IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

P.L., A.Q., K.T., R.F.J., A.R.B., B.M.B., and J.C., individually and on behalf of all others similarly situated; BROOKLYN DEFENDER SERVICES; THE LEGAL AID SOCIETY; and THE BRONX DEFENDERS, Plaintiffs	)	
v.	)	
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; RONALD VITIELLO, Deputy Director and Acting Director of ICE, in official capacity; KIRSTJEN NIELSEN, Secretary of Homeland Security, in official capacity MATTHEW G. WHITAKER, Acting United States Attorney General, in official capacity MATTHEW T. ALBENCE, Executive Associate Director of ICE Enforcement Removal Operations, in official capacity; THOMAS R. DECKER, Director of New York Field Office of ICE, in official capacity; WILLIAM P. JOYCE, Deputy Director of New York Field Office of ICE, in official capacity; JAMES MCHENRY, Director of Executive Office for Immigration Review, in official capacity; and DANIEL J. DAUGHERTY, Assistant Chief Immigration Judge, in official capacity; Defendants	)	Civil Action No. 1:19-cv-01336

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

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I. INTRODUCTION

In June 2018, the Immigration and Customs Enforcement New York Field Office ("ICE NY Field Office") upended longstanding practice by refusing to transport detained immigrants to Varick Street Immigration Court for in-person hearings ("Refusal to Produce Policy" or the "Policy"). Without the option to appear in person, immigrants detained by the NY Field Office are left with only two choices: (1) attempt to present their cases by video teleconference ("VTC") technology despite technical failures, inability to fully present their testimony, lack of opportunity to confer confidentially with counsel, and months-long delays; or (2) forgo appearances altogether and be excluded from their removal proceedings. They should not be forced to make this choice. Defendants' Refusal to Produce Policy is unlawful and violates the rights of detained immigrants under the Constitution, the Immigration and Nationality Act, the Administrative Procedure Act, and the Rehabilitation Act. Defendants' conduct in connection with the Policy follows a common pattern and results in the same legal violations against all immigrants detained by the NY Field Office pending their removal proceedings ("putative class members"). And for those detained immigrants who have disabilities, the challenges to receiving a full and fair hearing are amplified.

Plaintiffs P.L., A.Q., K.T., R.F.J., A.R.B., B.M.B., and J.C., (collectively, "Representative Plaintiffs") seek to represent the putative class members in this case. Representative Plaintiffs are presently detained individuals who have been negatively impacted by the Refusal to Produce Policy. The Policy has resulted in, among other things, a denial of Representative Plaintiffs' rights to due process, including denying them access to the courts, creating impediments to confidential communications with counsel, and hindering their ability to meaningfully participate in their own proceedings. Their experiences are typical of putative

class members, and whether Defendants' Refusal to Produce Policy is in violation of the Constitution and applicable statutes turns on numerous issues of law and fact common to all putative class members.

Further, Representative Plaintiffs seek a ruling that the Refusal to Produce Policy does not comply with applicable law and an order requiring Defendants to return to the longstanding practice of in-person production of detained immigrants to the Varick Street Immigration Court. Such a ruling would resolve the claims of all putative class members. The case therefore meets all requirements for class certification, and Representative Plaintiffs respectfully ask the Court to certify the Class and Subclass, as defined herein.

Given the inherently unequal positions of the parties and the especially limited resources of the putative class members, it is highly unlikely that class members would be able to proceed with their claims individually. By the very nature of their circumstances, detained immigrants are ill-equipped to bring their valid claims to this Court. For these reasons, courts presiding over similar cases involving the due process and statutory rights of detained immigrants have certified classes like the one Representative Plaintiffs propose. *See, e.g.*, *Abdi v. Duke*, 323 F.R.D. 131, 145 (W.D.N.Y. 2017) (certifying class of detained asylum-seekers challenging legality of prolonged detention without bond hearings); *see also Ramirez v. U.S. Immigration & Customs Enf't*, 338 F. Supp. 3d 1, 50 (D.D.C. 2018) (certifying class of detained unaccompanied alien children challenging legality of detention); *Diaz v. Hott*, 297 F. Supp. 3d 618, 620, 628 (E.D. Va. 2018) (certifying class of detained immigrants challenging legality of denial of bond hearings); *Franco-Gonzales v. Napolitano*, No. CV 10-02211 DMG, 2011 WL 11705815, at *16 (C.D. Cal. Nov. 21, 2011) (certifying class of detained immigrants with serious mental disorders who were

unrepresented in their removal proceedings). As these courts have recognized, class certification is essential to the fair and efficient resolution of suits challenging unlawful government policies.

