Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Maria Sandra RIVERA, on behalf of herself as an individual and on behalf of others similarly situated,

Plaintiff-Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General of the United States; Juan P. OSUNA, Director, Executive Office for Immigration Review, United States Department of Justice; Jeh JOHNSON, Secretary of Homeland Security; Sara SALDANA, Assistant Secretary for United States Immigration and Customs Enforcement; Nathalie R. ASHER, Director, Seattle Field Office of United States Immigration and Customs Enforcement; Lowell CLARK, Warden, Northwest Detention Center; and the UNITED STATES OF AMERICA,

Defendants-Respondents.

Case No. 14-cv-01597-RSL

PLAINTIFF-PETITIONER'S REPLY TO DEFENDANTS-RESPONDENTS' OPPOSITION TO PLAINTIFF-PETITIONER'S MOTION FOR CLASS CERTIFICATION

NOTED ON MOTION CALENDAR:

January 16, 2015

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

INTRODUCTION

Three months ago, Defendants stipulated that "this lawsuit raises a purely legal issue that will determine the merits of the litigation and likely the propriety of class certification[.]" *See* Dkt. #17 at 2. Defendants have since conceded the "purely legal issue." Dkt. #28-1 at 22 ("Defendants agree that 8 U.S.C. § 1226(a) permits Immigration Judges ("IJs") to consider requests to release aliens detained under that statute *either* on '(A) bond of at least $ 1,500 with security approved by, and containing conditions prescribed by, the Attorney General;' *or* '(B) conditional parole.'") (emphasis in the original).

Defendants have instead turned their attention to convincing the Court not to reach the issue, *see, e.g.,*Dkt. # 28-1 (Def's Mot. for Summ. J.) at 6-24, and, now, to contesting class certification. Defendants present two arguments: (1) the same misstatement of law made in their other briefs arguing that Ms. Rivera lacks standing to be a class representative because she has been released; and (2) an assertion—invented out of whole cloth—that only a person granted the minimum bond might qualify for conditional parole.

Plaintiff-Petitioner has already addressed the first argument. The "relation-back" doctrine provides that Ms. Rivera has standing because she was subject to detention without a lawful custody determination at the time she filed the complaint and motion for class certification and because the claim presented is inherently transitory, demonstrably capable of repetition yet avoiding review. Ms. Rivera seeks class certification precisely because her claim is transitory and, like others before her, she had no opportunity to individually exhaust administrative appeals and thereafter seek judicial review.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

As to Defendants' second argument, there is simply no basis for their assertion that a person who is given a bond greater than the minimum amount is "by definition ineligible for conditional parole." Dkt. #31 at 16. The position is ironic, given that Defendants have a uniform policy and practice of refusing to acknowledge that IJs may release *anyone* on conditional parole. Defendants now assert for the first time that there is some prerequisite to be able to seek conditional parole (which heretofore has not even been an option). Unsurprisingly, Defendants have no authority to support this position. To the contrary, case law and Defendants' own actions undermine this assertion. Defendants have themselves acknowledged that conditional parole can come in different forms, requiring more or less obligations for people who present different degrees of flight risk. Dkt. #32 at 16 n.6 (citing *Matter of Aguilar-Aquino*, 24 I.&N. Dec. 747,748 (BIA 2009)); *see also In re: Luis Navarro-Solajo*, 2011 WL 1792597 at *1 n.2 (BIA Apr. 13, 2011) ("release on conditional parole as provided under section 236(a)(2)(B) of the Act could present more onerous conditions on a respondent than the minimum bond set by the Immigration Judge in this case.").

Ms. Rivera suffered the same injury as every other proposed class member—she was denied her statutory right to a bond hearing where the IJ properly determined if she should be released on a monetary bond under 8 U.S.C. § 1226(a)(2)(A), *or* whether she could be released instead under conditional parole under § 1226(a)(2)(B). Moreover, like all proposed class members, she was eligible for consideration of conditional parole, regardless of the monetary bond set by the IJ.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

ARGUMENT

I. Plaintiff-Petitioner Satisfies the Prerequisites for Class Certification Under the Federal Rules of Civil Procedure 23(a) and 23(b)(2).

