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

HAMEED KHALID DARWEESH and HAIDER SAMEER ABDULKHALEQ ALSHAWI, on behalf of themselves and all others similarly situated; and,

Petitioners,

-vs.-

DONALD TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); U.S. CUSTOMS AND BORDER PROTECTION ("CBP"); JOHN KELLY, Secretary of DHS; KEVIN K. MCALEENAN, Acting Commissioner of CBP; JAMES T. MADDEN, New York Field Director, CBP,

Respondents.

Case No. 1:17-cv-00480

Judge: Carol Bagley Amon

BRIEF OF PUBLIC JUSTICE, P.C. AND IMPACT FUND AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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STATEMENTS OF INTEREST

The Impact Fund is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights cases, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially-significant civil litigation, with a focus on fighting corporate and governmental misconduct. Much of Public Justice's work involves protecting and vindicating civil rights—and defending access to justice for those whose rights have been violated. Public Justice's experience is that a class action is often the only means to effectively redress and prevent civil rights violations. And Public Justice's Class Action Preservation Project seeks to preserve the integrity of class actions as a vehicle for challenging civil rights violations and other corporate and government abuses.

This case exemplifies the need for class actions to vindicate important rights. It would be difficult, if not impossible, to attempt to combat the detention and removal of large numbers people at airports across the country by filing individual habeas petitions. Without the ability to proceed as a class—and obtain class-wide relief—many of those affected by the executive order would simply be unable to protect their rights. Public Justice has a strong interest in this case to help ensure that all people whose rights are affected by the executive order are able to effectively vindicate their rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public Justice, P.C. and Impact Fund file this amicus to assist the Court in analyzing the class certification issues implicated in this case, particularly as they relate to the propriety of the stay and the issue of mootness. Amici respectfully submit that the stay was and remains proper, that the claims are not moot, and that class certification is not only appropriate, but necessary to fully vindicate the Plaintiffs' rights.

As the Court is aware, the Federal Rules of Civil Procedure—including the class certification procedures detailed in Rule 23—apply to Plaintiffs' claims for declaratory and injunctive relief. The Second Circuit long has recognized that class certification is also appropriate in habeas proceedings when a representative and inclusive action is necessary to vindicate substantive rights that are threatened on a group basis, so long as the court can adjudicate the common issues in a manner "uncluttered by subsidiary [individual] issues." *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-26 (2d Cir. 1974). Plaintiffs meet that standard because they challenge a single, uniform government policy that implicates the core substantive constitutional rights of a group of individuals, and seek equitable relief necessary to protect the rights of all, in a consistent and enforceable manner.

In fashioning a class mechanism for habeas claims like this, the Second Circuit returned in *Sero* to first principles of the federal courts' role and powers. 506 F.2d at 1125-27 (finding authority in the All Writs Act, 28 U.S.C. § 1651, the Rules Enabling Act, 28 U.S.C. § 2072, and courts' centuries'-old exercise of their equity jurisdiction). Similarly, courts in scores of cases have managed litigation technically beyond the scope of the Federal Rules by adopting and employing a class procedure. *See* Ex. A.

Amici submit that first principles further militate in favor of this Court applying the class procedure here. Federal Rule of Civil Procedure 1 provides for "the just, speedy, and

inexpensive determination of every action and proceeding." While habeas cases arise outside the express scope of those Rules, the spirit of Rule 1's mandate applies here with particular force. Absent class treatment, the core constitutional rights of many if not all members of the proposed class would go unpresented and thus unprotected. This peril implicates precisely "the policy at the very core of the class action mechanism," to ensure that potentially meritorious claims are pressed that, if left to individual litigation, likely would go unprosecuted. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997). That policy is so important that the Supreme Court has held that a plaintiff representing a class seeking injunctive relief—like that sought here—retains a "legally cognizable interest" in pursuing class-wide relief even if her individual claim becomes moot on the merits. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-3 (1980).

This Country's traditional motto is *e pluribus unum*. That motto—"out of many, one"—traces to the Second Continental Congress of 1776, and long has served as a critical philosophical pillar of our constitutional democracy. The core allegation in this case is that the January 27, 2017 Executive Order entitled Protecting the Nation from Foreign Terrorist Entry Into the United States ("January 27 Executive Order") violates the same fundamental rights of an otherwise disparate group of individuals, uniting them in common cause and creating a cohesive class with a justiciable group claim. Thus, it is only by addressing "as one" the claims of the many—now rendered similarly situated by the January 27 Executive Order—that the rights at stake can be effectively vindicated.