II. STATEMENT OF FACTS

A. Representative Plaintiffs

Representative Plaintiffs are seven individuals who, like the putative class members they seek to represent, are detained by the ICE NY Field Office in county jails while their immigration cases are pending.[1]

Representative Plaintiff P.L. is lawful permanent resident who has lived in the United States since 2011. He has been detained by the ICE NY Field Office since March 14, 2018 pending the outcome of his removal proceedings at the Varick Street Immigration Court. He is currently detained at Hudson County Jail. Compl. ¶ 17. P.L. has been diagnosed with unspecified schizophrenia and other psychotic disorder, shows indications of significant cognitive defects, and qualifies as disabled pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701. Compl. ¶¶ 161, 227.

Representative Plaintiff K.T. is a lawful permanent resident who has lived in the United States since he was a teenager. He has been detained by the ICE NY Field Office since July 13, 2018 pending the outcome of his removal proceedings at the Varick Street Immigration Court. He is currently detained at Orange County Jail. Compl. ¶ 18.

Representative Plaintiff A.Q. has lived in the United States since he was a toddler and has been a lawful permanent resident since he was eight years old. He has been detained by the ICE NY Field Office since February 1, 2018 and is currently detained at Essex County Jail pending

[1] Representative Plaintiffs are each represented by attorneys from the New York Immigrant Family Unity Project ("NYIFUP")—New York City's first-in-the-nation appointed counsel program for detained immigrants who cannot afford an attorney. The NYIFUP program is administered by three legal services providers: Brooklyn Defender Services ("BDS"), The Bronx Defenders ("BxD"), and The Legal Aid Society ("LAS") (collectively, "NYIFUP providers"). These organizations are also plaintiffs in this lawsuit.

the outcome of his appeal of a removal order issued by the Varick Street Immigration Court. Compl. ¶ 19. He has been diagnosed with Post-Traumatic Stress Disorder ("PTSD") and has borderline intellectual functioning, and he qualifies as disabled pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701. Compl. ¶¶ 166, 227.

Representative Plaintiff R.F.J. has been detained by the ICE NY Field Office since January 2018 pending the outcome of their removal proceedings at Varick Street Immigration Court.[2] They are currently detained at Bergen County Jail. Compl. ¶ 20.

Representative Plaintiff B.M.B. has continuously resided in the United States for 32 years. He has been detained by the ICE NY Field Office since April 2018 pending the outcome of his removal proceedings at Varick Street Immigration Court. He is currently detained at Bergen County Jail. Compl. ¶ 21. B.M.B. has been diagnosed with PTSD, major depressive disorder, and a major neurocognitive disorder due to a traumatic brain injury, and he qualifies as disabled pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701. Compl. ¶¶ 168, 227.

Representative Plaintiff A.R.B. has been detained by the ICE NY Field Office since April 2018 pending the outcome of his removal proceedings at Varick Street Immigration Court. He is currently detained at Bergen County Jail. Compl. ¶ 22.

Representative Plaintiff J.C. has been diagnosed with cognitive impairments and has been deemed incompetent by an immigration judge. He has been detained by the ICE NY Field Office since March 2018 pending the outcome of his removal proceedings at Varick Street Immigration Court. He is currently detained at Hudson County Jail. Compl. ¶ 23. J.C. qualifies as disabled pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701. Compl. ¶ 227.

[2] Representative Plaintiff R.F.J. identifies as gender non-conforming and uses they/them pronouns.

B. Defendants' Policy Violates Constitutional and Statutory Rights of Representative Plaintiffs and Putative Class Members

In June 2018, the ICE NY Field Office implemented the Refusal to Produce Policy, whereby it categorically refuses in-person production of detained immigrants for any of their immigration proceedings at Varick Street Immigration Court, and instead conducts those proceedings solely and entirely by VTC.[3] Under this Policy, Representative Plaintiffs are unable to attend and meaningfully participate in their immigration court proceedings in support of their applications for relief to allow them to remain in the United States.

