IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANKLIN GOMEZ CARRANZA and
RUBEN TORRES JAUREGUI,

Plaintiffs,

v. No. 20-cv-00424 KG/KRS

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, ACTING DIRECTOR OF ICE; DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; COREY A. PRICE, FIELD OFFICE DIRECTOR FOR THE EL PASO FIELD OFFICE,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL (DOC. 4)

The Court should decline to certify a class under Federal Rule of Civil Procedure 23. First, as set forth in Defendants' Motion to Dismiss, Doc. 23, this Court lacks subject matter jurisdiction over Named Plaintiffs' claims.[1] They lack standing to bring claims for injuries they have not personally suffered and cannot rely on the injuries of absent putative class members to manufacture standing. Furthermore, to the extent Named Plaintiffs—or any unnamed class members, for that matter—do have standing based on the injuries they personally suffered, their claims must be exhausted and brought in a petition for review filed in the court of appeals. *See* 8 U.S.C. §§ 1252(a)(5), 1252(b)(9). If the Court concludes that there is no subject matter jurisdiction, it need not reach the issue of class certification.

[1] Defendants will use "Named Plaintiffs" to refer to Messrs. Gomez Carranza and Torres Jauregui. To the extent the Complaint uses the term "Plaintiffs" to refer to unnamed class members, Defendants will refer to them as "class members" to distinguish them from Named Plaintiffs.

Second, Named Plaintiffs' class certification motion cannot survive the rigorous analysis required under Rule 23. Although Named Plaintiffs seek to represent all current and future detained individuals at Otero County Processing Center ("Otero") and El Paso Service Processing Center ("El Paso"), they cannot satisfy the commonality and typicality prerequisites because of the highly individualized nature of their claims and defenses. They also cannot satisfy the adequacy requirement to the extent one Named Plaintiff's claims are moot and proposed class counsel has not demonstrated any willingness to engage in in-person communications with the class. Moreover, Named Plaintiffs cannot satisfy the requirements for certification as an injunctive relief class. Named Plaintiffs propose a sprawling nine-part injunction, including "*reasonable* accommodations" for indigent and disabled class members and "an *adequate* process" for scheduling legal calls. However, because their proposal does not describe in reasonable detail what Defendants must do to comply, the Court cannot fashion injunctive relief satisfying Federal Rule of Civil Procedure 65. Doc. 1 at 28.

FACTUAL BACKGROUND

Named Plaintiff Franklin Gomez Carranza is a 21-year-old citizen of Honduras who, at the time of the Complaint, was in the custody of U.S. Immigrations and Customs Enforcement ("ICE") at Otero and was formerly in custody at El Paso.[2] Doc. 1 ¶¶ 70-71. He has removal proceedings pending in El Paso Immigration Court. *Id*. ¶ 70. Named Plaintiff Ruben Torres Jauregui is a 29-

[2] Named Plaintiff Gomez Carranza has been released on bond. However, Defendants do not contend that his release moots the claims of unnamed class members and will therefore address his claims as of the time the Complaint was filed. *See, e.g.*, *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (noting that where named plaintiffs' claims become moot before certification, class certification can relate back to the filing of the complaint); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) (noting that "a class action would be moot if *no* named class representative with an unexpired claim remained at the time of class certification" (emphasis added)).

year-old citizen of Cuba who is also currently in ICE custody at Otero and also has removal proceedings pending in El Paso Immigration Court. *Id*. ¶¶ 77-78. Both Named Plaintiffs allege that restricted or deficient telephone service, lack of privacy, and limited availability of free calls to their attorneys hindered their ability to prepare for their removal and asylum hearings, causing them to have to seek continuances and prolong their detention. *Id*. ¶¶ 72-75; 78-82.

Named Plaintiffs allege a broad array of other telephone-related issues suffered by the class members that they do not specifically claim to have experienced, including lack of free telephone service for indigent class members, lack of free telephone service to contact government entities, and lack of information in rare languages about accessing phone services. *Id*. ¶ 7. These disparate issues, according to Named Plaintiffs, violate the putative class members' right to representation by counsel, right to a full and fair hearing, and right to petition the government for redress of their grievances. *Id*. ¶¶ 100, 106, 110. Named Plaintiffs seek to represent a class of "[a]ll current and future adults who are or will be detained in immigration custody at the El Paso Service Processing Center and the Otero Processing Center." *Id*. ¶ 84. They seek declaratory and injunctive relief, class certification, appointment of class counsel, and attorneys' fees. *Id*. at 28 (Prayer for Relief).

