the Calhoun of members of the subclass violates the Due Process Clause, and what standard should be applied to answer that question.

In *Martin*, 896 F.3d at 413, the Sixth Circuit approved using issue class certification to bifurcate proceedings where class treatment is the superior method of resolving common questions, even if there are some issues that require individualized adjudication. *Martin* involved a toxic tort groundwater

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more individualized approach, then the Court may prefer to bifurcate proceedings. The Court could resolve the standards question under Rule 23(c)(4), and then establish procedures to apply that standard in individual cases.

contamination class action where the district court found that, although the class met Rule 23(a) requirements, it did not satisfy Rule 23(b)(3)'s predominance requirement, given the importance of differences among class members around injury-in-fact and causation. *Id.* at 409–10. However, the district court certified seven common issues under Rule 23(c)(4), with the intention of "'establish[ing] procedures by which the remaining individualized issues concerning fact-of-injury, proximate causation, and extent of damages can be resolved'" after resolution of the common certified issues. *Id.* at 408, 410 (quoting district court decision). In affirming, the Sixth Circuit adopted the "broad view" of the relationship between Rule 23(b) and Rule 23(c)(4), holding that an issue class can be certified if the requirements of Rule 23(b)(3) are met for particular issues, even if the claims of the class as whole do not meet the requirements of Rule 23(b)(3). In approving the issues that had been certified in *Martin*, the Court noted that they were "capable of resolution with generalized, class-wide proof," that they "need only be answered once because the answers apply in the same way to each [class member]," and that "[e]xpert evidence will be central to resolving these [] issues"—all factors that are equally true here. *Id.* at 414.

Although issues classes are used most commonly in (b)(3) class actions, courts have also used Rule 23(c)(4) where certification is sought under Rule 23(b)(1)

and (b)(2).[14] For example, in *McReynolds v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012), *abrogated on other grounds by Phillips v. Sheriff of Cook Cty.*, 848 F.3d 541, 559 (7th Cir. 2016), the Seventh Circuit reversed a denial of issue class certification under 23(b)(2) and 23(c)(4) in a suit seeking injunctive relief against allegedly discriminatory employment policies:

> [S]hould the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the [challenged] practices and if so what loss each class member sustained . . . But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful . . . The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with [Rule 23(c)(4)] . . . "If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings."

Id. (quoting *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003)).

In sum, the resolution of common questions is clearly warranted on a class-wide basis. At the certification stage, the question is *could* the Court award class-

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[14] *See, e.g., Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 n.32 (6th Cir. 1976); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 544 (N.D. Cal. 2012); *United States v. City of New York*, 2011 WL 3174084, at *37 (E.D.N.Y. 2011); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 380 (E.D. Ark. 2007).

wide relief, not *will* the Court award class-wide relief.[15] The Court should therefore certify under both Rule 23(b)(1) and (b)(2). To the extent the Court wishes to proceed in a more cautious fashion, it can, as an alternative to class certification for all proceedings, first certify issue classes, and then determine further proceedings after those common issues are resolved. This path is quite similar to simply certifying under Rule 23(b)(1) and (b)(2), and then first resolving Plaintiffs claims for class-wide declaratory relief (the availability of which is alone sufficient for certification, *Gooch*, 672 F.3d at 428). Either approach recognizes that there are common questions, the answer to which will determine what class-wide relief is available. In other words, "common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool*, 722 F.3d at 852. That means class certification is proper.

VI. Section 1252(f)(1) Presents No Obstacle to Certification.

8 U.S.C. § 1252(f)(1) provides:

> (f) Limit on injunctive relief
> (1) In general
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [the Immigration and Nationality Act ("INA")], other than

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[15] *See Savino*, 2020 WL 1703844, at *8 ("The Court concludes that a uniform remedy would be possible in this case, whether in the form of declaratory relief or (depending on the proper reading of 8 U.S.C. § 1252(f), as alluded to above) an injunction ordering the government to reduce crowding of Detainees."); *Dearduff v. Washington*, 330 F.R.D. 452, 474 (E.D. Mich. 2019).