A fundamental requirement of removal proceedings is that they be conducted in accordance with the Constitution. *See Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008) (holding that "due process requires, at a minimum, that the INS adopt procedures to ensure" that immigrants challenging their removal "are accorded an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., that they receive a full and fair hearing on their claims" (quoting *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002))). The due process requirements apply notwithstanding the fact that the Immigration and Nationality Act contemplates the use of video teleconferencing for removal proceedings. *See id.* (holding that while testimony of a witness via videoconference was "statutorily permitted, [it] must nevertheless still accord with the constitutional requirements for due process").

The Refusal to Produce Policy, however, fails to meet even basic due process requirements. Defendants' blanket use of VTC severely limits Representative Plaintiffs' ability to participate in their hearings, often leaving them unable to see, hear, understand, or provide

[3] On December 7, 2018, Defendants advised the Organizational Plaintiffs that the ICE NY Field Office would temporarily resume in-person production of immigrants housed at Bergen County Jail—one of the three facilities where immigrants are typically detained pending their proceedings at Varick Street Immigration Court—while ICE continues to implement VTC for all detained immigrants. And as recently as February 2019, the NY Field Office has occasionally produced some immigrants detained at Hudson County Jail for in-person hearings at 26 Federal Plaza in order to avoid problems caused by VTC. However, the ICE NY Field Office has made clear that it seeks full implementation of VTC-only hearings for all detained immigrants within its custody.

effective testimony in their own removal proceedings. The Policy also inhibits Representative Plaintiffs' confidential communications with their attorneys before, during, and after their hearings. And due to widespread technical and logistical failures—which have continued since the introduction of the Policy—Representative Plaintiffs' immigration proceedings are delayed for months at a time.

Representative Plaintiffs have all been harmed and continue to be harmed as a result of the infringement of their constitutional and statutory rights by Defendants' Policy. For example, as detailed in the Complaint, (1) putative class members seeking discretionary relief have no choice but to testify at length on sensitive and personal subjects by VTC (often in front of ICE or jail officers) (Compl. ¶¶ 148–156); (2) given the technical failures, immigration judges often are unable to adequately see, hear, or assess detained immigrants' credibility (Compl. ¶¶ 144–156); (3) Representative Plaintiffs' ability to retain counsel, understand the proceedings, review evidence, and assist in their cases is severely limited by the Policy (Compl. ¶¶ 117–124); (4) the Policy interferes with Representative Plaintiffs' ability to communicate confidentially with counsel before, during, and after court appearances (Compl. ¶¶ 125–138); and (5) putative class members have faced significant delays due to technological and scheduling problems associated with VTC, resulting in months of additional prolonged detention (Compl. ¶¶ 99–108). These harms affect each Representative Plaintiff and all those who are similarly situated.

Further, the Policy prevents putative class members with disabilities from effectively participating in their removal proceedings because of those disabilities. In particular, these class members are denied equal participation in their removal proceedings because, under the Policy, immigration judges are unable to adequately (i) assess whether they have disabilities; and (ii) determine the extent of these individuals' disabilities in order to tailor procedural safeguards.

Moreover, many of these individuals have disabilities that make it more difficult for them to participate in their removal proceedings by VTC. Compl. ¶¶ 157–175.

III. LEGAL STANDARD

Class certification is appropriate where the proposed class meets the requirements of Federal Rule of Civil Procedure 23(a) and the proposed class constitutes one of the types of classes enumerated in Federal Rule of Civil Procedure 23(b). Rule 23(a) sets forth the prerequisites for class certification: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact 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). In relevant part, Rule 23(b) provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if . . . (2) 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." Fed. R. Civ. P. 23(b).

Whether a class may be certified depends solely on whether the requirements of Rule 23 are satisfied. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (internal quotation marks omitted)). "'Rule 23 is given liberal rather than a restrictive construction, and courts are to adopt a standard of flexibility.'" *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 WL 4357376, at *4 (S.D.N.Y. Sept. 16, 2011) (quoting *Marisol A. v. Guiliani*, 126 F.3d 372, 377 (2d Cir. 1997)).