ARGUMENT

I. THIS COURT HAS THE POWER TO CERTIFY CLASS ACTIONS, EVEN OUTSIDE THE EXPRESS SCOPE OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. All courts to consider the issue have held that district courts may certify habeas claims for class treatment.

Plaintiffs' request for class certification in this habeas corpus action blazes no new procedural ground. For more than forty years, courts across the country have recognized that the class device is a valuable and necessary case management tool for habeas corpus petitions brought on a representative basis. In one of the most widely cited and detailed opinions addressing the question, the Second Circuit recognized the propriety of habeas class actions as early as 1974. *See Sero*, 506 F.2d 1115. Since *Sero*, numerous circuit and district courts allowed habeas cases to proceed on a representative basis, and no court has held that such cases are categorically improper. *See* Ex. A (listing cases). *Sero* was and is consistent with numerous cases in which courts approved the use of the class device to adjudicate habeas petitions that sought systemic relief or otherwise sought to "settl[e] the legality of the behavior with respect to the class as a whole." Fed. R. Civ. P. 23 advisory committee note (1966 amendments). In doing so, these courts have furthered judicial economy and consistency.

Sero involved a challenge to a New York statute that resulted in longer sentences for juveniles than they would have received as adults. The district court held that "[t]here is no doubt that this is a valid class action," and identified a core common question that affected all class members: the constitutionality of state sentencing provisions that resulted in juveniles serving longer sentences than would have been imposed on adults. *Sero v. Oswald*, 351 F. Supp. 522, 527, 528 (S.D.N.Y. 1972).

The Second Circuit affirmed, holding that district courts have the authority "to fashion for habeas actions 'appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.'" *Sero*, 506 F.2d at 1125 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)). The court found "a compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure," *id.*, as the allegation that the statute "violates equal protection is applicable on behalf of the entire class, uncluttered by subsidiary issues." *Id.* at 1125-26. Class certification was particularly appropriate, it held, because many of the young adults in the class were "likely to be illiterate or poorly educated, and since most would not have the benefit of counsel to prepare habeas corpus petitions, it is not improbable that more than a few would otherwise never receive the relief here sought on their behalf." *Id.* at 1126.

Since *Sero*, and using similar reasoning, numerous courts have approved class certification in habeas cases seeking systemic relief, or an adjudication of a policy or rule applicable to a class of petitioners. *See, e.g.*, *Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011). For example, in *Rodriguez v. Hayes*, the petitioner sought habeas relief on behalf of himself and a class of detainees who had been or would be held for more than six months without a bond hearing while engaged in immigration proceedings. 591 F.3d 1105, 1121-26 (9th Cir. 2009). The Ninth Circuit recognized that the case allowed the district court to end "piece-meal rulings in habeas actions . . . and have the courts address the issue on a class-wide basis across the various general immigration detention statutes." *Id.* at 1116-17. Performing a straightforward application of Rule 23, the Ninth Circuit reversed the district court's denial of class certification.[1]

[1] The Supreme Court has repeatedly declined to address whether Rule 23 is applicable to habeas petitions. *See Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984) (citing *Bell v. Wolfish*, 441 U.S. 520, 527, n.6 (1979), and *Middendorf v. Henry*, 425 U.S. 25, 30 (1976)). But even before *Sero*,

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Similarly, in *Ali v. Ashcroft*, the Ninth Circuit recognized the practical necessity of class certification in a case involving policies applicable nationwide. 346 F.3d 873, 890 (9th Cir. 2003), *vacated on other grounds by Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2003). In *Ali*, the Court affirmed certification of a nationwide class of Somali immigrants who sought to enjoin their removal to Somalia because, under the statute governing removal, Somalia did not have a functioning government to receive them. Noting the government's uniform application of its statutory interpretation, the court held that adjudicating a single answer to the central common question, which answer would apply to all Somali immigrants affected, both made nationwide class certification appropriate and served judicial economy. *Id.* at 888. *See also United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 221 (7th Circ. 1965) (affirming availability of class action device in habeas action challenging standard used in commitment proceedings).

In sum, this representative habeas action, in seeking class action status for individuals who have been or will be denied entry to the United States on the basis of the January 27 Executive Order, places it well-within a long line of cases in which courts have employed class certification in habeas actions.

B. Numerous courts have certified class actions outside the express scope of the Federal Rules.

It is worth emphasizing that there is nothing particularly remarkable about the rule that courts can certify habeas claims for class treatment. Many courts—in many contexts—have certified classes in cases technically outside the ambit of the Federal Rules. *See* Ex. A (collecting cases).

