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18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**
20 **EASTERN DIVISION**

21 IMMIGRANT DEFENDERS LAW
22 CENTER, *et al.*,

23 Plaintiffs,

24 v.

25 CHAD WOLF, *et al.*,

26 Defendants.

Case No. 2:20-cv-09893-JGB-SHK

**PLAINTIFFS' NOTICE OF
MOTION AND EMERGENCY
MOTION FOR PROVISIONAL
CLASS CERTIFICATION**

Judge: Honorable Jesus G. Bernal
Date: December 14, 2020
Time: 9:00 a.m.
Crtrm: 1

Action Filed: October 28, 2020

1 [Caption Page Continued - Additional Attorneys for Plaintiffs and putative class
2 members]

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**NOTICE OF MOTION AND EMERGENCY MOTION
FOR PROVISIONAL CLASS CERTIFICATION**

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on December 14, 2020, or as soon thereafter as this matter may be heard, in Courtroom 1 of the above-entitled Court, located at 3470 Twelfth Street, Riverside, CA 92501, or remotely via teleconference or videoconference, before the Honorable Jesus Bernal, Plaintiffs Immigrant Defenders Law Center, et al. will, and hereby do, move the Court to provisionally certify the following class pursuant to Federal Rule of Civil Procedure 23:

All noncitizens who (1) expressed or will express a fear of persecution in their home countries or a desire to seek asylum; (2) were or will be subject to the Migrant Protection Protocols; and (3) presented, will present, or have been directed to present themselves at the San Ysidro or Calexico ports of entry.

Plaintiffs also request that the Court appoint Daniel Doe, Hannah Doe, Benjamin Doe, Jessica Doe, Anthony Doe, Nicholas Doe, Feliza Doe, and Jaqueline Doe as class representatives.

Plaintiffs further request that the Court appoint Arnold & Porter Kaye Scholer LLP, Southern Poverty Law Center, National Immigration Project of the National Lawyers Guild, and Innovation Law Lab as class counsel.

Individual Plaintiffs and others similarly situated are trapped in dangerous zones and transit corridors in Mexico, where they have endured physical attacks and threats, have been denied their basic human needs, and have been deprived of access to legal assistance. Due to the urgency of the issues raised in the accompanying Memorandum of Points and Authorities and the Emergency Motion for a Preliminary Injunction, Plaintiffs, on behalf of themselves and all those similarly situated, respectfully request this Court to schedule a hearing on December 14, 2020.

1 This motion is based on this Notice of Motion and Motion, the accompanying
2 Memorandum of Points and Authorities, the accompanying Declarations in support
3 of Class Certification, all pleadings and papers filed in this action, and all other
4 matters properly before this Court. This motion is made following the conference of
5 counsel pursuant to L.R. 7-3, which took place on October 30, 2020.

6

7 Dated: November 9, 2020 ARNOLD & PORTER KAYE SCHOLER LLP

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9 By: /s/ Angel Tang Nakamura
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24 AMBER QURESHI

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26 Dated: November 9, 2020 INNOVATION LAW LAB

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24 CHAD WOLF, *et al.*,

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Case No. 2:20-cv-09893-JGB-SHK

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS’
EMERGENCY MOTION FOR
PROVISIONAL CLASS
CERTIFICATION**

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1 **I. INTRODUCTION**

2 Plaintiffs respectfully move this Court, pursuant to Federal Rule of Civil
3 Procedure 23, to provisionally certify the following class of individuals:

4 All noncitizens who (1) expressed or will express a fear of
5 persecution in their home countries or a desire to seek
6 asylum; (2) were or will be subject to the Migrant Protection
7 Protocols; and (3) presented, will present, or have been
8 directed to present themselves at the San Ysidro or Calexico
9 port of entry.

10 Plaintiffs further request that the Court appoint all named Individual Plaintiffs
11 as class representatives and appoint the undersigned counsel as class counsel.

12 This case readily meets the threshold requirements of Rule 23(a). First, the class
13 is so numerous that joinder of all members is impracticable under Rule 23(a)(1). The
14 class includes thousands of asylum seekers subject to the Migrant Protection Protocols
15 (“MPP” or “Protocols”) who presented, will present or have been directed to present
16 themselves at the San Ysidro or Calexico port of entry and are currently waiting in
17 Mexico for their immigration court hearings, which are unlikely to happen in the
18 foreseeable future.

19 Second, there are questions of law and fact common to the proposed class under
20 Rule 23(a)(2). Class members fled persecution and are seeking asylum in the United
21 States. After entering the United States through the southern border on or after January
22 19, 2019, class members were subjected to the Migrant Protection Protocols, which
23 force them to wait under dangerous conditions in Mexico for their hearings in U.S.
24 immigration court. All class members will present, have presented, or have been
25 directed to present at the San Ysidro or Calexico port of entry. They each raise the
26 same legal claims, and they seek declaratory and injunctive relief that would benefit
27 the class as a whole.

28 Third, Individual Plaintiffs’ claims are typical of the claims of the class under
Rule 23(a)(3). Their claims arise from the same course of conduct, and they are united
in their interest and injury.

1 Fourth, Individual Plaintiffs will fairly and adequately protect the class under
2 Rule 23(a)(4), as they seek relief on behalf of the class as a whole and have no interests
3 antagonistic to other members of the class. They are represented by attorneys with
4 extensive experience in immigrants' rights and class action litigation.

5 This case also qualifies for certification under Rule 23(b)(2) because
6 Defendants have acted or refused to act on grounds that are generally applicable to
7 Individual Plaintiffs and the class as a whole. Through their Return Policy,
8 Deprivation of Counsel Policy, and Presentation Requirement, Defendants have
9 denied all class members a meaningful right to apply for asylum and violated both
10 their statutory and constitutional rights. Class members seek identical declaratory and
11 injunctive relief that would remedy their harms in a single stroke.

