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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

DARREN BOTTINELLI,
PAMELA MARIE MCGOWAN,
TIMOTHY LASHAWN ALLEN,
RICARDO CESAR RAMIREZ,
JUAN JESUS BORREGO,
MICHAEL EUGENE DAVIS,
MARSHALL ALLEN STUCKY,
YENI NIEBLAS-ESCARREGA,
MARK NUTTER, and
ALEX DURAND WILLIAMS-DAVIS,

Petitioners,

v.

JOSIAS SALAZAR, Warden, Federal
Correctional Institution, Sheridan, and

WILLIAM BROWN, Bureau Of
Prisons Community Corrections
Manager,

Respondents.

Case No. 3:19-cv-00256-MO

MOTION AND MEMORANDUM IN
SUPPORT OF CLASS
CERTIFICATION FOR PETITION
FOR WRIT OF HABEAS CORPUS
AND FOR DECLARATORY AND
INJUNCTIVE RELIEF

(EXPEDITED CONSIDERATION
REQUESTED)

Introduction

The petitioners, through their attorney, Stephen R. Sady, respectfully request that this proceeding be certified a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of the following class:

All federal prisoners sentenced in the District of Oregon or serving sentences in the District of Oregon for whom the Bureau of Prisons has calculated a projected release date within 18 months of December 21, 2018, and who have been or are expected to be denied the benefit of the First Step Act's amendment of 18 U.S.C. § 3624(b).

This case is ideally suited for class certification. All class members have been or will be subject to the same Bureau of Prisons' calculation of good time credits in a manner inconsistent with the First Step Act's amendment of 18 U.S.C. § 3624(b) to require computation of credits against the sentence imposed, rather than time actually served. As a consequence, each class member is being denied an additional seven days of good time credit for each year of the term of imprisonment. All class members face irreparable harm based on a common legal question: should the amendment to § 3624(b) be deemed immediately effective upon its enactment on December 21, 2018, or must its effective date be delayed for up to seven months based on promulgation of rules pertinent only to a different part of the statute?

In addition to the common question of law, class certification in the habeas corpus context provides the optimal form of litigation because: 1) the class members are too numerous for ease of individual litigation; 2) the times at issue are individually relatively small but extremely important to the individual, while cumulatively the loss of liberty and the public expense is great; and 3) representation by counsel on a class basis assures equal treatment of prisoners while avoiding the inefficiencies of separate counsel for each class member. The formulation of remedies for class

members can be easily accomplished for subclasses based on having passed the expiration of the sentence or being in sufficient proximity to the projected release dates to require community corrections programming. All members of the class face sufficient irreparable harm to have common interest in interim relief in the form of immediate injunctive relief.

Legal Standards For Class Certification

As with other civil actions, “a class action may lie in habeas corpus.” *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987) (citing *Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir. 1972)); *see also United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-27 (2d Cir. 1974); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973). The principal purpose of a class action is “efficiency and economy of litigation.” *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). When considering the certification of a class, the court does not assess the merits of the claims. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1111-12 (9th Cir. 2014). All of the requirements under Rule 23 are met in this case. Therefore, this action should proceed as a class action on behalf of all prisoners who are potential beneficiaries of the First Step Act’s amendment to the federal good time credit statute who face irreparable harm from delay in implementation of the amendment to 18 U.S.C. § 3624(b).

A. The Prerequisites To A Class Action Under Rule 23(a) Are Satisfied.

Rule 23 petitioners seeking to represent a class must first establish that the proposed class meets the following four requirements of Rule 23(a):

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) common questions of law or fact exist among the class-members;

- (3) the claims of the class representative are typical of the claims of the class; and
- (4) the class representative will fairly and adequately represent the interests of the class.

These four prerequisites to a class action are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 828 n.6 (1999) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).