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courts recognized the utility of the class device in habeas actions. *Sero* cited, for example, *Williams v. Richardson*, in which the Eighth Circuit reversed the district court's holding that habeas class actions were inappropriate in a case involving inmates' challenge to the conditions of their confinement. 481 F.2d 358, 361 (8th Cir. 1973).

Just as Rule 23 falls "within the Supreme Court's mandate to adopt rules of 'practice and procedure' for the district courts, . . . [t]here is no reason why" class actions cannot be certified outside of Rule 23. *Quinault Allottee Ass'n & Individual Allottees v. United States*, 453 F.2d 1272, 1274 (Ct. Cl. 1972) (holding the Court of Claims may certify class actions). Part of the explanation stems from the nature of a class action, which is merely a "procedural technique for resolving the claims of many individuals at one time . . ., comparable to joinder of multiple parties and intervention." *Id*. As the Supreme Court itself explained, "Rule 23 … falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010)).

So, too, here, using the class device to adjudicate Plaintiffs' claims on behalf of themselves and all others similarly-situated merely ensures a single, uniform resolution of an indisputably common question with respect to the constitutionality of the Executive Order. It is, fundamentally, a procedural tool aimed at efficiency, one the Court unquestionably has the power to employ.

II. PRELIMINARY RELIEF ON A CLASS-WIDE BASIS IS APPROPRIATE.

Recent years have seen a budding controversy over the propriety of nationwide injunctions against executive action. *See, e.g., Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016); *Am. Health Care Ass'n v. Burwell*, No. 3:16-CV-00233, 2016 WL 6585295, at *19 (Nov. 7, 2016 N.D. Miss.), *appeal filed* (5th Cir. No. 17-60005). That controversy has no bearing here because this is a class action. As a result, the Court plainly has the authority to issue equitable relief on behalf of *all* class members. The scope of permissible relief is limited only by the contours of the class and the harm suffered by class members. *See*

Pella Corp. v. Saltzman, 606 F.3d 391, 395 (7th Cir. 2010) (Posner, J.) (affirming certification of a national declaratory relief class, even where class members would have to bring separate follow-on state-wide and/or individual claims for damages).

It bears emphasis that preliminary injunctive relief on a class-wide basis is appropriate even though no class has yet been certified. *See, e.g., Rodriguez v. Providence Cmty. Corrs., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) ("Neither must Plaintiffs seek Rule 23 certification in order to enjoin the conduct about which they complain."); *Fish v. Kobach*, No. 16-2105, 2016 WL 2866195, at *28 n.163 (D. Kan. 2016) ("[C]ase law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding the class certification motion.").[2]

This is so because Plaintiffs "allege a systemic deficiency" with respect to the January 27 Executive Order, and "[a] finding that this deficiency" violates their rights "applies with equal force" to similarly-situated individuals. *Rodriguez*, 155 F. Supp. 3d at 767. So long as "the Court can craft injunctive relief that will alleviate this injury pending a final ruling on the merits without necessitating individualized remedies," *id.*, preliminary class-wide relief is proper.

[2] *See also Strawser v. Strange*, 105 F. Supp. 3d 1323, 1330 (S.D. Ala. 2015) ("Courts in this District and others have previously issued a preliminary injunction concurrently with certifying a class or even prior to fully certifying a class."); *Lee v. Orr*, No. 13-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013) ("The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.") (citation omitted); *Kaiser v. Cnty. of Sacramento*, 780 F. Supp. 1309, 1312 (E.D. Cal. 1991) (granting class-wide injunctive relief even though the court had only provisionally certified the class and had not yet fully addressed Defendants' class certification arguments); *Thomas v. Johnston*, 557 F. Supp. 879, 916 (W.D. Tex. 1983) ("[A] district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers.").

III. THE CLASS CAN BE CERTIFIED AND RELIEF GRANTED EVEN IF PLAINTIFFS' INDIVIDUAL CLAIMS ARE MOOT.

It is black-letter law that federal courts retain jurisdiction over a class action even if the named plaintiffs' claims become moot before the class is certified. *See Geraghty*, 445 U.S at 399. It is for this reason that, while Amici agree with Plaintiffs that their claims are *not* moot, the Court need not wade into that issue. Courts have jurisdiction over class actions when individual "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." *Id.* at 399; *see also Amador v. Andrews*, 655 F.3d 89, 99-101 (2d Cir. 2011) (holding, in constitutional challenge to prison policies and procedures, claims were not mooted simply because named plaintiffs had been released prior to class certification).