12 The Court should provisionally certify this class. Courts in the Ninth Circuit
13 "routinely grant provisional class certification for purposes of entering injunctive
14 relief." *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 682 (C.D. Cal. 2020) (citation and
15 quotation marks omitted). And numerous courts in this Circuit have certified similar
16 actions brought by immigrants in government custody. *See Doe v. Wolf*, 424 F. Supp.
17 3d 1028, 1034 (S.D. Cal. 2020) (certifying class of individuals in Customs and Border
18 Protection (CBP) custody awaiting non-refoulement interviews under the Migrant
19 Protection Protocols); *Hernandez v. Lynch*, No. EDCV 16-00620-JGB, 2016 WL
20 7116611, at *2 (C.D. Cal. Nov. 10, 2016), *aff'd sub nom. Hernandez v. Sessions*, 872
21 F.3d 976 (9th Cir. 2017) (certifying a class of individuals who are or will be detained
22 under 8 U.S.C. § 1226(a)); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D.
23 Cal. 1982) (certifying a class of Salvadoran citizens eligible to apply for asylum who
24 have been or will be taken into immigration custody). Plaintiffs respectfully request
25 that this Court do the same here.

1 **II. BACKGROUND**

2 Individuals arriving at the U.S.-Mexico border have the right to apply for
3 asylum in the United States under the Refugee Act of 1980 (“the Refugee Act”).¹ Any
4 noncitizen “physically present in the United States or who arrives in the United States
5 . . . irrespective of such alien’s status” has the right to apply for asylum. 8 U.S.C.
6 § 1158(a)(1). That right is robust, and includes the right to counsel, at no expense to
7 the government, *see* 8 U.S.C. § 1158(d)(4); the right to notice of the right to counsel,
8 *see id.*; and the right to access information in support of an application, *see*
9 § 1158(b)(1)(B) (placing the burden on the applicant to present evidence establishing
10 eligibility).

11 Defendants’ Migrant Protection Protocols, which include several independent
12 and related policies described below, undermine both the right to apply for asylum and
13 the related rights to obtain and access counsel and receive a full and fair hearing on
14 asylum claims. Individual Plaintiffs and members of the proposed class have been
15 harmed by Defendants’ implementation of each of these policies.

16 **A. The Return Policy**

17 Under the Return Policy, class members are returned to Mexico to await their
18 immigration court hearings. *See, e.g.*, Declaration of Feliza Doe (“Feliza Doe Decl.”)
19 ¶¶ 15 (explaining Defendants returned her to Mexico under the Protocols after she
20 expressed her intent to seek asylum); Declaration of Anthony Doe (“Anthony Doe
21 Decl.”) ¶ 5 (same); Declaration of Benjamin Doe (“Benjamin Doe Decl.”) ¶ 7 (same);
22 Declaration of Nicholas Doe (“Nicholas Doe Decl.”) ¶ 6 (same); Declaration of Daniel
23 Doe (“Daniel Doe Decl.”) ¶ 7 (same); Declaration of Jessica Doe (“Jessica Doe Decl.”)
24 ¶¶ 4, 12 (same); Declaration of Hannah Doe (“Hannah Doe Decl.”) ¶¶ 7-10 (same);
25 Declaration of Jaqueline Doe (“Jaqueline Doe Decl.”) ¶¶ 12, 17 (same); *see generally*
26

27 ¹ Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified under the Immigration and
28 Nationality Act (INA)).

1 Compl. ¶¶ 57-70. Defendants, pursuant to this Policy, are to schedule those hearings
2 for “a specific . . . date and time.”² On their scheduled immigration court hearing
3 dates, class members must present themselves at the San Ysidro port of entry so that
4 Customs and Border Protection (CBP) can process them and Immigration and
5 Customs Enforcement (ICE) can transport them to the San Diego immigration court
6 for their hearings.³

7 **B. The Deprivation of Counsel Policy**

8 Defendants’ Deprivation of Counsel Policy gives represented class members a
9 minimum of one hour to consult with their legal representatives in advance of their
10 immigration court hearings.⁴ In practice, legal representatives and class members are
11 rarely, if ever, permitted a full hour to meet with their clients before each hearing.
12 Conditions in Mexico make it extremely difficult, if not impossible, for represented
13 class members to communicate with their legal representatives, gather and share
14 needed evidence, and prepare for court appearances. *See, e.g.*, Benjamin Doe Decl.
15 ¶¶ 24-26; Nicholas Doe Decl. ¶ 9; Feliza Doe ¶¶ 32-35; *see generally* Compl. ¶¶ 71-
16 83. Defendants do not provide class members with an adequate list of pro bono legal
17 service providers, *see, e.g.*, Daniel Doe Decl. ¶ 15, and refuse to allow pro bono
18 attorneys to meet with unrepresented class members physically present in immigration
19 court prior to their hearings, *see* Declaration of Margaret Cargioli (“Cargioli Decl.”)
20 ¶ 34. These restrictions obstruct class members’ ability to locate and retain paid or
21 pro bono legal representatives. *See, e.g.*, Anthony Doe Decl. ¶¶ 15, 17-19; Hannah

22 ² *See* Declaration of Hannah Coleman (“Coleman Decl.”), Ex. F (ICE ERO MPP
23 Guiding Principles).

24 ³ Coleman Decl., Ex. J (ICE Policy Memorandum) at 2.

25 ⁴ Coleman Decl., Ex. J (providing that, to “facilitate” access to legal
26 representation for individuals subjected to the Protocols, “ERO will depart from the
27 [port of entry] with the alien at a time sufficient to ensure arrival at the immigration
28 court not later than one hour before his or her scheduled hearing time in order to
afford the alien the opportunity to meet in-person with his or her legal
representative.”).

