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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC., a California Corporation;

HAITIAN BRIDGE ALLIANCE, INC., a California Corporation;

DIEGO DOE, ELENA DOE, GUADALUPE DOE, LAURA DOE, LUISA DOE, MICHELLE DOE, NATASHA DOE, PABLO DOE, AND SOMAR DOE, individually and on

Case No.: 3:23-cv-01367-AGS-BLM

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR PROVISIONAL CLASS CERTIFICATION

behalf of all others similarly situated;

Plaintiffs,

v.

ALEJANDRO N. MAYORKAS, Secretary, U.S. Department of Homeland Security, in his official capacity;

TROY A. MILLER, Senior Official Performing the Duties of Commissioner, U.S. Customs and Border Protection, in his official capacity;

DIANE J. SABATINO, Acting Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in her official capacity;

Defendants.

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I. INTRODUCTION

The Named Plaintiffs ("Named Plaintiffs" or "Plaintiffs") seek provisional class certification for the purpose of pursuing preliminary injunctive relief. They seek certification of a cohesive class consisting of all noncitizens who seek or will seek to present themselves at a Class A Port of Entry on the U.S.-Mexico border ("POE") to seek asylum, and were or will be prevented from accessing the U.S. asylum process by or at the direction of Defendants on or after May 12, 2023. The Plaintiffs easily meet all the requirements of Federal Rule of Civil Procedure Sections 23(a) and 23(b)(2).

Indeed, this Court has already certified nearly identical classes under nearly identical circumstances. *See, e.g.*, *Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 507 (S.D. Cal. 2020) (certifying class consisting of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [POE] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016"); *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 869-74 (S.D. Cal. 2019) (granting motion for provisional class certification).

Here, all the class members advance a common set of legal claims based on a common nucleus of operative facts. Each of the Named Plaintiffs and the class they seek to represent were injured by Defendants' refusal to comply with their own Binding Guidance (as defined below), according to which Defendants are supposed to inspect and process noncitizens who are in the process of arriving at POEs. Defendants are supposed to allow arriving noncitizens to be inspected and processed when they walk up to a POE. That is not happening. Along the U.S.-Mexico border, Defendants are refusing to follow that Binding Guidance. Instead, CBP has a policy and widespread practice of turning back noncitizens who do not have an appointment made through the CBP One mobile app ("CBP One"). Defendants' conduct affects thousands of arriving noncitizens and raises common questions for each of those

class members—including whether Defendants have adopted a policy of turning back arriving noncitizens who do not have a CBP One appointment and whether class members are harmed by Defendants' refusal to follow their own Binding Guidance of not turning back arriving noncitizens. The class members bring claims under the *Accardi* doctrine that are typical of the class, and they will adequately represent the proposed class. Finally, this Court can and should remedy the effects of Defendants' unlawful conduct through a single, narrow injunction prohibiting Defendants from diverting from their Binding Guidance. Thus, the Court should certify the provisional class.

II. FACTS COMMON TO THE PROVISIONAL CLASS

The facts in this case are simple, cohesive, and subject to common proof. Defendants adopted guidance and publicly stated that they would inspect and process noncitizens without CBP One appointments who were arriving at POEs. That is not what's happening. Instead, Defendants systematically turn back arriving noncitizens at POEs across the border and force asylum seekers to use a glitchy smartphone app—even though asylum seekers frequently lack the means or ability to do so— to try to obtain an appointment to present at a POE at some unspecified date in the future. Importantly, Plaintiffs have caught Defendants red-handed in a blatant and systematic *Accardi* violation. Even at this early stage of the litigation, Plaintiffs have irrefutable evidence of Defendants' turnbacks, including statements under oath from asylum seekers, legal service providers, and humanitarian organizations who witnessed the turnbacks, and audio recordings of CBP officers turning back arriving noncitizens. This is precisely the sort of case that can be quickly proved using a common set of evidence to address common factual questions.

A. THE GOVERNMENT STATED PUBLICLY THAT ASYLUM SEEKERS CAN PRESENT AT POES FOR INSPECTION AND PROCESSING WITHOUT A CBP ONE APPOINTMENT

On November 1, 2021, Acting CBP Commissioner Troy Miller issued a

memorandum titled *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (the "November 2021 Memo"). Ex. 1.[1] The memorandum "provides updated guidance for the management and processing" of undocumented noncitizens who present at POEs along the southern border. *Id.* at 1. The memorandum states that "asylum seekers or others seeking humanitarian protection cannot be required to submit advance information [i.e., use the CBP One app] in order to be processed at a Southwest Border land POE." *Id.* at 2. This memorandum, which constitutes CBP's binding internal guidance governing the processing of asylum seekers arriving at POEs along the southern border, remains in effect and available on the CBP's website, and has not been rescinded or superseded by CBP.