A. Commonality and Typicality.

i. Plaintiff-Petitioner has standing to represent the proposed class.

Ms. Rivera presents a question of law that is common to the entire proposed class: Whether Defendants' policy and practice of precluding an IJ from exercising the statutory authority under § 1226(a)(2)(B) to order conditional parole, and from making custody determinations in light of the availability of conditional parole, violates 8 U.S.C. § 1226(a)(2). Ms. Rivera and every putative class member suffer from the same injury as they all have been or will be denied bond hearings in which IJs consider the availability of conditional parole. This is the prototypical case for class certification, where the answer to the legality of the challenged policy and practice will "drive the resolution of the litigation" and thus fairly and efficiently resolve the issue raised "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted).

Nonetheless, Defendants argue that Ms. Rivera cannot assert the same injury as other putative class members (and thus does not satisfy commonality and typicality requirements) because she does not have standing to bring this action. Defendants assert the same arguments that they made in briefing the cross motions for summary judgment, challenging her ability to bring the case given that she is no longer subject to detention. *See* Dkt. ##28-1 at 6-12, 32 at 6-9. However, standing for class-wide declaratory and injunctive relief looks to the standing of the named plaintiff at the time the complaint is filed. *Haro v. Sebelius*, 747 F.3d 1099, 1108 (9th Cir. 2014). Where a named plaintiff experienced ongoing injury at the time the class complaint was filed, she has standing to

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

request class-wide injunctive relief. No further showing of a likelihood of irreparable injury is required. *See id.*; *see also* Dkt. #33 at 1-7 (Pl.-Pet'rs' Resp. to Defs. Resp'ts' Mot. for Summ. J.).

Moreover, a plaintiff who challenges the violation of "'a procedural right to protect [her] concrete interests can assert that right without meeting all the normal standards' for traceability and redressability." *Nat'l Res. Def. Council v. Jewell*, 749 F.3d 776, 782-83 (9th Cir. 2014) (en banc) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Standing is proper if she has "'a procedural right that, if exercised *could* protect [her] concrete interests and that those interests fall within the zone of interests protected by the statute at issue.'" *Id.* at 783 (citations omitted).

Plaintiff-Petitioner had—and similarly situated class members continue to have—a procedural right to seek release under conditional parole pursuant to § 1226(a)(2)(B). This procedural right protected a concrete interest at stake in custody hearings: liberty. The class-wide injunctive relief sought in the complaint, had it been ordered at the time the complaint was filed, could have protected her interests and the interests of proposed class members. Thus, Ms. Rivera has standing to pursue class-wide relief. *See* Dkt. #33 at 3-7.

Defendants then argue that Plaintiff-Petitioner's claim is not fit for review because she and other putative class members may not ultimately be *granted* release on conditional parole as a discretionary matter. *See* Dkt. #31 at 12-14. Ms. Rivera is not required to demonstrate that she would have been granted release on recognizance, only that the procedural protection *could* have impacted her case. It is well established that individuals subject to an unlawful process may challenge that process without having to demonstrate at the outset that lawful procedures would necessarily produce a different substantive result. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (quoting *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)) ("A

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered."); *Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

This is particularly true in the detention context, where courts have on numerous occasions adjudicated challenges to detention procedures and standards without regard to whether the parties bringing the challenge—whether individuals or members of a class—would obtain a different result if the standards were revised. *See*, *e.g., Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (adjudicating challenge to prolonged detention without bond hearings, without regard to whether individual class members would actually be granted bonds at their hearings); *see also* Dkt. No. 33 at 16-17 (collecting cases establishing that class challenges to procedures need not show different result under legal procedures); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (adjudicating class action challenge to prison disciplinary proceedings and adequacy of prison legal assistance without regard to whether class members would obtain different results under the improved rules, practices, and procedures sought).

