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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **EASTERN DIVISION – RIVERSIDE**

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12 STEPHENSON AWAH TENENG,  
13 MARCEL NGWA, ANKUSH KUMAR,  
14 GURJINDER SINGH, ATINDER PAUL  
15 SINGH, NOE MAURICIO GRANADOS  
16 AQUINO, and all others similarly situated,

17 Plaintiffs,

18 v.

19 DONALD J. TRUMP, President of the  
20 United States,  
21 KIRSTJEN NIELSEN, Secretary  
22 Department of Homeland Security;  
23 RONALD D. VITIELLO, Acting Director,  
24 Immigration and Customs Enforcement;  
25 DAVID MARIN, Field Office Director, Los  
26 Angeles Field Office of Immigration and  
27 Customs Enforcement;  
28 JEFFERSON BEAUREGARD SESSIONS,  
III, U.S. Attorney General;  
HUGH J. HURWITZ, Acting Director,  
Federal Bureau of Prisons,  
DAVID SHINN, Warden, FCI Victorville  
Medium Security Prison I/II, in their official  
capacities only,

Defendants.

Case Number:

5:18-cv-01609-JGB-KK

**CLASS ACTION**

**PLAINTIFFS’ NOTICE OF  
MOTION AND MOTION  
FOR CLASS  
CERTIFICATION;  
MEMORANDUM OF  
POINTS AND  
AUTHORITIES**

DATE: Oct. 9, 2018

TIME: 9:00 a.m.

JUDGE: Hon. Jesus G. Bernal

CRTRM: 1

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26 Attorneys for Plaintiffs, on *behalf of*  
27 *themselves and others similarly situated*

28

1 TO THE HONORABLE COURT, ALL PARTIES, AND THEIR  
2 ATTORNEYS OF RECORD HEREIN:

3 NOTICE IS HEREBY GIVEN that on October 9, 2018 at 9:00 am, or as  
4 soon thereafter as the matter may be heard by the above Court, located at Riverside,  
5 California, Plaintiffs Stephenson Awah Teneng, Marcel Ngwa, Ankush Kumar,  
6 Gurjinder Singh, Atinder Paul Singh, and Noe Mauricio Granados Aquino, on  
7 behalf of themselves and all others similarly situated, will and hereby do move the  
8 Court for entry of an Order:

9 1. Certifying that this action is maintainable as a class action under  
10 Federal Rules of Civil Procedure, Rules 23(a), 23(b)(1), and 23(b)(2);<sup>1</sup>

11 2. Certifying a Plaintiff Class (the “Civil Detainee Class”) consisting of:  
12 “All persons who are now, or in the future will be, in the legal custody of the U.S.  
13 Immigrations and Customs Enforcement (“ICE”) and detained at Federal  
14 Correctional Institution (“FCI”) Victorville”;

15 3. Certifying Plaintiffs Stephenson Awah Teneng, Marcel Ngwa, Ankush  
16 Kumar, Gurjinder Singh, Atinder Paul Singh, and Noe Mauricio Granados Aquino  
17 as representatives of the Civil Detainee Class;

18 4. Certifying a Plaintiff Subclass (the “Religious Freedom Subclass”) consisting of: “All religious persons who are now, or in the future will be, in the  
19 legal custody of ICE and detained at FCI Victorville”;

21 5. Certifying Plaintiffs Marcel Ngwa, Gurjinder Singh, Atinder Paul  
22 Singh, and Noe Mauricio Granados Aquino as representatives of the Religious  
23 Freedom Subclass;

24 6. Appointing Plaintiffs’ counsel of record as Class Counsel for the  
25

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26 <sup>1</sup> Pursuant to Local Rule 7-3, this motion is made following the attempts of  
27 Plaintiffs’ Counsel to conference with Counsel for Defendants regarding the  
28 motion. *See* Declaration of Donald Specter, (“Specter Dec.”), filed herewith, ¶¶ 6,  
8, Exs. 1, 3. Counsel for Defendants did not respond to repeated requests that they  
meet with Plaintiffs’ counsel to discuss the motion. *Id.* ¶¶ 7-8, Ex. 2.

1 Plaintiff Class and Subclass; and,

2 7. Directing the parties, pursuant to Rule 23(c)(2)(A), to confer and  
3 submit a proposed notice to the Plaintiff Class and Subclass, and the proposed  
4 method of distribution of that notice, within 30 days of the Order certifying the  
5 Plaintiff Class and Subclass.

6 This Motion is based on:

7 1. Plaintiffs' Complaint and the sworn Declarations of Plaintiffs and  
8 detainees filed thereto (Doc. 1; Exhibits 1 through 20);

9 2. This Notice of Motion and Motion and the accompanying  
10 Memorandum of Points and Authorities;

11 3. The concurrently filed Declarations of Corene Kendrick, Donald  
12 Specter, David Fathi, Timothy Fox, and Nancy Harris, and any exhibits filed  
13 thereto; and

14 4. Such other oral or documentary evidence as may be presented at the  
15 hearing of this Motion.

16 Dated: September 4, 2018

Respectfully submitted,

17

/s/ Corene Kendrick  
Corene Kendrick, Cal. #226642  
Attorney for Plaintiffs

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6 BOP PS P5310.07, Psychology Services Manual  
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 3 (5th ed. June 2018)..... 13

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5 District of Columbia Corrections Information Council,  
 6 *Inspection Report: FCI Victorville Medium II*, (Jan. 7, 2016)  
 7 (available at <https://cic.dc.gov/node/1133737>)..... 1

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 9 Prisoners?*, Rolling Stone (July 3, 2018),  
 10 [https://www.rollingstone.com/culture/culture-features/immigrant-detainees-  
 victorville-california-prisoners-695215/](https://www.rollingstone.com/culture/culture-features/immigrant-detainees-victorville-california-prisoners-695215/) ..... 2

11 Kate Morrissey, *ICE Is Sending 1,000 Immigrant Detainees to Victorville Prison,*  
 12 *San Diego Union-Tribune* (June 7, 2018),  
 13 [http://www.sandiegouniontribune.com/  
 news/immigration/sd-me-victorville-immigrants-20180607-story.html](http://www.sandiegouniontribune.com/news/immigration/sd-me-victorville-immigrants-20180607-story.html) ..... 1

14 Sarah Parvini, *A Growing Number of California Detainees Are Indians Crossing  
 15 Through Mexico To Seek Asylum*, *Los Angeles Times* (Aug. 14, 2018),  
 16 [http://www.latimes.com/local/lanow/la-me-indian-immigrants-20180813-  
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 18 Prisons’ Medical Staffing Challenges* (March 2016)  
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 21 (available at  
 22 [https://www.bop.gov/locations/institutions/vim/VIX\\_aohandbook.pdf](https://www.bop.gov/locations/institutions/vim/VIX_aohandbook.pdf)) ..... 6

23 Lauren Weber, *Detainee Attempts Suicide After Trump Administration Jams  
 24 Migrants Into Troubled Prison*, *The Huffington Post* (Aug. 1, 2018),  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Motion for Class Certification is filed by Stephenson Awah Teneng,  
4 Marcel Ngwa, Ankush Kumar, Gurjinder Singh, Atinder Paul Singh, and Noe  
5 Mauricio Granados Aquino, (hereinafter “Plaintiffs”) on behalf of themselves and  
6 all others similarly situated, on the grounds this action should be maintained as a  
7 class action under Federal Rules of Civil Procedure (“Rule[s]”) 23(a), 23(b)(1), and  
8 23(b)(2). Plaintiffs seek certification of a Class (“Civil Detainee Class”) of:

9 All persons who are now, or in the future will be, in the legal custody of  
10 the U.S. Immigrations and Customs Enforcement (“ICE”) and detained  
11 at Federal Correctional Institution (“FCI”) Victorville.

12 Further, Plaintiffs Ngwa, Gurjinder Singh, Atinder Paul Singh, and Granados  
13 Aquino seek certification of a Subclass (“Religious Freedom Subclass”) of:

14 All religious persons who are now, or in the future will be, in the legal  
15 custody of ICE and detained at FCI Victorville.

16 **II. STATEMENT OF FACTS**

17 **A. The Incarceration of Immigrant Detainees at Victorville Prison**

18 Victorville is a medium security prison operated by the Bureau of Prisons  
19 (“BOP”) that is more dangerous than other medium security prisons. *See* District of  
20 Columbia Corrections Information Council, *Inspection Report: FCI Victorville*  
21 *Medium II*, (Jan. 7, 2016) (available at <https://cic.dc.gov/node/1133737>) at 3. BOP  
22 closed nine housing units at the prison in early 2018 because it could not safely  
23 operate with available staff. *See* Kate Morrissey, *ICE Is Sending 1,000 Immigrant*  
24 *Detainees to Victorville Prison*, San Diego Union-Tribune (June 7, 2018).<sup>2</sup>

25 On June 8, 2018, ICE began to transfer approximately 1,600 immigrant  
26 detainees from ICE and Customs and Border Patrol (“CBP”) detention facilities to  
27 five federal prisons, including almost 1,000 men to Victorville. BOP reopened the

28 <sup>2</sup> Available at <http://www.sandiegouniontribune.com/news/immigration/sd-me-victorville-immigrants-20180607-story.html>.