The central principle animating *Geraghty* and *Amador* is that a certified class has a legal status independent of the class representative. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (explaining that, upon certification, "the class of unnamed persons . . . acquired a legal status separate from the interest" of the named plaintiff). Because that legal interest satisfies Article III, class certification "relate[s] back" to the filing of the original complaint, retaining jurisdiction even though the named plaintiff's claims may have been mooted along the way. *Id.* at 402 n.11; *Geraghty*, 445 U.S. at 404 n.11; *Amador*, 655 F.3d at 99-100; *see also Mental Disability Law Clinic v. Hogan*, No. 06-6320, 2008 WL 4104460, at *9-10 (E.D.N.Y. Aug. 29, 2008) (relating the mootness inquiry back to the time of the filing of complaint, rather than class certification motion, and finding that claims were not moot in constitutional and statutory challenge to mental health facility policies and practices).

Nothing in *Genesis Healthcare v. Symczyk*, 133 S. Ct. 1523 (2013), undermines the principles articulated in *Geraghty* and *Amador*. In *Genesis Healthcare*, the Court held that a

collective action under the Fair Labor Standards Act became moot when the named plaintiff's individual claims became moot *before* she had "moved for . . . certification." *Id.* at 1530. Here, Plaintiffs filed a class certification motion with their original pleading, when their claims were indisputably live. Dkt. No. 4. This Court plainly understood the class nature of the claims at that time, twice referencing the claims of those "similarly situated" to Plaintiffs. Dkt. No. 8, at 1.

Whether "claims are inherently transitory is an inquiry that must be made with reference to the claims of the class as a whole as opposed to any one individual claim for relief." *Amador*, 655 F.3d at 100. The "class-action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meet the 'capable of repetition, yet evading review' standard." *Geraghty*, 445 U.S. at 398 n.6. Instead, claims are inherently transitory where they are "acutely susceptible to mootness." *Comer*, *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir. 1994) (applying the doctrine to housing discrimination suits "because of the fluid composition of the public housing population"); *see also Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (finding that plaintiff's claims of detention without probable cause constitutes a "suitable exception" to the mootness doctrine on the grounds that "it is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class").

As in *Geraghty* and *Amador*, Plaintiffs' claims are "inherently transitory," and the "relation back" doctrine applies. The January 27 Executive Order authorizes and instructs Defendants to refuse entry to Class Members like Plaintiffs. *See* January 27 Executive Order § 3(e). Faced with the choice of being removed from the country or facing indefinite detention while the legality of the order is challenged, many or all potential named plaintiffs would do exactly what Plaintiffs did here—seek immediate relief on their individual claims rather than

wait and sit deprived of critical constitutional rights as the court considers a motion for class certification. The population of affected individuals is at least as "fluid" as the "public housing population" (*Comer*) or prisoners serving a range of sentences of imprisonment (*Amador*).

Another factor weighing in favor of the "inherently transitory" doctrine here is that the January 27 Executive Order (at § 3(g)) affords Defendants limited discretion to permit entry "on a case-by-case basis." This raises the possibility (not implausible given reports of Defendants' arbitrary and ultra vires behavior to this point) of the government strategically releasing class representatives in order to avoid judicial adjudication of the January 27 Executive Order on the merits. *See Washington v. Trump*, No. 17-35105, 2017 WL 526497, at *8 (9th Cir. Feb. 9, 2017) ("Moreover, in light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings."); *Olson v. Wing*, 281 F. Supp. 2d 476, 484 (E.D.N.Y. 2003) (Gershon, J.) (in determining whether to relate class certification back to filing of complaint, the court should consider "the likely ability of defendants to circumvent judgment by 'picking off' named plaintiffs through the mooting of individual claims" (citing *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977)); *Kazarov*, 2003 WL 22956006, at *3 (holding that a class action challenging prolonged detention of aliens was not moot because government's ability to release a detainee and moot their claims meant that "the system as it now exists seems to mean all cases will perpetually escape review"); *cf. e.g.*, *Am. Freedom Defense Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 109 (2d Cir. 2016) ("The voluntary cessation of challenged conduct will not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. . . .") (citation and quotation omitted).

One more point. In response to these arguments, Defendants may cite a number of mootness decisions arising in class or collective actions seeking money damages. *See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Genesis Healthcare*, 133 S. Ct. 1523. These cases are inapposite because they do not apply to injunctive relief class actions. Even if they did, they support Amici's position that this case is not moot because they make clear that a "would-be class representative with a live claim of her own," as Plaintiffs indisputably had, "must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672.