On May 11, 2023, Defendants promulgated a new Rule, dubiously titled "Circumvention of Lawful Pathways" (the "Rule"), which went into effect on May 11, 2023, and similarly sets forth the government's binding guidance that noncitizens presenting at POE will not be turned away or denied the opportunity to seek protection in the United States. *See* 88 Fed. Reg. 31,314 (May 16, 2023), codified at 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1).[2] The Rule bars asylum for all individuals who transited through a third country en route to the United States (*i.e.*, all non-Mexicans). 8 C.F.R. § 208.33(a)(1). It includes three principal exceptions for individuals who: (i) applied for and received a denial of protection in a transit

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[1] All references to "Ex." refer to the exhibits to the contemporaneously-filed Declaration of Stephen M. Medlock.

[2] The provisions governing asylum eligibility of §§ 208.33 and 1208.33 are identical. For simplicity, we cite only to § 208 throughout. On July 25, 2023, a California district court vacated the Rule on the basis that it is contrary to law, arbitrary and capricious, and procedurally invalid, in violation of the Administrative Procedure Act. *See East Bay Sanctuary Covenant v. Biden*, 2023 WL 4729278 (N.D. Cal. 2023). The Court of Appeals for the Ninth Circuit has stayed that order pending appeal. *See* Ninth Circuit Case No. 23-16032.

country; (ii) obtained advance permission to travel to the United States through an approved parole program; or (iii) obtained an appointment to present through CBP One. Despite the other exceptions, as a practical matter for the vast majority of people at the southern border, CBP One is the exclusive means through which they can seek asylum at a POE.

The Rule did not change or invalidate the relevant guidance from the November 2021 Memo. Instead, it reiterates that POEs will remain accessible for all noncitizens seeking protection. For example, the preamble states that "CBP's policy is to inspect and process all arriving noncitizens at POEs, regardless of whether they have used the CBP One app," that "[i]ndividuals without appointments will not be turned away," and that an advance appointment is "not a prerequisite to approach a POE, nor is it a prerequisite to be inspected and processed." 88 Fed. Reg. at 31,358. In fact, the preamble repeatedly asserts that CBP will process all individuals who present at a POE without regard to whether the individual has a CBP One appointment. *See* 88 Fed. Reg. at 31,358, 31,365, 31,392, 31,396, 31,399, 31,401, n.240.

This official policy is consistent with the structure of the Rule, which provides an exception to its asylum eligibility bar for those without a CBP One appointment who "demonstrate[] by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to [a] language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle," 8 C.F.R. § 208.33(a)(2)(ii)(B), or who "demonstrate[ ] by a preponderance of the evidence that exceptionally compelling circumstances exist," such as facing "an acute medical emergency" or "imminent and extreme threat to life or safety," or having been a victim of a severe form of trafficking." *Id.* §§ 208.33(a)(3)(i). In order to "demonstrate[ ] by a preponderance of the evidence" that an individual meets one of these exceptions, however, the individual needs to be in asylum proceedings. That is, the structure the Rule clearly envisions, as the preamble of the Rule expressly states,

that noncitizens arriving at a POE without a CPB One appointment will be given access to the asylum process—*i.e.*, they will be inspected and processed and not turned away. Collectively, we refer to the November 2021 Memo, the statements in the preamble to the Rule and the structure of the Rule as the "Binding Guidance" governing the inspecting and processing of asylum seekers arriving at POEs without a CBP One appointment.

B. DESPITE ITS STATED GUIDANCE, THE GOVERNMENT HAS A POLICY OF TURNING BACK ARRIVING NONCITIZENS WITHOUT A CBP ONE APPOINTMENT

CBP has a policy (the "CBP One Turnback Policy") under which CBP officials repeatedly refuse to process asylum seekers at POEs who present without a CBP One appointment despite the Binding Guidance. *See, e.g.*, Ex. 2 at ¶¶ 9, 11 (class representative Elena Doe turned back by CBP officer and told that she needed to use CBP One instead); Ex. 3 at ¶ 9 (same for class representative Guadalupe Doe); Ex. 4 at ¶ 8 (same for class representative Somar Doe); Ex. 5 at ¶ 14 (same for class representative Diego Doe); Ex. 6 at ¶¶ 15-17 (same for class representative Laura Doe); Ex. 7 at ¶¶ 14-15 (CBP officer told class representative Luisa Doe, "Don't you understand that's only possible through CBP One?," and turned her back to Mexico); Ex. 8 at ¶¶ 13-14 (CBP officer turned back class representative Michelle Doe despite the fact that she did not have a working phone); Ex. 9 at ¶ 9 (CBP officer turned back class representative Pablo Doe); Ex. 10 at ¶¶ 9-12 (turnback at Nogales POE). Defendants cannot dispute this fact. They have been caught in audio recording turning back arriving noncitizens at POEs despite the binding guidance that prevents them from doing so. *See, e.g.*, Ex. 11 (Ramos Decl.) at ¶¶ 6-8, 10, 11, and 14