1 closed housing units at the prison, but did not hire sufficient additional staff to  
 2 address the chronic understaffing and/or to provide essential services to detainees.  
 3 *See* Lauren Gill, *As Immigrant Detainees Are Moved to Prisons, What Happens to*  
 4 *the Prisoners?*, Rolling Stone (July 3, 2018); *see also* Lauren Weber, *Detainee*  
 5 *Attempts Suicide After Trump Administration Jams Migrants Into Troubled Prison*,  
 6 *Huffington Post* (Aug. 1, 2018) (“HuffPost Article”) (as of August 1, 2018, no new  
 7 permanent medical staff has been hired, and only seven new officers were added).<sup>3</sup>  
 8 ICE and BOP entered into a one year Inter-Agency Agreement (“IAA”) on June 11,  
 9 2018 to incarcerate up to 1,000 male immigrants at Victorville. *See* Declaration of  
 10 Corene Kendrick (hereinafter “Kendrick Dec.”), Ex. 1 at ¶ 3.

## 11 **B. Systemic Policies and Practices That Affect Immigrant Detainees**

12 According to the IAA, “[w]hile in the BOP custody, a transferred detainee  
 13 shall be subject to the BOP’s rules and regulations consistent with BOP’s policies  
 14 for pre-trial detainees and the laws, rules and regulations of the sending party.”  
 15 Kendrick Dec. Ex. 1 at ¶ 4.D.3.a; *see also Franco-Gonzalez v. Nielsen*, Case No.  
 16 2:10-cv-02211-DMG-DTB, Docket 1006-1 (C.D. Cal. Aug. 9, 2018) (Declaration  
 17 of Dr. Deborah G. Schult, BOP Assistant Director of Health Services) at ¶ 3.<sup>4</sup> By  
 18 the plain language of the IAA, it is undisputed that Victorville operated, and  
 19 continues to operate, as a prison. Both the policies and practices violate detainees’  
 20 constitutional rights.

### 21 **1. Health Care Policies and Practices**

22 BOP has systemwide policies that dictate the delivery of health care to  
 23 persons incarcerated in federal prisons.<sup>5</sup> “The IAA states “[t]he scope of in-house  
 24

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25 <sup>3</sup> Available at <https://www.rollingstone.com/culture/culture-features/immigrant-detainees-victorville-california-prisoners-695215/> and  
 26 [https://www.huffingtonpost.com/entry/victorville-prison-suicide-attempt-migrants\\_us\\_5b6267cce4b0de86f49dcbda](https://www.huffingtonpost.com/entry/victorville-prison-suicide-attempt-migrants_us_5b6267cce4b0de86f49dcbda).

27 <sup>4</sup> The BOP’s Program Statement (“PS”) 7331.04, “Pretrial Inmates” is  
 available at [https://www.bop.gov/policy/progstat/7331\\_004.pdf](https://www.bop.gov/policy/progstat/7331_004.pdf).

28 <sup>5</sup> The policies (referred to as Program Statements) are available on the BOP’s  
 website at [https://www.bop.gov/resources/policy\\_and\\_forms.jsp](https://www.bop.gov/resources/policy_and_forms.jsp) (last accessed

1 health care services will be the same as afforded to BOP inmates as determined by  
 2 BOP policies and clinical guidance.” *Id.* at ¶ 4.F.7.<sup>6</sup> Both the use of BOP’s  
 3 systemwide policies, and the practice of disregarding the policies’ requirements,  
 4 result in constitutional deprivations for class members.

5 For example, BOP’s Patient Care policy acknowledges, “[i]nsufficient  
 6 staffing will have an adverse effect on the quality, continuity, and cost-effectiveness  
 7 of health care.” BOP PS 6031.04 at § 12.a.(1).

8 [R]ecruitment and retention of medical professionals is a serious  
 9 challenge for the BOP, in large part because the BOP competes with  
 10 private employers that offer higher pay and benefits. We further found  
 11 that the BOP has not proactively identified and addressed its medical  
 recruiting challenges in a systemic way. Rather, it has attempted in an  
 uncoordinated fashion to react to local factors influencing medical  
 recruiting at individual institutions.

12 U.S. Dep’t of Justice, Office of Inspector General, *Review of the Federal Bureau of*  
 13 *Prisons’ Medical Staffing Challenges* (March 2016) at i-ii (available at  
 14 <https://oig.justice.gov/reports/2016/e1602.pdf>). The federal government hiring  
 15 freeze imposed by Defendant Trump compounded the shortage, and there is a  
 16 woefully low number of health care staff to serve the hundreds of new detainees.<sup>7</sup>

17 \_\_\_\_\_  
 18 Aug. 14, 2018). Specifically:

- 19 • Patient Care (PS 6031.04):  
[https://www.bop.gov/policy/progstat/6031\\_004.pdf](https://www.bop.gov/policy/progstat/6031_004.pdf)
- 20 • Health Services Administration (PS 6010.05):  
[https://www.bop.gov/policy/progstat/6010\\_005.pdf](https://www.bop.gov/policy/progstat/6010_005.pdf)
- 21 • Psychiatric Evaluation and Treatment (PS 6010.03):  
[https://www.bop.gov/policy/progstat/6010\\_003.pdf](https://www.bop.gov/policy/progstat/6010_003.pdf)
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[https://www.bop.gov/policy/progstat/6340\\_004.pdf](https://www.bop.gov/policy/progstat/6340_004.pdf)
- 23 • Psychology Services Manual (PS P5310.07):  
[https://www.bop.gov/policy/progstat/5310\\_017.pdf](https://www.bop.gov/policy/progstat/5310_017.pdf)
- 24 • Dental Services (PS 6400.03):  
[https://www.bop.gov/policy/progstat/6400\\_003.pdf](https://www.bop.gov/policy/progstat/6400_003.pdf)
- 25 • Pharmacy Services (PS P6360.01):  
[https://www.bop.gov/policy/progstat/6360\\_001.pdf](https://www.bop.gov/policy/progstat/6360_001.pdf)
- 26 • Infectious Disease Management (PS 6190.04):  
[https://www.bop.gov/policy/progstat/6190\\_004.pdf](https://www.bop.gov/policy/progstat/6190_004.pdf)

27 <sup>6</sup> In contrast, “ICE is responsible for providing the transportation,  
 supervision, and funding for outside medical care of ICE detainees. . .” *Id.* at  
 ¶ 4.F.1.

28 <sup>7</sup> See HuffPost Article, (“Staffers at Victorville have been sounding the alarm  
 for months that inadequate medical staffing – the prison effectively has one doctor

1 Detainees received minimal or no medical, dental, or mental health  
 2 screenings upon their arrival at Victorville. *See* Doc. 1-6 at ¶¶ 15-16; Doc. 1-10 at ¶  
 3 12; Doc. 1-15 at ¶ 5; Doc. 1-19 at ¶ 6.<sup>8</sup> For those who received intake health care  
 4 screening, or any subsequent health care, they must communicate with medical staff  
 5 who speak only English without a translator, or rely on other detainees who may  
 6 speak some English. *See* Doc. 1-2 at ¶ 16; Doc. 1-3 at ¶ 6; Doc. 1-7 at ¶ 4; Doc. 1-9  
 7 at ¶ 16; Doc. 1-14 at ¶ 5-6; Doc. 1-17 at ¶ 8.<sup>9</sup>

8 Furthermore, there are no forms or clear process in place to request health  
 9 care other than an emergency button in the cells. When the men have pushed the  
 10 emergency buttons, they received no care. *See* Doc. 1-2 at ¶¶ 11-12; Doc. 1-3 at ¶ 5;  
 11 Doc. 1-8 at ¶ 13; Doc. 1-9 at ¶ 15; Doc. 1-10 at ¶ 11; Doc. 1-11 at ¶¶ 6-8; Doc. 1-15  
 12 at ¶ 24. People seeking care report punishment of being locked in their cells  
 13 ostensibly for a “quarantine” even when they do not have an infectious disease, or  
 14 threats of punishment. *See* Doc. 1-1 ¶¶ 13-18; Doc. 1-13 at ¶ 3.