1 Doe Decl. ¶ 14. As a result, ninety-three percent of individuals subject to the Protocols
2 are not represented in their immigration court hearings.⁵

3 **C. The Presentation Requirement**

4 Through the Presentation Requirement, the Protocols require class members to
5 present themselves at a designated port of entry to gain access to the U.S. asylum
6 system, to attend their immigration court hearings, and to maintain their tenuous status
7 in Mexico. Class members must present themselves at the port of entry on the days of
8 their hearings and must return to the port of entry in order to renew their status in
9 Mexico when their hearings have been postponed under the Hearing Suspension
10 Directive. *See* Declaration of Michael Bochenek (“Bochenek Decl.”) ¶¶ 16-23. The
11 Presentation Requirement traps class members in dangerous zones and transit
12 corridors around the port of entry based on their precarious migration status and their
13 lack of resources to move elsewhere and still comply with this Requirement. Compl.
14 ¶¶ 84-87; *e.g.*, Hannah Doe Decl. ¶¶ 22-29 (describing having to live near border to
15 make multiple trips to present at port of entry); Nicholas Doe Decl. ¶¶ 9-13 (itemizing
16 multiple trips to port of entry to present); *see also* Bochenek Decl. ¶¶ 16-23 (describing
17 Presentation Requirement’s impact on migrants as “arduous and dangerous”);
18 Declaration of Daniel Berlin (“Berlin Decl.”) ¶¶ 17-28 (explaining reasons why
19 individuals subjected to MPP are forced to remain near the border).

20 **D. The Hearing Suspension Directive**

21 Since late March 2020, Defendants have postponed MPP hearings *en masse* six
22 times, leaving Class Members waiting, potentially indefinitely, for their court
23 hearings. Compl. ¶¶ 88-89. On July 17, 2020, Defendants announced an indefinite
24

25 ⁵ Transactional Records Access Clearinghouse (TRAC), *Details on MPP (Remain*
26 *in Mexico) Deportation Proceedings by Hearing Location and Attendance,*
27 *Representation, Nationality, Month and Year of NTA, Outcome, and Current Status*
28 *(Sept. 2020), available at* <https://trac.syr.edu/phptools/immigration/mpp/> (filter set to “Represented”); *see* Declaration of Amber Qureshi (“Qureshi Decl.”) ¶ 6.

1 suspension of hearings and stated that hearings would resume only after certain
2 “threshold criteria” relating to the COVID-19 pandemic had been met, both in Mexico
3 and in the border states of California, Arizona, and Texas. Compl. ¶¶ 90-93.

4 The “threshold criteria” set forth in the Hearing Suspension Directive will not
5 be met in the foreseeable future. Declaration of Dr. Arthur L. Reingold (“Reingold
6 Decl.”) ¶¶ 16, 27. Because of the recent surge in COVID-19 infections and deaths in
7 the United States and Mexico, the criteria for re-starting MPP hearings are unlikely to
8 be met “for at least the next six to nine months and potentially even longer.” *Id.* ¶ 29.
9 Thus, through the Hearing Suspension Directive, Defendants have indefinitely
10 postponed MPP hearings. Compl. ¶ 88-97. This leaves individuals subject to the
11 Protocols, including class members, stranded under dangerous conditions in Mexico
12 with no end in sight.

13 **III. ARGUMENT**

14 A plaintiff whose lawsuit meets the requirements of Rule 23 has a “categorical”
15 right “to pursue his claim as a class action.” *Shady Grove Orthopedic Assocs., P.A. v.*
16 *Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). To meet these requirements, the “suit
17 must satisfy the criteria set forth in [Rule 23(a)] (*i.e.*, numerosity, commonality,
18 typicality, and adequacy of representation), and it also must fit into one of the three
19 categories described in subdivision (b).” *Id.*

20 For the reasons discussed below, Plaintiffs’ proposed class satisfies all four Rule
21 23(a) prerequisites. The proposed class likewise meets the requirements for
22 certification under Rule 23(b)(2). The Court should therefore provisionally certify the
23 proposed class.

24 **A. The Proposed Class is So Numerous That Joinder is Impracticable.**

25 Rule 23(a)(1) requires that the class be “so numerous that joinder of all members
26 is impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticability does not mean
27 impossibility,” only the “difficulty or inconvenience in joining all members of the
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1 class.” *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 568 (C.D. Cal. 2014) (quoting
2 *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964)).
3 For plaintiffs seeking injunctive or declaratory relief, “the numerosity requirement is
4 relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs’
5 other evidence that the number of unknown and future members of [the proposed
6 class] is sufficient to make joinder impracticable.” *Inland Empire-Immigrant Youth*
7 *Collective v. Nielsen*, No. EDCV 17-2048 PSG, 2018 WL 1061408, at *5 (C.D. Cal.
8 Feb. 26, 2018) (quoting *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir.
9 2004)). Although there is no numerical cutoff to determine whether a class is
10 sufficiently numerous, courts in the Ninth Circuit and in this district generally presume
11 sufficient numerosity where the plaintiff class contains forty or more members. *See,*
12 *e.g., In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009); *Tait v.*
13 *BSH Home Appliances Corp.*, 289 F.R.D. 466, 473 (C.D. Cal. 2012); *see also Jordan*
14 *v. Cnty. of Los Angeles*, 669 F.2d 1311, 1319-20 (9th Cir. 1982), *vacated on other*
15 *grounds*, 459 U.S. 810 (1982).

16 The proposed class in this case easily meets the requirements of Rule 23(a)(1).
17 Based on data available through September 2020, the class includes at least 4,000
18 asylum seekers subjected to the Protocols who are currently awaiting their
19 immigration court hearings in Mexico and have presented or have been directed to
20 present at the San Ysidro or Calexico port of entry.⁶

21 In addition to the sheer number of similarly situated individuals, courts may
22 consider geographic dispersion of putative class members, financial resources of
23 putative class members, and the ability of putative class members to file individual
24 lawsuits, in determining the impracticability of joinder. *See McCluskey v. Trs. of Red*
25 *Dot Corp. Emp. Stock Ownership Plan & Tr.*, 268 F.R.D. 670, 674 (W.D. Wash.

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27 ⁶ TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings* (Sept.
28 2020), available at <https://trac.syr.edu/phptools/immigration/mpp/> (filters set to “Hearing Location” and “Outcome”); *see Qureshi Decl.* ¶¶ 4-5.