1. The Numerosity Requirement Is Met.

Rule 23(a) requires that members of a class be sufficiently numerous that joinder of all members of the class is impracticable. *Amchem*, 521 U.S. at 613. In establishing this element, the representative need not show that the number of class members is so large that it would be impossible to join all of them; “impracticability does not mean impossibility.” *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). There is no fixed number of class members that either necessitates or precludes the certification of a class. *General Tel. Co. of the Northwest v. Equal Employment Opportunity Commission*, 446 U.S.318, 330 (1980). “[A]s a ‘rough rule of thumb,’ approximately forty members is sufficient to satisfy the numerosity requirement.” *Oregon Laborers-Emp’rs Health & Welfare Tr. Fund v. Philip Morris*, 188 F.R.D. 365, 372 (D. Or. 1998) (citations omitted).

In this case, the class includes all federal prisoners whose projected release date is within 18 months of December 21, 2018, who are either serving sentences imposed in the District of Oregon, or who are serving sentences in the District of Oregon, or both. Based on anticipated releases from this District, the number of potential beneficiaries is at least 250 persons. The class includes prisoners who should already be released, whose release is imminent, as well as those whose transfer to community corrections should be accelerated to match an earlier projected

release date. If litigated separately, the demands on the system to process individual motions and petitions would not only be extraordinarily inefficient, the results would be unfair because prisoners who for whatever reason failed to contact counsel and commence litigation would be denied the remedy obtained by others.

In analyzing this element, courts are to consider not just the mere number of potential petitioners, but also such factors as “degree of sophistication, and class members’ reluctance to sue individually” in determining the impracticability of joinder. *Philip Morris*, 188 F.R.D. at 372-73 (citing *Jordan v. Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds*, 459 U.S. 810 (1982)). The Supreme Court has noted the lack of sophistication and other impediments to prisoners’ individual advocacy that militate in favor of class treatment. *See Halbert v. Michigan*, 545 U.S. 605, 607 (2005) (“Persons in Halbert’s situation, many of whom have little education, learning disabilities, and mental impairments, are particularly handicapped as self-representatives.”). The numerosity requirement is met by the raw number of prisoners affected, the efficiency and fairness of litigating common legal issues, and the need to protect prisoners whose circumstances make individual advocacy difficult and unlikely.

2. *The Questions Of Law Presented Are Common To The Class.*

The Ninth Circuit has repeatedly stated that the “commonality” requirement of Rule 23(a)(2) is “construed permissively.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). It is satisfied by the existence of “shared legal issues” with divergent facts, or a “common core of salient facts,” with “disparate legal remedies.” *Rodriguez*, 591 F.3d at 1122 (quoting *Hanlon*, 150 F.3d at 1019). The commonality requirement is satisfied where the question of law linking the class members is

substantially related to the resolution of the litigation even though the individuals are not identically situated. *Jordan*, 669 F.2d at 1320. As the Ninth Circuit explained, commonality does not require that class members are identically situated. *Rodriguez*, 591 F.3d at 1122. (“It is not necessary that “[a]ll questions of fact and law . . . be common to satisfy the rule.”) (quoting *Hanlon*, 150 F.3d at 1019). In *Rodriguez*, the putative class consisted of immigration detainees held for more than six months without a bond hearing. *Id.* at 1111.

The Ninth Circuit rejected the government’s argument that the various factual differences, such as variations in the detention authority and release status, defeated commonality. *Id.* Rule 23(a) does not require that petitioners show that all class members have identical factual and legal claims. *In re First All. Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006) (“When the modern class action rule was adopted, it was made clear that ‘common’ did not require complete congruence.”); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (differences among class members regarding merits of individual cases were “simply insufficient to defeat the propriety of class certification”); *Celano v. Marriott Int’l*, 242 F.R.D. 544, 551 (N.D. Cal. 2007); *see also Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (the need for subsequent individual proceedings “does not supply a basis for concluding that [the named plaintiff] has not met the commonality requirement”); *Doe v. Los Angeles Unified Sch. Dist.*, 48 F. Supp. 2d 1233, 1241 (C.D. Cal. 1999) (“[C]ommonality exists if plaintiffs share a common harm or violation of their rights, even if individualized facts supporting the alleged harm or violation diverge.”). The existence of one or more common facts or legal claims, as is present here, is sufficient. Accordingly, Rule 23(a)(2) does not require that the petitioners establish that all facts or legal issues are common to the class. It requires only a single question of law or fact common to the class. *Mazza v. Am. Honda Motor*

Co., 666 F.3d 581, 589 (9th Cir. 2012) (“commonality only requires a single significant question of law or fact.”).