Again, Ms. Rivera does not assert the right to be released on conditional parole nor does she seek review of a discretionary determination of whether she merits conditional parole or a lower bond amount. Rather, she asserts the right to a custody determination where the IJ considers whether he will release Ms. Rivera on conditional parole.[1] Ms. Rivera and all proposed class members are

[1] Defendants mistakenly assert that the only allegation of injury is that Ms. Rivera was detained for five months based on her inability to post bond. Dkt. #31 at 13. This is not the case. Instead, she argues that she was harmed by the

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

entitled to a lawful custody determination where the IJ must consider requests for conditional parole—regardless of whether they are ultimately afforded such release.

Defendants' cite to *Jumapili v. Ice Field Office Dir.*, 2013 WL 5719805 at *4 (W.D. Wash. Oct. 21, 2013), to assert the non-reviewability of discretionary determinations. However, that case reinforces that Plaintiff-Petitioner may bring a statutory challenge: "the Court retains jurisdiction to review discretionary decisions where the detention violates due process or exceeds statutory authority." *Id.*; *see also* Dkt. #33 at 7. Accordingly, Defendants' claim that "in order to redress Plaintiff's claim, the court would have to declare 8 U.S.C. § 1226(e) unlawful" is utterly without merit. *See* Dkt. #31 at 14.

ii. Mr. Rivera Has Experienced The Same Injury as the Proposed Class: the IJ's Refusal to Consider Her Request for Conditional Parole.

Ms. Rivera suffered the same injury as all other proposed class members: the IJ refused to consider her request for release under conditional parole and instead focused only on what he thought the proper monetary bond amount should be. Defendants now argue (1) that because Ms. Rivera's bond amount was not the minimum bond, she was ineligible for conditional parole in the first place and (2) because her bond amount was not the same as other class members, she did not suffer the same injury as other class members. Dkt. #31 at 15-17.

IJ's failure to consider her request for conditional parole. *See* Dkt. #1 ¶62 ("All class members are subject to irreparable injury, because absent an order from this Court, they are or will be detained absent a proper bond hearing in which Immigration Judges consider their eligibility for conditional parole, as required by § 1226(a)(2)."). *See also id*. at ¶¶3, 15.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

Both arguments lack merit. First, there is no basis for Defendants' assertion that only recipients of minimum bond are entitled to release on conditional parole. [2] The statute does not so link the two forms of release. In fact, as Defendants have conceded, Section 1226(a)(2) explicitly directs that monetary bond and conditional parole are separate, *alternative* forms of release. *See* Dkt. #28-1 at 22. Moreover, agency practice demonstrates that conditional parole can entail an array of non-monetary conditions, ranging from a simple order to appear at future hearings to more onerous conditions and reporting requirements that are calibrated to ensure future appearance.[3] Indeed, Defendants themselves acknowledge that conditional parole can come in different forms, requiring more or less obligations. Dkt. #32 at 16 n.6. A case cited by Defendants reflects as much. *In Re: Luis Navarro-Solajo*, 2011 WL 1792597 (BIA Apr. 13, 2011), declined to substantively address the IJ's decision not to grant conditional parole even where there was a minimum bond of $1,500; however, the Board noted, "release on conditional parole as provided under section 236(a)(2)(B) of the Act could present more onerous conditions on a respondent than the minimum bond set by the Immigration Judge in this case." *Id*. at *1. This further undermines Defendants' assertion that any discussion of conditional parole would have been pointless given that the IJ did not even grant Ms. Rivera the minimum bond.

Indeed, the case certified to the Board, *In re Vicente-Garcia*, upon which Defendants rely in

---

[2] And contrary to Defendants' assertion, Dkt. # 31 at 14, Plaintiff-Petitioner certainly does not concede to Defendants' novel theory.

[3] *See*, *e.g.*, *Matter of Aguilar-Aquino*, 24 I. & N. Dec. 747, 748 (BIA 2009) (noting that release on recognizance, as laid out in the Form I-220A, included various conditions: "These conditions included reporting for any hearing or interview as directed by the DHS or the Executive Office for Immigration Review, surrendering for removal from the United States if so ordered, reporting in person to the DHS on the 10th day of each month at 10 a.m., not changing his place of residence without first securing written permission, not violating any local, State, or Federal laws or ordinances, and assisting the DHS in obtaining any necessary travel documents.").