1 2010); *see also Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 737
2 (C.D. Cal. 2020) (holding that “obstacles to accessing counsel” impeding individual
3 class members from proceeding on their own weighed in favor of finding joinder
4 impracticable); *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (finding
5 numerosity satisfied, in part, because of “the severe practical concerns that would
6 likely attend [prospective immigrant class members] were they forced to proceed
7 alone”).

8 Class members’ precarious living situations in Mexico make joinder of their
9 claims impracticable. Class members lack stable living conditions and employment,
10 and struggle to fulfill their basic needs and those of their family members. *See* Daniel
11 Doe Decl. ¶¶ 9-11, 21, 29 (works six days a week to pay for a room that he shares with
12 his daughter; unable to afford follow-up tests for her severe chronic pain); Hannah
13 Doe Decl. ¶¶ 3, 27-28 (has lived in a salon since she lost her job and cannot afford
14 treatment for cervical spine injury); Jessica Doe Decl. ¶¶ 6, 8-9, 11 (had to leave her
15 job after cartels attempted to kidnap her son; her family has lived in crowded shelters
16 and different temporary accommodations); Benjamin Doe Decl. ¶¶ 15-20 (with his
17 family of five, lived in a shelter so crowded that he would wait 90 minutes for a
18 shower; had to wait a week for a volunteer doctor when his son contracted chicken
19 pox); Anthony Doe Decl. ¶¶ 6-10 (struggled to find steady employment; his current
20 job does not pay enough to cover rent, so he lives in a church); Jaqueline Doe Decl. ¶¶
21 19-22, 24-26, 55-57 (has had to survive on oats for days at a time and go without
22 medication); Nicholas Doe Decl. ¶ 15 (police confiscated the oranges he tried to sell;
23 has not found a steady source of income); Feliza Doe Decl. ¶¶ 13, 36, 37-38 (cannot
24 continue to afford the shelter expenses for herself and her daughters; often cannot
25 afford food for both her children and herself); *see also* Berlin Decl. ¶ 25 (noting lack
26 of employment opportunities for asylum seekers subject to MPP, who lack work
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1 authorization); Declaration of Adam Isacson (“Isacson Decl.”) ¶¶ 11-16 (describing
2 the shelter system in Mexico as “chaos”).

3 Moreover, class members do not speak English, have struggled or failed to
4 locate legal counsel, and lack the ability to consistently or reliably engage with legal
5 representatives. *See* Daniel Doe Decl. ¶¶ 13, 15, 29; Hannah Doe Decl. ¶¶ 14, 16, 21,
6 29; Benjamin Doe Decl. ¶ 9; Jessica Doe Decl. ¶ 12; Anthony Doe Decl. ¶¶ 15-20;
7 Jaqueline Doe Decl. ¶¶ 33-34; Nicholas Doe Decl. ¶¶ 8-9; Feliza Doe Decl. ¶ 22; *see*
8 *also* Declaration of Kennji Kizuka (“Kizuka Decl.”) ¶¶ 16, 19-20 (describing the
9 dangers that prevent U.S. attorneys from representing clients in Mexico, the barriers
10 to confidential attorney-client meetings in Mexico, and the risk of targeted violence
11 that individuals subject to the Protocols take when they meet with attorneys in
12 Mexico); Berlin Decl. ¶¶ 26-27 (describing barriers to access to counsel in Mexico,
13 including lack of attorneys offering representation and challenges to communication);
14 Isacson Decl. ¶ 28 (explaining that the logistical challenges of travel to Mexico,
15 substantial personal risk of harm, and border closures dissuade U.S. attorneys from
16 taking cases for individuals subject to the Protocols); Declaration of Steven H.
17 Schulman ¶¶ 8, 10-15 (describing the “significant and unprecedented obstacles” that
18 largely prevent pro bono representation of cases in Mexico).

19 Finally, although class members have all presented or been directed to present
20 at the San Ysidro port of entry in Tijuana, they are geographically dispersed
21 throughout Baja California, Mexico. While some live in Tijuana, *see, e.g.*, Daniel Doe
22 Decl. ¶ 9; Hannah Doe Decl. ¶ 10; Benjamin Doe Decl. ¶ 24, others live in Mexicali,
23 which is over 100 miles east of Tijuana over a dangerous mountain road, *see* Feliza
24 Doe Decl. ¶ 9.

1 **B. Plaintiffs’ Claims Present Questions of Law or Fact Common to the**
2 **Class.**

3 Rule 23(a) requires a showing that there are “questions of law or fact common
4 to the class.” Fed. R. Civ. P. 23(a)(2). This requirement “has been construed
5 permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998),
6 *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
7 “What matters to class certification . . . is not the raising of common questions—even
8 in droves—but rather, the capacity of a class-wide proceeding to generate common
9 *answers* apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350
10 (internal quotation marks omitted).

11 Thus, Plaintiffs need not show that all questions of law and fact are common to
12 the proposed class to satisfy Rule 23(a). *Ellis v. Costco Wholesale Corp.*, 657 F.3d
13 970, 981 (9th Cir. 2011). Instead, commonality requires plaintiffs to demonstrate that
14 their claims “depend upon a common contention . . . [whose] truth or falsity will
15 resolve an issue that is central to the validity of each one of the claims in one stroke.”
16 *Wal-Mart*, 564 U.S. at 350. Commonality can be satisfied by a single common issue.
17 *See, e.g., Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)
18 (commonality “does not . . . mean that *every* question of law or fact must be common
19 to the class; all that Rule 23(a)(2) requires is a single *significant* question of law or
20 fact” (internal quotation marks omitted)); *see also Nak Kim Chhoeun v. Marin*, No.
21 SACV 17-1878-CJC, 2018 WL 6265014, at *5 (C.D. Cal. Aug. 14, 2018)
22 (commonality satisfied where “[t]he central question in [the] case is whether the
23 Government’s policy of revoking proposed class members’ release and re-detaining
24 them without any procedural protections is unlawful”); *Inland Empire–Immigrant*
25 *Youth Collective*, 2018 WL 1061408, at *8 (commonality satisfied where plaintiffs
26 “challenge[d] Defendants’ common termination policies and practices as categorically
27 violating the APA and Due Process Clause—not the agency’s ultimate exercise of
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1 discretion with respect to each recipient” (citation and internal quotation marks
2 omitted)).