IV. THE CLASS SHOULD BE CERTIFIED.

Plaintiffs propose a class of:

> [A]ll individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States, but who have been or will be denied entry to the United States on the basis of the January 27, 2017 Executive Order.

Dkt. 4, at 3-4, ¶ 7.

Class treatment is appropriate here because Plaintiffs and class members challenge a single government policy, the January 27 Executive Order. Their claims necessarily rise or fall as one—they share a "fatal similarity"—and so are suitable for class treatment. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013) (affirming class certification where the key question was "common to the class"). Plaintiffs' legal theories rely on evidence common to the class, and will not require consideration of issues or evidence unique to themselves or individual class members.

When plaintiffs seek class certification for equitable relief, they must affirmatively prove five prerequisites to class certification:

(1) Numerosity. Class certification is only appropriate if it is not practical to join all potential claimants in one litigation. Fed. R. Civ. P. 23(a)(1).

(2) Commonality. At least one legal or factual question must be common to every member of the class. Fed. R. Civ. P. 23(a)(2).

(3) Typicality. The named plaintiffs must have the same type of claim as other class members. Fed. R. Civ. P. 23(a)(3).

(4) Adequacy. The named plaintiffs and their counsel must represent the interests of absent class members. Fed. R. Civ. P. 23(a)(4).

(5) General applicability. The party opposing the class has acted or refused to act on grounds that apply generally to the class. Fed. R. Civ. P. 23(b)(2).

See Sykes v. Mel S. Harris and Assocs., LLC, 780 F.3d 70, 79-80 (2d Cir. 2015).[3] All five requirements are met in this case.

A. Numerosity

Plaintiffs must demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is presumed when a class contains more than 40 members. *See, e.g.*, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Marshall v. Deutsche Post DHL*, No. 13-CV-1471 RJD JO, 2015 WL 5560541, at *3 (E.D.N.Y. Sept. 21, 2015) (Dearie, J.).

Plaintiffs satisfy numerosity because the government has publicly acknowledged that, pursuant to the January 27 Executive Order, approximately 60,000 visas have been revoked. *See, e.g.*, Jaweed Kaleem, *Nearly 60,000 visas revoked since Trump's immigration order*, L.A. TIMES, Feb. 3, 2017, https://goo.gl/fhCxuy. Defendants argue that there is no one in the class because no one is currently detained. Dkt. No. 66-1, at 9. But the class includes anyone who was or will be denied entry because of the January 27 Executive Order.

[3] Because Plaintiffs do not seek money damages, they need *not* prove that the class is readily ascertainable, that common issues predominate over individual issues, or that a class action is superior to individual actions. *See, e.g.*, *Shelton v. Bledsoe*, 775 F.3d 554, 560-61 (3d Cir. 2015).

B. Commonality

Plaintiffs must demonstrate that there is a question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2). In particular, Plaintiffs must show that there is at least one common question such that "a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original) (citation omitted). But the presence of individual issues—even in droves—does not defeat commonality, which requires only the presence of a single "common issue that 'drive[s] the resolution of the litigation.'" *Sykes*, 780 F.3d at 84 (quoting *Dukes*, 131 S. Ct. at 2550).

Plaintiffs' challenge to the January 27 Executive Order clearly meets the commonality requirement. Plaintiffs' core claim is that the January 27 Executive Order, and Defendants' policies and procedures implementing it, violate the Fifth Amendment's Due Process Clause, the Fifth Amendment's Equal Protection guarantees, the Immigration and Naturalization Act, and the Administrative Procedure Act. These alleged constitutional and statutory violations are "capable of classwide resolution—which means that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350.

None of Plaintiffs' legal theories or causes of action require the analysis of evidence or information unique to Plaintiffs or any individual class members to be resolved. Further, to the extent resolution of any of Plaintiffs' claims requires evidentiary analysis, the evidence will be common to the class, relating to a single, centralized policy (the January 27 Executive Order) applied uniformly to *all* class members. Courts regularly recognize that such challenges to centralized and uniform policies that apply to all class members are subject to common proof, and therefore apt for class treatment. *See, e.g.*, *Gill v. Paige*, 226 F. Supp. 2d 366 (E.D.N.Y. 2002) (Amon, J.) (reviewing question whether Dept. of Education policy was arbitrary,

capricious, and contrary to law under the APA on a class-wide basis); *Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 335-36 (N.D.N.Y. 2011) (finding that plaintiffs alleging violations of employment law met commonality requirement where "shared legal and factual issues central to th[e] litigation exist[ed] across the class," including that all class members were "subject to commonly applicable policies," and "the blanket treatment of persons" meeting certain criteria "exist[ed] as a class-wide concern").[4]