STANDARD OF REVIEW

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). The party seeking class certification bears the burden of proving that it meets all four of the prerequisites set forth in Federal Rule of Civil Procedure 23(a), and that the proposed class action falls within one of the three types of actions permitted under Rule 23(b). *See Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997).

Rule 23 does not set forth a mere pleading standard," and a plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The Court must conduct a "rigorous" class certification analysis, which may "entail some overlap with the merits of the plaintiff's underlying claim." *Id*. at 351. If the Court is not fully satisfied that all Rule 23 requirements are met, the Court cannot certify the class. *Id*.; *see also Vallario v. Vandehey*, 554 F.3d 1259, 1269 (10th Cir. 2009) ("[T]he district courts must decide each case on its own facts, taking into account whatever practical and prudential considerations apply to the matter at hand." (internal quotation marks omitted)).

Rule 23(a) requires a party seeking to certify a class to demonstrate that: (1) the class is so numerous that joinder is impractical ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and (4) the named plaintiffs will fairly and adequately protect the interest of the class ("adequacy of representation"). Fed. R. Civ. P. 23(a).

In addition, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart*, 564 U.S. at 345. Here, Named Plaintiffs seek certification under Rule 23(b)(2), which applies when "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)(2). "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." *Wal-Mart*, 564 U.S. at 360 (internal quotation marks omitted).

ARGUMENT

I. The Court Need Not Reach the Issue of Class Certification Because It Lacks Subject Matter Jurisdiction Over this Action.

Although Rule 23 provides that a court must determine whether to certify a class "[a]t an early practicable time," Fed. R. Civ. P. 23(c)(1)(A), "[t]he court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues *before* deciding on certification; however, such rulings bind only the named parties." Annotated Manual for Complex Litigation § 21.133 (4th ed.) (emphasis added). Because "[e]fficiency and economy are strong reasons for a court to resolve challenges to personal or subject-matter jurisdiction before ruling on certification," a court "should direct counsel to raise such challenges before filing motions to certify" and "should rule early on motions to dismiss." *Id*.; *see also* 3 Newberg on Class Actions § 7:9 (5th ed.) ("Ruling first on dispositive motions is typically a more efficient procedure and will often render moot the necessity of a court ruling on certification.") (footnotes omitted).

The Tenth Circuit has noted that there is no obligation for a district court to rule on a class certification motion before a dispositive motion. *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1207-08 (10th Cir. 2015) (affirming where the district court stayed ruling on class certification motion, granted the defendant's motion for summary judgment, and denied class certification motion as moot). Dismissal before certification is not only preferable from an efficiency standpoint, but it also preserves the claims of unnamed class members. *Reed v. Bowen*, 849 F.2d 1307, 1313 (10th Cir. 1988) (noting that "should any members of the putative class decide to assert this suit in the future, they are, of course, not bound by the dismissal of the named plaintiffs' claims); *see also Rector v. City & Cty. of Denver*, 348 F.3d 935, 949-50 (10th Cir. 2003) (after finding the named plaintiffs lacked standing to bring certain claims, decertifying class to avoid adversely affecting the interests of the unnamed class members). Accordingly, the Court

should consider Defendants' motion to dismiss before considering the motion to certify the class. If the Court concludes that dismissal of Named Plaintiffs' claims is appropriate, it need not reach the question of certification. *See, e.g., P.L. v. U.S. Immigration & Customs Enf't*, No. 1:19-CV-01336 (ALC), 2019 WL 2568648, at *4 (S.D.N.Y. June 21, 2019) (in a case raising similar access-to-counsel and due process claims, granting motion to dismiss for lack of subject matter jurisdiction without reaching the pending class certification motion).

II. The Proposed Class Does Not Meet All Four Prerequisites Under Rule 23(a).

Certification is inappropriate because Named Plaintiffs fail to show that they meet all four of Rule 23(a)'s requirements.[3]

A. The Proposed Class Does Not Satisfy the Commonality Requirement.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" *Wal-Mart*, 568 U.S. at 349-50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). It is not sufficient for a plaintiff to show that the class members "all suffered a violation of the same provision of law," since that alone "gives no cause to believe that all their claims can productively be litigated at once." *Id*. at 350. Rather, "[t]heir claims must depend upon a common contention" that "is 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." *Id*.