3 Plaintiffs are not required to demonstrate uniformity in the scope and nature of
4 the harms caused by Defendants’ policies. Courts have made clear that even “[w]here
5 the circumstances of each particular class member vary but retain a common core of
6 factual or legal issues with the rest of the class, commonality exists.” *Evon v. Law*
7 *Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (citation and internal
8 quotation marks omitted); *see also Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir.
9 1998) (“Differences among the class members with respect to the merits of their actual
10 document fraud cases, however, are simply insufficient to defeat the propriety of class
11 certification. What makes the plaintiffs’ claims suitable for a class action is the
12 common allegation that the INS’s procedures provide insufficient notice.”); *Arnott v.*
13 *U.S. Citizenship & Immigr. Servs.*, 290 F.R.D. at 575, 86–87 (C.D. Cal. 2012) (factual
14 variations did not defeat certification where core legal issues were similar). In fact,
15 courts have found commonality despite factual differences in application of a policy
16 or potential individual outcomes. *See Hernandez*, 2016 WL 7116611, at *19 (granting
17 certification in challenge to U.S. immigration officials’ policies and practices
18 surrounding bond requirements for detainees even though outcome of individual bond
19 cases would depend on the facts of each case); *Lyon v. Immigration & Customs Enf’t*,
20 300 F.R.D. 628, 642 (N.D. Cal. 2014) (holding that the fact that a policy limiting
21 access to counsel is enforced in a less than uniform manner does not negate a finding
22 of commonality).

23 For plaintiffs seeking injunctive and declaratory relief, commonality is satisfied
24 “where the lawsuit challenges a system-wide practice or policy that affects all of the
25 putative class members.” *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D.
26 Ariz. 2016) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) *abrogated*
27 *on other grounds by Johnson v. California*, 543 U.S. 499 (2005)). Such suits “by their
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1 very nature often present common questions satisfying Rule 23(a)(2).” 7A Charles A.
2 Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice & Procedure* § 1763 (3d
3 ed. 2019).

4 Plaintiffs readily satisfy Rule 23(a)(2)’s commonality requirement. This case
5 presents questions of law common to the class as a whole, including: (1) whether
6 Defendants violated class members’ right to apply for asylum by trapping them in
7 Mexico under dangerous conditions in a manner that obstructs their access to the U.S.
8 asylum system; (2) whether Defendants’ continued implementation of the Return
9 Policy notwithstanding the indefinite suspension of MPP hearings pursuant to the
10 Hearing Suspension Directive violates the Immigration and Nationality Act of 1952,
11 Pub. L. No. 82-414 (INA); (3) whether the Return Policy and/or Deprivation of
12 Counsel Policy violate class members’ statutory or constitutional rights to access
13 counsel; (4) whether the Return Policy and/or Deprivation of Counsel Policy violate
14 class members’ First Amendment rights; (5) whether the Return Policy and/or
15 Deprivation of Counsel Policy violate class members’ right to a full and fair hearing;
16 and (6) whether the Return Policy and/or Presentation Requirement violate class
17 members’ substantive due process rights.

18 Class members’ shared legal claims turn on a common core of facts and a
19 common injury. Through the Return Policy, Defendants have forced class members
20 to await their immigration court hearings in dangerous zones in Mexico. *See, e.g.,*
21 Daniel Doe Decl. ¶ 28 (must stay near the port of entry in Tijuana because he has no
22 other connections in Mexico and because buses do not run early enough to arrive at
23 the port of entry at 3:00 am to present for his hearing); Feliza Doe Decl. ¶¶ 42-43 (must
24 stay in Mexicali because she would otherwise not have a way to get to her hearings).
25 Class members in these dangerous zones have either experienced violence or live in
26 fear of it. *See* Jacqueline Doe Decl. ¶ 49-54 (threatened and assaulted due to her trans
27 identity); Benjamin Doe Decl. ¶¶ 19, 22 (cartel members attempted to kidnap his son;

1 his children are traumatized by surrounding violence); Jessica Doe Decl. ¶ 10-11, 16
2 (cartel members attempted to kidnap her son); Hannah Doe Decl. ¶¶ 9, 13, 15, 28, 30
3 (robbed walking home from the shift she was able to get at night; subsequently subject
4 to a break-in and attempted rape in her apartment); Feliza Doe Decl. ¶ 26, 39-40, 46-
5 47 (fears for her daughters' safety because a young girl was sexually assaulted at the
6 shelter where they live); Daniel Doe Decl. ¶¶ 12, 14, 19, 22-24, 27 (fears for his
7 daughter's safety after an attempted robbery and prohibits her from leaving the house);
8 Anthony Doe Decl. ¶¶ 7, 9, 11-13 (has been robbed three times; on the third occasion,
9 the assailants threatened to kill him); Nicholas Doe Decl. ¶¶ 13-14, 16-18 (bullets shot
10 into the shelter where he was staying; since moving, he has been threatened, robbed,
11 and extorted by the police). In addition to the risk of physical violence, class members
12 are in danger because they and their family members are unable to fulfill their basic
13 needs in Mexico. *See* Daniel Doe Decl. ¶¶ 7, 9-11, 21, 29, 31 (stating that he has
14 struggled to find work to pay for basic expenses and is unable to pay for a medical
15 exam to treat his daughter's chronic condition); Hannah Doe Decl. ¶¶ 5, 11, 28
16 (describing her inability to find stable work to pay for shelter and medical needs);
17 Benjamin Doe Decl. ¶¶ 15-18, 20-21 (describing his inability to find work to pay for
18 adequate housing and his family's unfit living conditions, including two months
19 without reliable running water); Jessica Doe Decl. ¶¶ 6-9, 11 (describing significant
20 difficulty of obtaining work permit in Mexico); Anthony Doe Decl. ¶¶ 5-6, 8-10, 20,
21 30-31 (stating that he is unable to find work to pay for housing other than at a church,
22 where he lives with other asylum seekers and does not receive adequate food); Feliza
23 Doe Decl. ¶¶ 11-13, 36-38 (describing inability to pay for sufficient food, water,
24 clothing, and medicine for her young daughters); Jaqueline Doe Decl. ¶¶ 7-9, 19-20,
25 22, 25-26, 33, 46, 55, 57 (describing having slept on the street for days at a time and
26 ongoing inability to consistently make enough money to pay for medicine, food, water,
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1 electricity, and housing); Nicholas Doe Decl. ¶¶ 13-15 (describing difficulty of finding
2 work without a work permit).