IV. ARGUMENT

Plaintiffs move for certification of a class defined as:

> All individuals who are now, or will in the future be, detained by the ICE NY Field Office for removal proceedings and who ICE and/or EOIR has not produced or will not produce in person for those proceedings because of Defendants' Refusal to Produce Policy.

(collectively, the "Plaintiff Class" or "Class").

Plaintiffs also move for certification of a subclass defined as:

> All individuals who are now, or will in the future be, detained by the ICE NY Field Office for removal proceedings who have a disability, as defined by the Rehabilitation Act, and who ICE has not produced or will not produce in person for those proceedings because of Defendants' Refusal to Produce Policy.

(collectively, the "Rehabilitation Act Subclass" or "Subclass"). Because each proposed class satisfies the requirements of both Rule 23(a) and Rule 23(b), Representative Plaintiffs respectfully request that the Court certify the Plaintiff Class and the Rehabilitation Act Subclass.

A. The Putative Classes Satisfy the Rule 23(a) Requirements

1. The Classes Are Sufficiently Numerous Under Rule 23(a)(1)

The Plaintiff Class and the Rehabilitation Act Subclass satisfy Rule 23(a)(1)'s requirement that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In the Second Circuit, a class with forty or more members is presumed to meet this requirement. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (noting that "numerosity is presumed at a level of 40 members"); *MacNamara v. City of New York*, 275 F.R.D. 125, 137 (S.D.N.Y. 2011) (same). To the extent there is a question of presumed numerosity, the inquiry into the practicability of joinder requires consideration of "all the circumstances surrounding a case." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). Other factors 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. Emps. Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014) (citing *Robidoux*, 987 F.2d at 936).

The Plaintiff Class far exceeds forty people, making the class presumptively sufficiently numerous. *See Consol. Rail Corp.*, 47 F.3d at 483. Hundreds of putative class members are currently detained by ICE at area county jails, including Bergen County Jail, Hudson County Jail, and Orange County Jail, while their immigration cases proceed at Varick Street Immigration Court. The latest statistics released by the Executive Office for Immigration Review ("EOIR") state that, as of September 30, 2017, 662 immigration cases were pending at Varick Street Immigration Court. *See* Ex. 1[4], U.S. Dept. of Justice, Exec. Office for Immigration Review, Statistics Yearbook: Fiscal Year 2017 at 9. Other sources confirm that the number of immigrants awaiting decisions at Varick Street and other immigration courts has only grown since that time. As of September 5, 2018, there were 861 pending cases at Varick Street Immigration Court. *See* Ex. 2, *Immigration Court Backlog Jumps While Case Processing Slows*, TRAC Immigration (June 8, 2018) at Table 1. Indeed, these numbers are likely to continue to grow. *Id*. at 1 ("The Immigration Court's backlog keeps rising.").

The numerosity of the Plaintiff Class is confirmed by the NYIFUP providers. BDS alone currently represents 120 detained clients in removal proceedings, and many others who were initially detained by ICE but who were subsequently released on bond. *See* Saenz Decl. ¶ 10. In 2018, BDS, BxD, and LAS each commenced nearly three hundred new representations of clients in removal proceedings. *Id.* And NYIFUP attorneys represent approximately 35 percent of detained immigrants in removal proceedings at Varick Street Immigration Court. Compl. ¶ 60. Defendants' Policy denies all of these detained immigrants a full and fair hearing and access to the court. In addition, Defendants have indicated that they intend to permanently implement the Refusal to Produce Policy for all detained immigrants in the custody of the New York Field

[4] Citations to 'Ex.' refer to exhibits attached to the Declaration of William C. Kinder in Support of Plaintiffs' Motion for Class Certification.

Office, meaning that the Plaintiff Class will grow. *See* Ex. 3, Letter from William P. Joyce to Robert J. Gunther, Jr. (Nov. 7, 2018) ("ERO will not return to the production of respondents 'in person' for court."); Ex. 4, Letter from Thomas R. Decker to Robert J. Gunther, Jr. (Nov. 30, 2018) ("ERO-NYC is committed to the use of VTC technology as the means of producing aliens for their immigration court hearings.").