(summarizing audio recordings); Ex. 12 (audio recordings).[3]

Each of the Named Plaintiffs experienced technical, language or other obstacles in using the CBP One app, experienced exceptionally compelling circumstances, or experienced both that would exempt them from being barred from asylum eligibility under the Rule. Indeed, many of the Named Plaintiffs are Mexicans, to whom the bar does not even apply. However, CBP officials have turned back the individual Named Plaintiffs and refused to consider their circumstances without a CBP One appointment. *See*, *e.g.*, Ex. 5 ¶ 13; Ex. 6 ¶ 14; Ex. 7 ¶ 15.

Plaintiff Pablo Doe tried to make CBP One appointments, but the app "is routinely broken, freezes constantly," he experiences errors when attempting to download the app's required update, and, as a Spanish speaker who does not read English, he cannot understand many of the app's error messages, which appear in English. Ex. 9 ¶ 8. Pablo Doe presented at a POE in July 2023 and explained his situation to two CBP officers who replied that he could not apply for asylum without a CBP One appointment and that technical difficulties with the app were not "their problem." *Id.* ¶ 9. In an implicit concession that Pablo Doe faced language barriers when using the app, the CBP officers told him that he "should learn English" if he wants to live in the United States. *Id*. *See also* Ex. 13 (Pinheiro Decl.) ¶¶ 27, 29.

Similarly, Plaintiff Laura Doe has tried to make a CBP One appointment but has repeatedly received error messages that prevent her from completing the process. Ex. 6 ¶ 14. She and her three young children have feared for their lives since Mexican cartels murdered her two brothers-in-law and kidnapped her husband and father-in-law. *Id.* ¶¶ 7-8. When Laura Doe and her children presented at a POE without a CBP One appointment, CBP officials refused to process her and told her to "keep trying"

[3] Subsequent to the filing of the complaint, Pablo Doe and Elena Doe received CBP One appointments. Because they were turned back, this does not affect their status as class representatives.

the app. *Id.* ¶ 16.

The other Plaintiffs recount similar circumstances. *See, e.g.* Ex. 7 ¶ 11 ("The app has given me error messages at least six or seven times, saying things like there is an error in the system, try again later; or that I have to delete and re-install the app; or that I should exit the app and try to re-open it."); Ex. 14 ¶ 9 ("I don't know how to use the app"); Ex. 3 ¶ 13 ("[W]e had experienced many problems using the app"); Ex. 5 ¶ 14 ("[W]e could not request a CBP One appointment because we do not have a sponsor in the United States and the app will not let us proceed without that information."). These experiences are not unique to the Plaintiffs, but common among the members of the proposed provisional class.[4] *See, e.g.*, Ex. 13 ¶ 26-27 (detailing reports of the "app crash[ing] frequently" and the many error messages asylum seekers receive); Ex. 16 ¶ 5 (describing the "inexplicable error messages [asylum seekers] received in English in the app, which prevented them from registering for an appointment"); Ex. 17 ¶ 18 (Carlos Doe explaining that he "received error messages" and that the app "froze[] about 7 times on different days"); Ex. 18 ¶ 15 ("I have personally witnessed dozens of migrants attempting to complete the lengthy CBP One registration and/or appointment process for themselves and their families, only to have the app drop connection with their phone and crash. Many of these people successfully completed the application, hit submit, and watched the app freeze and give them an error message.").

Humanitarian organizations working at the border have repeatedly observed CBP officials turning back asylum seekers without CBP One appointments in direct

[4] Joel Rose & Marisa Penaloza, *Migrants Are Frustrated with the Border App, Even after Its Latest Overhaul* at 00:33-39, NPR (May 12, 2023), https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul ("One by one, [asylum seekers] look up in disappointment, with a familiar message on their phone screens: 'system error.'").