Here, Named Plaintiffs assert that the common question of law or fact "is whether Defendants' denial and restriction of telephone access to detained individuals in Otero and El Paso violate Plaintiffs' constitutional, statutory, and regulatory rights to access counsel." Doc. 5 at 9.

[3] Defendants do not contest that the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

Of course, "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). "[R]ather than adequately advancing a discrete question of law, plaintiffs merely attempt to broadly conflate a variety of claims to establish commonality via an allegation of 'systematic failures.'" *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999).

Indeed, the Complaint alleges a laundry list of alleged telephone-related issues that go far beyond the overarching category of "denial and restriction of telephone access." For example, the Complaint alleges the following injuries suffered by various categories of detainees:

- Represented class members complain about noise, call quality, and lack of privacy when speaking with their attorneys. *Id.* ¶¶ 33-36.
- Indigent class members complain that phone calls are too expensive. Doc. 1 ¶ 41.
- Class members calling numbers with an automated greeting or voicemail tree complain about getting disconnected. *Id.* ¶¶ 48-49.
- Class members needing interpreters complain about lack of three-way calling. *Id.* ¶ 50.
- Disabled class members complain about lack of accommodations. *Id.* ¶ 55.
- Class members who speak rare languages complain about lack of instructions in their language. *Id.*
- Unrepresented class members complain about difficulty obtaining counsel, gathering evidence, and seeking "non-immigration attorney assistance." *Id.* ¶¶ 56-58.

Given the sheer breadth of these allegations, Named Plaintiffs cannot show that the class members have "suffered the same injury," or that there is a common question whose resolution "will resolve an issue that is central to each one of the claims in one stroke." *Wal-Mart*, 568 U.S. at 349-50 (internal quotation marks omitted).

Furthermore, the claims relating to the denial of the right to counsel and the right to a full and fair hearing sound in due process, which the Supreme Court has cautioned requires an individualized analysis. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (directing court on

remand to consider "whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause claims" given that due process "'calls for such procedural protections as the particular situation demands'" (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). To prevail on a due process claim, a plaintiff must show prejudice. *See Michelson v. I.N.S.*, 897 F.2d 465, 467 (10th Cir. 1990) (Fifth Amendment right-to-counsel); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 576 (10th Cir. 2017) (Fifth Amendment right to a full-and-fair removal proceeding). Whether there is prejudice depends on the facts and circumstances of each case. For example, in *Vilchez v. Holder*, the petitioner alleged that a video-conferenced immigration hearing violated his right to due process and right to a fair hearing pursuant to 8 U.S.C. § 1229a(b)(4)(B).[4] 682 F.3d 1195, 1199-1200 (9th Cir. 2012). The Ninth Circuit noted that such claims "must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice suffered by the petitioner." *Id*.

Because the due process claims require an individualized analysis, they are not susceptible to classwide resolution in one stroke. The Court should therefore find that Named Plaintiffs have not met the commonality requirement of Rule 23(a)(2).

B. Nor Does the Proposed Class Satisfy the Typicality Requirement.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The commonality and typicality requirements "tend to

[4] The petitioner in *Vilchez* filed a petition for review directly in the Ninth Circuit Court of Appeals rather than seeking review by the district court as Named Plaintiffs do here. *See* 682 F.3d at 1198. As Defendants argue in their motion to dismiss, challenges to due process relating to removal hearings may not be brought in district court because 8 U.S.C. § 1252(b)(9) channels such claims into the courts of appeals through the petition for review process. As *Vilchez* demonstrates, an alien does not lack the ability to challenge due process violations simply because the district court does not get the first bite at review.

merge." *Wal-Mart*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157-58 n.13). "[D]iffering fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). A named plaintiff is not typical if he "is subject to a unique defense that is likely to become a major focus of the litigation." *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006).