15 Detainees do not receive necessary medications. *See* Doc. 1-3 at ¶ 5-7; Doc.  
 16 1-15 at ¶¶ 3, 5, 6-8. *Id.* at ¶¶ 48, 50. They describe a myriad of medical, dental, and  
 17 mental health needs to staff, but are ignored or experience long delays before  
 18 receiving a perfunctory examination. *See* Doc. 1-1 at ¶ 17; Doc. 1-2 at ¶¶ 10, 13,  
 19 15; Doc. 1-6 at ¶¶ 11, 14-16; Doc. 1-7 at ¶¶ 7-12; Doc. 1-8 at ¶ 14; Doc. 1-9 at  
 20 ¶¶ 15-16; Doc. 1-14 at ¶ 7; Doc. 1-15 at ¶¶ 16-18, 25; Doc. 1-17 at ¶ 16; Doc. 1-18

21 \_\_\_\_\_  
 22 for roughly 4,300 inmates and detainees because its second doctor is a clinical  
 23 director – was a danger to inmates and workers. And that was before 1,000  
 24 detainees showed up June 8. The influx of detainees – whose numbers have ebbed  
 25 and flowed as migrants have been sent back to ICE and new people have been  
 26 processed in – has overwhelmed an already overtaxed medical department.”)

27 <sup>8</sup> Under the Court Implementation Plan Order in *Franco-Gonzalez v. Nielsen*,  
 28 Case No. 2:10-cv-02211-DMG-DTB, Dkt. 786), ICE must provide mental health  
 screening to all immigrant detainees within 14 days. In a recent filing with the  
 Court, regarding ICE detainees at Victorville and two other BOP facilities,  
 Defendant Sessions admitted there are differences between the ICE and BOP  
 screenings. *See id.*, Dkt. 1005 (C.D. Cal. Aug. 6, 2018) (Status Report) at 12-13.

<sup>9</sup> The Inter-Agency Agreement states that “ICE agrees to assist in the  
 translation of detainee publications, such as the Admission and Orientation  
 Handbook, applicable policies and procedures.” Kendrick Dec. Ex. 1 at ¶ 4.D.3.e.

1 at ¶¶ 3, 7; Doc. 1-19 at ¶¶ 7-9; Doc. 1-20 at ¶¶ 2, 4, 8-9.

## 2 **2. Food Service Policies and Practices**

3 The “Food Service Manual” governs food service to people incarcerated in  
4 BOP prisons. PS P4700.06, ([https://www.bop.gov/policy/progstat/4700\\_006.pdf](https://www.bop.gov/policy/progstat/4700_006.pdf)).

5 The policies require, *inter alia*, that “meals contain a variety of nutrient-dense foods  
6 among the basic food groups,” “[n]o more than 14 hours may elapse between the  
7 evening and breakfast meals,” and that people have at least 20 minutes to eat. *Id.*  
8 Ch. 2 §§ 7, 18(h).

9 Yet Defendants routinely and systemically disregard these written policies in  
10 practice. Defendants deny detainees adequate nutrition and adequate time to eat the  
11 substandard food. Meals are small, inadequate, of poor nutritional value, and  
12 inedible. *See* Doc. 1-8 at ¶¶ 15, 17; Doc. 1-9 at ¶ 10; Doc. 1-10 at ¶ 8; Doc. 1-15 at  
13 ¶ 21. Detainees are given only minutes to eat their meals, and then custody officers  
14 hustle them out of the chow hall and make them throw away any uneaten food. *See*  
15 Doc. 1-6 at ¶¶ 20-21; Doc. 1-7 at ¶ 5; Doc. 1-8 at ¶ 15; Doc. 1-10 at ¶ 8; Doc. 1-17  
16 at ¶ 12. Because of these inadequate and sometimes inedible meals, Plaintiffs and  
17 detainees imprisoned at Victorville are hungry and have lost weight. *See* Doc. 1-4 at  
18 ¶ 11; Doc. 1-8 at ¶ 15; Doc. 1-10 at ¶ 8; Doc. 1-11 at ¶ 5; Doc. 1-15 at ¶ 22.

## 19 **3. Religious Exercise Policies and Practice**

20 BOP has systemwide policies that address prisoners’ and pretrial detainees’  
21 religious-exercise rights. *See* BOP PS P5360.09 “Religious Beliefs and Practices”  
22 ([https://www.bop.gov/policy/progstat/5360\\_009\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5360_009_CN-1.pdf)). Under the policy,  
23 “[a]uthorized congregate services will be made available for all inmates weekly[.]”  
24 *Id.* § 548.10.<sup>10</sup> Personal property may include items such as rosaries, prayer beads,

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26 <sup>10</sup> The Pretrial Inmates policy states, “pretrial inmates may be allowed the  
27 opportunity to participate in religious programs with convicted inmates. Staff shall  
28 ensure that pretrial inmates who do not participate in religious programs with  
convicted inmates have access to other religious programs.” *See* PS 7331.04, *supra*  
at § 551.110.

1 oils, prayer rugs, and religious medallions, among other items, as well as religious  
2 texts, *id.* § 548.16(a), (b), and policy allows religious headwear such as yarmulkes,  
3 kufis, or turbans. *Id.* § 548.16(b).<sup>11</sup>

4 Victorville’s Inmate Handbook states that prisoners may engage in religious  
5 expression and practices, and encourages them to seek out religious services staff.<sup>12</sup>  
6 The prison “provides a variety of worship services, study groups, and prayer/  
7 meditation meetings each week” and pastoral care is available to all. *Id.* at 26-27.  
8 Prisoners may wear religious headwear and have religious items and texts. *Id.* at 25.

9 Notwithstanding the BOP policies and the Inmate Handbook, these forms of  
10 religious exercise are unavailable to the Subclass. Defendants routinely deny any  
11 meaningful opportunity to engage in worship services, congregate prayer, religious  
12 study, or counseling. *See, e.g.*, Doc. 1-2 at ¶ 9; Doc. 1-6 at ¶ 23; Doc. 1-7 at ¶ 13;  
13 Doc. 1-9 at ¶ 9; Doc. 1-12 at ¶ 7; Doc. 1-14 at ¶ 12; Doc. 1-18 at ¶ 2. Defendants  
14 restrict detainees’ access to religious items, and many detainees have had personal  
15 property, such as turbans, Bibles, or rosaries confiscated, and Defendants refuse to  
16 return or replace them. Detainees have been told that these items are not authorized  
17 or not available, or that they must pay to obtain replacements, even though many  
18 are indigent. *See, e.g.*, Doc. 1-4 ¶ 9; Doc. 1-5 at ¶ 6; Doc. 1-6 at ¶¶ 24-25; *see also*  
19 Doc. 1-12 at ¶¶ 4-9; Doc. 1-15 at ¶ 15; Doc. 1-18 at ¶ 2; Doc. 1-20 at ¶ 10.

#### 20 **4. Prison Operations and Conditions Policies and Practices**

21 Defendants subject ICE detainees to conditions at Victorville that are  
22 unnecessarily restrictive to fulfill the government’s objective of ensuring they  
23 appear at future immigration proceedings. In fact, Defendants subject detainees to  
24 conditions more punitive than those of convicted prisoners at Victorville, pre-trial  
25

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26 <sup>11</sup> The Inmate Personal Property policy similarly permits inmates to retain  
27 religious items approved by the Warden. *See* PS 5580.08 “Inmate Personal  
Property” at § 553.11(i) ([https://www.bop.gov/policy/progstat/5580\\_008.pdf](https://www.bop.gov/policy/progstat/5580_008.pdf)).

28 <sup>12</sup> *See* [https://www.bop.gov/locations/institutions/vim/VIX\\_aohandbook.pdf](https://www.bop.gov/locations/institutions/vim/VIX_aohandbook.pdf)  
at 25 (“Our Staff Chaplains are available to all residents at FCC Victorville.”).

1 detainees in BOP detention centers, or detainees in ICE detention centers.<sup>13</sup>

2 For example, the Pretrial Inmate Program Statement that applies to the  
3 detainees pursuant to the IAA is silent on the use of restraints on pretrial inmates, as  
4 is the IAA itself. As a result, Defendants shackle men for hours at a time in ankle  
5 and wrist restraints when moving them to or from Victorville, per BOP policy. *See*  
6 BOP PS 5666.06 “Use of Force and Application of Restraints” (available at  
7 [https://www.bop.gov/policy/progstat/5566\\_006.pdf](https://www.bop.gov/policy/progstat/5566_006.pdf)); *see also* Doc. 1-6 at ¶ 5.

8 When Plaintiff Kumar suffered from kidney stones, he was transported to the  
9 hospital in full ankle and hand shackles. Doc. 1-3 at ¶ 7. While receiving medical  
10 care at the hospital, he was chained to the bed the entire time – as is done with  
11 convicted prisoners taken to hospitals for care – but there was no indication that Mr.  
12 Kumar would be a threat to others or an escape risk while at the hospital. *Id.* at ¶8.