violation of CBP's Binding Guidance. *See, e.g.*, Ex. 10 ¶ 12 (describing turnbacks at Nogales POE); Ex. 13 ¶¶ 40 ("AOL staff and volunteers observed CBP officers at San Ysidro Ped East and the Otay Mesa POE refuse to process walk-ups without a CBP One appointment."), 47 (describing multiple turnbacks of individuals and families from the San Ysidro POE); Ex. 16 ¶¶ 7-8; Ex. 19 ¶ 29 (explaining that a Haitian Bridge Alliance delegation "witnessed Mexican officials turn away roughly 100 adults and children who had been waiting to seek asylum and send them back to Matamoros"); Ex. 23 ¶¶ 15-16 (Las Americas Immigrant Advocacy Center team detailing how a CBP officer turned back a pregnant woman and her family at the instruction of the CBP officer's supervisor), 25; Ex. 24 ¶ 15 (Strauss Center for International Security and Law Fellow explaining that she has witnessed asylum seekers being turned back at the San Ysidro POE and "instructed to use the CBP One application despite the insufficient number of appointments"); Ex. 25 at 42-46 (describing several incidents of asylum seekers turned away at various POEs). In fact, Plaintiff Al Otro Lado has recorded certain Named Plaintiffs' encounters with the CBP officers who turned them back at POEs. *See, e.g.*, Exs. 11-12 (Ramos Decl. and audio recordings).[5] Mexican officials likewise have been witnessed turning asylum seekers back at the direction or behest of CBP. *See, e.g.*, Ex. 18 ¶ 25 ("The INM officers ask the people in line to present their CBP One appointment confirmations and promptly send away those who do not have one."); *see also* Ex. 16 ¶¶ 7-8 (describing multiple asylum seekers being turned away by INM); Ex. 24 ¶ 16 (explaining that individuals who experience technical difficulties with CBP One have been "turned back either by CBP or by INM officials before they even reach the POE").

[5] Plaintiffs have lodged copies of the audio recordings with the Court and produced them to Defendants.

C. THE GOVERNMENT'S CONDUCT HAS IRREPARABLY HARMED THE CLASS

As a direct result of Defendants' CBP One Turnback Policy, asylum seekers who are arriving at POEs and would seek access to the asylum process in the United States but for Defendants' conduct are left waiting at POEs for months, in dire conditions and in areas of Mexico that are so dangerous that the U.S. State Department warns U.S. citizens not to travel there. *See* Ex. 15 (State Department Mexico Travel Advisory). These individuals, who fled their homes to escape violence, are met with similar and new threats in border towns near POEs. They find few safe shelters, no job prospects, and unreliable access to food, water, and medical treatment while they try repeatedly to use the CBP One app to request an appointment. *See, e.g.*, Ex. 13 ¶ 57 (describing the "extreme danger" where "[f]ew have access to safe housing, medical care, or work to support themselves"); Ex. 16 ¶ 9 ("The encampments, and some of the shelters, lack basic sanitation and hygiene, including non-functional toilets, makeshift portable toilets, or portable toilets that overflow before they are serviced."); Ex. 19 ¶ 32 (describing the "deplorable and shocking" living conditions many Haitian migrants face in Matamoros). These perilous conditions result in significant physical and mental harm to Plaintiffs and members of the proposed class. *See, e.g.*, Ex. 20 at 1-3 (explaining that many clients of Humanitarian Outreach for Migrant Emotional Health "have suffered kidnappings, assault, extortion, and rape in cities immediately outside U.S. ports of entry" and detailing the intense trauma-related symptoms asylum seekers suffer). Tragically, it is not uncommon for asylum seekers, including children, to die in these conditions. *See, e.g.*, Ex. 13 ¶¶ 34, 57 (describing deaths of ten clients and an infant); Ex. 19 ¶¶ 34, 42 (describing deaths of many Haitian asylum seekers due to stress, lack of water, lack of access to nutritious food and medical treatment, and lack of protection from extreme gang violence); Ex. 21 ¶¶ 13-17 (describing the murder of Isabel Doe's husband by cartel members in Tijuana); Ex. 23 ¶¶ 18, 19, 26 (describing kidnappings

and cartel activity in border towns).[6]

Each of the Plaintiffs have their own harrowing accounts of escaping imminent violence to seek asylum in the United States; common among them is that the risk of harm persists and increases the longer they are stranded near POEs awaiting a CBP One appointment. Elena Doe fears that her abusive ex-husband will find and harm her and suffers psychologically as a result. Ex. 2 ¶¶ 5-10. Laura Doe fears that the same cartel that disappeared her husband and father-in-law will find and harm her and her children, and rarely leaves her Tijuana shelter as a result. Ex. 6 ¶¶ 6, 8-12. Luisa Doe was previously attacked by narcotraffickers due to her cooperation with government authorities and has received threatening messages while waiting for a CBP One appointment. Ex. 7 ¶¶ 5-9, 17. Diego Doe escaped corrupt governmental officials and organized crime in Mexico and fears that the longer he stays in Mexico, the greater chance his persecutors will find and kill him. Ex. 5 ¶¶ 5-6, 9, 16. Michelle Doe fled her abusive ex-partner, a member of a Mexican cartel, with her newborn daughter and is currently living in hiding at a shelter in Tijuana while she awaits a CBP One appointment. Ex. 8 ¶¶ 9-13, 16. Pablo Doe was assaulted and robbed on his way to the POE and now lives in hiding. Ex. 9 ¶ 7. Natasha Doe fled Haiti after being forced into a car and assaulted; she later received death threats. Ex. 14 ¶¶ 4-5. Somar Doe and Guadalupe Doe fled an abusive family member with ties to organized crime and fear that he will find and harm them and their family. Ex. 3 ¶¶ 5-7, 16; Ex. 4 ¶¶ 6-7. Nonprofits have heard similar accounts from other members of the proposed class. *See, e.g.*, Ex. 21 ¶¶ 13-17 (describing the murder of Isabel Doe's husband by