Here, Named Plaintiffs are two represented aliens in removal proceedings. Doc. 1 ¶¶ 70, 78. They allege that the poor telephone service at Otero has injured them by "interfering with their ability to access counsel, preventing them from preparing for their immigration court hearings, and necessitating motions to continue those hearings, thus prolonging their detention in ICE custody." Doc. 5 at 7. Named Plaintiffs' injuries do not appear to be typical of the class of all detainees at El Paso and Otero, however. For example, Named Plaintiffs allege that only 36% of detainees nationwide are represented by counsel. Doc. 1 ¶ 68. Assuming that this figure is representative of El Paso and Otero, the majority of class members are not represented. Moreover, although the Complaint makes wide-ranging allegations regarding class members who are disabled, indigent, or speak rare languages, Named Plaintiffs do not allege that they experience similar issues as such class members. Named Plaintiffs' claims may also be subject to unique defenses. Since due process requires a showing of prejudice, whether their claims are meritorious will depend on the facts and circumstances of their particular hearings, as well as whether any deficiencies resulted from telephone access issues or the performance of their counsel notwithstanding such issues.

Commonality and typicality rise and fall together. *See Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) ("In determining whether the typicality and commonality requirements have been fulfilled, either common questions of law or fact presented by the class will be deemed

sufficient."). For the same reasons that Named Plaintiffs cannot show a common question of law or fact, they also cannot show that their claims and defenses are typical of the class they seek to represent. Consequently, the Court should find that they do not satisfy the typicality requirement of Rule 23(a)(3).

C. Named Plaintiff Gomez Carranza and Proposed Class Counsel Have Not Met Their Burden to Show They Will Adequately Represent the Class.

Rule 23(a)(4) requires that "the representative parties . . . fairly and adequately protect the interests of the class." The adequacy requirement tends to merge with the commonality and typicality requirements. *See Falcon*, 457 U.S. at 157-58 n.13. "'When the court reviews the quality of the representation under Rule 23(a)(4), it will inquire not only into the character and quality of the named representative party, but also it will consider the quality and experience of the attorneys for the class.'" *Lewis v. Clark*, 577 F. App'x 786, 793 (10th Cir. 2014) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1769.1 (3d ed.2005) (footnote omitted)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002) (internal quotation marks omitted).

Here, Named Plaintiff Gomez Carranza is now out on bond, but the declaration he filed was drafted before his release. *See* Doc. 6. The Court should therefore consider whether Named Plaintiff Gomez Carranza will vigorously prosecute the action on behalf of the class given the change in his circumstances. *See, e.g.*, *Reed v. Bowen*, 849 F.2d 1307, 1312 (10th Cir. 1988) (noting the need for "the district court to determine whether mooted named plaintiffs will remain adequate class representatives"). Furthermore, for the reasons stated below in Section IV, the Court

should also consider whether proposed class counsel Orrick will prosecute this action vigorously in light of its attorneys' apparent reluctance or inability to travel to Otero and El Paso in person, even though telephone communications with their clients is allegedly inadequate.

III. The Proposed Class Does Not Satisfy the Requirements for Certification under Rule 23(b)(2).

The proposed class must also satisfy one of the Rule 23(b) requirements for certification. Here, Named Plaintiffs rely on Rule 23(b)(2), which requires that they show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Ensuring the provisions of Rule 23(b)(2) are met requires the district court take a close look at the relationship between a proposed class, its injuries, and the relief sought." *Vallario*, 554 F.3d at 1267 (internal quotation marks omitted). "Ultimately, if equitable relief is not uniformly applicable to the class, and thus time-consuming inquiry into individual circumstances or characteristics is required, little is gained from the case proceeding as a class action." *Id*.

"Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification." *Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008). If the class is cohesive, "any classwide injunctive relief can satisfy the limitations of Federal Rule Civil Procedure 65(d)—namely, the requirement that it 'state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required.'" *Id*. (quoting Fed. R. Civ. P. 65(d)(1) (alteration in the original)). Moreover, cohesiveness among the class members obviates the need for "relief specifically tailored to each class member . . . to correct the allegedly wrongful conduct of the defendant." *Id*. (internal quotation marks omitted).

The Motion for Class Certification describes the proposed class's injuries at a high level of abstraction to make them appear to be uniform and applicable to the entire class: "Defendants do not provide telephone access for class members to contact and effectively communicate with their attorneys." Doc. 5 at 12. However, the myriad injuries alleged in the Complaint belie the assertion that the class—consisting of all present and future detainees at Otero and El Paso—is cohesive. As noted above in Section II.A., these alleged injuries range from complaints that phone calls are too expensive for indigent class members to concerns that class members who speak rare languages lack translated instructions. Given all of these disparate injuries alleged by different groups of class members, the proposed class does not satisfy Rule 23(b)(2)'s requirement that "class members' injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members." *Shook*, 543 F.3d at 604.