3 Moreover, class members’ immigration court hearings have been indefinitely
4 postponed under the Hearing Suspension Directive, *see* Daniel Doe Decl. ¶ 20; Hannah
5 Doe Decl. ¶¶ 24-25; Benjamin Doe Decl. ¶ 13; Jessica Doe Decl. ¶ 14; Anthony Doe
6 Decl. ¶¶ 25-29; Nicholas Doe Decl. ¶¶ 10-12; Feliza Doe Decl. ¶¶ 28-29, which means
7 that their struggle to survive will also continue indefinitely.

8 Through the Return Policy and the Deprivation of Counsel Policy, Defendants
9 have interfered with, and in some cases completely obstructed, class members’ access
10 to legal representation. *See* Hannah Doe Decl. ¶¶ 14, 20-21, 29 (describing inability
11 to locate pro bono legal service provider able to assist people outside the United
12 States); Anthony Doe Decl. ¶¶ 15-18 (stating that he has been unable to locate an
13 attorney willing to represent him while in Mexico and so has been forced to rely on
14 YouTube videos to represent himself). The list of free or low-cost legal service
15 providers that the government provides to class members consists primarily of
16 organizations that do not provide representation to individuals subject to the Protocols.
17 Declaration of Luis Gonzalez (“Gonzalez Decl.”) ¶ 13. As a result, class members
18 spend their limited resources contacting providers who cannot assist them. *See id.*;
19 Jaqueline Doe Decl. ¶¶ 33-34 (bought a phone plan and spent a significant amount of
20 money attempting to call legal service providers in the U.S. who could not or would
21 not represent individuals subject to the Protocols). Moreover, Defendants’
22 Deprivation of Counsel Policy unnecessarily limits class members’ access to legal
23 consultations in the United States. Compl. ¶¶ 73-83.

24 Defendants’ Return Policy also impedes class members’ communications with
25 legal service providers in the United States. Class members generally do not have
26 reliable access to telephone or internet service, which means that even those who are
27 represented are unable to communicate meaningfully or reliably with their legal
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1 representatives. *See, e.g.*, Daniel Doe Decl. ¶ 29 (explaining that he cannot always
2 afford the phone minutes or internet credits required to speak with his attorney);
3 Nicholas Doe Decl. ¶ 9 (describing losing cell phone connection during calls with his
4 attorney); Feliza Doe Decl. ¶¶ 30-33 (explaining that poor cell phone connection
5 means that calls with her attorney often drop and she must repeat traumatic details of
6 her story, and describing the time-consuming process of sending voluminous
7 documents through WhatsApp). Class members also lack access to private spaces in
8 Mexico where they can have confidential conversations with legal representatives.
9 *See, e.g.*, Daniel Doe Decl. ¶¶ 30, 32 (does not have confidential space away from his
10 daughter to speak to his attorney); Hannah Doe Decl. ¶¶ 22, 29 (no access to a space
11 where she can speak freely on the phone); *see also* Benjamin Doe Decl. ¶ 26; Jessica
12 Doe Decl. ¶ 15; Feliza Doe Decl. ¶¶ 30-31. The absence of private spaces leads
13 individuals to withhold information that they are afraid to share within earshot of
14 others and impedes trust-building between legal representatives and their clients. *See*
15 Daniel Doe Decl. ¶¶ 30-32 (stating that communicating with his attorney by phone is
16 difficult, expensive, and prevents him from discussing sensitive matters relevant to his
17 case); Benjamin Doe Decl. ¶ 27 (noting reluctance to discuss personal matters over
18 the phone with his attorney, whom he has never met in person); Jessica Doe Decl. ¶
19 15 (stating that she does not want to discuss sensitive topics in front of her children);
20 Feliza Doe Decl. ¶ 31 (stating that the lack of private space to speak with her attorney
21 hinders her ability to speak freely); *see also* Cargioli Decl. ¶¶ 19-26 (detailing various
22 obstructions to meeting and speaking with clients and potential clients); Gonzalez
23 Decl. ¶¶ 33-38 (same).

24 Defendants' Return Policy also thwarts class members' meaningful access to
25 the asylum process in other ways. *See* Daniel Doe Decl. ¶¶ 29, 31 (describing the
26 difficulty of collecting evidence); Anthony Doe Decl. ¶¶ 16, 21 (could not understand
27 or complete the asylum application, which is in English, when the judge instructed
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1 him to do so); Benjamin Doe Decl. ¶¶ 25, 26 (not always able to pay for the phone
2 calls necessary to collect evidence); Jessica Doe Decl. ¶ 15 (shares a cell phone with
3 her husband so cannot communicate with her attorney unless her husband is home);
4 Nicholas Doe Decl. ¶ 9 (uncomfortable sharing sensitive topics over the phone with
5 his attorney); Feliza Doe Decl. ¶¶ 34-35 (has not received mail sent from Guatemala
6 six months ago and cannot read the documents over WhatsApp); Jaqueline Doe Decl.
7 ¶¶ 40, 46 (deprived of her opportunity to present for her hearing).