Even setting aside the large and growing size of the Plaintiff Class, the totality of the circumstances in this case shows that joinder is impracticable; under these circumstances, courts conclude that numerosity is sufficiently established. *See Robidoux*, 987 F.2d at 936. Most concretely, because the class is made up of detained immigrants whom Defendants are actively trying to remove from the United States, the putative class is transient and "constantly revolving." *See Andre H. by Lula H. v. Ambach*, 104 F.R.D. 606, 608, 611 (S.D.N.Y. 1985) (holding that the fact that a purported class of "handicapped children at the Spofford Juvenile Center" was "constantly revolving establishes sufficient numerosity to make joinder of the class members impracticable"). Moreover, because "the proposed class includes future members who are necessarily unidentifiable, which makes joinder even more impracticable, numerosity must be recognized." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, No. 00 CV 513S, 2006 WL 581187, at *4 (W.D.N.Y. Mar. 8, 2006). The others factors identified by the Second Circuit as relevant to the numerosity inquiry also weigh in favor of class certification:

- Judicial Economy: Certification supports judicial economy because it is in the Court's interest to address the legal issues raised in one proceeding, rather than across hundreds of individual proceedings.

- Geographic Dispersion: The putative class members are dispersed, detained across multiple jails in two different states.

- Financial Resources of the Class: The putative class members are by-and-large indigent, meaning that they would be effectively unable to bring affirmative civil suits as individuals due to financial constraints.

- Ability to Sue Separately: The putative class members also face other barriers to suing as individuals, including limited financial resources to pursue separate actions, language barriers, and limitations on their ability to identify and retain counsel and then meet with their lawyers while in detention.

- Injunctive Relief Involving Future Class Members: Class members seek injunctive relief, affecting both current and future class members.

The Rehabilitation Act Subclass is also sufficiently numerous. A "significant portion" of NYIFUP clients have disabilities. *See* Saenz Decl. ¶ 6 ("Approximately one quarter of [BDS's] clients are seriously mentally ill, and many more have been diagnosed with Post Traumatic Stress Disorder or depression."). Collectively, then, the clients of NYIFUP attorneys alone likely exceed forty by a significant margin. Indeed, the government has previously acknowledged that up to five percent of all detained immigrants suffer from serious mental illness. *See Franco-Gonzalez v. Napolitano*, No. CV 10-02211, 2011 WL 11705815, at *7 (C.D. Cal. Nov. 21, 2011) (ICE report "estimated that 2–5% of immigrants in ICE custody suffer from serious mental illness"). Other sources suggest that the true number is much higher. *See* Ex. 5, ACLU, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (July 2010) at 3 (estimating that "at least 15 percent" of the total immigrant population in detention has a mental disability). Thus, based on the current and growing number of cases at Varick Street Immigration Court, the Rehabilitation Act Subclass is presumptively sufficiently numerous even under conservative estimates. *See Consol. Rail Corp.*, 47 F.3d at 483.

Moreover, members of the Rehabilitation Act Subclass face even greater challenges to bringing individual lawsuits than other detained immigrants because of their disabilities, making joinder impracticable. *See Rolland v. Cellucci*, No. CIV A 98-30208-KPN, 1999 WL 34815562, at *3 (D. Mass. Feb. 2, 1999) (finding that "the inability of [individuals] with mental retardation and developmental disabilities to initiate actions on their own behalf is an obvious factor strongly

supporting class certification" and noting that "numerous courts have relied upon the combination of confinement and disability to certify classes in similar situations"). In addition, members of the Rehabilitation Act Subclass face heightened difficulties obtaining and effectively communicating with counsel because of their disabilities. Thus, each of the numerosity factors that support certification of the Plaintiff Class also support certification of the Rehabilitation Act Subclass.

2. Questions of Law and/or Fact Are Common to the Classes Under Rule 23(a)(2)

The Plaintiff Class and the Rehabilitation Act Subclass satisfy Rule 23(a)(2)'s requirement that "there are questions of law or fact common to the class." For this requirement to be satisfied, a question must be "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). However, commonality does not "mandate that all class members make identical claims and arguments." *Stinson v. City of New York*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012) (quoting *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992)). Rather, "[a] single common issue of law may be sufficient to satisfy the commonality requirement." *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 155 (S.D.N.Y. 2010). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015) (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014)).