13 In another example, BOP policy states pretrial detainees “may not be visually  
14 searched unless there is reasonable suspicion that they are concealing a weapon or  
15 other contraband or they consent, in writing, to a visual search. If these inmates are  
16 not visually searched, they must be housed in an area separate from all other  
17 inmates.” PS 7331.04, *supra*, at § 551.03(b).<sup>14</sup> Accordingly, when new detainees

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18  
19 <sup>13</sup> This brief focuses on the common policies and practices of BOP to which  
20 detainees are subjected. Plaintiffs do not waive their right to subsequently challenge  
21 Defendants’ failure to detain them pursuant to the ICE detention standards, nor do  
22 Plaintiffs waive any argument as to the merits of which standard should apply.

23 <sup>14</sup> BOP’s definition of a “visual search” indicates it is much more intrusive  
24 than its seemingly innocuous moniker would imply:

25 Inmates empty pockets and remove jewelry and clothing,  
26 including shoes, underwear, dentures, hair pieces, and clips. [. . .] The  
27 ears, nose cavity, and mouth are thoroughly inspected for contraband.  
28 If the inmate wears dentures, they are removed. [. . .] Staff look in the  
ear canal and nose to ensure there are no capsules or containers lodged.  
The tops of hands are inspected and the hands turned over to inspect  
the palms. Fingers, palms, and fingernails are inspected. [. . .] The  
arms and armpits are thoroughly searched. If extremely hairy, the  
inmate is instructed to vigorously run his fingers through the hair. [. . .]

Staff instruct the inmate to lift or move any body folds or  
creases, including the penis and testicles or breasts, and excess skin  
folds. Staff ensure the inmate is not concealing contraband with his/her  
hands as the inmate is holding these areas.



1 are brought to the institution, Defendants segregate and lock them down 24 hours a  
2 day for three or more days after arrival. *See, e.g.*, Doc. 1-4 at ¶ 8; Doc. 1-5 at ¶ 7;  
3 Doc. 1-8 at ¶ 16; Doc. 1-11 at ¶ 3; Doc. 1-17 at ¶ 7.

4 But in apparent violation of the policy's requirement that there be reasonable  
5 suspicion a detainee has a weapon or other contraband before conducting a "visual  
6 search," Plaintiff Granados Aquino avows that at intake he was made to remove all  
7 of his clothes and was searched, yet then was not sent to general population as the  
8 policy requires, but instead was locked down in a cell. *See* Doc. 1-6 at ¶¶ 7-10. He  
9 reports that "I felt my privacy was violated" when "I had to take off all of my  
10 clothes in front of an official before I was given a brown jumpsuit." *Id.* at ¶ 7.

11 The amount of time immigrants spend in indoor common areas is limited  
12 because when the prison's convicted population moves through the facility, the ICE  
13 detainees are locked down for hours, a condition that would not occur if they were  
14 not incarcerated in a prison with convicted persons. Doc. 1-6 at ¶ 14; Doc. 1-9 at ¶  
15 6; Doc. 1-10 at ¶ 15; Doc. 1-11 at ¶ 3; Doc. 1-19 at ¶ 12.<sup>15</sup> These restrictions and  
16 conditions are unnecessary to achieve the government's stated aim to ensure  
17 attendance at future immigration proceedings.

18 \_\_\_\_\_  
19 The inspection continues by looking at the legs, ankles, feet, and  
20 toes. [. . .] The inmate is instructed to bend over as far as possible,  
21 reach behind, and pull the buttocks apart to expose the crevice area.  
22 Staff are alert for anything that may protrude from the body. Male  
23 inmates are instructed to cough deeply. Female inmates are instructed  
24 to face the officer, squat, and cough deeply.

25 BOP PS 5800.18 "Receiving and Discharge Manual" at ¶ 112(g)-(q)  
26 (available at [https://www.bop.gov/policy/progstat/5800\\_018.pdf](https://www.bop.gov/policy/progstat/5800_018.pdf)).

27 <sup>15</sup> Additionally, an entire housing unit will be locked down on "quarantine"  
28 any time a single person is suspected of having an infectious communicable disease  
such as scabies, tuberculosis, or chicken pox. *See* Doc. 1-2 at ¶¶ 5, 13. This practice  
of locking down an entire unit is contrary to BOP's Infectious Disease Management  
policy that states that limitations in "programming, duty, and housing" apply *only*  
to persons who have an infectious disease transmittable via casual contact. BOP PS  
6190.04, *supra*, at § 549.13(b). Persons with suspected tuberculosis or airborne  
diseases are to be housed in Centers for Disease Control compliant negative  
pressure isolation rooms, and if such rooms are not at a prison, "arrangements will  
be made to transport the inmate to the local hospital with the necessary facilities to  
isolate and treat until the inmate is no longer contagious." *Id.* at § 549.13(c).

1 BOP’s policies require all prisons “have, at a minimum: General Educational  
2 Development (GED), English-as-a-Second Language (ESL), continuing education,  
3 library services, parenting, and recreation programs.”<sup>16</sup> Yet Plaintiffs and detainees  
4 are not allowed to participate in these programs, and are given no access to  
5 educational or vocational programs, work opportunities, group programs such as  
6 Alcoholics Anonymous, or even books in languages they understand. Doc. 1-2 at ¶  
7 8; Doc. 1-4 at ¶ 7; Doc. 1-9 at ¶ 9; Doc. 1-15 at ¶ 14.

8 As a result of many hours of unnecessary and punitive imprisonment in cells,  
9 with no reading material, no recreational, religious, or other programming, and a  
10 lack of information about the status of their immigration cases, detainees suffer  
11 anxiety, fear, apprehension, severe boredom, fatigue, and, in some instances,  
12 depression, including acts of self-harm. *See, e.g.* Doc. 1-6 at ¶ 11, 14; Doc. 1-8 at  
13 ¶ 14; Doc. 1-9 at ¶ 12; Doc. 1-10 at ¶ 10; Doc. 1-14 at ¶ 7; Doc. 1-15 at ¶¶ 16-18;  
14 Doc. 1-17 at ¶ 16; Doc. 1-18 at ¶ 3, 10; *see also* HuffPost Article (“In the last week,  
15 one detainee has tried to kill himself, saying he was terrified he would be deported  
16 back to Cuba. Another was put on suicide watch after staffers noticed he couldn’t  
17 stop crying...”). As a result of the inhumane, restrictive, and gratuitously punitive  
18 conditions in Victorville, detainees with meritorious asylum claims abandon them  
19 and agree to return to their home countries, despite conditions that drove them to  
20 flee to the U.S. for safety. Doc. 1-1 at ¶ 17; Doc. 1-10 at ¶ 3; Doc. 1-18 at ¶ 10.

### 21 C. The Named Plaintiffs

22 Plaintiff Stephenson Awah Teneng is a civil detainee asylum seeker detained  
23 at Victorville under ICE authority from June 8 through August 23, 2018. After the  
24

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25 <sup>16</sup> BOP PS 5300.21 “Education, Training and Leisure Time Program  
26 Standards” at § 544.80 ([https://www.bop.gov/policy/progstat/5300\\_021.pdf](https://www.bop.gov/policy/progstat/5300_021.pdf)); *see*  
27 *also* BOP PS P5370.11 “Inmate Recreation Programs” at §544.30  
28 ([https://www.bop.gov/policy/progstat/5370\\_011.pdf](https://www.bop.gov/policy/progstat/5370_011.pdf)) (BOP “encourages inmates to  
make constructive use of leisure time, and offers movies, games, sports, social  
activities, arts and hobbycrafts, wellness, and other group and individual  
activities”).

1 filing of the Complaint, ICE transferred him to an ICE detention center, but he  
2 could potentially be returned to Victorville at any time in the future. He suffered  
3 from weeks of unaddressed dental pain, was unable to access medication or see a  
4 dentist, and was unnecessarily and punitively subjected to harsh conditions,  
5 including being denied food and locked in his prison cell for hours at a time in  
6 retaliation for requesting health care. *See generally* Doc. 1-1.

7 Plaintiff Marcel Ngwa is a civil detainee asylum seeker detained at  
8 Victorville under ICE authority from June 8 through August 15, 2018. After the  
9 filing of the Complaint, ICE transferred him to an ICE detention center, but he  
10 could potentially be returned to Victorville at any time in the future. Mr. Ngwa has  
11 back pain that has not been treated. Due to imprisonment at Victorville, he  
12 experienced depression but did not receive mental health care. He was told that  
13 only prisoners, not immigrants, can take classes and buy most products in the  
14 commissary. Mr. Ngwa is a Presbyterian whose sincere religious beliefs counsel  
15 him to attend church and seek out consultation with clergy as needed, but was  
16 denied access to services and clergy. *See generally* Doc. 1-2.

17 Plaintiff Ankush Kumar is a civil detainee asylum seeker detained at  
18 Victorville under ICE authority from July 16 through August 6, 2018. After the  
19 filing of the Complaint, ICE transferred him to an ICE detention center, but he  
20 could potentially be returned to Victorville at any time in the future. Mr. Kumar has  
21 a history of kidney stones and did not receive adequate medical care while  
22 imprisoned in Victorville. After experiencing excruciating pain, his request for  
23 emergency medical attention went unmet for hours, until finally he was shackled  
24 and taken to a hospital. *See generally* Doc. 1-3.