[6] *See also* Steven Dudley, Parker Asmann & Victoria Dittmar, *Unintended Consequences: How US Immigration Policy Foments Organized Crime on the US-Mexico Border*, InSight Crime, June 2023, https://insightcrime.org/wp-content/uploads/2023/06/HGBF-US-Policy-OC-and-Migration-Policy-Brief-InSight-Crime-June-2023-FINAL-ENG.pdf (describing high risks of extortion, kidnapping, and smuggling in and around border towns).

cartel members in Tijuana; Ex. 17 ¶¶ 5-8 (describing death threats to Carlos Doe and his family by MS-13 members); Ex. 22 ¶¶ 4-6 (describing Angela Doe fleeing abuse and threats by ex-partner). While these stories each have their own harrowing details, they share a common cause—Defendants' illegal conduct, which has deprived them of access to the U.S. asylum process and exacerbated the danger that they are facing.

In addition to the dangers that Plaintiffs and other class members fled, these individuals are at extreme risk of further violence while they wait for CBP One appointments. In July 2023, twenty-two nonprofits that work along the border reported that kidnappings and extortion of migrants were increasing in the states of Sonora, Chihuahua, and Tamaulipas, which border Arizona and Texas.[7] Asylum seekers have reported being robbed and raped while waiting for a CBP One appointment. *See, e.g.*, Ex. 13 ¶ 57 (explaining that many migrants "face kidnapping, rape, extortion, and other violence on a regular basis"), 58, 63-64.

In addition to the persistent threat of violence, asylum seekers experience perilous living conditions at shelters and camps near the POEs. Natasha Doe and her young child often go a day or more without eating because they cannot afford food or clean water and live outside an abandoned gas station. Ex. 14 ¶ 10. Elena Doe is currently at a shelter near the San Ysidro POE and struggles to find necessities, such as diapers and milk, for her baby. Ex. 2 ¶ 12. Laura Doe's daughter recently had to be taken to the hospital from their Tijuana shelter. Ex. 6 ¶ 18. Guadalupe Doe's children have repeatedly become ill after eating expired food at their shelter. Ex. 3 ¶ 12. Stories about precarious living conditions near POEs are all too common among members of the class. The extended periods of time that proposed class members must endure these conditions because of the CBP One Turnback Policy acutely harms

[7] Adam Isaacson, Washington Office on Latin America, "Weekly U.S.-Mexico Border Update: Heat wave hits migrants, trends along migration route, fentanyl seizures," (Jul. 7, 2023), https://www.wola.org/2023/07/weekly-u-s-mexico-border-update-heat-wave-hits-migrants-trends-along-migration-route-fentanyl-seizures/.

the most vulnerable among them, such as children, the elderly, those marginalized by race, indigeneity, gender and sexual identity, or language, and those with medical conditions. *See, e.g.*, Ex. 13 ¶ 57 (medically vulnerable asylum seeker who was hospitalized in Mexico remains in a coma due to brain trauma that could have been avoided had he been paroled into the United States earlier); Ex. 19 ¶ 34 (baby who stopped eating and whose fever spiked while in Mexico required emergency care after being paroled into the U.S.).

As detailed above, Defendants' failure to abide by their own Binding Guidance has wreaked havoc on the lives of Plaintiffs and proposed class members by denying them access to the U.S. asylum process.

III. THE REQUIREMENTS OF FED. R. CIV. P. 23(A) ARE MET

District courts routinely grant motions for provisional class certification where the requirements of Rule 23 are satisfied. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1005 n.4 (9th Cir. 2020); *Carillo v. Schneider Logistics, Inc.*, 2012 WL 556309, at *9 (C.D. Cal. 2012), *aff'd*, 501 F. App'x 713 (9th Cir. 2012). A plaintiff whose lawsuit meets the requirements of Rule 23 has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). To give rise to that right, a plaintiff needs to make only two showings. First, the plaintiff must show that the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—are met. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 424 (2022). Second, the plaintiff must demonstrate that the proposed class fits into one of the three types of classes authorized by Rule 23(b). *Id.* Plaintiffs have easily made that showing here.[8]

[8] When analyzing class certification, "[t]he court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018). "But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight

A. THE PROVISIONAL CLASS IS NUMEROUS

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." "Impracticability does not mean impossibility" but only "the difficulty or inconvenience of joining all members of [the] class." *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501 (S.D. Cal. 2013) (quoting *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)).