> with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

By its plain terms, section 1252(f)(1)—which is titled "Limit on injunctive relief"—does not bar the use of class actions to challenge immigration detention, but limits only the type of relief that is available in such litigation. In *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018) (*Hamama I*), and *Hamama v. Adducci*, 946 F.3d 875 (6th Cir. 2020) (*Hamama II*), the Sixth Circuit interpreted § 1252(f)(1) to bar class-wide **injunctive** relief that would "enjoin or restrain" 8 U.S.C. §§ 1225, 1226 and 1231—INA provisions governing immigration detention. *See Hamama I*, 912 F.3d at 880; *Hamama II*, 946 F.3d at 876. Section 1252(f)(1) does not bar the types of class-wide relief Plaintiffs seek at this juncture: habeas and declaratory relief. Thus, there are clearly remedies available that are entirely permissible under section 1252(f)(1), and "[a]t this class certification stage, it is enough to establish that the Court could provide a classwide remedy." *Savino*, 2020 WL 1703844, at *5 (original emphasis); *Quadrelli*, 2020 WL 3051778, at *8 (same).

With respect to habeas relief, the Sixth Circuit emphasized in *Hamama I* that class-wide habeas relief remains available: "there is nothing barring a class from seeking a traditional writ of habeas corpus (which is distinct from injunctive relief[])]." *Hamama I*, 912 F.3d at 879 (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 858 (2018) (Thomas, J., concurring in part and concurring in judgment)). With respect to declaratory relief, the Supreme Court recently reaffirmed its availability,

finding section 1252(f)(1) to be no obstacle. *See Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (Alito, J.) (plurality op.) (whether the district court had jurisdiction to enter a class-wide injunction "is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief"). Lower courts have also consistently found declaratory relief available notwithstanding section 1252(f)(1).[16] Indeed, several courts have provisionally certified or certified classes of immigrant detainees during the COVID-19 crisis based on the availability of declaratory relief, notwithstanding Section 1252(f)(1). *See Savino*, 2020 WL 1703844, at *5 (holding that Section 1252(f)(1) "does not bar declaratory relief and therefore poses no obstacle to class certification"); *Quadrelli*, 2020 WL 3051778, at *7 ("Section 1252(f) does not bar declaratory relief and is consequently not a bar to class certification."); *Gomes*, 2020 WL 2113642, at *3 (provisionally certifying class based, in part, on request for a declaratory judgment); *Fraihat*, 2020 WL 1932570, at *20 (certifying class in part based on availability of declaratory relief).

Finally, section 1252(f)(1) does not bar certification of Rule 23(c)(4) issue classes. As construed by *Hamama I*, section 1252(f)(1) prohibits enjoining or

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[16] *See also Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) ("[V]iewing [§ 1252(f)(1)] in context and then taking into consideration the heading of the provision ['limits on injunctive relief'], it is apparent that the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010) ("It is simply not the case that Section 1252(f) bars Petitioner from receiving declaratory relief on behalf of the class.").

restraining certain INA provisions on a class-wide basis. A judicial ruling deciding an issue of law or fact on a class-wide basis does not enjoin or restrain anything. For the same reasons that declaratory relief is not barred by section 1252(f)(1), issue class decisions are permissible as well. *Cf. Alli*, 650 F.3d at 1013-15 (concluding that a declaratory judgment would neither "enjoin" nor "restrain" the INA).

More fundamentally, a class-wide ruling on an issue is preliminary to any relief that might be granted. Here the Court might rule on a class-wide basis what standard should apply to determine whether civil detention at Calhoun is punitive, or might make factual findings about COVID-19 prevention measures there. Those issue determinations can become the predicate for further relief, which could be habeas, declaratory, or injunctive. If the subsequent relief is habeas or declaratory—which is the principal focus of Plaintiffs' class-wide claims—section 1252(f) is simply inapplicable. To the extent an issue class ruling would later be considered in adjudicating whether a particular individual is entitled to injunctive relief, any such relief would be with respect "to an individual alien." *Cf. Alli*, 650 F.3d at 1015 (concluding that "individual injunctions after issuance of a classwide declaration" are "expressly permitted under § 1252(f)(1)").

VII. The Class and Subclass Are Appropriately Defined.

Classes seeking only equitable relief, and not damages, do not need to demonstrate that the proposed class is "sufficiently definite" or that "the precise

identity of each class member" can be ascertained in order for certification to be granted. *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir 2016). Even if such a requirement existed, the class and subclass are definite and objectively measured.