25 Plaintiff Gurjinder Singh is a civil detainee asylum seeker detained at  
26 Victorville under ICE authority from July 16 through August 6, 2018. After the  
27 filing of the Complaint, ICE transferred him to an ICE detention center, but he  
28 could potentially be returned to Victorville at any time in the future. As a practicing

1 Sikh, Mr. Singh's sincere religious beliefs dictate he wear and keep with him  
2 religious articles of faith, including a turban and kara (a religious bracelet). His  
3 turban and kara were confiscated, and he repeatedly asked Victorville staff if he  
4 could have his religious items returned to him, or wear a head covering, but was  
5 told it was not allowed. His turban and kara were not returned or replaced at  
6 Victorville. *See generally* Doc. 1-4.

7 Plaintiff Atinder Paul Singh is a civil detainee asylum seeker detained at  
8 Victorville under the authority of DHS and ICE from June 12, 2018, through  
9 August 6, 2018. After the filing of the Complaint, ICE transferred him to an ICE  
10 detention center, but he could potentially be returned to Victorville at any time in  
11 the future. For the first two weeks he was incarcerated at Victorville, Mr. Singh  
12 wore the same prison uniform without access to clean clothes or laundry. As an  
13 adherent of the Sikh faith, his sincere religious beliefs require him to wear a turban  
14 and kara. Mr. Singh's articles of faith were confiscated and not returned or replaced  
15 at Victorville, despite his requests to access them. *See generally* Doc. 1-5.

16 Plaintiff Noe Mauricio Granados Aquino is a civil detainee asylum seeker  
17 detained at Victorville under ICE authority from approximately July 20 through  
18 August 6, 2018. After the filing of the Complaint, ICE transferred him to an ICE  
19 detention center, but he could potentially be returned to Victorville at any time in  
20 the future. Mr. Granados Aquino has depression, which was exacerbated by the  
21 isolation he experienced at the prison. Mr. Granados Aquino is a Christian whose  
22 sincere religious beliefs counsel him to attend church and read the Bible. During his  
23 imprisonment at Victorville, he was denied access to congregate prayer and  
24 worship. In addition, he had a Bible in his backpack when he crossed the border  
25 that was taken and not returned. Officers told him and other Spanish-speaking  
26 Christians that there are no Spanish Bibles available. *See generally* Doc. 1-6.

27 Plaintiffs Teneng, Ngwa, Kumar, Gurjinder Singh, Atinder Paul Singh, and  
28 Granados Aquino share interests with the Class, and will fairly and adequately

1 protect the interests of unnamed Class members. They do not have interests adverse  
2 to those of unnamed Class members. Like Plaintiffs, detainees currently housed at  
3 Victorville, as well as those in the future, are affected by Defendants' policies and  
4 practices, including the (1) failure to provide minimally adequate health care; (2)  
5 failure to provide adequate nutrition; (3) confinement of civil detainees in  
6 conditions that are unnecessarily restrictive and/or punitive; and (4) confinement of  
7 civil detainees in conditions similar to, or more restrictive than, persons charged  
8 with or convicted of criminal offenses. *See generally*, Docs. 1, 1-1 through 1-6.

9 Moreover, Plaintiffs Ngwa, Gurjinder Singh, Atinder Paul Singh, and  
10 Granados Aquino share interests with the Religious Freedom Subclass, and will  
11 fairly and adequately protect the interests of unnamed Subclass members. They do  
12 not have interests adverse to those of unnamed Subclass members. Like Plaintiffs  
13 Ngwa, Gurjinder Singh, Atinder Paul Singh, and Granados Aquino, members of the  
14 Subclass, as well as future detainees within it, are affected by Defendants' failure to  
15 provide adequate opportunities for worship services, congregate prayer, counseling,  
16 or consultation with clergy, or adequate access to religious garb, texts, and other  
17 items. *See generally*, Docs. 1, 1-1 through 1-6.

18 Plaintiffs allege that these failures have caused and continue to cause an  
19 ongoing injury in violation of the Class's and Subclass's rights under the  
20 U.S. Constitution's First and Fifth Amendments, as well as the Religious Freedom  
21 Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*

### 22 **III. ARGUMENT**

23 For a court to certify a class, named plaintiffs must satisfy each prerequisite  
24 of Rule 23(a), and at least one requirement of Rule 23(b). *Wal-Mart Stores, Inc. v.*  
25 *Dukes*, 564 U.S. 338, 345 (2011). The moving party "must affirmatively prove"  
26 compliance with the rules. *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014).

27 Here, the Class and Subclass satisfy each Rule 23(a) requirement: "(1) the  
28 class is so numerous that joinder of all members is impracticable; (2) there are

1 questions of law or fact common to the class; (3) the claims or defenses of the  
2 representative parties are typical of the claims or defenses of the class; and (4) the  
3 representative parties will fairly and adequately protect the interests of the class.”

4 The Class and Subclass satisfy two Rule 23(b) requirements, as prosecuting  
5 separate actions by individual members “would create a risk of [] inconsistent or  
6 varying adjudications with respect to individual class members that would establish  
7 incompatible standards of conduct for the party opposing the class,” (Rule  
8 23(b)(1)), and “the party opposing the class has acted or refused to act on grounds  
9 that apply generally to the class, so that final injunctive relief or corresponding  
10 declaratory relief is appropriate respecting the class as a whole.” Rule 23(b)(2).

#### 11 **A. Plaintiffs Satisfy the Requirements of Rule 23(a).**

##### 12 **1. The Class and Subclass Are So Large and Fluid That Joinder of** 13 **All Members Is Impracticable.**

14 Rule 23(a)(1) requires that the class be “so numerous that joinder of all  
15 members is impracticable.” “Impracticable” does not mean “impossible;” it only  
16 requires a showing that class members will “suffer a strong litigation hardship or  
17 inconvenience if joinder were required.” *Harris v. Palm Springs Alpine Estates,*  
18 *Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). Rule 23(a)(1) is  
19 satisfied when the prospective class has 40 or more members. *Jordan v. County of*  
20 *Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds by*  
21 *County of Los Angeles v. Jordan*, 459 U.S. 810 (1982); *see also* WILLIAM B.  
22 RUBENSTEIN, *et. al.*, NEWBERG ON CLASS ACTIONS, §3.12 (5th ed. June 2018). Here,  
23 the Class easily meets the Rule 23(a)(1) requirement – there are hundreds of  
24 detainees incarcerated at Victorville at any given time, with a contractual agreement  
25 for up to 1,000 detainees. Ex. 1. The putative Subclass is so numerous that joinder  
26 is impracticable. Defendants do not track detainees’ religious beliefs, but it is more  
27 than 40 people. *See, e.g.*, Sarah Parvini, *A Growing Number of California*  
28 *Detainees Are Indians Crossing Through Mexico To Seek Asylum*, Los Angeles

1 Times (Aug. 14, 2018) (BOP reporting that in early August, 380 of 680 Victorville  
2 detainees were from India and seeking asylum for religious or political  
3 persecution).<sup>17</sup>

4 Moreover, the population of immigrant detainees is fluid, with men moving  
5 in and out of Victorville virtually every day. This militates in favor of a finding that  
6 joinder is impracticable. When plaintiffs seek injunctive or declaratory relief and  
7 the class includes persons who might be injured in the future, joinder is inherently  
8 impracticable. *See Jordan*, 669 F.2d at 1320; *see also Henderson v. Thomas*,  
9 289 F.R.D. 506, 510 (M.D. Ala. 2012) (“[T]he fluid nature of a plaintiff class – as  
10 in the prison litigation context – counsels in favor of certification...”).

11 **2. The Commonality Requirement of Rule 23(a)(2) is Satisfied**  
12 **Because the Challenged Policies Present Common Questions of**  
13 **Fact and Law.**

14 Rule 23(a)(2) requires “there [be] questions of law or fact common to the  
15 class.” Class claims must “depend upon a common contention . . . [] capable of  
16 classwide resolution . . . mean[ing] that determination of its truth or falsity will  
17 resolve an issue that is central to the validity of each one of the claims in one  
18 stroke.” *Dukes*, 564 U.S. at 350. Put another way, “[w]hat matters to class  
19 certification . . . [is] the capacity of a classwide proceeding to generate common  
20 answers apt to drive the resolution of the litigation.” *Id.* (emphasis, citation, and  
21 quotation marks omitted). Crucially, “for purposes of Rule 23(a)(2) [e]ven a single  
22 [common] question will do.” *Id.* at 359 (citation and quotation marks omitted).  
23 “[P]olicies and practices of statewide and systemic application” are precisely the  
24 “kind of claim . . . firmly established in our constitutional law” that meet the  
25 commonality requirement. *Parsons*, 754 F.3d at 676. The Class and Subclass  
26 satisfy the requirement because they share multiple questions of law and fact that  
27 will generate common answers to resolve this case. *See generally* Part II.B, *supra*.