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

arguing that this Court should stay proceedings, involves a person who was granted a low bond ($2000), but not the minimum bond ($1500), yet Defendants have claimed that the noncitizen in that case has a live claim to consideration for conditional parole. *See* Dkt. # 24 (Defs.' Reply in Support of Stay) at 4. Defendants' position contradicts their novel argument that a person who is given a bond greater than the minimum amount is "by definition ineligible for conditional parole." Dkt. #31 at 17.

Ms. Rivera suffered the same injury as every other proposed class member—she was denied her statutory right to a bond hearing where the IJ applied his authority to determine if she should be released on a monetary bond under 8 U.S.C. § 1226(a)(2)(A), *or* whether she could be released instead under conditional parole under § 1226(a)(2)(B).[4] Although the IJ determined that Ms. Rivera presented some flight risk, he did so only for purposes of determining the bond amount—*not* for purposes of determining whether she should be released under conditional parole or for determining what conditions should be imposed pursuant to that release. Just as he conducted his analysis on what amount should be placed on the monetary bond, he could have considered her moderate flight risk in determining if more rigorous conditions should be imposed on ordering her released under conditional parole.

Defendants should not be permitted to shield their failure to apply conditional parole simply because they assign bond amounts, as a matter of discretion, at more than the minimum monetary bond. Defendants have uniformly refused to consider release on conditional parole. It is irrelevant

[4] Moreover, it is not necessary that the class representative's injuries be identical to all class members' injuries, "only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Armstrong v. Davis,* 275 F.3d 849, 869 (9th Cir.2001), *abrogated on other grounds by Johnson v. California,* 543 U.S. 499, 504–05, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

whether an IJ, in failing to consider conditional parole, assigned a $2,000 bond, a $3,500 bond, or a $15,000 bond. Clearly, individuals like them who have received low bonds as opposed to those who have serious criminal records and receive bonds for well over $10,000, are more likely to benefit from an opportunity to seek conditional parole. However, even those putative class members who receive high bonds because of serious criminal records or because they present a serious flight risk, may present compelling or unique factors (such as a sudden debilitating illness) that will convince an IJ to order their release on conditional parole. Moreover, as previously noted, courts have certified classes challenging procedural protections to detention without having to demonstrate at the outset that lawful procedures would necessarily produce a different substantive result.

Defendants previously stipulated that "this lawsuit raises a purely legal issue that will determine the merits of the litigation and likely the propriety of class certification." Dkt. #17 at 2. As such, the parties stipulated that there was no need for discovery. *Id.* Defendants now seek to reverse course an argue that bond amounts, individual determinations of flight risk and risks of reoffending divide up the class so that "the only real similarity of injury between Ms. Rivera and the putative class is the potential for categorical dissimilarities based on bond amount, flight risk, and recidivism once released." Dkt. # 31 at 15. Thus, despite previously conceding that Plaintiff-Petitioner's claim presents a pure legal issue with no need for discovery, Defendants now argue it is not appropriate for class-wide resolution. However, the claim presented is indeed a pure legal issue that is appropriate for class treatment, as it presents a common question of statutory interpretation that will "drive the resolution of the litigation" and will resolve Plaintiff-Petitioner and all proposed class members' claims "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

iii. Ms. Rivera's Claim is Not Moot.

Defendants argue that Plaintiff-Petitioner cannot demonstrate commonality and typicality because her individual claim is mooted out. Under the relation-back doctrine, she can still represent the class. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) ("relation back doctrine" appropriate where "claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."). Her injury at the time she filed the complaint is identical to the injury shared by class members. The commonality and typicality requirements are, therefore, met.