8 Class members’ shared core facts ensure consistent judicial findings regarding
9 the legality of the challenged policies and practices. Should Plaintiffs prevail, all class
10 members will benefit—each will be allowed to return to the United States, with
11 appropriate precautionary public health measures, and to pursue their asylum claim
12 from inside the United States. In other words, class members “‘have suffered the same
13 injury,’” and that injury is “‘capable of classwide resolution.” *Wal-Mart*, 564 U.S. at
14 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Any factual
15 differences that may exist among class members are immaterial to their core claim that
16 the Protocols, including the Return Policy, the Deprivation of Counsel Policy, and the
17 Presentation Requirement, exceed Defendants’ authority under the INA and violate
18 the APA, the First Amendment, or the Fifth Amendment.

19 **C. Individual Plaintiffs’ Claims Are Typical of the Claims of Class**
20 **Members.**

21 Rule 23(a)(3) requires that “the claims . . . of the representative parties [be]
22 typical of the claims . . . of the class.” Fed. R. Civ. P. 23(a)(3). The purpose of this
23 requirement is to “assure that the interest of the named representative aligns with the
24 interests of [the] class.” *Wiener v. Dannon Co.*, 255 F.R.D. 658, 665 (C.D. Cal. 2009)
25 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). “[T]he
26 typicality requirement is permissive and requires only that the representative’s claims
27 are reasonably coextensive with those of absent class members; they need not be
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1 substantially identical.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010)
2 (citation and internal quotation marks omitted). “The test of typicality is ‘whether
3 other members [of the class] have the same or similar injury, whether the action is
4 based on conduct which is not unique to the named plaintiffs, and whether other class
5 members have been injured by the same course of conduct.’” *Parsons v. Ryan*, 754
6 F.3d 657, 685 (9th Cir. 2014) (citation omitted). Typicality is satisfied “when each
7 class member’s claim arises from the same course of events, and each class member
8 makes similar legal arguments to prove the defendant’s liability.” *Rodriguez*, 591 F.3d
9 at 1124; *see also id.* (finding typicality satisfied because “though Petitioner and some
10 of the other members of the proposed class are detained under different statutes and
11 are at different points in the removal process . . . they . . . raise similar constitutionally-
12 based arguments and are alleged victims of the same practice of prolonged detention
13 while in immigration proceedings”).

14 Individual Plaintiffs satisfy Rule 23(a)(3)’s typicality requirement. Defendants
15 subjected all Individual Plaintiffs and class members to the Migrant Protection
16 Protocols, including the Return Policy, the Deprivation of Counsel Policy, and the
17 Presentation Requirement. As a result, Individual Plaintiffs and all class members
18 have suffered the same harms—namely, denial of the right to apply for asylum; denial
19 of meaningful access to legal assistance; denial of the right to hire and consult an
20 attorney and petition the courts, denial of the right to a full and fair hearing, and denial
21 of their substantive due process rights. Compl. ¶¶ 118-206; *see Parsons*, 754 F.3d at
22 685. And all class members raise the same legal claims arising from those harms:
23 violations of the INA, 8 U.S.C. § 1158(a); 8 U.S.C. § 1225(b)(2)(C); the
24 Administrative Procedure Act; the First Amendment, and the Due Process Clause of
25 the Fifth Amendment. Compl. ¶¶ 250-81, 288-93, 293-300, 319-33.

26 In addition, the experiences of the Individual Plaintiffs typify those of other
27 class members. All class members fled persecution in their home countries to seek
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1 asylum in the United States. All were returned to Mexico under the Protocols after
2 entering the United States via the U.S.-Mexico border. Daniel Doe Decl. ¶¶ 6-7.
3 Jessica Doe Decl. ¶¶ 3-5; Nicholas Doe Decl. ¶¶ 5-6; Feliza Doe Decl. ¶¶ 6, 9;
4 Anthony Doe Decl. ¶ 5; Hannah Doe Decl. ¶¶ 5, 10. And all are currently trapped in
5 Mexico where they have experienced or are at high risk of violent crime, struggle to
6 access basic needs, and confront significant barriers to accessing legal representation.
7 *See supra* Section III(B).

8 Because these common harms arise from the same course of conduct by
9 Defendants, in violation of the same constitutional and statutory protections, the
10 Individual Plaintiffs’ claims typify the claims of the Class Members. And as with
11 commonality, any factual differences between the harms suffered by the Individual
12 Plaintiffs and the Class Members are not sufficiently material to defeat typicality. *See*
13 *Hanlon*, 150 F.3d at 1020 (under “permissive” typicality standard, representative
14 claims need only be “reasonably co-extensive with those of absent class members;
15 they need not be substantially identical”); *Fraihat*, 445 F. Supp. 3d at 739 (holding
16 that the availability of individualized habeas relief to class members did not bar a
17 finding of typicality); *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (“The
18 minor differences in the manner in which the representative’s Fourth Amendment
19 rights were violated does not render their claims atypical of those of the class.”).

20 **D. Individual Plaintiffs Will Fairly and Adequately Protect the Interests**
21 **of the Proposed Class.**

22 Rule 23(a)(4) requires that “the representative parties will fairly and adequately
23 protect the interests of the class.” “To satisfy the adequacy of representation
24 requirement, [Plaintiffs] must show (1) that the putative named plaintiffs have the
25 ability and the incentive to represent the claims of the class vigorously; (2) that the
26 named plaintiffs have obtained adequate counsel, and (3) that there is no conflict
27 between the named plaintiffs’ claims and those asserted on behalf of the class.” *Torres*
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1 v. *Milusnic*, — F. Supp. 3d —No. CV 20-4450-CBM-PVC(x), 2020 WL 4197285, at
2 *22 (C.D. Cal. July 14, 2020) (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d
3 507, 512 (9th Cir. 1978). Plaintiffs have met all these requirements.