There is no "specific number of class members required for numerosity." *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). A plaintiff does not need to specify the exact number of class members in order to certify a class. *Ms. L. v. ICE*, 331 F.R.D. 529, 536 (S.D. Cal. 2018). However, "courts generally find that the numerosity factor is satisfied if the class comprises 40 or more members, and will find that it has not been satisfied when the class comprises 21 or fewer." *In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 452 (N.D. Cal. 2012), *aff'd sub nom. Fox Test Prep v. Facebook, Inc.*, 588 F. App'x 733 (9th Cir. 2014). Where, as here, a plaintiff "seek[s] only injunctive and declaratory relief, the numerosity requirement is relaxed and [the] plaintiff[] may rely on [] reasonable inference[s] . . . that the number of unknown and future members . . . is sufficient to make joinder impracticable." *Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Tr.*, 317 F.R.D. 91, 100 (N.D. Cal. 2016) (internal quotation marks omitted), *aff'd*, 867 F.3d 1093 (9th Cir. 2017); *see also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 589-90 (N.D. Cal. 2015) ("In determining whether numerosity is satisfied, the Court may consider reasonable inferences drawn from the facts before it.").

Here, joinder is clearly impracticable,[9] because "general knowledge and

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that evidence is given at the class certification stage." *Id.* (concluding that district court abused its discretion by refusing to consider a declaration purely on admissibility grounds).

[9] *See supra*, Section II.B.

common sense indicate that [the provisional class] is large." *Von Colln v. Cnty. of Ventura*, 189 F.R.D. 583, 590 (C.D. Cal. 1999) (internal quotation marks omitted). In two motions involving two classes nearly identical to the one proposed here, the defendants conceded, and the Court agreed, that the classes satisfied Rule 23(a)(1)'s numerosity requirement. *Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 500-02 (S.D. Cal. 2020) (finding that a class of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [POE] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016" satisfied Rule 23(a)(1)); *see also Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 869-70 (S.D. Cal. 2019) (finding that a class of "all non-Mexican noncitizens who were denied access to the United States Asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process" also satisfied Rule 23(a)(1)). Here, the provisional class contains at least hundreds, if not thousands of individuals, which is "large enough on its face" to satisfy Rule 23(a)(1). *Al Otro Lado*, 423 F. Supp. 3d at 870.

B. THERE ARE COMMON QUESTIONS OF LAW AND FACT

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotation marks omitted). Therefore, a question is common to the class when "it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. In contrast, a question is individual "where members of a proposed class will need to present evidence that varies from member to member." *Olean*, 31 F.4th at 663; *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

However, all questions of law and fact do not need to be common to the proposed class in order to satisfy Rule 23(a)(2). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). Commonality can be satisfied by as little as one common issue. *See, e.g.*, *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (commonality "does not . . . mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single *significant* question of law or fact") (internal quotation marks omitted).

When a plaintiff is seeking injunctive relief, commonality is present "where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D. Ariz. 2016) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005)). Such suits "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Mary Kay Kane, *Federal Practice & Procedure* § 1763 (4th ed. 2023). Thus, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Arroyo v. U.S. Dep't of Homeland Sec.*, 2019 WL 2912848, at *9 (C.D. Cal. 2019) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003)).

Whether an agency is correctly interpreting and enforcing its own regulations is a common question of law and fact sufficient for class certification. *See Al Otro Lado*, 423 F. Supp. 3d at 870-71. In *Al Otro Lado v. McAleenan*, the plaintiffs sought provisional class certification for a class of asylum seekers turned away before the effective date of a new asylum eligibility rule. *Id.* at 871. This Court found that commonality existed because it could determine "in one fell swoop" whether the government was "improperly construing" its own regulation to apply to those who had been turned back before the regulation's promulgation. *Id.*

Slight variations in how class members experience the government's failure to comply with its own regulations or guidance do not defeat class certification. In fact,

this Court has certified similar classes despite variations in how the class members were impacted by a government policy. *See Al Otro Lado*, 336 F.R.D. at 502-03. In *Al Otro Lado*, this Court found that although Plaintiffs asserted that turnbacks at ports of entry occurred in eight different ways, there were "sufficient commonalities between all eight practices to generate common answers" that would drive the litigation forward. *Id.* at 502-03. Namely, the actions and omissions at issue were caused by a single actor (CBP) for the same reason (restricting access to asylum), each of the class members were affected by one of the practices, and the plaintiffs contended that each of the practices was illegal. *Id.* at 503; *see also Lyon v. ICE*, 300 F.R.D. 628, 642 (N.D. Cal. 2014) ("[t]he fact that the precise practices among the three [immigration detention] facilities may vary" was not a basis to deny class certification), *modified*, 308 F.R.D. 203 (N.D. Cal. 2015); *Unknown Parties*, 163 F. Supp. 3d at 638-39 (rejecting as "irrelevant" government's argument that "factual differences" in the treatment of "individual immigration detainees" negated commonality).