Challenges to immigration policies are no exception. Indeed, "[c]lass actions seeking injunctive relief against specific INS policies and procedures are not unusual. To the contrary, courts have held that actions for declaratory and injunctive relief which challenge the general administration of an INS program are the very type of lawsuit contemplated by Rule 23(a)." *Campos v. I.N.S.*, 188 F.R.D. 656, 659 (S.D. Fla. 1999).[5]

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[4] *See also, e.g., Maziarz v. Housing Auth. of the Town of Vernon*, 281 F.R.D. 71, 84 (D. Conn. 2012) (certifying claim that housing authority policy violated the Fair housing Act); *Lyons v. Weinberger*, 376 F. Supp. 248, 263 (S.D.N.Y. 1974) (commonality was met in class action challenge to Social Security Administration regulation because "[a]lthough various recipients' S.S.I. benefits have been reduced for different reasons the basic legal question in this lawsuit, applicable to all members of the class, is whether benefits can be reduced without a prior opportunity to be heard"); *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011) (certifying a class that challenged a Social Security Administration regulation under the APA); *New York v. Heckler*, 105 F.R.D. 118, 124 (S.D.N.Y.1985) ("Common questions of law and fact are presented in that the inquiry addressed by this litigation is not to a determination of the merits of individual claims, but to the legality of defendants' policy of using *per se* rules to deny disability claims."); *Steele v. United States*, 159 F. Supp. 3d 73 (D.D.C. 2016) (certifying a class bringing an APA challenge to lawfulness of IRS regulation); *cf. Rivera v. Harvest Bakery, Inc.*, 312 F.R.D. 254, 276 (E.D.N.Y. 2016) (Spatt, J.) ("Courts in this Circuit have held that the existence of . . . a common compensation practice will help to establish the Defendants' liability with respect to each class member's overtime and spread of hours claims.").

[5] *See also, e.g., Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (affirming certification of class challenging the immigration service's procedures in obtaining waivers of a right to a hearing in removal proceedings and affirming those procedures violated notions of due process); *Rodriguez* 591 F.3d 1105 (reversing denial of class certification for class of aliens detained for more than six months who brought habeas claims challenging their detention on due process and APA grounds); *Gonzales v. U.S. Dep't of Homeland Sec.*, 239 F.R.D. 620, 628 (W.D. Wash. 2006)

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C. Typicality

Plaintiffs must show that the representative plaintiffs' claims are typical of those they seek to represent. *See* Fed. R. Civ. P. 23(a)(3). The Second Circuit has explained that typicality 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." *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (citation and internal quotation marks omitted). In other words, the named plaintiffs should bring claims "for the same type of injury under the same legal theory as the rest of the class." *Marshall*, 2015 WL 5560541, at *3. But "[m]inor variations in the fact patterns underlying individual claims" cannot defeat typicality so long as the defendant directs "the same [allegedly] unlawful conduct" at all proposed class members. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *cf. Sykes*, 780 F.3d 70, 80 (2d Cir. 2015) (explaining that in some cases the "commonality and typicality requirements of Rule 23(a) tend to merge").

Typicality, like the other prerequisites to class certification, is not a close call here. Plaintiffs do not merely make arguments that are similar to the legal arguments of other class

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(certifying class of at least 31 individuals challenging administration of an inadmissibility waiver, and recognizing as common questions "whether Defendant's policy . . . violates *Perez-Gonzales*, the Immigration and Nationality Act, the Fifth Amendment, the Administrative Procedures Act, and general principles of administrative law"), *vacated and remanded on other grounds by Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007) (reversing preliminary injunction but not disturbing class certification); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 369-372 (C.D. Cal. 1982) (certifying provisional class of Salvadorans challenging asylum practices who sought preliminary injunction); *Kazarov v. Achim*, No. 02-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003) (certifying class challenging prolonged detention of those ordered but not yet removed from the U.S.); *Perez-Funez v. I.N.S.*, 611 F. Supp. 990 (C.D. Cal. 1984) (certifying class and granting preliminary injunction to class challenging the INS's practice of obtaining waiver of a right to a hearing from unaccompanied minors in violation of due process); *Fernandez-Roque v. Smith*, 91 F.R.D. 117 (N.D. Ga. 1981) (certifying class and subclasses of detained Cuban aliens challenging their detention).

members (which is all that Rule 23 requires), they make the *same* legal arguments as other class members: like all other class members, they are from one of the seven Muslim-majority countries identified in the January 27 Executive Order and hold a valid visa. They challenge the facial lawfulness of that Order, which directs that they and all other class members be denied entry into the United States based solely on their membership in the class.