Here, it is indisputable that the Defendants' Refusal to Produce Policy applies to all putative class members, as Defendants enacted a blanket refusal to produce detained immigrants for in-person hearings at Varick Street Immigration Court. Compl. ¶¶ 72–76. It is this Policy

that gives rise to all of the putative class members' constitutional and statutory claims. Because of the Policy, all putative class members have experienced or face an increased likelihood of unreasonably delayed hearings and unreasonably prolonged detention; an inability to confer confidentially with their attorneys during hearings; an inability to examine documents, testimony, and evidence inside the courtroom; and materially greater difficulty in presenting testimony and evidence on their own behalf. *See generally* Compl. ¶¶ 98–175. Thus, among other things, whether Defendants' Policy violates the constitutional and statutory rights of the putative class members and, in particular, whether the Defendants' adoption of that Policy was arbitrary and capricious under the Administrative Procedure Act, are questions of law common to all putative class members.

In deciding these and other questions, this Court will also be asked to decide a host of common questions of fact, including, for example, the origins of and true basis for the Policy. Plaintiffs allege that the origins of the Policy are grounded not in a neutral application of statutory ability to conduct removal proceedings by videoconference, but rather an effort to expedite deportations at the expense of due process. Moreover, the relief the putative class members seek—an order enjoining Defendants from refusing to produce detained immigrants for in-person hearings—would provide common relief to the Plaintiff Class.

The Rehabilitation Act Subclass also presents common questions of law and fact. For example, whether the Policy denies a reasonable accommodation for those detained immigrants with disabilities, in violation of the Rehabilitation Act, is a question of law common to all members of the Subclass. That is so even though "the class members have diverse disabilities," as "[a] court may find a common issue of law even though there exists some factual variation among class members' specific grievances." *Brooklyn Ctr. for Indep. of the Disabled v.*

Bloomberg, 290 F.R.D. 409, 418–19 (S.D.N.Y. 2012). Moreover, whether the Defendants failed to consider and make necessary accommodations for the needs of detained immigrants with disabilities as required by the Rehabilitation Act is a question of fact common to the Subclass.

3. The Claims Presented Are Typical of the Classes Under Rule 23(a)(3)

The claims asserted by Representative Plaintiffs satisfy Rule 23(a)(3)'s requirement that "the claims . . . of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23 (a)(3). The typicality requirement "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007) (internal quotation marks omitted); *see also Open Hous. Ctr., Inc. v. Samson Mgmt. Corp.*, 152 F.R.D. 472, 478 (S.D.N.Y. 1993) ("In this District, courts have recognized that the typicality requirement may be satisfied whenever the representatives' claims arise from the same practice or policy from which the proposed class members' claims arise and upon which the proposed class members' legal theory is based." (internal quotation marks omitted)). Where, as here, the same unlawful conduct affects Representative Plaintiffs and the putative class members, "the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 937; *see also Tsereteli v. Residential Asset Securitization Tr. 2006-A8*, 283 F.R.D. 199, 208 (S.D.N.Y. 2012) ("The requirement of typicality is not demanding. It does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of the other members." (internal quotation marks omitted)).

Representative Plaintiffs' claims are typical of the putative class members. *First*, the claims of both Representative Plaintiffs and the putative class members arise from the same Refusal to Produce Policy, pursuant to which all putative class members have been or will be denied certain constitutional and statutory rights. *Second*, the claims of both Representative Plaintiffs and the putative class members are based on the same legal theories, namely, that Defendants' policy violates federal constitutional and statutory law. Specifically, Representative Plaintiffs allege that the Refusal to Produce Policy constitutes a violation of, *inter alia*, the right to due process, the right to counsel, the right to access to courts, and the right to a fair hearing. Compl. ¶¶ 198–239. These claims apply equally to the putative class members. Thus, Representative Plaintiffs' claims are typical of the Plaintiff Class as they "arise[] from the same course of events" and rest on "similar legal arguments." *Cent. States*, 504 F.3d at 245; *see also Open Hous. Ctr.*, 152 F.R.D. at 478 (holding that typicality is satisfied where claims arise from the "same practice or policy").