The commonality requirement is met in this case because commonality arises “when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.” *Philip Morris*, 188 F.R.D. at 373 (citing *Newberg & A. Conte, Newberg on Class Actions* § 3.10, at 51 (3d ed. 1992)). Thus, commonality is found where the actions complained of are the product of centralized decision-making. *Staton v. Boeing Co.*, 327 F.3d 938, 956 (9th Cir. 2003); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)(“commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.”), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). In *Sacora v. Thomas*, Judge Marsh found that commonality was satisfied when federal inmates had shared legal questions concerning the legality of the BOP’s prerelease policies and practices implementing the Second Chance Act. No. CV 08-578-MA, 2009 WL 4639635, at *10 (D. Or. Dec. 3, 2009). Although Judge Marsh found the BOP’s regulation violated the Administrative Procedure Act, the Ninth Circuit affirmed his denial of relief based on informal rules in *Sacora v. Thomas*, 628 F.3d 1059, 1078 (9th Cir. 2010). But both in the district court and on appeal, the common issues of law were deemed appropriate for class litigation.

Similarly, in this case, each class member raises the same fundamental question of law: whether the BOP’s failure to immediately recalculate their projected release date based on the amended good time credit statute violates the statute and Constitution. Each class member is deprived of up to seven days of good time credits for each year of the term of imprisonment. The

commonality issues are limited by the condition of projected release dates within 210 days of the date of the First Step Act's enactment because those with later dates will likely receive recalculated release dates even with the delayed effective date. The deprivation is based on the single categorical policy determination that applies to all class members, not on individual characteristics. The commonality requirement is satisfied.

3. *The Claims Of The Representative Petitioners Are Typical Of The Claims Of The Class.*

Although commonality and typicality tend to merge, the purpose of the typicality requirement is to ensure that the claims or defenses of the representative petitioners are typical of the claims or defenses of the class. *Staton*, 327 F.3d at 957 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)); *Philip Morris*, 188 F.R.D. at 373. Typicality, like commonality, is “permissive and requires only that the representative’s claims are ‘reasonably co-extensive with those of absent class member; they need not be substantially identical.’” *Rodriguez*, 591 F.3d at 1124 (quoting *Hanlon*, 150 F.3d at 1020).

In *Rodriguez*, although the petitioners and putative class were at different points in the removal process, and hence did not raise identical claims, the typicality requirement was satisfied because they were “alleged victims of the same” governmental practice. *Id.* A representative is typical of the class where there is a nexus between the petitioner’s injury and the injuries suffered by the class members. *E.Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). “[A] nexus will be found where the named plaintiffs’ claims stem from the same event, practice or course of conduct that forms the basis of the class claims and is based on the same legal or remedial theory.” *Bower v. Bunker Hill*, 114 F.R.D. 587, 594 (E.D. Wash. 1986) (internal citations omitted). The typicality requirement is satisfied where the respondent’s unlawful conduct was

directed at or affected the class as a whole. *Rodriguez*, 591 F.3d at 1124. Significantly, even the representative's release to supervision while putative class members remain in custody does not defeat typicality. *Rodriguez*, 591 F.3d at 1124. Consequently, it is the nature of the claim or defense of the class representative, and not the facts related to the individual class member, that provides the necessary nexus. *Philip Morris*, 188 F.R.D. at 374.

The petitioners' and the class members' claims arise from the same government conduct, namely the BOP's failure to implement the First Step Act's good time credit fix upon enactment. The petitioners and the class members share similar injuries because they are all deprived of seven days of freedom for every year of their term of imprisonment and, for those not deprived of outright release, they are deprived of earlier transition to prerelease custody under 18 U.S.C. § 3624(c). Although individual facts may bear on how much time the BOP will ultimately give individual class members, the predicate question is whether the rules delaying the implementation of the good time fix are valid, which is typical of all class members. *See LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class."). The class representatives present claims typical of the class.