Defendants also repeat their argument that the issue before this Court is not insulated from review because Defendants have certified a case to the Board raising this issue. Dkt. 31 at 18-19. But the fact that the Board may weigh in does *nothing* to demonstrate that this issue is not insulated from *judicial* review. Plaintiff-Petitioner seeks relief from the agency's policy and practice of refusing to apply conditional parole as a form of relief in bond hearings. It is no answer for the agency to respond that the agency itself may at some point in the future address this policy.[5]

B. Adequacy.

With respect to adequacy Defendants fail to demonstrate any potential conflict between Ms. Rivera and the proposed class members. Instead they simply repeat their arguments that Ms. Rivera lacks standing and that she has not suffered the same injury. Dkt. #31 at 20-22. Those arguments

[5] It defies logic that Defendants claim "[e]ach as-of-yet unnamed class member can invoke [administrative appeal and then habeas review], such that no individual claim will ever evade review. Dkt. #31 at 20. It is indisputable that Plaintiff-Petitioner was unable, despite her best efforts, to use even the administrative appeal, let alone a habeas petition, to raise her claim before it mooted out. Moreover, Defendants also repeat their argument that the relation-back doctrine should be limited to those cases where Defendants "pick off" potential class representatives. As already addressed, this argument is frivolous.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

should be rejected for the same reason set forth above: it would eviscerate the relation-back doctrine to find that because a claim is inherently transitory a plaintiff may serve as class representative, yet then find that she is not an adequate representative because she does not continue to be directly impacted by the transitory harm.

C. Numerosity.

Relying on the premise that only individuals who have been granted the minimum bond are eligible to seek conditional parole, Defendants assert that Plaintiff-Petitioner cannot establish numerosity. Dkt. #31 at 23. As previously noted, the underlying premise is flawed, as there is no legal basis for their argument that a person who is given a bond greater than the minimum amount is "by definition ineligible for conditional parole." *Id*. at 17. All proposed class members suffered the same injury—denial of a hearing that complied with § 1226(a)(2)—regardless of their individual chances of being granted conditional parole.

Plaintiff-Petitioner has presented uncontested evidence that, under the most conservative numbers available every month there are hundreds of putative class members detained in at the Northwest Detention Center in Tacoma on a daily basis, all of whom are subject to the same practice and policy. *See* Dkt. #2 at 14. This information demonstrates that the proposed class is sufficiently numerous.[6]

[6] Nor do Defendants rebut Plaintiff-Petitioner's point that this Court may also certify a class even when there are relatively few class members where the case demonstrates impracticability of joinder. *See Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765-66 (9th Cir. 1971) (finding seventeen class members sufficient); *McCluskey v. Trs. of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class with twenty-seven known members).

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

Finally, Defendants repeat their argument that exhaustion and prudential concerns weigh against certifying the class. As Plaintiff-Petitioner previously demonstrated, these arguments are unavailing. *See* Dkt. #33 at 11-19.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff-Petitioner's motion for class certification.

Dated: January 16, 2015

Respectfully submitted,

/s/ Matt Adams
Matt Adams, WSBA No. 28287
NORTHWEST IMMIGRANT
RIGHTS PROJECT
615 2nd Avenue, Suite 400
Seattle, WA 98104
(206) 587-4009 ext. 111
(206) 587-4025 (Fax)
matt@nwirp.org

Elizabeth Benki, WSBA No. 45938
NORTHWEST IMMIGRANT
RIGHTS PROJECT
1331 G Street NW, Suite 200
Tacoma, WA 98402
(206) 957-8653
(206) 383-0111 (Fax)
elizabeth@nwirp.org

Judy Rabinovitz (*pro hac vice*)
Michael K.T. Tan (*pro hac vice*)
ACLU IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th floor
New York, NY 10004
(212) 549-2618
(212) 549-2654 (Fax)
jrabinovitz@aclu.org
mtan@aclu.org

Sarah Dunne, WSBA No. 34689
Margaret Chen, WSBA No. 46156
ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184
dunne@aclu-wa.org
mchen@aclu-wa.org

Attorneys for Plaintiff-Petitioner

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 SECOND AVE., STE. 400
SEATTLE, WA 98104
TELEPHONE (206) 957- 8611
FAX (206) 587-4025

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2015, I electronically filed the foregoing reply with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

s/ Matt Adams

Matt Adams, WSBA No. 28287
NORTHWEST IMMIGRANT
RIGHTS PROJECT
615 2nd Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611
(206) 587-4025 (fax)
Email: matt@nwirp.org