To satisfy the cohesiveness requirement, "a motion for class certification must describe the equitable relief sought in sufficient detail that the district court can conceive of an injunction that comports with the requirements of Rules 23(b)(2) and 65(d)." *Vallario*, 554 F.3d at 1267-68; *see also Shook*, 543 F.3d at 605 n.4. Here, the motion for class certification describes the equitable relief sought as follows:

> The injunctive relief specifically includes that Defendants provide free, confidential legal calls, and to make reasonable accommodations for non-legal calls for indigent class members. Compl. at pages 28-29. The injunctive relief would also include requiring Defendants to ensure the privacy of legal calls and no obstructive background noise. *Id*. Further, the injunctive relief requested includes Defendants assisting class members in penetrating telephone voicemail tress [*sic*] for legal calls, leaving voicemails for legal calls, providing class members with adequate notice about the communication options available to them, and providing accommodations for non-English speaking class members, illiterate class members, and class members with disabilities.

Doc. 5 at 13.

The relief sought by the proposed class bears many similarities to the relief sought in *Shook*. There, the named plaintiffs sought to represent a class of current or future El Paso County Jail inmates with serious mental health needs, or alternatively, "all persons who are now, or in the future will be, confined in the El Paso County Jail." *Shook*, 543 F.3d at 602. They sought "an injunction establishing standards across a wide range of areas affecting mentally ill inmates." *Id.* In affirming the district court's denial of class certification under Rule 23(b)(2), the Tenth Circuit noted that much of the relief requested would require "the district court to craft an injunction that takes into account the specific circumstances of individual inmates' plights." *Id*. at 605. For example, the plaintiffs' request for "adequate screening and precautions to prevent self-harm and suicide" would require individualized inquiries into "how and in what ways individual inmates are predisposed to harm themselves." *Id*. Moreover, the plaintiffs "eschewed any effort to give content to what it would mean to provide adequate mental health staff, adequate screening, or an adequate system for delivering medication." *Id*. at 606. Because Rule 65(d) requires the injunction to be sufficiently specific that the court and defendant can evaluate compliance, "a class certification motion requesting injunctive relief that simply prescribes 'adequate' or 'appropriate' levels of services fails to indicate how final injunctive relief may be crafted to 'describe[ ] in reasonable detail . . . the acts . . . required.'" *Id*. (quoting Fed. R. Civ. P. 65(d)).

Here, as in *Shook*, Named Plaintiffs "seek an injunction ordering a wide range of behavior conformed to an essentially contentless standard, bounded only by reference to ambiguous terms like 'reasonable' behavior or 'adequate' treatment." *Id*. at 608. For example, they seek telephone access sufficient to "receive *adequate* representation from" their attorneys, "*reasonable* accommodations for non-legal calls for indigent class members," "*adequate* notice about the communication options available to them," an "*adequate* process by which immigration attorneys

can schedule legal calls," and the "ability to have calls with attorneys in a place of *reasonable* quiet." Doc. 5 at 10, 13 (emphasis added); Doc. 1, Prayer for Relief ¶ 4 (emphasis added). Such language fails to give the Court "any indication as to how injunctive relief can be crafted to satisfy the specificity requirements of Rule 65(d)." *Shook*, 543 F.3d at 607-08.

Because Named Plaintiffs "seek to enjoin a 'wide range of behavior' against the 'broad class framed in the complaint,'" yet fail to "'give content' to the equitable relief they request," this Court should deny certification under Rule 23(b)(2). *Vallario*, 554 F.3d at 1268 (quoting *Shook*, 543 F.3d at 605, 607).

IV. The Court Should Not Appoint Orrick as Class Counsel Without a Stronger Showing As to the Resources It Is Willing to Commit to Representing the Class.

Named Plaintiffs seek to appoint attorneys from the firm Orrick as class counsel pursuant to Rule 23(g)(1), which requires the Court to consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Defendants do not contest that Orrick satisfies the first three requirements. *See* Pavone Decl., Doc. 9. However, Orrick does not explain what resources it will commit to representing the class other than to state in conclusory fashion that it "intends to commit all necessary resources to do so." *Id*. ¶ 9; *see also* Doc. 5 at 14. The entire premise of this case is that the proposed class cannot adequately communicate with their attorneys by telephone, and in-person visitation by their attorneys is too time-consuming and expensive to be a viable alternative. If attorneys cannot reach their clients by telephone, as the Complaint alleges, it is unclear that the Orrick attorneys can adequately represent the class unless they are willing to visit their clients in person.