So too, here. CBP turned back, or, in the case of Natasha Doe, would have turned back, the Named Plaintiffs while they were in the process of arriving in the United States at a POE. *See, e.g.*, Ex. 2 at ¶¶ 9, 11 (Elena Doe turned back by CBP officer and told that she needed to use CBP One instead); Ex. 3 at ¶ 9 (same for Guadalupe Doe); Ex. 4 at ¶ 8 (same for Somar Doe); Ex. 5 at ¶ 14 (same for Diego Doe); Ex. 6 at ¶¶ 15-17 (same for Laura Doe); Ex. 7 at ¶¶ 14-15 (substantially same for Luisa Doe); Ex. 8 at ¶¶ 13-14 (CBP officer turned back class representative Michelle Doe despite the fact that she did not have a working phone); Ex. 9 at ¶ 9 (CBP officer turned back Pablo Doe). And CBP's turnbacks were in direct contravention of its Binding Guidance. CBP's bait-and-switch at the border is an issue common to the class. *See* Fed. R. Civ. P. 23(a)(2); *Doe 1 v. Nielsen*, 357 F. Supp. 3d 972, 988-89 (N.D. Cal. 2018) (finding that commonality existed and

certifying class with respect to *Accardi* claim).[10]

C. TYPICALITY IS SATISFIED

Federal Rule 23(a)(3) requires "the claims . . . of the representative parties [to be] typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "[T]he typicality requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (internal quotation marks omitted). "Measures of typicality include whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the Named Plaintiffs, and whether other class members have been injured by the same course of conduct." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks omitted). Therefore, "typicality . . . is satisfied when . . . each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez*, 591 F.3d at 1124 (internal quotation marks omitted).

Here, the Named Plaintiffs' claims are reasonably coextensive with the remainder of the class. The Named Plaintiffs and class members suffered injuries when they were, or would have been, turned back from Class A POEs by or at the instruction of CBP. Ex. 2 ¶¶ 5-10 (Elena Doe describing increased risk of harm the longer she is stranded in dangerous conditions near a POE awaiting a CBP One appointment); Ex. 6 ¶¶ 6, 8-12 (same for Laura Doe); Ex. 7 ¶¶ 5-9, 17 (same for Luisa Doe); Ex. 5 ¶¶ 5-6, 9, 16 (same for Diego Doe) Ex. 8 ¶¶ 9-13, 16 (same for Michelle Doe); Ex. 9 ¶ 7 (same for Pablo Doe); Ex. 14 ¶¶ 4-5 (same for Natasha Doe); Ex. 3 ¶¶ 5-7, 16 (same for Guadalupe Doe); Ex. 4 ¶¶ 6-7 (same for Somar Doe). The claims of the Named Plaintiffs and the class members also raise the same legal issue—namely, whether Defendants are ignoring their own Binding Guidance requiring

[10] *See supra*, Section II.

them to inspect and process noncitizens who are in the process of arriving at POEs regardless of whether they have a CBP One appointment. *See Al Otro Lado*, 336 F.R.D. at 504 (finding that similar facts demonstrated typicality); *Rodriguez*, 591 F.3d at 1124 (finding typicality where the petitioner and proposed class "raise[d] similar constitutionally-based arguments and [were] alleged victims of the same practice").

D. THE NAMED PLAINTIFFS AND COUNSEL ARE ADEQUATE

Federal Rule of Civil Procedure 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This factor requires (1) that the proposed representative plaintiffs not have conflicts of interest with the proposed class, and (2) that the plaintiffs be represented by qualified or competent counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. 338. "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." Kane, *supra*, § 1768.

Similarly, Federal Rule of Civil Procedure 23(g) is designed to "guide the court in assessing proposed class counsel as part of the certification decision." Fed. R. Civ. P. 23(g) advisory committee's note to 2003 amendment. Rule 23(g)(1)(A) provides that, in appointing class counsel, a court "must consider" the following: "(1) the work counsel has done in identifying or investigating potential claims in the action, (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action, (3) counsel's knowledge of the applicable law, and (4) the resources that counsel will commit to representing the class." Indeed, this Court previously found nearly the same counsel to be adequate on two prior occasions. *See Al Otro Lado*, 423 F. Supp. 3d at 872; *Al Otro Lado*, 336 F.R.D. at 505; *see also* Medlock Decl. at ¶¶ 2-5 (discussing qualifications of class counsel).