28 <sup>17</sup> Available at <http://www.latimes.com/local/lanow/la-me-indian-immigrants-20180813-story.html>.

1 First, a critical question of law common to the entire Class is whether the  
2 punitive conditions to which they are subjected, pursuant to the IAA that detainees  
3 shall be subject to the BOP's rules and regulations consistent with policies for pre-  
4 trial detainees, violate their Fifth Amendment due process rights. Immigrant  
5 detainees in ICE custody, even those with prior criminal records, are civil detainees,  
6 and are protected by the Due Process Clauses of the Fifth Amendment. *Zadvydas v.*  
7 *Davis*, 533 U.S. 678, 690 (2001) (“The [immigration] proceedings at issue here are  
8 civil, not criminal, and we assume that they are nonpunitive in purpose and effect”).  
9 The protections afforded by the Fifth and Fourteenth Amendments are stronger than  
10 those applicable to persons convicted of crimes: while the Eighth Amendment  
11 allows punishment so long as it is not “cruel and unusual,” the Fifth and Fourteenth  
12 Amendments do not permit punishment at all. *Bell v. Wolfish*, 441 U.S. 520, 535  
13 n.16 (1979) (“Due process requires that a pretrial detainee not be punished”).<sup>18</sup>

14 Furthermore, not only are civil detainees constitutionally entitled to better  
15 conditions than convicted prisoners, they are entitled to better conditions than  
16 criminal pretrial detainees:

17 With respect to an individual confined awaiting adjudication under  
18 civil process, a presumption of punitive conditions arises where the  
19 individual is detained under conditions *identical to, similar to, or*  
20 *more restrictive* than those under which pretrial criminal detainees are  
held, or where the individual is detained under conditions more  
restrictive than those he or she would face upon commitment.

21 *Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2000) (emphasis added); *see also King*  
22 *v. County of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (“privileges” provided  
23 to civil detainees, not as a right but as a “courtesy,” did not create better conditions  
24 of confinement where detainees were confined to housing pod, and given minimal  
25 opportunities for recreation and exercise).

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26  
27 <sup>18</sup> The claim at issue in *Bell* arose under the Fourteenth Amendment, but  
28 since the Due Process Clauses of the Fifth and Fourteenth Amendments “are  
coextensive,” the Court’s reasoning applies to the Fifth Amendment claims at issue  
here. *United States v. Navarro-Vargas*, 408 F.3d 1184, 1189 (9th Cir. 2005).



1 A civil detainee can show that a particular condition constitutes prohibited  
2 punishment with evidence that the condition is intended to punish the detainee, or,  
3 in the absence of such direct evidence, by showing the condition is not reasonably  
4 related to or is excessive in relation to a legitimate governmental objective. *Bell*,  
5 441 U.S. at 561; *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016  
6 WL 8188563, at \*5 (D. Ariz. Nov. 18, 2016), *aff'd sub nom. Doe v. Kelly*, 878 F.3d  
7 710 (9th Cir. 2017) (affirming preliminary injunction addressing conditions of  
8 confinement and adequacy of health care for immigrant detainees in CBP facilities).  
9 The detainee need not prove “deliberate indifference” on the part of government  
10 officials, as is required under the Eighth Amendment. *Jones*, 393 F.3d at 934.

11 A common question of law for the Subclass is whether Defendants’ policies  
12 and practices denying Plaintiffs adequate opportunities for worship services,  
13 congregate prayer, counseling, or consultation with clergy, as well as adequate  
14 access to religious items, violate Plaintiffs’ rights under the Free Exercise Clause of  
15 the First Amendment, as well as their statutory right to religious exercise under  
16 RFRA, which governs the religious rights of persons in federal institutions. The  
17 Court will analyze if there is a “valid rational connection” between “a legitimate  
18 government interest” and Defendants’ failure to provide access to worship services  
19 and the restrictions on religious items. *See Pierce v. County of Orange*, 526 F.3d  
20 1190, 1209 (9th Cir. 2008). Under RFRA’s more stringent standard, the Court will  
21 analyze if the policies and practices are the least restrictive means of furthering a  
22 compelling governmental interest. *See* 42 U.S.C. §§ 2000bb-1(b).

23 Common questions of fact exist as to the adequacy of Defendants’ policies,  
24 practices, and procedures governing detainees’ conditions of confinement,  
25 including the provision of adequate health care and nutrition, and if the conditions  
26 put the Class at risk of harm. The Eighth Amendment standard to analyze  
27 constitutional violations with respect to convicted prisoners is whether a policy or  
28 practice of systemic application exposes all incarcerated persons to a substantial

1 risk of serious harm. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“[I]t would be  
2 odd to deny an injunction to inmates who plainly proved an unsafe, life threatening  
3 condition in their prison on the ground that nothing yet had happened to them”).  
4 These issues form the core of the Plaintiffs’ claims and are the type of questions  
5 that are sufficient to meet the commonality requirement. *See Parsons*, 754 F.3d at  
6 677-78 (affirming certification of a class of “all prisoners who are now, or will in  
7 the future be, subjected to the medical, mental health, and dental care policies and  
8 practices of the [Arizona Department of Corrections],” because any one person  
9 “could easily fall ill, be injured, need to fill a prescription, require emergency or  
10 specialist care, crack a tooth, or require mental health treatment”) (citing *Helling*,  
11 509 U.S. at 33); *Brown v. Plata*, 563 U.S. 493, 531 (2011) (“Even prisoners with no  
12 present physical or mental illness may become afflicted, and all prisoners in  
13 California are at risk so long as the State continues to provide inadequate care.”)

14 Differences among class members’ specific permutations of the adverse  
15 effects of inadequate health care, conditions of confinement, or opportunities for  
16 religious exercise, do not undermine commonality. “In a civil rights suit such as  
17 this one . . . commonality is satisfied where the lawsuit challenges a system-wide  
18 practice or policy that affects all of the putative class members. Under such  
19 circumstances, individual factual differences among class members pose no  
20 obstacle to commonality.” *Parsons*, 754 F.3d at 682 (quotation omitted).

21 Here, Plaintiffs and all members of the Class and Subclass share the exposure  
22 to conditions of confinement identical to, similar to, or more restrictive than, the  
23 conditions in which federal convicted prisoners and pre-trial detainees are held.  
24 Common questions include the legality of policies and practices such as:

- 25 • Defendants’ provision of inadequate health care screenings at intake; there is  
26 no system by which detainees can request health care or medication;  
27 Defendants’ failure to abide by medical privacy laws by using other  
28 detainees as interpreters in health care encounters; and delays in treatment of  
serious medical and mental health conditions. *See* Doc. 1-1 at ¶¶ 13-18; Doc.  
1-2 at ¶¶ 10-16; Doc. 1-3 at ¶¶ 5-7; Doc. 1-6 at ¶¶ 11, 14-16; Doc. 1-7 at ¶¶  
4, 7-12; Doc. 1-8 at ¶¶ 13, 14; Doc. 1-9 at ¶¶ 15-16; Doc. 1-10 at ¶¶ 11, 12;

1 Doc. 1-11 at ¶¶ 6-8; Doc. 1-13 at ¶ 3; Doc. 1-14 at ¶ 5-7; Doc. 1-15 at ¶¶ 3,  
2 5-8, 16-18, 24-25; Doc. 1-17 at ¶¶ 8, 16; Doc. 1-18 at ¶¶ 3, 7; Doc. 1-19 at ¶¶  
3 6-9; Doc. 1-20 at ¶¶ 2, 4, 8-9.