D. Adequacy

Plaintiffs must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see also Amchem*, 521 U.S. at 625. For purposes of adequacy, the Court must address whether: (1) "plaintiff's interests are antagonistic to the interest of the other members of the class" and; (2) "plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Kindle v. Dejana*, 315 F.R.D. 7, 11 (E.D.N.Y. 2016) (Feuerstein, J.) (quoting *Baffa v. Donaldson, Lufkin & Jenretet Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (same).

The proposed class representatives and their counsel meet Rule 23's "adequacy" prong. *See Kindle*, 315 F.R.D. at 11. First, there is no conflict between Plaintiffs and other class members; i.e., there is no sense in which Plaintiffs' success in this lawsuit could somehow injure other proposed class members, nor is there any sense in which Plaintiffs' failure in this lawsuit could benefit proposed class members. The adequacy inquiry, moreover, is not implicated by the fact that Plaintiffs are no longer in detention. *See* Section III (explaining why a class may be certified even if Plaintiffs' individual claims are moot); *see also J.G. ex rel. F.B. v. Mills*, 995 F. Supp. 2d 109, 121 (E.D.N.Y. 2011) (Ross, J.) (holding that when named plaintiffs were

discharged from custody it did not "render them inadequate to represent the interests of the class").[6]

Second, there can be no serious doubt that Plaintiffs and their counsel will "vigorously pursue the claims of the class." *Toure v. Cent. Parking Sys.*, No. 05- 5237, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)); *see also Sykes*, 780 F.3d at 80. Proposed class counsel includes many of the most experienced immigration experts in the country, with significant experience prosecuting class actions in the immigration context.

E. General applicability.

As a final requirement, Plaintiffs must show that the Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This requirement is readily met where, as here, plaintiffs challenge a centralized policy that they allege violates the rights of a broad class of people. *See, e.g, Amchem*, 521 U.S. at 614 ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes).[7] It is for this reason that courts regularly certify classes

[6] *See also, e.g., Williams v. Conway*, 312 F.R.D. 248, 253-254 (N.D.N.Y. 2016) (rejecting notion that pretrial detainee was inadequate to represent class of detainees simply because he had been released); *Kazarov*, 2003 WL 22956006, at *7 (plaintiff was adequate to represent class of aliens challenging prolonged detention despite mootness of individual claims because "[b]oth he and class members have allegedly been harmed by the unconstitutional government procedures and have the same interest in stopping the practices and procedures currently in place") (quotation and citation omitted).

[7] *See also, e.g., Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (district court did not abuse discretion in certifying Rule 23(b)(2) class where plaintiffs challenged "central and systemic failures"); *Comer* , 37 F.3d at 796 ("pattern of racial discrimination cases for injunctions . . . are the 'paradigm' of Fed. R. Civ. P. 23(b)(2) class action cases") (citation omitted); *Hill v. City of New York*, 136 F. Supp. 3d 304, 357 (E.D.N.Y. 2015) ("Rule 23(b)(2) is

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challenging immigration rules or policies. *See, e.g.*, *Rodriguez*, 591 F.3d at 1125-1126 (affirming class certification where class of aliens challenged long-term detention because "all class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right").[8]

CONCLUSION

For the above reasons, Amici respectfully submit that this Court has the power to employ the class certification procedure to manage litigation of Plaintiffs' claims and to order class-wide relief, and should exercise that power to certify the claims regardless of whether Plaintiffs' individuals claims have become moot.

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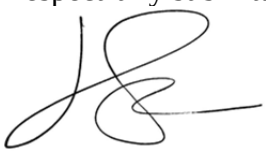
designed to assist and is most commonly relied upon by litigants seeking institutional reform in the form of injunctive relief.") (quotation and citation omitted).