Plaintiffs' counsel have extensively investigated Defendants' refusal to comply with their own Binding Guidance governing the inspection and processing

of noncitizens arriving at POEs and analyzed the legal basis for Plaintiffs' claims. They have also identified additional asylum seekers harmed by Defendants' CBO Turnback Policy and have worked closely with Plaintiffs Al Otro Lado and Haitian Bridge Alliance, as well as other nongovernmental organizations working at the U.S.-Mexico border, to obtain relevant evidence concerning Defendants' conduct. *See, e.g.*, Medlock Decl. ¶ 2.

Plaintiffs' counsel have extensive experience with complex litigation and class actions, including challenges related to the government's immigration policies and Defendants' implementation of those policies. Medlock Decl. ¶¶ 3-5. Together, the class action and subject matter expertise of Plaintiffs' counsel qualify them to represent the provisional class. Finally, Plaintiffs are aware of no conflicts amongst the provisional class. Medlock Decl. ¶ 6. Thus, the requirements of Rule 23(a)(4) have been met.

E. RULE 23(B)(2) IS SATISFIED

Rule 23(b)(2) is easily satisfied here. "The key to the [Rule 23](b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360 (citation omitted). Thus, class certification is appropriate where the party opposing the class "has acted in a consistent manner towards members of the class so that [its] actions may be viewed as a part of a pattern of activity, or has established or acted pursuant to a regulatory scheme common to all class members." *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 240 (C.D. Cal. 2003) (citation omitted). "Even if some class members have not been injured by the challenged practice, a [Rule 23(b)(2)] class may nevertheless be appropriate." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).

The mere existence of factual differences among some class members will not defeat a motion to certify a Rule 23(b)(2) class because the focus of Rule 23(b)(2) is

the relief sought, not the factual circumstances of each class member. *See Unknown Parties*, 163 F. Supp. 3d at 643 (rejecting argument that plaintiffs were "challeng[ing] . . . various practices amongst [multiple] facilities," because plaintiffs identified the "systemic nature of the conditions" at those detention facilities) (internal quotation marks omitted); *Walters*, 145 F.3d at 1047 ("[T]he government's dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule"). The relevant question for purposes of Rule 23(b)(2) is "the 'indivisible' nature of the claim alleged and the relief sought." *Ms. L.*, 331 F.R.D. at 541 (certifying Rule 23(b)(2) class); *Lyon*, 308 F.R.D. at 214 (rejecting argument that ICE facilities had different attributes, because "these differences do not negate the fact that Plaintiffs seek relief that is applicable to . . . the entire class"). This is because Rule 23(b)(2) "focuses on the defendant and questions whether the defendant has a policy that affects everyone in the proposed class in a similar fashion." 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4:28 (6th ed. 2023).

For example, in *Jane Doe 1 v. Nielsen*, a group of eighty-seven Iranian Christians sued DHS for denying them entry into the United States. 357 F. Supp. 3d at 980-81. Those plaintiffs argued that the government's "uniform response" to their applications to enter the United States was "sufficient to satisfy Rule 23(b)(2)." *Id.* at 992. The court reasoned that, in the face of the government's apparent uniform action, the "declaratory and injunctive relief sought [would] appl[y] equally to all members of the proposed class and thus conform[ed] to Rule 23(b)(2)." *Id.*

The Rule 23(b)(2) basis for class certification here is equally as strong. The class members were, or would have been, all turned back from POEs in violation of Defendants' own Binding Guidance. Each of the class members will benefit from an injunction that prohibits Defendants from continuing to deviate from their Binding Guidance. *See Al Otro Lado*, 336 F.R.D. at 506 (granting class certification where injunctive relief would benefit proposed class "in a single stroke"). Therefore, the

class should be certified under Rule 23(b)(2).[11]

IV. CONCLUSION

For the foregoing reasons, the Court should certify a class consisting of all noncitizens who have sought or will seek to access the U.S. asylum process by presenting themselves at a Class A Port of Entry on the U.S.-Mexico border, and who were or will be denied access to the U.S. asylum process by or at the instruction of Defendants on or after May 12, 2023.

[11] As this Court has previously found, ascertainability is not a requirement for certification of a Rule 23(b)(2) class. *See Al Otro Lado*, 423 F. Supp. 3d at 872-73 (collecting cases).

Dated: August 9, 2023

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