The class is defined as all noncitizens who are detained in ICE custody at Calhoun—a clearly identifiable group.[17] *See* 2d Am. Compl., Dkt. 97, PageID.3337. The subclass is defined as all noncitizens who are detained in ICE custody in Calhoun, and who have one or more risk factors placing them at heightened risk of severe illness or death if exposed to COVID-19. *Id.* The risk factors incorporated into the subclass definition track those identified by the Centers for Disease Control and Prevention (CDC), but also include three additional risk factors (age over 50,

[17] Defendants suggested at the June 5, 2020 status conference that class certification would be improper because the class might include people who brought individual habeas petitions that have been denied. If the Court is concerned about this issue, it can simply adopt the approach used in *Hamama v. Adducci*, where the class definitions explicitly carved out individuals who had challenged their detention through individual petitions. 285 F. Supp. 3d 997, 1027 (E.D. Mich.), *rev'd on other grounds*, 912 F.3d 869 (6th Cir. 2018); *see also Ingles v. City of New York*, 2003 WL 402565, at *4 (S.D.N.Y. 2003) (defining class of inmates challenging excessive force to exclude those "subject to court order based on prior use of force litigation"). For example, the class definition could be amended to read "all noncitizens who are detained in Immigration and Customs Enforcement custody at the Calhoun County Correctional Center, and who have not had an individual habeas petition denied that seeks relief on claims similar to Counts I and II."

hypertension, and history of smoking) as verified by experts.[18] *See, e.g.*, Venters Class Certification Decl. ¶ 15, Ex. C; Mayer Decl. ¶ 25, Ex. B; Golob Decl. ¶ 3, Dkt. 44-2; Greifinger Decl. ¶ 5, Dkt. 44-3; McKenzie Decl. ¶ 18, Dkt. 99; Lieb Decl. ¶ 9, Dkt. 84; *cf. Fraihat*, 2020 WL 1932570, at *16 n.20 (certifying subclass of risk factors deviating from the CDC guidelines); *Rodriguez Alcantara*, 2020 WL 2315777, at *6–7 (same on age); *Gomes*, No. 1:20-cv-00453-LM, Dkt. 52, at 4-5 (same on hypertension). As this Court previously found, "[w]hile CDC guidance is an appropriate point to begin risk analysis, the Court's inquiry cannot end there. Indeed, the CDC itself acknowledges that 'COVID-19 is a new disease and there is limited information regarding risk factors for severe disease.'" Apr. 9 Op. & Order, Dkt. 29, PageID.638. Thus, "while the Court treats the presence of a CDC risk factor as dispositive of a person's increased risk, the inverse is not true where public health or other evidence on the record can show a Plaintiff is nonetheless at substantial risk." May 23 Op. & Order, Dkt. 90, PageID.2709-10.

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[18] *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf (last accessed June 2, 2020); *Groups at Higher Risk for Severe Illness*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last accessed June 2, 2020); *People Who Are at Higher Risk for Severe Illness*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last accessed June 4, 2020).

As Dr. Venters explains, the proposed subclass definition accurately reflects what is presently known about which individuals are at highest risk, although it may be somewhat underinclusive. Venters Class Certification Decl. ¶ 16, Ex. C. In addition to the CDC risk factors, the subclass definition includes hypertension and history of smoking, based on expert evidence that they severely increase risk.[19] *Id.* ¶¶ 11, 19, 29–37; Mayer Decl. ¶ 24, Ex. B; McKenzie Decl. ¶¶ 18, 20. The subclass definition also includes individuals who are age 50 or older because the CDC's age guidelines need to be modified to the detention setting.[20] Venters Class Certification Decl. ¶ 40, Ex. C; *see also* Golob Decl. ¶ 3, Dkt. 44–2; Greifinger Decl. ¶ 5, Dkt. 44–3; McKenzie Decl. ¶ 19, Dkt. 99.