4. *The Representatives' Counsel Will Fairly And Adequately Advocate The Interests Of The Class.*

"Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Rodriguez*, 591 F.3d at 1125 (quoting *Walters*, 145 F.3d at 1046 (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir.1994)). Rule 23(a)(4) requires that the class representatives must "fairly and

adequately protect the interests of the class.” *Amchem*, 521 U.S. at 613. To satisfy the requirement of adequate representation, (1) the proposed class representative must not have conflicts of interest with the proposed class, and (2) class counsel must be qualified and competent. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1238-39 (9th Cir. 1998); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litigation*, 693 F.2d 847, 855 (9th Cir. 1982); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

In this case, the representative petitioners and their counsel are well qualified to represent the interests of the class. *See Sacora*, 2009 WL 4639635, at *11 (“Given [the Oregon Federal Public Defender’s] experience in handling the issues presented by the previous and pending habeas corpus petitions, there is no doubt that counsel will vigorously prosecute this action on behalf of the class as required under Rule 23(a)(4).”). The Oregon Federal Public Defender has litigated regarding the correct interpretation of the good time credit statute in the Ninth Circuit and the Supreme Court and has extensive experience litigating to enforce prisoners’ rights against BOP policies and practices that violate statutory and constitutional limits on the agency’s authority. All representatives and counsel share the interest of the class in ensuring that prisoners receive the full amount of good time credits to which they are entitled under the law. Because the resolution of the case depends on purely legal issues, there is no realistic possibility of prohibitive conflict between the representative petitioners and class members.

B. A Class Action Is Maintainable Under Each Of The Requirements Of Rule 23(b)(2).

In addition to satisfying the prerequisites of Rule 23(a), the petitioners meet the requirements of Rule 23(b)(2) because the BOP’s actions affect the class as a whole, thereby making injunctive and declaratory relief appropriate. For a class to be certified under Rule

23(b)(2), there must be a showing 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 to the class as a whole.” Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is satisfied if class members complain of a pattern or practice that is generally applicable to the class as a whole. *See Walters*, 145 F.3d at 1047. Although the petitioners maintain that this action can meet the standards of Rule 23(b)(1) and (3), “questions of manageability and judicial economy are irrelevant to 23(b)(2) class actions.” *Rodriguez*, 591 F.3d at 1126 (quoting *Forbush*, 994 F.2d at 1105); *see Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) (“By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2), class action.”), *aff’d in pertinent part and rev’d in part sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979).

In *Rodriguez*, the Court rejected the government’s argument that Rule 23(b)(2) was not satisfied because some class members may not ultimately be entitled to relief. 591 F.3d at 1126. The Court reasoned that “[t]he rule does not require us to examine the viability or bases of class members’ claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them.” *Rodriguez*, 591 F.3d at 1125. “[I]t is sufficient’ to meet the requirements of Rule 23(b)(2) that ‘class members complain of a pattern or practice that is generally applicable to the class as a whole.’” *Rodriguez*, 591 F.3d at 1125 (quoting *Walters*, 145 F.3d at 1047, and citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977)). Injunctive relief is appropriate under Rule 23(b)(2) where the government agency engages in a pattern or practice of conduct adverse to the class. *LaDuke*, 762 F.2d at 1330. Even though some members of the putative class may have suffered no injury or

different injuries from the challenged practice, such variables do not prevent the class from meeting the requirements of Rule 23(b)(2). *Rodriguez*, 591 F.3d at 1124; *Walters*, 145 F.3d at 1047.

Here, the requirements of Rule 23(b)(2) are easily satisfied. The petitioners allege that all class members have been or will be subject to the BOP's invalid delay of recalculation of good time credits. The class members seek the same final injunctive and declaratory relief implementing the First Step Act's good time fix. Rule 23(b)(2) requires no more. *Rodriguez*, 591 F.3d at 1125 (requirements of Rule 23(b)(2) met although various statutes will govern class members' hearing, because "all class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right") (citing *Walters*, 145 F.3d at 1047) (certifying under Rule 23(b)(2) class of aliens seeking declaratory and injunctive relief on the ground that they received constitutionally deficient notice of deportation procedures following charges of document fraud); *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (certifying under Rule 23(b)(2) class of children seeking declaratory and injunctive relief from systemic failures in child welfare system despite differing harms experienced by class members)).