[8] *See also, e.g.*, *Campos*, 188 F.R.D. at 661 (class of legal permanent residents met 23(b)(2) requirement where all members "were denied the [medical] waivers based on the same, allegedly illegal, policies and practices," and they sought injunctive relief as remedy); *Orantes-Hernandez*, 541 F. Supp. at 371 (plaintiffs who were "challenging various procedures and practices of the INS which, they allege, are based on grounds generally applicable to Salvadoran aliens" satisfied Rule 23(b)(2)); *Perez-Funez*, 611 F. Supp. at 998 (Rule 23(b)(2) satisfied in challenge to memorandum "establish[ing] an official INS policy by which the INS has acted on grounds 'generally applicable to the class'"); *Kazarov*, 2003 WL 22956006 at *7 (certification appropriate because "Petitioner does not challenge individual detention decisions, but rather the procedures used by Respondent toward the class as a whole").

Dated: February 16, 2016

Respectfully submitted,



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I hereby certify that on February 16, 2016, I caused this document to be served via ECF, which will provide notice to all counsel of record.

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EXHIBIT A

United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974) (affirming use of class action device in case involving challenge to a New York statute that resulted in longer sentences for young adults than they would have received as adults).

Bijeol v. Benson, 513 F.2d 965, 968 (7th Circ. 1975) (affirming use of class action procedure where petitioners alleged a failure by the United States Parole Board to hold a meaningful parole hearing prior to the expiration of one-third of their sentences).

United States ex rel. Morgan v. Sielaff, 546 F.2d 218, 221 (7th Circ. 1976) (allowing use of representative procedure in case challenging lower standard used in commitment proceedings).

Preap v. Johnson, 831 F.3d 1193 (9th Cir. 2016) (affirming grant of class certification in habeas proceeding challenging mandatory detention under the Immigration and Nationality Act).

Rodriguez v. Hayes, 591 F.3d 1105, 1121-26 (9th Cir. 2009) (reversing denial of class certification in case seeking habeas relief for a class of detainees who had been or would be held for more than six months without a bond hearing while engaged in immigration proceedings).

Ali v. Ashcroft, 346 F.3d 873, 890 (9th Circ. 2003), vacated on other grounds by *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2003) (affirming class certification of nationwide class of Somali aliens, who sought to enjoin removal to Somalia, and affirming permanent injunction).

Mead v. Parker, 464 F.2d 1108, 1112–13 (9th Cir. 1972) (holding that class action was appropriate in case involving allegations of inadequate prison library, in part because "the relief sought can be of immediate benefit to a large and amorphous group. In such cases, it has been held that a class action may be appropriate").

Cox v. McCarthy, 829 F.2d 800, 804 (9th Cir. 1987) (approving use of class device in habeas action challenging constitutionality of amendments to California Penal Code).

Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (reversing district court conclusion that a habeas class action could never be appropriate).

LoBue v. Christopher, 82 F.3d 1081, 1085 (D.C. Cir. 1996) (rejecting argument that there is no equivalent to class actions in habeas proceedings).

Bertrand v. Sava, 535 F. Supp. 1020, 1024-25 (S.D.N.Y. 1982) (granting class certification in habeas proceeding involving Haitian detainees), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982).

Gesicki v. Oswald, 336 F. Supp. 371, 374 (S.D.N.Y. 1971) (three-judge panel) (certifying class in case brought under state Habeas Corpus Act and enjoining enforcement of unconstitutional statute governing juvenile punishment).

Lacy v. Butts, No. 1:13-cv-811-RLY-DML, 2015 WL 5775497 (S.D. Ind. Sept. 30, 2015) (certifying class in habeas proceeding involving constitutional challenge to aspects sex offender statute).

Kazarov v. Achim, No. 1:02-cv-5097, 2003 WL 22956006, at *3 n.8 (N.D. Ill. Dec. 12, 2003) (granting class certification in case involving challenge to continuing detention following removal order).

Burgener v. California Adult Authority, 407 F. Supp. 555, 556 n.1 (N.D. Cal. 1976) ("It is well established that a class action may be appropriate in habeas corpus proceedings under some circumstances.").

Adderly v. Wainwright, 58 F.R.D. 389, 401 (M.D. Fla. 1972) (reviewing habeas petition from capital defendants and holding that "it would have constituted an effective denial of an opportunity for habeas corpus relief for this Court to have ruled adversely to petitioners' motion to proceed as a class in accordance with Rule 23").

Fernandez-Roque v. Smith, 91 F.R.D. 117, 122 (N.D. Ga. 1981) (granting class certification in habeas case brought on behalf of class of Cuban citizens held in detention).

Streicher v. Prescott, 103 F.R.D. 559 (D.D.C. 1984) (granting class certification in habeas proceeding involving civil commitment procedures).