It is a straightforward task to determine if a particular individual falls within the subclass definition. One must simply determine if the individual has one of the listed conditions, or is over 50. Pursuant to the nationwide injunction entered in *Fraihat,* Defendants already have an obligation to track and identify medically

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19 This Court has credited testimony from medical experts stating that despite some uncertainty surrounding causation, hypertension is nonetheless "a CDC-recognized risk factor" for severe illness and/or death from COVID-19. *See* May 23 Op. & Order, Dkt. 90, at PageID.2717.

20 Relying on expert evidence that people over fifty are at serious risk of severe illness and death from COVID-19, and on statements by both the Centers for Disease Control and Prevention and the World Health Organization that risk increases with age, the Court previously found that age was a risk factor for 55-year-old Amer Toma. Apr. 9 Op. & Order, Dkt. 29, PageID.637–39; Apr. 22 Op. & Order, Dkt. 41, PageID.904-05; May 23 Op. & Order, Dkt. 90, PageID.2710.

vulnerable individuals. 2020 WL 1932570, at *27, *29. Defendants themselves have used or claim to have used nearly the same uniform criteria to identify detained individuals at high risk.[21] *See, e.g.*, ICE Guidance, Dkt. 44-4, Pg.ID# 1139–40, Bostock Decl., Dkt. 52-8, Pg.ID# 1602. For the few risk factors not covered under the *Fraihat* or ICE protocols—namely ages between 50-54, history of smoking, and hypertension—identification can be easily administrated through a review of medical records and questionnaires to class members. *See Snead v. CoreCivic of Tennessee, LLC*, No. 3:17-CV-0949, 2018 WL 3157283, at *16 (M.D. Tenn. June 27, 2018) (noting that class membership "should be objectively ascertainable based on defendants' records . . . [and] on responses to questionnaires to former inmates").

Courts have certified classes nearly identical to the subclass proposed here at other detention facilities. *See, e.g.*, *Fraihat*, 2020 WL 1932570, at *16 n.20, *29 (certifying subclass of all ICE detainees nationwide with risk factors for compliance with ICE's COVID-19 guidance); *Alcantara*, 2020 WL 2315777, at *5 (provisionally certifying subclass of immigrants detained at Otay Mesa Detention

[21] ICE's list is underinclusive because it does not include all of those with risk factors as set out in the subclass definition. Venters Class Certification Decl. ¶ 38, Ex. C. However, the fact that ICE can create lists of people who have certain medical conditions shows that it can also create lists of people who have other medical conditions, particularly as they pertain to universally noted information such as age and blood pressure readings. *Id.* ¶ 21 ("Identifying individuals in the high-risk population is not only logistically manageable, but also something that ICE should already be actively engaged in.").

Center who are at high risk of serious illness or death from COVID-19). Outside the COVID-19 context, courts in the Sixth Circuit routinely certify classes that are defined based on criteria akin to those Plaintiffs propose here. *See, e.g.*, *Dodson*, 2018 WL 4776081, at *5 (certifying class of incarcerated people with "Type I and insulin-dependent Type II diabetes . . . who require access to blood sugar checks and insulin administration in coordination with regular mealtimes"); *Snead*, 2018 WL 3157283, at *16 (certifying a class of former inmates who had a rash consistent with scabies and were denied or received delayed treatment); *McBride v. Mich. Dep't of Corr.*, 2017 WL 3097806, at *1, *8 (E.D. Mich. June 30, 2017) (certifying a class of deaf and hard of hearing prisoners); *Ball v. Kasich*, 2017 WL 2061398, at *1 (S.D. Ohio May 11, 2017) (certifying class of "individuals with intellectual and developmental disabilities who are institutionalized or at serious risk of institutionalization in large Intermediate Care Facilities ("ICFs") with eight or more beds throughout Ohio"); *Lippert*, 2017 WL 1545672, at *10 (certifying a class of "all prisoners in the custody of the Illinois Department of Corrections with serious medical or dental needs"). Just as in those cases, certification is warranted here.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify the class and subclass as defined above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeannie S. Rhee, certify that on June 14, 2020, I caused a true and correct copy of the foregoing document to be filed and served electronically via the ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. I also caused true and correct copies of the foregoing document as well as un-redacted copies of the declarations and exhibits filed therewith to be served by electronic mail on counsel for Defendants.

Respectfully submitted,

/s/ Jeannie S. Rhee