C. The Remedy Sought In Individual Cases Affects All Class Members and The Legality Of The BOP's Policy Is A Common Question Of Law That Predominates Over Any Individual Questions Making Class Action A Superior Method Of Adjudication.

This case also meets the requirements for certification under Rule 23(b)(1) and (3). Rule 23(b)(1) provides that a class action may be maintained if litigating individually creates the risk of varying and inconsistent adjudications that would establish incompatible standards for the opposing party, or if the adjudications would be dispositive, or substantially impair or impede, the rights of non-parties. Rule 23(b)(3) permits certification if "questions of law or fact common to

class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” This District requires consideration of four factors: “(1) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (3) the desirability or undesirability of concentrating the litigation of claims in the particular forum; (4) the difficulties likely to be encountered in the management of a class action.” *Philip Morris*, 188 F.R.D. at 375.

Here, each of these considerations favors class certification. First, there are no individual considerations that would have any effect, much less predominate over the common issues. The issues are purely legal, and the class members share the identical interest in receiving the full statutorily permitted additional good time credits. Second, although an individual case has been litigated, the case was not decided in a manner that resolved the merits issues. *See United States v. Walker*, Case No. 3:10-cr-298-RRB (D. Or. February 7, 2019) (Order Requiring Recalculation of Good Time Credit). Considering the issues as a class at this juncture would not intrude on or duplicate other actions. In fact, certification at this juncture would limit the need to individually litigate the same issues with the concomitant risk of inconsistent results. Third, the petitioners have already briefed the legal issues, and a class action is far superior than litigating these common issues in separate actions that would likely be assigned to different judges. Finally, because the issues are primarily legal, there are few difficulties managing a class action. A class action is by far the most efficient and fair method for adjudicating these cases.

D. Mootness and Ripeness Are Not Bars To Litigation As A Class Action.

Mootness, much less the potential for mootness, is not a basis to deny class certification. *Rodriguez*, 591 F.3d at 1117-118; *Gorbach v. Reno*, 219 F.3d 1087, 1092 n.24 (9th Cir. 2000) (en banc) (“a class action does not become moot merely because it has become moot as to a named plaintiff.”) (citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). Further, in litigation that preceded Congress’s amendment to the good time statute, the Ninth Circuit explicitly held that the same good time credit question – calculation of credits against the term of imprisonment or time served – was not rendered moot by the commencement of supervised release. *Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (9th Cir. 2008) (“The ‘possibility’ that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the petition from being moot”) (quoting *Mujahid v. Daniels*, 413 F.3d 991, 994-95 (2005)); see generally *United States v. Johnson*, 529 U.S. 53, 60 (2000) (“There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term.”).

Similarly, the ripeness doctrine is not a bar to class certification. All the class members’ claims are ripe, either because they would be released or because their reentry programming would be accelerated. See 18 U.S.C. § 3624(c) (providing for up to one year in prerelease custody in reentry centers or home confinement). The BOP’s rules call for reentry programming to begin at least 30 months prior to the projected release date. BOP Program Statement 5325.07 (2007).¹ The definition of the class is limited to prisoners within 18 months of the date of enactment of the First

¹ Available at https://www.bop.gov/policy/progstat/5325_007.pdf.

Step Act. All class members have immediate interests in correct calculation of good time credits, either to receive immediate release, to prepare for earlier release, or to accelerate transfer to community corrections.

Conclusion

This action should proceed as a class action because the requirements of Rule 23 have been met. Without district-wide certification, the class members would be required to initiate individual suits raising identical claims. The injunctive and declaratory relief requested affects all class members. Proceeding as a class would provide for fair and efficient consideration of the class members' claims. For the foregoing reasons, the petitioners respectfully request that the Court enter an order certifying petitioners' petition for habeas corpus relief and remedial injunctive and declaratory relief as a class action and declare them to be Rule 23 class representatives.

Respectfully submitted this February 20, 2019.

/s/ Stephen R. Sady

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