Similarly, the claims of the Rehabilitation Act Subclass representatives—P.L., A.Q., B.M.B., and J.C.—are typical of the putative Subclass members. All four are disabled as defined by the Rehabilitation Act. Representative Plaintiffs allege that the Defendants' Policy increases the risk that individuals with disabilities will not be identified, and even where disabled individuals are identified, Defendants' Policy denies accommodations to those disabled persons requesting in-person production. Compl. ¶ 157. For example, Plaintiff P.L. has been diagnosed with unspecified schizophrenia spectrum and other psychotic disorder (Compl. ¶ 161); Plaintiff A.Q. has been diagnosed with PTSD and borderline intellectual functioning (Compl. ¶ 166); Plaintiff B.M.B. has been diagnosed with PTSD, major depressive disorder, and a major neurocognitive disorder (Compl. ¶ 168); and Plaintiff J.C. has been diagnosed with a cognitive

impairment such that his psychologist has specifically cautioned that "the use of any electronic or virtual communication will have serious repercussions on his performance" (Compl. ¶ 172). Despite these formal diagnoses, all Representative Plaintiffs have been forced to appear over VTC due to Defendants' Policy, thereby exacerbating the challenges these plaintiffs face because of their disabilities. Indeed, during a competency hearing for Plaintiff J.C., the immigration judge remarked that "clearly the VTC format would add to that stress for anybody, particularly somebody with first grade level cognitive abilities." Compl. ¶ 173. Because Representative Plaintiffs' claims arise from harms caused by the same Policy affecting all members of the Subclass and are based upon similar legal theories demonstrating that the Policy violates the Rehabilitation Act, Representative Plaintiffs' claims are typical.

The typicality of the claims asserted by Representative Plaintiffs for both the Plaintiff Class and the Rehabilitation Act Subclass is further supported by the fact that Plaintiffs seek both injunctive and declaratory relief. This Court has stated that the fact that representative plaintiffs request declaratory and injunctive relief for the class as a whole can itself provide "ample basis for a finding that the claims of the named plaintiffs are typical of those of the proposed class." *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 691 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997); *see also Crisci v. Shalala*, 169 F.R.D. 563, 572 (S.D.N.Y. 1996) ("The fact that plaintiffs seek declaratory and injunctive relief for the class as a whole further supports a finding that the claims of the named plaintiffs are typical of those of the proposed class in satisfaction of Rule 23(a)(3)."). Here, the fact that Representative Plaintiffs seek only declaratory and injunctive relief with no request for monetary relief further compels a finding that the typicality requirement is satisfied.

4. Representative Plaintiffs Will Fairly and Adequately Represent the Classes Under Rule 23(a)(4)

Representatives of the Plaintiff Class and Rehabilitation Act Subclass will also "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23 (a)(4). Whether Representative Plaintiffs will adequately represent the class requires a two-fold inquiry: "[(1)] the proposed class representative must have an interest in vigorously pursuing the claims of the class, and [(2)] 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). Under the second prong of this inquiry, only a fundamental conflict going to the "very heart of the litigation" will support a finding of inadequacy. *Cent. States*, 504 F.3d at 246.

There is no known conflict between Representative Plaintiffs and the Class and Subclass. None of the Representative Plaintiffs of the Class or Subclass has an interest antagonistic to the interests of other class members, and all Representative Plaintiffs have articulated a desire to end the Refusal to Produce Policy by representing the Class and the Subclass. *See* P.L. Decl. ¶¶ 2–5; A.Q. Decl. ¶¶ 2–5; K.T. Decl. ¶¶ 2–5; R.F.J. Decl. ¶¶ 2–4; A.R.B. Decl. ¶¶ 2–4; B.M.B. Decl. ¶¶ 2–5; J.C. Decl. ¶¶ 2–4. Instead, Representative Plaintiffs have an interest in vigorously pursuing the claims of the Class and Subclass, as each Representative Plaintiff has been injured by the same Refusal to Produce Policy that is challenged by the Class and Subclass. Thus, the adequacy requirement of Rule 23(a)(4) is satisfied. *See In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 51 (S.D.N.Y. 2012) ("Courts rarely deny class certification on the basis of the inadequacy of class representatives, doing so only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit, display an unwillingness to learn about the facts underlying their claims, or are so lacking in credibility that they are likely to harm their case." (internal quotation marks omitted)).