- 4 • Defendants' policy of maintaining a 24-hour lockdown for three or more  
5 days after intake of detainees to Victorville, during which time they are not  
6 allowed to leave their cells for any reason. *See* Doc. 1-4 at ¶ 8; Doc. 1-5 at ¶  
7 7; Doc. 1-6 at ¶¶ 7-10; Doc. 1-8 at ¶ 16; Doc. 1-11 at ¶ 3; Doc. 1-17 at ¶ 7.
- 8 • Defendants' requirement that detainees wear orange or brown prison  
9 jumpsuits or uniforms, and when transported to or from the prison, detainees  
10 are shackled and chained at the ankles and wrists. *See* Doc. 1-3 at ¶ 7; Doc.  
11 1-4 at ¶ 3; Doc. 1-6 at ¶¶ 5, 7; Doc. 1-9 at ¶ 11; Doc. 1-10 at ¶ 6.
- 12 • Defendants' practice of denying adequate nutrition and time to eat, the  
13 provision of small meals that are inedible and/or of low nutritional value. *See*  
14 Doc. 1-4 at ¶ 11; Doc. 1-8 at ¶¶ 15, 17; Doc. 1-9 at ¶ 10; Doc. 1-10 at ¶ 8;  
15 Doc. 1-11 at ¶ 5; Doc. 1-15 at ¶¶ 21, 22
- 16 • Defendants' practice of allowing detainees an extremely limited amount of  
17 time outside of their prison cells. Outdoor exercise time is not scheduled  
18 regularly and sometimes is cancelled. *See* Doc. 1-10 at ¶ 4; Doc. 1-15 at ¶ 20;  
19 Doc. 1-17 at ¶ 10. The amount of time Defendants allow detainees to spend  
20 in indoor common areas is limited. Doc. 1-6 at ¶ 14; Doc. 1-9 at ¶ 6; Doc. 1-  
21 10 at ¶ 15; Doc. 1-11 at ¶ 3; Doc. 1-19 at ¶ 12. Defendants' failure to provide  
22 reading material, programs or activities, and practice of imprisoning  
23 detainees in their cells for long periods of time that results in mental  
24 decompensation. Doc. 1-6 at ¶ 11, 14; Doc. 1-8 at ¶ 14; Doc. 1-9 at ¶ 12;  
25 Doc. 1-10 at ¶ 10; Doc. 1-14 at ¶ 7; Doc. 1-15 at ¶¶ 16-18; Doc. 1-17 at ¶ 16;  
26 Doc. 1-18 at ¶ 3, 10.
- 27 • Defendants' denial of access to religious worship services and opportunities  
28 to engage in congregate worship or group prayer, and to obtain religious  
counseling and consultation with clergy. Doc. 1-2 at ¶ 9; Doc. 1-6 at ¶ 23;  
Doc. 1-7 at ¶ 13; Doc. 1-9 at ¶ 9; Doc. 1-12 at ¶ 7; Doc. 1-14 at ¶ 12; Doc. 1-  
18 at ¶ 2. Defendants restrict access to various religious items, including the  
confiscation of (and refuse to return or replace) religious headgear, jewelry,  
and holy texts. Doc. 1-4 ¶ 9; Doc. 1-5 at ¶ 6; Doc. 1-6 at ¶¶ 24-25; Doc. 1-12  
at ¶¶ 4-9; Doc. 1-15 at ¶ 15; Doc. 1-20 at ¶ 10.

21 In sum, there are multiple questions of law and fact common to the Class,  
22 including whether: (1) lack of access to health care creates a serious risk of harm;  
23 (2) there is access to adequate nutrition; (3) the conditions are unnecessarily  
24 restrictive and/or punitive; (4) the conditions that are identical to, similar to, or  
25 more restrictive than the conditions for convicted prisoners and pre-trial detainees;  
26 and (5) the aforementioned conditions result in constitutional violations. With  
27 regard to the Subclass, common questions include whether Defendants deny  
28 detainees adequate access to worship services, congregate prayer, counseling, and

1 consultation with clergy, or adequate access to religious garb, texts, and other  
2 items, and if these limitations violate the First Amendment and RFRA.

3 Class and Subclass members are incarcerated at Victorville to ensure their  
4 appearance at immigration proceedings. They are not imprisoned because they  
5 stand accused of or are serving time for a conviction for a crime. Instead, they are  
6 locked up as a direct result of Defendants' "zero tolerance" policy for immigrants,  
7 in conditions identical to, similar to, or more restrictive than those in which BOP  
8 prisoners are incarcerated. Much less restrictive means exist of ensuring detainees  
9 appear at immigration proceedings. Thus, a systemwide resolution of the common  
10 questions of law and fact will yield common answers applicable to the entire Class  
11 and Subclass that are likely to drive resolution of this litigation.

### 12 **3. Plaintiffs' Claims Are Representative of Those of the Class and** 13 **Subclass, and Satisfy Rule 23(a)(3)'s Typicality Requirement.**

14 Rule 23(a)(3) requires "the claims or defenses of the representative parties  
15 are typical of the claims or defenses of the class." The test is "whether other  
16 members have the same or similar injury, whether the action is based on conduct  
17 which is not unique to the named plaintiffs, and whether other class members have  
18 been injured by the same course of conduct." *Parsons*, 754 F.3d at 685 (quotation  
19 omitted). Injuries do not have to be identical, but similar and due to Defendants'  
20 conduct. *Id.* at 685-686; *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2009).<sup>19</sup>  
21 Commonality and typicality are closely related concepts; a finding of one normally  
22 compels a finding of the other. *Parsons*, 754 F.3d at 685 (quoting *Dukes*, 564 U.S.  
23 at 349 n.5 ("Both serve as guideposts for determining whether under the particular  
24 circumstances maintenance of a class action is economical and whether the named  
25 plaintiff's claim and the class claims are so interrelated that the interests of the class  
26 members will be fairly and adequately protected in their absence.")).

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27 <sup>19</sup> As noted above in Part III.A.2, the law is clear that in an injunctive case,  
28 the actionable "injury" need not be a tangible physical injury, but rather it is the *risk*  
of harm. *Plata*, 563 U.S. at 531; *Helling*, 509 U.S. at 33; *Parsons*, 754 F.3d at 678.

1 Here, Plaintiffs Teneng, Ngwa, Kumar, Gurjinder Singh, Atinder Paul Singh,  
2 and Granados Aquino are exposed to Defendants' policies, procedures, and  
3 practices with respect to conditions of confinement. In fact, their injuries are typical  
4 of the kind that would result from Defendants' systemic failures. Defendants'  
5 conduct in implementing these policies is not unique to Plaintiffs. Defendants  
6 employ prison-wide policies and practices that restrict the Class's and Subclass's  
7 rights and puts all detainees at risk of harm. For example:

- 8 • The staffing patterns for custody and health care staff are a result of  
9 Defendants' nationwide hiring freeze. *See supra* Part II.A. and Part II.B.1.
- 10 • While detainees react differently to health care treatment and have different  
11 health conditions, Defendants employ system-wide and prison-wide policies  
12 and practices to deliver health care to detainees. *See supra* Part II.B.1.
- 13 • In practice Defendants disregard the policies regarding food service  
14 contained within the BOP Food Service Manual, and provide substandard  
15 meals of poor nutritional value. *See supra* Part II.B.2.
- 16 • Defendants fail to follow the BOP policies on religious practices, or the  
17 Inmate Handbook, resulting in the systematic denial to Subclass members of  
18 adequate opportunities for worship services, congregate prayer, counseling,  
19 and consultation with clergy, or adequate access to religious garb, texts, and  
20 other items. *See supra* Part II.B.3.
- 21 • Defendants' policies governing the management of prisoners subject  
22 detainees to harsh and punitive conditions that are identical to, similar to, or  
23 more restrictive than, the conditions in which federal convicted prisoners and  
24 pre-trial detainees are held. *See supra* Part II.B.4.

25 For these reasons, the injuries suffered by Plaintiffs Teneng, Ngwa, Kumar,  
26 Gurjinder Singh, Atinder Paul Singh, and Granados Aquino are typical of the injury  
27 to Class and Subclass Members, in satisfaction of Rule 23(a)(3).

#### 28 **4. Plaintiffs and Class Counsel Will Fairly and Adequately Represent Interests of the Class and Subclass, As Required by Rule 23(a)(4).**

Rule 23(a)(4) requires named plaintiffs fairly and adequately represent the  
class's interests. The court examines "the qualifications of counsel [...]; an absence  
of antagonism, a sharing of interests between representatives and absentees, and the  
unlikelihood that the suit is collusive." *Walters v. Reno*, 145 F.3d 1032, 1046 (9th  
Cir. 1998) (citations and quotation marks omitted).

1 Plaintiffs will fairly and adequately represent the interests of all class  
2 members because they seek relief that is of the same nature as the relief sought by  
3 the Class and Subclass, have no interests adverse or antagonistic to other class  
4 members, and are committed to the vigorous prosecution of this suit. Plaintiffs’  
5 interests are of the same nature as those of the Class and Subclass – all seek  
6 declaratory and injunctive relief enjoining Defendants from depriving immigrant  
7 detainees of: (1) minimally adequate health care; (2) adequate nutrition; (3) their  
8 right to religious exercise; (4) their right to not be housed in conditions that are  
9 unnecessarily restrictive and/or punitive; and (5) their right to not be housed in  
10 conditions similar to, or more restrictive than, persons convicted of criminal  
11 offenses or awaiting trial. “Class representatives have less risk of conflict with  
12 unnamed class members when they seek only declaratory and injunctive relief.”  
13 *Hernandez v. County of Monterey*, 305 F.R.D. 132, 160 (N.D. Cal. 2015). Finally,  
14 there is no suggestion of collusion between Plaintiffs and any of the Defendants.