According to the Complaint, "[i]n-person visits by out-of-state counsel to El Paso or Otero often are prohibitively expensive and unreasonably time-consuming." Doc. 1 ¶ 4. "For example, in order for a *pro bono* attorney based in New York to physically visit a detained client in El Paso, he or she would have to take a 1+ stop flight totaling approximately 16 roundtrip travel hours and costing upwards of $400. To visit a detained client in Otero, a New York-based attorney would be forced to add the time and expense of renting a car and driving from El Paso to Otero." *Id*. ¶ 61. Moreover, "[w]ith COVID-19-related mandated remote working and social distancing policies, in-person visitation is all but impossible." *Id*. ¶ 62.

The Orrick attorneys listed in the Pavone Declaration are all based on the East Coast (New York and Boston), according to Orrick's website (www.orrick.com). Named Plaintiffs have not explained whether their proposed choice of class counsel would be willing to travel all the way to El Paso or Otero if the need arises.[5] Indeed, it appears that no Orrick attorneys have visited either facility in person. *See* Pavone Decl., Doc. 9 ¶ 8 (noting that Orrick investigated this matter by "research[ing] the applicable laws and correspond[ing] with various interested and knowledgeable parties"). Nor has Orrick explained what "COVID-19-related mandated remote working and social distancing policies" would prevent their attorneys from making an in-person visit. In-person attorney visits are still available at El Paso and Otero, and the Orrick attorneys do not specifically allege that they are among the attorneys who cannot visit because they lack personal protective equipment. Doc. 1 ¶¶ 52, 80.

[5] Although Orrick did represent a similar class in an action in the Northern District of California, Orrick has an office in San Francisco, the attorneys representing the class were based in San Francisco, and the facilities at issue in that case were "21, 83, 123, and 282 driving miles from San Francisco," *Lyon v. U.S. Immigration & Customs Enf't*, 171 F. Supp. 3d 961, 964 (N.D. Cal. 2016), which is not as arduous a journey as Named Plaintiffs characterize for a New York-based *pro bono* attorney to come to Otero.

Because proposed class counsel have not presented evidence that they will devote the time and effort to make in-person visits when needed, they have not satisfied the requirements of Rule 23(g)(1), and the Court should decline to appoint them as class counsel. *See, e.g.*, *Goers v. L.A. Entm't Grp., Inc.*, No. 2:15-CV-412-FTM-99CM, 2017 WL 78634, at *6 (M.D. Fla. Jan. 9, 2017) (declining to appoint class counsel "[a]bsent assurances" that counsel had the necessary resources to devote to the action); *Fisher v. United States*, 69 Fed. Cl. 193, 201 (2006) (declining to appoint class counsel when the plaintiff "failed to present the Court with sufficient evidence" to show, *inter alia*, that counsel had resources necessary to litigate the case).

V. Denial of Class Certification Does Not Deprive Named Plaintiffs and the Unnamed Class Members of a Remedy.

Named Plaintiffs argue that class certification is appropriate because "Plaintiffs cannot individually challenge ICE's systemic denial of telephone access," and class certification "thus provides the only viable means to adjudicate the underlying claims." Doc. 5 at 5.

The Tenth Circuit has cautioned district courts "against giving undue weight to [plaintiffs'] claims that they will be unable to obtain judicial review of [defendants'] jail practices absent certification of their requested class." *Vallario*, 554 F.3d at 1269. As the Tenth Circuit noted in *Shook*, "[n]either does the inability of plaintiffs to have *this particular class* certified defeat their ability to have these issues reviewed either individually or even through the class action mechanism." 543 F.3d at 610-11.

The sole consideration for the Court is whether this particular class satisfies the requirements of Rule 23, without regard to other avenues for relief. "Only if the district court is convinced that the requirements of the federal rules are satisfied may it certify a class." *Vallario*, 554 F.3d at 1269.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Class Certification and Appointment of Class Counsel (Doc. 4).

Respectfully submitted.

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/s/ Christine H. Lyman 6/29/2020
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, Defendants filed through the United States District Court CM/ECF System the foregoing document, causing it to be served by electronic means on all counsel of record.

/s/ Christine H. Lyman 6/29/2020
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