In making an adequacy determination, courts will also consider whether class counsel is well-qualified to conduct the litigation. *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir.1992) (class counsel must be "qualified, experienced, and generally able to conduct the litigation" (internal quotation marks omitted)). Here, class counsel includes three legal service providers—BDS, BxD, and LAS—with extensive experience in civil rights class action litigations. *See* Menschel Decl. ¶¶ 3–8; Borchetta Decl. ¶¶ 2–8; Dona Decl. ¶¶ 3–7. In addition, two of the leading law firms in the country represent the Classes and possess broad and deep experience in a full array of civil litigation, including a number of past and ongoing civil rights class actions. *See* Gunther Decl. ¶¶ 2–8; Gittes Decl. ¶¶ 2–8. This wealth of experience suffices to render class counsel "generally able to conduct the litigation." *In re Drexel Burnham*, 960 F.2d at 291.

B. The Classes Satisfy Rule 23(b)(2) Requirements

Certification of the Plaintiff Class and Rehabilitation Act Subclass is also appropriate under Rule 23(b)(2) because 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). Civil rights cases, like this one, 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. v. Guiliani*, 126 F.3d 372, 378 (2d Cir. 1997) (quoting *Jeanine B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995)); *see also Shepard v. Rhea*, No. 12-CV-7220 RLE, 2014 WL 5801415, at *6 (S.D.N.Y. Nov. 7, 2014) ("Civil-rights actions are particularly appropriate for certification under Rule 23(b)(2).").

This action satisfies Rule 23(b)(2). Defendants' Refusal to Produce Policy applies to all detained immigrants in ICE custody whose cases are pending at the Varick Street Immigration Court, and it thus applies generally to the putative members of the Plaintiff Class and the Rehabilitation Act Subclass. Moreover, the Plaintiff Class and the Rehabilitation Act Subclass seek (1) a declaration that the Refusal to Produce Policy violates the constitutional and statutory rights of the classes, and (2) injunctive relief from the Policy, whereby Defendants would be permanently enjoined from relying exclusively on VTC to conduct removal proceedings for individuals detained by the ICE NY Field Office. Thus, such injunctive or declaratory relief would provide relief on a class-wide basis. *See Wal-Mart Stores*, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." (internal quotation marks omitted)). Because all putative members of the Plaintiff Class and Rehabilitation Act Subclass are harmed by the uniform policy of the Defendants, and because Representative Plaintiffs seek injunctive relief that would remedy the harm for all putative class members, certification under Rule 23(b)(2) is appropriate.

V. CONCLUSION

This action satisfies all requirements for class certification under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. Accordingly, Representative Plaintiffs respectfully request that this Court certify the Plaintiff Class and the Rehabilitation Act Subclass

pursuant to Rule 23.[5] Representative Plaintiffs also request that this Court designate the undersigned as class counsel under Rule 23(g).

[5] Class discovery is not necessary here because class certification is entirely proper on the existing record. *See, e.g.*, *Reeb v. Ohio Dep't of Rehab. & Corr.*, 81 F. App'x 550, 555 (6th Cir. 2003) (a district court may certify a class "based on the pleadings alone where they set forth sufficient facts"). However, in the event this Court finds the record inadequate to determine whether the class should be certified, Representative Plaintiffs respectfully request class discovery to support certification. *See Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 (2d Cir. 1978) ("The court should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues."); *see also Yaffe v. Powers*, 454 F.2d 1362, 1367 (1st Cir. 1972) (remanding case to district court for further discovery in support of motion for class certification). Defendants possess extensive information about putative members of both the Plaintiff Class and Rehabilitation Act Subclass, including with respect to detained immigrants whom the government has identified as disabled, the aggregate effects of the Refusal to Produce Policy on deportation rates and unreasonable case adjournments, and the bases and stated justifications for enacting the Policy. If necessary, limited class discovery would allow Representative Plaintiffs to obtain additional support for their motion for class certification

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Respectfully submitted,

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