15 Proposed Class Counsel have significant experience with large and complex  
16 federal class action litigation, including litigation challenging conditions in  
17 correctional facilities, and will fairly and adequately protect the Class’s and  
18 Subclass’s interests. The **American Civil Liberties Union Foundation (“ACLU”)**  
19 is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million  
20 members, and the ACLU’s National Prison Project has litigated challenges to  
21 conditions of confinement in prisons, jails, juvenile facilities, and immigration  
22 detention facilities across the United States, and has represented incarcerated people  
23 in five cases before the U.S. Supreme Court. Declaration of David Fathi at ¶¶ 2-5.  
24 The ACLU’s Program on Freedom of Religion and Belief has served as counsel in  
25 numerous cases challenging violations of the Free Exercise Clause and RFRA,  
26 including litigation involving incarcerated persons’ religious rights. *Id.* at ¶ 6. The  
27 **Prison Law Office** is a nonprofit organization that for more than 40 years has  
28 engaged in class action impact litigation to improve conditions in prisons, jails, and

1 juvenile halls, and has litigated numerous large-scale class actions on behalf of  
2 incarcerated people, including *Brown v. Plata*, 563 U.S. 493 (2011). Declaration of  
3 Donald Specter ¶ 3. The **Civil Rights Education and Enforcement Center**  
4 (**“CREEC”**) is a nonprofit organization that has litigated numerous civil rights  
5 class actions, including on behalf of incarcerated people. Declaration of Timothy  
6 Fox ¶¶ 3-8. Finally, **Meyers Nave** is a California-based law firm that regularly  
7 litigates complex federal litigation cases, including class actions, and is committed  
8 to providing pro bono assistance to underserved populations. Declaration of Nancy  
9 Harris ¶ 3.

10 Additional facts establishing the adequacy of proposed Class Counsel are set  
11 forth fully in the concurrently filed declarations of David Fathi (ACLU), Donald  
12 Specter (Prison Law Office), Timothy Fox (CREEC), and Nancy Harris (Meyers  
13 Nave). Class Counsel have committed and will continue to commit significant  
14 resources to the prosecution of this case to zealously represent the Class and  
15 Subclass. “Absent a basis for questioning the competence of counsel, the named  
16 plaintiffs’ choice of counsel will not be disturbed . . .” *Mateo v. M/S Kiso*, 805 F.  
17 Supp. 761, 771 (N.D. Cal. 1991). Therefore, the proposed Class Counsel are  
18 adequate for the purposes of class certification under Rule 23(a)(4), and this Court  
19 should appoint them class counsel pursuant to Rule 23(g)(1) and (4).

## 20 **B. Class Certification Is Appropriate Under Rule 23(b)(1) and (2).**

21 In addition to meeting the requirements under Rule 23(a), Plaintiffs must  
22 establish that at least one provision for maintaining a class action under Rule 23(b)  
23 applies. The case fits squarely within Rule 23(b)(1) and 23(b)(2).

### 24 **1. Separate Lawsuits By Each Class Member Would Create a 25 Risk of Incompatible Standards of Conduct by Defendants.**

26 A class action is proper under Rule 23(b)(1) when separate lawsuits by class  
27 members would create a risk of imposing incompatible standards of conduct on the  
28 opposing party through inconsistent adjudications. Rule 23(b)(1)(A). Here, there is

1 a contractual capacity to detain up to 1,000 men at Victorville at any given time,  
2 who are affected by the challenged policies and practices, and each one could file  
3 suit for injuries arising from the same. The Subclass is upwards of 250 detainees.  
4 This Court has held that Rule 23(b)(1) “in particular has been applied in actions by  
5 prisoners challenging the conditions of their confinement.” *Gray v. County of*  
6 *Riverside*, No. EDCV-13-0044-VAP, 2014 WL 5304915, at \*38 (C.D. Cal. Sept. 2,  
7 2014); *see also Ashker v. Governor of California*, No. C 09-5796-CW, 2014 WL  
8 2465191, at \*7 (N.D. Cal. June 2, 2014) (certifying under 23(b)(1) a class of people  
9 incarcerated indefinitely in California’s Secure Housing Units); *Coleman v. Wilson*,  
10 912 F.Supp. 1282, 1293 (E.D. Cal. 1995) (certifying class of prisoners with mental  
11 illness challenging California Department of Correction’s mental health care).  
12 Thus, certification of the Class and Subclass is appropriate under Rule 23(b)(1).

13 **2. Defendants Have Acted on Grounds Generally Applicable to**  
14 **the Class and Subclass Such That Declaratory and Injunctive**  
15 **Relief is Appropriate**

16 Class certification is warranted if “the party opposing the class has acted or  
17 refused to act on grounds that apply generally to the class, so that final injunctive  
18 relief or corresponding declaratory relief is appropriate respecting the class as a  
19 whole.” Rule 23(b)(2). “[C]ivil rights cases against parties charged with unlawful  
20 [conduct] are prime examples of what (b)(2) is meant to capture.” *Dukes*, 564 U.S.  
21 at 361 (quotation omitted). Rule 23(b)(2)’s “requirements are unquestionably  
22 satisfied when members of a putative class seek uniform injunctive or declaratory  
23 relief from policies or practices that are generally applicable to the class as a  
24 whole.” *Parsons*, 754 F.3d at 688 (citing *Rodriguez*, 591 F.3d at 1125).

25 Here, all members of the Class and Subclass are subjected to a substantial  
26 risk of serious harm by a specified set of Defendants’ prison-wide policies and  
27 practices. *Dukes*, 564 U.S. at 360 (“The key to the (b)(2) class is the indivisible  
28 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



1 class members or as to none of them”) (quotation marks and citations omitted).  
2 Accordingly, the requirements of Rule 23(b)(2) are satisfied here.

3 **C. While Ascertainability Inquiries Are Inapplicable to Classes Certified**  
4 **Under Rule 23(b)(2), The Class and Subclass Are Ascertainable.**

5 Finally, “[i]n addition to the explicit requirements of Rule 23, an implied  
6 prerequisite to class certification is that the class must be sufficiently definite; the  
7 party seeking certification must demonstrate that an identifiable and ascertainable  
8 class exists.” *Xavier v. Phillip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089  
9 (N.D. Cal. 2011). A class is ascertainable if it is “administratively feasible for the  
10 court to determine whether a particular individual is a member” using objective  
11 criteria. *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 521 (C.D. Cal.  
12 2012) (citation omitted).

13 Although the Ninth Circuit has not ruled directly on this issue, other circuit  
14 courts have held that “ascertainability is an inappropriate requirement for class  
15 certification in a Rule 23(b)(2) action seeking injunctive relief.” *P.P. v. Compton*  
16 *Unified Sch. Dist.*, Case No. CV 15-3726-MWF, 2015 WL 5752770, at \*23 (C.D.  
17 Cal. Sept. 29, 2015); *see In Re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal.  
18 2015) (citing *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015); *Shook v.*  
19 *El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362,  
20 1366 (1st Cir. 1972).

21 In any event, even if the ascertainability requirement were to apply here, the  
22 Class and Subclass satisfy it. Class membership is based upon objective criteria –  
23 they are immigrant detainees in the legal custody of ICE and are incarcerated in the  
24 Victorville prison, and can be ascertained using the daily housing rosters within  
25 Defendants’ control. The proposed Subclass is likewise ascertainable – whether or  
26 not an immigrant detainee incarcerated at Victorville holds religious beliefs.

27 //

28 //

1       **IV. CONCLUSION**

2           For the above stated reasons, Plaintiffs request that this Court enter an order  
3 certifying this action as a class action and certify a class of “all persons who are  
4 now, or in the future will be, in the legal custody of the U.S. Immigrations and  
5 Customs Enforcement (“ICE”) and detained at Federal Correctional Institution  
6 (“FCI”) Victorville.” Plaintiffs Teneng, Ngwa, Kumar, Gurjinder Singh, Atinder  
7 Paul Singh, and Granados Aquino request that they be certified as Class  
8 representatives, and that their counsel of record be appointed as Class Counsel.

9           Plaintiffs also request that this Court enter an order certifying a subclass of  
10 “All religious persons who are now, or in the future will be, in the legal custody of  
11 ICE and detained at FCI Victorville.” Plaintiffs Ngwa, Gurjinder Singh, Atinder  
12 Paul Singh, and Granados Aquino request that they be certified as the  
13 representatives of the Subclass, and that their counsel of record be appointed as  
14 Subclass Counsel.

15           A proposed Order is attached.

16           Plaintiffs further request that the Court order the parties, pursuant to Rule  
17 23(c)(2)(A), to confer and submit a proposed notice to the Class and Subclass, and  
18 the method of distribution of that notice, within 30 days of the Order certifying the  
19 Plaintiff Class and Subclass.

20 Dated:       September 4, 2018

Respectfully submitted,

21

/s/ Corene T. Kendrick  
Corene T. Kendrick (Cal. 226642)

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*Attorney for Plaintiffs*

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