4 First, Individual Plaintiffs have the ability and incentive to vigorously prosecute
5 their claims because each of them faces severe harm or an imminent threat of severe
6 harm in Mexico—including physical injury, kidnapping or death—unless they obtain
7 the relief sought. *See supra* Section III(B). Individual Plaintiffs have also been
8 deprived of access to basic needs for themselves and their family members. *See id.*
9 They each likewise have encountered substantial difficulty in identifying, retaining
10 and consulting with legal representatives who can assist them in applying for asylum,
11 parole, and other relief. *See id.*

12 Second, Individual Plaintiffs are represented by counsel with experience in
13 litigating similar class actions. They are represented by attorneys from the Southern
14 Poverty Law Center, the National Immigration Project of the National Lawyers Guild,
15 Innovation Law Lab, and Arnold & Porter Kaye Scholer LLP. Each of these
16 organizations has a demonstrated commitment to protecting the rights and interests of
17 noncitizens and substantial experience handling complex class action litigation in the
18 immigration arena. *See* Declaration of Sirine Shebaya (“Shebaya Decl.”) ¶¶ 5-9;
19 Declaration of Angel Tang Nakamura (“Nakamura Decl.”) ¶¶ 4-5; Declaration of
20 Stephen W. Manning (“Manning Decl.”) ¶¶ 9, 11, 12; Declaration of Melissa Crow
21 (“Crow Decl.”) ¶¶ 3, 4, 10. Counsel have represented numerous classes of noncitizens
22 and other victims of systemic government misconduct in actions in which they
23 successfully obtained class relief. *See* Shebaya Decl. ¶¶ 5-9; Nakamura Decl. ¶¶ 4-6;
24 Manning Decl. ¶¶ 9, 11-12; Crow Decl. ¶ 5.

25 Third, and finally, Individual Plaintiffs have no interests adverse to the other
26 class members. Both Individual Plaintiffs and members of the class seek to enter the
27 United States so that they may live safely, provide for their basic needs, and access
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1 legal assistance in order to meaningfully exercise their right to apply for asylum. None
2 of those interests is antagonistic to any other; thus, there are no conflicts that would
3 preclude any Individual Plaintiff from adequately representing the interests of other
4 class members.

5 **E. Separately, Rule 23(B)(2) is Satisfied Because Defendants Have**
6 **Acted or Refused To Act On Grounds That Are Generally Applicable**
7 **To The Class.**

8 The class may be certified under Rule 23(b)(2) because Defendants have “acted
9 or refused to act on grounds that apply generally to the class, so that final injunctive
10 relief or corresponding declaratory relief is appropriate respecting the class as a
11 whole.” Fed. R. Civ. P. 23(b)(2). “The primary role of [Rule 23(b)(2)] has always
12 been the certification of civil rights class actions.” *Parsons*, 754 F.3d at 686. The
13 central question in certifying a Rule 23(b)(2) class is “the indivisible nature of the
14 injunctive and declaratory remedy warranted—the notion that the conduct is such that
15 it can be enjoined or declared unlawful only as to all of the class members or as to
16 none of them.” *Wal-Mart*, 564 U.S. at 360 (citation omitted). Thus, certification under
17 Rule 23(b)(2) is appropriate where the defendant “has acted in a consistent manner
18 towards members of the class so that [its] actions may be viewed as part of a pattern
19 of activity, or has established or acted pursuant to a regulatory scheme common to all
20 class members.” *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 240
(C.D. Cal. 2003) (citation omitted).

21 Here, Plaintiffs allege that Defendants are acting on grounds that “apply
22 generally to the class” by subjecting class members to the same set of policies and
23 practices pursuant to the Migrant Protection Protocols. These uniform policies and
24 practices apply or will apply to all members of the proposed class. Although there
25 may be factual differences between the circumstances of each class member, Rule
26 23(b)(2) asks “only . . . whether class members seek uniform relief from a practice
27 applicable to all of them.” *Rodriguez*, 591 F.3d at 1125. That is the case here:
28

1 Plaintiffs seek only injunctive and declaratory relief to remedy systemic violations of
2 class members’ statutory and constitutional rights. These remedies do not require
3 individualized determinations of eligibility for relief and would “provide relief to all
4 class members, or to none of them.” *Fraihat*, 445 F. Supp. 3d at 741 (rejecting
5 argument that detention of class members under different conditions and at different
6 facilities precluded class certification).

7 Nor do factual differences between class members preclude certification. Any
8 factual differences between the experiences of individual class members are minor.
9 *See supra* Section III(A)-(C). And since Plaintiffs seek uniform relief from a
10 uniformly applicable practice, certification is warranted even where some class
11 members “have suffered . . . different injuries from the challenged practice.”
12 *Rodriguez*, 591 F.3d at 1125; *Unknown Parties*, 163 F. Supp. 3d at 643 (rejecting
13 argument that plaintiffs were “challeng[ing] . . . various practices amongst [multiple]
14 facilities,” because plaintiffs identified the “systemic nature of the conditions” at CBP
15 detention facilities) (internal quotation marks omitted). Indeed, even if such claims
16 “may involve some individualized inquiries,” the relevant question for purposes of
17 Rule 23(b)(2) is “the ‘indivisible’ nature of the claim alleged and the relief sought.”
18 *Ms. L. v. ICE*, 331 F.R.D. 528, 541 (S.D. Cal. 2018) (certifying Rule 23(b)(2) class);
19 *Lyon v. ICE*, 308 F.R.D. 203, 214 (N.D. Cal. 2015) (rejecting argument that ICE
20 facilities had different attributes, because “these differences do not negate the fact that
21 Plaintiffs seek relief that is applicable to . . . the entire class”); *Saravia v. Sessions*, 280
22 F. Supp. 3d 1168, 1205 (N.D. Cal. 2017) (Rule 23(b)(2) satisfied “[b]ecause a single
23 injunction can protect all class members’ procedural due process rights”).

24 Therefore, Plaintiffs’ Rule 23(b)(2) class should be certified.

25 **IV. CONCLUSION**

26 For the foregoing reasons, the Court should certify the proposed provisional
27 class.

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